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The post-Vietnam period has, by historical standards, been accompanied by relatively little criticism of the military. Perhaps this reflects that the United States' role in Southeast Asia was primarily perceived as a political, not a military enterprise. The goals were never wholly military but were chiefly political. The limits placed on the military effort were not primarily dictated by military capability but were regulated by political considerations, climate or expediency. Likewise by historical perspective, the Vietnam-era performance of the military justice system has not drawn the intense, sustained criticism which the court-martial system attracted after previous conflicts. There were courts-martial which caught national attention and became *causes célèbres* — the Presidio Mutiny,[1] Captain Levy and the Green Berets[2] and the My Lai incident with Lieutenant Calley.[3] However, the general public and elected officials did not and have not participated in any movement to overhaul military justice as a consequence of Vietnam. Generally stated, the military criminal justice system established by Congress in 1951, The Uniform Code of Military Justice,[4] operated tolerably well from 1964 to 1974. This general characterization should not be regarded by staunch defenders of military justice as even qualified praise. The problems, among others inherent in military justice, of unbridled prosecutorial discretion, the lack of independent and experienced defense counsel and the shadow of command influence remain,

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[1]*See* F. GARDNER, THE UNLAWFUL CONCERT: AN ACCOUNT OF THE PRESIDIO MUTINY CASE (1970) (a vivid and relatively accurate glimpse of the typical AWOL soldier and his battle with the military justice system).

[2]Dr. Howard K. Levy was convicted of disobeying an order to teach Green Berets certain medical techniques, conduct unbecoming an officer and a gentleman, and conduct prejudicial to good order and discipline. His case is discussed in Glasser, *Justice and Captain Levey*, 12 COLUM. F. 46 (1969). After lengthy litigation his conviction was upheld by the United States Supreme Court in Parker v. Levy, 417 U.S. 733 (1974).

[3]On the morning of March 16, 1968, the civilian inhabitants of My Lai (4) in Song My Village, Quang Nai Province, South Vietnam, were the victims of unrestrained armed assault. Lt. William L. Calley was convicted of the premeditated murder of at least 22 persons and one specification of assault with intent to commit murder as a result of this episode. His conviction was affirmed on appeal, *see* United States v. Calley, 22 C.M.A. 534, 48 C.M.R. 19 (1973), and after collateral attack in federal court, *see* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), *cert denied*, 525 U.S. 911 (1976). For an account of this incident see R. HAMMER, THE COURT-MARTIAL OF LT. CALLEY (1971). The facts are presented in detail in United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973).

[4]Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940 (1970) (originally enacted as Act of May 5, 1950, ch. 169, § 1, arts. 1-140, 64 Stat. 107).

although in subtle forms. On the other hand, to those interested in the continuing reform of military justice, the limited success of the court-martial system during the Vietnam era must be recognized as one reason for the lack of impetus for change.

The course of military justice faced a crucial crossroads in the immediate post-Vietnam period. The public and Congress expressed little interest in legislative change in military justice.[5] The entire military establishment turned somewhat inward. Those responsible for the operation of the military justice system expressed satisfaction with their performance.[6] Federal courts had rebuffed most serious challenges to military authority and the court-martial system, notwithstanding widespread and multifaceted attack.[7] The most vigorous organ of the military justice system, the civilian, three judge United States Court of Military Appeals,[8] had lost its energy and sense of direction. In 1974, military justice, though functioning, was adrift. With no public clamor for change, with no foreseeable legislative action and with Supreme Court decisions approving entrenched doctrines, continued reform of military justice may

[5]The Vietnam war did result in a few proposals for legislative change aimed at eliminating command control. *See, e.g.*, S. 1127, 92d Cong., 1st Sess. (1971) (Bayh); S. 4168-4178, 91st Cong., 2d Sess. (1970) (Hatfield); H.R. 2196, 92d Cong., 1st Sess. (1971) (Price); H.R. 6901, 92d Cong., 1st Sess. (1971) (Whalen); H.R. 579, 92d Cong., 1st Sess. (1971) (Bennett). These and other proposals are discussed in Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Hodson, *Military Justice: Abolish or Change*, 22 U. KAN. L. REV. 31 (1973); Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971). A major change is urged by two critics of military justice in Schiesser and Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders From Military Justice*, 7 TEX. TECH L. REV. 559 (1976).

[6]*See, e.g.*, Poydasheff and Suter, *Military Justice? — Definitely!* 49 TUL. L. REV. 588 (1975).

[7]Due to the nature of the Vietnam war as a limited conflict unpopular with an increasingly large segment of the American population and due to the general growth in litigation, challenges to military law and authority in federal courts became plentiful. The number of civilian attorneys sophisticated in military law grew, and some of them were produced by serving at some point in the Vietnam war in the military. Law schools not only published articles and notes about significant military cases but military law courses sprang up at various campuses. The following list of articles which review the federal/military court relationship illustrates the degree of concern. Burris and Jones, *Civilian Courts and Courts-Martial — The Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971); Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, *70* MIL. L. REV. 1 (1975); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969); Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539 (1974); Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F.L. REV. 81 (Summer 1976); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971); *Development in Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1208-38 (1970); Note, *Civilian Court Review of Court-Martial Adjudications*, 69 COLUM. L. REV. 1259 (1969); Note, *Civilian Review of Military Habeas Corpus Petitions: Is Justice Being Served*, 44 FORDHAM L. REV. 1228 (1976); Note, *Post-Conviction Relief in the Federal Courts for the Service-member Not in Custody*, 73 MICH. L. REV. 930 (1975).

[8]The court is established by UCMJ art. 67, 10 U.S.C. § 867 (1970). For a detailed history of the Court see Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972).

have ended. However, with changes in personnel accompanied by renewed enthusiasm and fresh perspective, the Court of Military Appeals has been "born again."

This introductory article and the material which follows endeavor to demonstrate the significance of the renewed judicial activism of the "military Supreme Court" through a discussion of precedent breaking decisions, the vigorous exercise of supervisory review and the continued "civilianization" of military justice despite discordant Supreme Court decisions.

A summary glance at the statistics for the term commencing October 1975 partially reveals the impact of the court's renaissance.[9] From an historical low of 5.6 percent of petitions for review being granted in 1974, the court granted 16.8 percent in 1975 and averaged 20.9 percent for the first five months of 1976. Of the 104 written opinions during this most recent full term, 71 were rendered in favor of the accused, an increase from 48.4 percent in 1974 to 68.3 percent this past term. The nation's largest criminal jurisdiction has once again become active and fertile with the prospect of improving the quality and likelihood of justice for those members of our society subject to the Uniform Code of Military Justice.

The Role of Appellate Review in Military Justice

Ever since Midshipman Philip Spencer was hanged aboard the *USS Somers* in 1842 for an alleged mutiny[10] public and legislative demands for reform in military justice have inevitably led to the creation of methods to insure a fair and impartial review of courts-martial. Midshipman Spencer's legacy has been that no navy serviceman has subsequently died pursuant to a court-martial death sentence. Only after thirteen black soldiers were quickly executed without any opportunity for clemency or appeal in the Fort Sam Houston mutiny trials of 1917[11] was it prohibited, first by general order[12] and then by congressional legislation,[13] to execute a death sentence without an appellate review procedure. Deluged by complaints about the abuses of command control and excessive sentences after World War II, Congress was compelled to legislative action.[14] Again, appellate review was considered a major part or key to a resolution as evidenced by the final House Report:

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[9]These statistics were compiled from data provided by the Office of the Clerk of Court United States Court of Military Appeals, Washington, D.C.

[10]*See* E. Byrne, Military Law, 14-17 (1970).

[11]*See Trials by Court-Martial, Hearings Before Senate Comm. on Military Affairs on S. 5320*, 65th Cong., 3d Sess. 39-42 (1919).

[12]As a result of this incident General Orders Nos. 7 and 84, War Department, 1918 were issued requiring an opinion by The Judge Advocate General before a death sentence could be executed.

[13]Act of June 4, 1920, ch. 227, § 1, arts. 48 and 50 ½, 41 Stat. 759.

[14]The outpouring of demands for the reform of military justice was tremendous. For a collection of newspaper editorials see *Hearings on H.R. 2575 Before the Subcomm. of the*

> Article 67 contains the most revolutionary changes which have ever been incorporated in in our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice.[15]

Perched at the pinnacle of the military justice system, the Court of Military Appeals reviews a very small percentage of all court-martial convictions. Its appellate jurisdiction does not extend to every court-martial but is restricted to certain specified cases or to cases having a minimum adjudged sentence. The court has appellate jurisdiction over cases reviewed by any one of four Courts of Military Review[16] which in turn review cases "in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more."[17] Translated into numbers, the court has acted in only 32,650 cases rendering some 3,700 opinions since its creation in 1951 out of the over 3,200,000 courts-martial during that time.

The performance of the Court of Military Appeals has drawn relatively little negative reaction[18] and earned qualified praise from critics of the

House Comm. on Military Affairs, 80th Cong., 1st Sess. 2166-75 (1947). For a journalistic account see Keefe, *Drumhead Justice: Our Military Courts*, READERS' DIGEST, Aug. 1951, at 37; Rosenblatt, *Justice on a Drumhead*, 162 NATION 501 (1946). Numerous committees (military, legislative and ad hoc) were established to review complaints and make recommendations. One committee held hearings in eleven major cities. *See* Report of War Dep't Advisory Comm. on Military Justice to the Secretary of War (1946) (committee composed of American Bar Association members; submitted 2519 page report).

[15]H.R. REP. No. 491, 81st Cong., 1st Sess. 6 (1949).

[16]UCMJ art. 66, 10 U.S.C. § 866 (1970). There is a separate Court of Military Review for the Army, Navy, Air Force and Coast Guard, each consisting of one or more panels of three judges each. Although Article 66(a) permits civilian members of these tribunals, only the Coast Guard has complete civilian membership and of the remaining services only the Navy has any civilian judges. The judges are appointed by the various Judge Advocate Generals and are senior military attorneys.

[17]UCMJ art. 66(b), 10 U.S.C. § 866(b) (1970). There are three levels of courts-martial — general, special and summary — distinguished by the levels of command which can convene them, *i.e.*, order their existence, and by the sentences which can be imposed. A summary court-martial, which consists of a single officer, can impose up to thirty days' confinement. UCMJ arts. 20, 24, 10 U.S.C. §§ 820, 824 (1970). A special court-martial, which ordinarily consists of a military judge and at least three court members, can impose six months' confinement and, under certain conditions, a bad conduct discharge. UCMJ arts. 19, 23, 10 U.S.C. §§ 819, 823 (1970). A general court-martial, which consists of a military judge and at least five court members, can impose the statutory maximum punishments. UCMJ arts. 18, 22, 10 U.S.C. §§ 818, 822 (1970). Because of these sentence limitations the Court of Military Appeals never reviews a summary court-martial, reviews a very small percentage of special courts-martial and can not review all general courts-martial in ordinary appellate channels.

[18]The court has had its critics. *See* Benson, *The United States Court of Military Appeals*, 3 TEX. TECH L. REV. 1 (1971); Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of the Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 181 (1962); West, *A History of Command Influences on the Military Justice System*, 18 U.C.L.A. L. REV. 1 (1970). The gravest criticism has come from within the military. *See* Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 91-92 (1972).

military justice system.[19] But in the mid 1960's the court began to experience aging pains both in personnel and judicial doctrine. This aging process may have been signaled in the court's reaction to the landmark decision of *O'Callahan v. Parker*[20] which for the first time held that something more than status as a serviceman is necessary for court-martial jurisdiction. The court did not enthusiastically embrace the lessening of its jurisdiction, as evidenced by its generous carving of exceptions and former Chief Judge Quinn's bitter comments in *United States v. Borys.*[21] Another hint was the proclamation and assertion of extraordinary writ powers but the failure to utilize those powers except in isolated instances.[22] Finally, the inevitable consequences of personnel changes and age had its impact. After only six judges in its first twenty years, the Court has had seven judges in the past four years with nine different combinations.[23] Enduring transition periods brought uncertainty and reluctance to the decisionmaking process. This past term may not have erased the uncertainty of particular aspects of military law, but without question the court exhibited no hesitancy in addressing and deciding issues.

PRECEDENT RECONSIDERED — A CLEAR CHANGE OF DIRECTION

Whenever a judicial body fails to follow a prior decision reverberations in practice and critical commentary inevitably flow. Adherence to precedent and *stare decisis* are cohesive forces in a judicial system. Although consistency and predictability are proper objectives or goals of a judicial system, as Justice Cardozo observed, judge-made law inherently contains flaws and the "tendency to subordinate precedent to justice" is "in the main a wholesome one."[24] During its most recent term the Court of Military Appelas exhibited a rather free tendency to subordinate precedent to its perception of justice by expressly overruling prior decisions affecting search and seizure, command influence and court-martial jurisdiction.

As treated elsewhere in this issue's military law project,[25] the subject of search and seizure received considerable recent attention from the Court of

[19]*See, e.g.*, Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 51 (1970); Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380, 390 (1966).

[20]395 U.S. 258 (1969).

[21]18 C.M.A. 547, 40 C.M.R. 259 (1969).

[22]See H. MOYER, JUSTICE AND THE MILITARY §§ 2-830 to 844 (1972); Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals*, 10 HARV. C.R.-C.L. L. REV. 33 (1975).

[23]The present judges are Albert B. Fletcher, Jr. (Chief Judge, sworn in on April 30, 1975; B.S., Kansas State Univ., 1948; LL.B., Washburn Univ.; 1951); William H. Cook (took oath on August 21, 1974; J.D., Washington Univ., 1947); Matthew J. Perry (began term February 18, 1976; B.S., South Carolina State College, 1948; J.D., South Carolina State College, 1951). Also available for judicial duties as a senior judge is Homer Ferguson (initially sworn May 1, 1956; LL.B., University of Michigan, 1913).

[24]B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 160 (1921).

[25]*See* Note, *Searches and Seizures in the Military Justice System*, 52 IND. L.J. ____ (1976), *infra.*

Military Appeals. In *United States v. Jordan*,[26] the court overturned an over twenty year old precedent and a Manual for Courts-Martial[27] provision governing the admissibility in courts-martial of evidence seized as a result of searches by officials of foreign governments. The court initially encountered the foreign search issue in *United States v. DeLeo*,[28] finding fourth amendment protection inapplicable to a search conducted by foreign officials on foreign soil where the American officials were merely present. Paragraph 152 of the Manual for Courts-Martial modified this holding by applying the exclusionary rule whenever "the search in question was conducted, instigated, or participated in by an official or agent of the United States . . . who was acting in a Governmental capacity. . . ."[29] In *Jordan*, concerned by the "difficulty in drawing the line between 'mere presence' and participation" and by the temptation merely to delegate search authority to those not subject to constitutional restraint, the majority opinion of Chief Judge Fletcher found the *DeLeo* standard inadequate and held:

> [W]henever American officials are present at the scene of a foreign search or, even though not present, provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the Fourth Amendment as applied in the military community before fruits of the search may be admitted into evidence in a trial by court-martial.[30]

The majority further held that in the event of a "search conducted solely by foreign authorities" the government must be prepared to show that the search was proper under the relevant foreign law and that it "does not shock the conscience of the court."[31] Insofar as a significant proportion of American servicemen serve in overseas areas and court-martial jurisdiction is broadest on foreign soil, *Jordan* represents an important extension of the protection against unreasonable searches and seizures.

One of the authorized manifestations of command influence in the court-martial system is found in Article 62(a) of the UCMJ, which provides in part:

> If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.[32]

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[26]24 C.M.A. 156, 51 C.M.R. 375 (1976).

[27]*See* note 29 *infra*.

[28]5 C.M.A. 148, 17 C.M.R. 148 (1954).

[29]Manual for Courts-Martial ¶ 152, United States, 1969 (rev.) [hereinafter cited as MCM]. The MCM was first promulgated in 1898 to serve as a basis for court-martial practice and procedure. *See* note 48, *infra*, & text accompanying.

[30]24 C.M.A. at 159, 51 C.M.R. at 378.

[31]*Id.*

[32]UCMJ art. 62(a), 10 U.S.C. § 862(a) (1970).

In accordance with prior court-martial practice, the drafters of the Manual for Courts-Martial accompanying the implementation of the Uniform Code of Military Justice in 1951 included the following explanation:

> To the extent that the matter in disagreement relates solely to a question of law, as, for example, whether the charges allege an offense cognizable by a court-martial, the military judge or the president of a special court - martial without a military judge will *accede* to the view of the convening authority.[33]

This power of the convening authority had been implicitly sustained and expressly upheld by the court on several occasions.[34] Confronting the issue anew this past term in *United States v. Ware*,[35] Chief Judge Fletcher and Judge Cook joined with Senior Judge Ferguson's long held position that there was no statutory basis for a convening authority to require a military judge to reverse a ruling and overruled a set of prior decisions. The definition of reconsideration, the opaque legislative history and the strict construction ordinarily to be applied against government appeals led the unanimous court to hold:

> It appears to us to be inherently inconsistent with the action of Congress in creating an independent judicial structure in the military, to strain the clear meaning of Article 62(a) to the point of permitting the *lay* convening authority to *reverse* a ruling of *law* by the trial *judge*. We decline to do so.[36]

This affirmation of the preeminance of judicial power in the court-martial system and diminution of command power make *United States v. Ware* perhaps the most symbolic decision of the court's last term.

Court-martial jurisdiction is another area in which the Court of Military Appeals has markedly changed direction.[37] Whereas the court had previously implied that drug related offenses were always service-connected because of the impairment on the serviceman's ability to perform,[38] such

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[33]MCM ¶ 67*f*, 1969 (rev.) (emphasis added).

[34]United States v. Frazier, 21 C.M.A. 444, 45 C.M.R. 218 (1972); United States v. Bielecki, 21 C.M.A. 450, 45 C.M.R. 224 (1972); Lowe v. Laird, 18 C.M.A. 131, 39 C.M.R. 131 (1969); United States v. Boehm, 17 C.M.A. 530, 38 C.M.R. 328 (1968). For a critical appraisal of these cases see Recent Development, *COMA Reexamines the Convening Authority and Military Judge Relationship; A Threat to the Judicialization of Military Justice*, 59 MIL. L. REV. 215 (1973).

[35]24 C.M.A. 102, 51 C.M.R. 275 (1976).

[36]*Id.* at 106, 51 C.M.R. at 279. (emphasis in original).

[37]*See* Note, *Parties and Offenses in the Military Justice System: Court Martial Jurisdiction*, 52 IND. L.J. ____ (1976), *infra*.

[38]*See* United States v. Rose, 19 C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Castro, 18 C.M.A. 598, 40 C.M.R. 310 (1969); United States v. DeRonde, 18 C.M.A. 575, 40 C.M.R. 287 (1969); United States v. Boyd, 18 C.M.A. 581, 40 C.M.R. 293 (1969); United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

rationale was expressly rejected in *United States v. McCarthy*.[39] In *United States v. Uhlman,* Chief Judge Fletcher and Senior Judge Ferguson joined to overrule court-martial jurisdiction over the forgery of another serviceman's check, although the checks were themselves stolen, in order to procure goods off post.[40] Finally, whereas the court had always sustained court-martial jurisdiction where the victim of the offense was another serviceperson,[41] the court toward the end of this past term rejected on three occasions the mere status of the victim and offender as sufficient to sustain court-martial jurisdiction: concealment of stolen property[42] and robbery[43] were found not service-connected when committed off post and the victim's status as a serviceperson was only an incidental circumstance, and earlier in the term, the overseas exception to *O'Callahan*[44] was determined not to cover a conspiracy to import heroin from Vietnam where the necessary overt act occured in the civilian stateside community.[45]

The unhesitant reversal of prior caselaw including the voluntary surrender of court-martial jurisdiction vividly demonstrates the fresh perspective thriving within the Court of Military Appeals.

Supervisory Powers — Confirmed and Completed

From its inception, the Court of Military Appeals has been an activist judicial body. Notwithstanding jurisdictional limitations and the lack of express authority, the court proclaimed early that its duty was to see that all courts-martial were conducted fairly and that it possessed authority to supervise the administration of military justice.[46] By first filling the gaps in military jurisprudence,[47] then invalidating Manual provisions[48] and finally by judicial rulemaking[49] the court has expanded its powers and exercised supervisory control over military justice.

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[39]25 C.M.A. 30, 54 C.M.R. 30 (1976).

[40]24 C.M.A. 256, 51 C.M.R. 635 (1976), *overruling* United States v. Morisseau, 19 C.M.A. 17, 41 C.M.R. 17 (1969).

[41]*See, e.g.*, United States v. Lovejoy, 20 C.M.A. 18, 42 C.M.R. 210 (1970); United States v. Everson, 19 C.M.A. 70, 41 C.M.R. 70 (1969); United States v. Plamondon, 19 C.M.A. 22, 41 C.M.R. 22 (1969); United States v. Rego, 19 C.M.A. 9, 41 C.M.R. 9 (1969).

[42]United States v. Tucker, 24 C.M.A. 311, 52 C.M.R. 22 (1976).

[43]United States v. Hedlund, 25 C.M.A. 1, 54 C.M.R. 1 (1976); United States v. Wilson, 25 C.M.A. 26, 54 C.M.R. 26 (1976).

[44]O'Callahan v. Parker, 395 U.S. 258 (1969) (significantly limited court-martial jurisdiction over service personnel). For a general discussion of developments in personal jurisdiction, *see* Note, *Parties and Offenses in the Military Justice System: Court-Martial Jurisdiction,* 52 Ind. L.J. ____ (1976), *infra.*

[45]United States v. Black, 24 C.M.A. 162, 51 C.M.R. 381 (1976).

[46]United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951).

[47]*E.g.*, United States v. McVey, 4 C.M.A. 167, 15 C.M.R. 167 (1954); United States v. Andis, 2 C.M.A. 364, 8 C.M.R. 164 (1953); United States v. Slozes, 1 C.M.A. 47, 1 C.M.R. 47 (1951).

[48]*E.g.*, United States v. Varnadore, 9 C.M.A. 471, 26 C.M.R. 251 (1958); United States v. Cothern, 8 C.M.A. 158, 23 C.M.R. 382 (1957); United States v. Rosato, 3 C.M.A. 143, 11 C.M.R. 143 (1953); United States v. Wappler, 2 C.M.A. 393, 9 C.MR. 23 (1953).

[49]*E.g.*, United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969) (outlining requirements

Subordinating the Manual for Courts-Martial to the Uniform Code of Military Justice, the United States Constitution and the court's notion of fundamental fairness is regarded as a landmark development in the court's history.[50] The Manual, published by executive order of the President, had been the principal basis of court-martial practice and procedure since the nineteenth century.[51] Reaction to this judicial erosion of tradition and executive power was cool and biting from the military establishment.[52] The present court has freely accepted the diminished role of the Manual, invalidating provisions which affected the use of pretrial investigation transcripts at trial,[53] established maximum sentences in violation of constitutional equal protection,[54] gave the convening authority the power to overrule the trial judge in certain instances[55] and governed the admissibility of evidence derived from foreign searches.[56]

Previous rulemaking of the court included prohibiting the use of the Manual by court members,[57] establishing a presumption of a speedy-trial violation after 90 days of pretrial confinement[58] and creating a presumption of a lack of speedy review if action is not taken within 90 days of sentencing if the accused is confined.[59] These latter two rules received strong confirmation this past term, with three cases being overturned for exceeding the 90 day pretrial limit (including one murder conviction)[60] and the lack of timely post-trial review resulting in the dismissal of another case.[61]

During this term the court also promulgated three new explicit rules. Although finding the issue of disclosing the terms of a grant of immunity waived in the case at hand, the court announced in *United States v.*

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for guilty plea inquiry); United States v. Donofew, 18 C.M.A. 149, 39 C.M.R. 149 (1969) (advise of right to counsel); United States v. Rinehart, 8 C.M.A. 402, 24 C.M.R. 212 (1957) (forbidding use of MCM by court members).

[50]*See* Quinn, *Courts-Martial Practice: A View From The Top*, 22 HASTINGS L.J. 201 (1971); 72 HARV. L. REV. 388 (1958).

[51]The first official Manual for Courts-Martial was published in 1898 and was revised in 1901, 1905, 1908, 1917, 1921, 1928, 1949 and, with the implementation of the UCMJ, in 1951. The current edition, revised in 1969, was promulgated by Exec. Order No. 10,214, 3 C.F.R. 408 (1970).

[52]*See* Report to Hon. Wilbur M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army (Jan. 18, 1960) (commonly known as Powell Report, submitted by a committee of high level commanders who found the court "not sufficiently conducive to stable procedures and consistent administration of justice").

[53]United States v. Douglas, 24 C.M.A. 178, 51 C.M.R. 397 (1976).

[54]United States v. Courtney, 24 C.M.A. 280, 51 C.M.R. 796 (1976).

[55]United States v. Rowel, 24 C.M.A. 137, 51 C.M.R. 327 (1976); United States v. Ware, 24 C.M.A. 102, 51 C.M.R. 275 (1976).

[56]United States v. Jordan, 24 C.M.A. 156, 51 C.M.R. 375 (1976).

[57]United States v. Rinehart, 8 C.M.A. 402, 24 C.M.R. 212 (1957).

[58]United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[59]Dunlap v. Convening Authority, 23 C.M.A. 135, 48 C.M.R. 751 (1974).

[60]United States v. Henderson, 24 C.M.A. 259, 51 C.M.R. 711 (1976); United States v. Johnson, 24 C.M.A. 147, 51 C.M.R. 337 (1976); United States v. Dinkins, 23 C.M.A. 582, 50 C.M.R. 847 (1975).

[61]Bouler v. United States, 24 C.M.A. 152, 51 C.M.R. 342 (1976).

Webster[62] that the government must henceforth serve on the accused in writing the terms of any grant of immunity or promise of leniency within a reasonable time before the testimony is to be given. This rule was designed not only to insure fairness but to also minimize judicial concern with collateral issues. Similarly, the court added to the requirements of a guilty plea inquiry in *United States v. Green,*[63] by holding that a trial judge should ascertain whether a plea bargain exists and, if so, review each condition of any such agreement, assuring himself of understanding by the accused and striking those provisions violating caselaw, public policy or the judge's notion of fundamental fairness. The third rule, governing foreign searches, has been discussed above as a precedent breaking decision.[64].

Disturbed by the recurring pretrial confinement problem, the court pronounced general guidelines after inviting *amicus curiae* pleadings from all services.[65] Under the UCMJ an individual can be ordered into confinement by a commanding officer where probable cause exists that an offense has been committed or where circumstances may require after an offense is formally charged.[66] Redressing an unwarranted pretrial confinement in the military is difficult as there is no recognized constitutional right to bail in the court-martial system,[67] no permanent standing military judges to review confinement decisions, authorized administrative remedies have not proven useful or effective,[68] and a purported cure at time of trial, much less on appellate review, is dubious. In recognition of these problems and the inherent disadvantages of jailed accused, Chief Judge Fletcher declared in *Courtney v. Williams:*

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[62]24 C.M.A. 26, 51 C.M.R. 76 (1975).

[63]24 C.M.A. 299, 52 C.M.R. 10 (1976).

[64]United States v. Jordan, 24 C.M.A. 156, 51 C.M.R. 375 (1976). *See* text accompanying notes 25-32 *supra.*

[65]*See* Note, *Building a System of Military Justice Through the All Writs Act,* 52 IND. L.J. ___ (1976), *infra.*

[66]UCMJ arts. 9(c), (d) & 10, 10 U.S.C. §§ 809(c), (d) & 810 (1970).

[67]United States v. Hangsleben, 8 C.M.A. 320, 323, 24 C.M.R. 130, 133 (1957).

[68]Article 138 of the UCMJ provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer against whom it is made. [That officer] shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

UCMJ art. 138, 10 U.S.C. § 938 (1970). The court has previously urged military defendants to file complaints under this Article. *See* Tuttle v. Commanding Officer, 21 C.M.A. 229, 45 C.M.R. 3 (1972). Articles 97 and 98 of the UCMJ, 10 U.S.C. §§ 897, 898 (1970), make the improper confining or delaying of processing of an accused punishable, but there has not been a reported prosecution under this supposed remedy. *See* United States v. Ray, 20 C.M.A. 331, 335, 43 C.M.R. 171, 175 (1971) (Ferguson, J., dissenting). For a thorough consideration of the military pretrial confinement process see Boller, *Pretrial Restraint in the Military,* 50 MIL. L. REV. 71 (1970). Under its extraordinary writ power of the Court of Military Appeals has considered pretrial confinement cases but never ordered a release on the merits of a petition.

> We believe, then, that a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person could be detained and if he should be detained. The consequences of detention are too important to require less.[69]

Senior Judge Ferguson concurred with the Chief Judge but added that he believed military judges already possessed the powers to hold such a hearing.[70] The military had made some effort to establish such a procedure[71] but it is apparent from *Courtney v. Williams* that later cases will have to determine the acceptability of specific procedures.[72]

The present court most convincingly displayed its intention to exercise broad supervisory powers over the entire administration of military justice in *McPhail v. United States*,[73] where the unanimous court ordered the Judge Advocate General of the Air Force to vacate the findings and sentence of a special court-martial not within the court's statutory appellate jurisdiction. A trial judge had found a lack of court-martial jurisdiction over a forged credit application but had been "overruled" by the convening authority, leading to Sergeant McPhail's conviction. Under the holding of *United States v. Ware*,[74] this overruling was improper but could not be corrected through normal appellate channels as the sentence did not include confinement or discharge. After the exhaustion of administrative remedies[75] McPhail filed a petition for extraordinary relief in the Court of Military Appeals. Although the court had proclaimed that it possessed extraordinary writ power as early as 1966,[76] that power had been held not to extend to courts-martial which, after sentencing, would not be reviewable by the court.[77] In *McPhail*, a broader concept of supervisory review was embraced and previous doctrinal restraints cast aside. Drawing on boastful passages from earlier opinions, relying on analogies in Supreme Court practice and raising anew its congressional mandate to insure fairness in military justice, Judge Cook declared for the court:

> Still, this Court is the supreme court of the military judicial system. To

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[69]24 C.M.A. 87, 90, 51 C.M.R. 260, 263 (1976).

[70]*Id.* at 91, 51 C.M.R. at 264.

[71]The Army had instituted a military magistrate program whereby a military attorney reviews pretrial confinement decisions. Army regulation 27-10, Chap. 16.

[72]The uncertainty caused by Courtney v. Williams, 24 C.M.A. 87, 51 C.M.R. 260 (1976), has already been noted in Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F.L. REV. 81, 93 (Summer 1976). Possible procedures and the experience of the military pilot programs are discussed in Gilley, *Using Counsel to Make Military Pretrial Procedure More Effective*, 63 MIL. L. REV. 45, 96-109 (1974).

[73]24 C.M.A. 304, 52 C.M.R. 15 (1976). *See* Note, *Building a System of Military Justice Through the All Writs Act*, 52 IND. L.J. ___ (1976), *infra*.

[74]24 C.M.A. 102, 51 C.M.R. 275 (1976).

[75]After the approval of his sentence by the convening authority Sergeant McPhail sought relief from the Air Force Judge Advocate General under Article UCMJ art. 69, 10 U.S.C. § 869 (1970), but was denied relief. 24 C.M.A. at 307, 52 C.M.R. at 18.

[76]United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966).

[77]United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969).

> deny that it has authority to relieve a person subject to the Uniform Code of the burdens of a judgment by an inferior court that has acted contrary to constitutional command and decisions of this Court is to destroy the "integrated" nature of the military court system and to defeat the high purpose Congress intended this court to serve.[78]

McPhail not only contributed substance to the existence of extraordinary writ power but also theoretically completed the Court of Military Appeal's position as the highest authority in all military justice matters.

Civilianization From Within

The civilianization of military law was a phrase popularized and a trend noted by Professor Edward F. Sherman in his leading article on military justice.[79] Undoubtedly having varied meanings to varied persons or groups, civilianization can be broadly defined as a process whereby civilian concepts of justice, procedural and substantive, are gradually adopted or assimilated into the court-martial system. Whether hailed, lamented or dismissed as irrelevant, the military system of justice became increasingly comparable to federal and state criminal law systems after World War I.[80] The present Court of Military Appeals is continuing the civilianization process through bolstering the role of trial judges and reliance upon civilian precedent and standards.

Outlining and strengthening the role and responsibilities of the trial judge has been a major thrust of the revitalized court which is not necessarily surprising. The court has focused on the law officer or military judge in the past during periods of growth in military law.[81] Chief Judge Fletcher was a trial judge before his appointment to the court and Judge Perry an active trial attorney. Decisions placing responsibility on the trial judge to advise defendants of their rights,[82] to conduct greater inquiry into guilty pleas,[83] to instruct on relevant issues,[84] to assume an impartial role[85] and to

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[78]24 C.M.A. at 309, 52 C.M.R. at 20.

[79]Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3 (1970).

[80]*See* Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15 (1949); Langley, *Military Justice and the Constitution — Improvements Offered by the New Uniform Code of Military Justice*, 29 Tex. L. Rev. 651 (1951); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. Rev. 1240 (1968); Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3 (1970); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962).

[81]*See* Bodziak, *The Law Officer Under the UCMJ, Authoritative Court of Military Appeals Concept*, 16 JAG J. 3 (1962); Douglas, *The Judicialization of Military Courts*, 22 Hastings L.J. 213 (1971); Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 Mil. L. Rev. 39 (1959); Perkins, *The Military Judge: Evolution of a Judiciary*, 23 JAG J. 155 (1969).

[82]United States v. Hawkins, 25 C.M.A. 23, 54 C.M.R. 23 (1976); United States v. Anastasio, 24 C.M.A. 3, 51 C.M.R. 3 (1975); United States v. Jorge, 23 C.M.A. 580, 50 C.M.R. 845 (1975); United States v. Copes, 23 C.M.A. 578, 50 C.M.R. 843 (1975).

[83]United States v. Frangoules, 24 C.M.A. 317, 52 C.M.R. 28 (1976); United States v. Green, 24 C.M.A. 299, 52 C.M.R. 10 (1976); United States v. Harden, 24 C.M.A. 76, 51 C.M.R. 249 (1976).

[84]United States v. Hicks, 24 C.MA. 223, 51 C.M.R. 520 (1976); United States v. Miller, 24 C.M.A. 181, 51 C.M.R. 400 (1976); United States v. Horner, 24 C.M.A. 38, 51 C.M.R. 132 (1975); United States v. McGee, 23 C.M.A. 591, 50 C.M.R. 856 (1975).

[85]United States v. Shackelford, 25 C.M.A. 13, 54 C.M.R. 13 (1976) (trial judge

insure a fair trial[86] comprise the largest group of cases in the 1975-1976 term. Though reversal because of trial judge error fosters greater judicial responsibility, the court was also supportive, commending particular judicial efforts[87] and insulating the trial judge from military command pressure.[88] This reliance on the trial judge is conjunctive with the court's persistent citation to the American Bar Association Standards, Code of Professional Responsibility and Canons of Judicial Ethics. The court has proposed adopting the Standards and Code in its own rules[89] and has referred to them at virtually every opportunity in cases involving the conduct of trial counsel (the military prosecutor),[90] the performance of defense counsel,[91] the responsibilities of the trial judge[92] and even the role of intermediate military appellate courts.[93] Civilianization through and of the judiciary should improve military justice particularly when led by the example of its highest appellate court.

The court's civilianization of military law is also apparent in its

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improperly asked questions in front of court members based on answers received in rejected guilty plea); United States v. Moore, 24 C.M.A. 217, 51 C.M.R. 514 (1976) (trial judge erroneously elicited testimony that accused had relied on right to counsel).

[86]United States v. Hale, 24 C.M.A. 134, 51 C.M.R. 324 (1976) (trial judge erred in precluding defense from litigating suppression of testimony as the product of illegal search); United States v. Dunks, 24 C.M.A. 71, 51 C.M.R. 200 (1976) (trial judge abused discretion and denied accused judicial review of administrative decision by refusing to grant a continuance).

[87]The military judge was expressly commended in Bouler v. Wood, 23 C.M.A. 589, 50 C.M.R. 854 (1975), for finding no basis for pretrial confinement and, although not ordering release, recommending release to the convening authority and suggesting that the accused petition the Court of Military Appeals for extraordinary relief.

[88]The removal of convening authority power to reverse a dismissal not amounting to a finding of not guilty was the major effort in insulating the judiciary. United States v. Ware, 24 C.M.A. 102, 51 C.M.R. 275 (1976). At the beginning of the 1976 Term the court faced a case in which the trial judge had been questioned by the convening authority and judicial superiors about light sentences and subsequently transferred to a noniudicial assignment. United States v. Ledbetter, 25 C.M.A. 51, 54 C.M.R. 51 (1976). In response the court suggested tenure for *all* military judges and barred official inquiry seeking justification of judicial rulings.

[89]Rule 12, Proposed Rules of Practice and Procedure, United States Court of Military Appeals, presented at The Homer Ferguson Conference on Appellate Advocacy, Georgetown University Law Center, May 20-21, 1976. For a glimpse of the military acceptance of the ABA Standards see Hodson, *Use of the ABA Standards in the Military,* 12 AM. CRIM. L. REV. 447 (1975).

[90]*E.g.,* United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976) (improper argument by trial counsel); United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1975) (improper argument by trial counsel); Kidd v. United States, 24 C.M.A. 25, 51 C.M.R. 75 (1975) (trial counsel chided for making frivolous motion to delay trial).

[91]The potential conflict of interest in representing multiple defendants drew comment in United States v. Blakey, 24 C.M.A. 63, 51 C.M.R. 192 (1976), and United States v. Evans, 24 C.M.A. 14, 51 C.M.R. 64 (1975).

[92]*See, e.g.,* United States v. Hughes, 24 C.M.A. 169, 51 C.M.R. 388 (1976); United States v. Evans, 24 C.M.A. 14, 51 C.M.R. 64 (1975).

[93]In rejecting a government argument that a rule should be given only prospective effect because the lower court opinion was not published by The Judge Advocate General, the court cited the ABA Standards on Appellate Courts for the proposition that all courts have inherent authority to order publication of their opinions, implying this power should rest with the Courts of Military Review. United States v. Cruz-Rijos, 24 C.M.A. 271, 51 C.M.R. 723 (1976).

reliance upon federal precedent and the Constitution of the United States.[94] The concept of equal protection as embodied in the due process clause of the fifth amendment was employed for the first time to strike down sentence differentials which had been long-practiced in the military.[95] The due process clause was used to test a presumption of regularity in military records.[96] The sixth amendment right to compel process was cited in reversing a homicide case where a witness was material to a self defense claim.[97] Relying on the Supreme Court holding in *Gerstein v. Pugh*[98] Chief Judge Fletcher, in declaring the necessity for a neutral and detached magistrate to decide detention questions, stated:

> We believe that those procedures required by the Fourth Amendment in the civilian community must also be required in the military community. We discern no considerations of military necessity that would require a different rule.[99]

The warm embrace by the Court of Military Appeals of Supreme Court precedent in fashioning expanded rights for military accused, surrendering court-martial jurisdiction and asserting broader powers is in sharp contrast to the spcial needs of the military as perceived by the Supreme Court in its recent decisions affecting military justice. The *O'Callahan*[100] majority, which evidenced little respect for the court-martial process, has vanished in the eight military justice cases subsequently considered by the Supreme Court. The harsh tones of *O'Callahan* were softened in the *ad hoc* approach to subject-matter jurisdiction taken in *Relford v. Commandant*[101] and the denial of retroactivity in *Gosa v. Mayden.*[102] The procedural decisions of *Noyd v. Bond,*[103] *Parisi v. Davidson*[104] and *Schlesinger v. Councilman,*[105] manifest the reluctance of the Supreme Court to open the possibility of increased litigation. Upholding the constitutionality of

[94]*See, e.g.,* Note, *Self-incrimination in the Military Justice System,* 52 IND. L.J. ___ (1976), *infra.*

[95]United States v. Courtney, 24 C.M.A. 280, 51 C.M.R. 796 (1976); United States v. Larner, 24 C.M.A. 197, 201, 51 C.M.R. 442, 446 (1976) (Fletcher, C.J., concurring).

[96]United States v. Mahan, 24 C.M.A. 109, 51 C.M.R. 299 (1976) (the absence of a morning report entry held insufficient to serve as a presumption of the inception of an AWOL).

[97]United States v. Iturralde-Aponte, 24 C.M.A. 1, 51 C.M.R. 1 (1975).

[98]420 U.S. 103 (1975).

[99]Courtney v. Williams, 24 C.M.A. 87, 89-90, 51 C.M.R. 260, 262-63 (1976).

[100]O'Callahan v. Parker, 395 U.S. 258 (1969).

[101]401 U.S. 355 (1971) (the kidnap and rape of a dependent wife and a sister of other servicemen which were committed on a military reservation were held to be triable by court-martial).

[102]413 U.S. 665 (1973).

[103]395 U.S. 683 (1969) (petition seeking post-trial release from confinement dismissed for failure to exhaust remedies within the military justice system including petition to the Court of Military Appeals).

[104]405 U.S. 34 (1972) (holding federal courts can review the denial of a conscientious objector discharge despite the pendency of a court-martial if all remedies have been exhausted).

[105]420 U.S. 738 (1975) (held that military defendant must first allow military courts to

Articles 133 and 134 of the UCMJ in *Parker v. Levy*[106] and *Secretary of the Navy v. Avrech*[107] signaled a return to the traditional "hands off" attitude toward military law. And most recently, the conclusion and reasoning in *Middendorf v. Henry*[108] that defense counsel are not constitutionally required at summary courts-martial leaves military law in a paradox although the Supreme Court's record of *never* having reversed a court-martial on other than jurisdictional grounds has been kept intact.[109]

The Court of Military Appeals, certainly not unaware of the Supreme Court decisions, persists in its effort to civilianize military justice while the Supreme Court in *Parker v. Levy* and *Middendorf v. Henry* marches in the opposite direction, raising and accepting the assertions of need for differences between the military and civilian systems of justice. Recognizing the trends in both tribunals, one can readily imagine the different results if the Supreme Court had been presented with the cases which were before the Court of Military Appeals this past term.[110] The constitutional philosophy of the Supreme Court majority as expressed by Justice Rehnquist toward military law is comparable to that approach taken by the Court of Military Appeals in its formative years — implied acceptance of due process clause, reliance on congressional judgment and deference to naked claims of military necessity.[111] As a specialized court accruing first hand knowledge of the military judicial system and military needs, the Court of Military Appeals developed a more sophisticated and perceptive approach to the court-martial process. Perhaps with open dialogue[112] and

determine whether offenses are service-connected). The implications of this deference to military courts are discussed in Bartley, *Military Law in the 1970's: The Effects of Schlesinger v. Councilman*, 17 A.F.L. REV. 65 (Winter 1975).

[106]417 U.S. 733 (1974). For a reaction to this changed Supreme Court attitude toward military justice *see* Everett, *Military Justice in the Wake of Parker v. Levy*, 67 MIL. L. REV. 1 (1975); Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F.L. REV. 81 (Summer 1976).

[107]418 U.S. 676 (1974).

[108]425 U.S. 25 (1976). This decision was opposite the result reached by the Court of Military Appeals in United States v. Alderman, 22 C.M.A. 298, 46 C.M.R. 298 (1973).

[109]*See* Note, *Right to Counsel at Summary Courts-Martial: COMA at the Crossroads*, 52 Ind. L.J. ____ (1976), *infra.*

[110]Different or opposite conclusions may very well have been reached in the area of search and seizure, self-incrimination and the extent of court-martial jurisdiction under O'Callahan v. Parker, 395 U.S. 258 (1969).

[111]Beyond Justice Rehnquist's remarkable, and it is submitted plainly erroneous, conclusion that a summary court-martial is not a criminal proceeding (confinement may be imposed and conviction carries all the collateral consequences of any federal conviction), his opinion in Middendorf v. Henry, 425 U.S. 25 (1976), and the concurring opinion of Justice Powell accord significant weight to the congressional judgment of not providing counsel in summary courts-martial. This approach is similar to the *Clay-Sutton* constitutional philosophy employed by the Court of Military Appeals during its first decade where constitutional rights of servicemen were deemed to flow through congressional enactment. *See* Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 28-38 (1972). The Court of Military Appeals later shed this restrictive, filtered view of constitutional rights in United States v. Jacoby, 11 C.M.A. 428, 28 C.M.R. 244 (1960).

[112]The present Court of Military Appeals is conscious of the need to communicate with the federal judiciary. Justice Rehnquist was a featured speaker at the court's Conference or

certain legislative changes[113] there could be a joinder of approach between the two courts. Meanwhile, the Court of Military Appeals remains free to be the primary potential and thrust toward further civilianization of the military justice system.

CONCLUSION

These introductory remarks have not been a case for or against military justice or the court-martial system. That is a well fertilized debate and a task assumed by numerous authors.[114] Rather, the reality that the court-martial system exists and is unlikely to be substantially modified or abolished is accepted and trends in military law should be sought and discussed. Although one term may not yield a conclusive trend, military defendants have reason to feel secure in a fair and impartial appellate system with an activist Court of Military Appeals. Meanwhile the promise of a greater balancing of individual rights and military necessity in favor of defendants from federal courts has evaporated under the Supreme Court's apparent willingness to accept broadly stated claims of military necessity or difference. Indeed, ironically, it may now be that the government military attorney and not the defense attorney would prefer a court-martial case to reach the Supreme Court.

The United States Court of Military Appeals has rejuvenated military justice. But, how long can the court continue its energetic resurgence? There are limits on the court's time and the implementation of its rules and suggestions will require the cooperative efforts of others. The quality of any judicial system ultimately depends on the individuals responsible for its administration, from those at the trial level to those sitting on appellate courts. When individuals change, or cooperation ceases, the Court of Military Appeals may again find itself floating without direction. The positive contribution of the present court can be negated, and its enthusiasm dissipated. Thus, it is essential that constructive criticism of the court and of military justice be maintained and that permanent solutions through legislative action be pressed.

Appellate Advocacy held on May 20-21, 1976, and the court members have participated in various meetings manifesting this objective.

[113]The legislative changes which have been urged include providing for writ of certiorari to the United States Supreme Court, increasing the number of judges on the Court of Military Appeals, granting life tenure and other attributes of Article III status to the Court of Military Appeals, expressly making the court a part of the federal judiciary and granting the court clear and broad powers to issue writs and supervise the entire military justice system.

[114]Proponents of the military system include Bishop, *The Case For Military Justice*, 62 MIL. L. REV. 215 (1973); Kent, *Practical Benefits for the Accused — A Case Comparison of the U.S. Civilian and Military Systems of Justice*, 9 DUQ. L. REV. 186 (1970); Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 ME. L. REV. 105 (1970); Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971); Poydasheff and Suter, *Military Justice? — Definitely!*, 49 TUL. L. REV. 588 (1975). Opponents include Schiesser and Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders From Military Justice*, 7 TEX. TECH L. REV. 559 (1976); Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973); West, *A History of Command Influences on the Military Justice System*, 18 U.C.L.A. L. REV. 1 (1970).