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FROM *O'CALLAHAN* TO *CHAPPELL*: THE BURGER COURT AND THE MILITARY

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> A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice. *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969).

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice is too obvious to require extensive discussion . . . . The inescapable demands of military discipline and obedience to orders cannot be taught on the battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. *Chappell v. Wallace*, 103 S. Ct. 2362, 2365 (1983).

I. INTRODUCTION

In 1969, the United States was deeply committed to a ground war in Southeast Asia in which the suffering and death was brought home daily to the American television viewer.[1] Distrust of the military was never higher, as the repeated assertions of the imminent collapse of the enemy had apparently been graphically belied a year earlier in the Tet Offensive.[2] As a newly elected President pledged to bring "peace with honor" to a war which seemed amenable to neither, Justice Douglas announced the decision of the Court in *O'Callahan v. Parker*.[3]

In 1983, America was at peace. It had finally honored its Vietnam veterans[4] and begun the process of rearmament in order to restore an equitable East-West military balance.[5] At a time when there was martial law in Poland,[6] were Soviet troops in Afghanistan,[7] and was a Vietnamese puppet regime in Kampuchea,[8] Chief Justice Burger authored *Chappell v. Wallace*[9] for a unanimous Court.

O'Callahan v. Parker[10] had been among the final decisions of the Warren Court; *Chappell v. Wallace*[11] is among the most recent decisions of the Burger Court. During the fourteen years of the Burger Court, from *O'Callahan* to *Chappell*, there developed a change of both the tone and the substance of the Supreme Court's attitude toward the military services. Whether in the fields of court-martial jurisdiction, individual rights, the preconditions to judicial

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1. For an account of the reporting of America's first televised war, see D. OBERDORFER, TET! (1971). For a skeptical view of the media's performance during Tet, see W. WESTMORELAND, A SOLDIER REPORTS 325 (1976).

2. *See infra* text accompanying notes 250-52.

3. 395 U.S. 258 (1969). *See infra* text accompanying notes 15-34.

4. The Vietnam Veterans Memorial, a black granite monument inscribed with the names of American service members killed or missing in action during the Vietnam era, was formally dedicated on Veterans Day, November 11, 1982. Washington Post, Nov. 12, 1982, at A1, col. 1.

5. *See, e.g.*, *The 36¢ Buck Stops Here*, TIME, Feb. 16, 1981, at 8, 10 (discussion of President Reagan's military budget); *"Teamwork Makes the Difference," id.*, Jan. 5, 1981, at 61 (interview with National Security Advisor appointee Richard Allen).

6. *See, e.g.*, *Man of the Year: He Dared to Hope, id.*, Jan. 4, 1982, at 13 (article on Solidarity leader Lech Walesa).

7. *See* H. BRADSHER, AFGHANISTAN AND THE SOVIET UNION 169-255 (1983).

8. *See, e.g.*, W. SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA 390 (1979).

9. 103 S. Ct. 2362 (1983).

10. 395 U.S. 258.

11. 103 S. Ct. 2362.

review of military activities, or the existence of a constitutional tort action by a service member against his or her commander, the Court almost uniformly deferred to the military's exercise of authority over its ranks. Although not necessarily noteworthy in themselves, the significance of these decisions is that in each case the Court, armed with substantial Warren Court precedent and a potentially persuasive rationale, could have decided otherwise.

This article will examine the trend of the Burger Court toward limiting the avenues of a litigious military member to civilian courts. The cases beginning with *O'Callahan v. Parker*,[12] and culminating with *Chappell v. Wallace*,[13] will be surveyed, with particular emphasis on the way in which the Court could have decided each case differently. Thereafter, an attempt will be made to identify some of the causes, whether in the country, the Court, or the military, which have contributed to this change. Finally, an attempt will be made to predict the result of what may be the next military case of the Burger Court.[14]

II. The Court and the Court-Martial

A. *The Legacy of the Warren Court: O'Callahan v. Parker* (1969)

Sergeant James F. O'Callahan of Fort Shafter, Territory of Hawaii, was on pass and dressed in civilian clothes when he and a companion assaulted and attempted to rape a young woman in a Waikiki beach hotel room. O'Callahan was apprehended and confessed to the offenses, for which he was tried and convicted by

12. 395 U.S. 258.

13. 103 S. Ct. 2362.

14. This article will not consider Burger Court cases which refer to the needs of the military, which essentially involve decisions made by civilian policymakers, or which involve coordinate branches of government. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (involving questions of congressional authority); Department of Air Force v. Rose, 425 U.S. 352 (1976) (involving decisions on release of information); Schlesinger v. Ballard, 419 U.S. 498 (1975) (determination of promotion policies); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (concerning questions of standing); Gilligan v. Morgan, 413 U.S. 1 (1973) (questions of congressional authority); Frontiero v. Richardson, 411 U.S. 677 (1973) (determining eligibility for dependents' benefits); Laird v. Tatum, 408 U.S. 1 (1973) (involving questions of justiciability); Strait v. Laird, 406 U.S. 341 (1972) (concerning technical considerations in a habeas corpus petition); Gillette v. United States, 401 U.S. 437 (1971) (concerning conscientious objector determination). *See generally* Beans, *Sex Discrimination in the Military*, 67 Mil. L. Rev. 19 (1975); Ellis, *Judicial Review of Promotions*, 98 Mil. L. Rev. 129 (1982); Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53 (1982).

court-martial.[15] The conviction was affirmed within the military appellate system.[16]

On writ of habeas corpus in the federal district court, O'Callahan challenged the jurisdiction of the military to try him for a nonmilitary offense committed while off-post and on pass. He was denied habeas relief by the district court,[17] and the denial was affirmed by the Third Circuit.[18] The Supreme Court granted certiorari to decide the question:

> Does a court-martial . . . have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?[19]

Having suggestively stated the issue, the Court reversed the decisions below. Writing for five justices, Justice Douglas began his analysis by noting that "[t]he Fifth Amendment specifically exempts 'cases arising *in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger' from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury."[20] Conversely, should a case be characterized as failing to arise in the land or naval forces of the United States, those constitutional provisions would be fully available to the service member. Justice Douglas concluded that offenses which bore no relation to the accused's military duties and which occurred in a jurisdiction where civilian courts in which the rights to indictment by grand jury and trial by petit jury were honored, were not "service connected" and, therefore, did not fall within the

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15. 395 U.S. 258, 259-60.

16. O'Callahan was sentenced to a dishonorable discharge from the service, forfeiture of all pay and allowances, and confinement at hard labor for ten years. He appealed to the Army Board of Review, a panel consisting of three military attorneys, which affirmed his conviction. A petition for review by the United States Court of Millitary Appeals, a three-judge panel consisting of civilians, was denied. United States v. O'Callahan, 7 C.M.A. 800 (1957).

17. United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966), *aff'd*, 390 F.2d 360 (3d Cir. 1968), *rev'd*, 395 U.S. 258 (1969).

18. United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968), *rev'd*, 395 U.S. 258 (1969).

19. 393 U.S. 822, 822 (1968).

20. O'Callahan v. Parker, 395 U.S. 258, 261 (1969) (quoting U.S. CONST. amend. V) (emphasis in *O'Callahan*).

specific exemption of the fifth amendment.[21] Consequently, O'Callahan "could not be tried by court-martial but rather was entitled to trial by the civilian courts."[22]

As controversial as the holding was considered at the time,[23] the language of the opinion was perhaps a greater shock to the defenders of the military justice system. Justice Douglas, obviously concerned by both the appearance and presumed actuality of command influence over the supposedly neutral court-martial personnel, wrote that a "court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."[24] Notwithstanding that a three-member civilian panel oversees the court-martial system, the Court determined that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[25] The Court also cited with approval the quotation: "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice."[26]

Perhaps this thorough indictment of military justice was necessary to support Justice Douglas' view, for it was not supported by precedent and language emanating from the Supreme Court. As

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21. 395 U.S. at 261.

22. *Id.* at 274.

23. For example, then Professor of Law at the Duke University Law School and current Chief Judge of the Court of Military Appeals, Robinson O. Everett, wrote that "the majority opinion in *O'Callahan* must be viewed as a triumph of abstract concept over practical realities" and should be promptly overruled. Everett, O'Callahan v. Parker—*Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853, 867. *See also* Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of* O'Callahan v. Parker, 54 MINN. L. REV. 1 (1969); Rice, O'Callahan v. Parker*: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41 (1971); Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction:* O'Callahan v. Parker, 9 WASHBURN L.J. 193 (1970). *O'Callahan* was praised as well. *See, e.g.*, McCoy, *Equal Justice for Serviceman: The Situation Before and Since* O'Callahan v. Parker, 16 N.Y.L.F. 1 (1970).

24. 395 U.S. at 265 (footnote omitted). Justice Douglas referred to instances of abuses detailed before a Senate Subcommittee on Constitutional Rights. It did not appear persuasive to him that the Court of Military Appeals had reversed the convictions in each case, thus demonstrating a self-corrective ability within the military justice system as a whole. *See id.* at 264 n.5.

25. *Id.* at 265.

26. *Id.* at 266 (quoting Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969)). *But see infra* text accompanying notes 180-206. For a contrary view of the protections afforded a military accused, see Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 MIL. L. REV. 1 (1971).

noted by the dissent, military status alone had heretofore been the sole predicate for amenability to court-martial jurisdiction.[27] In *Coleman v. Tennessee*,[28] a case which denied a state jurisdiction to try a service member of an occupying army following the Civil War, the Court stated:

> As Congress is expressly authorized by the Constitution "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization, and government of the national armies, *including therein the punishment of offenses committed by persons in the military service*, would seem to be plenary.[29]

In *Kinsella v. United States ex rel. Singleton*,[30] a case which refused to permit court-martial jurisdiction over civilian dependents accompanying the armed forces overseas, the Court found that "[t]he test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces . . . .' "[31] Thus, under the *Coleman* test, Congress had the constitutional authority to permit the trial by court-martial of service members for *all* offenses, while under the *Singleton* test, one's status as a member of the military service was the sole test for amenability to military jurisdiction. O'Callahan clearly met the latter requirement.

In *O'Callahan*, Justice Douglas reached back into British and American practice in an attempt to justify his result. While conceding that the "practice was not altogether consistent,"[32] he found the military courts were loathe to try service members for other than military offenses and, when such courts-martial did take place, the convictions obtained for purely civil offenses were occasionally set aside by the reviewing authority.[33] The dissent

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27. 395 U.S. at 275.

28. 97 U.S. 509 (1878).

29. *Id.* at 514. The argument that court-martial jurisdiction had historically been based upon military status alone formed the basis of Justice Harlan's dissent, in which Justices Stewart and White joined. *O'Callahan*, 395 U.S. at 274-76 (Harlan, J., dissenting).

30. 361 U.S. 234 (1960).

31. *Id.* at 240-41 (emphasis added).

32. 395 U.S. at 271.

33. *Id.* (citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 1124 nn.82 & 88 (2d ed. 1896)). Of course, to reach the stage of conviction, jurisdiction would have to have been

took issue with this historical review and added important governmental interests which would tend to justify jurisdiction over even nonmilitary crimes.[34] Nonetheless, when the dust had settled, military courts-martial had been stripped of subject matter jurisdiction over offenses which lacked a demonstrable service connection. This denial of jurisdiction, together with the corresponding derogation of military law and procedures by the majority, was the legacy of the Warren Court to the United States armed forces.

B. *The Burger Court Debuts:* Relford v. Commandant (1971)

Less than two years after *O'Callahan,* the Burger Court was presented with an opportunity to refine or overrule that decision in *Relford v. Commandant.*[35] In *Relford,* the accused was tried and convicted by court-martial in 1961 for kidnapping and raping two women on the grounds of Fort Dix and the adjacent McGuire Air Force Base, New Jersey. After exhausting his military appeals, Relford sought and was denied habeas corpus relief in the federal courts.[36]

On petition for writ of certiorari to the Supreme Court, Relford asserted that the service connection mandated by *O'Callahan* "demands that the crime itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action."[37] Under this view, the admittedly nonmilitary offences of rape and kidnapping, albeit occurring on a military installation, assume no special military significance; the same standard of conduct is required of the civilian citizens of the state

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found at the outset of the case. For a different view of the history of military court-martial jurisdiction, see Rice, *supra* note 23, at 47-54.

34. Justice Harlan noted that military prosecution of service members for both civil and military offenses served to foster military discipline, to discourage offenses against civilian society which might tend to bring the services into discredit, and to rehabilitate the soldier and return him to active duty. 395 U.S. at 274, 281-83 (Harlan, J., dissenting). Moreover, relegation of a service member to the custody of civil authorities, even if the accused were released on bail, would render the soldier incapable of deployment with his military unit. *Id.* at 282-83. Some of the justifications for the assertion of military jurisdiction over off-post offenses advanced by Justice Harlan have recently been echoed by the Court of Military Appeals. *See* United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983), *discussed in* Criminal Law Division, The Judge Advocate General's School, *Significant Decisions of the Court of Military Appeals, 1982-1983,* 103 MIL. L. REV. 79, 80 (1984).

35. 401 U.S. 355 (1971).

36. *Id.* at 360.

37. *Id.* at 363.

of New Jersey, in the courts of which Relford argued that he ought to have been tried.

The Court, through Justice Blackmun,[38] rejected this argument and instead offered what one commentator has labeled "an exegesis of its *O'Callahan* decision."[39] Noting that, in *O'Callahan*, the offense over which jurisdiction had been denied took place off-post and "did not involve any question of . . . the security of a military post,"[40] the Court identified twelve factors which had borne on the issue of the service connection:

> 1. The serviceman's proper absence from the base.
> 2. The crime's commission away from the base.
> 3. Its commission at a place not under military control.
> 4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
> 5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
> 6. The absence of any connection between the defendant's military duties and the crime.
> 7. The victim's not being engaged in the performance of any duty relating to the military.
> 8. The presence and availability of a civilian court in which the case can be prosecuted.
> 9. The absence of any flouting of military authority.
> 10. The absence of any threat to a military post.
> 11. The absence of any violation of military property.
> One might add still another factor implicit in the others:
> 12. The offense's being among those traditionally prosecuted in civilian courts.[41]

The Court found that factors 4, 5, 6, 8, 9, 11, and 12 tended to weigh in Relford's favor; factors 1, 2, 3, 7, and 10 weighed against him.[42] The latter factors, however, coupled with the essential, obvious, historical, and perhaps uniquely military interest[43] in main-

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38. *Id.* at 355. Justice Blackmun, having been appointed to the Court in late 1969, had not participated in the *O'Callahan* decision.

39. Cooper, O'Callahan *Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 165 (1977).

40. *Relford*, 401 U.S. at 365 (quoting *O'Callahan*, 395 U.S. at 273-74).

41. 401 U.S. at 365.

42. *Id.* at 366-67.

43. The Court acknowledged "[t]he distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community." *Id.* at

taining the security of the post for those who occupy it led the Court to hold that "a serviceman's crime against the person of an individual upon the base or against property on the base is 'service connected' within the meaning of that requirement as specified in *O'Callahan.*"[44]The Court concluded by expressing its hope that *Relford* would eliminate a degree of the confusion fostered by the sweeping language of *O'Callahan.*[45]

It does not strain credulity to suppose that the Court could have held the other way. A panel that, less than twenty months earlier, had expatiated at length upon the "travesties"[46] and "retributive justice"[47] practiced under the guise of "so-called military justice"[48] might well have relegated to the civilian courts Relford's nonmilitary and off-duty offenses committed against civilians. It could be argued that it had been fortuitous that Relford had found his victims at Fort Dix and not in a town in New Jersey. Indeed, it would be in the interests of state authorities to prosecute and imprison this rapist in order to prevent his next attack from occurring within their bailiwick. Mindful of the criticism of *O'Callahan,* cited at length in *Relford,*[49] however, the Court declined to so rule.

The significance of *Relford* to military court-martial jurisdiction, however, lies in the concededly nonexclusive listing[50] of the factors that impelled the *O'Callahan* decision. Following *O'Callahan,* the Court of Military Appeals declared that court-martial jurisdiction existed over offenses committed by service members outside the territorial limits of the United States[51] and over petty offenses;[52] in both cases, the right to grand jury indictment and to trial by petit

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367-68.

44. *Id.* at 369.

45. *Id.* at 370.

46. O'Callahan v. Parker, 395 U.S. 258, 266 (1969).

47. *Id.*

48. *Id.* at 266 n.7.

49. 401 U.S. at 357 n.3. While trial of service members for offenses committed on a military installation may be alien to the American practice, the West German Grundgesetz (Constitution) prohibits the peacetime creation of military courts, except in territories outside the Federal Republic and on warships. GG art. 96a (W. Ger.). German soldiers are therefore routinely tried in civilian courts. *See generally* Krueger-Sprengel, *The German Military Legal System,* 57 MIL. L. REV. 17, 19-20 (1972).

50. 401 U.S. at 365. "*O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time." *Id.* at 369.

51. United States v. Keaton, 19 C.M.A. 64, 41 C.M.R. 64 (1969).

52. United States v. Sharkey, 19 C.M.A. 26, 41 C.M.R. 26 (1969).

jury were lacking. After *Relford*, an on-post exception to the rule of *O'Callahan* was acknowledged: If any portion of the activity surrounding an offense, such as the negotiation or arrangement of a drug transaction that would take place off-post, could be proven to have occurred on a military installation, jurisdiction would be found.[53] Most recently, seizing upon the language of *Relford* that the Court had therein marked "an area, perhaps not the limit, where the court-martial jurisdiction is appropriate and permissible,"[54] and noting the potentially destructive impact of widespread drug usage upon the military mission, the Court of Military Appeals held in *United States v. Trottier*[55] that "almost every involvement of service personnel with the commerce in drugs is 'service connected.' "[56] The intermediate military courts of review have taken this holding to mean that off-post drug usage,[57] and perhaps even mere possession,[58] are service connected. Neither the post-*O'Callahan* nor post-*Relford* assertions of court-martial jurisdiction have reached the Supreme Court.[59]

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53. *See, e.g.*, United States v. Cornell, 9 M.J. 98 (C.M.A. 1980); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979); United States v. Carr, 7 M.J. 339 (C.M.A. 1979); United States v. Hardin, 7 M.J. 399 (C.M.A. 1979); United States v. Cruz, 5 M.J. 286 (C.M.A. 1978).

54. 401 U.S. at 369.

55. 9 M.J. 337 (C.M.A. 1980).

56. *Id.* at 350 (footnote omitted). For a discussion of *Trottier* and its implications, see Schutz, Trottier *and the War Against Drugs: An Update*, THE ARMY LAW., Feb. 1983, at 20.

57. United States v. Brace, 11 M.J. 794 (A.F.C.M.R.), *petition denied*, 12 M.J. 109 (C.M.A. 1981); United States v. Lange, 11 M.J. 884 (A.F.C.M.R.), *petition denied*, 12 M.J. 318 (C.M.A. 1981). The Court of Military Appeals, beyond denying review in *Brace* and *Lange*, has recently sanctioned a prosecution for off-post drug usage, at least where metabolites of the drug are discovered by urinalysis in the accused's system upon his return to military duties. Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

58. On petition by the government for extraordinary relief from a military judge's dismissal of a charge of off-post possession for want of subject matter jurisdiction, the Navy-Marine Corps Court of Military Review refused relief, even though the panel "would disagree" with the trial judge's decision. United States v. Labella, 14 M.J. 688, 689-90 (N.C.M.C.M.R. 1982), *aff'd*, 15 M.J. 228 (C.M.A. 1983). The Coast Guard Court of Military Review has declined to find jurisdiction in such a case. United States v. Barton, 11 M.J. 621 (C.G.C.M.R.), *petition denied*, 11 M.J. 461 (C.M.A. 1981).

59. Military decisions have not reached the United States Supreme Court by either appeal or writ of certiorari. Noyd v. Bond, 395 U.S. 683 (1969); *Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863). Rather, some military cases have entered the federal system by petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1976). *See* United States v. Augenblick, 393 U.S. 348 (1969); Burns v. Wilson, 346 U.S. 137 (1953); Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). Other cases have reached the federal system by suits for backpay. *See* Runkle v. United States, 122 U.S. 543 (1887); Werner v. United States, 206 Ct. Cl. 719, *cert. denied*, 423 U.S. 911 (1975). *See generally* Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40 (1961); Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1 (1974); Weckstein, *Federal Court Review of Courts-Martial*

C. *A Revisionist View of* O'Callahan: Gosa v. Mayden (1973)

Although certiorari had been granted in *Relford* to answer the question of whether *O'Callahan* would be retroactively applied, the *Relford* Court expressly left that question for another day.[60] Two years later, in *Gosa v. Mayden*,[61] recognizing that *O'Callahan* had been "a clear break with the past,"[62] the Court refused to accord the decision retroactive application.

The case was a consolidation of two procedurally different actions. In *Gosa v. Mayden*, the accused, an airman, had been tried and convicted by court-martial in 1966 of rape committed off-base, while the defendant was on leave. After *O'Callahan* was decided, he sought a writ of habeas corpus in federal court. Both the district court[63] and the Fifth Circuit[64] denied relief and declined to apply *O'Callahan* retroactively.

In *Warner v. Flemings*,[65] the accused, absent without authority from his military unit in 1944, was apprehended in a stolen automobile in the civilian community. He was convicted by court-martial of both the unauthorized absence and larceny. Inter alia, a punitive discharge and confinement were given.[66] Relying on *O'Callahan*, Flemings filed suit to compel the Secretary of the Navy to correct his military records by upgrading the punitive discharge and setting aside the conviction. Unlike the Court's decision

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Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities, 54 MIL. L. REV. 1 (1971); Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380 (1966); Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 COLUM. L. REV. 1259 (1969). Section 10 of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1397, 1405 (codified at 28 U.S.C. § 1259), altered this tortured course of review by permitting a petition for certiorari to be filed with the Supreme Court in cases finally decided by the Court of Military Appeals.

60. "We recognize that the retroactivity question has important dimensions, both direct and collateral. . . . We have concluded, however, that the issue is better resolved in other litigation where, perhaps, it would be solely dispositive of the case." Relford v. Commandant, 401 U.S. 355, 370 (1971).

61. 413 U.S. 665 (1973).

62. *Id.* at 672 (quoting Desist v. United States, 394 U.S. 244, 248 (1969)).

63. 305 F. Supp. 1186 (N.D. Fla. 1969), *aff'd*, 450 F.2d 753 (5th Cir. 1971), *aff'd*, 413 U.S. 665 (1973).

64. 450 F.2d 753 (5th Cir. 1971), *aff'd*, 413 U.S. 665 (1973).

65. 413 U.S. 665 (1973), *rev'g* United States *ex rel.* Flemings v. Chafee, 458 F.2d 544 (2d Cir. 1972).

66. United States *ex rel.* Flemings v. Chafee, 330 F. Supp. 193, 194 (E.D.N.Y. 1971), *aff'd*, 458 F.2d 544 (2d Cir. 1972), *rev'd sub nom.* Warner v. Flemings, 413 U.S. 665 (1973). Flemings was sentenced to be dishonorably discharged from the service, confined at hard labor for three years, and reduced to the rank of seaman apprentice. 413 U.S. at 671.

in *Gosa*, both the district court[67] and the Second Circuit[68] granted the requested relief and determined that *O'Callahan* should be applied retroactively to expunge the conviction for the non-service-connected offense. The Supreme Court granted certiorari in both cases to resolve the conflict among the circuits.[69]

In an opinion in which Chief Justice Burger and Justices White and Powell joined,[70] Justice Blackmun, the author of *Relford*, began by downplaying Justice Douglas's condemnation of the military justice system in *O'Callahan*:

> 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 non-service-connected crime was so unfair as to be void *ab initio*.[71]

Despite the purportedly longstanding British and American tradition and practice recounted by Justice Douglas in his decision, *O'Callahan* was deemed to have announced "a newly recognized constitutional principle."[72]

After so characterizing the *O'Callahan* decision, the Court applied the three-part test of *Stovall v. Denno*[73] to determine whether *O'Callahan* should be given retrospective effect. The test required judicial scrutiny of "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new stan-

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67. 330 F. Supp. 193 (E.D.N.Y. 1971).

68. 458 F.2d 544 (2d Cir. 1972).

69. Warner v. Flemings, 407 U.S. 919 (1972); Gosa v. Mayden, 407 U.S. 920 (1972).

70. 413 U.S. 665. Justice Rehnquist concurred. In *Gosa*, he would overrule *O'Callahan*; in *Flemings*, he would find any offense committed by a service member during wartime to be service connected. *Id.* at 692 (Rehnquist, J., concurring). Justice Douglas concurred for the same reason in *Flemings*, but would have heard argument in *Gosa* concerning whether Gosa's belated plea of lack of subject matter jurisdiction was barred by the doctrine of res judicata. *Id.* at 686 (Douglas, J., concurring in part).

71. *Id.* at 675.

72. *Id.* Earlier in the opinion, Justice Blackmun recounted the very cases relied upon by the dissent in *O'Callahan*. *Id.* at 673 (citing Kinsella v. Singleton, 361 U.S. 234, 240-41 (1960); Reid v. Covert, 354 U.S. 1, 22-23 (1957); Grafton v. United States, 206 U.S. 333, 348 (1907); Johnson v. Sayre, 158 U.S. 109, 114 (1895); Coleman v. Tennessee, 97 U.S. 509 (1879); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866)).

73. 388 U.S. 293 (1967).

dards."[74] The Court concluded that all three factors favored only a prospective application of *O'Callahan.*

A new constitutional rule usually will be given retroactive application only if the old rule has "substantially impaired the truth-finding process . . . ."[75] The Court found that *O'Callahan*'s denial of court-martial jurisdiction over non-service-connected offenses was not due to a distrust of the "truth-finding process" of courts-martial:

> Although the opinion in *O'Callahan* was not uncritical of the military system of justice, and stressed possible command influence and the lack of procedural safeguards, . . . the decision there . . . certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process. Indeed, our subsequent ruling in *Relford* itself indicates our conclusion that military criminal proceedings are not basically unfair, for *Relford* clearly approves prosecution in a military court, of what is otherwise a civilian crime, when factors are present that establish the offense's "service connection."[76]

Concerning the military's reliance upon the old standard of court-martial jurisdiction, the Court acknowledged that the previous standard had been one of "the military status of the defendant and was not dependent on the situs or nature of the offense."[77] Consequently, the "clear break with the past" of *O'Callahan* also favored prospectivity.[78]

Finally, the Court determined that the orderly administration of justice would be upset if every pre-*O'Callahan* prosecution were to be called into question on the issue of service connection, particularly where "there is no significant question concerning the accuracy of the process by which the judgment was rendered or, in other words, when essential justice is not involved."[79] The invalidation of all pre-*O'Callahan* convictions for non-service-connected offenses would require either the release or retrial of the defen-

74. *Gosa*, 413 U.S. at 679 (quoting *Stovall*, 388 U.S. at 297).

75. *Gosa*, 413 U.S. at 680.

76. *Id.* at 680-81 (citations omitted).

77. *Id.* at 682.

78. Indeed, "[t]he military is not to be faulted for its reliance on the law as it stood before *O'Callahan* and not anticipating the 'clear break with the past' that *O'Callahan* entailed." *Id.*

79. *Id.* at 685.

dants at times when witnesses and physical evidence may have disappeared or, at the very least, memories have surely dimmed.[80] Consequently, *O'Callahan* would be applied only prospectively. *Gosa v. Mayden* was affirmed; *Warner v. Flemings* was reversed.[81]

Justice Marshall's dissent, however, highlighted the weak link in Justice Blackmun's reasoning, his characterization of *O'Callahan* as a new constitutional rule, in sharp contrast to the language of *O'Callahan* itself:

> I am unable to agree with the plurality's characterization of *O'Callahan*. In my view, it can only be understood as a decision dealing with the constitutional limits of the military's adjudicatory power over offenses committed by servicemen. No decision could more plainly involve the limits of a tribunal's power to exercise jurisdiction over particular offenses and thus more clearly demand retroactive application.[82]

For the dissenters, the three-pronged *Stovall* test was inapplicable for "*O'Callahan* did not mark a sharp, new departure from prior law."[83] Tracing a line of post-World War II cases in which the military had progressively been denied court-martial jurisdiction over discharged service members,[84] dependents accompanying the military overseas,[85] and overseas civilian employees of the armed forces,[86] Justice Marshall concluded that *O'Callahan* was not the dramatic departure described by Justice Blackmun.[87] Indeed, Marshall cited a 1955 agreement between the Departments of Justice and Defense in which the boundary of the military installation limited the investigation and prosecution of violations of

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80. *Id.* Moreover, the records of the pre-*O'Callahan* courts-martial would likely be devoid of evidence of service connection; before June 1969, service connection was not an issue thought litigable. Finally, if non-service-connected convictions were invalidated, a vast array of collateral matters, such as backpay, eligibility for veterans' benefits, retirement, and pension rights, would become subjects of litigation. *Id.* at 683.

81. *Id.* at 686.

82. *Id.* at 694. (Marshall, J., dissenting). Justice Marshall found implicit in the plurality's determination to cast *O'Callahan* in a mold other than that of jurisdictional competency a concession that, were *O'Callahan* purely jurisdictional, it would be entitled to retroactive application. *Id.* at 693-94 (Marshall, J., dissenting).

83. *Id.* at 704 (Marshall, J., dissenting).

84. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

85. Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

86. Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960).

87. Justice Marshall asserted that "these cases and *O'Callahan* clearly were all pieces of the same cloth." *Gosa*, 413 U.S. at 706 (Marshall, J., dissenting).

federal law by service members. The Defense Department would investigate and prosecute on-post offenses; the Justice Department would investigate and prosecute off-post offenses.[88] Thus, although merely as a matter of accommodation and involving only violations of federal law, a rudimentary requirement of "service connection" had been adopted within the federal departments fourteen years prior to *O'Callahan*. Consequently, Justice Marshall doubted that "retroactive application [of *O'Callahan*] would do substantial violence to any legitimate, official reliance upon prior law . . . ."[89]

The affirmance of the conviction in *Warner v. Flemings* was not unexpected; the larceny had taken place during wartime, while the accused was absent from his unit without authority. In his concurrence, Justice Stewart found those facts alone to be dispositive.[90] *Gosa v. Mayden*, however, involved an off-post off-duty sexual assault virtually identical to that in *O'Callahan*.[91] This similarity did not go unnoticed. Justice Rehnquist would have overruled *O'Callahan*;[92] and Justice Stewart, although continuing to believe that *O'Callahan* had been wrongly decided, would have reversed *Gosa v. Mayden* unless *O'Callahan* were overruled.[93] At a minimum, *Gosa v. Mayden* presented the Court with an opportunity to recharacterize *O'Callahan* as a new and unexpected development in the law, rather than as evolutionary and inevitable. Declining to reverse itself within only four years, the Court instead noted the harsh language of Justice Douglas and exempted decades of non-service-connected prosecutions from the rule of *O'Callahan*.

D. *The Abstention Doctrine in Courts-Martial:* Schlesinger v. Councilman (1975)

After *Relford* had determined that *O'Callahan* would not be applied to on-post offenses and after *Gosa v. Mayden* had declined to render *O'Callahan* retrospective, the Court in *Schlesinger v. Coun-*

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88. *Id.* (citing Memorandum of Understanding Between the Dep'ts of Justice and Defense Relating to Prosecution of Crimes Over Which the Two Dep'ts have Concurrent Jurisdiction (July 19, 1955)). This memorandum still provides the foundation for interdepartmental allocation of authority. *See* Manual for Courts-Martial, United States, 1984, app. 3.

89. 413 U.S. at 706 (Marshall, J., dissenting) (footnote omitted).

90. *Id.* at 693 (Stewart, J., concurring in *Flemings*).

91. In *O'Callahan*, the offense was attempted rape, 395 U.S. 258, 260 (1969); in *Gosa*, it was rape, 413 U.S. at 669.

92. 413 U.S. at 692 (Rehnquist, J., concurring).

93. *Id.* at 693 (Stewart, J., dissenting in *Gosa*).

cilman[94] determined that the integrity of the court-martial and military appellate processes ought to be respected and that the federal courts should not prematurely intrude in order to impose their particular notions of "service connection" under *O'Callahan.*

Captain Bruce R. Councilman had been apprehended for the off-post sale and transfer of marijuana to an undercover military investigator. When the case proceeded to trial, Councilman moved to dismiss the charges against him for lack of subject matter jurisdiction under *O'Callahan.*[95] After an evidentiary hearing, the military judge denied the motion. Prior to the scheduled trial date, Councilman sought a temporary restraining order and preliminary injunction to prevent his court-martial, alleging that he would suffer "great and irreparable damage" were his military trial for a non-service-connected offense to go forward. Both the district court and the Tenth Circuit agreed, and the court-martial was enjoined.[96]

The Supreme Court reversed. Citing *Younger v. Harris,*[97] a case mandating federal abstention from ongoing state criminal proceedings, Justice Powell analogized a military court-martial to both state prosecutions and federal administrative proceedings. In the former situation, under notions of federalism, the federal courts will stay their equitable powers until the case has run its course in the state system. Despite allegations of "great and irreparable damage," such cases actually threaten the accused with no "injury other than that incidental to every criminal proceeding brought lawfully and in good faith."[98] Similarly, in the case of federal administrative proceedings, the exhaustion of remedies doctrine requires the applicant to pursue all administrative avenues prior to bringing suit in federal court. This doctrine permits administrative bodies "to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors . . . . [W]hatever judicial review is available will be informed and narrowed by the agencies' own decisions."[99]

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94. 420 U.S. 738 (1975), *rev'g* Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973).

95. Motions in bar of trial are made to the military judge in the absence of the court-members. Uniform Code of Military Justice, art. 39(a), 10 U.S.C. § 839(A) (1982).

96. Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), *rev'd sub nom.* Schlesinger v. Councilman, 420 U.S. 738 (1975).

97. 401 U.S. 37 (1971). *See infra* text accompanying notes 310-15.

98. 420 U.S. at 754 (quoting Douglas v. City of Jeanette, 319 U.S. 157, 164 (1943)).

99. Schlesinger v. Councilman, 420 U.S. at 756. One commentator has suggested that an additional consideration was the Court's desire to alleviate the caseload of federal district

Abstention by federal courts from a pending court-martial proceeding recognizes the specialized nature of military society which requires "respect for duty and a discipline without counterpart in civilian life."[100] Justice Powell left untouched the congressional scheme whereby members of the military are tried by "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges . . . who . . . gain over time thorough familiarity with military problems."[101] Review in the federal courts, whether by petition for a writ of habeas corpus[102] or suit for backpay,[103] is ultimately available. Justice Powell distinguished earlier cases in which federal intervention into court-martial proceedings had been permitted because each of these cases had involved civilians, over whom military jurisdiction was clearly lacking.[104] As a captain on active duty in the armed forces, Councilman could not lay claim to those precedents. Accordingly, the military process ought not to have been interrupted by the federal courts in this case.

Justices Brennan, Douglas, and Marshall would have granted the relief sought. In rejecting the applicability of the abstention doctrine, the dissent failed to discern "any special 'expertise of the military courts,' including the Court of Military Appeals, that even approximates the far greater expertise of civilian courts in the determination of constitutional questions of jurisdiction."[105] Justice Brennan observed that the offense was not uniquely military, but "a common everyday type of drug offense that federal courts encounter all over the country every day."[106] After citing a series of decisions in which the Court of Military Appeals uniformly found jurisdiction over off-post drug offenses,[107] the dissent viewed the

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courts. Everett, *Military Justice in the Wake of* Parker v. Levy, 67 MIL. L. REV. 1, 9 (1975).

100. 420 U.S. at 757.

101. *Id.* at 758 (citations omitted).

102. *See, e.g.*, Noyd v. Bond, 395 U.S. 683 (1969).

103. *See, e.g.*, Runkle v. United States, 122 U.S. 543 (1887).

104. 420 U.S. at 759 (citing McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (civilian employee); Reid v. Covert, 354 U.S. 1 (1957) (dependent); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (discharged serviceman)).

105. 420 U.S. at 763 (Brennan, J., dissenting).

106. *Id.* at 764 (Brennan, J., dissenting). A few sentences later, the dissent echoed *O'Callahan*: "It is virtually hornbook law that 'courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.'" *Id.* at 765 (Brennan, J., dissenting) (quoting O'Callahan v. Parker, 395 U.S. 258, 265 (1969)).

107. 420 U.S. at 766 (Brennan, J., dissenting). In this view, the dissent was, at the time, correct. In United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969), the Court of Military Appeals adopted a per se rule of service connection for offenses by service members

requirement of exhaustion as a futile exercise.[108]

Examining the jurisdictional issue, Justice Brennan applied the twelve *Relford* factors[109] and failed to perceive any evidence of special military interest in the case.[110]

The significance of *Schlesinger v. Councilman* lies in both the tone and the import of the decision. In terms far from the derogatory language of *O'Callahan*, the majority accorded the military justice system in general, and the Court of Military Appeals in particular, a specialized role akin to that of both state court systems and federal administrative agencies. Additionally, the Court moved to protect the integrity of this system. Absent a gross abuse of the court-martial process, such as the trial of a civilian, the federal courts were forbidden from intruding upon the military justice system. Whatever "travesties" might occur within the system would be reviewable only by collateral attack after an exhaustion of military appeals.

E. *Validating the Summary Court-Martial:* Middendorf v. Henry (1976)

In *O'Callahan*, the Warren Court had dwelt upon the differences between a military court-martial and a civilian trial to the detri-

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involving drugs. In 1976, however, the court abrogated this rule and opted instead to study each case individually for a service connection with the post. United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976). *See supra* note 53 and accompanying text. This ad hoc approach has produced some absurd results. Jurisdiction has been sustained, for example, over a drug sale which occurred miles from the post, because some discussion of the offense had taken place on the post. *See* United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979). On the other hand, court-martial jurisdiction has been denied for a drug sale which took place on an "isle" of civilian property completely surrounded by Fort Belvoir, Virginia, only yards from the installation. (Whether by land or air, the drugs inevitably would have been transported onto Fort Belvoir.) United States v. Klink, 5 M.J. 404 (C.M.A. 1978) (per curiam). More recently, however, in recognition of the gravity of the drug problem in the armed forces, the Court of Military Appeals has virtually, if not admittedly, returned to a per se rule of jurisdiction. *See* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

108. 420 U.S. at 766 (Brennan, J., dissenting) (citing United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 929 n.4. (D.C. Cir. 1958), *aff'd*, 361 U.S. 281 (1960)).

109. 401 U.S. at 365 (Brennan, J., dissenting). *See supra* text accompanying note 41.

110. Perhaps this conclusion could have been avoided by a better development of the record at the Article 39(a) session at the accused's court-martial, for Justice Brennan wrote: "[T]he record is devoid of any evidence whatever that use of marijuana in any amounts under any circumstances adversely affects a serviceman's performance of his duties. Whatever might be the judgment of medical, psychological, and sociological research in these particulars, none was introduced in this record." 420 U.S. at 769 (Brennan, J., dissenting).

ment of the military justice system. In *Middendorf v. Henry*,[111] the Burger Court used the same distinction to permit the denial of counsel to an accused tried before the most unique of military tribunals, the summary court-martial.

A summary court-martial is a trial of enlisted personnel before a court consisting of a single officer who essentially serves as prosecutor, defense counsel, judge, and jury.[112] The summary court officer is obligated to advise the accused of his rights in the proceeding, including the right to remain silent, the right to have witnesses summoned on his behalf, the right to cross-examine witnesses who testify against him, and, most significantly, the right to decline trial by summary court-martial.[113] Upon a refusal of consent by the accused to trial by summary court-martial, the case is returned to the convening authority,[114] who determines whether the case should be pursued to a higher level of court-martial.[115]

If a summary court-martial proceeds to trial, the summary court officer must call all witnesses listed by the government[116] or re-

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111. 425 U.S. 25 (1976).

112. Uniform Code of Military Justice, art. 16, 10 U.S.C. § 816(3) (1982).

113. Uniform Code of Military Justice, art. 20, 10 U.S.C. § 820 (1982). This last provision was added by the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1334 (1968) (codified in scattered sections of 10 U.S.C.), which became effective after the *O'Callahan* decision. *See infra* text accompanying note 285. For a "script" for procedures at a summary court-martial, see U.S. DEP'T OF ARMY, PAMPHLET NO. 27-7, MILITARY JUSTICE HANDBOOK: GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (1982).

114. The "convening authority" is the person who initially directed that the charges proceed to trial. Designation of the individual who may convene a summary court-martial is found in the Uniform Code of Military Justice, art. 24, 10 U.S.C. § 824 (1982).

115. At a special or general court-martial, the potential penalties may be more severe, but the accused is afforded more rights. For example, the accused has a choice of counsel, who may be appointed or requested, military or civilian. Uniform Code of Military Justice, art. 38, 10 U.S.C. § 838 (1982). The accused also has a choice of trial before a court consisting entirely of officers or, if the accused is an enlisted member, of at least one-third enlisted membership. Uniform Code of Military Justice, art. 25, 10 U.S.C. § 825 (1982). The trial also may be before a military judge alone. Uniform Code of Military Justice, art. 16, 10 U.S.C. § 816 (1982). Additionally, as in civilian courts, the accused has a right of compulsory process and confrontation, Uniform Code of Military Justice, art. 46, 10 U.S.C. § 846 (1982), and to remain silent at trial, Uniform Code of Military Justice, art. 31, 10 U.S.C. § 831 (1982).

The case may be disposed of in other ways. For example, the accused may be made subject to administrative discharge proceedings. *See, e.g.*, U.S. Dep't of Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, chs. 13, 14 (Oct. 1, 1982). Or the accused may be reprimanded or admonished, either orally or in writing. *See, e.g.*, U.S. Dep't of Army Reg. No. 600-37, Personnel—General—Unfavorable Information, ch. 2 (Nov. 15, 1980). Remedial training is also a command option. *See* Kaczynski, *The School of the Soldier: Remedial Training or Prohibited Punishment?*, THE ARMY LAW., June 1981, at 17.

116. The government's witnesses are typically listed by name and unit of assignment on

quested by the accused. The summary court officer alone determines the issue of guilt or innocence. If acquitted, the accused may not later be retried for the offense[117] If he is convicted, the potential penalties are relatively minor.[118] Any conviction or sentence is subject to the clemency powers of the convening authority.[119]

In *Middendorf v. Henry*,[120] certain enlisted members of the Marine Corps had been convicted by summary courts-martial and sentenced to confinement. None had been afforded counsel at their trials. Before the Supreme Court, they asserted that *Argersinger v. Hamlin*[121] required defense counsel to be provided in every criminal proceeding which could result in imprisonment. Therefore, the military lacked authority to try the defendants by summary court-martial without affording them counsel.

Writing for the Court, Justice Rehnquist rejected the claim. Crucial to the attachment of the right to counsel in *Argersinger* was the existence of a criminal prosecution. The mere fact that a proceeding might result in a loss of liberty was not dispositive; neither juvenile hearings nor probation revocation hearings, both of which could result in loss of liberty, invoked the protections of *Argersinger*.[122] Noting that a summary court tries minor offenses, metes out minor punishments, and has procedures different from a criminal trial, the Court concluded that a summary court-martial is not an adversary proceeding which invokes the right to counsel.[123] Finally, the insertion of counsel into a summary court-martial might prove a burden to the military:

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the front page of the "Charge Sheet," Dep't of Defense Form 458. *See* U.S. Dep't of Army Reg. No. 27-10, Legal Services—Military Justice, para. 5-143 (Sept. 1, 1982).

117. Uniform Code of Military Justice, art. 44, 10 U.S.C. § 844 (1982).

118. In cases involving junior enlisted personnel, the maximum permissible punishments include confinement for as long as 30 days or hard labor without confinement for as long as 45 days, forfeiture of as much as two-thirds of a month's pay, and reduction to the lowest grade. Uniform Code of Military Justice, art. 20, 10 U.S.C. § 820 (1982). Junior enlisted personnel include service members in the first four enlisted-pay grades: Private (E-1), Private (E-2), Private First Class (E-3), and Corporal/Specialist Four (E-4). For enlisted personnel above the fourth pay grade, the maximum punishments include a single-grade reduction, forfeiture of two-thirds of a month's pay, and extra duty for as long as 60 days. Manual for Courts-Martial, United States, R.C.M. 1302(a)(d)(2) (1984).

119. *See* Manual for Courts-Martial, United States, R.C.M. 1108-09 (1984); *see also* Uniform Code of Military Justice, art. 64, 10 U.S.C. § 864 (1982).

120. 425 U.S. 25 (1976).

121. 407 U.S. 25 (1972).

122. 425 U.S. at 35-37.

123. *Id.* at 39-41.

> [P]resence 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 have properly felt to be beyond what is warranted by the relative insignificance of the offenses being tried.[124]

If the accused desires counsel, he may decline trial by summary court-martial and, should the case proceed to a higher level of court-martial, be assigned counsel then.[125] Justices Powell and Blackmun concurred, finding that the "unique military exigencies" themselves could distinguish *Argersinger*.[126]

In dissent, Justice Marshall pointed out that *Argersinger* held that the relatively minor period of confinement is irrelevant when considering the issue of whether counsel should be provided.[127] Moreover, the Court of Military Appeals, "a body with recognized expertise in dealing with military problems,"[128] had determined that *Argersinger* applied to summary courts-martial.[129] Whether a summary court *should* try only military offenses ignores the fact that "a substantial portion of the offenses actually tried by summary courts-martial are offenses, such as larceny and assault, that would also constitute offenses if committed by a civilian."[130] Additionally, the summary court-martial process possesses authority to try *any* noncapital offense cognizable under the Uniform Code of Military Justice and includes nonmilitary offenses.[131] The choice of proceeding without counsel at a summary court or refusing the summary court in order to secure the assistance of counsel

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124. *Id.* at 45.

125. *Id.* at 46-47. The Court analogized this choice, of accepting a counsel-less trial by summary court-martial or exposing oneself to potentially more severe penalties in order to obtain counsel, to that of either pleading guilty to a lesser offense, thus waiving a trial altogether, or contesting the greater charge and thus taking the risk of the attendant greater penalties. *Id.* at 47-48.

126. *Id.* at 49 (Powell, J., concurring) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

127. 425 U.S. at 56 (Marshall, J., dissenting). Justice Brennan joined in the dissent.

128. *Id.* at 66 (Marshall, J., dissenting). *See supra* text accompanying note 101.

129. United States v. Alderman, 22 C.M.A. 298, 46 C.M.R. 298 (1973).

130. 425 U.S. at 57 (Marshall, J., dissenting). The author's experience as a summary court-martial officer in 57 cases in the 25th Infantry Division supports this observation. In 27 of the cases, the most serious charge was a nonmilitary offense. Included were prosecutions for larceny, possession and use of marijuana, possession of drug paraphernalia, assault, destruction of private property, and receiving stolen property. In 20 of the cases, the accused was represented by counsel.

131. 425 U.S. at 57 (Marshall, J., dissenting). Regardless of the identity of the offense, however, the maximum punishments prescribed in Uniform Code of Military Justice, art. 20, 10 U.S.C. § 820 (1982), still apply.

presents the constitutionally questionable scheme of "two levels of imprisonment for the same offense—a lower tier for defendants who are willing to proceed to trial without counsel, and a higher one for those who insist on having the assistance of counsel."[132]

The Supreme Court's ruling that *Argersinger* is inapplicable to summary courts-martial, in the face of a Court of Military Appeals decision that the right to counsel attached, is truly remarkable.[133] Perhaps reading reluctance in *Argersinger's* split decision, the Supreme Court may have felt free to rule otherwise. In so doing, it validated a procedure which might well have been one of the "travesties" under the Uniform Code of Military Justice that Justice Douglas had had in mind in *O'Callahan.*

III. The Burger Court and Personal Liberties in the Military

A. *An Admonition:* Parisi v. Davidson (1972)

That the strengthening of military authority evident in the decisions from *Relford* through *Middendorf* was not without limits was demonstrated a year after *Relford* in *Parisi v. Davidson.*[134] Parisi, a service member, was inducted into the armed forces, but later applied for discharge as a conscientious objector. He was denied the status by the Department of the Army. Subsequently, he sought relief from the Army Board for the Correction of Military Records (ABCMR) and, a few days later, commenced a habeas corpus proceeding in federal court. The court deferred a hearing on the merits of the petition until the ABCMR had rendered its decision.[135]

While both actions were pending, Parisi was ordered to board an aircraft for deployment to Vietnam, where he was to perform noncombat duties. He refused to obey the order and was court-martialed and convicted. While the charges were pending, the ABCMR rejected Parisi's application for relief. The federal court with jurisdiction over the habeas corpus petition announced that it would defer ruling upon the petition until the military criminal appeals process had been exhausted. The Ninth Circuit affirmed the

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132. 425 U.S. at 71 (Marshall J., dissenting).

133. "Dealing with areas of the law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference." *Id.* at 43.

134. 405 U.S. 34 (1972).

135. *Id.* at 36.

stay.[136]

The Supreme Court granted certiorari and reversed. Historically, the writ of habeas corpus had been a remedy for service members alleging improper retention in the armed forces.[137] But, prior to being afforded relief in federal court, the petitioner must have availed himself of the administrative avenues of appeal provided by law.[138] Under this exhaustion of remedies doctrine, but for the court-martial conviction, the district court undoubtedly would have entertained Parisi's petition since his appeal to the ABCMR had been unsuccessful.[139]

The Supreme Court found, however, that the existence of a criminal proceeding was legally irrelevant to the adjudication of the administrative habeas claim:

> Under accepted principles of comity, the court should stay its hand only if the relief that the petitioner seeks—discharge as a conscientious objector—would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge.[140]

The issue of the improper denial of conscientious-objector status, however, would constitute only a defense to Parisi's criminal charge, *i.e.* that the order to proceed to Vietnam was unlawful.[141] Even if acquitted, Parisi would remain on active duty in the armed forces because the relief sought by his habeas corpus petition could not be granted through the military judicial system.[142] Conse-

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136. 435 F.2d 299 (9th Cir. 1970).

137. 405 U.S. at 39 (citing Schlanger v. Seamans, 401 U.S. 487, *reh'g denied*, 402 U.S. 990 (1971); Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968); Eagles v. Samuels, 329 U.S. 304 (1946)).

138. 405 U.S. at 37.

139. *Id.* at 39.

140. *Id.* at 41-42 (citations omitted).

141. The Court noted that existing Army regulations directed that, as far as it was practical, conscientious-objector applicants be retained in their units pending final decisions on their applications. *Id.* at 42 n.9 (citing U.S. Dep't of Army Reg. No. 635-20). The Court of Military Appeals had recognized that the erroneous rejection of conscientious-objector status by the Secretary of the Army would constitute a defense to a charge of disobedience of an order to perform duties inconsistent with that status. United States v. Noyd, 18 C.M.A. 483, 492, 40 C.M.R. 195, 204 (1969). In general, however, an order relating to military duty is presumptively valid, and the burden rests heavily upon one who has disobeyed it to demonstrate its illegality. *See* Manual for Courts-Martial, United States, para. 14c(2)(a)(i) (1984).

142. *Parisi*, 405 U.S. at 43 n.12.

quently, "the pendency of court-martial proceedings . . . [should] not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies . . . ."[143]

Although logically reasoned and precedentially secure, the Court's decision may also have been influenced by the apparent arrogance of the military in ordering an avowed conscientious objector, whose claim had not been finally adjudicated, to a war zone, albeit in a noncombat status. Indeed, the Court noted the "historic respect in this Nation for valid conscientious objection to military service."[144] *Parisi* recognizes limitations on the deference of the Burger Court to internal military authority. Callousness or disdain for historically protected rights will be promptly and surely remedied.

B. *Free Speech and the Military Mission*

1. In General

Although "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 requires a different application of those protections."[145] Some examples of the differing protections given speech in the civilian and military communities are obvious. To insult one's superior in the civilian community may be rude and may lead to unemployment; in the military, it is a crime.[146] To speak contemptuously of the President or a Governor indicates only that the civilian may vote for the opponent in the next election; in the military, it is a crime.[147]

A military commander has the inherent authority to maintain security and discipline on the installation. The extent to which a commander may limit free speech on the installation pursuant to those ends has concerned the Burger Court. After some early hesi-

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143. *Id.* at 45.

144. *Id.* The Court observed that, where the court-martial charge is wholly unrelated to the claim of conscientious objection, such as a charge of larceny, a district court might grant habeas relief, but stay its order of discharge from the service pending the petitioner's trial and sentence (if applicable). *Id.* at 46 n.15.

145. Parker v. Levy, 417 U.S. 733, 758 (1974).

146. Uniform Code of Military Justice, art. 89, 10 U.S.C. § 889 (1982) (proscribing disrespect toward a commissioned officer); *id.*, art. 91, 10 U.S.C. § 891 (1982) (forbidding insurbordinate conduct toward a warrant or petty officer or a noncommissioned officer).

147. *Id.*, art. 88, 10 U.S.C. § 888 (1982).

tation, the Court has afforded the commander great control over forms of speech and assembly occurring on the installation, whether involving civilians or military personnel.

2. The Civilian and the Military Installation: *Flower v. United States* (1972) and *Greer v. Spock* (1976)

Section 1382 of Title 18 of the United States Code, provides that, "[W]hoever reenters or is found within [a military] . . . installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—Shall be fined not more than $500 or imprisoned not more than six months, or both."[148]

John Thomas Flower had been barred by the military commander from Fort Sam Houston, Texas because of "alleged participation in an attempt to distribute 'unauthorized' leaflets" on the post.[149] Flower subsequently returned to Fort Sam Houston and again distributed leaflets. He was arrested by military authorities and convicted in federal district court of violating section 1382. This conviction was later affirmed by the Fifth Circuit.[150]

In an unusual procedure, the Supreme Court immediately granted certiorari and then reversed and remanded the conviction, per curiam.[151] Relying on the dissent to the Fifth Circuit opinion, the Court cited evidence that the avenue where Flower was distributing leaflets was generally open to the public, traffic traversed the street constantly, civilian public and private transportation regularly used it as a route, and the sidewalks were open to military and civilian alike. Accordingly, "Fort Sam Houston was an open post [and] . . . the street . . . was a completely open street."[152] This circumstance indicated to the Supreme Court that "the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order . . . [Flower] off this public street than could the city police order any leafleteer off any public

148. 18 U.S.C. § 1382 (1982).

149. Flower v. United States, 407 U.S. 197 (1972) (per curiam).

150. 425 F.2d 80 (5th Cir. 1972).

151. 407 U.S. 197 (1972) ("Accordingly, without need to set the matter for further argument, we grant the petition for a writ of certiorari and reverse the conviction." *Id.* at 199).

152. *Id.* at 198 (quoting United States v. Flower, 452 F.2d 80, 90 (5th Cir. 1972) (Simpson, J., dissenting)).

street."[153] Since first amendment rights, such as handing out leaflets may properly be exercised on streets, Flower's activity was constitutionally protected from interference by the military authorities as long as the activity was conducted in an orderly fashion.[154]

Justice Rehnquist, joined in dissent by the Chief Justice, highlighted the conundrum which the majority had presented to the post commander:

> He may close access to civilian traffic on New Braunfels Avenue and other traffic arteries traversing the post, thereby rendering the post once more subject to the authority that Congress intended him to have, but also causing substantial inconvenience to civilian residents of . . . [the surrounding county] who presently use these arteries. Or, he may continue to accommodate the convenience of the residents, but only at the cost of surrendering the authority Congress conferred upon him under 18 U.S.C. 1382 to control access to the post he commands.[155]

In the year following *Flower*, the open post rationale was often argued as a basis for access to military property.[156]

In 1972, Benjamin Spock and Julius Hobson, then the People's Party candidates for President and Vice-President respectively, and Linda Jenress and Andrew Pulley, Socialist Workers Party candidates for the same offices, requested permission of the commanding general of Fort Dix, New Jersey to enter Fort Dix to distribute campaign literature and discuss the upcoming election issues with those on the installation. Pursuant to two Fort Dix regulations which prohibited political activity[157] and the distribu-

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153. 407 U.S. at 198.

154. *Id.* at 198-99.

155. *Id.* at 201 (Rehnquist, J., dissenting).

156. *See, e.g.*, United States v. Gourley, 502 F.2d 785, 787-88 (10th Cir. 1973) (arguing the open-post doctrine to prohibit issuance of a bar letter (*i.e.*, an order issued by an installation commander forbidding an individual to reenter that installation under 18 U.S.C. § 1382 (1982)), following an antiwar protest outside the Air Force Academy's football stadium); Burnett v. Tolson, 474 F.2d 877, 880-82 (4th Cir. 1973) (arguing the doctrine to permit leafletting in areas open to the civilian public); McGaw v. Farrow, 472 F.2d 952, 957 (4th Cir. 1973) (asserting the open-post rationale to permit access to the post's chapel for an antiwar memorial service); CCCO Western Region v. Fellows, 359 F. Supp. 644, 649-50 (N.D. Cal. 1972) (arguing the doctrine to allow leafleteers access to military installation). *See generally* Rosenow, *Open House or Open Forum: When Commanders Invite the Public on Base*, 24 A.F.L. REV. 260 (1984).

157. "Demonstrations, picketing, sit-ins, protest marches, political speeches and similar

tion of printed material without prior command approval,[158] the commander denied the request and indicated that the proposed activity would interfere with the basic training mission on the post.[159] The candidates filed suit in federal district court to enjoin enforcement of those regulations. Although the district court denied relief, the Third Circuit granted preliminary[160] and permanent[161] injunctions. Spock eventually campaigned at Fort Dix.

The Supreme Court granted certiorari and reversed the part of the permanent injunction that prohibited the military authorities from prospective enforcement of the regulatory ban on political speeches and distributions of political literature.[162] Distinguishing *Flower*, the Court found that the military had not abandoned control over the base so as to create a public forum.[163] To the contrary, "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so however and whenever they please.' "[164] Since the primary business of Fort Dix is "to train soldiers, not to provide a public forum,"[165] the Fort Dix commander retained the authority to exclude from the confines of the post any activity which would be detrimental to the military mission.[166] The regulations were neutrally applied and served the traditional goal of "keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind."[167] Consequently, the regulations were a legitimate exercise

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activities are prohibited and will not be conducted on the Fort Dix Military Reservation." Fort Dix Reg. No. 210-26 (1968).

158. "The distribution or posting of any publication . . . issued, published or otherwise prepared by any person, persons, agency or agencies . . . is prohibited . . . without prior written approval of the Adjutant General, this headquarters." Fort Dix Reg. No. 210-27 (1970).

159. The letter from the commanding general cited the two post regulations and training needs as bases for denial of the requested appearances. Additionally, the general expressed the opinion that granting this request, where all others had been denied, might appear as an endorsement of the speakers' candidacies by the command. Greer v. Spock, 424 U.S. 828, 833 n.3 (1976).

160. Spock v. David, 469 F.2d 1047 (3d Cir. 1972).

161. Spock v. David, 502 F.2d 953 (3d Cir. 1974).

162. 424 U.S. 828 (1976). As to the 1972 ruling concerning Spock, the issue was moot; Spock had later campaigned at Fort Dix pursuant to the court order. *Id.* at 834.

163. Abandonment of control was never an issue before the Court of Appeals. *Id.* at 837.

164. *Id.* at 836 (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

165. 424 U.S. at 838.

166. *Id.*

167. *Id.* at 839.

of command authority.[168]

Justices Brennan and Marshall dissented. At the outset, they found nothing in the record to differentiate *Flower* factually from the present case. Civilian automobile and pedestrian traffic regularly passed through Fort Dix, and visitors from the general public frequented nonrestricted areas. Public transportation served the post, and the base entrance was neither guarded by a sentry nor blocked by a barrier. The dissent found the majority's claim that Fort Sam Houston was "open," yet Fort Dix was "closed" to be an insufficient basis for their decision.[169]

The areas proposed for the distribution of literature and for political campaigning were nonrestricted portions of the post which were frequented by civilian traffic.

> Those areas do not differ in their nature and use from city streets and lots where open speech long has been protected . . . . There is no credible claim here that distributing leaflets in those areas would impair to any significant degree the Government's interests in training recruits or, broadly, national defense.[170]

The decision in *Greer v. Spock*, however, did not end litigation over whether a "public forum" could be created on a military installation. In *Persons for Free Speech at SAC v. United States Air Force*,[171] the military invited the public onto an air force base for an "open house," which included demonstrations of military equipment and aerial displays. Certain defense contractors were invited to attend, but a group opposing the arms race requested and was denied permission to attend because their proposed activities

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168. The Court stressed that the record indicated an evenhanded application of this policy. *Id.* at 838-39. A different case might be presented if the regulations were applied "irrationally, invidiously, or arbitrarily." *Id.* at 840. Both Chief Justice Burger, *id.* (Burger, C.J., concurring), and Justice Powell, *id.* at 842 (Powell, J., concurring), concurred separately and stressed the need for an apparent and actual separation of the military from partisan politics.

169. *Id.* at 849-52 (Brennan, J., dissenting). Justice Brennan appended to his opinion photographs of New Braunfels Avenue, found to be "open" in *Flower*, and the front gate to Fort Dix, found to be "closed" in *Greer v. Spock*. Any differences were not discernible to the observer. *Id.* at 871.

170. *Id.* at 861 (footnote and citation omitted). Justice Marshall, in his dissent, alleged that this case, and that of *Middendorf v. Henry*, 425 U.S. 25 (1976) (*see supra* notes 111-33 and accompanying text), "go distressingly far toward deciding that fundamental constitutional rights can be denied to both civilians and servicemen whenever the military thinks its functioning would be enhanced by so doing." 424 U.S. at 873 (Marshall, J., dissenting).

171. 675 F.2d 1010 (8th Cir.), *cert. denied*, 103 S. Ct. 579 (1982).

(which included songs and distributions of peace literature) "would not be in keeping with the purpose of the Open House program."[172] A federal district court denied a request for a preliminary injunction which would have permitted the group to participate in the open house, and the Eighth Circuit affirmed.

The circuit court rejected the argument that the open house created a public forum and that the Air Force abandoned control over the base for a one-day period, stating, "the detailed operations plan for the event and the concerns it reflects for security, traffic flow and personnel are inconsistent with a one-day abandonment."[173] Moreover, the fact that the open house was a community relations project did not turn the Air Force into an advocate of any particular nuclear policy so as to open the forum to differing viewpoints. The military's display of equipment and capabilities was merely a demonstration of how the Air Force would fulfill its military mission.[174] Furthermore, the defense contractors' participation in the forum did not deny the peace group equal protection since the contractors' weaponry displays were supportive of the purpose of the open house.[175] The Supreme Court denied certiorari.[176]

A different result however, was reached by the Ninth Circuit in *United States v. Albertini*.[177] There, the court reversed a conviction for violation of section 1382 by an antinuclear protester who had returned to Hickam Air Force Base during an open house, after having been issued a bar letter by the base commander.[178] The court found that the character of the open house was akin to that of a state fairgrounds and was similar to the situation in *Flower*—the military had essentially abandoned control over the base "for the duration of the day's festivities."[179] As a result, the base constituted a public forum, and the military commander could not restrict the orderly activity of Albertini in the nonrestricted areas.

Thus, military control over civilian activities on military installa-

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172. 675 F.2d at 1012.

173. *Id.* at 1015-16.

174. *Id.* at 1022.

175. The contractors' displays did no more than explain the current state of Air Force weaponry. *Id.*

176. 103 S. Ct. 579 (1982).

177. 710 F.2d 1410 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3777 (U.S. Apr. 3, 1984) (No. 83-1624).

178. *Id.* at 1412, 1413 n.1. See *supra* note 156 for a definition of a "bar letter."

179. 710 F.2d at 1415.

tions, at least in the first amendment realm, remains a source of litigation. The ruling in *Greer v. Spock* and the subsequent denial of review in *Persons for Free Speech at SAC*, suggest that, if certiorari is granted in *Albertini*, the Court will reverse the Ninth Circuit.

3. Activities of a Service Member: *Parker v. Levy* (1974), *Brown v. Glines* (1980), and *Secretary of the Navy v. Huff* (1980)

Although the permissible limitations on civilian free speech on military installations are still unclear, the Burger Court has spoken more definitely with regard to the restrictions applicable to service members.

In *Parker v. Levy*,[180] an Army dermatologist stationed at the Army Training Center at Fort Jackson, South Carolina had made various statements to subordinates which were highly critical of the government, the Army, and the Vietnam War.[181] Levy was tried and convicted by court-martial for conduct unbecoming an officer and for having caused a disruption to the prejudice of good order and discipline in the armed forces,[182] in violation of Articles 133[183] and 134[184] of the Uniform Code of Military Justice.

After exhausting his military appeals,[185] Captain Levy was also denied a writ of habeas corpus by a federal district court; nevertheless, the Third Circuit reversed and found both Articles 133 and

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180. 417 U.S. 733 (1974).

181. Levy asserted that he would refuse an order to go to Vietnam, that blacks should refuse to fight in Vietnam because they suffer from discrimination in the United States and are given the most hazardous duty, and that "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children." *Id.* at 737.

182. Levy had also disobeyed an order from the hospital commandant to conduct certain training for Special Forces personnel, for which he was convicted under Uniform Code of Military Justice, art. 90, 10 U.S.C. § 890 (1982). 417 U.S. at 739-40 & n.6.

183. "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." Uniform Code of Military Justice, art. 133, U.S.C. § 933 (1982).

184. Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Uniform Code of Military Justice, art. 134, U.S.C. § 934 (1982).

185. The conviction was affirmed by an Army Board of Review, United States v. Levy, 39 C.M.R. 672 (A.B.R. 1968), and the Court of Military Appeals denied review. 18 C.M.A. 627 (1969).

134 to be void for vagueness.[186]

In a 5-4 decision, the Supreme Court reversed the Third Circuit.[187] Justice Rehnquist, writing for the majority, noted:

> 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 or be ready to fight wars should the occasion arise."[188]

The historical development in British and American military law of punishment for conduct unbecoming an officer and disorders inuring to the prejudice of the good order and discipline of the armed forces were just such "laws and traditions."[189]

In light of the unique mission of the military and this tradition, the Court declined to equate the Uniform Code of Military Justice (UCMJ) to a civilian criminal code:

> [The UCMJ] 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 small segment of potential conduct and declares its 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.[190]

Although there is no civilian counterpart to the challenged Articles of the UCMJ, the service member is not left uneducated with regard to proscribed conduct. The Manual for Courts-Martial of

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186. 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974).

187. 417 U.S. 733 (1974).

188. 417 U.S. at 743 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

189. The Court found counterparts to Articles 133 and 134 in the Articles of the Earl of Essex (1642), the British Articles of War of 1765, and the American Articles of War from 1776 to the present Code. 417 U.S. at 745-49.

190. 417 U.S. at 749. On the other hand, the military justice system may dispense fairly minor punishments, some of which, such as reduction in rank or dismissal from the service, reminded the Court of the civilian "law of labor-management relations as much as the civilian criminal law." *Id.* at 750.

1969 provided over sixty examples of Article 134 violations.[191] Likewise, conduct unbecoming an officer, in violation of Article 133, was well-defined by the decisions of the Court of Military Appeals.[192]

The Court concluded that Levy

> could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so were both "unbecoming an officer and a gentleman," and "to the prejudice of good order and discipline in the armed forces," in violation of the provisions of Arts. 133 and 134, respectively. . . . [H]is challenge to them as unconstitutionally vague under the Due Process Clause of the Fifth Amendment must fail.[193]

Answering the assertion that the statutes were overbroad, the Court found that "[t]he fundamental necessity for . . . imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[194] Consequently, whatever Captain Levy's conception of the standards of an Army officer might have been, "[h]is conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."[195]

Justice Douglas, in his dissent, could not find an exception in the Bill of Rights for speech in the military. "In our society where di-

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191. Manual for Courts-Martial, United States, para. 213 (rev. ed. 1969). The Manual for Courts-Martial is an executive order issued by the President pursuant to his constitutional authority as commander-in-chief of the armed forces, U.S. CONST. art. II, § 2, and his statutory authority to prescribe the procedure for trials of courts-martial, Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1982). A major revision of the Manual took place in 1969; the next was completed in 1984.

192. 417 U.S. at 752-53 (citing United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972); United States v. Harvey, 19 C.M.A. 539, 42 C.M.R. 14 (1972); United States v. Sadinsky, 14 C.M.A. 563, 34 C.M.R. 343 (1964); United States v. Holiday, 4 C.M.A. 454, 16 C.M.R. 28 (1954); United States v. Frantz, 2 C.M.A. 161, 7 C.M.R. 37 (1953)).

193. 417 U.S. at 757.

194. *Id.* at 758.

195. *Id.* at 761. Although not extensively discussed by the Court, a factor in the decision may have been the fact that the forum chosen by Captain Levy for his tirades, Fort Jackson, South Carolina, was a basic training post. Thus, the most easily influenced recipients of Captain Levy's message, that is, the youngest, least educated, and perhaps involuntarily conscripted service members, would have been based there. Three weeks after the *Levy* decision, on the authority of *Parker v. Levy*, the Supreme Court upheld a Marine enlisted man's court-martial conviction under Article 134 for attempting to distribute antiwar literature in Vietnam. Secretary of the Navy v. Avrech, 418 U.S. 676 (1974) (per curiam).

versities are supposed to flourish it never could be 'unbecoming' to express one's views, even on the most controversial public issue."[196] While the views of Captain Levy might have "affronted some of his superiors, [who had expected] homogenized individuals who think—as well as march—in unison,"[197] the criminality of this activity is constitutionally doubtful. Whatever Captain Levy said, it was "his own belief—an article of faith that he sincerely held."[198] In Justice Douglas' view, regardless of the forum of enlisted trainees, "[u]ttering one's beliefs is sacrosanct under the First Amendment. Punishing the utterances is an 'abridgement' of speech in the constitutional sense."[199]

Justice Stewart, also dissenting,[200] found it "hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain general articles . . . ."[201] Regardless of the interpretation given to specific instances of activity prohibited under the UCMJ, Articles 133 and 134 were themselves designed to defy limitation: "In short, the general articles are in practice as well as theory 'catch-alls,' designed to allow prosecutions for practically any conduct that may offend the sensibilities of a military commander."[202] An assertion that the general articles were narrowed by a "combination of military custom and instinct" is inapplicable to an army of millions, many of whom at the time of Levy's conduct were conscripts.[203] To expect those service members to be imbued with the same notions of tradition that may have existed in times of a small standing Army was "an act of judicial fantasy."[204]

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196. 417 U.S. at 769 (Douglas, J., dissenting).

197. *Id.* at 770 (Douglas, J., dissenting).

198. *Id.* at 772 (Douglas, J., dissenting).

199. *Id.* (footnote omitted). Justice Douglas saw no distinction between announcing those beliefs to impressionable subordinates in public while on duty and reading newspapers, books, plays, poems, or periodicals or holding conversations in bars or at meetings while off-duty. *Id.* at 769.

200. Justices Douglas and Brennan joined Justice Stewart's dissent. *Id.* at 773 (Stewart, J., dissenting).

201. *Id.* at 774 (Stewart, J., dissenting). Justice Stewart referred to the Supreme Court decisions which had invalidated laws prohibiting behavior labelled "misconduct" or "reprehensible," Giaccio v. Pennsylvania, 382 U.S. 399 (1966); "annoying," Coates v. City of Cincinnati, 402 U.S. 611 (1971); or "prejudicial to the best interests" of a city, Gelling v. Texas, 343 U.S. 960 (1952) (per curiam).

202. 417 U.S. at 779 (footnote omitted) (Stewart, J., dissenting).

203. *Id.* at 781-82 (Stewart, J., dissenting).

204. *Id.* at 782 (Stewart, J., dissenting). Justice Stewart discounted the mandatory training in military justice which is given to all newly arrived inductees because only a small amount of time is devoted to exploring the nuances of the general articles. *Id.* at 782-83 n.27 (citing U.S. Dep't of Army Subject Schedule 21-10, Military Justice—Enlisted Personnel

In response to the majority's belief that, whatever the parameters of the general articles, Levy should have known that his conduct was unlawful, Justice Stewart answered that "[h]owever foreign to the military atmosphere of Fort Jackson, the words spoken by him represented a viewpoint shared by many American citizens."[205] The idea that criminal sanctions for such conduct should attach under "meaningless statutes" was beyond the constitutional pale.[206]

The division of the Court in *Parker v. Levy* roughly approximated the division in *Greer v. Spock*.[207] While the issues were different—due process considerations of vagueness and overbreadth in *Parker v. Levy* and free speech and public forum issues in *Greer v. Spock*—the ultimate questions were similar: To what degree may a military commander restrict a public airing of political issues on a military installation? In *Greer v. Spock*, a commander was given authority to bar all political candidates from a closed basic training post. In *Parker v. Levy*, criminal sanctions were imposed upon an officer, also on a basic training installation, who advocated disobedience to orders to fight. In both cases, the military mission required an unquestioning obedience to orders; and, to the extent that the candidates in *Spock* and the officer in *Levy* caused military members to question those orders, their activity could be barred from a military installation.

Those decisions may have been influenced by the facts that both Fort Dix and Fort Jackson were basic training posts and that the United States was at war. Yet it was demonstrated in *Brown v. Glines*[208] and *Secretary of the Navy v. Huff*[209] that those factors were not controlling. Both cases challenged service regulations which required the approval of the base commander prior to circulating petitions or distributing printed materials.[210] Both cases arose after America's disengagement from Vietnam, and, in both

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Training (June 24, 1969)).

205. 417 U.S. at 785-86 (Stewart, J., dissenting).

206. *Id.* at 789 (Stewart, J., dissenting).

207. 424 U.S. 828 (1976). Justice Stewart, the author of Greer v. Spock, joined the dissent in Parker v. Levy. Justice Marshall had not taken part in *Parker*, and Justice Douglas had left the Court before *Greer*.

208. 444 U.S. 348 (1980).

209. 444 U.S. 453 (1980) (per curiam).

210. U.S. Dep't of Air Force, Reg. No. 31-1(9) (1971); U.S. Dep't of Air Force, Reg. No. 35-15(3)(a)(1) (1970), *cited in* Brown v. Glines, 444 U.S. at 349-50; Fleet Marine Force Pacific Order No. 5370.3, para. 3(b) (1974), *cited in* Secretary of the Navy v. Huff, 444 U.S. at 455 n.2.

cases, the regulations were upheld.

Writing for the majority in *Glines*,[211] Justice Powell found the Air Force regulation in question indistinguishable from the post regulation upheld in *Greer v. Spock*.[212] As in *Spock*, the authority of the commander to maintain the morale, discipline, and readiness of his troops was a sufficient justification to require prior review of any materials which might cause "possible disruption" in the ranks.[213] Although the proposed distribution would have been made in peacetime, "[l]oyalty, morale, and discipline are essential attributes of *all* military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster."[214] Even the federal statute which prohibits command interference with a service member's right to petition Congress would not invalidate the regulation.[215] That statute was interpreted to protect only *direct* communication between service members and legislators. The unrestricted circulation of collective petitions was unprotected under the statute since it "could imperil [military] discipline."[216] On the authority of *Glines*, a similar Marine Corps regulation was upheld the same day in *Huff*.[217]

Justice Brennan dissented in both cases on grounds that the first amendment rights to express and receive ideas, to communicate with the government, and to associate with others were impermissibly infringed by the questioned regulations:

> The petition is especially suited for the exercise of all of these rights: It serves as a vehicle of communication; as a classic means of individual affiliation with ideas or opinions; and as a peaceful yet effective method of amplifying the views of the individual signers. Indeed, the petition is a traditionally favored method of political expression and participation . . . . Thus, petitioning of officials has

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211. Justice Powell was joined by Chief Justice Burger and Justices White, Blackmun, and Rehnquist. 444 U.S. at 348.

212. *See supra* notes 157-58.

213. *Glines*, 444 U.S. at 356.

214. *Id.* at 356-57 n.14 (emphasis added).

215. "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." Uniform Code of Military Justice, art. 234, 10 U.S.C. § 1034 (1982).

216. 444 U.S. at 360.

217. 444 U.S. 453 (1980) (per curiam).

> been expressly held to be a right secured by the First Amendment.[218]

Since prior restraint upon first amendment rights may be used for censorship, the regulation must fall in the absence of a precisely articulated governmental interest furthered by the regulation.[219]

Justice Brennan distinguished *Greer v. Spock*, which dealt with the regulation of the speech of *civilians* on a military installation. Here, the speech of individuals required to be on the installation—service members—was involved. Second, alternative public forums are available to civilians from which to further their ideas. In the case of service members, however, "when service personnel are stationed abroad or at sea, the base or warship is very likely the *only* place for communication of thoughts."[220] Finally, unlike the regulation which had been neutrally applied in *Greer v. Spock* to all political candidates, the denial of the right to circulate petitions and distribute literature in *Glines* was based upon the "erroneous and misleading commentary" contained therein and because it "impugn[ed] by innuendo the motives and conduct of the President."[221] In sum, the denial had been based upon the content of the material.

Glines and *Huff* demonstrate that the Court will safeguard internal discipline of a military installation even in times when the United States is not at war. The military commander is afforded a large measure of discretion in controlling the activity of both civilian and military personnel on the installation, subject to review within the military system itself and, if necessary, the federal courts. Absent a judicial finding of an open post as in *Flower* (only Fort Sam Houston and the Presidio of San Francisco have been declared open posts by federal courts)[222] or other activity by which a public forum has been created,[223] the Court will respect com-

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218. 444 U.S. at 363 (Brennan, J., dissenting) (footnotes omitted).

219. *Id.* at 364-68. Justice Brennan counseled "skepticism" when dealing with claims of military necessity. To him, the Court was "unduly acquiescent" to the government's explanation of how the blanket restriction, applying to both front-line combat units and rear-echelon noncombat units, was necessary to national security. *Id.* at 369-70.

220. *Id.* at 372 (original emphasis) (footnote omitted).

221. *Id.* at 373.

222. Flower v. United States, 407 U.S. 197 (1972) (per curiam) (Fort Sam Houston); CCCO Western Region v. Fellows, 359 F. Supp. 644 (N.D. Cal. 1972) (Presidio of San Francisco).

223. *Compare* United States v. Albertini, 710 F.2d 1410 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3777 (U.S. Apr. 3, 1984) (No. 83-1624) (open house on Air Force base),

mand determinations of whether the activity in question poses a threat to the military mission.

C. *A Unanimous Vote for the Military System:* Chappell v. Wallace (1983)

In *Chappell v. Wallace*,[224] a unanimous Supreme Court refused to create a right of action against superior commissioned and non-commissioned officers, based upon alleged violations of the constitutional rights of enlisted service members. It is not remarkable in itself that the Court reached this decision, but the unamimity of the decision was somewhat surprising, especially in light of prior decisions of the Burger Court.

In one of these prior decisions, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[225] a divided Court[226] permitted a fourth amendment right of action against federal agents who were alleged to have violated the constitutional rights of the plaintiff. In so doing, however, the Court indicated that in the future, such a remedy would not be available if "special factors counselling hesitation" were present.[227] Although later litigation would define such "special factors" chiefly in terms of a congressional declaration that such an action should not lie,[228] the Court was unable to find a case in which judicial refusal to imply a remedy was justified. Thus, a cause of action was permitted under the due process clause of the fifth amendment against a member of Congress charged with sexual discrimination[229] and, under the eighth amendment, against federal prison officials charged with failure to provide proper medical care to a federal prisoner.[230] The latter decision was particularly startling because a remedy for the alleged violations already existed under the Federal Tort Claims

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with Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir.) (open house but no abandonment of military control), *cert. denied*, 103 S. Ct. 579 (1982). *See supra* text accompanying notes 171-79.

224. 103 S. Ct. 2362 (1983).

225. 403 U.S. 388 (1971).

226. For a discussion of Chief Justice Burger's vigorous dissent in *Bivens*, 403 U.S. at 411-27 (Burger, C.J., dissenting), see Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 MIL. L. REV. 83, 107-09 (1983).

227. 403 U.S. at 396.

228. *See* Carlson v. Green, 446 U.S. 14, 19 (1980); Davis v. Passman, 442 U.S. 228, 246-47 (1979).

229. *Davis*, 442 U.S. 228 (1979).

230. *Carlson*, 446 U.S. 14 (1980).

Act.[231]

In a related area, the question of the immunity of governmental officials from suit, the Burger Court had also been reluctant to permit official constitutional wrongs to go unredressed. In *Scheuer v. Rhodes*,[232] the Court afforded only a qualified immunity to a state governor. In *Butz v. Economou*,[233] the same standard was applied to the Secretary of Agriculture. Finally, and most significantly, the Court decided during the same term as *Chappell* that, while the President of the United States was absolutely immune from suit,[234] only a qualified immunity extended to immediate presidential advisors.[235] Although, since 1950, the Court had immunized service members from common law tort actions brought by other service members,[236] it was difficult to predict that the Court would afford a military commander greater protection from suit based upon constitutional tort than that afforded a presidential advisor.[237]

Ultimately, the Court ignored the immunity issue altogether by deciding the threshold question in favor of the military defendant. In *Chappell*, five enlisted sailors complained that they had been assigned undesirable duties, excessively punished, threatened, and given low performance ratings because of their race. In federal district court, they sought declaratory and injunctive relief and monetary damages from their superiors. The district court dismissed the suit, but the Ninth Circuit reversed and remanded to the district court with instructions to determine whether the defendants were entitled to immunity from suit.[238]

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231. 28 U.S.C. §§ 2671-2680 (1982). Under the Act, the victim of an enumerated tort committed by an employee of the federal government within the scope of his or her employment may file a claim against the United States for a sum certain. *Id.* § 2675(b). Upon denial of the claim or inaction by the government, suit may be filed in federal court. *Id.* § 2675(a). Determinations of liability are made under the law of the state in which the tort occurred, just as would be the case with a private individual. *Id.* § 2674. Punitive damages and prejudgment interest are not recoverable under the Act. *Id.*

232. 416 U.S. 232 (1974). The case involved liability for the shooting deaths of Kent State University students by Ohio State National Guardsmen in 1970.

233. 438 U.S. 478 (1978).

234. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

235. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

236. Feres v. United States, 340 U.S. 135 (1950).

237. One clue to the Court's inclinations could possibly have been inferred from the denial of certiorari in Jaffee v. United States, 663 F.2d 1226 (3d Cir.), *cert. denied*, 456 U.S. 972 (1982), on the same day that certiorari was granted in *Chappell v. Wallace*. In *Jaffee*, the Third Circuit had refused to imply a constitutional remedy against military and civilian officials in favor of a former service member.

238. 661 F.2d 729 (9th Cir. 1981), *rev'd*, 103 S. Ct. 2362 (1983). The Ninth Circuit

The Supreme Court focused on the "special factors" language of *Bivens*, the need for military discipline, and the existence of statutory remedies for each alleged wrong in finding that a constitutional right of action did not lie. "Special factors counselling hesitation" were found to be present: "In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel 'without counterpart in civilian life.' "[239] Response to the commands of a superior "must be virtually reflex with no time for debate or reflection."[240] Therefore, "[t]he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."[241]

In any event, Congress, in exercising its plenary power over the regulation of the armed forces, had created statutory remedies to redress the alleged wrongs. Grievances against a commander could be remedied through Article 138 of the UCMJ.[242] Complaints con-

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couched the issue in terms both of immunity and of the reviewability of military decisions in general. The latter issue was governed by the factors articulated in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). Under this test, a reviewing court must first look at the nature of the legal challenge. If the administrative action allegedly violated the Constitution, statutory authority, or a regulation intended primarily for the protection of the individual, the court may then consider four factors in determining whether to review the claim:

> (1) The nature and strength of the plaintiff's challenge to the military determination . . . .
>
> (2) The potential injury to the plaintiff if review is refused.
>
> (3) The type and degree of anticipated interference with the military function . . . .
>
> (4) The extent to which the exercise of military expertise or discretion is involved . . . .

Id. at 201. *But see* Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981) (rejecting *Mindes*). *See generally* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 61-77 (1975). The Ninth Circuit had remanded *Chappell* to the district court for a reconsideration of the reviewability of the military decisions in the case in light of the *Mindes* factors.

239. *Chappell*, 103 S. Ct. at 2365.

240. *Id.* In extreme cases, however, this maxim does not accurately reflect military doctrine. Where a soldier is given an order which he believes to be illegal, the soldier is instructed first to seek clarification of the order and, if the clarification still describes an illegal act, to disobey the order. *See, e.g.*, U.S. Dep't of Army Training Circular 27-10-1, Selected Problems in the Law of War 56 (June 1979); *see also* United States v. Calley, 46 C.M.R. 1131 (C.M.A. 1973).

241. 103 S. Ct. at 2367.

242. A service member who feels wronged by his commanding officer may seek redress from that commander and, if denied satisfaction, may pursue the matter to the Secretary of

cerning efficiency reports could be aired before the Board for Correction of Naval Records,[243] the determinations of which are subject to judicial review.[244] Perceived severity in nonjudicial punishment may be appealed to the next higher commanding officer.[245] In *Chappell*, the record revealed that only one of the plaintiffs had availed himself of any portion of this appellate scheme, and he had done so only in an uninformed manner.[246]

The sum of these factors represented the "special factors counselling hesitation" of *Bivens* and warranted the Court's refusal to create a new cause of action. However, in so doing, the Court expressly declined to close the courts to suits by military plaintiffs.[247] The only commentator to date on the *Chappell* decision has labeled this refusal to dispose of all potential tort suits "particularly vexing."[248] Yet, the Burger Court appears, both by its language and by its unanimity, to have signalled that any such suit would be subject to searching judicial scrutiny of its possible effects upon military discipline and that "counsel wishing to explore the niches of the Court's holding plays a distinctive long-shot."[249] In any event, just as *Schlesinger v. Councilman* had established a respect for the military justice system, *Chappell v. Wallace* demonstrated that the congressional scheme of administrative redress for purported wrongs would be granted deference, at least where the alternative would interfere with the accomplishment of the military

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the service concerned. Uniform Code of Military Justice, art. 138, 10 U.S.C. § 938 (1982).

243. The Board may correct any military record when "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a) (1982).

244. Board decisions may be set aside if arbitrary, capricious, an abuse of discretion, or not based on substantial evidence. *See* Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

245. The next higher commander may set aside the entire episode or portions of an episode of nonjudicial punishment, or may set aside, suspend, or reduce any portion of the punishment. Uniform Code of Military Justice, art. 15, 10 U.S.C. § 815 (1982); U.S. Dep't of Army Reg. No. 27-10, Legal Services—Military Justice, para. 3-32 (July 1, 1984).

246. One plaintiff filed an application before the Board for Correction of Naval Records. The request for relief was denied for failure to exhaust available administrative remedies and for insufficient evidence. No further action appears to have been taken. 103 S. Ct. at 2367 n.1.

247. The Court expressed no opinion concerning the availability of relief under 42 U.S.C. § 1985(3) (1976), which prohibits conspiracies to deprive individuals of their civil rights. That issue was remanded to the Ninth Circuit. 103 S. Ct. at 2368 n.3.

248. Zillman, *Tort Liability of Military Officers: An Initial Examination of* Chappell, THE ARMY LAW., Aug. 1983, at 29, 33. Left unaddressed were common law tort actions and suits by civilians against military officers. *Id.* at 35-37. A suit against a military official in state court may be removed to the federal courts. 28 U.S.C. § 1442(a) (1976).

249. Zillman, *supra* note 248, at 37.

mission.

IV. FROM *O'Callahan* TO *Chappell*: WHY?

The two passages quoted at the beginning of this article perhaps best epitomize the respective attitudes of the Warren and Burger Courts toward the military. From 1969 to 1983, something happened. Whether it was the result of American disengagement from an unpopular war, a change in the composition of the Court, reforms within the military legal system itself, a developed respect for other legal systems in general, or a confluence of these factors, the Supreme Court has come to exhibit a greater deference to military decisionmaking processes than during the era of the Warren Court. This section will examine some of the possible causes for this change of judicial attitude toward the military.

A. Changes

1. In the Nation

To some extent, the metamorphosis of the Supreme Court's attitude toward the military between 1969 and 1983 mirrors that of the nation as a whole. In late 1967, President Lyndon Johnson had dispatched U.S. Army General William Westmoreland, commander of American forces in Vietnam, on a speaking tour throughout the United States. General Westmoreland repeatedly trumpeted the imminence of the collapse of communist forces in Vietnam and hailed the progress of the American war effort.[250] But several months later, during the Tet Offensive of 1968, his optimistic predictions were telegenically belied as the American public daily viewed evidence of a communist aggressor that appeared unweakened and unbowed.[251] While the Tet Offensive was in fact a devastating defeat for the communist forces,[252] the credibility and public respect given pronouncements by the U.S. military establishment had markedly declined.

The era of *O'Callahan* was tumultuous for reasons besides the Vietnam War. Racial tensions flared into open violence in Ameri-

250. This campaign was termed the "Success Offensive" by one author. D. OBERDORFER, TET! 101 (1971).

251. *Id.* at 159-60.

252. *Id.* at 329-31.

can cities.[253] The military, as a reflection of society in general, could not avoid being affected by this conflict. One commentator noted that "courts-martial often became the focal point for problems within the Army caused by racial animosity and dissillusionment with the Vietnam War."[254]

Following American disengagement from Vietnam[255] and continuing through the late 1970s and into the 1980s, however, perceptions of the United States and the United States military, in particular, changed. From the propagandized "aggressors" in Indochina of 1964-74, American soldiers increasingly were viewed as heroes or martyrs. Instead of hurling napalm at Vietnamese villages, American forces were attempting to rescue their fellow citizens held captive in Iran for over a year by a government which openly defied an international court decree and ignored the fundamental decencies of international relations.[256]

Additionally, world events to a large extent bore out the predictions of those who had espoused the "domino theory" as justification for American involvement in Vietnam. Indeed, by the end of the 1970s, the North Vietnamese regular army, now undisguised as an "indigenous peasant revolt," invaded and overran South Vietnam; America evacuated in disgrace.[257] North Vietnam, which had played the victim so well during the decade of American involvement in the region, also invaded Cambodia[258] and effectively incorporated Laos into its sphere of influence.[259] Thus, by the 1980s, the purported victim of American war crimes was a regional power with hegemony over former French Indochina. The United States had been powerless to prevent it.

The elimination of the draft also helped quell a restive American public's fears about the military. No longer were Americans asked to give their sons to an unpopular cause. Well before 1983, the armed services were composed entirely of enlistees who had chosen

253. *See, e.g., The City: Guerrilla Summer?*, TIME, June 27, 1969, at 16; *Spring of Discontent, id.*, Feb. 21, 1969, at 36; *Rampage & Restraint, id.*, Apr. 19, 1968, at 15.

254. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 16 (1983).

255. For an account of the final negotiations surrounding the United States' withdrawal from Vietnam, see A. ISAACS, WITHOUT HONOR: DEFEAT IN VIETNAM AND CAMBODIA (1983).

256. *See, e.g., A Mission Comes to Grief in Iran*, NEWSWEEK, May 5, 1980, at 24.

257. *See generally* A DAWSON, 55 DAYS: THE FALL OF SOUTH VIETNAM (1977).

258. *See* J. HARRISON, THE ENDLESS WAR: FIFTY YEARS OF STRUGGLE IN VIETNAM 297-300 (1982).

259. *See id.* at 297-98.

to join.[260]

The results of the 1980 Presidential election indicated that the American citizens recognized a need to restore American military strength. Campaigning on a platform of returning the United States to a position of strength vis-a-vis the Soviet Union, Ronald Reagan handily won the election, capturing forty-four of the fifty states.[261] The Congress that assumed office with him agreed that military expenditures would have to be increased; the only debate concerned the percentage of increase.[262]

In sum, the American military establishment was no longer recognized by the American public as an instrument of aggression that forcibly committed its sons to a senseless war. Indeed, the military was increasingly seen as the instrument that the Founding Fathers had designed it to be, an instrument of defense to be supported in its efforts to instill discipline and to train its troops for the necessities of combat. It was in this spirit that the United States finally honored its Vietnam dead with a memorial in the nation's capital. The Supreme Court was also affected by the national change of perspective.

2. In the Court

Undoubtedly, the changes in personnel on the Supreme Court affected the attitudinal change from *O'Callahan* to *Chappell*. By 1983, Justice Douglas, the author of *O'Callahan*, and two of those who had joined in the *O'Callahan* majority, Chief Justice Warren and Justice Black, were gone from the Court.[263] Gone, too, were two dissenters, Justices Harlan[264] and Stewart.[265] In their places were Chief Justice Burger[266] and Justices Powell,[267] Rehnquist,[268] Blackmun,[269] Stevens,[270] and O'Connor.[271] One *O'Callahan* dis-

260. *See* 50 U.S.C. app. § 467(c) (1976) (ending the draft after July 1, 1973).
261. *See Reagan Coast-to-Coast*, TIME, Nov. 17, 1980, at 22, 23.
262. *See Reagan Gets a G.O.P. Senate*, *id.* at 55; *The House Is Not a Home*, *id.* at 61.
263. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 394 (1979) (Douglas); *id.* at 10 (Warren); *id.* at 157-58 (Black).
264. *See id.* at 158.
265. *See Surprise from the Swing Man*, TIME, June 29, 1981, at 48.
266. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 263, at 22.
267. *See id.* at 160-63.
268. *See id.* at 161-63.
269. *See id.* at 86-88.
270. *See id.* at 400-02.
271. *See The Brethren's First Sister*, TIME, July 20, 1981, at 8.

senter, Justice White, remained on the Court, as did two members of the *O'Callahan* majority, Justices Brennan and Marshall. The four Nixon appointees, Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist, were touted as "strict constructionists" at the time of their appointments.[272] Indeed, of the four, only Justice Powell in *Flower* and Chief Justice Burger and Justice Blackmun in *Parisi*, have ever voted against the military. The philosophy of the Burger Court toward the military will be discussed later in this article.[273] At this point, however, it should be noted that the personalities of the members of the Court have unquestionably played a role in the change of judicial position toward the military.

3. In the Military Justice System

Starting at the time of the *O'Callahan* decision and continuing for over a decade, reforms of the UCMJ and the *Manual for Courts-Martial* were taking place. Additionally, the administration of military justice itself was being changed. In each case, the changes reflected a "civilianization" of the system and a tendency to imitate, as closely as the military mission permitted, the practice and procedures of federal district courts.

a. The Military Justice Act of 1968

Even prior to the condemnation of the military justice system in *O'Callahan*, Congress had acted to ameliorate some of the perceived inequities of the system. The Military Justice Act of 1968,[274] signed by President Johnson on October 24, 1968 and effective August 1, 1969, marked the first major revision of the military criminal justice system since the enactment of the UCMJ in 1950. The Act effected six major changes in military law and procedures:

(1). *Counsel.* Under the UCMJ, an accused had a right to counsel in general courts-martial, the level of court with authority to sentence an accused to substantial periods of confinement, including life imprisonment,[275] and to hand down the death penalty.[276] In

272. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 263, at 11 (Burger); *id.* at 87 (Blackmun); *id.* at 161 (Powell and Rehnquist).

273. *See infra* text accompanying notes 353-84.

274. Pub. L. No. 90-632, 82 Stat. 1335 (1968) (codified at scattered sections of 10 U.S.C.).

275. *See, e.g.*, 10 U.S.C. §§ 894, 899-902, 904, 913, 918, 920 (1982).

276. *See, e.g.*, *id.* §§ 894, 899-902, 904, 906, 913, 918, 920 (1982).

the inferior special courts-martial, in which the maximum punishment might include a bad-conduct discharge and confinement for as long as six months,[277] no such right to counsel existed.

The Act corrected this disparity. In special courts-martial empowered to adjudge a bad-conduct discharge as a part of the punishment, the accused was to be afforded legally trained counsel.[278] Moreover, absent severe military exigency, the trial would be held before a military judge independent of the commander who had sent the case to trial. Additionally, even if the court were not authorized to discharge the accused,[279] legal counsel was to be provided unless military considerations made it impossible. A supporter of the Act noted, "It is sheer fantasy . . . to contend that a veterinary officer or a transportation officer who has read a few pages of the Uniform Code and the *Manual for Courts-Martial* can adequately represent a defendant in such proceeding."[280] In practice, an accused is always provided counsel before all special courts-martial.[281]

(2). *Military Judges.* In response to criticism that the officer presiding at a court-martial may be under the influence of a commander with an interest in the outcome of the case, the Act created the title "military judge" and required that the judge be legally trained and certified as competent to preside over courts-martial by The Judge Advocate General of the service in question. The military judge was intended to "preside over courts-martial to which . . . assigned much as a federal district court judge does, with roughly equivalent powers and functions."[282] A military judge was to be provided for all general courts-martial and, absent military exigency, for all special courts-martial empowered to give a

277. *Id.* § 819 (1982).

278. Under current standards a person will be certified as a military defense counsel only if admitted to practice law before the highest court of a state or before a federal court. U.S. Dep't of Army Reg. No. 27-10, Legal Services—Military Justice, para. 6-3g (July 1, 1984) (citing Uniform Code of Military Justice, art. 27(b), 10 U.S.C. § 827(b) (1982)).

279. For a special court-martial to be empowered to adjudge a bad-conduct discharge, the court must have been convened by a general court-martial convening authority, a court reporter must have been detailed, qualified defense counsel must have been provided, and a military judge must preside. Uniform Code of Military Justice, art. 19, 10 U.S.C. § 819 (1982).

280. Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 85 (1969).

281. Even an attorney who is in the military but not assigned to the Judge Advocate General's Corps may not be detailed as counsel without permission of the Office of The Judge Advocate General. Office of The Judge Advocate General, U.S. Army, Personnel, Plans and Training Office, JAGC Personnel Policies, para. 9-1*b* (Oct. 1983).

282. Ervin, *supra* note 280, at 88-89.

bad-conduct discharge. In practice, military judges preside over all general and special courts-martial. Indeed, since the Act, each service has created a judiciary independent of both local commanders and that command's legal office; military judges are evaluated only by other members of the independent trial judiciary.[283]

(3). *Procedures.* Various procedural rules of court-martial were refocused to "bring . . . [the court-martial] more in line with criminal proceedings in federal district courts."[284] The military judge was permitted to accept guilty pleas and to dispose of interlocutory pretrial motions, such as those involving the suppression of physical evidence or confessions, out of the hearing of the court-members. Moreover, an accused was afforded a choice of forum to hear his case. The case could be tried before a court consisting entirely of officers or, if the accused was an enlisted member, before a court with a composition of at least one-third enlisted members. Finally, an accused could waive trial before court-members and opt instead to be tried by the military judge alone. In the latter case, contrary to federal procedures, the consent of the government to the waiver is not required.

(4). *Command Influence.* Although Article 37 of the UCMJ had forbidden commanders to take disciplinary action against court-members on account of their service on a court-martial panel, perceptions of command influence on court-members persisted. The Military Justice Act sought to protect both commanders and defense counsel further by decreeing that other adverse action, such as the preparation of an unfavorable fitness report, was also forbidden when motivated by the officer's involvement in a court-martial proceeding.

(5). *Summary Courts-Martial.* The rights of the accused before a summary court-martial and the procedures such a tribunal involves have already been noted in the discussion of *Middendorf v. Henry*.[285] It was the 1968 Act which gave the accused the right to decline trial by summary court-martial and to seek instead a trial in which the rights to counsel and choice of forum attach.

(6). *Post-Conviction Procedures.* The Act empowered a commander to defer serving a sentence to confinement pending appeal,

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283. *See, e.g.*, U.S. Dep't of Army Reg. No. 27-10, Legal Services—Military Justice, para. 8-5*e* (July 1, 1984).

284. Ervin, *supra* note 280, at 91.

285. 425 U.S. 25 (1976). *See supra* text accompanying notes 112-19.

a form of "release on bail"[286] previously unauthorized under the Code. The time period for petitioning for a new trial was extended from one to two years and applied to all cases, not merely to those in which a serious penalty had been imposed.[287] Finally, the intermediate military appellate tribunal, the Boards of Review, was rechristended the "Court of Military Review" and was now constituted much as is a federal circuit court of appeals. The court was administered by a chief judge, who was to organize the other appellate judges into panels. The Act encouraged both uniformity of decision[288] and professional independence.[289]

b. The Military Rules of Evidence

Pursuant to his statutory authority to prescribe procedures for the trial of courts-martial and to insure that, where possible, those procedures were similar to those practiced in federal courts,[290] on March 12, 1980, President Carter promulgated an executive order amending the Manual for Courts-Martial.[291] Effective September 1, 1980, the order adopted the Military Rules of Evidence which, with certain exceptions,[292] mirror the Federal Rules of Evidence. Therefore, the complaint of Justice Douglas in *O'Callahan* that "[s]ubstantially different rules of evidence and procedure apply in military trials"[293] was remedied.

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286. Ervin, *supra* note 280, at 95.

287. Heretofore, the petition for a new trial could be made only in cases involving sentences which included death, dismissal, a punitive discharge, or confinement at hard labor for one year or more. *Id.* at 96.

288. *Id.* at 97. *But see* United States v. Chilcote, 20 C.M.A. 283, 43 C.M.R. 123 (1971); Allen, *The Precedential Value of Decisions of the Court of Military Review and the Need for En Banc Reconsideration*, THE ARMY LAW., Mar. 1983, at 16 (discussing fact that en banc reconsideration to resolve conflicts among panels of the Courts of Military Review is not authorized). This latter problem was resolved by section 7(b) of the Military Justice Act of 1983, 97 Stat. 1402 (codified at 10 U.S.C. § 866(a)), which permits en banc reconsideration by the Courts of Military Review.

289. Ervin, *supra* note 280, at 97.

290. Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1982).

291. Exec. Order No. 12,198, 3 C.F.R. 151 (1980).

292. For example, the Military Rules discuss the procedures for the admission of evidence obtained through confessions, searches and seizures, and inspections. MIL. R. EVID. 301-21. The Military Rules also broach the question of privileges, an area unaddressed by the Federal Rules of Evidence. MIL. R. EVID. 501-12.

293. 395 U.S. 258, 264 (1969) (footnote omitted). For an analysis of the Military Rules of Evidence, see S. SALTZBURG, L. SCHINASI, & D. SCHLEUTER, MILITARY RULES OF EVIDENCE MANUAL (1981); Symposium, *The Military Rules of Evidence*, THE ARMY LAW., May 1980, at 1.

c. An Independent Defense Corps

From the days of *O'Callahan* until the mid-1970s, both the prosecutor and the defense counsel in courts-martial worked directly for the commander's legal advisor, the staff judge advocate, and thus, indirectly, for the commander himself. At best, this situation created the appearance of improper influence upon the professional activity and zealous advocacy of a defense counsel on behalf of a client. In some instances, actual impropriety occurred.[294] This inherent conflict of interests led both the Navy and the Air Force in 1974 to establish defense organizations separate from the command which the individual counsel serviced. In 1980, after a two-year test period, the Army followed suit.[295] Organized similarly to the independent judiciary, defense counsel were answerable only to other defense counsel.[296] Insulation from the command was complete; evaluation reports or disciplinary action could be issued only by the independent defense supervisory chain.[297]

B. *Respect For Other Systems*

In part, the willingness of the Burger Court to defer to the military justice and administrative processes reflects the Court's increased respect for other legal systems. During the period of the Burger Court, the integrity of state criminal and federal administrative schemes has not been disturbed and those processes have

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294. *See generally* Memorandum from Comm. on Defense Counsel to the Judge Advocate General, U.S. Army, Subject: Defense Counsel Program (May 12, 1958), *cited in* Howell, *supra* note 254, at 13 n.35.

295. *Fact Sheet: US Army Trial Defense Service,* THE ARMY LAW., Jan. 1981, at 27. As the largest branch of the armed forces, the Army decided to be especially cautious in implementing a separate defense program. On May 15, 1978, a test program of the separate defense corps was initiated at six training posts within the continental United States. On September 1, 1979, the test was extended to other Army units in the continental United States, Alaska, and Hawaii. On December 1, 1979, the program was implemented in Germany and, one month later, in Korea as well. Finally, on November 7, 1980, the Army Chief of Staff, General Edward C. Meyer, approved the Trial Defense Service as a permanent Army organization. Howell, *supra* note 254, at 35-46. *See also* Park, *The Army Judge Advocate General's Corps, 1975-1982,* 96 MIL. L. REV. 5, 34-38 (1982).

296. *See* U.S. Dep't of Army Reg. No. 27-10, Legal Services—Military Justice, ch. 6 (July 1, 1984).

297. Trial defense counsel in the Army are evaluated by the senior defense counsel of their office, by the regional defense counsel who oversees several trial defense offices in a geographic area, and by the Executive Officer of the U.S. Army Trial Defense Service, in Falls Church, Va. Disciplinary authority is vested in the Commander, U.S. Army Legal Services Agency, the parent organization of the Trial Defense Service, also located at Falls Church, Va. *Id.* para. 6-3.

been granted a large measure of immunity from interference by the federal courts.

1. State Systems

a. Abstention

Federal courts are generally prohibited from interfering with the processes of state courts.[298] In 1908, the Supreme Court in *Ex Parte Young*,[299] recognized an exception to this general rule and held that, at least when a federal injunctive action has been commenced prior to the initiation of a state criminal prosecution under an allegedly unconstitutional statute, the federal courts possess the authority to enjoin the state prosecution.[300] However, shortly after *Young* the Court made it clear that such injunctions would issue only "under extraordinary circumstances where the danger of irreparable loss is both great and immediate."[301] The Court thereafter consistently affirmed refusals to enjoin criminal prosecutions which had been brought "lawfully and in good faith,"[302] albeit under the authority of an allegedly unconstitutional statute.[303]

In 1965, in *Dombrowski v. Pfister*,[304] the Warren Court upheld a federal injunction against enforcement of a state statute which regulated freedom of expression. In *Dombrowski*, the petitioners asserted that the state statutes, the Louisiana Subversive Activities and Communist Control Law[305] and the Communist Propaganda Control Law,[306] were overbroad. Furthermore, they claimed that

298. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1982). *See also id.* § 1341 (no injunction of state agency rate orders).

299. 209 U.S. 123 (1908).

300. *Id.* at 162-65. The central issue in *Young* was whether the eleventh amendment forbade suit where, although the state was not a party, the suit was directed against a state official charged with enforcing the laws of the state. To avoid the issue and permit the suit, the Court created the legal fiction that the official is "stripped of his official or representative character" when seeking to enforce a statute in violation of the Constitution. Consequently, the suit is a personal one against the official rather than one against the state. *Id.* at 163.

301. Feener v. Boykin, 271 U.S. 240, 243-44 (1926).

302. Dombrowski v. Pfister, 380 U.S. 479, 485 (1965).

303. *See, e.g.*, Douglas v. City of Jeanette, 319 U.S. 157 (1943); Williams v. Miller, 317 U.S. 599 (1942); Watson v. Buck, 313 U.S. 387 (1941).

304. 380 U.S. 479 (1965).

305. LA. REV. STAT. ANN. §§ 14:358-:374 (West 1976)

306. LA. REV. STAT. ANN. §§ 14:390-:390.8 (West 1976).

the past conduct of state and local officials had evidenced a pattern of harassment against the petitioners in order to deter their efforts to secure civil rights for Blacks in the state.[307]

Heavily influenced by the evidence of "the chilling effect on free expression" resulting from the state's activity, the Supreme Court found abstention by the lower court[308] to have been inappropriate. The Court determined "that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's determination and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury."[309] Thus, where a party can allege the threat of bad-faith prosecution under a state statute regulating freedom of expression, a federal court is permitted to exercise its equitable power to enjoin the state official from commencing the prosecution.

Dombrowski was consistent with *Young*; in neither case was the federal court asked to intervene in a pending state prosecution. A different situation, however, was presented to the Burger Court in *Younger v. Harris*.[310] In *Younger*, the accused had been indicted under the California Criminal Syndicalism Act.[311] Thereafter, in federal court, he sought to enjoin further prosecution, alleging that both the state prosecution and the statute itself chilled the exercise of his first amendment rights. Relying on *Dombrowski*, a three-judge federal court issued the injunction.[312]

Noting the longstanding policy against federal intervention in state proceedings, the Supreme Court found "that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of

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307. The complaint alleged a pattern of unlawful arrests, searches and seizures, and threats of additional prosecutions. 380 U.S. at 487-88.

308. The court in question was a three-judge federal district court convened to rule upon the constitutionality of the state statutes. *Id.* at 482. Since 1965, the jurisdiction of such courts has been limited to questions involving the apportionment of congressional districts. 28 U.S.C. § 2284 (1982).

309. 380 U.S. at 486.

310. 401 U.S. 37 (1971).

311. CAL. PENAL CODE §§ 11400-11401 (West 1982).

312. 281 F. Supp. 517 (C.D. Cal. 1968). Others, against whom charges were not pending, joined Harris in the suit, claiming that the statute interfered with their freedom of expression. The Supreme Court quickly disposed of their claims: "Whatever right Harris, who is being prosecuted under the state syndicalism law may have, [the others] . . . cannot share it with him." 401 U.S. at 42. Their feelings of inhibition in the face of the statute were insufficient to permit them to invoke the equity powers of the federal court. *Id.*

injunctive relief against state criminal prosecutions."[313] Absent a showing of bad-faith prosecution, the mere existence of an allegedly unconstitutional statute and the allegation of a "chilling effect" on the rights of free expression would not alone justify federal court interference in a pending state prosecution. Under those circumstances the accused would be required to present his constitutional claims in his defense to the state prosecution, subject to review of adverse determinations in the state and, ultimately, federal court systems.[314]

In *Younger*, the Court assumed that the state trial and appellate court system could adequately entertain and, if appropriate, vindicate the accused's constitutional claims; the Burger Court would not impugn the integrity of the state criminal justice process. Similar considerations were present in *Schlesinger v. Councilman*,[315] in which the Court likewise refused to intervene in the military justice system. In both cases, whether on the bases of comity, federalism, or prudential concerns, the Burger Court opted to avoid premature intervention in a scheme in which the Court believed that the accused's claim could be fully aired and appropriately adjudicated.

b. Habeas Corpus

Federal law grants a person held "in custody in violation of the Constitution or laws or treaties of the United States" the right to petition a federal court for a writ of habeas corpus.[316] If the respondent is unable to show that the petitioner is lawfully in custody, the court may order the petitioner released.[317] Although first deemed to be available only for attacks upon the jurisdiction of the sentencing court,[318] it is now clear that habeas corpus may be sought for claims of disregard for any constitutional right of an accused.[319] Habeas corpus is available in federal court to review

313. 401 U.S. at 53.

314. *Id.* at 54.

315. 420 U.S. 738 (1975). *See supra* text accompanying notes 94-110.

316. 28 U.S.C. § 2241 (1982).

317. The application for a writ of habeas corpus must identify only the applicant, the person who has custody over him, and the claim or authority for that detention. *Id.* § 2242. The judge would thereafter require the respondent to the writ to show cause why the writ should not be granted. *Id.* § 2243.

318. *See, e.g., Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855).

319. *See, e.g.*, Waley v. Johnson, 316 U.S. 101 (1942).

persons in custody by reason of a judgment of the state court, provided, however, that the petitioner has exhausted all remedies available to him in the state system.[320]

The existence of such a mechanism is inevitably a source of friction between the state and federal court system. In 1963, in *Fay v. Noia*,[321] the Warren Court greatly exacerbated that inherent friction by permitting federal courts to entertain the habeas corpus petition of a defendant who had failed to appeal his conviction in the state court system. Although federal judges possess discretion to refuse habeas relief in such a case, the standard for exercise of that discretion is high:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the *deliberate by-passing* of state procedures, then it is open to the federal court on habeas to deny him all relief. . . . A choice made by counsel and not participated in by the petitioner does not automatically bar relief.[322]

The Court concluded by finding no "deliberate bypass" by Noia that would preclude habeas relief.[323]

The "deliberate bypass" rule of waiver remained the law throughout the remaining tenure of the Warren Court. Not long after Warren Burger became Chief Justice, however, a process of retrenchment began. In *Davis v. United States*,[324] a federal prisoner sought to attack first by writ of habeas corpus the composition of the grand jury which had indicted him. The Federal Rules of Criminal Procedure require that such an attack must be made by motion before trial, it will otherwise be deemed waived.[325] Rejecting the "deliberate bypass" rule of *Fay v. Noia*, the Court found a valid waiver of the motion and barred habeas relief absent a showing of cause for noncompliance with the rule and a showing

320. 28 U.S.C. § 2254(b) (1976).

321. 372 U.S. 391 (1963).

322. *Id.* at 439 (emphasis added).

323. *Id.* The Court did note that Noia had been faced with the "grisly choice" either of not appealing and keeping his existing sentence or of appealing through the state system. Were he to be granted a new trial, the death penalty would become a possibility. *Id.* at 440.

324. 411 U.S. 233 (1973).

325. FED. R. CRIM. P. 12(b)(2).

of actual prejudice.[326]

Three years later, in *Francis v. Henderson*,[327] the Court accorded the same deference to a similar state rule of procedure. Indeed, in *Francis, Fay v. Noia* was cited only for the proposition that federal courts possess the power to "forego the exercise of . . . [their] habeas corpus power" when required by "considerations of comity and concerns for the orderly administrating of criminal justice."[328]

Finally, in *Wainwright v. Sykes*,[329] the Burger Court refused to entertain a habeas challenge to an "involuntary" confession when the accused had failed to raise the issue at trial in violation of a state "contemporaneous objection" rule. Finding that the state rule served valid governmental purposes,[330] the Court extended the *Francis* "cause-and-prejudice" standard to cases in which the accused has failed to take advantage of the opportunity provided by state procedures to object at some stage of the proceeding.[331] The "deliberate bypass" rule, criticized by the Court as "sweeping language,"[332] was found to have been "limited by *Francis*"[333] and was condemned as encouraging " 'sand bagging' on the part of defense lawyers."[334] The Court hoped that an awareness by the accused and their attorneys that "contemporaneous objection" rules would be enforced in federal and state courts would encourage full litigation in the state courts, thus, perhaps, achieving a more equitable result and returning to state criminal proceedings a greater degree of finality.

In *Engle v. Isaac*,[335] the "cause-and-prejudice" standard was ex-

326. 411 U.S. at 238-40. *But see id.* at 245 (Marshall, J., dissenting). Citing *Fay v. Noia* only in a footnote, Justice Marshall, who was joined by Justices Brennan and Douglas, found that in none of the earlier cases "did the prisoner show his failure to object was not an intentional relinquishment of a known right." *Id.* at 257 (Marshall, J., dissenting).

327. 425 U.S. 536 (1976).

328. *Id.* at 539. Only Justice Brennan dissented and would have held to the "deliberate bypass" standard. *Id.* at 542-43 (Brennan, J., dissenting). Neither Justice Marshall nor Justice Stevens took part in the decision.

329. 433 U.S. 72 (1977).

330. The Court found that the rule enabled an accurate record to be made when witnesses' recollections are the freshest and that enforcement of the rule might lead to the exclusion of evidence, "thereby making a major contribution to finality in criminal litigation." *Id.* at 88-90.

331. *Id.* at 90-91.

332. *Id.* at 87-88.

333. *Id.* at 85.

334. *Id.* at 89.

335. 456 U.S. 107 (1982).

tended to an accused's failure to object to a jury instruction as required by the Ohio "contemporaneous objection" rule.[336]

Further respect for the state court's processes was evidenced in *Stone v. Powell*,[337] in which an accused had unsuccessfully litigated a motion at trial to suppress evidence discovered as a result of an arrest made pursuant to an unconstitutional statute. After an unsuccessful appeal in the state system, Powell successfully obtained habeas relief in federal court.[338] The Supreme Court reversed. Finding that, unlike violations of the fifth and sixth amendments, violations of the fourth amendment do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable,"[339] the Court refused to suppress evidence in a collateral action when the state had provided the accused with "an opportunity for a full and fair litigation of a Fourth Amendment claim . . . ."[340] Thus, the Court relegated primarily to the state courts the responsibility for hearing and deciding fourth amendment issues, subject only to direct Supreme Court review.

Finally, in *Rose v. Lundy*,[341] the accused submitted a federal habeas corpus petition based on claims upon only some of which the state remedies had been exhausted. The Supreme Court held that the entire habeas petition should have been dismissed by the federal district court. The exhaustion of remedies doctrine is designed to advance the interests of comity, under which the state court system should be given the initial opportunity to review and perhaps correct any issue which might otherwise constitute part of a request for collateral relief. The petitioner in *Rose v. Lundy* was given the choice of returning to the state courts to litigate the unexhausted claim or amending his federal habeas petition to delete it.[342] Whichever option is chosen, the federal courts are hereafter foreclosed from reviewing any issue upon which the state courts have not finally ruled.

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336. *Id.* at 124-25. *See also* United States v. Frady, 456 U.S. 152 (1982) (finding a waiver in the failure to object to a jury instruction under FED. R. CRIM. P. 52(b)).

337. 428 U.S. 465, *reh'g denied*, 429 U.S. 874 (1976).

338. 507 F.2d 93 (9th Cir. 1974), *rev'd*, 428 U.S. 465 (1976).

339. 428 U.S. at 479 (quoting Kaufman v. United States, 394 U.S. 217, 224 (1969)). Rather, the purpose of an exclusionary rule is to deter constitutional violations. The deterrence factor present in the exclusion of evidence on collateral review was found to be negligible. 428 U.S. at 488-89.

340. 428 U.S. at 482.

341. 455 U.S. 509 (1982).

342. *Id.* at 520-22.

2. Administrative Agencies

Federal courts will usually defer to the expertise of federal administrative agencies when the agencies act within their fields of expertise.[343] Indeed, by statute, federal courts are generally limited in the scope of their review of administrative decisions to determining only whether the decision was arbitrary or capricious or an abuse of discretion.[344] In cases where opinions could differ as to the wisdom of a particular decision in an area within the agency's competence, the court will not substitute its judgment for that of the agency.[345] In sum, the legislative scheme of specialized agencies designed to oversee regulation of specific areas of activity is rarely disturbed.

Nor would a different result obtain when the wrong complained of was of constitutional dimension, at least when the complainant was not a participant in the regulated activity, but rather a member of the agency itself. In *Bush v. Lucas*,[346] the plaintiff, an employee of the National Aeronautics and Space Administration, alleged that he had been demoted and reassigned after making remarks critical of the facility at which he worked. Bush appealed unsuccessfully to the Federal Employee Appeals Authority and to the Civil Service Commission's Appeals Review Board. Bush was successful before the Board, which ordered him reinstated with back pay.

While pursuing his administrative appeals, Bush brought suit against his former superior, seeking damages for violations of his first amendment rights.[347] After Bush's tortuous journey through the federal court system,[348] the Supreme Court refused to imply a

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343. *See, e.g.*, Udall v. Tallman, 380 U.S. 1 (1965); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

344. 5 U.S.C. § 706(2)(A) (1982). In some cases, the reviewing court is directed to conduct a de novo review. *See id.* §§ 552(a)(3)(B) (review of decision to withhold records under the Freedom of Information Act), 552(a)(g)(1) (decision to release records under the Privacy Act).

345. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 29.02 - 29.03 (1959).

346. 103 S. Ct. 2404 (1983).

347. *Id.* at 2407. Bush also sued for defamation. The district court and the Fifth Circuit found the defendants absolutely immune from such a suit. 598 F.2d 958 (5th Cir. 1979). The issue was thereafter narrowed to the constitutional question.

348. Initially, the Supreme Court vacated the Fifth Circuit's determination that no liability existed. The Supreme Court found applicable the reasoning in Carlson v. Green, 446 U.S. 14 (1980), in which the Court decided that federal prison officials ought to be afforded only qualified immunity from suit. 446 U.S. 914 (1980). On remand, the Fifth Circuit again ruled

judicial remedy to redress the purported constitutional violations.

For purposes of the decision, the Court assumed that a violation of Bush's constitutional rights had occurred and that monetary damages would more effectively compensate for the violation than would reinstatement under the regulatory scheme.[349] Nonetheless, the Court found "special factors counselling hesitation" in creating a new remedy. The Pendleton Act[350] (the original civil service act), its subsequent amendments, and the regulations promulgated to implement them evidence "an elaborate remedial system that has been constructed step by step, with careful attention to the conflicting policy considerations."[351] Because these "comprehensive procedural and substantive provisions [gave federal employees] . . . meaningful remedies against the United States," the Court expressed reluctance to create a new constitutional remedy in addition to the congressionally created structure.[352]

Thus, it appears that *Chappell v. Wallace* was not written in a vacuum. In the federal administrative realm, even without the additional factor in *Chappell* of the need for military discipline, the Court chose to respect a statutory system of redress of grievances and declined to superimpose a constitutional cause of action upon it. As the Burger Court had chosen to respect the integrity of the state criminal justice systems, so, too, it would respect the integrity of the administrative system created by the civil service acts. The deference given the military justice and administrative systems in cases such as *Schlesinger v. Councilman* and *Chappell v. Wallace* may be seen as a part of this general judicial philosophy.

V. The Burger Court and the Military: Constructing a Judicial Philosophy

In a 1962 address to the faculty and students of the New York University School of Law, Chief Justice Earl Warren outlined the Supreme Court philosophy on the protection of individual rights of military personnel.[353] In language that might reasonably be mis-

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against the plaintiff. 647 F.2d 573 (5th Cir. 1981).

349. 103 S. Ct. at 2408.

350. Ch. 27, 22 Stat. 403 (1883) (current version in scattered sections of 5 U.S.C., 18 U.S.C., & 40 U.S.C. (1982)).

351. 103 S. Ct. at 2416.

352. *Id.* at 2416-17.

353. Address by Earl Warren to the New York University Law Center (Feb. 1, 1962), *printed in* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962).

taken for that of a Burger Court majority, in sharp contrast to the language of the Vietnam-era Warren Court in *O'Callahan*, the Chief Justice expounded a judicial "hands off" policy concerning military activity directed toward service members.[354] Although noting that the 1953 decision in *Burns v. Wilson*[355] permitted federal habeas corpus review of allegations that a court-martial had denied an accused his or her fundamental rights, the Chief Justice related that extremely few cases had reached the courts since *Burns*. To explain the infrequency of such claims, Chief Justice Warren pointed with admiration to the role of the Court of Military Appeals as an "effective guarantor" of respect for the constitutional rights of the service members.[356] In language prescient of *Schlesinger v. Councilman*,[357] he remarked that the federal courts were "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal."[358]

Now, after almost a decade and a half of Burger Court decisions concerning various aspects of the military, it may be possible to articulate the present Court's philosophy toward cases involving the armed forces. The construct will inevitably be imperfect: Except in *Relford*[359] and *Chappell*,[360] Justices Brennan and Marshall have dissented in every case in which the result favored the military. Although Justice Stevens voted with the Court in *Chappell*, he dissented on matters of statutory construction in *Glines*[361] and *Huff*.[362] Justice O'Connor is as yet a relatively untested jurisprudent in military matters. While she voted with the unanimous Court in *Chappell*, her vote joined those of both the philosophical activists, Justices Brennan and Marshall, and the conservatives, Chief Justice Burger and Justice Rehnquist. However, it appears that a majority composed of at least Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist can be mustered in support of the philosophy outlined below.

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354. *Id.* at 186.
355. 346 U.S. 137 (1953).
356. Warren, *supra* note 353, at 188-89.
357. 420 U.S. 738 (1975).
358. Warren, *supra* note 353, at 187.
359. 401 U.S. 355 (1971).
360. 102 S. Ct. 2362 (1983).
361. 444 U.S. 348 (1980).
362. 444 U.S. 453 (1980) (per curiam).

Initially, it should be noted that the Burger Court places great emphasis on the military as a community separate and distinct from that which lies outside the gate of the military installation. Throughout the military cases of the Burger Court are repeated references to the needs for unquestioning response to orders and an atmosphere conducive to training service members to so respond.[363] The introduction into the military community of a disruptive influence, whether a political campaign by Benjamin Spock,[364] Captain Levy's peculiar views,[365] or a lawsuit against a commander,[366] will be regarded by the Court with a skeptical eye. Additionally, in the military matters the Court will condone the application of a rule different from that existing in the civilian community when that rule can be presented as necessary to further the military mission. Thus, while a lawsuit against a presidential advisor will be countenanced,[367] a suit against a military commander will not be.[368]

Unlike the five-member majority of the Warren Court that supported the scathing language of Justice Douglas in *O'Callahan*, the Burger Court affords a great measure of respect to the military justice system. The Court, in *Relford v. Commandant*,[369] tread lightly upon the language of *O'Callahan*; it only footnoted legal literature critical of *O'Callahan*[370] and nowhere cited the language of Justice Douglas. It was with *Gosa v. Mayden*[371] that the Court almost apologetically cited Douglas's language[372] and began to rehabilitate the military justice system. By *Schlesinger v. Councilman*,[373] the Court had begun to speak of the expertise of the military court system, particularly the Court of Military Appeals, and to analo-

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363. *See, e.g.*, Chappell v. Wallace, 103 S. Ct. 2362, 2365 (1983) ("[T]he habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."); Parker v. Levy, 417 U.S. 733, 758 (1974) ("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.").

364. Greer v. Spock, 424 U.S. 828 (1976). *See supra* text accompanying notes 157-70.

365. Parker v. Levy, 417 U.S. 733 (1974). *See supra* text accompanying notes 180-206.

366. Chappell v. Wallace, 103 S. Ct. 2362 (1983). *See supra* text accompanying notes 224-49.

367. Harlow v. Fitzgerald, 457 U.S. 731 (1982).

368. *Chappell*, 103 S. Ct. 2362.

369. 401 U.S. 355 (1971).

370. *Id.* at 357 n.3.

371. 413 U.S. 665 (1973).

372. *Id.* at 680-81.

373. 420 U.S. 738 (1975).

gize that system favorably to state court systems[374] and federal administrative agencies.[375] Although the dissenting opinions continually hearkened back to the indictments in *O'Callahan*,[376] the majorities in these cases were content to permit military courts to resolve military issues, subject, upon exhaustion of remedies, to collateral review in the federal courts.

When the military deals with civilians, the Court will require only the evenhanded application of a rule with some nexus to the military mission. In this regard, the neutral application of the regulation concerning political activity on a military base in *Greer v. Spock*[377] appears to have mollified the Justices who had voted differently in *Flower*.[378] Spock had been denied access to Fort Dix, just as had every political candidate before him, and had been excluded for what the Court found to be a good reason. Moreover, the Court's belief that a military installation may not be constitutionally equated with a city street or municipal park was demonstrated both by *Greer v. Spock* and possibly by the denial of certiorari in *Persons for Free Speech at SAC v. United States Air Force*.[379] Attempts to breach the wall of a politically neutral military will be resisted by the Burger Court.

Where, however, the Court feels that the military has not come to court with "clean hands," it will cast a skeptical eye upon the armed forces. *Parisi v. Davidson*[380] was such a case. Similarly, where there is evidence of arbitrary or discriminatory application of a regulation governing speech, unlike the situation in *Greer v. Spock*, the Burger Court might be persuaded to find a basis to invalidate the military action.

During the tenure of the Warren Court, vast inroads into the authority of the military were made.[381] The Burger Court has not

374. *Id.* at 754.

375. *Id.* at 756.

376. *See, e.g.*, Gosa v. Mayden, 413 U.S. 665, 694 (1973) (Marshall, J., dissenting).

377. 424 U.S. 828 (1976).

378. 407 U.S. 197 (1972) (per curiam).

379. 675 F.2d 1010 (8th Cir.), *cert. denied*, 103 S. Ct. 579 (1982).

380. 405 U.S. 34 (1972).

381. The earlier military jurisdiction cases of the Warren Court, such as United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955), and Reid v. Covert, 354 U.S. 1 (1957), were not inexorable expositions of the law. Chief Justice Warren was initially disposed at least to permit the exercise of court-martial jurisdiction over the discharged service member in *Toth* for offenses committed while on active duty. At the behest of the potential dissenters, however, the case was postponed for reargument. By then, Warren had changed his mind, Justice Clark had followed him, and Justice Harlan had joined the Court. This situation cre-

reversed and is unlikely to reverse these decisions. There have, for example, been three opportunities to overrule *O'Callahan*: *Relford*,[382] *Gosa v. Mayden*,[383] and *Schlesinger v. Councilman*.[384] Instead, within the general framework of the Warren Court decisions, the Burger Court has chosen to distinguish the facts and to defer to and respect military rules and procedures where a plausible argument can be made that those rules and procedures deserve respect. *Chappell* indicates that this approach is alive and well. Military commanders have generally been granted authority by the Court to control their installations and charges. Where rational, nondiscriminatory applications of that authority are present, military determinations will not be upset by the Burger Court.

VI. The Burger Court and the Military: The Future

Wickham v. Hall, decided by the Fifth Circuit on June 10, 1983,[385] may be the next military case before the Burger Court. Like *Relford*,[386] the issue is jurisdiction; however, unlike any case decided by the Supreme Court in over two decades, the issue concerns the in personam jurisdiction of a court-martial to try an ostensibly discharged member of the armed forces.

Article 3(b) of the Uniform Code of Military Justice provides in part:

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge and is after apprehension subject to [the UCMJ] . . . while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses . . . committed before the fraudulent

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ated a six-to-three majority for denial of jurisdiction. B. Schwartz & S. Lesher, Inside the Warren Court, 1953-1969, 144-46 (1983). Chief Justice Warren later explained that a different result in *Toth* potentially would have affected the status of over 22,500,000 veterans. Warren, *supra* note 353, at 194-95. Concerning the denial of court-martial jurisdiction over civilian employees accompanying the armed forces overseas, as in McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960), and Grisham v. Hagan, 361 U.S. 278 (1960), the Chief Justice observed that, if the military were concerned about discipline, it could have soldiers perform the work. Warren, *supra* note 353, at 195.

382. 401 U.S. 355 (1971).

383. 413 U.S. 665 (1973).

384. 420 U.S. 738 (1975).

385. 706 F.2d 713 (5th Cir. 1983).

386. 401 U.S. 355 (1971).

discharge.[387]

Article 83 of the UCMJ makes the fraudulent procurement of a discharge a criminal offense.[388]

In 1980, Wendy Wickham presented to military authorities a urine sample, purported to be hers, a test of which revealed that the donor was seven weeks pregnant. In October, 1980, she was discharged from active duty and placed in the Individual Ready Reserve for the balance of her military commitment, which would expire in April, 1984. In November, 1980, however, the Army learned that Wickham had submitted the urine sample of another woman and that Wickham was not and had not been pregnant. In December, 1980, her discharge was revoked, and a violation of Article 83 was lodged against her. Following an unsuccessful petition before the Court of Military Appeals,[389] she sought to enjoin the court-martial in federal court. She was summarily denied relief.

A split panel of the Fifth Circuit affirmed the district court's decision. From *United States ex rel. Toth v. Quarles*,[390] the case in which the Supreme Court had denied the military jurisdiction to try by court-martial former service members for offenses committed while on active duty, the majority drew three factors upon which military jurisdiction over discharged service members would hinge. First, a court must determine whether the trial of the defendant "would further the primary function of the military to fight or be ready to fight wars, rather than the incidental purpose of maintaining discipline within the service."[391] This factor was resolved in favor of the military: "Fraudulent separation, like desertion, places the power to thin the ranks of those ready for combat in the hands of the soldier, not the service."[392]

Second, the court examined whether the assertion of jurisdiction over those situated similarly to Wickham would "sweep under military jurisdiction a great number of persons not otherwise subject to military law."[393] The court discounted such a likelihood: "The reach of Article 3(b) in this respect is minimal" inasmuch as it ap-

387. 10 U.S.C. § 803(b) (1982).
388. *Id.* § 883.
389. 12 M.J. 145 (C.M.A. 1981).
390. 350 U.S. 11 (1955).
391. 706 F.2d at 716 (citing *Toth*, 350 U.S. at 17, 22-23).
392. 706 F.2d at 716.
393. *Id.* (citing *Toth*, 350 U.S. at 19-20, 22-23).

plies only to a narrow classification of individuals, those who have fraudulently procured their discharge from active duty.[394]

Finally, the court determined that Article 3(b) was limited to "*the least possible power adequate to the end proposed.*"[395] The statute is narrowly drawn and seeks only to enforce the service obligations of those who enlist in the armed forces. To the court, this power was analgous to the "power to try and punish deserters;" both had sought unlawfully to avoid their duties to the nation. In the absence of a validly procured and executed discharge, Wickham's military status and service obligation continued.[396]

The Fifth Circuit was content to permit the military courts to determine the merits of the case: "Despite the extreme examples used by Justice Douglas in his scathing attack on 'so-called military justice' in *O'Callahan v. Parker*, . . . military courts are not Kafkaesque Star Chambers. They assume the same responsibility to protect a person's constitutional rights as state and federal courts."[397] Additionally, the court noted that the validity of the discharge may be determined by a reading of Army regulations and procedures. "Such matters fall within the special expertise of the military courts. . . . We should defer to them in these respects."[398] Should Wickham ultimately be dissatisfied with the protection of her constitutional rights in the military proceedings, she may commence a collateral attack by writ of habeas corpus in federal district court.[399]

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394. 706 F.2d at 716 (citing Wickham v. Hall, 12 M.J. 145, 151 (C.M.A. 1981)).

395. 706 F.2d at 716 (quoting *Toth*, 350 U.S. at 23) (emphasis in *Toth*).

396. 706 F.2d at 716-17.

397. *Id.* at 717 (citing O'Callahan v. Parker, 395 U.S. 258, 266 n.7 (1969)).

398. 706 F.2d at 717-18 (citing Schlesinger v. Councilman, 420 U.S. 738 (1975)). The Fifth Circuit appears to be less secure on this point. It appears that the key issues are questions of fact, such as whether Wickham submitted the urine specimen of another, which a federal court would be as competent as a military court to resolve. *See* 706 F.2d at 724 (Thornberry, J., dissenting).

399. Judge Thornberry dissented, finding initially that to permit the military to determine even the threshold jurisdictional question would be to indulge in a presumption of guilt. Wickham was ostensibly a civilian in possession of a valid discharge. In conferring jurisdiction upon the military, Article 3(b) presumes that Wickham committed the act with which she is charged; without the fraudulent procurement of the discharge, jurisdiction would be lacking. 706 F.2d at 719-21 (Thornberry, J., dissenting). Judge Thornberry resolved all three *Toth* factors against the government. First, he found that Article 3(b) was largely irrelevant to the military mission. Far from "thinning the ranks," fraudulently procured discharges had not been the basis for a prosecution in the more than thirty years of operation of the Uniform Code of Military Justice; Wickham was the first target. *Id.* at 722 (citing Wickham v. Hall, 12 M.J. 145, 156 (C.M.A. 1981) (Everett, C.J., dissenting)). Second, Judge Thornberry charged that the majority had misread *Toth*. The evil of subjecting dis-

Whether *Wickham v. Hall* will reach the Supreme Court is as yet undetermined. If it does, a divided Court will probably affirm the decision of the Fifth Circuit. Based on the philosophy of the Burger Court toward the military apparent from the cases from *Relford* to *Chappell,* however, it seems likely that the Court's opinion will forego the initial analysis of the Fifth Circuit and will focus instead upon the expertise of the military system and the need for discipline.

The Court might begin its exposition by hearkening back to the early military status cases, such as *In re Grimley,*[400] for the proposition that enlistment in the military creates a status terminable only by a valid discharge. Cases such as *United States ex rel. Toth v. Quarles*[401] would be distinguished, not cited for guidance. First, for example, the discharge obtained by the accused in *Toth* was unquestionably valid and served to sever all connection between him and the military. In *Wickham,* however, the validity of the discharge itself has been called into question. Second, given the discussion in *Chappell* of the need to instill an unquestioning obedience to orders in peacetime in order for service members to be prepared to function effectively in wartime, the Burger Court might take issue with the language in *Toth* that maintenance of discipline was an "incidental" function of the military.[402]

The Burger Court, affording the military court system the same prerogatives exercised by a federal district court, could allow the court into which the accused is brought to determine in the first instance whether jurisdiction over the person exists. Echoing various passages from *Schlesinger v. Councilman,*[403] the Court might then permit the military justice system, at both trial and appellate levels, to register its "expert" determination concerning the extent to which the maintenance of discipline among active-duty service members would depend upon the prosecution of one who had al-

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charged service members to court-martial jurisdiction lies in the *potential* number of persons affected, not in those actually affected. In this regard, the majority "places over the head of every veteran a damoclean threat that, without a hearing, he may be seized by military authorities to face trial by court-martial on the charge that his discharge was fraudulently procured. The potential reach of Article 3(b) is enormous." 706 F.2d at 722. Finally, whatever the military interest in the case, it could be adequately vindicated by a resolution of the issue of fraud in the federal courts. *Id.* at 722-23.

400. 137 U.S. 147 (1890).

401. 350 U.S. 11 (1955).

402. *Id.* at 17.

403. 420 U.S. 738 (1975).

legedly procured a discharge fraudulently. Although the Fifth Circuit's equation of the fraudulent procurement of a discharge to desertion might have been extreme, there is little doubt that a majority of the Burger Court (possibly consisting of at least Chief Justice Burger and Justices Blackmun, White, Rehnquist, and O'Connor), could find the impact upon military discipline and readiness sufficient to warrant litigation of the claim, at least initially, through the military justice system.

VII. Conclusion

Times have changed. Just as the America of the Vietnam era is not the America of the home computer age, so too, the Supreme Court of Earl Warren and William O. Douglas is not the Supreme Court of Warren Burger and William Rehnquist. The American—and judicial—views of the role of the proper limitations upon the military have changed. The litigiousness encouraged during the Warren era has yielded to a deferential and prudential mindset in the Burger era. Whatever the cause or causes, the Court has chosen to accord the military criminal and administrative processes a greater range of action than that granted by the latter-day Warren Court. One might argue, however, hearkening back to Chief Justice Warren's 1962 exposition,[404] that this "hands off" approach had been the tradition and that *O'Callahan* was an aberration. In *O'Callahan*, tradition arguably yielded to the emotion of the moment, in a denigration of the military legal process. In any event, particularly after *Chappell v. Wallace*,[405] the Supreme Court seems to have chosen to follow the path delineated by Chief Justice Warren in 1962: That is, in the absence of a violation of the fundamental rights of a service member, the military may control its own personnel and installations. Those pursuing an expansion of individual rights would be afforded no more; those seeking discipline in the armed forces would be permitted no less.

404. Warren, *supra* note 353.
405. 103 S. Ct. 2362 (1983).