
The Supreme Court and Its Impact on the Court of Military Appeals

CAPTAIN SCOTT L. SILLIMAN

THE INTERRELATIONSHIP between the United States Supreme Court and the Court of Military Appeals is not a new subject for either analysis or commentary. It has been the subject of numerous articles and lectures throughout the years.¹ However, recent significant pronouncements from both courts warrant re-examination of the relationship. This comment addresses the "philosophy" of each court and the extent to which the Supreme Court and other sources of commentary have influenced the Court of Military Appeals' perception of its function and identity. Since the comment is concerned primarily with trends and philosophies, much of its appraisal can be found in dicta and footnotes rather than the holding of any specific case.

I. THE SUPREME COURT'S VIEW OF MILITARY LAW

For at least the last two decades, the Supreme Court has followed a general doctrine of extremely restricted review of court-martial proceedings in which jurisdiction was the only subject of inquiry. Even though the Court, in the 1953 case of *Burns v. Wilson*,² left open the

1. See, e.g., Everett, *Military Justice in the Wake of Parker v. Levy*, 67 MIL. L. REV. 1 (1975); Willis, *The Constitution, The Court of Military Appeals, and the Future*, 59 MIL. L. REV. 27 (1972).

2. 346 U.S. 137 (1953).

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Captain Silliman (B.A., J.D., University of North Carolina) is currently Chief, Military Justice Division, the Air Force Judge Advocate General School, Maxwell Air Force Base, Alabama. He is a member of the bar of North Carolina and is admitted to practice before the United States Supreme Court, the United States Court of Claims, and the Court of Military Appeals.

possibility for review as to whether the military "fully and fairly" considered claims of denial of constitutional due process,³ an overall policy of noninterference with military judicial proceedings has been the rule-of-thumb. This was certainly true during the 1968-1969 term when the Supreme Court decided two leading cases. In *Noyd v. Bond*,⁴ the Court acknowledged the power of the Court of Military Appeals to issue writs under the All Writs Act with respect to a conscientious objector's claims of unlawful confinement. Consequently, the Supreme Court declined jurisdiction as to Noyd's petition for habeas corpus because he had not sought his remedy in the military court during his appeal. Earlier, in *United States v. Augenblick*,⁵ the Supreme Court ruled that the Court of Claims could not receive a court-martial conviction in a suit for back pay when the claimed errors were not of constitutional magnitude.

But both of these cases, which had furthered the Supreme Court's "hands-off" approach, were overshadowed by the landmark decision in *O'Callahan v. Parker*,⁶ in which the Court limited jurisdiction to offenses with "service connection."⁷ Although the holding of the case has had tremendous significance in military law,⁸ the military community will long remember the dicta in Mr. Justice Douglas' opinion, especially the following oft-quoted language: "While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."⁹ Even during the peak of resentment toward the military establishment incident to involvement in Vietnam, this language was a scathing condemnation of the military justice system. Although many military lawyers rationalize that the language was unfounded or merely a product of the liberal "Warren Court," it, nonetheless, remains as the court's appraisal of military jurisprudence at that point in time.

The 1970s brought a change in the personalities on the court and, at least, a diminution of the main thrust in what has been characterized as the "Criminal Law Revolution."¹⁰ Similarly, the seventies heralded a changing attitude in the court's view of the military. In a footnote to his

3. *Id.* at 144.

4. 395 U.S. 683 (1969).

5. 393 U.S. 348 (1969).

6. 395 U.S. 258 (1969).

7. *Id.* at 272-73:

We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by grand jury and a trial by a jury of his peers.

8. See, e.g., *United States v. Black* 24 U.S.C.M.A. 162, 51 C.M.R. 381 (1976); *United States v. Sexton*, 23 U.S.C.M.A. 102, 48 C.M.R. 663 (1974); *United States v. McGonical*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Gothro*, 51 C.M.R. 106 (C.G.C.M.R. 1975); *United States v. Wentzel*, 50 C.M.R. 690 (A.F.C.M.R. 1975).

9. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969).

10. See generally BNA THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH, 1960-1972 (1973).

separate concurring opinion in *Parisi v. Davidson*,¹¹ which concerned the question of exhaustion of administrative remedies for a conscientious objector, Mr. Justice Douglas, in 1972, wrote that “critics must concede, however, that the Court of Military Appeals has at least been partially successful in infusing civilian notions of due process into the military justice system.”¹² Nonetheless, he reiterated his *O’Callahan* charge in the same footnote: “Despite these advances, however, the military justice system’s disregard of the constitutional rights of servicemen is pervasive.”¹³ This language from *Parisi* must be viewed as a softening, however slight, of the harsh stance of the majority in *O’Callahan* when Mr. Justice Douglas spoke of “so-called military justice”¹⁴ and quoted, with approval, Glasser’s phrase, “the travesties of justice under the Uniform Code of Military Justice.”¹⁵

The lower tone of Mr. Justice Douglas’ vehement attack only foreshadowed things to come. One year later, in *Gosa v. Mayden*,¹⁶ in which the Court ruled that *O’Callahan* was not to be given retroactive effect, Mr. Justice Blackmun wrote an opinion for a plurality in which the dicta revealed the Court’s view of the military justice system. In the opinion, he notes:

Although the decision in *O’Callahan* emphasizes the difference in procedural protections respectively afforded by the military and the civilian tribunals, the Court certainly did not hold, or even intimate, that the prosecution in a military court of a member of the armed services for a nonservice-connected crime was so unfair as to be void ab initio. Rather, the prophylactic rule there formulated ‘created a protective umbrella serving to enhance’ a newly recognized constitutional principle.¹⁷

This comment alone is, perhaps, insignificant, but a footnote to the opinion can be easily interpreted as praiseworthy of the military judicial system.¹⁸ Taken together, they represent another step in the changing mood of the Court. *Parisi* and *Gosa* were only preludes to the first full orchestration of the Court in the 1974 case of *Parker v. Levy*.¹⁹ In this

11. 405 U.S. 34 (1972).

12. *Id.* at 52 n.4.

13. *Id.*

14. *O’Callahan v. Parker*, 395 U.S. 258, 266 n.7 (1969).

15. *Id.* at 266.

16. 413 U.S. 665 (1973).

17. *Id.* at 675.

18. *Id.* at 681 n.6:

There are some protections in the military system not afforded the accused in the civilian counterpart. For example, Art 32 of the Code . . . requires “thorough and impartial investigation” prior to trial, and prescribes for the accused the rights to be advised of the charge, to have counsel present at the investigation, to cross-examine adverse witnesses there, and to present exonerating evidence. It is not difficult to imagine, also, the situation where a defendant, who is in service, may well receive a more objective hearing in a court-martial than from a local jury of a community that resents the military presence.

19. 417 U.S. 733 (1974).

case, Chief Justice Burger and Justices Rehnquist, White, Blackmun, and Powell united in a majority view of the military establishment that was radically different from the condemnation in *O'Callahan*. In upholding the constitutionality of Articles 133 and 134 of the Uniform Code of Military Justice,²⁰ the Court seemingly went out of its way to make amends for the harsh treatment of the military in *O'Callahan*. Even though Mr. Justice Rehnquist, the author of the majority opinion in *Parker*, had previously stated in *Gosa* that the *O'Callahan* case was wrongly decided,²¹ this hint from the past did not indicate the extent to which the Court had changed its image of military justice. The following excerpt from the opinion provides the picture:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again, by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that it is the primary business of armies and navies to fight and be ready to fight wars should the occasion arise.²²

Later on, the opinion cites, with approval, the following language from *Burns v. Wilson*²³:

The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . . Just as military society has been a society apart from civilian society, so military law is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.²⁴

In speaking of the military judicial system, Mr. Justice Rehnquist again makes the majority position abundantly clear:

[*The Uniform Code of Military Justice*] cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War, which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively

20. For explanations of the scope of articles 133 and 134, see Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N. CAR. L. REV. 142 (1959); Nelson, *Conduct Expected of an Officer and Gentlemen*, 12 A.F. JAG L. REV. 124 (1970).

21. *Gosa v. Maryden*, 413 U.S. 665, 692 (1973):

In No. 71-6314 (*Gosa*), since I believe that the *O'Callahan* rule could not in any event be given only prospective application, the question arises whether the analytical inquiry sanctioned by that decision should even be undertaken. *O'Callahan* was, in my opinion, wrongly decided, and I would overrule it for the reasons set forth by Mr. Justice Harlan in his dissenting opinion. (emphasis added).

22. *Parker v. Levy*, 417 U.S. 733, 743 (1974), citing *Troth v. Quarles*, 359 U.S. 11, 17 (1955).

23. 346 U.S. 137 (1953).

24. *Parker v. Levy*, 417 U.S. 733, 744 (1974), quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.²⁵

Finally, in commenting on the question of freedom of speech in the military community, Mr. Justice Rehnquist observes:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The 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.²⁶

Even the Court of Military Appeals received praise in the majority opinion²⁷ for its sensible statement of the reason for a different application of first amendment doctrines as expressed in *United States v. Priest*.²⁸ In the context of previous decisions, *Parker* represents a singularly unique expression of satisfaction and accord with the military community. Nowhere else had the Court expended such an effort on the virtues of military justice, and this is particularly noteworthy since much of its discussion was not essential in resolving the question before it.²⁹

The Court next commented on the military justice system in *Schlesinger v. Councilman*,³⁰ decided on 25 March 1975. The defendant in *Councilman* claimed that the preferred charges against him involving the sale, transfer, and possession of marijuana were not service-connected within the meaning of *O'Callahan*, and, thus, the military court-martial should not be allowed to proceed to trial. A federal district court agreed and enjoined Councilman's trial. Although the Supreme Court held that the lower court had statutory jurisdiction in the suit,³¹ it nonetheless ruled that the lower court had improperly enjoined the court-martial proceeding. The Court stated: ". . . when a serviceman

25. 417 U.S. at 749.

26. *Id.* at 758.

27. *Id.*

28. 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972).

29. See Everett, *supra* note 1, at 4-5. The same five justices who formed the majority in *Parker* issued a per curiam opinion one month later in which the *Parker* holding was summarily applied to roughly similar facts. See *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974). In a brief disclaimer in dissent, Mr. Justice Douglas observed that "the steps we take in *Parker v. Levy* and in this case are backward steps measured by the standards of an open society." *Id.* at 681 (dissenting opinion of Douglas, J.). An appropriate comment for a justice who has long advocated the strongest possible protections for first amendment rights, the words seem equally apt to describe his perspective to the erosion of the *O'Callahan* view of the military community in general.

30. 420 U.S. 738 (1975). See generally Bartley, *Military Law in the 1970's: The Effects of Schlesinger v. Councilman*, 17 A.F.L. REV. 65 (Winter 1975).

31. *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975); "We therefore reiterate the construction given the Art 76 language in *Gusik* [*Gusik v. Schilder*, 340 U.S. 128 (1950)] and accepted by other courts, including the Court of Military Appeals, and accordingly hold that Art 76 does not stand as a jurisdictional bar to Captain Councilman's suit."

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."³² The holding left unanswered the question of whether off-base possession of marijuana is "service connected," but the opinion suggests that the door left open in *Burns v. Wilson* for civilian review of courts-martial may be closing.

Collateral attack seeks, as a necessary incident to relief otherwise within the court's power to grant, a declaration that a judgment is void . . . [and] . . . for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect³³

Mr. Justice Powell wrote the opinion in *Councilman*, with Justices Rehnquist, White, Blackmun, and Stewart joining him in the opinion. The Chief Justice filed a separate opinion concurring in the judgment. Despite a slight change in the composition of the majority in *Councilman*, analysis of the dicta supports the contention that the laudatory comments concerning the military in *Parker* were given further emphasis. Three brief excerpts from the opinion should prove the point.

[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.³⁴

Later, in discussing considerations that warrant intervention in military proceedings, the Court noted:

We see no injustice in requiring respondent to submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well.³⁵

Finally, in a footnote to the statement that the considerations involved in the question of service-connection "are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Article III courts,"³⁶ the Court observed:

32. *Id.* at 758.

33. *Id.* at 746-47.

34. *Id.* at 758.

35. *Id.* at 759-60.

36. *Id.* at 760.

We express no opinion whether the offense with which respondent in this case was charged is in fact service connected. But we have no doubt that military tribunals *do* have both experience and expertise that qualify them to determine the facts and to evaluate their relevance to military discipline, morale, and fitness.³⁷

Councilman did not exhaust the Court's vocabulary of commendatory adjectives, nor was it the final acclamation concerning the credibility of military jurisprudence. Two recent cases, *Greer v. Spock*³⁸ and *Middendorf v. Henry*,³⁹ continue the praise of the military system. The *Spock* case, which upheld a commander's right to restrict political campaigning on a military installation, represents a weighing in favor of military necessity as opposed to the matter of conflicting interests under the first amendment. In distinguishing the earlier case of *Flower v. United States*⁴⁰ and in commenting upon the "objectively and even-handedly applied" policy of remaining "free of entanglement of partisan political campaigns of any kind,"⁴¹ the Court was genuinely complimentary of the training programs at Fort Dix.⁴² Furthermore, Mr. Justice Powell revitalized the cases discussed above by drawing heavily upon *Parker* and *Councilman* in his concurring opinion.⁴³ The *Middendorf* case, decided on the same day as *Spock*, has drawn the greater comment from the military community, and it has had the greater impact on this comment's analysis of the court's view of the military justice system. Mr. Justice Rehnquist authored the opinion, with the Chief Justice and Justices White, Blackmun, and Powell joining him; this alignment is identical to the majority composition and authorship in *Parker v. Levy*. The holding of *Middendorf* was that counsel are not required in summary court-martial proceedings because these tribunals are not criminal prosecutions within the meaning of the sixth amendment.⁴⁴ Although the analysis applied by the majority to reach this holding is a current matter of controversy, no argument can alter what has been written. Taken as a whole, the majority opinion can only be interpreted as a vote of complete confidence in the capability of the military judicial system to dispense discipline fairly and impartially. Even though the Supreme Court

37. *Id.* at 760 n.34.

38. 44 U.S.L.W. 4380 (24 Mar. 1976).

39. 44 U.S.L.W. 4401 (24 Mar. 1976).

40. 407 U.S. 197 (1972). In *Flower*, the Court issued its decision without benefit of briefing or oral argument and summarily reversed the conviction of a civilian for entering Fort Sam Houston after having been ordered not to do so. The Court premised its holding on the basis that New Braunfels Avenue, the street within the post where the petitioner was arrested, was a "completely open street" and, therefore, military authorities could not exercise control over the petitioner in his distribution of leaflets.

41. *Greer v. Spock*, 44 U.S.L.W. 4380, 4383 (24 Mar. 1976).

42. *Id.* "Such a policy is wholly consistent with the American Constitutional tradition of a politically neutral military establishment under civilian control."

43. *Id.* at 4384 (concurring opinion of Powell, J.); *cf.* *Middendorf v. Henry*, 44 U.S.L.W. 4401, 4408 (24 Mar. 1976) (concurring opinion of Powell, J.).

44. 44 U.S.L.W. 4401, 4408 (24 Mar. 1976).

implicitly overturned the holding of the Court of Military Appeals in *United States v. Alderman*,⁴⁵ the majority was quick to state that "dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference."⁴⁶ Moreover, the Court took great pains to assess the individual views of each judge in *Alderman* before reverting to the congressional determination that counsel are not required.⁴⁷ Perhaps the following excerpt from the opinion best exemplifies the majority view:

In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the armed forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.⁴⁸

The foregoing commentary briefly summarizes developments from *O'Callahan* to *Middendorf* and shows that the Supreme Court has rapidly and methodically altered its view of the military judicial system and the military within a span of seven years.⁴⁹ An explanation of the Court's motivation in changing its perspective of the military is beyond the scope of this comment, but at least one writer has suggested that the movement toward an all-volunteer force was a factor that prompted the favorable language in *Parker v. Levy*.⁵⁰ Undoubtedly, the changing political scene following Vietnam and, *more simply*, the infusion of new personalities have influenced the Court's decisions. Regardless of the Court's motivation, the larger question that must now be considered is the effect, if any, of the Court's changed perspective on the philosophy and opinions of the Court of Military Appeals.

II. THE COURT OF MILITARY APPEALS

Spurred by forceful criticism of military justice following World War II,⁵¹ Congress enacted the *Uniform Code of Military Justice*.⁵² One of the

45. 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973).

46. *Middendorf v. Henry*, 44 U.S.L.W. 4401, 4407 (24 Mar. 1976).

47. *Id.*

48. *Id.*

49. It should be noted that the *Middendorf* majority of Mr. Justice Rehnquist, the Chief Justice and Justices White, Blackman, and Powell (joined by Mr. Justice Stewart) recently upheld the right of a police department to regulate the length of its employees' hair. *Kelly v. Johnson*, 44 U.S.L.W. 4469 (5 April 1976). The *Kelly* opinion has obvious significance in regard to pending challenges to military dress and appearance regulations.

50. Everett, *supra* note 1, at 5.

51. See Crump, *Part II: History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F.L. REV. 55, 58-62 (Spring 1975).

52. 10 U.S.C. §§ 801-940 (1970 ed.).

most significant features of the new code was the creation of the Court of Military Appeals, a controversial interjection of civilian control into the military system, albeit a court restricted in its jurisdictional limits. Judge Latimer perhaps expressed the original philosophy of this court best in 1951 when he opined in the case of *United States v. Clay*⁵³:

We look to the acts of Congress to determine whether it has declared that there are fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he has been fairly convicted.⁵⁴

Further, Judge Latimer predicated his principles of “military due process” in his assessment that such principles flow not from the Constitution but, rather, from the laws as enacted by Congress.⁵⁵ Thus, an *equalization* of the rights of a military accused and his civilian counterpart best characterized the philosophy of the early court. But this doctrine of equivalent rights did not last, for, in *United States v. Jacoby*⁵⁶ and, later, in *United States v. Tempia*⁵⁷ the Court of Military Appeals expressed its concern for upholding its obligation to protect a service member’s rights under the Constitution. In *Tempia*, the court took comfort in quoting the words of Chief Justice Vinson that “the military courts, like the state courts, have the same responsibility as do the federal courts to protect a person from a violation of his constitutional rights.”⁵⁸

However, to state that the Court of Military Appeals adopted what some sources have labeled as a “constitutional philosophy”⁵⁹ does not suggest that the court shifted its focus to the Constitution to the exclusion of codal and manual provisions. To the contrary, constitutional considerations became a significant *additive* source of authority in conjunction with codal and manual considerations, and the Court of Military Appeals has remained steadfast in its desire to cite the statutory rights of service members as authority for its pronouncements whenever possible. Thus, in writing for the majority in *United States v. McOmber*,⁶⁰ Chief Judge Fletcher declared that, “although the question presented [*i.e.*, interviewing an accused without consent of counsel] has certain constitutional overtones, our disposition of the matter on statutory grounds makes it unnecessary to resolve the sixth amendment claim.”⁶¹

Much has been written on the history of the Court of Military Ap-

53. 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

54. *Id.* at 77, 1 C.M.R. at 74.

55. *Id.* “For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress.”

56. 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

57. 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

58. *Id.* at 633, 37 C.M.R. at 253, citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

59. See Willis, *supra* note 1, at 28-38.

60. 24 U.S.C.M.A. 207, 51 C.M.R. 452 (1976).

61. *Id.* at 208, 51 C.M.R. at 453.

peals and the evolution of its "constitutional philosophy."⁶² To pursue it further would exceed the scope of this comment. However, there is a related matter which constitutes a substantial factor in understanding what one might call the current "activism" of the court, and it is this factor which leads back to the opening premise. The introductory paragraph questioned the extent to which opinions of the Court of Military Appeals have been influenced by the perception of its function and identity as reflected in Supreme Court decisions and in other sources of commentary. Any conclusions in this regard must necessarily be tentative. The present Court of Military Appeals is a "new" court still very much in its formative years. Judge Cook was administered his oath on 24 August 1974 and the chief judge was sworn in on 30 April 1975. Judge Ferguson, who had provided continuity for so many years, retired from the bench and Judge Perry was administered the oath on 18 February 1976. Additionally, there has been more than a marginal turnover of staff personnel at the court during the last two years. Nonetheless, recent decisions of the court indicate that it may be profitable to examine the manner in which this court has reacted and fostered its self-image in light of the language in the Supreme Court cases discussed above.

In the first place, the court appears particularly sensitive to Mr. Justice Douglas' comments in *O'Callahan*,⁶³ despite more complimentary language in subsequent cases. Since the Court of Military Appeals has openly identified itself as an integral part of the military justice system, it could not take comfort in Mr. Justice Douglas' distinction between it and "courts-martial as an institution." Furthermore, because of its close identification with the system, the court cannot merely claim that condemnation of the military justice system is the child of a previous court. Finally, *O'Callahan* serves as a measuring rod to the future direction of the military justice system in relation to its past. To the new court, the call was to reform and revitalize—to expunge from the system those elements that were subject to adverse comment and criticism. In a word, it was a call for judicial activism.

If *O'Callahan* was not sufficient to prompt such a response, a host of articles in legal periodicals during the early seventies examined the military justice system, and many of them were highly critical. Even within the system itself, there were suggestions that the court had not adequately fulfilled its role. Captain John Willis made the following comments in an article that appeared in the *Military Law Review*⁶⁴ in 1972:

The jurisdictional weaknesses of the Court of Military Appeals are

62. See, e.g., Benson, *The United States Court of Military Appeals*, 3 TEX. TECH L. REV. 1 (1971); Everett, *Military Justice is to Justice*, 12 A.F. JAG L. REV. 202 (1970); Willis, *supra* note 1; Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972).

63. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969). For a discussion of the *O'Callahan* decision, see text accompanying notes 6-9, *supra*.

64. See Willis, *supra* note 1.

plainly evident in its exercise of extraordinary writ power. This has extended the Court's jurisdiction to cases which may not have come before it depending upon the sentence adjudged by a court-martial and approved by the convening authority. However, because of judicial conservatism, limited original jurisdiction, and uncertainty about the remedies it may grant and enforce, the Court has infrequently granted relief.⁶⁵

Later on, in the same article, Captain Willis stated:

While the Court of Military Appeals cannot guarantee by itself the successful functioning of the military justice system, its activism can assure the continued vitality and development of the nation's largest criminal jurisdiction. Unless the Court obtains the independence, the personnel, the powers, and the prestige that it needs, it may very well grow stale reclining on its past success.⁶⁶

The current Court of Military Appeals is thoroughly familiar with views expressed in outside commentaries, and it is deeply concerned about its image as the highest military tribunal. Was it mere coincidence that Captain Willis' inference of judicial conservatism in the area of the extraordinary writ, a point of view recently reiterated in a note in the April 1975 issue of the *Michigan Law Review*,⁶⁷ was answered by a movement of the court toward more liberal and active interpretation of the statute?⁶⁸ Was it also coincidence that the court, in *United States v. Ware*,⁶⁹ laid to rest the controversial question of the power of the convening authority to overrule a military judge when the same subject had been addressed in a commentary by Professor Everett at the Army JAG School in late 1974?⁷⁰ Intuition suggests not. In the writer's view, the court is reacting to what it reads, and, to that end, it is being extremely selective of the cases that it has chosen for expansive opinions.

If one accepts the hypothesis that the court reacted strongly to criticism and condemnation of the military justice system voiced by the Supreme Court in *O'Callahan* or in legal journals, he may logically question why it has not also reacted to more recent and favorable language in such cases as *Parker*, *Councilman*, and *Middendorf*. In a very real sense, it has reacted but not in the manner anticipated by its critics. This writer suggests that the Court has viewed accolades of the system,

65. *Id.* at 81.

66. *Id.* at 97.

67. Note: *Post-Conviction Review in the Federal Courts for the Service-member Not in Custody*, 73 MICHIGAN L. REV. 930 (1975).

68. See *Phillippy v. McLucas*, ___ U.S.C.M.A. ___, 50 C.M.R. 915 (1975); *Milanes-Canamero v. Richardson*, ___ U.S.C.M.A. ___, 50 C.M.R. 916 (1975); *Porter v. Richardson*, ___ U.S.C.M.A. ___, 50 C.M.R. 910 (1975); *cf. Boulter v. Wood*, 23 U.S.C.M.A. 589, 50 C.M.R. 854 (1975). See generally *Stevenson, The Inherent Authority of the Military Judge*, 17 A.F.L. REV. 1, 10-21 (Summer 1975).

69. *United States v. Ware*, 24 U.S.C.M.A. 102, 51 C.M.R. 275 (1976).

70. Everett, *supra* note 1.

not as repudiation of the *O'Callahan* appraisal but as recognition of a new and dynamic era in military law. If this assessment of the reaction is correct; that is, if the court believes that the language of *Middendorf* is an unbridled vesting of total confidence in the three judges to administer the military justice system with the utmost degree of wisdom and legal acumen, then the last thing to expect would be a decrease in the court's activism. To the contrary, the opposite development is more likely with an increasing of the court's involvement in areas where it has heretofore never ventured. Moreover, only a clear and direct chastisement by the Supreme Court will affect a change in direction, and such is highly unlikely in the present climate.

The Court of Military Appeals will undoubtedly continue in much the same direction as in the recent past, particularly in questions of law requiring interpretations of provisions of the *Uniform Code* as measured against congressional intent, and this is the area where one should anticipate the thrust of the court's efforts. Similarly, one can anticipate that the court will increase its examination of the provisions of Article 36; that is, the authority of the President to prescribe procedure, modes of proof, and the rules of evidence for courts-martial. In recent instances, the court has declared certain provisions of the *Manual for Courts-Martial* to be inconsistent with the *Uniform Code*,⁷¹ and further decisions are likely. Only in areas where the code is silent, notably fourth amendment considerations, will the court feel constrained to follow closely the dictates and direction of the Supreme Court. In this very important area of the law, some restraint and adherence to the pronouncements of the Supreme Court have already been reflected in the opinion on reconsideration in *United States v. Jordan*⁷² although the question of applying the revised test is still a matter of controversy. However, this interpretation of Supreme Court dictates concerning search and seizure can produce diametrically opposing views on the part of the Court of Military Appeals judges; for example, in *United States v. Kinane*,⁷³ the *Cupp v. Murphy*⁷⁴ doctrine served as the battlefield for Chief Judge Fletcher and Judge Cook, and the question of the difference between an inspection and a search produced radically differing views between the same two judges in *United States v. Thomas*.⁷⁵

III. CONCLUSION

Candor requires one to acknowledge that the new activism of the

71. *E.g.*, *United States v. Douglas*, U.S.C.M.A. 178, 51 C.M.R. 397 (1976); *United States v. Carpenter* ____ U.S.C.M.A. ____, 24 C.M.R. ____ (1976).

72. 24 U.S.C.M.A. 156, 51 C.M.R. 375 (1976).

73. 24 U.S.C.M.A. 120, 51 C.M.R. 310 (1976).

74. 412 U.S. 291 (1973). In *Cupp*, the Supreme Court upheld the "seizure" of fingernail scraping of a suspect not under arrest. The justification for the seizure was the *Chimel* doctrine, which allows a limited search of the area under control of an arrested suspect. *See Chimel v. California*, 395 U.S. 752 (1969). A close reading of *Cupp*, however, suggests that the real basis for the decision may have been the exigent circumstances of the case.

75. ____ U.S.C.M.A. ____, ____ C.M.R. ____ (1976).

Court of Military Appeals has fostered problem areas, both for the court and for those who seek to interpret and abide by its decisions. First, in the court's perspective of the military law as totally dynamic, one finds the issuance of opinions that contain only statements of direction for use as guidelines instead of rules. For example, the opinion in *United States v. Graves*⁷⁶ does not reflect simplistic rules that are easily followed by a military judge. Rather, it merely vests him with a cloak of authority that requires him to assure a fair trial for the accused. In the same vein, *Courtney v. Williams*,⁷⁷ does not purport to define a "neutral and detached magistrate"⁷⁸ or his identity in the military community, but, rather, the opinion leaves it up to the interpreter to discern the meaning of *Gerstein v. Pugh*⁷⁹ and to make the transition to the military framework. Although this type of written opinion is totally consistent with the dynamic activism that now characterizes the court, decisions such as *Graves* and *Courtney* have been widely misinterpreted, and such confusion has bred mistrust of, and disillusionment with, the court. This is one area where continued exposure of the judges to military lawyers in the field will be beneficial.

A second problem stems from the first problem. Since military lawyers have not, as yet, fathomed the rhyme or reason of the court's movement, they have tended to become defensive and vehemently argumentative regarding the court's written opinions. Rightly or wrongly, when they see no justification for change as mandated by an opinion, their first and, perhaps, final comment is that the court was either incorrect or ill-advised. Again, this is a breeding ground for discord, and a balm is urgently needed.

One can and should ask what the future holds for the military justice system. Undoubtedly, further changes are in the offing, but the specific areas and the degree of change cannot be easily forecast. Perhaps the answer lies in legislation similar to that cited by the chief judge in his concurring opinion in *United States v. Rowel*⁸⁰. This would allow the Government to appeal adverse rulings by the military judge. Perhaps much of the court's motivation in its rulings has been to highlight this need for further, extensive legislation, and this could be a hint of the direction for the coming years. In any event, the current court will be with us for some time; therefore, it behooves all of us involved in the military justice system, judges and military attorneys alike, to foster the type of environment in which fundamental fairness in the law can live and grow—the fairness that has enabled military lawyers to claim truthfully that the *Uniform Code of Military Justice* is the finest codification of criminal law in the world.

76. 23 U.S.C.M.A. 434, 50 C.M.R. 393 (1975). See generally Hilliard, *The Waiver Doctrine: Is It Still Viable?*, 18 A.F. L. REV. 45 (Spring 1976).

77. 24 U.S.C.M.A. 87, 51 C.M.R. 260 (1976).

78. *Id.* at 90, 51 C.M.R. at 263.

79. 420 U.S. 103 (1975).

80. 24 U.S.C.M.A. 137, 51 C.M.R. 327 (1976).