THE UNITED STATES COURT OF MILITARY APPEALS

*Daniel H. Benson**

The United States Court of Military Appeals is a complex institution, and the task of describing it is at once both demanding and sensitive. The task is demanding because since its founding significant misconceptions have developed concerning the court, its functions, and its status within the federal system. The task is sensitive because the United States Court of Military Appeals is essential to the accomplishment of justice in the armed forces. Any responsible discussion of the court must be highly critical because the Court has failed, in numerous areas, to accomplish its primary task set by Congress. In spite of these failings, the court has made an enormously beneficial contribution to the overall administration of military justice in the armed forces, and in doing so has become indispensible to the American system of military justice.

The United States Court of Military Appeals is not the "Supreme Court" of the military even though it is the court of last resort for any direct appeal within the military justice system.[1] The decisions of this specialized court of limited jurisdiction may be set aside by the United States Supreme Court on collateral attack.[2] Because the court's jurisdiction is limited, most of the military criminal cases tried in the armed forces never reach the court.[3] Nonetheless, since it is the highest court in the military justice system, it deserves respect and should be examined with care.

Although it could be said that the court has strained at gnats and

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* B.A. University of Texas at Austin, 1958; J.D. University of Texas School of Law, 1961; member of the Texas and District of Columbia Bars; Military Judge, 7th Judicial Circuit, U.S. Army, 1969-1970.

1. 10 U.S.C. § 867 (1971).

2. *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), first stated the rule that neither the Constitution nor federal statutes mandate direct review by civilian courts of military court determinations. The rule has been consistently followed. *E.g., In re* Vidal, 179 U.S. 126 (1900); Shaw v. United States, 209 F.2d 811 (D.C. Cir. 1954). Thus, decisions of the Court of Military Appeals can be set aside by the federal courts only through collateral attack. *E.g.*, O'Callahan v. Parker, 395 U.S. 258 (1969); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

Also, other federal courts freely disagree with United States Court of Military Appeals holdings and depart from its precedents as a case may require. *E.g.* Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969); *In re* Stapley, 246 F. Supp. 316 (D. Utah 1965); Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *rev'd*, 393 U.S. 348 (1969).

3. See text accompanying notes 65 to 71, *infra*.

swallowed camels,[4] and has failed to lift military justice above continuing criticism,[5] such criticism must not deteriorate into a cynical rejection of the court. It might appear to be a worldly and knowledgeable position to scorn the Court of Military Appeals entirely, as Robert Sherrill has done.[6] G.K. Chesterton reminds us, however, that "[t]horoughly worldly people never understand even the world; they rely altogether on a few cynical maxims which are not true."[7] It is not the purpose of this discussion to be so worldly and so cynical that we fail to see the healthy effect the United States Court of Military Appeals has had on military justice over the years. Rather, it is the purpose of this paper to examine some deficiencies of the court and to suggest changes which would enable the court to function smoothly as an integral part of the federal court appellate review system.

HISTORY

Oddly enough, the first civilian review court was proposed by a military man, General Samuel T. Ansell, acting Judge Advocate General of the Army during part of World War I.[8] General Ansell's proposal, known as the Chamberlain bill,[9] provided for a court of military appeals with three judges. Under his plan, each judge would be appointed by the President for life during good behavior, and each would receive the pay and retirement benefits of a federal circuit court judge.[10] This three-judge civilian court, however, would have been located "for convenience of administration only"[11] in the Office of the Judge Advocate General.[12]

General Ansell's plan required the civilian court to review every

4. *Matthew* 23:24.

5. *E.g.*, West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A.L. REV. 1 (1970); *The Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence*, 18 CATH. U. L. REV. 429 (1969); Smith, *Subterranean Injustice*, 22 Cornell L.F., Fall 1969, at 9; Glasser, *Justice and Captain Levy*, 12 Colum. F., Spring 1969, at 46; Sherman, *The Right to Competent Counsel in Special Courts-Martial*, 54 A.B.A.J. 866 (1968); Keeffe, *JAG Justice in Korea*, 6 CATH. U.L. REV. 1 (1956).

6. R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 213-16 (1970) [hereinafter cited as SHERRILL].

7. G. CHESTERTON, ORTHODOXY 14 (1908).

8. *Hearings on S. 5320 Before the Senate Comm. on Military Affairs* 65th Cong., 3d Sess. 48-52 (1919). Even General William T. Sherman anticipated the creation of such a court as early as 1882. *See* J. FRY, MILITARY MISCELLANIES 193-94 (1889).

9. S. 64, 66th Cong., 1st Sess. (1919).

10. *Id.* at 24-26.

11. *Id.* at 24.

12. The location would have been unsatisfactory, even if only for administrative purposes. A major difficulty with the present Court of Military Appeals is that its close involvement with the armed forces is inimical to proper judicial review of courts-martial cases.

general court-martial conviction where the sentence included death, dishonorable discharge or dismissal, or confinement for over six months. The scope of review extended to "correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused, without regard to whether such errors were made the subject of objection or exception at the trial."[13] The Ansell court had the power (1) to disapprove a finding of guilty, (2) to approve only so much as involved a lesser included offense, (3) to disapprove the sentence in whole or in part and to order a new trial, or (4) to report to the Secretary of War for transmissions of recommendations of clemency to the President. General Ansell's plan did not provide for a hierarchical set of appellate courts as found in the civilian systems, and it wholly failed to provide any review of convictions imposed by special or summary courts-martial.[14] The Ansell plan did at least require that after the appointing authority had approved the findings and sentence, he would have to forward the record of trial to general headquarters appointed by the President, and there a judge advocate would review the proceedings, and would have the power to revise the results in the event he found error prejudicial to the substantial rights of the accused.[15]

Immediate and strong opposition greeted General Ansell's proposals as reflected in the Chamberlain bill. Professor Wigmore vigorously opposed the reforms, saying:

> The prime object of military organization is Victory, not justice. . . . If it [the Army] can do justice to its men, well and good. But justice is always secondary, and Victory is always primary.[16]

The usual and traditional military argument for total command control of the military justice system was put forth by a New York lawyer (and judge advocate), Howard Kingsbury, who argued that any proposed reform of court-martial procedure "which contemplates setting up a military judiciary, independent of . . . command, proceeds upon an unsound basis."[17] There was general, institutional opposition to the Chamberlain bill from the armed forces, and the subcommittee considering the bill failed to report it out of committee.

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13. *Id.* at 25.

14. *Id.*

15. *Id.* at 17, 22. The lack of jurisdiction to review special or summary courts-martial continues to be one of the most serious deficiencies of the present Court of Military Appeals.

16. 24 MD. ST. B. ASS'N TRANSACTIONS 183, 188 (1919) (remarks made in an address to the Maryland Bar Ass'n).

17. Kingsbury, *Courts-Martial and Military Justice*, in 5 NATIONAL SERVICE WITH THE INTERNATIONAL MILITARY DIGEST 280 (1919).

General Ansell was not a typical military lawyer, and for his troubles in attempting to reform the system, he suffered the loss of his military career.[18] The armed services felt that they had successfully weathered the storm of protest coming out of World War I, and escaped with only a minimum degree of reform foisted upon them by outsiders who were trying to meddle with their system of military justice. No further significant steps toward establishing the Court of Military Appeals were taken until after World War II.

Even in the midst of the hue and cry raised after World War II, however, the Court of Military Appeals was not born without considerable conflict. At the time of its creation, the Army had already established a Judicial Council.[19] The Judicial Council was nothing more than a "super" Army board of review, but many of the military witnesses who testified before Congress concerning the proposed Uniform Code of Military Justice advocated that such a Judicial Council be given the supreme reviewing function under the new Code.[20]

At every step of the way the armed forces resisted the concept of a court being created to pass upon the judicial actions taken in courts-martial. It was always proposed, instead, that a "board" be given the job, or a "judicial council"—or indeed, it seems, anything at all but a real court. Whatever was desired, it was not a court—not a truly independent judicial body. It was even proposed that the three judge advocate generals of the armed forces sit as the supreme reviewing agency.[21]

The Court of Military Appeals that finally emerged was a compromise between the strictly military and strictly judicial positions. Although vastly better than any review system American military justice had used before, it still left much to be desired. The Court of Military Appeals came into existence when the Uniform Code of Military Justice became law on May 5, 1950, with the provisions of the Code relating to this court taking effect in early 1951.[22] The statute provided that the Court of Military Appeals would be located, for administrative purposes, in the Department of Defense, and would consist of three judges appointed from civilian life by the President, by and with the advice and

18. *Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Senate Comm. on Military Affairs*, 66th Cong., 1st Sess. 160-64 (1919).

19. *See* Act of June 24, 1948, ch. 625, § 226, 62 Stat. 604, 635.

20. *Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong., 1st Sess. 772 (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong., 1st Sess. 259 (1949).

21. 6 VAND. L. REV. 228-29.

22. Act of May 5, 1950, ch. 169, 64 Stat. 107 [hereinafter referred to as the Code or the Uniform Code of Military Justice].

consent of the Senate, for a term of fifteen years.[23] Not more than two of the three judges could be appointed from the same political party. This provision sadly missed the point; no problem, potential or actual, existed from party affiliation concerning military justice. The problem—the real problem, and the one that has plagued military law from the start—was the military affiliation of reviewing personnel. True, the new statute did say the judges would be "appointed from civil life,"[24] but that admonition did not prevent the military-related appointments actually made.

The original members of the court were all nominated by President Truman on May 22, 1951,[25] and were all confirmed by the Senate on June 19, 1951.[26] Chief Judge Robert E. Quinn was a former governor of Rhode Island, and was a captain in the United States Navy Reserve[27] (he has now held that military position for some twenty-eight years). Thus the first Chief Judge of the new "civilian" court was a man who held senior rank in the United States Navy. The other two judges were George W. Latimer,[28] a former justice of the Utah Supreme Court, and Paul W. Brosman. Judge Brosman died of a heart attack in 1955, and was replaced by a man who still sits, Judge Homer Ferguson,[29] a former United States Senator from Michigan. Judge Latimer's term of office expired on May 1, 1961, and President John F. Kennedy appointed Paul J. Kilday, a Congressman from Texas, to that seat.[30] Kilday, for twenty-two years, had served on the House Armed Services Committee and was certainly not known for his impartial approach to military matters. Indeed, as Robert Sherrill has noted, Judge Kilday's honors "included several citations from military organizations for 'tireless efforts to build national armed strength'."[31] On Judge Kilday's death in 1968, William H. Darden[32] was appointed to the court at the request of Senator

23. 10 U.S.C. § 867 (1964). In 1968 the Court of Military Appeals was redesignated the United States Court of Military Appeals and specifically empowered to overrule the *Manual for Courts-Martial* whenever the *Manual* was determined to be inconsistent with the Code. 10 U.S.C. § 867 (Supp. V, 1970). *See also* 2 U.S. Code Cong. & Ad. News 2053-58 (1968).

24. 10 U.S.C. § 867(a)(1) (1964).

25. The first three judges—former Chief Judge Quinn, Judge Latimer, and Judge Brosman—received staggered terms of office lasting fifteen, ten, and five years, respectively. 6 VAND. L. REV. 231.

26. 97 CONG. REC. 6748 (1951).

27. CONG. DIRECTORY, 91st Cong., 2d Sess. 704 (1970).

28. Judge Latimer had served as a colonel in the field artillery and the general staff of the Army of the United States. 6 VAND. L. REV. 231.

29. 102 CONG. REC. 2820 (1956).

30. 107 CONG. REC. 12622 (1961).

31. SHERRILL 214.

32. 115 CONG. REC. 567 (1969).

Richard Russell, a well-known partisan of the armed forces who was at the time Chairman of the Senate Armed Services Committee. Judge Darden had been Senator Russell's secretary for three years, and "then served as chief clerk and chief of staff of the Armed Services Committee for seventeen years before becoming a military appellate judge in 1968."[33] Thus, during much of its twenty year history the court has had only one judge (Judge Ferguson) without a military related background. And it is submitted that, notwithstanding military insistence that a background in military justice is a vital qualification for any appellate reviewer of court-martial proceedings, only Judge Ferguson has consistently demonstrated healthy skepticism toward the military.[34]

JURISDICTION

The jurisdiction of the court is narrowly limited and encompasses only a minority of the thousands of courts-martial tried every year.[35]

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33. SHERRILL 214.

Recently (effective June 23, 1971) Judge Darden was elevated to the position of Chief Judge, replacing former Chief Judge Quinn, who has now become an associate judge. The remaining member of the current court, Judge Ferguson, whose regular term of office expired May 1, 1971, has elected to become a senior judge on the court. He will remain on "active duty" (this being the term used in the official Headquarters, Dept. of the Army Pamphlet No. 27-71-13, July 1, 1971) in that capacity until his successor is appointed by President Nixon. Whether Nixon will appoint yet another judge with a history of long and close association with the military remains to be seen. Experienced observers of the court regard this as a distinct possibility.

34. Compare the dissenting opinions of Judge Ferguson with the opinions of the majority in the following cases: United States v. Richardson, 21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971); United States v. Platt, 21 U.S.C.M.A. 16, 44 C.M.R. 70 (1971); United States v. Brooks, 21 U.S.C.M.A. 3, 44 C.M.R. 57 (1971); United States v. Montgomery, 20 U.S.C.M.A. 35, 42 C.M.R. 227 (1970); United States v. Weatherford, 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970); United States v. Wright, 18 U.S.C.M.A. 348, 40 C.M.R. 60 (1969); United States v. Babbidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969); United States v. Wood, 18 U.S.C.M.A. 291, 40 C.M.R. 3 (1969); United States v. Hinkson, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967); United States v. Albert, 16 U.S.C.M.A. 111, 36 C.M.R. 267 (1966); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964); United States v. Wood, 13 U.S.C.M.A. 217, 32 C.M.R. 217 (1962); United States v. Davis, 12 U.S.C.M.A. 576, 31 C.M.R. 162 (1961); United States v. Danzine, 12 U.S.C.M.A. 350, 30 C.M.R. 350 (1961); United States v. Hurt, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958). Luther West commented that Judge Ferguson's "distrust of military commanders is classic." West, *supra* note 5, at 113.

35. In 1969 there were 72,243 convictions by courts-martial in the United States Army. The Court of Military Appeals, however, had jurisdiction on direct review of only 2,323 of these cases; only 464 petitions for review were processed in fiscal 1969; review was denied in 403 cases and granted in only 61 cases. 1969 ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION 17-18 (1969) [hereinafter cited as 1969 ANNUAL REPORT; an annual report of a different year will also be cited as ANNUAL REPORT with the year of the report indicated before the cite].

The court must review all cases in which the sentence, as affirmed by a court of military review, affects a general or flag (admiral) officer, or extends to death.[36] While there is no question of the propriety of mandatory review of all death cases, serious constitutional questions are raised by the provision of the Code which grants review, as of right, to all generals and admirals, while withholding review as of right to all other military defendants except those who have been sentenced to death.

This issue was raised, unsuccessfully, before the Court of Military Appeals in *United States v. Gallagher*,[37] a case in which the constitutionality of 10 U.S.C. § 867(b)(1) was questioned. The Court of Military Appeals held that the statute was constitutional, and the United States Court of Appeals for the District of Columbia Circuit subsequently took the same position, in *Gallagher v. Quinn*.[38] Although the Court of Military Appeals later described the *Gallagher* litigation as "an attack on the scope of the Court's appellate review powers,"[39] it actually was an attempt to broaden the scope of appellate review. Private Gallagher asserted that he, and all other military personnel *under* the rank of general or admiral, should have mandatory appellate review of a court-martial conviction if generals and admirals have it. In 1965 and 1966, the courts rejected the argument, but the question might be raised more successfully in a future case. The provision in question violates our normally accepted concepts of equal protection of the laws and finds no parallel in the laws of any state or federal appellate review system. The military is the only legal system in the United States that accords or withholds appellate review of criminal convictions on the basis of rank, class and status—as distinguished from the merits of a case, or a classification based on the nature of the case or sentence imposed.

The second category of cases that must be reviewed by the Court of Military Appeals consists of those cases certified for review by a judge advocate general after a court of military review has acted on them.[40] The original idea behind this provision was that cases involving significant points of military law or involving an issue which was unresolved because of conflicting decisions by courts of military review should be decided by the Court of Military Appeals upon certification of the case by a judge advocate general.[41] This avenue of review has been used fairly

36. 10 U.S.C. § 867(b)(1) (Supp. V, 1970).

37. 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965).

38. 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966).

39. 1966 ANNUAL REPORT 6.

40. 10 U.S.C. § 867(b)(2) (Supp. V, 1970).

41. *See* UNIFORM CODE OF MILITARY JUSTICE, TEXT, REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE 97 (1949) (This is the so-called Morgan Draft of the Code).

extensively by the judge advocate generals over the years, but it should be noted that the certification process has become, at least in Army practice, a method of obtaining further review whenever the government has lost before a court of military review.[42] The Air Force and Navy have been more liberal in the certification of cases where the accused has lost before a court of military review, thus according him one more bite at the apple before the Court of Military Appeals. But in the Army, the certification process is almost always restricted to those cases in which the government stands to benefit by further appellate review. In fairness, it must be said that most of the cases certified for review have, indeed, involved issues of broad scope, and have been properly certified from a legal point of view.[43] It is still unfortunate, however, that the certification device has been so sparingly employed when an accused would stand to gain by further review of the case.[44]

Finally, the Court of Military Appeals must review those cases which have been reviewed by a court of military review, when it determines, upon petition by the accused "on good cause shown," that review should be granted. The language of the provision is oddly cumbersome:

> The Court of Military Appeals *shall* review the record in . . .
> (3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.[45]

Although the mandatory "shall" is used in designating those types of cases that must be reviewed, subparagraph (3) makes it plain that the court itself is in full control of whether it will review any cases upon petition of an accused. The court, indeed, "must" review the case and "shall" review it if it grants the petition, but it has discretion to grant or not to grant any and all petitions presented to it. Why the Code expresses this jurisdiction to review—which, essentially is just certiorari jurisdiction—in mandatory rather than discretionary terminology, which would reflect its true nature, is unclear.

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42. *E.g.*, in 1970 only one case was certified for the defense in the Army (United States v. Weshenfelder, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971)) while four cases were certified for the government (United States v. Napier, 20 U.S.C.M.A. 422, 43 C.M.R. 262 (1971); United States v. Meade, 20 U.S.C.M.A. 510, 43 C.M.R. 350 (1971); United States v. Gwaltney, 20 U.S.C.M.A. 488, 43 C.M.R. 328 (1971); United States v. Larson, ___ U.S.C.M.A. ___, ___ C.M.R. ___ (1971), No. 23, 634 (Nov. 25, 1970)).

43. It is well settled, however, that the court will not answer moot questions, nor will it render advisory opinions. *See, e.g.*, United States v. Turner, 15 U.S.C.M.A. 438, 35 C.M.R. 410 (1965).

44. *See* note 42, *supra*.

45. 10 U.S.C. § 867(b)(3) (Supp. V, 1970) (emphasis added).

The meaning of the language "good cause shown" is somewhat obscure. It has no precise definition. When the court grants a petition, then "good cause" was shown, and when it denies one, "good cause" was not shown.[46] In *United States v. Gallagher*,[47] the Court indicated that if a *majority* of its judges held the opinion that an incorrect result had been reached, or an accused had been denied, to his prejudice, some substantial right, then it would grant review. And, it added, if an accused's petition is denied, that means that a *majority* of the court thought that the case was free of any error that ought to be corrected by the court. But this sheds very little light on the matter. "Good cause" as used in the Code provision under discussion still has no clearly defined meaning; it is best considered in terms of Holmes' formulation, paraphrased slightly: *what the court has done in fact*, and nothing more pretentious.[48]

Although the court has recognized that it is not a court of original jurisdiction and that it lacks general powers of law and equity,[49] it has asserted that it possesses "powers incidental to, and protective of, those defined in Article 67,[50] and that it has the duty to protect and preserve "the Constitutional rights of persons in the armed forces."[51] It has

46. Former Judge Latimer put it this way: "no conclusion as to the Court's position on a legal principle may be drawn from its denial of a petition for review, except that good cause for review has not been shown." Latimer, *"Good Cause" in Petitions for Review*, 6 VAND. L. REV. 163 (1953).

47. *See* text accompanying note 37, *supra*.

48. *The Path of the Law*, an address by Justice O.W. Holmes, Bost. U. Law School dedication, 1897, reprinted in 45 B.U.L. REV. 24, 27 (1965). Former Judge Latimer would apparently agree with Holmes' test. See Latimer, *supra* note 46, at 163. It should be noted that review by the Court of Military Appeals under its "good cause" jurisdiction is not quite the same as certiorari jurisdiction at the Supreme Court, since the Supreme Court may decline to accept a case for review, even if a wrong result was reached below. The Supreme Court does not sit as a super court of appeals for every judicial determination made in the courts of the United States and of the various states.

According to Chief Justice Vinson,

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. . . . If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

Vinson, *Work of the Federal Courts*, 69 S. Ct. v., vi (address to the American Bar Association delivered on September 7, 1949).

49. *In re* Taylor, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961).

50. United States v. Frischholz, 16 U.S.C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966).

51. *Id.* at 152, 36 C.M.R. at 308.

claimed that it was "the intent of Congress to confer upon the Court a general supervisory power over the administration of military justice."[52] The court has even gone so far as to say that it "is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary."[53] The court itself, however, subsequently narrowed the scope of its asserted powers in this regard.[54]

The Court of Military Appeals possesses some degree of extraordinary control over the military justice system, and indeed the Supreme Court has so recognized.[55] But this control is limited to those cases over which the court has potential jurisdiction on direct appeal,[56] and broad assertions that the court may right all wrongs committed within the military system of criminal justice are untrue.[57] In any case in which such potential jurisdiction is excluded as a matter of law, the court has no extraordinary writs power at all.

The court does use grandiloquent phrases to convey the importance and the necessity for all-writs power in aid of its jurisdiction. Moreover, it asserts that it is always ready to employ such power to the fullest extent if a case ever requires it. But the catch, almost after the classic fashion of Joseph Heller,[58] is that normally *no case ever does require it*. A reasonable expectation, however, is that with a change, or perhaps an increase,[59] in judicial personnel, the Court of Military Appeals may begin to grant extraordinary relief in a more realistic way.

Linguistic analysis can be a helpful tool in clarifying the meaning of statements by investigating the way in which they are ordinarily used.

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52. United States v. Gale, 17 U.S.C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967). *See also* Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

53. United States v. Bevilacqua, 18 U.S.C.M.A. 10, 11-12, 39 C.M.R. 10, 11-12 (1968).

54. *See* notes 64-70 *infra*.

55. Noyd v. Bond, 395 U.S. 683 (1969).

56. United States v. Snyder, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

57. "Congress simply has not empowered this Court to vindicate all constitutional or statutory rights of a member of the armed forces at all places and in all circumstances." Petty v. Convening Authority, 20 U.S.C.M.A. 438, 443, 43 C.M.R. 278, 283 (1971) (Darden, J., dissenting).

Also illuminating is the fact that in Medina v. Resor, 20 U.S.C.M.A. 403, 406, 43 C.M.R. 243, 246 (1971), Judge Darden would have dismissed Captain Ernest Medina's petition for extraordinary relief *solely* because the relief requested was not in aid of the court's jurisdiction.

58. J. HELLER, CATCH 22 (1955).

59. S. 1127, 92nd Congress, 1st Sess. (1971) a bill introduced in the Senate by Senator Birch Bayh of Indiana, would provide for an increase from the present three judges to a total of nine judges. *Id.* at 67-71.

The approach of Ludwig Wittgenstein is appropriate: "Say what you choose, so long as it does not prevent you from seeing the facts. (and when you see them there is a good deal that you will not say.)"[60] Accordingly one can *say* that the Court of Military Appeals *has* all-writs power and jurisdiction to grant extraordinary relief in any appropriate case; yet, at the same time, that statement should not prevent realization of the fact that the court rarely uses such power. The situation is aptly illustrated by Paul van Buren's recounting of a story told by Anthony Flew, a British philosopher:

> Once upon a time two explorers came upon a clearing in the jungle. In the clearing were growing many flowers and many weeds. One explorer says, 'Some gardener must tend this plot.' The other disagrees. 'There is not gardener.' So they pitch their tents and set a watch. No gardener is ever seen. 'But perhaps he is an invisible gardener.' So they set up a barbed wire fence. They electrify it. They patrol with bloodhounds. . . . But no shrieks ever suggest that some intruder has received a shock. No movement of the wire ever betrays an invisible climber. The bloodhounds never give cry. Yet still the Believer is not convinced. 'But there is a gardener, invisible, intangible, insensible to electric shocks, a gardener who has no scent and makes no sound, a gardener who comes secretly to look after the garden which he loves.' At last the Sceptic despairs, 'But what is left of your original assertion? Just how does what you call an invisible, intangible, eternally elusive gardener differ from an imaginary gardener or even from no gardener at all?'[61]

Flew concludes: "A fine brash hypothesis may thus be killed by inches, the death of a thousand qualifications."[62] Van Buren notes that Flew's point is that the Believer has said no more than the Sceptic about "how things are."[63]

The same conclusion can be reached about the assertions by the Court of Military Appeals that it can and will grant extraordinary relief as required in any appropriate case. These assertions by the court say little about "how things are." Whatever extraordinary relief powers the court has, the "fine hypothesis" that it will vigorously employ such powers has been "killed by inches [with a] . . . death of a thousand qualifications"[64] through wholesale rejection of applications for such

60. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 79 (1953).

61. P. VAN BUREN, THE SECULAR MEANING OF THE GOSPEL BASED ON AN ANALYSIS OF ITS LANGUAGE 3 (1966).

62. A. FLEW & A. MACINTYRE, NEW ESSAYS IN PHILOSOPHICAL THEOLOGY 96 (1955).

63. P. VAN BUREN, *supra* note 61, at 4.

64. A. FLEW & A. MACINTYRE, *supra* note 62, at 96.

relief. This conclusion becomes clearer after examination of the court's performance in this area, as distinguished from its rhetoric.

In practice the court has rejected petitions for relief in numerous instances where the case was not within its jurisdiction on direct appeal. Thus, requests for relief in summary courts-martial,[65] special courts-martial without bad-conduct discharges,[66] class actions,[67] or nonjudicial punishment cases[68] will not be entertained; nor will review of administrative decisions be granted.[69] Likewise, review has been denied in cases where charges have not been preferred,[70] or in cases tried prior to the effective date of the Uniform Code of Military Justice.[71] In fact, the court grants very little extraordinary relief. During the first twenty years of its existence, it granted such relief in only four cases.[72]

Military justice, in general, tends to suffer from its own type of credibility gap when one compares its actual accomplishments with the extravagant assertions of its effectiveness made by its supporters.[73] The Court of Military Appeals is not immunized from the effects this malady, as its extraordinary relief performance clearly shows. Despite having the power to grant extraordinary relief in appropriate cases, it has been extraordinarily reluctant to do so in day-to-day practice.

Luther West, a former Army judge advocate who served for over seventeen years as a career Army legal officer, in commenting that the Court of Military Appeals is not a strong court, stated:

> For better or worse, with its judicial blinders firmly in place, it cautiously awaits formal appeals from the approximately eight percent of military cases that constitute its formal appellate jurisdiction.[74]

West concluded that the court has been particularly weak in approaching command influence cases under its extraordinary relief jurisdiction:

> The failure of the Court of Military Appeals to grant extraordinary relief in these [command influence] cases is underscored by the

65. Thomas v. United States, 19 U.S.C.M.A. 639 (1970).
66. Hyatt v. United States, 19 U.S.C.M.A. 635 (1970).
67. *In re* Watson, 19 U.S.C.M.A. 401, 42 C.M.R. 3 (1970).
68. Whalen v. Stokes, 19 U.S.C.M.A. 636 (1970).
69. Hurt v. Cooksey, 19 U.S.C.M.A. 584, 42 C.M.R. 186 (1970).
70. Thompson v. Chafee, 19 U.S.C.M.A. 631 (1970).
71. United Stated v. Homcy, 18 U.S.C.M.A. 515, 40 C.M.R. 227 (1969). In Hutson v. United States, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970) the court stated that criminal investigators should be provided to assist the defense before trial, but held that the court lacked authority to require appointment of criminal investigators for the defense.
72. Petty v. Convening Authority, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971); Collier v. United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970); Zamora v. Woodson, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970); Fleiner v. Koch, 19 U.S.C.M.A. 630 (1969).
73. Schiesser & Benson, *Modern Military Justice*, 19 CATH. L. REV. 489, 492-95 (1970).
74. West, *supra* note 5, at 136-37.

> fact that the Court of Military Appeals, during its almost twenty years of existence, has never granted extraordinary relief in *any* command influence case.[75] (emphasis original).

West attributes the court's inaction in this critical area of military law, as I do, to judicial timidity. Involved as counsel in several command influence cases in which Army petitioners sought extraordinary relief from the court, West noted:

> In these cases, where extremely well documented instances of command influence were noted, the Court of Military Appeals turned its back on the plight of each defendant involved.[76]

The four cases in which the court has granted extraordinary relief in its twenty year history are recent cases.[77] The first was decided by the court in 1969, and the most recent in 1971.[78] This fact provides some basis for the hope that perhaps the court is at last emerging from its judicial reluctance in the realm of extraordinary relief, and that it will continue to grant such relief more frequently in the future than it has in the past. West, however, has little confidence in this possibility, and has recommended that the United States courts of appeals be given specific statutory authority to entertain any extraordinary writ cases denied by the Court of Military Appeals.[79]

It is possible, as a matter of abstract legal theory, that not a single extraordinary relief case presented to the court in the first twenty years of its existence had sufficient merit to warrant granting the relief requested. Yet to anyone familiar with the realities of military justice litigation, that is an inordinately difficult conclusion to accept. By the end of 1969, the court had processed over twenty-two thousand cases on its appellate docket alone. It strains credulity to suppose that in those twenty-two thousand and more cases on the appellate docket, and in the thousands of cases that for one reason or another never reached the court for review, there was not a single instance of any erroneous action on the part of military authorities which would have justified any type of extraordinary relief. Of course, extraordinary relief petitions were not presented, and were probably not even considered, in the vast majority of the thousands of cases tried during the first twenty years of the court's

75. *Id.* at 135.
76. *Id.* at 133.
77. *Supra* note 72.
78. *Id.*
79. West, *supra* note 5, at 155-56.

operations. But the court's consistent practice of *never* granting any extraordinary relief undoubtedly discouraged many defense counsel from attempting to obtain such relief for their clients.

Blind chance may account for the fact that no extraordinary relief was granted by the court for twenty years, the reasoning presumably being that as it happened, there were no meritorious petitions presented to the court during that period. But this begins to resemble the assertions of regularity so frequently offered by jury selectors to explain the absence of jurors who are members of minority groups. Justice Frankfurter said of such explanations:

> If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose.[80]

It is difficult to resist the conclusion that the Court of Military Appeals deliberately intended to grant no extraordinary relief during the first twenty years of its existence. The court may have been convinced, during most of that time, that it did not really possess extraordinary relief powers. Or perhaps, as Luther West suggests,[81] the court was simply so out of touch with the realities of military justice that it was easily lulled into a complacent attitude toward military defendants seeking extraordinary relief. In any event, the extraordinary relief jurisdiction of the Court of Military Appeals remains a "fine brash hypothesis"[82] rather than a vigorous, effective reality at the present time.

THE COURT'S PERFORMANCE

What has just been said concerning the court's failure to exercise vigorously its extraordinary writs power, has application in the area of the court's performance generally. The assertions of those who support the court and desire to see it continue in strength and good health (as I do) must constantly be weighed against the actual facts of the court's functioning. My conclusion is that the court has not lived up to the great expectations envisioned by its supporters in the early 1950's. Moreover,

80. Cassell v. State of Texas, 399 U.S. 282, 293 (1950).

81. In discussing the inherent absurdity of the military law concept of a "fair minded" staff judge advocate who can supervise both the prosecution and the defense of a criminal case at the same time, West comments on the unrealistic attitude of the court: "There can never be such a system, especially in the military, that is 'fairly' administered, *but this fact has never kept the Court of Military Appeals from alluding to it as real.*" (emphasis added) West, *supra* note 5, at 107.

82. A. FLEW & A. MACINTYRE, *supra* note 62, at 96.

to a significant degree it has become unduly aligned with the military establishment that it was created to police. These conclusions become clearer after studying the court's performance in the area of constitutional rights and its present alignment with the military establishment.

A. Constitutional Rights of Servicemen

As previously noted, the task of describing the Court of Military Appeals is both demanding and sensitive. It would be misleading to portray the Court of Military Appeals as a champion of constitutional rights.[83] But it would be a grave disservice to the commendable progress that has been made by the court in this direction to convey the impression that the court has done nothing at all to protect the constitutional rights of servicemen. The court has extended a number of due process rights to servicemen. These include the right to confront witnesses;[84] the right to a speedy trial;[85] protection against unreasonable searches and seizures;[86] the privilege against self-incrimination;[87] the right to compulsory process;[88] and the right to pre-interrogation warnings.[89]

The problem confronting the Court of Military Appeals in protecting the constitutional rights of servicemen was recently analyzed by a military judge in *United States v. Watson*.[90] The judge rejected the authority of the Court of Military Appeals on a constitutional issue and followed instead a United States District Court decision. A subsequent review by the convening authority resulted in the military judge's decision being reversed, and the trial was required to proceed.[91] An attempt to obtain relief in a federal district court was unsuccessful.[92] In *Watson*,

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83. In United States v. Prater, 20 U.S.C.M.A. 339, 342, 43 C.M.R. 179, 182 (1971), Judge Darden stated:

> Although this Court has declared that constitutional safeguards apply to military trials except insofar as they are made inapplicable expressly or by necessary implication, the Court has not held that the due process clause of the Fifth Amendment applies *ex proprio vigore* to appellate review of military trials.

84. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

85. United States v. Schalk, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

86. United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); United States v. Nowling, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958).

87. United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

88. United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

89. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). *See* Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970).

90. 6 BNA CRIM. L. REP. 2377 (Special Court-Martial, 7th Jud. Cir., March 4, 1970).

91. This appeal was taken by the Government pursuant to the U.S. DEP'T OF DEFENSE; MANUAL FOR COURTS-MARTIAL, ¶ 67f (rev. ed. 1969).

92. Watson v. Laird, No. EP-70-CA-40 (W.D. Tex. 1970) (unreported).

the military judge noted that the Court of Military Appeals has manifested concern for the constitutional rights of servicemen even though early in its history the court clearly stated that the Uniform Code of Military Justice, rather than the Constitution, was the primary basis of its decisions.[93] The court has also shown an increasingly greater willingness through the years to apply civilian standards in determining constitutional rights. Moreover it has acknowledged a duty to follow the constitutional interpretations of the United States Supreme Court.[94] But the Court of Military Appeals has been willing to apply the Constitution to the military only "insofar as it is not made expressly or by necessary implication inapplicable to members of the armed forces."[95]

That language parallels the court's position in *United States v. Jacoby*,[96] in which the court indicated plainly that since it is a legislative court, it continues to be most sensitive to congressional limits on its authority. In any event, the court is not sufficiently independent of the legislative branch of government to insure service members the same measure of protection on constitutional issues that an article III court would provide, a general conclusion expressed in *United States ex rel. Toth v. Quarles*,[97] and in *Reid v. Covert*.[98] More recently the Supreme Court repeated its complaints about military justice in *O'Callahan v. Parker*,[99] notwithstanding the Court of Military Appeals' decisions extending some constitutional protections to servicemen.

The federal district court, whose decision the military judge in *Watson* followed, also addressed itself to this problem. It concluded that, "The federal district courts are the front lines of constitutional litigation, more suited to decision-making in the constitutional area than any of the various federal agencies or the military tribunals."[100]

Because it is a legislative court, the Court of Military Appeals follows its organic statute, the Uniform Code of Military Justice, or alternatively the congressional intent, when possible, in deciding liigation concerning the constitutional rights of service members. Only when the constitutional violation is flagrant and cannot be condoned under any conceivable theory, will the court strike down some pre-existing military practice as being a violation of a service member's constitu-

93. United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).
94. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).
95. *Id.* at 640, 37 C.M.R. at 260.
96. 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).
97. 350 U.S. 11, 17 (1955).
98. 345 U.S. 1, 19-22 (1967).
99. 395 U.S. 258 (1969).
100. Moylan v. Laird, 305 F. Supp. 551, 554 (D. R.I. 1969).

tional rights. This approach to the determination of constitutional rights is unsatisfactory, and is only compounded by the court's close ties with the military establishment.

B. Undue Alignment with the Military Establishment

It is becoming apparent, if indeed it was not clear several years ago, that to a disturbing extent the Court of Military Appeals has become unduly aligned with the very institution—the military justice establishment—that it was created to police. The parallels between the situation of the court and the Interstate Commerce Commission are striking.

Recently, the Interstate Commerce Commission has come under attack by the Center for Study of Responsive Law, headed by Ralph Nader. In Nader's Study Group Report on the Commission, written by Robert Fellmeth, the charge is made that, although the Interstate Commerce Commission was established to be a watchdog for the public interest in transportation matters, it long ago "found itself surrounded by a special interest constitutency that viewed the agency as an opportunity for protection from competition and for insulation from consumer demands."[101] The same criticism leveled at the Interstate Commerce Commission can legitimately be directed at the United States Court of Military Appeals.

The history of the Court of Military Appeals, like that of the Interstate Commerce Commission, throws light on valid criticism of the court and offers a key to understanding why the court has failed to measure up to the expectations of its creators. As two of the court's commissioners have pointed out,

> The Court is, of course, the product of a reform movement, and, as such, did not come into being overnight, but was produced by the slow-working catalyst of experience. Its roots lie in the historical development and improvement of military criminal law, a history that is marked by repeated conflicts between military commanders and interested civilians.[102]

They go on to note that when a civilian court for the review of court-martial convictions was first proposed in Congress, "it evoked immediate, vociferous and emotional reactions from those most directly concerned with military criminal law."[103]

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101. R. FELLMETH, THE INTERSTATE COMMERCE OMISSION vii (1970) [hereinafter cited as FELLMETH].

102. Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228, 229 (1953) [hereinafter cited as 6 VAND. L. REV.].

103. *Id.* 228.

The industry view of the Interstate Commerce Commission, in its infancy, was much the same as the initial military reaction to proposals for a civilian review court. In 1892, shortly after the establishment of the Interstate Commerce Commission in 1887, Charles E. Perkins, president of the Chicago, Burlington and Quincy Railroad, wrote a letter to Richard Olney, who was then the Attorney General of the United States, recommending that the Commission be abolished. Robert Fellmeth has commented that Olney's reply, although a masterpiece of impropriety, was also a masterpiece of prophecy which deserves attention in any study of the Interstate Commerce Commission.[104] Olney wrote, in part:

> The Commission . . . can be made of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that the supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests . . . . The part of wisdom is not to destroy the Commission but to utilize it.[105]

The same sort of thought, with reference to the newly created Court of Military Appeals, may have occurred to American military leaders. In any event, what is alleged to have happened to the Interstate Commerce Commission in this regard has also happened to the Court of Military Appeals in some measure. The court has been "utilized" by the military, and the older it has become, the more it has tended to "take the business and railroad view of things," as it were.

An indication of the close relationship between the court and the military is the court's attitude toward the armed services. The attitude of the court has changed since its creation, as is reflected by a close examination of the statements made by the judges themselves in the annual reports submitted pursuant to statute.[106] The reports often contain unhealthy references to the apparent approval and acceptance that the court seems to receive from time to time from the armed forces.[107] It would be difficult to imagine a report by, for example, the justices of the Supreme Court of the United States, which contained comments indicating inordinate pleasure about the degree of acceptance and ap-

104. FELLMETH xiv.
105. *Id.* xv.
106. 10 U.S.C. § 867(g) (1964).
107. 1965 ANNUAL REPORT 11-12; 1966 ANNUAL REPORT 6-7.

proval the Court's decisions were receiving from any particular segment of the population. And what is more, the Court of Military Appeals, in its annual reports, is oddly silent about the attitude of the ordinary serviceman, who, after all, is the consumer of the justice meted out by the armed forces of the United States.[108] Unfortunately, the court appears to be concerned primarily with the attitudes of the leaders of the various armed services.

In addition, the judges on occasion travel from one military installation to another, taking tours, meeting high-ranking officers, and enjoying military hospitality.[109] The desirability of this association is perhaps questionable when it is remembered that a significant and vital function of the court is to say "no," and to say it forcefully, to the armed services in case after case.

The bond between the court and the military is also reflected in its opinions. Indeed, the decisions of the court reveal that of the three judges, only Judge Homer Ferguson—who is without any prior military connection—shows any continuing, vigorous interest in seeing to it that the military is held to a rigid, uncompromising standard of correctness in the conduct of its criminal investigations and trials.[110]

Some of the court's decisions, particularly in the realm of courtroom procedures and instructions by military judges, convey the impression of an extremely paternalistic judicial system, with a great and continuing concern for even the most minute details of procedure and use of language. The court will, for example, reverse a whole string of cases for the failure of the military judge to follow a precise outline in determining from an accused and his counsel whether the pretrial advice concerning the right to representation by a lawyer was sufficiently administered to the accused.[111] But then, in some case where a true, substantive violation of an accused's rights has occurred, the court will fail to take corrective action.[112] Because of this close alignment with the

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108. Cahn, *Law in the Consumer Perspective*, 112 PA. L. REV. 1 (1963).

109. For an excellent example of the judges' travels see 1969 ANNUAL REPORT 6-9.

110. *See* note 37, *supra*.

111. United States v. Scott, 19 U.S.C.M.A. 383, 41 C.M.R. 383 (1970); United States v. Bowman, 20 U.S.C.M.A. 119, 42 C.M.R. 311 (1970); United States v. Donohew, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969); United States v. Fortier, 19 U.S.C.M.A. 149, 41 C.M.R. 149 (1969).

112. *E.g.*, United States v. Wimberley, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966) (in which an accused was inadequately defended, an insanity defense prematurely abandoned, and no evidence or argument was offered by defense counsel during the sentencing stage of the case, after which a death sentence was adjudged. Wimberley v. Laird, No. CV-71-21-D, (E.D. Ill. Sept. 28, 1971) (appeal pending United States Court of Appeals, 7th Circuit, No. 71-1810) has collaterally attacked the above decision.); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964) (in which the Court of Military Appeals sanctioned the standard Army practice of stacking a court-martial against an accused by selecting only senior noncommissioned officers as enlisted "jurors"

military viewpoint, the Court of Military Appeals is subject to justifiable criticism for its apparent inability to mete out impartial military justice.

RECOMMENDED REFORMS

Two essential changes should be made in the Court of Military Appeals. First, and by far the most critical change, the court's decisions must be made subject to review by the federal courts.[113] The best way to accomplish this, without placing an undue burden on the already heavily burdened Supreme Court, would be to provide for a review as of right of any Court of Military Appeals decision by the United States court of appeals for the circuit in which the accused is confined, presently resides (if not in confinement), or in the District of Columbia Circuit[114] in the event an accused is outside the United States. Further appeal from a court of appeals decision could be made subject to the present rules concerning appeal of any federal criminal case decision from such courts to the Supreme Court of the United States. Such a system would have the distinct advantage of providing review by the various courts of appeals in a manner which would distribute the load among them more or less equally, and such a system would also leave the way open for review by the Supreme Court if necessary. Eventually, in this way, the decisions of the Court of Military Appeals could be made to conform with federal criminal law.

Second, the Uniform Code of Military Justice should be amended

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whenever there is a request for enlisted court members); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (in which the court held that legally trained counsel are not required in special courts-martial, with Judge Kilday even going so far as to say that the sixth amendment has no applicability to courts-martial at all). *See also* Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); United States v. Gallagher, 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965); United States v. Baker, 14 U.S.C.M.A. 311, 34 C.M.R. 91 (1963). The court's failure to take corrective action in the *Crawford* case, for example, has allowed improper court-packing to continue down to the present time. *See* Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. L. REV. 171 (1966); Benson, *The Military Jury—An Unrepresentative Tribunal?*, 7 TRIAL 40 (September/October 1971).

113. Pending legislation would provide for Supreme Court review of Court of Military Appeals cases by petition for writ of certiorari. *S. 1127, supra* note 62 at 79. *See* 1969 ANNUAL REPORT 21. The Court of Military Appeals, which is not now within our system of federal courts of general jurisdiction, has been criticized as a specialized court, e.g., the terse comment of Colonel Frederick B. Wiener: "You are setting up a specialized court . . . . Now, the fact of the matter is—and I think we should face it frankly—that the appointments to the specialized courts of our judicial system haven't attracted the same sort of talent that the courts of general jurisdiction have attracted."

114. Professor Arthur John Keeffe of the Catholic University Law School has recommended that the Uniform Code of Military Justice be amended "to provide for a direct appeal from the Court of Military Appeals to the Supreme Court via the Circuit Court of Appeals for the District of Columbia." Keeffe, *Reactions to Current Legal Literature*, 56 A.B.A.J. 188, 193 (1970).

to provide for discretionary review by the Court of Military Appeals of *all* court-martial convictions, whether summary, special, or general. At present, the court is not truly the "Supreme Court" of the military since it can review only a tiny fraction of the cases that are actually tried each year by the armed forces. Numerous injustices occur in the decisions of inferior courts-martial which go uncorrected because there is no way to take the case to the Court of Military Appeals. Only in the manner suggested herein would the Court of Military Appeals be put in a position to review military cases in a manner which would enable the court to supervise the whole of military justice.

These changes would be expensive. But as the Chief Justice of the United States remarked in his first report to the nation on the state of the judiciary, the entire annual cost of the federal judicial system of the United States is less than the $200,000,000 cost of the C-5A airplane.[115] Money expended to correct our system of court-martial appellate review would be money well spent.

These are the basic reforms needed.[116] If these changes are made, the United States Court of Military Appeals may evolve into a more satisfactory criminal appellate court with powers adequate to meet its enormous responsibilities in our system of military justice.

115. Burger, *The State of the Judiciary*, 56 A.B.A.J. 929 (1970).

116. Compare proposed reforms in C. Schiesser, Military Practice and Procedure (ch. 8), (unpublished doctoral dissertation in George Washington University Library).