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THE CASE FOR TERMINATION OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Abstract

Since 1951, the military's equivalent of a state supreme court has been a specialized civilian court responsible for appeals under a single Act of Congress, the Uniform Code of Military Justice. After nearly three-quarters of a century, a clear trend of assimilating military and civilian law, a plummeting caseload, and substantial reason to doubt the wisdom of conferring appellate jurisdiction over courts-martial on a specialized court, this Essay suggests that the United States Court of Appeals for the Armed Forces should be terminated and its jurisdiction transferred to the United States Court of Appeals for the District of Columbia Circuit.

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Introduction

Diamonds may be forever,[1] but—except for the Supreme Court[2]—federal courts can come and go. And go they do, even though courthouse architecture and choice of construction materials typically strive to signal permanence.[3] Where circumstances (or politics) call for it, federal courts have been terminated.

The death blow may come quickly or only after decades. Thus, in 1802, Congress abolished judgeships it had controversially created the year before, after President Adams's failed bid for re-election.[4] As new states entered the Union (typically but not invariably after a short period as territories), their Article IV (territorial) courts were superseded by state and Article III federal courts.[5] The Court of Private Land Claims, established in 1891, had a limited purpose and ended in 1904.[6] The Choctaw and Chickasaw Citizenship Court lasted a mere seven months between 1902 and 1903, deciding only a single case.[7] The Commerce Court of the United States was created in 1910 and abolished in 1913.[8] The United States Court for China[9] and the consular courts in that country ended with the expiration of American extraterritorial rights in 1943.[10] The World War II-era Emergency Court of Appeals somehow made it to 1962,[11] the District Court for the Canal Zone expired in 1982,[12] as did the Temporary Emergency Court of Appeals in 1993,[13] the Regional Rail Reorganization Special Court in 1997,[14] and the Special Division of the D.C. Circuit for the appointment of independent counsels in 1999.[15] The non-statutory United States Court for Berlin (a holdover from the post-World War II occupation) was shut down in 1991,[16] and the Midway

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[1] *See S.H. Silver Co. Inc. v. David Morris Int'l*, 2008 WL 4058364 at *7 (N.D. Cal. Aug. 28, 2008).

[2] *See* U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

[3] For a close examination of courthouse iconography see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE, INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES (2011).

[4] Act of January 2, 1802, 2 Stat. 132. *See* William S. Carpenter, *Repeal of the Judiciary Act of 1801*, 9 AM. POL. SCI. REV. 519 (1915). *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[5] *See Benner v. Porter*, 50 U.S. (9 How.) 235 (1850).

[6] *See generally* RICHARD W. BRADFUTE, THE COURT OF PRIVATE LAND CLAIMS: THE ADJUDICATION OF SPANISH AND MEXICAN LAND GRANT TITLES, 1891-1904 (1975). The court is described in *Ex parte Bakelite Corp*., 279 U.S. 438, 456 (1929).

[7] *See Ex parte Joins*, 191 U.S. 93, 102 (1903) (dismissing a petition for a writ of prohibition because the court was no longer in existence).

[8] *See* Urgent Deficiencies Act, 38 Stat. 208, 219 (1913). *See generally* George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEG. HIST. 238 (1964).

[9] *See generally* Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923 (2004).

[10] *See* Treaty Between the United States of America and the Republic of China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, Jan. 11, 1943, 57 Stat. 767, T.S. No. 984, 10 U.N.T.S. 261. American consular courts in Egypt, Turkey, and Morocco were abolished in 1931, 1949, and 1956, respectively. The court in Morocco concluded its last case by 1960. 35:909 DEP'T OF STATE BULL. 844. *See generally* Richard Young, *The End of American Consular Jurisdiction in Morocco*, 51 AM. J. INT'L L. 402 (1957).

[11] *See U.S. Emergency Court of Appeals, Transcript of Proceedings of the Final Session of the Court*, 299 F.2d 1, 20-21 & n.* (Emer. Ct. App. 1961) (order).

[12] *See* Panama Canal Act of 1979, 22 U.S.C. § 3601 note.

[13] *See* Pub. L. No. 102-572, 106 Stat. 4506 (1992).

[14] *See* 45 U.S.C. § 719(b)(2).

[15] *See* Pub. L. No. 103-270, § 2, 108 Stat. 732 (1994).

[16] *See* Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U.N.T.S. 123.

Islands Court is no more.[17] When a non-Article III court is abolished, its judgeships terminate automatically.[18]

When Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950, one of its principal achievements was the creation for the first time in American history of a civilian court to hear appeals from courts-martial.[19] It was a sound idea, especially given the flawed history of the administration of justice in the armed forces during World War II. Since 1951, when the Court of Military Appeals (or CMA (pronounced like "coma" by friend and foe), known since 1994 as the United States Court of Appeals for the Armed Forces (CAAF))[20] came into being, this Article I court[21] has weathered a variety of storms, starting with resistance from the Judge Advocates General (who sought to control access to it)[22] and including a Defense Department trial balloon calling for the transfer of its functions to the United States Court of Appeals for the Fourth Circuit during the Carter Administration.[23] The court has been almost entirely free of scandal.[24] Its judges have included former Supreme Court law clerks[25] and its work product typically meets contemporary standards of judicial scholarship and rigor. Only recently, the court was the subject of favorable comment in *Ortiz v. United States*,[26] which held that, notwithstanding its location in the Defense Department "for administrative purposes only,"[27] it was sufficiently judicial to permit Congress to authorize the Supreme Court to review its decisions by writ of certiorari.

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[17] *See* 65 Fed. Reg. 53,171 (Sept. 1, 2000) (removing 32 C.F.R. pt. 762).

[18] *See* 1 Op. OLC 236, 236-37 (1977) (abolition of D.C.Z. "will automatically terminate" the tenure of the district judge). The judges of the Commerce Court had fixed terms on the court but held Article III appointments. *See* Act of June 18, 1910, 36 Stat. 539, 540. Apart from one who was impeached, *see* Patrick J. McGinnis, *A Case of Judicial Misconduct: The Impeachment and Trial of Robert W. Archbald*, 101 PA. MAG. HIST. & BIOG. 506 (1977), they became at-large circuit judges upon abolition. *See* Urgent Deficiencies Act, 38 Stat. 208, 219 (1913).

[19] This aspect of the UCMJ's novelty was not that some civilian court was to review courts-martial; it was that that review would be direct rather than collateral and would be provided by a specialized court. Courts-martial were and still are subject to various types of collateral review in civilian courts. *See* text accompanying notes 156-62 *infra*.

[20] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2831 (1994).

[21] *See* art. 141, UCMJ, 10 U.S.C. § 941.

[22] *See generally* JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, at 73-106 (1998).

[23] Senator Strom Thurmond supported the move, but the Fourth Circuit wasn't buying. *See* Joshua E. Kastenberg, *Reversing a Devolutionary Pathway of Shoddy History Protecting Commander in Chief "Authorities" in the Article I Courts: A Dual Call for Judicial Rigor and a Broader Amicus Practice in Adjudicating Military and Veterans Appeals*, 74 BAYLOR L. REV. 396, 405 & nn.33-36, 436-37 & n.245 (2022). There was also a detailed staff study that examined, among others, an option of giving CMA's jurisdiction to the D.C. Circuit. *See generally* Dep't of Defense, Off. of Gen. Counsel, Reform of the Court of Military Appeals (May 7, 1979), *discussed in* Lurie, *supra* note 22, at 260-62.

[24] The three dark chapters in the court's history involve a chief judge's submission of an undated but signed resignation letter, *see generally* Lurie, *supra* note 22, at 177-79, 200-09, 215-16, 231-32, litigation by the court's executive against the Secretary of Defense, *see Mundy v. Weinberger*, 554 F. Supp. 811 (D.D.C. 1983), *discussed in* Kastenberg, *supra* note 23, at 436-37; *see also* Lurie, *supra* note 22, at 252-53, 257, and the negotiated disability retirement of a chief judge who had been convicted by a Virginia court. *See* Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation of Powers Strike Out in* Freytag, 12 NEV. L.J. 691, 698-99 (2012); *see Fletcher v. Commonwealth*, No. 450-85, 1986 WL 400462 (Va. Oct. 10, 1986).

[25] Judges Margaret E. Ryan and Liam P. Hardy clerked for Justice Thomas; Judge Gregory E. Maggs clerked for Justices Kennedy and Thomas.

[26] 138 S. Ct. 2165 (2018).

[27] *See* art. 141, UCMJ, 10 U.S.C. § 941.

One would think that after nearly three-quarters of a century, such a court would merit a permanent place in the pantheon of the federal judiciary. This Essay suggests that, on the contrary, CAAF has become a costly anachronism. The time has come to terminate it and transfer its jurisdiction, with some important changes,[28] to the Court of Appeals for the District of Columbia Circuit.

In Part I, the Essay outlines the reasons Congress created CMA and considers whether they were compelling or even arguable in 1950. Part II surveys how intervening developments cast doubt on the contemporary viability of the rationale for a specialized appellate court for courts-martial. Part III asks whether the cost of maintaining CAAF is defensible given the court's meager caseload. Finally, Part IV explains why the D.C. Circuit should succeed, with some modifications, to the appellate jurisdiction exercised by CAAF.

I. Should Congress Have Created a Specialized Court of Military Appeals?

When it enacted the UCMJ, Congress had a variety of related goals. Among these were to establish a uniform disciplinary system for all of the armed forces, overseen by a civilian court the jurisdiction of which would be confined to the appellate review of courts-martial. Independent of the armed forces, that court would put flesh on the bare bones of the statute. Most notably, it would be a "bulwark"[29] against the command influence that had tarnished the administration of military justice during World War II.

Was that final, central goal sound in principle—and was it achieved?

On the latter question, the answer must be no, since unlawful command influence (UCI) has continued to plague the military justice system. This is not to say that every claim of UCI has succeeded, but it is a fact that the fairly simple prohibitions of the Code and the implementing provision of the *Manual for Courts-Martial* have continued to generate substantial issues despite decades of judicial decisions and recurring job training for both commanders and judge advocates.

On the former question, I have come to believe that the goal was unwise because it gave (or was understood to give) the new court a charter to advance a specific substantive goal. The resulting friction with the armed forces was therefore inevitable. Not to overstate the point, but a court is not supposed to "have a horse in the race." Conceiving of CMA as a bulwark arguably gave it one, as if the Tax Court were enjoined to increase collections and the Court of Federal Claims were expected to protect the fisc. It would have been enough—indeed, better—for Congress simply to have enacted the statutory protections it thought were needed, whether those

[28] *See* p. 21 *infra*.

[29] *See, e.g., United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). For a summary of the contentious process that led to the creation of CMA see Andrew S. Effron, United States v. DuBay *and the Evolution of Military Law*, 207 MIL. L. REV. 1, 7, 11-14 (2011). Jonathan Lurie's definitive history of the court provides a granular account. *See* JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950 (1992); Lurie, *supra* note 22.

long found in Article 37 of the UCMJ[30] or the criminal prohibition now found in Article 131f[31] or both, and rely on the military criminal investigative organizations and the adversary system to ensure compliance. However laudable the impulse, making the new court a policeman undermined its status as an impartial and essentially passive decider. This unfortunate effect was only amplified by situating it in the Defense Department where, for administrative purposes, it remains.

The point is not to be harsh on the Congress that enacted the UCMJ, or on President Truman, who signed it into law. The Code was undoubtedly a major reform, and the creation of a civilian appellate court was arguably its crown jewel. To have used an Article III generalist appellate court for an institutional experiment with many unknowns (not least of which was the likely caseload)[32] might have been a legislative bridge too far. The question is whether that judgment should be revisited with the benefit of nearly three-quarters of a century of experience.

II. Intervening Developments Have Eroded the Rationale for a Specialized Court

However strong the case for a specialized appellate court was in 1950, it has significantly eroded from several perspectives, despite the Supreme Court's respectful treatment of it in *Ortiz*. These include the filling in of whatever doctrinal gaps there were when the UCMJ took effect; the assimilation of military law to civilian law generally; the rarity of appeals that demand familiarity with military arcana; the emergence of new concerns, such as the rights of victims; the persistence of UCI and the congressional response to that persistence; structural changes; the role of evolving international standards; and the collapse of the military justice system caseload.

First, though, a word about *Ortiz*. It is an unfortunate fact that judges and justices at times may write too broadly or get carried away. Examples include Justice Black's dismissive treatment in *United States ex rel. Toth v. Quarles*[33] and description of courts-martial as a "rough form of justice" in *Reid v. Covert*;[34] Justice Douglas's failure in *O'Callahan v. Parker*[35] to take account of the Military Justice Act of 1968;[36] Chief Justice Roberts' grumpy partial dissent in *United States*

[30] 10 U.S.C. § 837.

[31] 10 U.S.C. § 931f. There is no record of anyone having been criminally charged for UCI, even though UCI cases have been a steady staple of the appellate courts of the military justice system. One might speculate that the reason for this is that responsibility for the disposition of offenses has been vested in commanders, a community that has itself been a rich source of UCI over the decades. In the last-minute bargaining over the military justice reform provisions of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541, 1692 *et seq*. (2021), charging decisions for alleged violations of art. 131f will, even after the changes take effect, continue to be made by commanders rather than the new Special Trial Counsels (unless the offender has committed one of the statutory "covered offenses" or some related offense). *See* arts. 24a, 34(c), UCMJ, 10 U.S.C. §§ 824a, 834(c). *See generally* Philip D. Cave, Don Christensen, Eugene R. Fidell, Brenner M. Fissell & Dan Maurer, *The Division of Authority Between the Special Trial Counsel and Commanders Under the Uniform Code of Military Justice: Planning Now for the Next Phase of Reform*, Lawfare, Feb. 28, 2022.

[32] *See* text accompanying notes 115-18 *infra*.

[33] 350 U.S. 11, 17 (1955) ("military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts").

[34] 354 U.S. 1, 35 (1957) (plurality opinion).

[35] 395 U.S. 258, 266 (1969) ("a military trial is marked by the age-old manifest destiny of retributive justice").

[36] Pub. L. No. 90-632, 82 Stat. 1335.

v. Denedo;[37] and Justice Alito's history-rooted dissent in *Ortiz* itself.[38] A related phenomenon is that sometimes a decision can come to stand for a broader proposition that it should. Thus, many within the military justice community have read *Solorio v. United States*[39] as the last word on whether courts-martial *should* have jurisdiction over non-service-connected offenses, when all it stands for is that the trial of non-service-connected offenses by court-martial does not offend the Constitution. So it is with the majority decision in *Ortiz*, which is read in some quarters as having affixed an overall seal of approval to the military justice system[40] and, more precisely, CAAF. But the issue before the Supreme Court was a narrow one: is CAAF sufficiently judicial that Congress may constitutionally confer direct appellate jurisdiction to review its decisions on the Supreme Court? The point that was decided is an important one, but the Court's answer should not be taken as a reason not to subject the UCMJ's appellate architecture, including the continuation of CAAF, to legislative scrutiny.

Now let us consider what has changed since 1950 that is pertinent to the purposes that led Congress to enact the UCMJ and whether, in light of those changes, CAAF should be terminated.[41]

A. *Gap-filling*. CMA's task of filling in gaps left by the new UCMJ, while never literally complete (any more than it could ever be said that the Article III courts have answered the last remaining issue under title 18),[42] has been fulfilled. The work of interpretation will go on, if for no other reason than Congress will inevitably continue to amend the Code. But if (as I have argued) it was true in 1976, after 25 years, that the body of case law developed under the Code was "mature, substantial, and essentially coherent,"[43] it is even truer now, nearly 50 years later. And whatever truth (and validity) there may have been to Judge Brosman's founding-era notion that the court's predecessor was "freer than most" in selecting the best rule,[44] it is a thing of the past. Not that there aren't issues to which a kind of "military exceptionalism"[45] may apply, but they are increasingly

[37] 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part).
[38] 138 S. Ct. at 2199-2205 (Alito, J., dissenting).
[39] 483 U.S. 435 (1987).
[40] This is hardly surprising, as the *Ortiz* majority enthusiastically calls it "one of the glories of this country that the military justice system is so deeply rooted in the rule of law." 138 S. Ct. at 2176 n.5 (faulting the dissent for denigrating the military justice system). The implications of *Ortiz* are explored in Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 657-97 (2021).
[41] Plainly, there have been many developments that have significantly affected the armed forces. These include the abandonment of conscription; reduced reliance on "boots on the ground" in military operations due among other things to technological advances; changed roles and missions and operational tempo; and of course the dramatic racial, gender, and sexual-orientation integration of the force since 1950. Some of these may come into play under the headings of new concerns and caseload. But the impact of the judicial architecture issue on the armed forces is more remote than some of the other issues surveyed.
[42] *Cf.* Ronald W. Meister, *The Day the Common Law Stopped*, 71 A.B.A.J. 104 (1985).
[43] *See* Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049, 6059 (1976).
[44] *See* Paul W. Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166 (1953).
[45] For a sober appraisal of exceptionalism and the costs of specialized-court review in veterans' law see Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U.L. REV. 1709, 1730-41 (2017). "Like other areas of law that are treated as exceptional, veterans' law is a backwater that generally lags behind developments in constitutional due process, administrative law, and civil rights law." *Id*. at 1711 (footnote omitted). Veterans' law is distinct from military justice, which has had a substantially different history. While military justice structural reform and doctrinal change should have proceeded at a faster pace, the system's overall trajectory has been positive, even if the project of making it just another federal court fell short. *See generally Pyrrhic Victory*. With the advent of Supreme Court review, the appointment of judges with impressive credentials,

infrequent. It is also a fact that, quite simply, more and more of the field has been occupied by the *Manual for Courts-Martial*, with correspondingly less room for judge-made law. A comparison of the 1951 edition with the 2019 edition shows this dramatically.[46]

B. *Assimilation*. As Professor Wishnie has observed, "No body of law is completely divorced from all others, and as such, any legal discipline termed 'exceptional' is really so only to a degree."[47] This is certainly true of military justice. The law governing courts-martial has grown ever more like that which governs federal criminal trials. From the beginning Congress directed that the rules issued by the President in the *Manual for Courts-Martial* would track those generally applied in the trial of criminal cases in the district courts, except as otherwise provided in the Code or if the President deems the civilian rule impracticable.[48] It later made it clear that this standard applied to pretrial, trial and post-trial rules.[49] In 1980, President Carter issued Military Rules of Evidence[50] that very closely track the Federal Rules of Evidence,[51] and include a provision for automatically keeping pace with changes in the Federal Rules.[52] CAAF decisions consistently look to Article III case law, and the impulse to keep in step with developments in those courts is strong.[53] There is less and less daylight between the two bodies of law. Law and Equity merged long ago. Federal civilian and military criminal justice are in the process of doing so.

C. *Vanishing Arcana*. Congress's belief that appellate review of military cases requires arcane knowledge has been eroded from two directions.

First, appellate jurisdiction over military cases has repeatedly been conferred on courts composed entirely of civilians,[54] and indeed, on generalist courts whose work ranges far from military justice. Thus, appellate jurisdiction over decisions of the United States Court of Military Commission Review[55] is vested in the D.C. Circuit,[56] and since 1984 the certiorari jurisdiction of

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wholesale adoption of the Federal Rules of Evidence, and cases that occasionally grip the public's attention, it is not the jurisprudential backwater it once was.

[46] The growth is due in part to the inclusion of important explanatory and historical material that makes research easier for generalist judges. *See* p. 12 *infra* (noting availability of legal resources to inform the work of generalist judges).

[47] Wishnie, *supra* note 45 at 1774.

[48] *See* art. 36(a), UCMJ, 10 U.S.C. § 836(a). It was assumed in *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006), that the President's practicability determination was entitled to "complete deference." *See generally* Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 106-11, 135-42 (1999).

[49] *See* Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801(b), 93 Stat. 803, 811 (1979).

[50] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

[51] In 2015, in response to a CAAF decision, Congress directed the President (to the extent he considers practicable) to modify a specific provision of the Military Rules of Evidence to conform with "the rules governing the admissibility of the corroboration of admissions and evidence in the trial of criminal cases in the United States district courts." *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015), *noted in United States v. Whiteeyes*, 82 M.J. 168, 173 n.3, 177 (C.A.A.F. 2022). For the background of this unusual provision see Seth M. Engel, *Military Law—Redefining Corroboration: The History, Intent, and Effect of Congress's Decision to Change How Confessions are Corroborated in Military Courts*, 41 W. NEW ENG. L. REV. 219, 220-21, 229-31 (2019), *cited in Whiteeyes, supra*, at 178 n.2 (Hardy, J., concurring in the result).

[52] *See* MIL. R. EVID. 1102(a). Like the Article III courts of appeals, *see* FED. R. APP. P. 28(a)(8)(B), CAAF requires litigants to identify the pertinent standards of review. *See* C.A.A.F.R. 30(a). Its standards are indistinguishable from those applied under the Federal Rules of Appellate Procedure.

[53] *See, e.g., United States v. Anderson*, 82 M.J. 82, 89-90 (C.A.A.F. 2022) (Maggs, J., concurring).

[54] *How* civilian those judges are is another matter. *See* text accompanying notes 100-03 *infra*.

[55] *See* 10 U.S.C. § 950f.

[56] *See* 10 U.S.C. § 950g.

the Supreme Court of the United States has extended to CAAF decisions, albeit with indefensible limitations.[57] Moreover, there has long been provision for generalist judges of the Article III courts to sit on military appeals[58] and many have done so,[59] although this became less common after CMA was expanded to five judgeships, leading to a sizable cohort of senior judges of CAAF who are also eligible to sit in the event of vacancies and recusals.[60]

Military justice cases arise in the 54 state and territorial National Guards even when not in federal service. The UCMJ does not apply to these cases. The result is a bewildering patchwork of state and territorial statutes.[61] A number of states and territories have created uniformed appellate boards, panels, and courts to review courts-martial, but at least 28 jurisdictions (some of which *also* have uniformed intermediate appellate bodies) explicitly authorize appellate review by the regular civilian courts, at times a trial court of general jurisdiction, but more typically the state's intermediate appellate court or supreme court.[62] The judges of the court-martial appeal courts of the United Kingdom and Canada are members of other generalist courts.[63] These facts remove any doubt that generalists are fully capable of deciding questions of military criminal law.

Second, the law applied in military appeals is not particularly arcane and, if anything, it has become less so since 1950. As CAAF's home page notes, "[c]ases on the Court's docket address a broad range of legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law." The arcaneness rationale is also hard to swallow given the fact that no fewer than seven individuals who have never even been in uniform—Judges Ferguson, Kilday, Darden, Fletcher, Perry, Crawford, and (currently) Hardy—have served on CMA and CAAF.[64] Setting aside Judge Hardy, who joined the court after the period covered by David Anderson's remarkable study, these non-veteran judges accounted for 32 percent

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[57] *See* art. 67a(a), UCMJ, 10 U.S.C. § 867a(a); 28 U.S.C. § 1259; *see generally* Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J.F. (2021).
[58] *See* art. 142(f), UCMJ, 10 U.S.C. § 942(f).
[59] *See* EUGENE R. FIDELL, BRENNER M. FISSELL, MARCUS N. FULTON & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 6.03[6], at 69-71 (Matthew Bender & Co. 21st ed. 2022) ("GUIDE"). In one case where there were three recusals, three of the five judges who sat by designation were members of Article III courts. *See United States v. Schneider*, 38 M.J. 387, 389 n.1, 397 nn.8-9 (C.M.A. 1993).
[60] *See* art. 142(e), UCMJ, 10 U.S.C. § 942(e); C.A.A.F. R. 3A. At this writing, there are eight senior judges.
[61] *See generally* Douglas Simon, *Making the UCMJ More Uniform*, ARMY LAW. No. 3, 73, 76 & n.50 (2021).
[62] *E.g.*, *State v. Riemer*, 377 Wis.2d 189, 900 N.W.2d 326 (2017), *discussed in id*. at 76; *Childers v. State*, 2020 Ark. 241, 602 S.W.3d 90 (2020); *State v. Davis*, No. 2010-KA-0697, 2010 WL 4278277 (La. Ct. App. 2010); *State v. Malone*, 28 So.3d 1050 (La. Ct. App. 2009) (per curiam) (overturning contempt conviction); *Waterman v. Florida*, 654 So.2d 150 (Fla. Dist. Ct. App. 1995); *State v. Baca*, 116 N.M. 19, 859 P.2d 487 (Ct. App. 1993). In Tennessee, military offenses by members of the National Guard are tried in the civilian courts subject to normal civilian appellate review. *See, e.g., State v. Morrow*, 72 S.W.2d 337 (Tenn. Crim. App. 2001). Links to the various state and territorial codes of military justice may be found on the website of the National Institute of Military Justice, at https://www.nimj.org/state-ucmjs.html.
[63] National Defence Act § 234(2), R.S.C. 1985, ch. N-5; Court-Martial (Appeals) Act 1968, § 2(1). The British court may also include nonjudges under § 2(2), but that power has not been exercised.
[64] *See* David A. Anderson, *An Empirical Study of the Political Party Balance Requirement of the United States Court of Appeals for the Army Forces and Its Predecessor Court, the United States Court of Military Appeals, from 1951 to 2016*, 225 MIL. L. REV. 541, 581-85 (2017).

of the total votes cast in cases decided by published non-unanimous opinion between 1951 and 2016.[65]

Fifty-four years ago, in *Noyd v. Bond*,[66] the Supreme Court observed that in military habeas cases, "we must interpret a legal tradition which is radically different from that which is common in civil courts," adding that

> . . . [i]t is for these reasons that Congress, in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces," has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.[67]

A half-century-plus later, these comments plainly do not justify maintaining a specialized court for the appellate review of courts-martial. For one thing, Congress in 1983 extended the Supreme Court's appellate jurisdiction to cover courts-martial. For another, the "radically different" legal tradition to which the Court referred was little more than a debater's point. Civilian practitioners had long served as defense counsel in courts-martial, albeit subject to restrictions.[68] Indeed, many judge advocates had also been in private practice—with no particular exposure to military law—before donning the uniform.[69]

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[65] *Id*. at 589. While not relevant to the present inquiry. Col. Anderson also found that the judges without military experience were more likely to vote for the appellant. *Id*. at 590 & n.183.

[66] 395 U.S. 683, 694 (1969).

[67] *Id*. (footnote omitted).

[68] Examples may be found in U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 (1975); WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 133-34 (1859, Wm. S. Rein & Co. repr. ed.); and WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 167 n.44 (1886, 2d rev. & enlarged ed. 1920). In theory, the 19th century U.S. Army forbade defense counsel from participating actively, but according to Col. Winthrop, "the actual practice has become much more indulgent and reasonable; not merely military but professional [*i.e*., private] counsel being in general permitted to examine the witnesses and address the court without objection on the part of the members." *Id*. at 166. That both kinds of defense counsel were not always entirely welcome is apparent from what follows in Winthrop's authoritative account: "Occasionally indeed the old rule is insisted upon at the outset, though relaxed later; but more frequently much the same license is allowed at all stages as at an ordinary criminal trial, subject, however, to a restriction of the privilege when counsel by their prolixity, captiousness, disrespectful manner, or other objectionable trait, fatigue or displease the court. Thus, in practice, the old rule is mainly held in reserve, to be enforced by the court at its discretion in exceptional cases. Objection to the reading of the final address, or to a closing oral or written argument by the counsel, is now of the rarest occurrence." *Id*. at 166-67 (footnotes omitted).

[69] This was inevitable when the U.S. Army Judge Advocate General's Department expanded exponentially (from 17 lawyers to 425) in World War I. *See generally* FRED L. BORCH III, JUDGE ADVOCATES IN THE GREAT WAR, 1917-1922 xiii (2021). Chapter 6 of Col. Borch's book provides biographical sketches of many of those officers. Many Army judge advocates are "direct commission" officers. Before being certified and getting into the courtroom, they undergo a six-week course to learn "[s]oldier skills such as customs and courtesies, basic rifle marksmanship, land navigation, and convoy operations." Ten and one-half weeks of legal training follows, during which they learn the organization, function, and mission of the JAG Corps, and receive an overview of military law. *See* Annual Historical Summary of the Judge Advocate General's Corps, U.S. Army, Presented by the Judge Advocate General to the American Bar

And even by 1950, the mere fact that the centuries-old roots of British and American courts-martial lay somewhere other than the common law courts at Westminster hardly mandated a specialized court. After all, the law of admiralty was probably even more foreign to the common law than military justice under the Articles of War was to the criminal law. And yet, when the First Congress passed the Judiciary Act of 1789, it conferred admiralty and maritime jurisdiction (an explicit element of the "judicial Power of the United States")[70] not on some specialized court, but on the regular district courts,[71] where it has remained ever since.[72] It is difficult to see why something inherent in military justice, but not in maritime law, warranted a different kind of appellate court when Congress enacted the UCMJ.

In 1994, when the Arizona Supreme Court was given appellate jurisdiction over the state's new Court of Military Appeals, a judge of the Superior Court thought it would be a challenge—not an insuperable one, but one that might require some added effort:

> The justices of the Arizona Supreme Court will have to broaden their legal knowledge as the Court begins to oversee Arizona's newest appellate court, the Arizona Court of Military Appeals. They will have to remember military acronyms long forgotten. They will have to familiarize themselves with the militia article, Article XVI of the Arizona Constitution, and the organization of the Arizona National Guard. They may wrestle with age-old military justice issues including determining whether an offense is "prejudicial to the good order and discipline" or what is "conduct unbecoming an officer and gentleman."[73]

Most of what concerned Judge Portley is scarcely "inside baseball" of a kind that might militate against reliance on a court of generalists, whether or not the judges had had military experience. To argue otherwise would be disrespectful of the talents of legislature or the state justices, or both. But did he have a point about concepts like "prejudice to good order and discipline" or "conduct unbecoming"? Although his specific examples may once have been low-hanging fruit, by the time he wrote in 1994 they were familiar concepts thanks to decades of judicial decisions and detailed explanatory provisions of the *Manual for Courts-Martial* that provided sufficient clarity to persuade a majority of the Supreme Court of the United States that they satisfy constitutional standards.[74]

Calling CAAF a specialized court is the beginning of the conversation, not the end. What about the other "age-old military justice issues" to which Judge Portley referred? What are they

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Association, July 2021, at 2-3. Importantly, only part of that time is spent on military justice and trial advocacy; also covered are research and written and oral communications skills, personnel law, claims, legal assistance, contract and fiscal law, and international and operational law. *See* U.S. Army, Judge Advocate Officer Basic Course.

[70] U.S. Const. art. III, § 2.

[71] 1 Stat. 73, 76-77 (1789) (§ 9).

[72] *See* 28 U.S.C. § 1333.

[73] Maurice Portley, *The Arizona Court of Military Appeals: A New Challenge for the Arizona Supreme Court*, 30-JUN AZATT 23 at *12, ARIZ. ATT'Y (June 1994) (footnotes omitted).

[74] *See, e.g., Parker v. Levy*, 417 U.S. 733 (1974). *Stare decisis* aside, whether the Constitution should be read as permitting criminal sanctions for "novel" offenses under the General Article, art. 134, UCMJ, 10 U.S.C. § 934, is debatable, as witness the divided vote in *Levy*.

and do they plausibly counsel against appellate review by civilian generalists? Here are a baker's dozen that come to mind: the "accuser concept";[75] custom of the service;[76] condonation of desertion;[77] command influence;[78] inelasticity in the exercise of discretion;[79] unreasonable multiplication of charges;[80] conduct that is service-discrediting;[81] uttering contemptuous words;[82] preemption of offenses;[83] the "unprotected victim";[84] reasonable expectations of privacy in the military context;[85] lawfulness of orders;[86] and dereliction of duty.[87] As indicated in the footnotes, each is usefully addressed by some combination of statute, *Manual for Courts-Martial* provision,[88] case law, [89] and professional literature.[90] With the benefit of a decision by the service court of

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[75] *See* art. 1(9), UCMJ, 10 U.S.C. § 801(9); *see, e.g., United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992).

[76] *See, e.g.*, art. 98(1), UCMJ, 10 U.S.C. § 898(1); *Manual for Courts-Martial*, pt. IV, ¶¶ 18.c(3)(a), 91.c.(2)(b).

[77] *See* R.C.M. 907(b)(2)(D)(iii) (2016 ed.); *see, e.g., United States v. Scott*, 6 U.S.C.M.A. 650, 20 C.M.R. 366 (1956); *United States v. Linerode*, 11 C.M.R. 262 (A.B.R. 1953); *but see* note 89 *infra*.

[78] *See* art. 37, UCMJ, 10 U.S.C. § 837; R.C.M. 104. Command influence was previously known as unlawful command influence and sometimes simply as "unlawful influence." *See United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). Congress changed the heading of art. 37 (which had been "unlawfully influencing action of court") in 2019. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(a)(1), 133 Stat. 1198, 1360 (2019).

[79] *See, e.g., United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003).

[80] *See* R.C.M. 906(b)(12); *see, e.g., United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

[81] *See* art. 134, UCMJ, 10 U.S.C. § 934; *Manual for Courts-Martial*, pt. IV, ¶¶ 91.c.(3), 99.c.(1); *e.g., United States v. Norman*, 74 M.J. 144 (C.A.A.F. 2015).

[82] *See* art. 88, UCMJ, 10 U.S.C. § 888; *Manual for Courts-Martial*, pt. IV, ¶ 14.c.; *e.g., United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[83] *See generally Manual for Courts-Martial*, pt. IV, ¶ 91.c.(5)(a); *e.g., United States v. Avery*, 79 M.J. 363 (C.A.A.F. 2020).

[84] *See generally Manual for Courts-Martial*, pt. IV, ¶ 15.c.(2)(d). This special defense is also referred to as divestiture-of-office, *e.g., United States v. Gonzalez*, 16 M.J. 423 (C.M.A. 10983) (per curiam), or simply divestiture. *E.g., United States v. Diggs*, 52 M.J. 251, 256 (C.A.A.F. 2000); *United States v. Johnson*, 36 C.M.R. 862, 863, 868 (A.C.M.R. 1993).

[85] *See generally* arts. 117a(b)(5) & 120c(d)(3), UCMJ, 10 U.S.C. §§ 917a(b)(5) & 920c(d)(3); MIL. R. EVID. 311(a)(2), 314(d), 316(c)(4); *e.g., United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976); *cf. Repp v. United States*, 23 Cl. Ct. 628 (1991) (Tucker Act review).

[86] *See generally Manual for Courts-Martial*, pt. IV, ¶ 16.c.(2)(a); *e.g., United States v. Kisala*, 64 M.J. 50 (C.A.A.F. 2006).

[87] *See* art. 92(3), UCMJ, 10 U.S.C. § 892(3); *Manual for Courts-Martial*, pt. IV, ¶ 18.c.(3); *see, e.g., United States v. Blanks*, 77 M.J. 239 (C.A.A.F. 2018).

[88] Professor (now Judge) Maggs's exhaustive article nowhere suggests that special expertise is needed to review provisions of the *Manual*. On the contrary, he suggests that interpretive matter found in the *Manual* is entitled to judicial deference because of the expertise brought to bear by the uniformed drafters. *See generally Judicial Review of the Manual for Courts-Martial*, *supra* note 48, at 110, 116 & n.96, 117 & n.99. He argues for deference, but, in light of *United States v. Scheffer*, 523 U.S. 303, 308 (1998), would leave it to the court to determine whether the demands of deference were outweighed by "weighty interests of the accused." *See* 160 MIL. L. REV. at 136 & n.217, 137. Those interests do not call for specialized judicial expertise. Professor Maggs called for the application of conventional standards of judicial review of agency action, *see id*. at 106-07, 156, a function that is regularly exercised by generalist judges of the Article III courts under the Administrative Procedure Act. *See* 5 U.S.C. § 706.

[89] Some more than others. Constructive condonation of desertion and unprotected-victim case are particularly rare. Condonation had largely fallen into desuetude and perhaps for that reason was omitted when the latest edition of the *Manual for Courts-Martial* was promulgated. *Compare* R.C.M. 907(b)(3)(D)(iii) (2016 ed.) *with* R.C.M. 907(b)(2)(D) (2019 ed.). *See Manual for Courts-Martial* (2019 ed.) at A15-15.

[90] The Army, Navy and Air Force all publish law reviews, and the civilian law reviews include articles on military justice. There are current treatises on military justice practice and procedure and evidence, as well as casebooks. *See* EUGENE R. FIDELL, ELIZABETH L. HILLMAN, JOSHUA E. KASTENBERG, FRANKLIN D. ROSENBLATT, DWIGHT H. SULLIVAN & RACHEL E. VANLANDINGHAM, MILITARY JUSTICE: CASES AND MATERIALS (3d ed. 2020); LISA M.

criminal appeals and a modicum of research, enriched by diligent advocacy by counsel for the government, the accused, and the occasional *amicus curiae*, there is no reason a conscientious generalist judge, with or without personal military service, cannot deal with such as these with as much ease, confidence, and creativity as she can with the myriad other issues an appellate court of generalists encounters week in and week out. This is especially so given the improved access to military case law through the Westlaw and LexisNexis systems, with which judges and law clerks across the country are familiar.

Over the years, I have made it a practice to ask students to select a case at random from the most recent CAAF Term, and to come to the first class prepared to discuss whether the issues were such as to require adjudication by the specialized court. Most semesters, there are no such cases; every once in a while, there may be an arguable one, but with a little discussion the class typically concludes that a generalist court would be fully capable of deciding the matter. Readers are invited to replicate this experiment either personally or with students or colleagues. For what it is worth, the four decisions summarized in the court's report for the October 2020 Term concerned (i) the constitutionality of court-martial jurisdiction over members of the Fleet Reserve,[91] (ii) whether a service court of criminal appeals has All Writs Act jurisdiction based on the fact that a case is within its potential appellate jurisdiction,[92] (iii) whether such a court can consider matter dehors the record when conducting sentence appropriateness review,[93] and (iv) whether indecent acts with a child fell within the definition of "child abuse offenses" in the 2016 version of Article 43(b)(2)(B) of the UCMJ.[94]

D. *Emergence of new concerns.* Since 1950, numerous new concerns have arisen within the armed forces and American society as a whole. To cite a few examples, in 1950, *Brown v. Board of Education of Topeka*[95] lay ahead, and with it much of the Civil Rights Era. Racial segregation remained a reality in the country and in the armed forces, despite President Truman's formal termination of it in the military.[96] It was an era of conscription, leading to repeated issues concerning conscientious objection and outright draft resistance. It was an era in which the military commission was a fresh memory[97] rather than a museum piece that would not be deployed (to no one's satisfaction) until the next century. It was the era of the Korean War, followed the next decade by the Vietnam War, and in time by the wars in Iraq and Afghanistan. While women had been in the armed forces in World War I, and some remained on active duty in limited roles after World War II, the armed forces remained overwhelmingly male.

It was an era in which capital sentences were not only adjudged but carried out.[98]

SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS (3d ed. 2019). Useful materials are also available to the public on the website of the Judge Advocate General of the Army's Legal Center and School. A generalist judge might also benefit from following the military law blogosphere (including *CAAFlog* and, under my editorship, *Global Military Justice Reform*). How many CAAF judges do so is anyone's guess.

[91] *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021).

[92] *United States v. Brown*, 81 M.J. 1 (C.A.A.F. 2021).

[93] *United States v. Willman,* 81 M.J. 355 (C.A.A.F. 2021).

[94] *United States v. McPherson*, 81 M.J. 372 OC.A.A.F. 2021).

[95] 347 U.S. 483 (1954).

[96] *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

[97] *See, e.g., Ex parte Quirin*, 317 U.S. 1 (1942).

[98] There has not been an execution under the UCMJ since 1961.

Civilian and military drug use presented new challenges to law enforcement and good order and discipline. By the 1980s, concern began to emerge regarding the long-neglected interests of victims of crime and the epidemic of child pornography, facilitated by the computer revolution and social media. Technology having dramatically changed and social media having become broadly available, there were novel questions of both free speech and expectations of privacy. Social mores changed as well, with growing acceptance of people who are gay, lesbian, bisexual and transgender, and other gender and sexual minorities—and far less toleration of sexual assault and harassment.

And the geopolitical situation became unrecognizable with the fall of the Iron Curtain after the collapse of the Soviet Union. Later developments included new health challenges, including HIV, anthrax, and most recently, the coronavirus in its various iterations. All of these impacted the armed forces as well as the larger society.

The legal world also changed dramatically after 1950, including the era of the Warren Court and the revolution in the rights of criminal defendants. In 1950, "court administration" was rudimentary. It was a time of hard-copy submissions to courts, and long before computerization and the PACER/ECF system had been dreamed of.[99]

It is an understatement that the United States today is a far different society from what it was in 1950. To pretend that the military justice system and the court at its pinnacle have been unaffected by these developments is deeply unrealistic.

E. Trompe l'oeil *civilians*. Congress and the Executive Branch have been of two minds about the composition of CMA and CAAF. On the one hand, the statute has always contemplated that the judges would be appointed either from "civil" or "civilian" life.[100] On the other hand, the record of appointments has been spotty. Thus, one of the court's first three judges was on active duty until the day before he took the oath.[101] Thereafter, the bench has included many individuals with long active and reserve service, including one who retired as a Marine Corps lieutenant colonel (Judge Sparks), another who was a retired Air Force Reserve colonel (Chief Judge Everett), and yet another (Judge Wiss) who was a retired rear admiral in the Naval Reserve.

The practice was to not appoint retired regulars. A bar on anyone who had served on active duty for 20 years or more was added to the text of the UCMJ after a retired Regular Navy captain came under serious consideration.[102] Since 2013 there has instead been a seven-year cooling-off

[99] Transfer of CAAF's jurisdiction, as suggested here, would belatedly bring military caselaw under the PACER umbrella that is so familiar to contemporary federal and state practitioners and judges.
[100] *Compare* Act of May 5, 1950, 64 Stat. 129 (former version of art. 67(a)(1), UCMJ) (civilian life), *with* 70A Stat. 60 (former version of art. 67(a)(1), UCMJ) (civil life), *and* National Defense Authorization Act for Fiscal Year 1991, § 541(f)(1), 104 Stat. 1565 (1990) (civilian life), and art. 142(b)(1), UCMJ, 10 U.S.C. § 942(b)(1) (same). *See generally* Scott W. Stucky, *Appellate Review of Courts-Martial in the United States*, 69 CATH. U.L. REV. 797, 804 (2020).
[101] *See* Eugene R. Fidell, *The Next Judge*, 5 J. NAT'L SEC. L. & POL'Y 303, 308 & n.24 (2011).
[102] *See id.* at 308 n.25.

period.[103] Unlike the similar period for Secretaries of Defense,[104] this one has never been waived. President Biden's nominee to succeed Chief Judge Scott W. Stucky was a Regular Army JAG Corps colonel who had retired more than seven years earlier, so no waiver was required. By allowing individuals who have spent decades within the military, we lose the different knowledge and skills that an attorney who had spent comparable time in civilian law practice would bring to the task.

Only a fraction of American lawyers have served in the armed forces, much less as judge advocates. Even so, it is obvious that there is a preference both at the White House and in the Senate for CAAF judges to have had substantial military experience. It is difficult to reconcile that preference with the clear intent of the statute in the case of retirees in particular. Additionally, to the extent that it was thought, as the Supreme Court suggested in *Noyd v. Bond*,[105] that the judges of the specialized appellate court would over time gain familiarity with the circumstances of the armed forces, that would seem to be inconsistent with the practice that has emerged of favoring candidates who were *already* familiar with those circumstances through personal experience. Of course, given the quickening pace of change in the armed forces as a whole as well as with respect to military justice, experience gleaned more than seven years in the past may be not only of limited utility but also a wasting asset.

F. *Unlawful Influence*. In 2019, Congress amended Article 37 of the UCMJ in important ways. One change imposed a requirement for a particularized showing of prejudice,[106] something that had not been required for cases of "apparent," as opposed to "actual," UCI.[107] The new provision, which affects only cases tried after December 20, 2019,[108] will take a substantial bite out of the UCI docket, even though unlawful influence remains a threat to public confidence in the administration of military justice.[109]

G. *Structural changes.* Since 1950, military justice has witnessed a variety of significant structural changes. These include the creation of a trial judiciary through the Military Justice Act

[103] *See* art. 142(b)(4), UCMJ, 10 U.S.C. § 942(b)(4), *as amended by* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 531, 127 Stat. 672, 759 (2013). At a March 22, 2022, Senate Armed Services Committee hearing on pending nominations, Sen. Tom Cotton expressed concern about "the direction of the court" given fact that, with Judge Johnson's appointment, a majority of CAAF's judges would be active (*i.e*., regular) or reserve retirees. He wondered whether, "if a lance corporal or a private sees, you know, a retired colonel, or flag officer who made their life in the military justice system, they may view them as part of the system." He commented that allowing retirees to serve was something the committee may need to review.

[104] *See* 10 U.S.C. § 113(a). Section 113(a) was waived for George C. Marshall Jr., James N. Mattis, and Lloyd J. Austin III. The cooling-off period was initially 10 years. It was reduced to seven in 2008. *See generally* Susan Hennessey & Rohini Kurup, *What's at Stake in the Austin Waiver*, Lawfare, Jan. 18, 2021 (noting need to address "public perceptions of civilian control").

[105] *See* p. 9 *supra*.

[106] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(a)(2), 133 Stat. 1198, 1359-61 (2019).

[107] *See, e.g., United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021).

[108] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(c), 133 Stat. 1361 (2019).

[109] Congress has recognized the persistence of the danger, requiring the Judge Advocates General to include in their annual reports, among other things, "descriptions of the circumstances surrounding cases in which general or special court-martial convictions were . . . reversed because of command influence." *See* art. 146a(b)(2)(B)(i), UCMJ, 10 U.S.C. § 946a((b)(2)(B)(i).

of 1968,[110] treatment of the old boards of review as real appellate courts with real judges, expansion of CMA from an intimate three-judge bench to its current complement of five, and subjection of its decisions to direct appellate review by the Supreme Court. For the first time, some servicemembers who lost at the top UCMJ court could seek certiorari, and they would have free appellate defense counsel, rather than having to rely on uncertain collateral remedies for which they would either have to secure private counsel or litigate *pro se*. Even though the Supreme Court has taken up only a handful of military cases, the subliminal impact of the fact that such review is even possible should not be underestimated. Finally, at the end of 2023, military justice will see a new system in operation, as "Special Trial Counsels" take over from nonlawyer commanders the responsibility for charging decisions in a broad swath of major offenses. This change in the fundamental architecture of the system is unlikely to be Congress's last word on the subject.[111]

H. *International standards*. Principle No. 1 of the 2006 draft UN Principles Governing the Administration of Justice Through Military Tribunals,[112] also known as the Decaux Principles, states that military tribunals "must be an integral part of the general judicial system." Principle No. 17 deals with "recourse procedures in the ordinary courts," and provides in part that "[i]n all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts." The 2006 draft was the subject of a workshop convened at Yale Law School in 2018. The resulting "Yale Draft"[113] recounts the history of the Decaux Principles and takes account of subsequent developments. The Yale Draft discussion under Principle No. 17 states:

> While the residual maintenance of first-instance military courts may be justified by their functional authority, there would seem to be no justification for the existence of a parallel hierarchy of military tribunals separate from ordinary law. Indeed, the requirements of proper administration of justice by military courts dictate that remedies, especially those involving challenges to legality, are heard in civil courts. In this way, at the appeal stage or, at the very least, the cassation stage, military tribunals would form "an integral part of the general judicial system". Such recourse procedures should be available to the accused and the victims; this presupposes that victims are allowed to participate in the proceedings, particularly during the trial stage.

Neither the Decaux Principles nor the Yale Draft address the propriety of appellate review by a civilian appellate court the jurisdiction of which is restricted to the review of courts-martial. But such a court is plainly not an "ordinary court[]."

I. *Caseload*. There is no other way to put this: CAAF's caseload has tanked. This is by no means simply because the court is not granting all the petitions it should grant. Every appellate defense attorney who has written a petition that was denied, not to mention their client, surely feels that way at times. The judges, on the other hand, have at times been heard to assert that they bend over backwards to grant. Whichever perspective is accurate, the sharp decline in the court's

[110] Pub. L. No. 90-632, 82 Stat. 1335.
[111] *See generally* Cave, Christensen, Fidell, Fissell & Maurer, *supra* note 31.
[112] U.N. Doc. E/CN.4/2006/58 at 4 (2006).
[113] The Yale Draft can be found at https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf.

caseload is largely the result of factors beyond its control, most notably a long-term decline in the military justice system's overall throughput.[114] CAAF cannot grant review in a case that has not been tried or, if tried, has not resulted in a conviction.

When the UCMJ was under consideration in Congress, a little attention was paid to what the new court's workload might prove to be. The Judge Advocates General of the Army and Navy provided estimates of how many of their services' cases might be appealed, but their estimates could not have been more divergent. The Army assumed at a House hearing in 1949 that all eligible Army and Air Force cases would be taken up to the new court,[115] while the Navy unrealistically put the figure at five percent.[116] One participant observed that the caseload might begin on the high side but taper off over time.[117] In the end, the conclusion seems to have been drawn that there was no way of knowing what CMA's petition caseload would prove to be.[118]

It soon became apparent that the new court would have plenty to do. A chronology of its first decade reported that CMA received 996 petitions for discretionary grant of review during its first year and 2,215 in its second.[119] The numbers settled down, and over the first decade, the court received 15,182 cases, for an annual average of 1,518. The deputy clerk who wrote the 1951-61 chronology reported:

> The decrease in the number of cases may be attributed to several factors. First, the decisions of the Court have established the law on many points so that many of the errors committed in the lower tribunals have now been corrected. Also the number of men in the armed forces has decreased each year thus cutting down on the number of courts-martial. For example, on July 1, 1951, there were approximately one million six hundred thousand personnel in the Army and in the fiscal year July 1, 1951, to June 30, 1952, the Army held eight thousand and thirty-seven general courts-martial. On July 1, 1959, the personnel of the Army had been reduced to approximately eight hundred and seventy-three thousand and in the year July l, 1959, to June 30, 1960, the Army held two thousand and sixty general courts-martial. In addition, it should be remembered that in the early stages of the Court's existence the United States was involved in the Korean conflict.
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> These reasons, plus others, such as the awarding of administrative discharges in lieu of a court-martial, a practice which this Court deplores, have tended to reduce the number of cases coming before the Court of Military Appeals.

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[114] *See generally* Don Christensen, *Reflections on Court-Martial Numbers*, CAAFlog, Mar. 8, 2022 (noting "historic lows" and reduced conviction rates). Trial court and court of criminal appeals data for FY18 and later can be found in the annual reports of the services under art. 146a, UCMJ, 10 U.S.C. § 946a. These are available on the website of the Joint Service Committee on Military Justice. Data for earlier years can be found in the service reports that were included in the joint reports of the former Code Committee on Military Justice. These are available on the CAAF website.

[115] *See Uniform Code of Military Justice: Hearings on H.R.2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong., 1st Sess. 1284-85 (1949) (No. 37) ("*1949 Hearings*").

[116] *Id*. at 1286.

[117] *Id*. at 1287.

[118] *Id*. at 1286.

[119] *See* FREDERICK R. HANLON, TEN-YEAR CHRONOLOGY OF THE UNITED STATES COURT OF MILITARY APPEALS 1951-1961 9 (1961).

> While the case-load has been reduced, some idea of the tremendous work accomplished by the Court in its early years can be gleaned from the fact that it is still one of the busiest appellate courts in the country.[120]

It is not hard to update Mr. Hanlon's list. The armed forces have fewer members, and all are volunteers. Ever more is being done by contractors who are subject to the UCMJ only under very limited circumstances.[121] High operational tempos over many years have probably helped to reduce criminal conduct within the armed forces, and thereby reduced the court-martial caseload. Dependents have not been subject to the UCMJ since the 1950s.[122] And although there is no longer a requirement that offenses be service-connected,[123] prosecutions for non-service-connected offenses remain infrequent. Entry-level separations have perhaps also contributed to the lower caseload by affording the services an easy way to rid themselves of recruits who, being ill-suited to military service, might have wound up in the dock, the brig, the stockade, or the U.S. Disciplinary Barracks. Recent changes to service-level appellate review of courts-martial[124] could in theory trigger an uptick in the number of cases that are eligible for review by the civilian court, but there is no evidence that that has occurred.

Why the caseload has declined over the long haul is of little moment. It is beyond debate that it has declined and that the decline in recent years has been precipitous. Looking solely at petitions for grant of review filed every tenth year thereafter, the court's core petition and cross-petition caseload was 1,204 in 1971, 2,179 in 1981, 1,811 in 1991, 924 in 2001, and 699 in 2011. The caseload continues to decline. In the Term that ended September 30, 2021, the court received a mere 344 petitions for grant of review.[125] The caseload is thus a shadow of its former self. But even that "best case" figure overstates the workload by including the 23 percent of cases that are submitted "on the merits," *i.e.*, without identifying any issues.[126] Because (as the legislative history indicates)[127] the court has no duty to review the record unless the petitioner has presented contentions, the caseload is more properly viewed as on the order of 265 cases per year. Either way, the decline is considerable and sustained.

III. The Court of Appeals for the Armed Forces is No Longer Worth the Cost

Federal courts do not exist because they are profit centers. On the other hand, if a federal court has only a small caseload and alternatives exist that would materially reduce the cost to the taxpayers, there is no reason not to ask whether the underused court is simply too expensive.[128]

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[120] *Id*. at 10.
[121] *See, e.g.*, art. 2(a)(10), UCMJ, 10 U.S.C. § 802(a)(10).
[122] *See Reid v. Covert*, 354 U.S. 1 (1957).
[123] *See Solorio v. United States*, 483 U.S. 435 (1987).
[124] *See* Military Justice Act of 2016, Pub. L. No. 114-328, § 5330(b)(2), 130 Stat. 2932-342 (amending art. 66, UCMJ, 10 U.S.C. § 866). *See generally* David A Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 84-88 (2017).
[125] *See* Report of the U.S. Court of Appeals for the Armed Forces, Oct. 1, 2020 to Sept. 30, 2021 (2021). The court's annual reports can be found on its website, https://www.armfor.uscourts.gov/newcaaf/ann_reports.htm.
[126] *See* text accompanying notes 132-34 i*nfra*.
[127] *See 1949 Hearings*, *supra* note 115, at 1197 (Felix Larkin) (rejecting "generalized reading of records" in favor of focus on "issues and contentions").
[128] According to one recent article, "[p]erhaps the most important reason for Congress to place [CMA] under the [Defense Department] was to ensure efficient government spending." Tyler W. Winslow, *Reconstituting USCAAF*

In Fiscal Year 2021, CAAF cost the taxpayers $17,750,249, up nearly a million dollars from $16,852,094 in Fiscal Year 2017.[129] While this is a very small fraction of the Defense Department budget, it is still "real money." The court's workforce consists of five judges and 54 other employees.[130] In recent years, CAAF has decided very few cases on full opinion. During its October 2020 Term there were only 35 such cases (and one more per curiam).[131] To be sure, the court's work is not confined to those cases. During the same Term, it received 344 petitions for discretionary review, as previously noted, of which it denied or dismissed 297.[132] Only 165 (48.7 percent) of the 339 that that were neither withdrawn nor dismissed had errors that civilian or military appellate defense counsel deemed worthy of briefing; ninety-six (28.3 percent) included errors personally asserted by the petitioner;[133] and the remaining 78 (23.0 percent) identified no errors whatever.[134] The court also receives infrequent capital cases (which are subject to mandatory review),[135] a handful of certificates for review from the Judge Advocates General (on which it is also required to rule),[136] the odd new trial petition, and a trickle of petitions for extraordinary writs and writ-appeal petitions.[137] The court's annual report for the October 2020 Term found only four cases significant enough to summarize.[138]

No one would call this a heavy caseload. It would be even lighter if CAAF did not insist, as it has for decades,[139] on docketing and reviewing the record in cases that present literally no issues. In recent years, the judges have typically written fewer than one opinion each per month. This is simply not a full-time job, even with the unnecessary consideration of "merits" cases.[140]

Seventeen million dollars a year is a lot to pay for this output. To be sure, if there were some magic to what CAAF does that could not be done by another, existing court, one might be

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Under Article III: Preserving Fairness, Resolving Political Tensions, and Balancing Justice and Order in American Military Justice, 58 WASHBURN L.J. 449, 490 & nn.361 & 365 (2019) (arguing that making the court "would better protect public resources and limit spending by the federal government").

[129] USA Spending, Federal Account Profile, U.S. Court of Appeals for the Armed Forces, Defense, https://www.usaspending.gov/federal_account/097-0104 (FY21).

[130] Dep't of Defense, Fiscal Year (FY) 20 President's Budget, Operation and Maintenance, Defense-Wide, U.S. Court of Appeals for the Armed Forces 3, 9 (March 2019).

[131] *See, e.g.*, Report of the U.S. Court of Appeals for the Armed Forces, Oct. 1, 2020 to Sept. 30, 2021 (2021). The number of opinions in the preceding three Terms was equally anemic: 25 in 2019, 32 in 2018, and 35 in 2017. The court again decided only 25 cases on full opinion during the October 2021 Term. *See* Eugene R. Fidell, *Nearing the End o' Term*, Global Mil. Just. Reform, Sept. 28, 2022.

[132] Report of the U.S. Court of Appeals for the Armed Forces, Oct. 1, 2020 to Sept. 30, 2021, *supra* note 131.

[133] *See United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[134] Email from David A. Anderson, Chief Deputy Clerk and Dir., Central Legal Staff, U.S. Court of Appeals for the Armed Forces, Feb. 24, 2022 (on file with the author). The figure for cases that cited no errors is a little higher than the traditional estimate, but lower than the stratospheric 41 percent reported for the September 2009-10 Terms. *See generally* GUIDE § 21.03[6], at 218.

[135] *See* art. 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1).

[136] *See* art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

[137] *See* Report of the U.S. Court of Appeals for the Armed Forces, Oct. 1, 2020 to Sept. 30, 2021, *supra* note 131.

[138] *See id*. App. A.

[139] GUIDE § 6.03[6], at 218-19.

[140] Even if the armed forces were to expand in response to changing geopolitical conditions, it is unlikely that the number of court-martial appeals with any substance would increase dramatically. The brunt of any upsizing surge would be borne by the services' trial judiciaries and courts of criminal appeals, all of which are easily expanded and contracted without either legislation or changes in the *Manual for Courts-Martial*.

disposed to continue with the current arrangement. But there is no magic. As explained in Part II, appellate review of contemporary courts-martial does not require a specialized court. On the rare occasion that some truly arcane matter of military justice does arise, the expert uniformed judge advocates on each side (and civilian appellate defense counsel retained by the accused) are fully capable of laying out the issues for a court of generalists. Similarly, if there were no other court that could accommodate additional cases, one might be inclined to leave the current arrangement as it is. But there is such a court—the D.C. Circuit—three blocks away. Ironically, that court is the descendant of the very court that had occupied the Judiciary Square premises that CMA and CAAF have occupied since October 1952.[141] Indeed, together, those courts now have been housed at 450 E Street, N.W. far longer than the court for which the courthouse was built in 1910.

IV. The District of Columbia Circuit Should Succeed, With Changes, to the Jurisdiction of the Court of Appeals for the Armed Forces

The D.C. Circuit is neither overworked nor incapable of providing rigorous appellate review of courts-martial. It has 11 circuit judgeships, all of which are currently occupied. It also has six senior circuit judges. For the 12 months ending December 31, 2021, it had 850 new cases filed, down 25.8 percent from the year before.[142] During that same two-year period its pending cases declined by 9.3 percent, a bit under the nationwide decline of 10.4 percent.[143] It would certainly seem able to accommodate additional cases, especially since roughly half of the shrinking cohort of cases that would come to it from the service courts of criminal appeals would be subject to dismissal for lack of briefable issues.[144] Many other cases would be disposed of summarily.[145] This is strongly suggested by the fact that CAAF denies discretionary review in all but a few dozen cases under the current statute.[146] Just as much of the screening at that court is done by a Central Legal Staff, the D.C. Circuit's Legal Division would play a major role in separating the wheat from the chaff for its "special panel."[147]

Importantly, the jurisdiction of the D.C. Circuit is both local (on review of decisions of the United States District Court for the District of Columbia)[148] and nationwide (on direct review of decisions of a host of federal administrative agencies).[149] Its judges also have a steady diet of

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[141] *See* GUIDE § 9.03[3], at 91; Hanlon, *supra* note 119, at 13.

[142] *See* Admin. Off. of the U.S. Courts, Federal Judicial Caseload Statistics (2021) (Table B, U.S. Courts of Appeals—Cases Filed, Terminated, and Pending—During the 12-Month Periods Ending Dec. 31, 2020 and 2021) (hereinafter "AO").

[143] *Id*.

[144] *See* text accompanying note 134 *supra*.

[145] *See* text accompanying notes 132-33 *infra*.

[146] *See* p. 18 *supra*.

[147] *See* D.C. Cir., Handbook of Practice and Internal Procedures 3, 31 (2021). Unlike the Legal Division, the lawyers of the Central Legal Staff at the Court of Appeals for the Armed Forces perform a *de novo* review of the record of trial. *See* U.S. Court of Appeals for the Armed Forces, Job Announcement, Staff Attorney (undated), https://www.armfor.uscourts.gov/newcaaf/library/Notices/JobAnnouncementCLSStaffAttorney2021Feb.pdf, *noted in* Eugene R. Fidell, *Department of Serendipity (One in a Series)*, Global Mil. Just. Reform, Mar. 1, 2021. That practice is of long standing but uncalled for textually under art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3), and inconsistent with the UCMJ drafters' intent that the new court would review "contentions presented" by the petitioner, *1949 Hearings*, *supra* note 115, at 1284, who must show good cause for a grant of review. *Id*. at 1285-86.

[148] 28 U.S.C. § 1294(1).

[149] *See generally* Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013).

criminal and civil appeals, some of which inevitably involve application of the Federal Rules of Evidence, which are virtually identical with the Military Rules of Evidence. In the 12 months ending September 30, 2021, 90 of the 1022 cases the D.C. Circuit terminated were criminal appeals.[150] Of the 90, 28 (31 percent) were decided on the merits after oral argument and 27 after submission on briefs.[151] Another 26 were disposed of on procedural grounds.[152] The overall reversal rate in the criminal cases was 18.2 percent.[153]

The D.C. Circuit plays a special role in "quintessentially federal subject matter areas like national defense."[154] It regularly addresses issues with a military flavor on review of decisions of the district court in record-correction cases under the Administrative Procedure Act,[155] on federal question collateral review of courts-martial,[156] and on direct appellate review of decisions of the Court of Military Commission Review.[157] In contrast, while the Court of Federal Claims and the Court of Appeals for the Federal Circuit certainly see military pay claims,[158] including the occasional collateral review of a court-martial[159] or non-judicial punishment[160] under the Tucker Act[161] (and in the case of the Federal Circuit, under the Little Tucker Act),[162] they have no direct criminal jurisdiction.[163]

To the extent that the Military Commissions Act of 2009 in numerous important respects tracks the UCMJ and involves military criminal proceedings, the D.C. Circuit's role under that statute[164] is a persuasive recent legislative precedent for giving it appellate jurisdiction over courts-

[150] Admin. Off. of the U.S. Courts, Federal Judicial Caseload Statistics (2021) (Table B-1, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, During the 12-Month Period Ending Sept. 30, 2021).
[151] *Id*.
[152] *Id*. These numbers may be lower than they would have been without the effects of COVID-19. On the other hand, they also predate the substantial number of appeals that will follow the many prosecutions arising out of the January 6, 2021 Capitol riot. For the year ending September 30, 2020, the Administrative Office of the United States Courts reports that criminal appeals dropped by three percent nationwide. Admin. Off. of U.S. Courts, Judicial Business 2020.
[153] AO, *supra* note 142 (Table B-5, U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, By Circuit and Nature of Proceeding, During the 12-Month Period Ending Sept. 30, 2021). Comparative reversal rates should not drive the decision on whether to terminate CAAF and transfer its jurisdiction to the D.C. Circuit, but for readers who are curious, the former court's reversal rate was higher, clocking in at 22.2 percent for the year ending September 30, 2021. *See* Report of the U.S. Court of Appeals for the Armed Forces, Oct. 1, 2020 to Sept. 30, 2021 (2021).
[154] *See* Fraser, Kessler, Lawrence & Calhoun, *supra* note 149, at 144.
[155] 5 U.S.C. § 706; 10 US.C. § 1552; *e.g.*, *Frizelle v. Slater*, 111 F.3d 172 (D.C. Cir. 1997).
[156] 28 U.S.C. § 1331; *e.g., Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009); *Homcy v. Resor*, 455 F.23d 1345 (D.C. Cir. 1971) (UCI).
[157] 10 U.S.C. § 950g(a).
[158] *E.g., Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005).
[159] *E.g., Klingenschmitt v. United States*, 119 Fed. Cl. 163 (2014), *aff'd mem*., 623 F. App'x 1013 (Fed. Cir. 2015) (per curiam).
[160] *E.g., Houghtling v. United States*, 114 Fed. Cl. 149 (2013).
[161] 28 U.S.C. §§ 1295(a)(3), 1491.
[162] 28 U.S.C. §§ 1295(a)(2), 1346.
[163] *See* 28 U.S.C. § 1295 & ch. 91. The Court of Federal Claims may adjudicate damage claims under 28 U.S.C. § 1495 by persons unjustly convicted and imprisoned for federal crimes but has no authority to review the disputed criminal proceedings. That power is vested in the court of conviction, which must issue a statutory certificate of innocence before a complaint may be filed under the Unjust Conviction and Imprisonment Act. *Compare Abu-Shawish v. United States*, 898 F.3d 726 (7th Cir. 2018), *with Crooker v. United States*, 828 F.3d 1357 (Fed. Cir. 2016) (per curiam). The procedure is rarely invoked.
[164] 10 U.S.C. § 950a(g); *see, e.g., In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019).

martial, even though there are and always will be more court-martial appeals than military commission appeals.

If, as this Essay suggests, appellate review of courts-martial should be transferred to the D.C. Circuit, Congress should in the process simplify the UCMJ's appellate jurisdiction provisions so that court-martial cases decided by the services' intermediate courts of criminal appeals would be subject to review on the same terms as cases coming up from the district court. That is, appeal to the top court should be as of right rather than discretionary, as at present.[165] The power of the Judge Advocates General to certify cases[166] should be rescinded, since it would no longer be necessary if the government had an appeal as of right in any case it lost at the intermediate court. By abandoning discretionary review, Congress would put military cases on an equal footing with other criminal appeals at the D.C. Circuit.

This would have numerous important consequences. First, it would mean that the court could dismiss any appeal in which the appellant either did not or could not identify an appealable issue. Second, the time-consuming current two-step appellate process at CAAF[167] would be compressed into one, with most cases being disposed of on motion without oral argument or plenary briefing. Third, cases could be decided by three-judge panels rather than the *en-banc-at-all-times* five-judge CAAF bench.[168] Fourth, the needlessly complicated extraordinary writ practice developed by that court[169] could be abandoned in favor of the D.C. Circuit's settled practice under the All Writs Act.[170] Finally, terminating CAAF in favor of conventional Article III appellate review under 28 U.S.C. § 1291 would spell the end of that court's unconstitutional and deeply unfair ability to block access to the Supreme Court,[171] giving military appellants for the

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[165] *See* art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). In addition, Congress should provide for appeal as of right from all courts-martial to the service courts of criminal appeals in all cases, assuming those courts are retained. At present, first-level appeals from the trial courts are discretionary if the sentence does not include a punitive discharge or confinement for six months or less. *See* arts. 66(b)(1) & 69(d)(1)(B), UCMJ, 10 U.S.C. §§ 866(b)(1) & 869(d)(1)(B).

[166] *See* art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

[167] The accused must file a petition for grant of review, supported by a "supplement" that sets forth the issues. If the court grants review, the accused must ordinarily file a plenary brief. *See generally* C.A.A.F. R. 20-21, 25. The process mimics that of the Supreme Court in cases arising on petition for a writ of certiorari.

[168] *See* Stucky, *supra* note 100, at 805; GUIDE § 6.03[1], at 62. The court sits with fewer than five judges for the consideration of petitions for grant of review when there is a vacancy. This disadvantages petitioners, *see* Eugene R. Fidell, *On Vacancies and Access to Justice*, Global Mil. Just. Reform, Aug. 6, 2015, especially when a seat remains unfilled for months at a time, as has happened repeatedly. *See, e.g*., Fidell, *Nearing the End o'Term*, *supra* note 131. One question that would have to be resolved in the event of transfer is whether decisions of the Court of Appeals for the Armed Forces would be binding precedent in the D.C. Circuit, and hence subject to overruling only by the full court, or merely precedent from a sister court, and therefore evaluated solely for their persuasive value. Affording binding effect would be consistent with the approach taken when the Eleventh Circuit was carved out of the Fifth, *see Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (en banc); *Stein v. Reynolds Securities, Inc*., 667 F.2d 33 (11th Cir. 1982); when the Tenth was carved out of the Eighth, *see Bonner*, 661 F.2d at 1210 (collecting cases); and when the Federal Circuit was created. *See South Corp. v. United States*, 690 F.23d 1368 (Fed. Cir. 1982) (en banc). Although the interest in stability and predictability is always strong, the D.C. Circuit would have to determine how strongly it applies when the added jurisdiction was previously exercised by an Article I court (something that was not the case in the three instances just cited), especially if the ruling at issue had been handed down before Congress subjected CAAF decisions to direct review by the Supreme Court in 1983.

[169] *See generally* C.A.A.F. R. 27-28.

[170] 28 U.S.C. § 1651; D.C. Cir. R. 21.

[171] *See generally* Fidell, Fissell & Cave, *supra* note 57. This is not to say that CAAF judges malevolently deny review in order to "cert proof" an otherwise plausible candidate for a grant of certiorari; it is simply a fact that denial of a

first time the same opportunity to seek certiorari as is enjoyed by all other litigants before the D.C Circuit (including individuals convicted by the military commissions at Guantánamo Bay, Cuba).

Conclusion

For those who have only known a military justice system that has had at its apex a specialized civilian court, the notion that such an institution might not be a permanent part of the legal landscape will be startling. Not every innovation in the law and legal institutions, however, stands the test of time. Some may be wise or at least plausible, or may serve a pressing current need at the outset. Some of those may be candidates for permanence. They may continue to serve their intended purpose or, as a result of intervening developments, may no longer do so. Or, more mundanely, their fate may be sealed by budgetary imperatives in an era of increasing government austerity.

As this Essay suggests, all of these observations apply in CAAF's case. Its architects (if not the Judge Advocates General) certainly wanted it to thrive and presumably thought their brainchild would be durable, even if it might morph with experience. What neither they nor those who have had the privilege of serving on the court in its formative years could have anticipated was the steady erosion of both its caseload and *raison d'être*. Congress should, with the support of the Defense Department,[172] terminate it and transfer its jurisdiction to the D.C. Circuit. It's time.

petition has that effect literally 100% of the time and takes far fewer keystrokes than writing an opinion that even summarily sets forth reasons that would lead a busy Justice to conclude that the case does not warrant a grant of certiorari.

[172] As noted in *Ortiz*, CAAF is located for administrative purposes in the Defense Department. As a result, it is appropriate for the Secretary to function on the issues presented in this Essay pursuant to his duty "to reform the Department of Defense to improve the efficacy and efficiency of the Department, and to improve the ability of the Department to prioritize among and assess the costs and benefits of covered elements of reform." *See* 10 U.S.C. § 125a(a). Transfer of the court's functions to the D.C. Circuit, a court whose judges enjoy greater security of tenure than the UCMJ provides for CAAF judges, *compare* U.S. Const. art. III, § 1 (service during good behavior, *i.e.*, life tenure subject to impeachment) *with* art. 142(c), UCMJ, 10 U.S.C. § 942(c) (removal by the President for neglect of duty, misconduct, or mental or physical disability), would raise no concern that judicial independence was being compromised. *Compare U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). Indeed, the effect would be precisely the opposite.