

COMMANDERS' ORDERS

vs.

CONSTITUTIONAL RIGHTS

1. DOD Directive 1325.6 states that "The commander of a military installation shall prohibit any . . . activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline or morale of the troops."

2. DA letter, subject: Guidance on Dissent, dated 23 June 1969, states pertinently:

" . . . 'soldier dissent' is linked to the Constitutional right of free speech . . . commanders should consult with their Staff Judge Advocate and may in appropriate cases confer with higher authority before initiating any disciplinary or administrative action in response to manifestations of dissent. The maintenance of good order and discipline . . . remains, of course, the responsibility of commanders.

" . . . the right to express opinions on matters of public and personal concern is secured to soldier and civilian alike by the Constitution and laws of the United States. This right, however, is not absolute Other functions and interests of the Government and the public, which are also sanctioned and protected by the Constitution . . . may require reasonable limitations on the exercise of the right of expression In particular, the interest of the Government and the public in the maintenance of an effective and disciplined Army . . . justifies certain restraints upon the activities of military personnel which need not be imposed on similar activities by civilians."

3. An order is presumed lawful and if subsequently challenged will normally be found lawful in fact if the order relates to a specific military duty (has a military purpose) and is one which the individual issuing the order was authorized under the circumstances to give. To put it another way, an order is unlawful if it is unrelated to military duty (has no military purpose), has for its object the attainment of some private end, is arbitrary and capricious, or is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit.

4. Certainly no reasonable person would deny that groups of soldiers can gather on a military installation. They do it all the time--waiting to get into a movie, at ball games, inside movie theaters, mess halls, at company picnics, in chapels, etc. Nor could a reasonable person deny that a valid order may be given to such groups of soldiers to disperse. The question is whether the order is issued by an authorized person, is related to military duty (has a military purpose), is not arbitrary and capricious, and is not given for the purpose of increasing punishment as stated in paragraph 3 above.

5. But, suppose that the group contends that they are assembled in the exercise of their right to expression of symbolic speech guaranteed to them by the US Constitution they are sworn to defend? Can a lawful order be given to disperse? The answer is yes, if there exist two additional elements: a clear danger to good order and discipline, or the interference with the accomplishment of a military mission. These are questions of fact, not law, to be decided by commanders, or juries and members of courts-martial if the issue is raised as a defense during a trial. In the usual failure to obey situation, Constitutional questions are not raised; e.g., "Get out of your bunk and go to duty." But a defense might exist; e.g., medical evidence to the effect that the soldier was unable to get out of his bunk. In this case the questions to be determined would be only whether a military purpose existed (go to duty) and whether the order was arbitrary and capricious (the order was given in spite of the soldier's statement he was not physically able to comply).

6. A sufficiently accurate summation of all of the above exists in the word "reasonableness."



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