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Culver v. Secretary of the Air Force: Restriction of Servicemen's Individual Freedoms Abroad for Foreign Policy Reasons

COMMENTS

CULVER V. SECRETARY OF THE AIR FORCE: RESTRICTION OF SERVICEMEN'S INDIVIDUAL FREEDOMS ABROAD FOR FOREIGN POLICY REASONS

The controversies surrounding the Vietnam war spawned extensive litigation in military law.[1] Many of the consequent courts-martial and civil suits revealed an underlying antagonism between first amendment freedoms of speech and assembly and the military's need to control the behavior of its servicemen.[2] The military's justifiable concern with values such as discipline, motivation, and obedience resulted in the promulgation of regulations, frequently couched in broad and imprecise terms, that restricted speech and conduct detrimental to the interests of the armed forces.[3] The "general articles,"[4] prominent

1. *See* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 1-2 (1975).

2. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974); Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977); Carlson v. Schlesinger, 364 F. Supp. 626 (D.D.C. 1973); Stolte v. Laird, 353 F. Supp. 1392 (D.D.C. 1972); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd*, 447 F.2d 245 (2d Cir. 1971), *cert. denied sub nom.* Cortright v. Froehlke, 405 U.S. 965 (1972); Miller v. Rockefeller, 327 F. Supp. 542 (S.D.N.Y. 1971).

3. *See, e.g.*, Air Force Reg. 35-15, § 3e(3)(b), which is quoted at note 9 *infra*.

4. Uniform Code of Military Justice (UCMJ), arts. 133-134, 10 U.S.C. §§ 933-934 (1970). Article 133 provides in pertinent part: "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." Article 134 provides in pertinent part:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital . . . shall be taken cognizance of by a . . . court-martial . . . and shall be punished at the discretion of that court.

The UCMJ is a codification of the military's rules of criminal justice. The punitive articles define criminal offenses under military law. UCMJ, arts. 77-134, 10 U.S.C. §§ 877-934 (1970). Particular crimes are defined in Articles 77-132. *Id.* §§ 877-932. Some offenses, such as disobedience of orders and desertion, are uniquely military in nature. *See, e.g.*, UCMJ, arts. 85, 92, 10 U.S.C. §§ 885, 892 (1970). Other violations, including murder and rape, are common to criminal codes generally.

among such laws, were upheld against challenges for vagueness and overbreadth in *Parker v. Levy*.[5] Suggesting that these statutes may be unconstitutional if applied in a civilian context,[6] the United States Supreme Court held in *Parker* that the broad language of the articles is justified by the fundamental differences between military and civilian society.[7]

Similarly, in *Culver v. Secretary of the Air Force*,[8] the United States Court of Appeals for the District of Columbia Circuit considered vagueness and overbreadth challenges to Air Force Regulation 35-15, 3e(3)(b),[9] which prohibits Air Force personnel stationed abroad from participating in demonstrations. Affirming the district court's summary judgment for the government,[10] the appellate court sustained the court-martial conviction of Culver, a captain in the Judge Advocate General's Corps of the United States Air Force.[11]

In determining that the Air Force regulation is neither vague nor overbroad, the majority applied the standards of review identified by the Supreme Court in *Parker*.[12] Unlike the rationale in *Parker*, however, which premised the validity of the general articles on the need for discipline and obedience within the military, the decision in *Culver* justified the regulation's legality on the sensitive position of the military in foreign affairs.[13]

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5. 417 U.S. 733 (1974).

6. *See id.* at 758-59, in which the Court quotes United States v. Priest, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1970):

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

(Citations omitted).

7. 417 U.S. at 756-57.

8. 559 F.2d 622 (D.C. Cir. 1977).

9. This regulation provides: "Members of the Air Force are prohibited from participating in demonstrations when . . . [i]n a foreign country."

10. Culver v. Secretary of the Air Force, 389 F. Supp. 331 (D.D.C. 1975).

11. 559 F.2d at 630.

12. *See id.* at 624.

13. *Id.* at 628.

Clearly, the need for discipline and obedience is an internal aspect of the military, crucial to its effective operation. Matters of foreign policy, on the other hand, are external to the structure of the armed forces; the statuses of foreign policy issues change rapidly and exert no constant pressure upon the military comparable to the continuing requirement of the maintenance of internal order. The holding in *Culver* sanctioning restrictions on the first amendment freedoms of military personnel for foreign policy reasons, therefore, constitutes a significant extension of the military's power to control its personnel and may portend the creation of greater restrictions on the rights of servicemen abroad.

Culver manifests the recent liberal approach to collateral attacks of courts-martial in civil courts.[14] Modern legal developments support both the District of Columbia Circuit's subject matter and equitable jurisdiction to review Culver's court-martial.[15] Whether the court exercised the proper scope of review, however, is less clear. This Comment will discuss briefly the court's jurisdiction to hear Culver's claim and trace the inconclusive history of the proper scope of civilian court review of military courts-martial. Finally, the Comment will analyze the propriety of the court's decision on the merits with respect to its disposition of Culver's vagueness and overbreadth claims.

COLLATERAL ATTACKS ON COURTS-MARTIAL

The plaintiff in *Culver* collaterally attacked his court-martial conviction, seeking declaratory and injunctive relief as well as compensation for monetary damages. Review of court-martial convictions historically has been limited to habeas corpus actions[16] and to certain suits in the Court of Claims.[17] In a series of recent cases, however, several federal courts of appeals have held that civil courts possess subject matter jurisdiction to review courts-martial in other than habeas corpus proceedings.[18] The Supreme Court's acceptance of this

14. Prior to the late 1950's federal district courts would entertain collateral attacks on courts-martial only in habeas corpus proceedings. *See* notes 16-18 *infra* & accompanying text. For a history of cases involving non-habeas corpus actions, see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1040, 1219 n.70 (1970) [hereinafter cited as *Federal Habeas Corpus*]. *See generally* Peck, *supra* note 1.

15. *See* notes 18-21, 23-24 *infra* & accompanying text.

16. *See* Peck, *supra* note 1, at 7-9; *Federal Habeas Corpus*, *supra* note 14, at 1208-38.

17. Traditionally the Court of Claims has heard attacks on courts-martial in suits to recover back pay. *See, e.g.*, United States v. Brown, 206 U.S. 240 (1907).

18. *See, e.g.*, Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971) (declaratory judgment voiding conviction and mandatory injunction); Kauffman v. Secretary

view in *Schlesinger v. Councilman*[19] eliminated some of the traditional jurisdictional restrictions on judicial review of courts-martial[20] and supports the subject matter jurisdiction of the court in *Culver*.[21]

Despite a finding of subject-matter jurisdiction in *Councilman*, the Supreme Court emphasized that judicial propriety and rules of equitable jurisdiction normally preclude interference by civil courts with the ongoing proceedings of the military court system.[22] Invoking the "exhaustion of remedies" doctrine,[23] the Court indicated that a civil court might properly entertain a collateral attack of a court-martial only upon the completion of review within the military's judicial hierarchy.[24] In *Culver* the challenged court-martial was subject to no further military review when the collateral attack was instituted;[25] the court, therefore, possessed equitable as well as subject matter jurisdiction.

Scope of Review

The most perplexing problem concerning modern collateral attacks on courts-martial is that of defining the civil court's scope of review.[26] Over a century ago, in *Dynes v. Hoover*,[27] the Supreme Court

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of the Air Force, 415 F.2d 991 (D.C. Cir. 1969) (declaratory judgment); Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968) (mandamus); Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966) (mandatory injunction); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (declaratory judgment).

19. 420 U.S. 738 (1975).

20. *See id.* at 745, 750-51, 753.

21. In Avrech v. Secretary of the Navy, 520 F.2d 100 (D.C. Cir. 1975), in which a court-martial conviction was challenged collaterally, the court interpreted *Councilman* as expanding the traditional jurisdictional limitations. Noting the jurisdictional finding in *Councilman*, the court stated: "We view *Councilman* as the more difficult jurisdictional case [because it was an attempt to enjoin a trial] and are confident that there is jurisdiction to consider an action seeking post-conviction relief." *Id.* at 102-03 n.5.

22. 420 U.S. at 755-57. According to the majority, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." *Id.* at 758.

23. *Id.* The Court analogized the ban against judicial intervention in ongoing court-martial proceedings to the requirement that federal courts refrain from interfering in state criminal and federal agency proceedings. *Id.* at 755-58.

24. *Id.* at 758.

25. Brief for Appellee at 16-17, Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977).

26. For a detailed discussion of the availability, method, and scope of review, see Strassburg, *Civilian Review of Military Criminal Justice*, 66 MIL. L. REV. 1, 1-41 (1974).

27. 61 U.S. (20 How.) 65 (1858).

held that civil review of courts-martial was confined to jurisdictional determinations. The reviewing court limited its inquiry to ascertaining the propriety of the subject matter jurisdiction exercised by the court-martial,[28] the legality of the sentence imposed by the military adjudication,[29] and the conformity of the court-martial proceeding with statutory mandates.[30] Subsequently, the Supreme Court's expansion of judicial review to due process challenges in civilian habeas corpus proceedings [31] prompted lower federal courts to entertain questions of due process in military habeas corpus proceedings as well.[32] However, the decision in *Hiatt v. Brown*,[33] in which the Supreme Court reiterated that only jurisdictional questions are within the province of civilian judicial review,[34] halted this liberal approach.

Burns v. Wilson,[35] the most recent Supreme Court case to address the scope of judicial review issue in the context of courts-martial, announced the present standard. In *Burns* the Court stated that a civilian court could review alleged violations of the Constitution, but only if the military tribunal had failed to consider those questions "fully and fairly." [36] Deliberation of the constitutional issues by the court-

28. *Id.* at 81.

29. *Id.* at 83.

30. *Id.* at 81.

31. Johnson v. Zerbst, 304 U.S. 458 (1938).

32. *See, e.g.*, Schita v. King, 133 F.2d 283 (8th Cir. 1943).

33. 339 U.S. 103 (1950).

34. *Id.* at 111. In *Hiatt*, the petitioner claimed that he had been denied due process and challenged specifically the sufficiency of the evidence, the adequacy of the pretrial investigation, and the competency of defense counsel. The Court refused to decide the issues on the merits, stating that such a determination would exceed its powers of review. *Id.* at 110-11.

Nine months after *Hiatt*, the Court seemed to liberalize the permissible scope of review in Whelchel v. McDonald, 340 U.S. 122 (1950). In holding that the defendant serviceman had been accorded due process while specifically restating the principle that jurisdiction is "the only issue before the Court in habeas corpus proceedings," *id.* at 126, the Court suggested that a denial of due process could be jurisdictional in nature if the defendant is denied the opportunity to raise an issue, such as insanity. *Id.* at 124.

For a discussion of the propriety of broadened collateral review by civil courts, see Strassburg, *supra* note 26, at 48-63. *See generally* Peck, *supra* note 1; Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969).

35. 346 U.S. 137 (1953).

36. *Id.* at 142. Citing Whelchel v. McDonald, 340 U.S. 122 (1950), the Court stated that "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ [of habeas corpus] simply to re-evaluate the evidence." 346 U.S. at 142.

martial, however, precluded a civilian court from "reexamin[ing] and reweigh[ing] each item of evidence." [37]

The *Burns* standard, permitting judicial review of claimed constitutional violations in appropriate situations, is broader than the rule stated in *Hiatt*, which limited review to jurisdictional issues only. Predictably, attempts to reconcile the two doctrines have produced inconsistent interpretations.[38] A majority of jurisdictions refuse to inquire into alleged constitutional violations, following a determination that the military fairly considered the petitioner's contentions.[39] This approach contrasts with an interpretation adopted by one minority, which permits civil courts to conduct detailed reviews of constitutional issues.[40]

The latter approach received the Supreme Court's limited approval in *Parker v. Levy*,[41] in which the Court conducted an extensive review of the constitutionality of the general articles in the Uniform Code of Military Justice (UCMJ).[42] Nevertheless, some vitality for the majority construction of *Burns* remained: the Court in *Parker* authoritatively cited *Burns* to delimit the review of other issues to be considered on remand.[43]

Burns, *Hiatt*, and the decisions preceding those cases suggest that the Supreme Court has limited its scope of review primarily because neither the Constitution nor the Congress has given the Court direct appellate or supervisory power over military courts.[44] Yet the Court regards itself as the final arbiter of constitutional issues,[45] and collateral attacks offer the justices their sole opportunity to review constitutional questions arising in courts-martial. *Parker* manifests this latter proposition, suggesting that civil courts may review comprehensively the constitutionality of the articles and regulations governing

37. 346 U.S. at 144.

38. *See* Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193, 206-09 (1966).

39. *Id.* at 208.

40. *Id.* at 209. In the other two minority patterns the courts have attempted either to avoid the scope of review issue by declaring that the petitioner's allegations are insufficient regardless of the degree of scrutiny employed or to satisfy simultaneously the standards enunciated in both *Burns* and *Hiatt*. *Id.* at 206-07.

41. 417 U.S. 733 (1974).

42. *See id.* at 752-61. *See* notes 4-7 *supra* & accompanying text.

43. *See id.* at 762.

44. *See* 346 U.S. at 140; 339 U.S. at 111. *See generally In re* Yamashita, 327 U.S. 1, 8-9 (1946) (no congressional grant); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1863) (no constitutional grant).

45. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

the rights and conduct of military personnel.[46] The judicial activism in military justice sanctioned by *Parker*, however, was tempered by the Court's citation of *Burns*. Thus, unless the military tribunal failed to consider the issue fairly, the civil courts remain precluded from inquiring whether the constitutional or other legal rights of a serviceman were denied by a specific action of a military official that is alleged to be unauthorized under those articles and regulations.[47]

Culver v. Secretary of the Air Force followed the principles suggested in *Parker*. In *Culver* the court reviewed the substantive first amendment challenges to the Air Force regulation; however, the majority questioned the court's authority to consider the propriety of an allegedly prejudicial jury instruction.[48] Such a limited scrutiny was consistent with *Parker*.

Whether this liberal approach to defining the permissible scope of review will be extended to enable the civil courts to consider all constitutional questions in a collateral attack is uncertain. A belief among some federal judges that the military's judicial system does not always consider constitutional claims adequately [49] suggests that at least some members of the judiciary would welcome such an extension. However, the current conservative direction of the Supreme Court in military matters,[50] together with the specific constitutional power of Congress

46. *Compare* Parker v. Levy, 417 U.S. 733 (1974) (upholding constitutionality of UCMJ arts. 133 & 134, which prohibit "conduct unbecoming an officer and a gentleman" and conduct prejudicial to "good order and discipline in the armed forces") *with* Middendorf v. Henry, 425 U.S. 25 (1976) (upholding constitutionality of UCMJ arts. 16, 20, and 27 providing for summary courts-martial without benefit of defense counsel) *and* Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977) (upholding constitutionality of Air Force regulation that proscribes servicemen's participation in "demonstrations" in foreign countries).

47. *But see* Peck, *supra* note 1, at 65, in which the author concludes that "the Court has finally removed any doubt that it will entertain the full range of constitutional challenges to military administrative activities," and that "there is no longer any restriction on the nature of the constitutional challenges which are eligible for review." *Id.*

48. 559 F.2d at 629.

49. *See, e.g.*, Culver v. Secretary of the Air Force, 559 F.2d 622, 630-31 (D.C. Cir. 1977) (Leventhal, J., concurring); *Id.* at 637 n.12 (Bazelon, C.J., dissenting). In *Culver* the constitutional issues did receive extensive consideration at the trial level and at two levels of military review. Brief for Appellee at 16-17, Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977). For a forceful statement outlining the constitutional guaranties afforded a defendant in military criminal proceedings see Strassburg, *supra* note 26, at 50-54.

50. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25 (1976) (defense lawyer not required in summary court-martial); Greer v. Spock, 424 U.S. 828 (1976) (military commander's prohibition against political campaigning on military base upheld); Schlesinger v. Councilman, 420 U.S. 738 (1975) (civil court's

to regulate the armed forces,[51] may prevent further expansion of the civil courts' authority to conduct reviews of constitutional issues.

MILITARY NECESSITY AND FOREIGN AFFAIRS

The judiciary's increasing willingness to review a variety of military matters derived in part from the extensive litigation initiated during the Vietnam war. Some of the war's foremost opponents were members of the Armed Forces who became parties to suits challenging traditional assumptions of military authority.[52]

Captain Thomas Culver was a member of the United States Air Force and stationed in England when he was charged with organizing and participating in a demonstration in violation of a lawful order.[53] Following his trial and conviction by general court-martial, he attacked the judgment collaterally in federal court.[54] In considering Culver's claim that the regulation banning participation in demonstrations in foreign countries was vague and overbroad, the court applied the test for review of alleged constitutional infirmities in military law formulated by the Supreme Court in *Parker v. Levy*.

Parker v. Levy: The Military Standard

As noted, the petitioner in *Parker v. Levy* challenged the general articles of the UCMJ.[55] Because the Supreme Court previously had upheld the general articles,[56] the military relied on them extensively during the Vietnam war to permit the court-martial of dissidents for

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interference with court-martial proceedings proscribed); Parker v. Levy, 417 U.S. 733 (1974) (UCMJ general articles upheld against vagueness and overbreadth challenges).

51. "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . ." U.S. CONST. art. I, § 8, cl. 14.

52. For a discussion of cases arising under the first amendment during the Vietnam war, see Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971).

53. Culver was charged under Article 133 of the UCMJ, 10 U.S.C. § 933 (1970), for soliciting military personnel to violate Air Force Reg. 35-15, § 3e(3)(b). For the pertinent text of the article and regulation see notes 4 & 9 *supra*. Culver's personal participation in the demonstration resulted in his being charged under Article 92 of the UCMJ, 10 U.S.C. § 892 (1970), which provides in pertinent part: "Any person subject to this chapter who . . . violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial shall direct."

54. 559 F.2d at 623.

55. *See* note 5 *supra* & accompanying text.

56. *See, e.g.*, Grafton v. United States, 206 U.S. 333 (1907); Swaim v. United States, 165 U.S. 553 (1897); *Ex parte* Mason, 105 U.S. 696 (1882); *cf.* Dynes v.

conduct that arguably was protected by the first amendment.[57] *Parker*, however, provided the Supreme Court with its first opportunity to rule on the articles' conformity with modern standards of vagueness and overbreadth.[58] Holding that the special nature and mission of the armed forces dictated constitutional standards for military statutes different from those applicable in civilian society, the Court found the general articles to be neither vague nor overbroad.[59]

Vagueness

Noting that the broad reach of the general articles had been narrowed by judicial and executive construction, the Supreme Court in *Parker* held that inherent differences between military and civilian society required the vagueness challenge to be reviewed under the criteria applicable to "criminal statutes regulating economic affairs."[60] As such, the presumption of validity that attaches to a statute properly enacted by Congress could not be overcome by a mere showing of difficulty in determining whether marginal acts fell within the

Hoover, 61 U.S. (20 How.) 65 (1858) (naval equivalent of the general articles upheld). *See also* Weiner, *Are the General Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

57. The Court of Military Appeals decided four principal cases involving first amendment rights during this era: United States v. Gray, 20 C.M.A. 63, 42 C.M.R. 255 (1970); United States v. Harvey, 19 C.M.A. 539, 42 C.M.R. 141 (1970); United States v. Daniels, 19 C.M.A. 529, 42 C.M.R. 131 (1970); United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967). *See also* United States v. Vorhees, 4 C.M.A. 509, 16 C.M.R. 83 (1954) (servicemen's first amendment right to publish a book that criticized American involvement in Korea held limited by strict military necessity). *See generally* Sherman, *supra* note 52; Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing*, 18 WAYNE L. REV. 665 (1972).

58. Captain Levy was charged with violations of the UCMJ, arts. 90, 133-134, 10 U.S.C. §§ 890, 933-934, for refusing to train Special Forces personnel and for making public statements in opposition to the Vietnam war to enlisted men. 417 U.S. at 737-39. His numerous appeals in military and civilian courts, *see id.* at 740 n.7, resulted in a successful habeas corpus petition to the Court of Appeals for the Third Circuit, Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974), which held the general articles to be void for vagueness.

59. 417 U.S. at 756-57. Several weeks after its decision in *Parker*, the Court decided a companion case, Secretary of the Navy v. Avrech, 418 U.S. 676 (1974). In a per curiam opinion the Court dismissed Avrech's vagueness and overbreadth challenges to Article 134 on the basis of *Parker*. For an analysis of *Parker* and *Avrech*, see Everett, *Perspective: Military Justice in the Wake of Parker v. Levy*, 67 MIL. L. REV. 1 (1975).

60. 417 U.S. at 756.

law's proscription.[61] The term "void for vagueness," according to the Court, " 'simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.' " [62] Because the general articles prohibited an ascertainable range of conduct [63] and the defendant had received reasonable notice of the illegality of the activity,[64] the Court concluded that the vagueness challenge was without merit.

Overbreadth

The concept of "expanded standing" in first amendment cases permits those persons whose constitutional rights are not violated directly to challenge statutes for overbreadth.[65] Although the Court in *Parker* conceded that a serviceman might be accorded expanded standing even though his conduct clearly lies within the prohibitions of the statute, it recognized that the exigencies of military society normally would preclude an expansion of strict standing doctrine.[66]

The imposition of limited standing required a rejection of the overbreadth challenge as applied to the appellee's conduct in *Parker*. Nevertheless, the Court also indicated that the challenged regulations

61. *Id.* at 757, *quoting* United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963). *See also* Jordan v. De George, 341 U.S. 223 (1951) (upholding the Immigration Act); United States v. Petrillo, 332 U.S. 1 (1947) (upholding the Communications Act of 1934).

62. 417 U.S. at 757, *quoting* United States v. Harriss, 347 U.S. 612, 617 (1954).

63. 417 U.S. at 754-57.

64. The Court in *Parker* found that Captain Levy "could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so were both 'unbecoming to an officer and a gentleman,' and 'to the prejudice of good order and discipline in the armed forces . . . .' " 417 U.S. at 757.

65. An exception to the traditional rules of standing "has been carved out in the area of the First Amendment," Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973), on the ground that the importance of a free society justifies "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). *See also* Gooding v. Wilson, 405 U.S. 518 (1972). For a general review of the overbreadth doctrine see Torke, *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974). *See generally* Imwinkelried & Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEXAS L. REV. 42 (1975).

66. 417 U.S. at 758-60. Although holding that servicemen are accorded first amendment protection, the Court nevertheless stated that the "differing character of the military community and of the military mission" required the protected rights to be implemented under alternative procedures than those that are applicable to civilian society. *Id.* at 758. Accordingly, the Court held that the

could not be invalidated as facially overbroad.[67] The Court thus concluded that the general articles prohibited only a broad range of "easily identifiable and constitutionally proscribable . . . conduct," [68] whereas the behavior in question was "unprotected under the most expansive notions of the First Amendment." [69]

Culver v. Secretary of the Air Force

Although both *Culver* and *Parker* involved vagueness and overbreadth challenges to military laws, significant differences exist between the two cases. These disparities arguably render *Parker*'s standards inapplicable to *Culver*.

Vagueness

Asserting that an extended analysis of the vagueness issue was unnecessary, the court in *Culver* simply applied *Parker*'s holding without discussion and determined that the vagueness claim was invalid.[70] Closer examination reveals that the court's application of the *Parker* standard is justifiable, albeit not on the basis of *Parker*'s reasoning.

One pronounced difference between the two cases is the type of law in question. In *Parker*, the Court reviewed the challenged UCMJ

" 'weighty countervailing policies,' which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a good deal less weight in the military context." *Id.* at 760 (citation omitted), *quoting* Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

67. 417 U.S. at 757-58.

68. *Id.* at 760, *quoting* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 580-81 (1973) (invalidation of a statute on its face is inappropriate if there exists a substantial number of situations to which it can be applied validly).

69. 417 U.S. at 761.

70. 559 F.2d at 624, 630. The court regarded *Parker* and Greer v. Spock, 424 U.S. 828 (1976) as "immediately controlling," and stated:

> It seems neither necessary nor desirable in this case to attempt a comprehensive analysis of the authorities generally treating the questions of overbreadth or vagueness. There could be a temptation in such a crowded legal art to become captives of collateral problems of the past and the apprehensions of the future in diversion from issues presently before us. The timing and circumstances of this case lie somewhere between the travail of Vietnam and prior wars and, hopefully, the more complete release of freedom from the remaining constraints of military necessity abroad, as well as at home.

559 F.2d at 624.

articles [71] under the presumptive validity accorded to all congressional enactments.[72] In *Culver*, however, the defendant contested the legality of an Air Force regulation.[73] Whether a court reviewing the constitutionality of a military regulation should grant that regulation the same deference afforded to congressional enactments is questionable. To the extent that *Parker* relied on the presumptive validity of federal statutes, it fails to support the decision in *Culver*.

Parker also differs from *Culver* insofar as the statutes challenged in the former case had been interpreted by their extensive judicial and legislative history. The American Articles of War were adopted almost verbatim in 1775 from the British Articles, and despite substantial changes in 1951, the general articles of the UCMJ retain intact many of their earlier provisions.[74] Further, the judiciary has construed the general articles narrowly, according due consideration to the "long-standing customs and usages of the services [that] impart accepted meaning to the [articles'] seemingly imprecise standards." [75] Finally, the Manual for Courts-Martial details the scope of the general articles.[76] The proscription of a wide range of unquestionably impermissible behavior,[77] therefore, has resulted in relatively few restrictions on first amendment rights. Such considerations compelled the Court in *Parker* to apply a relaxed standard of review for vagueness to the general articles.[78] In contrast, the scope of the Air Force regulation

71. UCMJ, arts. 133-134, 10 U.S.C. §§ 933-934 (1970).

72. 417 U.S. at 757, *quoting* United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963).

73. AFR 35-15, ¶ 3e(3)(b).

74. For the history of the general articles see Parker v. Levy, 417 U.S. 733, 745-46 (1974).

75. *Id.* at 746-47. *See* cases cited at note 56 *supra*. For a judicial history of the general articles, see Wiener, *supra* note 56.

76. *See* MANUAL FOR COURTS-MARTIAL (MCM) ¶¶ 212-213 & 127c. An executive promulgation, the MCM contains a table of maximum punishments for various violations and describes the court-martial procedure. Detailed commentary attempts to narrow the purview of the punitive articles by setting forth specific applications for each provision. *See generally* Ackroyd, *Professor Morgan and the Drafting of the Manual for Courts-Martial*, 28 MIL. L. REV. 14 (1965).

77. Perhaps because of the articles' generality, the military makes a concerted effort to advise its personnel of the contents of the UCMJ, first on enlistment and then after six months of active service. UCMJ, art. 137, 10 U.S.C. § 937 (1970). Moreover, the military's enforcement of the general articles arguably has been reasonable. One critic who reviewed thousands of cases under Article 134 and its predecessors found no situation in which the accused could not reasonably have understood that his action was proscribed by the statute. Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Articles*, 22 HASTINGS L.J. 259, 288-89 (1971).

78. *See* notes 60-64 *supra* & accompanying text.

disputed in *Culver* never has been limited by judicial construction.[79] Moreover, the effect of its enforcement is to restrict political demonstrations, a form of speech and conduct traditionally protected by the first amendment.

Clearly, the vagueness standard enunciated in *Parker* was inapplicable in *Culver* absent an extended legal analysis. The Supreme Court in *Parker* has specified the test to be applied in reviewing the constitutionality of the UCMJ articles, provisions that were enacted by Congress.[80] Whether the Court intended that the same standard be applied in the review of military regulations promulgated by the executive branch, however, is uncertain.

That the need for a separate standard was based on "the factors differentiating military society from civilian society" [81] suggests that the test in *Parker* should apply to reviews of military regulations. Although the Supreme Court's view of the military as a "society apart" [82] arguably is unwarranted in many respects,[83] crucial differences between military and civilian society justify stricter regulation

79. The Court of Military Appeals decided a case involving a regulation similar to that challenged in *Culver* two years after Captain Culver's court-martial. United States v. Alexander, 22 C.M.A. 485, 47 C.M.R. 786 (1973). The court in *Alexander* avoided the constitutional issues by refusing to apply the regulation to on-base expressions against military policy. *Id.* at 487-88, 47 C.M.R. at 788-89. In contrast to *Culver*, in which the challenged regulation banned all demonstrations, the regulation in *Alexander* permitted such activity if the serviceman obtained permission from his commanding officer. Army Reg. 600-20, Jan. 31, 1967, *reprinted in* United States v. Alexander, 22 C.M.A. at 486, 47 C.M.R. at 787.

80. *See* 471 U.S. at 756.

81. *Id.* The Court consistently has recognized that inherent differences between civilian and military society create a "vast gulf between civilian and military jurisdiction." Gibson v. United States, 329 U.S. 338, 357 (1946). Thus, the Court has stated:

> [J]udges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

The principal factor distinguishing military society from its civilian counterpart is the fundamental necessity for obedience and discipline among members of the armed forces. As a result, the prevailing military law is "that of obedience," *In re* Grimley, 137 U.S. 147, 153 (1890), without which the military would be unable "to perform its mission effectively." 417 U.S. at 744.

82. *Id.*

83. For a discussion of the major changes in military discipline within the last twenty years, see Sherman, *Legal Inadequacies and Doctrinal Restraints in Con-*

of servicemen's conduct. For example, the maintenance of *esprit de corps* and discipline in combat, major concerns of the military commander, constitute areas incapable of reduction to precise rules; in drafting regulations to implement such objectives, the military requires a latitude that would be impermissible in civilian society. Moreover, orders and regulations governing the daily operations of the military affect discipline and obedience more directly than do the general articles of the UCMJ. Such justifications for many types of restrictions of conduct [84] suggest that the *Parker* standards properly are applicable to the regulation challenged in *Culver*.

Because the term "demonstration" was defined neither in the regulation nor by judicial construction, Culver asserted that the blanket ban on participation in demonstrations was insufficient to provide him with adequate notice that his conduct was prohibited.[85] He argued that the word "demonstration" as used in the regulation was analogous to the imprecise language condemned by the Supreme Court in *Smith v. Goguen*,[86] *Coates v. City of Cincinnati*,[87] and *Lanzetta v. New Jersey*.[88] Dismissing this argument peremptorily, the court stated that as used in the regulation the term had acquired a "kind of gloss." [89]

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trolling the Military, 49 IND. L.J. 539 (1974). *See generally* Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on a Society Apart*, 51 NOTRE DAME LAW. 396 (1976).

84. Without extended discussion, the Court of Appeals for the District of Columbia Circuit had reached this conclusion in an earlier case, Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975). While stationed on a United States airbase in Vietnam, Carlson was arrested for soliciting signatures on an anti-war petition. Air Force regulations required that prior approval of petitioning activity be obtained from the installation commander; the commander had denied such approval on the basis of a clear danger to the loyalty, discipline, and morale of other servicemen on the base. Reversing the district court's finding that the regulation was unconstitutionally vague, the court of appeals stated that the regulation was based upon military necessity and that the decision of the installation commander would stand unless "manifestly unrelated to legitimate military interests." *Id.* at 1333.

85. 559 F.2d at 623-24 n.5.

86. 415 U.S. 566 (1972) ("treats contemptuously the flag of the United States" held vague).

87. 402 U.S. 611 (1971) ("conduct . . . annoying to persons passing by" held vague).

88. 306 U.S. 451 (1939) ("gang" held vague).

89. 559 F.2d at 628. The "gloss" derived both from common parlance and from usage in the regulation itself, "from the context of 'protest and dissent' in which it appears." *Id.*

Chief Judge Bazelon's dissenting opinion agreed that the term had acquired a gloss but contended that the resultant meaning of the word "blurs into vagueness precisely in the area of appellant's activity. I assume that 'demonstration' would not describe individual presentations of petitions . . . just as I assume

Therefore, no valid comparison could be made between the word "demonstration" and the terms held impermissibly vague in the earlier cases.[90]

The court's summary holding that *Goguen* and *Coates* were inapplicable is correct: the statutory language contested in those earlier cases required a subjective determination of the propriety of the proscribed conduct, whereas the word "demonstration," as used in the regulation, carried reasonably objective connotations. A distinction between *Culver* and *Lanzetta,* however, is not as obvious. Both cases questioned whether a given term was defined adequately in its criminal context. The court in *Culver* reasoned that *Lanzetta* was inapposite because the word "gang," as used in the challenged statutes in *Lanzetta,* frequently appeared in other, noncriminal contexts.[91] The argument is unconvincing, however, because "demonstration" also has meaning outside the context of a political protest.

The court's distinction is strained and ultimately unnecessary inasmuch as the facts of *Culver* comprised a situation in which *Parker*'s relaxed standard of review was directly applicable. In discussing this standard of vagueness with respect to economic regulations, the Supreme Court has stated that compliance with due process does not require "impossible standards of specificity" [92] and that the sufficiency of notice provided by a statute necessarily must be examined "in light of the conduct with which the defendant is charged." [93] Some imprecision in defining the word "demonstration," therefore, would not invalidate the regulation in question if the nature of Culver's activity fell within that class of actions undoubtedly encompassed by the term.[94]

As planned and executed, the group activity in *Culver* constituted a demonstration. Prior to the rally, Culver had distributed pamphlets soliciting servicemen stationed in England to participate in what was labelled a "presentation" of antiwar petitions to the Ambassador at the American Embassy in London.[95] The literature noted that participants would be bussed into London from their bases and that "[o]nly

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that it would describe mass gatherings with all the usual trappings of political protests. Appellant's activity fell somewhere between these extremes." 559 F.2d at 633-34 (Bazelon, C.J., dissenting).

90. 559 F.2d at 628.

91. *Id.* at 628 n.10.

92. Jordan v. De George, 341 U.S. 223, 231 (1951).

93. United States v. National Dairy Prods. Corp., 372 U.S. 29, 33 (1963). *See* text accompanying note 61 *supra.*

94. Under this standard, Chief Judge Bazelon's argument is without merit. *See* notes 89-93 *supra* & accompanying text.

95. Culver claimed that, rather than demonstrating, he was exercising his

when a large number of G.I.'s turn out can we have an effect." [96] Moreover, at the request of British police the organizers had changed both the location of the assembly and the manner of the presentation to prevent crowds from congregating at the Embassy. Thus, from its inception the "presentation" was intended to involve a large group of servicemen.[97]

Culver's intention remained unchanged notwithstanding his receipt of a statement prepared by the local Staff Judge Advocate, noting that participation in a demonstration was punishable regardless of its appellation.[98] The communication's timing alone implied strongly that it was directed at Culver's planned activity and that his superiors considered the assembly to be a prohibited demonstration.[99] Nevertheless, the event proceeded as planned, attracting 200 servicemen and invoking comments to the press by group leaders.[100]

Despite the regulation's failure to define the term "demonstration" specifically, Culver's activity clearly fell within the class of actions that a reasonable person would designate a demonstration.[101] Applying the *Parker* rationale, then, the court correctly rejected Culver's vagueness challenge.

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constitutional right to present a petition at the American Embassy. However, the demonstration was accorded no special status merely because it involved the presentation of petitions. *See* 559 F.2d at 632-33. (Leventhal, J., concurring). Because the military did not prohibit individual servicemen from inconspicuously delivering petitions to the Embassy, the Air Force regulation did not infringe upon the right to petition.

96. 559 F.2d at 625 (quoting the text of the leaflet distributed by Culver).

97. *Id.* at 627.

98. *Id.* at 626. The statement noted that the prohibitions of Air Force Reg. 35-15, ¶ 3e(3)(b) applied "whether the serviceman or servicewoman is on or off base, in or out of uniform, on or off duty." *Id.*

99. The binding effect of such notice depended on whether the Staff Judge Advocate's interpretation of AFR 35-15 ¶ 3e(3)(b) carried the force of law. As noted in Chief Judge Bazelon's dissenting opinion, however, this question was not raised at trial. 559 F.2d 635 n.3.

100. Although wearing civilian clothes, the military members who participated in the assembly, including Culver, also wore white arm bands depicting a helmet and upraised clenched fist. 559 F.2d at 626-27.

101. On the issue of whether Culver had notice that he was participating in a prohibited demonstration, the district court stated:

> [A]t the time of the commission of the offense, plaintiff was not an untutored novice. He had been on active duty as a judge advocate for more than five years, and had extensive expertise in the area of military criminal law. He . . . cannot claim ignorance or naivete.

Culver v. Secretary of the Air Force, 389 F. Supp. 331, 333 (D.D.C. 1975), *aff'd*, 559 F.2d 622 (D.C. Cir. 1977).

Overbreadth

Culver's adoption of *Parker*'s standard for reviewing challenges of overbreadth followed implicitly. After determining that the factual situation in *Culver* constituted a demonstration within the meaning of the regulation,[102] the court concluded that the military constitutionally could forbid servicemen abroad from participating in a wide range of political activity.[103] Indirectly, therefore, the circuit court held that the Air Force regulation was not overbroad and could validly prohibit Culver's activity.[104]

Parker's overbreadth analysis is not directly relevant in *Culver* inasmuch as the Supreme Court, in the former case, stated that the petitioner's conduct "was unprotected under the most expansive notions of the First Amendment." [105] Yet, the activity challenged in *Culver* involved political conduct that traditionally has been protected by the Constitution. Notably, however, the Court in *Parker* recognized that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." [106] Moreover, the Court relied upon this rationale in the subsequent case of *Greer v. Spock*,[107] which upheld a ban against civilian political activities within the confines of a domestic military base.[108] As a result, *Greer* and *Parker*, in combination, support the proposition that the military may forbid some conduct traditionally protected by the first amendment if such a prohibition is necessary for the maintenance of discipline and obedience within the armed forces. Whether the military may proscribe these activities for a purpose other than the protection of internal order is uncertain. Even if the armed forces prohibit conduct that would be permissible in the civilian community, the test for constitutionality approved in *Parker* requires that the breadth of the proscription be closely related to the needs of the military.[109]

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102. 559 F.2d at 627.

103. *Id.* at 628.

104. The court rejected Culver's overbreadth claim with sweeping language. *Id.* at 628, 630. Because *Parker* establishes that a serviceman normally would not be given expanded standing to contest the constitutionality of a military regulation, 417 U.S. at 760, however, the court's holding in *Culver* must be regarded as dictum to the extent that it might be applicable to factual situations differing from the circumstances in the case.

105. 417 U.S. at 761.

106. *Id.* at 758.

107. 424 U.S. 828 (1976).

108. *Id.* at 839.

109. *See, e.g.*, United States v. Smith, 23 C.M.A. 542, 50 C.M.R. 713 (1975) (naval regulation prohibiting usury held unduly restrictive); United States v.

Thus, in declaring invalid a Navy regulation for overbreadth, the Court of Military Appeals asserted that "an order which is broadly restrictive of a private right is arbitrary and illegal in the absence of circumstances demonstrating a connection to a military need." [110]

In *Culver,* however, the court failed to establish any relationship between the regulation's broad ban against off-base political activity by Air Force personnel stationed abroad and the need to maintain internal standards of obedience and discipline. Indeed, in view of previous Supreme Court decisions, the establishment of such a connection may be impossible. In *Greer,* for example, the Court upheld Army regulations prohibiting on-base speeches and requiring activists to obtain prior approval of headquarters command before distributing political literature on base [111] but also stated that "[u]nder such a policy, members of the Armed Forces . . . are wholly free as individuals to attend political rallies, out of uniform and off base." [112] The Court in *Greer* recognized that the armed forces, regardless of their interest in maintaining internal order, cannot constitutionally prohibit all political activity by servicemen, implying that the off-base conduct of military personnel may not be considered a threat to discipline and obedience. Moreover, in view of Supreme Court holdings that American citizens in a foreign country enjoy the same constitutional protection with respect to acts by federal officials as do those at home,[113] this explanation of *Greer* applies to *Culver* although the conduct in the latter case occurred in England. Clearly, the Air Force regulation in *Culver* cannot be justified under the holding in *Parker* as a restriction upon the conduct of servicemen that is designed to maintain internal order within that branch of the armed services.

Ultimately, the court in *Culver* upheld the regulation for foreign policy reasons. Rather than promoting discipline, the prohibition of

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Milldebrandt, 8 C.M.A. 635, 25 C.M.R. 139 (1958) (order to report financial condition at specified times held unrelated to the requirements of military service and unduly broad); United States v. Martin, 1 C.M.A. 674, 5 C.M.R. 102 (1952) (military need justified order prohibiting transfer of cigarettes for bartering purposes).

110. United States v. Smith, 23 C.M.A. 542, 544, 50 C.M.R. 713, 715 (1975).

111. 424 U.S. at 839-40.

112. *Id.* at 839.

113. Although the Court held in 1891 that "[t]he Constitution can have no operation in a foreign country," *In re* Ross, 140 U.S. 453, 464 (1891), subsequent decisions consistently have held otherwise. In Reid v. Covert, 354 U.S. 1 (1957), for example, the Court stated that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.* at 6. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

demonstrations by military personnel avoids embarrassment and friction between the United States and foreign countries in which American armed forces are based.[114] As all the judges in *Culver* agreed,[115] the military occupies a particularly sensitive position in foreign affairs. Host countries, perceiving the presence of foreign military forces as a threat to their national sovereignty, might demand as a prerequisite to the stationing of foreign forces on their soil that the sending nation strictly control its military personnel. The court emphasized that the NATO Status-of-Forces Agreement[116] placed the United States under an important treaty obligation to ensure the political inactivity of American servicemen stationed in England.[117]

Culver therefore suggests that the foreign policy goal of military unobtrusiveness in host nations validly may require restrictions on servicemen's conduct similar to those that may be imposed to maintain military discipline and obedience. Such a conclusion is reasonable. A well-disciplined army would be useless if it could not be deployed in a militarily strategic area of the world. Officers of the armed forces must have the authority to promulgate and enforce such regulations as are necessary to ensure compliance with the conditions under which a host nation has consented to the stationing of United States forces on its soil.

The judges in *Culver* do not disagree with this proposition; their opinions differ, however, as to its application. Chief Judge Bazelon would prohibit a total ban on political demonstrations by military personnel; instead, a serviceman might participate in organized activities if he first secured his commanding officer's approval.[118] Moreover, the judge would invalidate the proscription of any activity that was not actually proved to be harmful to the relationship between the United States and the host nation.[119]

Supporting the court's opinion upholding the regulation, Judge Leventhal successfully rebuts the Chief Judge's proposals. Leventhal notes that "[i]ndividual servicemen cannot demand the right to predict or determine which demonstrations will prove disruptive or em-

114. 559 F.2d at 628.

115. *Id.*; *id.* at 631-32 (Leventhal, J., concurring); *id.* at 635-36 (Bazelon, C.J., dissenting).

116. The NATO Status-of-Forces Agreement, [1951] 4 U.S.T. 1792, T.I.A.S. No. 2486, art. II provides: "It is the duty of a force . . . and the members thereof . . . to abstain . . . in particular, from any political activity in the receiving state. It is also the duty of the sending state to take necessary measures to that end." [1951] 4 U.S.T. at 1796.

117. 559 F.2d at 628.

118. *Id.* at 638-39 (Bazelon, C.J., dissenting).

119. *Id.* at 639.

barrassing in our relations with the host country." [120] This statement is applicable whether the serviceman is the commanding officer of a military base or the person planning to participate in an off-base demonstration. Obviously, neither individual should be allowed to act on his own speculations as to the probable effects of a demonstration: such a determination involves the consideration and formulation of complex foreign policy issues. With respect to Chief Judge Bazelon's suggestion requiring proof of the harmful effects of any particular demonstration, Leventhal observes that England already has articulated, in the Status-of-Forces Agreement, its objection to such activity and that no further testimony, which in itself might prove to be embarrassing to the host nation, should be necessary.[121]

Because military regulations designed to implement foreign policy considerations probably will prohibit conduct that traditionally has been protected by the Constitution, they should be subjected to a military necessity test similar to that approved in *Parker*.[122] Under this test, a military regulation banning political demonstrations in a foreign country would not be valid unless, as in *Culver*, the host nation had specificially demanded as a condition to the stationing of armed forces within its borders that the United States restrict the organized activities of its servicemen. Moreover, a court should construe any such condition narrowly to prohibit only the conduct with which the host country was concerned. Finally, regulations and orders implementing a ban on political demonstrations can be issued validly only from those groups within the military who are competent to interpret and formulate issues of foreign policy. Thus, for the same reason that a commanding officer is unable to authorize participation in off-base demonstrations by individual military personnel, he also is incapable of unilaterally promulgating an order banning such activity.[123]

CONCLUSION

Culver v. Secretary of the Air Force represents a significant extension of the power of the military to restrict the individual freedoms of its servicemen. Previously, such restrictions could be justified only

120. *Id.* at 632 (Leventhal, J., concurring).

121. *Id.* at 632 n.3.

122. 417 U.S. at 758-59. *See* text accompanying notes 109-10 *supra*.

123. Apart from these procedural limitations on the imposition of restrictions on servicemen's rights, the armed forces' ability to agree to these proscriptions may be circumscribed in some instances by overriding constitutional considerations. A delineation of the ultimate controls that the military constitutionally may exercise over its personnel is beyond the scope of this Comment.

by the intrinsic need for a high level of obedience and discipline within the military. In *Culver*, however, the external pressures created by the military's position in foreign affairs were deemed sufficiently sensitive to permit the enforcement of restrictions on the first amendment freedoms of servicemen. The importance of such rights to civilians and military personnel alike mandates a narrow reading of *Culver*'s holding under a test of strict military necessity.