

The US Army War College Quarterly: Parameters

Volume 41
Number 3 *Parameters Autumn 2011*

Article 11

8-1-2011

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Recommended Citation

Donald G. Rehkopf Jr., "Commentary and Reply: On “The General Stanley McChrystal Affair: A Case Study in Civil-Military Relations”," *Parameters* 41, no. 3 (2011), doi:10.55540/0031-1723.2598.

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Commentary and Reply

On “The General Stanley McChrystal Affair: A Case Study in Civil-Military Relations”

DONALD G. REHKOPF JR.

This commentary is in response to Dr. Marybeth P. Ulrich’s article “The General Stanley McChrystal Affair: A Case Study in Civil-Military Affairs,” published in the Spring 2011 issue of Parameters (vol. 41, no. 1).

Let civilian voices argue the merits or demerits of our processes of government; whether our strength is being sapped by deficit financing, indulged in too long, by federal paternalism grown too mighty, by power groups grown too arrogant, by politics grown too corrupt, by crime grown too rampant, by morals grown too low, by taxes grown too high, by extremists grown too violent; whether our personal liberties are as thorough and complete as they should be. These great national problems are not for your professional participation or military solution.¹

Professor Ulrich’s scholarly article, “The General Stanley McChrystal Affair: A Case Study in Civil-Military Affairs,” should be mandatory reading for every military academy cadet, Reserve Officers’ Training Corps (ROTC) cadet, and Officer Candidates School (OCS) candidate as well as all officers attending any level of Professional Military Education (PME). But, it should be followed by an important postscript. The McChrystal case in general, and her analysis of it in particular, fails to address another component permeating the overall assessment of the civil-military relations issue—military justice. My comments, however, should not be interpreted as a criticism of Professor Ulrich’s erudition on the topic of civil-military relations and the issues and suggestions she raises.

“Conduct unbecoming an officer,”² and conduct prejudicial to “good order and discipline in the armed forces,”³ while superficially obvious to the verbal conduct of General McChrystal and his staff officers involved in the *Rolling Stone* debacle, need a more robust examination in the overall civil-military relations issue *vis-a-vis* military justice. Congress, exercising its power under Article I, § 8, of the US Constitution, has the exclusive power “To

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make Rules for the Government and Regulation of the land and naval Forces.” Congress exercised that power when it enacted the Uniform Code of Military Justice (UCMJ).⁴ In doing so, Congress made the following a crime:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.⁵

But, this was not a new crime in military law when the UCMJ was enacted in 1950. The *American Articles of War of 1776*, enacted eleven years before our Constitution was authored, contained the following offense:

Whatsoever officer or soldier shall presume to use traitorous (sic) or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered, if a commissioned officer, he shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.⁶

The concept that, our military would be led by an elected civilian was framed constitutionally when the drafters wrote Article II, § 2, of the Constitution declaring that “The President shall be commander in chief of the Army and Navy of the United States” Hence, there is more than a doctrinal basis for the civil-military relationship—there is a constitutional command.⁷ Or, as one scholar noted:

The principle of civilian control of the armed forces is basic in our Constitution and that of England, and saves us from a military dictatorship, such as that which now exists in Spain⁸ [. . .] and those which have existed at various times in some Latin-American countries and elsewhere.⁹

Considering that upon commissioning, all officers must take an oath to “support and defend the Constitution of the United States”¹⁰ it would seem fundamental that the components of this oath within the context of civil-military relations, be a core PME concept.

All of the players in the *Rolling Stone* interviews were commissioned long after the UCMJ went into effect in 1951, and as such, all were charged with the knowledge of what Article 88, UCMJ, prohibits. If all of the officers involved—including General McChrystal—did not have actual knowledge of Article 88, the PME issues identified by Professor Ulrich are even more profound and troublesome, demanding attention by both civilian and military leadership.

While I am not advocating, nor even suggesting, that General McChrystal and his subordinates should have been court-martialed, serious considerations of nonjudicial punishment (NJP) under Article 15, UCMJ, should not have been ignored or discarded. At a minimum, the “contemptuous words” not only violated Article 88’s prohibitions, but were also “conduct unbecoming an officer” and prejudicial to “good order and discipline.” The *Rolling Stone* interviews

however, were not General McChrystal's first encounter with civil-military relations issues, something that respectfully should have given his superiors pause.¹¹

Approximately eight months before the *Rolling Stone* article was published, General McChrystal gave a speech in London that, while perhaps not as problematic as the *Rolling Stone* interviews, was a public gaffe flying directly in the face of proper civil-military relations.¹² Widespread media reports claimed that General McChrystal told the audience that an Afghan proposal being advocated by Vice President Biden, "would lead to 'Chaos-istan,'" and that he would not support the Vice President's position.¹⁴ That prompted a private face-to-face meeting between President Obama and General McChrystal in Copenhagen.¹⁵ The *Rolling Stone* article was the proverbial "straw that broke the camel's back," in the context of civil-military relations.

Readers of *Parameters* should recall one of the seminal articles on civil-military relations, then Lieutenant Colonel Charles Dunlap's perceptive article, *The Origins of the American Military Coup of 2012*. Major General (Retired) Dunlap's thesis looked at the civil-military relations issue from the other side of the coin—that civilian leadership needed to grasp that the US military constitutes America's warriors—not the janitor to clean up society's messes. His vision was perceptive, as he noted:

Americans became exasperated with democracy. We were disillusioned with the apparent inability of elected government to solve the nation's dilemmas. We were looking for someone or something that could produce workable answers. The one institution of government in which the people retained faith was the military. Buoyed by the military's obvious competence in the First Gulf War, the public increasingly turned to it for solutions to the country's problems. Americans called for an acceleration of trends begun in the 1980s: tasking the military with a variety of new, non-traditional missions, and vastly escalating its commitment to formerly ancillary duties.

Though not obvious at the time, the cumulative effect of these new responsibilities was to incorporate the military into the political process to an unprecedented degree. These additional assignments also had the perverse effect of diverting focus and resources from the military's central mission of combat training and warfighting.¹⁶

Professor Ulrich is not a lawyer and I am not faulting her scholarship for not addressing the military justice component of the US civil-military relationship. As a former judge advocate, I would be remiss if I did not suggest that judge advocates have both a professional obligation and role to play in this context. Indeed, there is no dearth of research on the topic.¹⁷ As LTC Davidson notes in the context of Article 88, UCMJ:

From its earliest days, this military prohibition has been a mechanism to ensure the foundational cornerstone of our Republic that military power is subordinate to the authority of our civilian leadership. Additionally, like other punitive articles that criminalized disrespect and insubordination to military superiors, this provision of military law serves to enhance discipline and to protect the hierarchical system of rank within the military.¹⁸

In the context of PME for general officers (or general officers select), one would hope that the early case of then Brigadier General Winfield Scott—of Mexican War fame—would be a study point. Scott was passed over for promotion to Major General in 1828. President John Quincy Adams selected Colonel Macomb for the promotion and command of the Army. Miffed at that decision, Scott “publicly announced that he would not obey Macomb’s orders.”¹⁹ The Secretary of War promptly relieved Brigadier General Scott of his command, and Scott took a “leave of absence.”²⁰ But, that was not Scott’s first brush with insubordination. He was convicted by a court-martial of insubordination as a Captain for overt criticism of his commander and sentenced to be suspended from the Army for a year.²¹ As one can see, there is considerable relevant source material for inclusion into Professor Ulrich’s PME suggestion.

Staff Judge Advocates (SJAs) have innumerable professional responsibilities to their commander clients. In addition to Professor Ulrich’s cogent recommendation that the civil-military relationship issue be robustly incorporated into all levels of PME, I am suggesting that this topic be included in every SJA’s briefing checklist. That is, whenever an SJA receives a new commander or is assigned to a new command, the SJA must—in the context of professional responsibility—ensure that the Commander understands and appreciates the constitutional, legal, and historical basis for civilian control over the military and the obligations of military officers under this doctrine.

Most officers are aware of General MacArthur’s relief by President Truman during the Korean War. Few however (at least in my experience) know and understand the constitutional and legal basis for such, to apparently include General McChrystal. That such military talent is lost is a shame, but it is one constitutionally mandated to be enforced to preserve the military’s duty to remain subordinate to civilian control. Hopefully, if Professor Ulrich’s suggestions are adopted, this loss of talent can be minimized in the future.²² As LTC Davidson cogently observed:

Article 88 also serves to enforce discipline within the military. The President is more than just another politician. He is the Commander-in-Chief, and as such, is entitled to no less protection under the UCMJ than the most junior officer or noncommissioned officer who suffers disrespect at the hands of an insubordinate private. Indeed, by virtue of his superior position, the President is entitled to the highest degree of obeisance.²³

That is what General McChrystal unfortunately failed to grasp. The core principle of our civilian criminal justice system is to punish people who violate our criminal laws. While that is also a core component of our military justice system, it is only part of the equation. The other purpose of the UCMJ is to provide a tool for commanders to preserve and enforce good order and discipline. The key component of that is deterrence. There are two prongs to deterrence: first, individual deterrence, i.e., impressing upon the individual offender not to “do it again;” second, general deterrence—my point here—to let other military members know that conduct violating the UCMJ has consequences. The theory being that punishment of one will deter others from similar misconduct.

But what, if any, deterrent effect does the relief of General McChrystal²⁴ have in the context of preserving good order and discipline to similar "contemptuous words" by a new second lieutenant, petty officer, or private—much less other general officers? The relevance to this discussion is this—if the relief of General McChrystal has no perceivable deterrent effect on the "rank and file" of our Armed Forces, considering the constitutional and historical underpinnings of Article 88, UCMJ, did the failure to enforce that law constitute a "dereliction of duty"²⁵ by General McChrystal's superiors?

I ask that question rhetorically because there can be no "right" answer. That is so because regardless of how robust the debate, both the administration of military justice and the methodology of preserving good order and discipline are discretionary functions of command, absent a superior commander withholding or assuming jurisdiction over the matter. I posit this both rhetorically and in the context of professional discourse, that, considering the prior London incident, more than just relief and retirement was warranted for General McChrystal. This would have preserved good order and discipline in the context of general deterrence, and properly respected the constitutionally mandated civil-military relationship. Professor Ulrich's suggestions are sage and salient.

NOTES

1. General Douglas MacArthur, "Duty, Honor, Country" speech delivered at West Point, New York, 12 May 1962, <http://www.americanrhetoric.com/speeches/douglasmacarthurhayeraward.html> (accessed 14 September 2011). General MacArthur had been relieved as commander of the U.N. forces in Korea eleven years earlier for openly challenging President Truman's policies.

2. Article 133, UCMJ; 10 U.S. Code [U.S.C.] § 933.

3. Article 134, UCMJ; 10 U.S.C. § 934.

4. 10 U.S.C. § 801 et seq.

5. Article 88, UCMJ; 10 U.S.C. § 888. Prior to the enactment of the UCMJ, the Articles of War also permitted prosecution of enlisted members for such an offense.

6. American Articles of War of 1776, in *Military Law and Precedents*, 2nd ed., William Winthrop (1920 reprint) (Washington, DC: Government Printing Office), 961. Available online through the Library of Congress at http://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf (accessed 13 September 2011).

7. For a comprehensive look at the constitutional and legal foundations for US civil-military relations, see Professor Diane Mazur's provocative, but comprehensive article, Why Progressives Lost the War When They Lost the Draft, 32 *Hofstra L. Rev.* 553, 571 (2004) http://www.hofstra.edu/PDF/law_lawrev_mazur_vol32no2.pdf (accessed 14 September 2011). For the most comprehensive historical and legal analysis of this subject, see COL Archibald King (USA JAGD Retired), *The Command of the Army: A Legal and Historical Study of the Relations of the President, the Secretaries of War and the Army, the General of the Army, and the Chief of Staff, with One Another*, published by the Army JAG School in 1960. It is available through the Library of Congress at http://www.loc.gov/rr/frd/Military_Law/pdf/Command-Army_King.pdf. Hereafter referred to as "Command of the Army."

8. General Francisco Franco.

9. *Command of the Army*, 4, 10.

10. To put this into perspective, see Colonel O. Sampson, USAF, The Military Oath of Office, reprinted from *USAF Academy Journal of Professional Military Ethics* 2, no. 1 (September 1981): 33–35, <http://www.au.af.mil/au/awc/awcgate/au-24/sampson.pdf> (accessed 13 September 2011).

11. It is not my purpose to attack General McChrystal personally nor to criticize the legal handling that led to his resignation and early retirement. Rather, it is to make my point that the problems Professor Ulrich identifies are deeper than the impression her article may convey to the average, non-lawyer reader.

12. Utterances in the public context are aggravating factors under Article 88, UCMJ, but not an element of the offense as Article 88's language does not require that "contemptuous words" be made in a public forum. Indeed, Maj Gen Jerry Page, USAF, was relieved as commandant of the Air War College, for remarks in a closed-door, classified discussion, where he criticized some of Defense Secretary Robert McNamara's Vietnam policies. For a detailed discussion of the Page incident as well as other senior military officers, see Colonel L. Matthews (USA Retired), "The Speech Rights of Air Professionals," *Airpower Journal* (Fall 1998): 19, <http://www.airpower.au.af.mil/airchronicles/apj/apj98/fal98/mathews.pdf> (accessed 14 September 2011).

13. "Gen. McChrystal vs. Obama: A Timeline," *The Week*, 23 June 2010, <http://theweek.com/article/index/204325/gen-mcchrystal-vs-obama-a-timeline> (accessed 14 September 2011).

14. *Ibid.*

15. Alex Spillius, "White House angry at General Stanley McChrystal speech on Afghanistan," *The Telegraph*, 5 October 2009, <http://www.telegraph.co.uk/news/worldnews/barackobama/6259582/White-House-angry-at-General-Stanley-McChrystal-speech-on-Afghanistan.html> (accessed 14 September 2011).

16. Charles J. Dunlap Jr., "The Origins of the American Military Coup of 2012," *Parameters* 40, no. 4 (Winter 2010-11): 109, http://www.carlisle.army.mil/usawc/parameters/Articles/2010winter/Dunlap_Jr.pdf (accessed 14 September 2011). Maj Gen Dunlap followed up his "Coup" article with a more in-depth analysis in "Melancholy Reunion: A Report From the Future on the Collapse of Civil-Military Relations in the United States," *Airpower Journal* (Winter 1996): 93, <http://www.airpower.au.af.mil/airchronicles/apj/apj96/win96/dunlap.pdf>.

17. For readers with a legal bent, see, e.g., the well-researched article by LTC Michael Davidson, "Contemptuous Speech Against the President," *The Army Lawyer* (July 1999): 1. [https://www.jag-cnet.army.mil/JAGCNETInternet/Homepages/AC/ArmyLawyer.nsf/c82d279f9445da185256e5b005244ee/686b63c63699069485256e5b0054e11a/\\$FILE/Article%201.pdf](https://www.jag-cnet.army.mil/JAGCNETInternet/Homepages/AC/ArmyLawyer.nsf/c82d279f9445da185256e5b005244ee/686b63c63699069485256e5b0054e11a/$FILE/Article%201.pdf) (14 September 2011); Matthews, "Speech Rights," note 10. Both articles catalogue numerous incidents of not only commanders being relieved of command, but also punished under the UCMJ to include being court-martialed. Non-lawyers will benefit from both articles' historical perspectives and the potential scope of Article 88, UCMJ's reach.

18. Davidson, "Contemptuous Speech," 1.

19. *Command of the Army*, 18, 53.

20. *Ibid.*

21. "Brevet Lieutenant General Winfield Scott," *The Army Historical Foundation, Army History Center*, <http://www.armyhistory.org/ahf2.aspx?pgID=877&id=191&exCompID=56> (accessed 15 September 2011). Scott had called his Commanding General, Major General James Wilkinson, "a 'liar and a scoundrel' a 'traitor' and said that serving under Wilkinson was 'as dishonorable as being married to a prostitute.'" *Humanities and Social Sciences Net Online*, <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-civwar&month=0101&week=a&msg=PUE5JzPO%2BUsi/s5oqbIQLA&user=&pw=> (accessed 15 September 2011).

22. Matthews, "Speech Rights," note 10. Consider COL Matthews's discussion of former Air Force Chief of Staff, General Michael Dugan's relief by then Secretary of Defense Cheney, based on General Dugan's remarks to a select group of reporters prior to the first Gulf War.

23. Davidson, "Contemptuous Speech," 12.

24. Especially accompanied by the gratuitous generosity of allowing him to retire as a General without meeting the normal time-in-grade requirements legislated by Congress at 10 U.S.C. § 1370(2).

25. Article 92, UCMJ, 10 U.S.C. § 892

The Author Replies

MARYBETH P. ULRICH

Donald Rehkopf was not the only former member of the Judge Advocate General (JAG) Corps to contact me suggesting that military justice issues were left unaddressed in the McChrystal relief generally, and specifically, in my article. Although my analysis was limited to the sphere of professional military norms, Mr. Rehkopf's reminder that the Uniform Code of Military Justice (UCMJ) demands respectful service to civilian authorities illuminates another important dimension of the issue. His commentary linking the relevant articles in the UCMJ¹ to the officer's commissioning oath implies that the military profession may be straying from key dimensions of the professional ethic. A lack of proper grounding in professional foundations to include civil-military relations norms and the legal obligations outlined in the UCMJ seems to be at the root of the issue.

The recent relief of Major General Peter Fuller over published remarks disparaging the political leadership of the country, whose armed forces he was responsible for training, is further evidence of the thin adherence to and lack of awareness of professional norms in the highest echelons of the American military. The Fuller misstep is difficult to understand in the wake of the much publicized relief of General McChrystal, which was a teachable moment for all participants in the civil-military relationship—the military, the political leadership, and the public.

The McChrystal relief and its surrounding circumstances was an opportunity to illustrate both deviations from and adherence to civil-military relations norms in a democracy on the part of both the actors who violated them and those who enforced them. The Fuller relief poses yet another opportunity. Some see progress in the Fuller case from the standpoint that the military policed its own, demonstrating the preservation of its professional autonomy and an ability to enforce its professional norms.

Already, cadets at the Military Academy and students at the War College are studying these cases. Systemic recognition of the need to ensure that all members of the profession are imbued with the appropriate level of constitutional and ethical professional foundations will lead to the development of servants of the nation deeply committed to professional norms, precluding the need to resort to military justice, and resulting in fewer and fewer cases of their breach.

NOTE

1. Rehkopf noted that Articles 88, 133, and 134 were relevant as well as Article 15 for nonjudicial punishment.