

**IN ORDER TO FORM A MORE PERFECT COURT: A
QUANTITATIVE MEASURE OF THE MILITARY’S
HIGHEST COURT’S SUCCESS AS A COURT OF LAST
RESORT**

Rodrigo M Caruço**

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INTRODUCTION

American military criminal law does not often receive much attention outside the military and its law journals. But for the first time in over three decades, Congress will debate sweeping reforms to the United States

* Rodrigo M. Caruço, Captain, United States Air Force (B.A., University of Central Florida (2006); J.D., *magna cum laude*, Barry University Dwayne O. Andreas School of Law (2010)), is the Area Defense Counsel for Joint Base Andrews, Maryland. Prior to entering active duty, Captain Caruço served as a law clerk to the Honorable Charles E. “Chip” Erdmann, United States Court of Appeals for the Armed Forces.

† The Author is most grateful for the support and encouragement of his wife, Sandy L. Caruço. This article simply could not have been completed without her support and inspiration. The opinions and assertions contained herein are the private opinions of the Author and are not to be construed as official or reflecting the views of the Department of the Air Force or the Department of Defense.

military's legal system proposed by the Department of Defense (DoD) that, if enacted, would further civilianize the military's criminal code.¹ Just a few years ago, the acclaimed documentary *The Invisible War*² brought the issue of sexual assault in the U.S. military to the forefront of national attention. This film prompted sustained attacks by certain members of Congress regarding how the military prosecutes sexual assault cases, as well as the creation of numerous panels to study different aspects of the military's approach to sexual assault investigation and prosecution.³ On its own initiative, the DoD took a broader view and initiated a comprehensive review of the entire military legal system.⁴ The result of this review is the

1. See, e.g., Military Justice Improvement Act of 2013, S. 967, 113 Cong. (2013) (providing that prosecution determinations in sexual assault cases cannot be made by commanding officers).

2. THE INVISIBLE WAR (Chain Camera Pictures 2012).

3. Senator Kristin Gillibrand, D-NY, first introduced the Military Justice Improvement Act of 2013, which sought to remove the authority to decide whether to prosecute sexual assault cases from military commanders and place that authority in senior attorneys outside the chain of command. S. 967. Sen. Gillibrand's bill did not make it out of committee, but the substantial interest she generated had an impact. The subsequent National Defense Authorization Act (NDAA) created two panels focused on the prosecution of sexual assault cases. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758-62 (2013). The charter of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel) directed its membership to review judicial proceedings in such cases for the purpose of gathering statistics, determining trends, and making recommendations on improving military judicial proceedings. THE JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS PANEL, CHARTER 1-3 (2012). In addition, the charter of the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) directed its members to investigate "the systems used to investigate, prosecute, and adjudicate . . ." sexual assault and related offenses. RESPONSE SYS. TO ADULT SEXUAL ASSAULT CRIMES PANEL, CHARTER 1 (2013). Part of this directive included investigating whether military commanders should retain their authority in the military legal system, known as the military justice system. *Id.* at 1. The panel concluded they should. CARL LEVIN, ET AL., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIME PANEL 6-7, 22-23, 36-37, 161-71, 173-74 (2014). Partly in response, Sen. Gillibrand re-introduced the Military Justice Improvement Act. Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2014). It fell a few votes short in a cloture vote, 55-45. *On the Cloture Motion S. 1752*, GOVTRACK, <https://www.govtrack.us/congress/votes/113-2014/s59> (last visited Nov. 22, 2016).

4. During the same period that the NDAA directed the establishment of the Judicial Proceedings Panel and the Response Systems Panel, the DoD established the Military Justice Review Group (MJRG) to perform a comprehensive review of the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial (MCM), and the applicable service regulations. Memorandum from the Secretary of Defense on a Comprehensive Review of the Uniform Code of Military Justice to Secretaries of the Military Departments, et al. (Oct. 18, 2013), http://www.dod.gov/dodgc/images/mjrg_secdef_memo.pdf. The last such review occurred in 1983, with many piecemeal amendments since then. *Id.* The MJRG conducted hearings and received information for two years; its proposals then underwent approximately a month of internal DoD review. See *Military Justice Review Group*, DEP'T OF DEFENSE, <http://www.dod.gov/dodgc/mjrg.html> (last visited Nov. 22, 2016) (providing documents related to the DoD's review of the military justice system). Subsequently, the DoD proposed the Military Justice Act of 2016 on December 28, 2015, based on the MJRG's initial report. Press Release, U.S. Dep't of Def., Department of Defense Forwards to Congress Proposed Changes to the Uniform Code of Military Justice (Dec. 28, 2015), <http://www.defense.gov/News/News->

DoD-proposed Military Justice Act of 2016, a wide-ranging proposal that substantially civilianizes a legal system already radically civilianized compared to its original enactment in 1775.⁵ However, one institution critical to the military's legal system will escape all scrutiny by both Congress and the DoD—its highest court, the United States Court of Appeals for the Armed Forces (CAAF). This article closes that gap.

Though an Article I court, CAAF is an independent judicial body.⁶ Its budget flows through the DoD, but Congress has made it clear that CAAF is located within the DoD “for administrative purposes only”⁷ Like all judicial bodies, it should benefit from ongoing scrutiny. Its early judges agreed and invited such scrutiny.⁸ Though the military services law review journals and numerous civilian journals publish works analyzing specific aspects of military law, few, if any, include structural analyses of the military's appellate institutions generally, and CAAF specifically.⁹ This type of study has not occurred since the 1970s.¹⁰ Thus, CAAF, and

Releases/News-Release-View/Article/638095/department-of-defense-forwards-to-congress-proposed-changes-to-the-uniform-code.

5. Bryan Koenig, *DOD Proposes 'First Comprehensive' UCMJ Update in 30 Years*, LAW360 (Jan. 4, 2016), <http://www.law360.com/articles/742081/dod-proposes-first-comprehensive-ucmj-update-in-30-years>.

6. In its report, the MJRG stated that “[i]n view of the judicial independence of the Court, the Department of Defense, as a matter of policy, typically has deferred to the Court with respect to initiating any legislative proposal that might be necessary in the interests of judicial administration.” Military Justice Review Group, *Report of the Military Justice Review Group, Part: 1: UCMJ Recommendations* 1020 (Dec. 22, 2015), http://www.dod.mil/dodgc/images/report_part1.pdf.

7. 10 U.S.C. § 941 (2012).

8. Robert E. Quinn, *The Court's Responsibility*, 6 VAND. L. REV. 161, 162 (1953). Chief Judge Quinn eagerly welcomed scrutiny:

It is my hope that the bar, individually and through its legal journals, will follow closely the work of this Court. They can perform a most valuable function in weighing individual cases against the dichotomous concept of military justice and tell the public, the services and us, the judges, whether we are performing properly our task of enunciating principles worthy of existence in this relatively new field of law.

Id.

9. See, e.g., Eugene R. Fidell, *Is There a Crisis in Military Appellate Justice?*, 12 ROGER WILLIAMS U. L. REV. 820, 820 (2007) (“The highest court of the jurisdiction — The United States Court of Appeals for the Armed Forces — is turning out careful, scholarly opinions that are easily on par with the work of the geographical circuits.”); Jonathan Lurie, *Presidential Preferences and Aspiring Appointees: Selections to the U.S. Court of Military Appeals 1951-1968*, 29 WAKE FOREST L. REV. 521 (1994) (exploring the politicized nature of presidential appointments to the U.S. Court of Military Appeals); Scott L. Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F. L. REV. 81, 82 (1976) (considering the Court of Military Appeals' status within the military justice system).

10. See, e.g., Daniel H. Benson, *The United States Court of Military Appeals*, 3 TEX. TECH L. REV. 1, 2 (1971) (describing the structure of CAAF); John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 44 (1977)

consequently military law, has evolved over the last 50 or so years without much scrutiny of its role within the military justice system and whether its conduct is consistent with its role. No comprehensive understanding of the military justice system is complete without a better understanding of its highest court.

This article attempts to further the understanding of CAAF's role in the military justice system by examining CAAF's effectiveness as the court of last resort within this system. This is accomplished by answering a series of questions. First, what is a court of last resort? Second, is CAAF viewed as a court of last resort in the military judicial hierarchy, or is it viewed as the first real intermediate appellate court, with the service courts acting as mere reviewing agencies? Third, if CAAF is viewed as a court of last resort, does it act like one?

This article concludes that CAAF is a court of last resort that, far too often, acts as an intermediate error-correction court. This conclusion raises both concerns and opportunities for a legal system facing ongoing scrutiny over its legitimacy. Each of the questions presented above are answered in order. Part I introduces the role of a court of last resort in a judicial system. Courts of last resort in a two-tiered system primarily focus on declaring what the law is, not error correction. This role is concerned with the development of the law. Error correction is the primary task of intermediate courts.¹¹ Part II turns the focus to the perceptions of CAAF, perceptions by both the Supreme Court of the United States (Court) and CAAF itself. Even during periods in which the Court expressed grave concern over the

(discussing the effects of transforming the military justice system during the late 1970s); John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972) (providing a history of the Court of Military Appeals and its role); John T. Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 27 (1972) (examining the decisions and structure of the Court of Military Appeals), John T. Willis, *The United States Court of Military Appeals – "Born Again"*, 52 IND. L.J. 151, 153 (1976) (discussing precedent-breaking decisions, supervisory review and civilianization by the Court of Military Appeals).

11. To be fair, there is some discussion that this distinction is not so clear; courts of last resort and intermediate courts routinely engage in a two-way communication in the law development function. See, e.g., Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 462, 464 (2012) (arguing the circuit courts' role is to maintain stability and help evolve the judicial system); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 7–8 (1994) (comparing and contrasting two models of behavior in inferior courts, namely (1) deference to existing superior court precedents and (2) predictions of future superior court rulings). However, this article structures the roles of each level in accordance with the American Bar Association's Standards Relating to Court Organization. See Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 27 (1993) (citing Standards Relating to Court Org. § 1.13 commentary at 39–40 (1990)).

legitimacy and competency of the military justice system, it has always viewed CAAF as the court of last resort within that system.¹² Likewise, CAAF has always asserted itself as the court of last resort in the military justice system.¹³ Though CAAF expressed this view less in recent years, it has never retreated from its earlier declarations that it was the military's supreme court.¹⁴

Part III begins the inquiry into whether CAAF acts like a court of last resort describing the methodology used to obtain, review, and classify the relevant data. The sample size consisted of each published decision from four select terms: 1951–52, 1968–69, 1994–95, and 2014–15. The first three selected terms followed the enactment of legislation that specifically intended to clarify CAAF's status as an independent and important federal court. Presumptively, these terms transpired when CAAF was most aware of its enhanced prestige. The 2014–15 term represents CAAF's most recent full term, thus presenting the opportunity to examine its recent conduct. Based on the criteria established in Part I, each decision in these terms was given one of ten codes to classify it as either an error correction decision or a declaration of law. Nine of the codes mark the nine bases for granting review common amongst courts of last resort. The tenth code marks the decision as one of error correction. In addition to the first three terms, the Court's 2014–15 term was reviewed and coded for validation. Proper coding should result in a high total number, indicating more declaration decisions by the Court.

Part IV analyzes the results of this examination. It concludes that each term contained an extraordinary number of error correction decisions, at times making up nearly 90% of all decisions in a given term. Furthermore, when CAAF does issue a law declaration decision, thus acting as a court of last resort, it often does not frame the issues or address them in a manner one would expect from such a court. The discussion in Part IV offers some initial potential explanations, which ultimately narrow down the question to whether CAAF understands its role, and if it is properly served by its lower courts and appellate counsel. Part V offers a procedural and substantive framework for approaching petitions for review and subsequent decisions based on the available data. This includes suggesting CAAF make clear when it is conducting error correction and when it is conducting law declaration—and why the distinction is important. Finally, this article concludes with a call for examination of the historically high level of error correction decisions issued by CAAF.

12. Silliman, *supra* note 9, at 82.

13. *Id.* at 89–91.

14. *Id.* at 91.

I. THE ROLE OF A COURT OF LAST RESORT IN A JUDICIAL SYSTEM

Before investigating whether CAAF is perceived, or perceives itself, as a court of last resort, it is important to first understand the appropriate role of a court of last resort within a judicial system. Courts of last resort exist in single-tier or two-tiered systems.¹⁵ In a single-tier system, all appeals come to the court of last resort; it is the sole appellate court.¹⁶ A two-tiered system, by contrast, serves different purposes.¹⁷ The intermediate courts focus on error correction, while the court of last resort focuses on law declaration.¹⁸ In its most basic sense, error correction ensures “that law is interpreted correctly and consistently”¹⁹ In contrast, a court of last resort provides “a means for the development of law through . . . decisions and explanations of decisions.”²⁰ This effort may involve error correction, but “only incidental to [the] ‘law declaring’ function.”²¹ The purpose of a two-tiered appellate system is to “shift the time-consuming review-for-correctness function to the court of appeals and to streamline the supreme court’s workload [sic].”²²

In his theoretical discussion on the role of an appeals process in an adjudicative system, Steven Shavell concluded that intermediate courts exist in part because there is a presumption that trial courts occasionally make “fairly clear mistakes” for a variety of reasons.²³ These mistakes can arise out of the inexperience of some trial judges, time pressure, or “the fact that the courts are responsible for applying a vast body of law.”²⁴ Most of these errors are corrected at the trial level, but not all; in fact, sometimes the error is the decision itself.²⁵ However, when these errors make it past the trial level, they may need “deliberation that the press of trial does not allow,” in order to properly evaluate what happened.²⁶

15. Cope, *supra* note 11, at 26–27.

16. *Id.* at 26.

17. *Id.* at 29.

18. *Id.*

19. Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APP. PRAC. & PROCESS 105, 105 (2010).

20. *Id.*

21. Thomas C. Marks, Jr., *Jurisdiction Creep and the Florida Supreme Court*, 69 ALB. L. REV. 543, 543 (2006).

22. Cope, *supra* note 11, at 30.

23. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 414 (1995). “Errors may be factual in nature, and they may also occur in the determination of the applicable legal rule or in its use in combination with the found facts.” *Id.* at 413.

24. *Id.* at 414.

25. *Id.*

26. *Id.*

Though an intermediate court has an initial responsibility for the law development function, its review is “performed chiefly for [the aggrieved litigant’s] benefit.”²⁷ Some have argued that “[l]ower courts function as geographically dispersed extensions of the Supreme Court, designed simply to reduce the burdens on both the Court and litigants.”²⁸ The law-declaring function is generally reserved for the court of last resort.

Victor Flango concluded that the existence of intermediate courts allowed a court of last resort to “focus on developing the law, including the articulation of new principles, the resolution of conflicts among statutory laws, and the resolution of conflicts in interpretation among intermediate appellate courts.”²⁹ Thus, courts of last resort receive few required appeals.³⁰ Cases heard by these courts are usually performed for the legal community at large.³¹ These courts hear cases to “resolve legal issues of great importance” and to “assure decisional uniformity throughout” their jurisdiction.³²

Courts of last resort in two-tiered appellate systems generally adopt explicit criteria that must be met by a petitioner in order for the court to grant review.³³ For example, the Supreme Court of the United States has articulated specific criteria required for the grant of a petition for a writ of certiorari.³⁴ These criteria are broken down into three categories of petitions.³⁵ The first category includes decisions by a lower court that conflict with another sister court; decisions regarding important federal questions that conflict with a state court of last resort; or decisions that have “so far departed from the accepted and usual course of judicial proceedings,” or approved a trial court’s similar departure, that they compel the exercise of the Court’s supervisory power.³⁶ This exercise of supervisory power includes intervening “to prevent a gross miscarriage of justice.”³⁷ The second category of petitions includes decisions by state courts of last resort on “an important federal question” that conflicts with

27. Cope, *supra* note 11, at 28.

28. Caminker, *supra* note 11, at 16.

29. Flango, *supra* note 19, at 114.

30. Cope, *supra* note 11, at 28. Granted appeals are “reserved for matters of greatest importance, such as ‘capital cases and . . . a limited number of other matters.’” (quoting Am. Bar Ass’n., STANDARDS RELATING TO COURT ORGANIZATION § 1.13(a) (1990)).

31. *Id.* at 28.

32. *Id.* at 29.

33. *Id.* at 24.

34. SUP. CT. R. 10. Of course, the rule declares that these criteria are neither controlling nor limiting on the Court’s discretion. *Id.*

35. *Id.*

36. *Id.* R. 10(a).

37. Cope, *supra* note 11, at 58 (footnote omitted).

another state court of last resort or a federal court of appeals.³⁸ The third category includes decisions by a state court of last resort or federal court of appeals on “an important question of federal law that has not been, but should be, settled” by the Court, or that conflicts with the Court’s precedent.³⁹ In each decision in which the Court resolves a conflict, it specifically identifies those courts whose conflicts it is settling.⁴⁰ Though not an articulated category, commentators argue that the Court may also consider, *sub silentio*, petitions arising from a closely divided lower court.⁴¹

The Court’s established criteria have existed in largely the same form since 1925 and have been very influential in the several states.⁴² Some state courts of last resort add to their list of criteria an issue of “first impression,” a “novel question,” an “undecided point of law,” an issue of “great public importance,” or an issue that “affects the public interest.”⁴³ Minnesota and Wisconsin go so far as to grant review of petitions necessary to “help develop, clarify, or harmonize the law”⁴⁴ In decisions involving conflicts among lower courts, state courts of last resort also specifically identify whose conflicts it is considering, and often additionally assert that they are resolving the conflict to ensure “uniformity of decision.”⁴⁵ Unlike the Court, some state courts of last resort list the existence of a divided lower court or the inability of a lower court to agree on a common rationale within their discretionary review criteria.⁴⁶ A few other state courts even mandate review of lower court decisions in which there is a dissenting opinion.⁴⁷ CAAF also lists criteria that substantially align with the Court’s list of reasons to grant review.⁴⁸

Though the criteria for review amongst courts of last resort vary, most courts explicitly declare that they are not bound to those criteria listed.⁴⁹

38. SUP. CT. R. 10(b).

39. *Id.* R. 10(c).

40. Cope, *supra* note 11, at 54.

41. *Id.* at 59.

42. *Id.* at 46.

43. *Id.* at 49–50.

44. *Id.* at 51.

45. *Id.* at 54.

46. *Id.* at 59.

47. *Id.*

48. C.A.A.F. R. 21(b)(5). Rather than assess how well CAAF utilizes its own criteria, this article sought to find common criteria shared by all courts of last resort. If CAAF were to adopt the recommendations made here, subsequent studies could better evaluate how well CAAF is utilizing its criteria for considering granting petitions for review.

49. Cope, *supra* note 11, at 48 (“A majority of states, as well as the federal system, explicitly state that their review criteria do not limit the power of the supreme court [sic] to grant discretionary review.”).

Nearly all courts agree, however, that error correction should not be the sole basis for granting review.⁵⁰

There are two general theories that explain how courts of last resort should operate.⁵¹ Under the managerial theory or precedent model,⁵² the court is a “manager of a system of courts”⁵³ The court of last resort establishes a framework for lower courts, delegates the exercise of that framework to those lower courts, and polices their efforts.⁵⁴

Alternatively, under the proxy model theory, “an inferior court discharges its duty to ‘say what the law is’ by applying the dispositional rule that the superior court enjoying revisory jurisdiction predictably would embrace.”⁵⁵ Regardless of whether lower courts follow marching orders or seek to predict how the higher court would rule, lower courts apply existing law to correct errors, and courts of last resort declare what the law should be going forward.⁵⁶

Courts of last resort also utilize the concept of percolation. Essentially, lower courts experiment with a rule or standard established by the court of last resort.⁵⁷ Sometimes a consensus materializes.⁵⁸ If it does not, and a conflict develops, the court of last resort benefits from choosing among

50. Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 285 (2006) (“Error correction remains one of the most ubiquitous reasons to deny a petition.”). Professor Shapiro argues that the Court itself can do better as a court of last resort, particularly in the application of established standards. *Id.* at 273 (“Because the Court does not focus on application, it tolerates significant inconsistency and unpredictability, both between and within circuits—inconsistency that sometimes rises to a level that should be intolerable under the rule of law.”). This is because the Court often equates the misapplication of a properly stated rule of law with error correction. *Id.* at 292. Such an advanced analysis of a mature court of last resort should be applied to the military appellate system in due course.

51. Caminker, *supra* note 11, at 7.

52. Gewirtzman, *supra* note 11, at 465–66. Under this theory, “anticipatory overruling” is prohibited. *Id.* at 468–69 (“Even if a circuit court judge has good reason to believe that the significance of a particular precedent has eroded over time or that the current Court would overrule the case, she must still comply with the Court’s earlier decision.”).

53. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 717 (1984).

54. *Id.* (“The Court can, and should, establish and police a framework for the delegation and exercise of responsibility to and by lower courts.”).

55. Caminker, *supra* note 11, at 16 (footnote omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

56. James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459, 460, 470 (1975).

57. Shapiro, *supra* note 50, at 331–32. *See also* Gewirtzman, *supra* note 11, at 482 (footnotes omitted) (“Before the Court chooses to nationalize a particular constitutional rule, it gets a chance to see how the rule ‘writes,’ and the opportunity to use lower courts as smaller ‘laboratories’ for experimentation to assess the rule’s consequences.”).

58. Shapiro, *supra* note 50, at 332 (“Further involvement by the Court might or might not be necessary to ensure an appropriate level of uniformity, and were the Court to intervene again, it would have a clearer idea of what specific aspects of the standard called for further guidance.”).

numerous “doctrinal” alternatives.⁵⁹ On controversial issues, this concept preserves the court’s political capital.⁶⁰ In constitutional disputes, stakeholders have time to engage in the political process.⁶¹ Percolation also encourages lower courts “to take their job more seriously”;⁶² it is a sign of respect for their competency.

II. PERCEPTIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

A. *The Court’s View of CAAF*

Throughout most of CAAF’s history, the Court has viewed it as a court of last resort.⁶³ This view was evident early in CAAF’s history. Separately convicted of rape and murder, Private (PVT) Herman Dennis and Sergeant (SGT) Robert Burns filed petitions for writs of habeas corpus in district court after exhausting all administrative remedies under the then-existing Articles of War.⁶⁴ The issue that ultimately reached the Court was one of jurisdiction.⁶⁵ The district court dismissed both petitions without review of

59. Gewirtzman, *supra* note 11, at 483 (“[T]he release of a new Supreme Court opinion often ushers in a ‘period of learning within the circuits,’ in which different lower courts follow different doctrinal paths, culminating in the Supreme Court selecting one of the alternatives and nationalizing it.”).

60. *Id.* at 484–85 (“[A] robust percolation process allows the Court to use its limited monitoring resources more efficiently, minimizes the Court’s expenditures of political capital, incentivizes lower court judges to take their job more seriously, and lets the Court measure support for a potential ruling among lower court judges, who are ultimately charged with applying the rule and whose allegiance is necessary for the Court to enforce its will.”) (footnotes omitted).

61. *Id.* at 487 (“Constitutional disputes that linger at the lower court level provide time for political stakeholders to mobilize support for their positions, gather and analyze information, exert pressure on elected branches of government to adopt different policy choices, and to fully consider the impact of different constitutional rules on particular constituencies.”). *See also* Estreicher & Sexton, *supra* note 53, at 716 (“The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.”).

62. Gewirtzman, *supra* note 11, at 484.

63. Silliman, *supra* note 9, at 82.

64. *Burns v. Wilson*, 346 U.S. 137, 138 (1953). Three years earlier, as CAAF came into being, the Court rejected a habeas claim on procedural grounds because the appellant did not exhaust all the administrative remedies available through the new UCMJ. *Gusik v. Schilder*, 340 U.S. 128, 133–34 (1950). Here, Dennis and Burns alleged that the Army illegally detained them, coerced their confessions, denied them effective counsel, suppressed favorable evidence, and suborned perjury. *Burns*, 346 U.S. at 138. They “charged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play.” *Id.* As an interesting aside, Thurgood Marshall and Robert Carter, giants of the civil rights era, represented Dennis in district court. *Dennis v. Lovett*, 104 F. Supp. 310, 311 (D.D.C. 1952).

65. *Burns*, 346 U.S. at 139.

the merits because, consistent with Court precedent at the time,⁶⁶ the courts-martial had proper jurisdiction over the individuals and the offenses.⁶⁷ The D.C. Circuit Court agreed, but after a review on the merits.⁶⁸

In its subsequent decision, the Court described CAAF as a court of last resort in a separate jurisdiction with a long history independent of the civilian legal system.⁶⁹ Military law, the Court declared, developed much like state law.⁷⁰ Accordingly, the Court historically played no role in its development.⁷¹ The Constitution left that task entirely to Congress, which created a judicial system through the UCMJ.⁷² CAAF, the Court stated, was the “highest court” in that system.⁷³ Therefore, when CAAF has “dealt fully and fairly” with an issue, it is inappropriate for a civilian court to second guess it.⁷⁴

The Court’s near total deference to Congress in the area of military justice was consistent with its precedent at the time.⁷⁵ Over the next two decades, the Court developed a substantially skeptical view of the military and its legal system.⁷⁶ Rather than re-affirm CAAF’s role as a court of last resort capable of dealing “fully and fairly” with issues brought before it, including constitutional questions, the Court questioned the competency of the military justice system itself.⁷⁷

66. *See, e.g.*, *Dynes v. Hoover*, 61 U.S. 65, 82 (1857) (“With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them.”); *see also* John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 164 (2000) [hereinafter O’Connor, *Military Deference*] (regarding the Court’s willingness to perform constitutional review of the military justice system, the Supreme Court implemented the “doctrine of noninterference”).

67. *Burns*, 346 U.S. at 138–39.

68. *Id.* at 139. Based on the seriousness of the allegations, and the “divergent bases for decision in the two courts below . . .,” the Court granted certiorari. *Id.*

69. *Id.* at 140.

70. *Id.* at 140 (“Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”).

71. *Id.* at 140.

72. *Id.*

73. *Id.* at 141 n.7.

74. *Id.* at 142.

75. *See* O’Connor, *Military Deference*, *supra* note 66, at 164 (regarding the Court’s “doctrine of noninterference” towards the military justice system).

76. *Id.*

77. *Id.* To be fair, CAAF has always had very limited jurisdiction. It can only hear death penalty cases and cases in which the accused is sentenced to more than a year in confinement or to receive a punitive discharge. 10 U.S.C. § 867(a) (2012). These cases are a very small subset of all courts-martial. James A. Young, *Court-Martial Procedure: A Proposal*, THE REPORTER, Vol. 41, No. 2, 24 (2014). At least one scholar has argued that this shift toward deep skepticism was largely due to Justice Douglas’s strong anti-Vietnam sentiment. *See generally* Joshua E. Kastenberg, *Cause and Effect*:

In three cases involving the courts-martial of civilians, the Court questioned the competency of military courts and the military justice system.⁷⁸ The first concerned the conviction of a civilian honorably discharged from the Air Force for crimes committed when on active duty.⁷⁹ The other two cases, consolidated by the Court, concerned the convictions of two civilian spouses of service members for the murder of their husbands.⁸⁰ In both decisions, the Court began by noting differences between civilian and military courts and ended by expressing concern with military courts' competence in constitutional law.⁸¹

In *Toth v. Quarles*, the Court noted that certain differences between civilian and military courts make civilian courts the appropriate forum to prosecute civilians.⁸² "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."⁸³

The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker, 26 T.M. COOLEY L. REV. 163, 242, 249, 268 (2009) (arguing that Douglas played a roll in reducing the reach of the military's jurisdiction).

78. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955); *Reid v. Covert*, 354 U.S. 1, 3 (1957).

79. *Toth*, 350 U.S. at 13. The Air Force honorably discharged Robert Toth after his service in Korea, arrested him five months later, transported him back to Korea, and convicted him of murder and conspiracy to commit murder while still on active duty. *Id.* The Court granted review after the district and circuit courts disagreed over whether the military had jurisdiction over Toth. *Toth v. Talbott*, 114 F. Supp. 468, 469 (D.D.C. 1953) (finding no military jurisdiction), *overruled by Toth v. United States ex rel. Toth*, 215 F.2d 22, 31 (D.C. Cir. 1954) (finding military jurisdiction); *Toth*, 350 U.S. at 13.

80. *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion). Clarice Covert killed her husband, a sergeant in the Air Force, in England where he was stationed. *Id.* at 3. Dorothy Smith killed her husband, an Army officer, in Japan where he was stationed. *Id.* at 4. Defense counsel in both cases introduced substantial evidence of each defendant's insanity. *Id.* at 3-4. In both cases, the court-martial found each defendant guilty and sentenced each to life in prison. *Id.* CAAF, then known as the Court of Military Appeals, reversed Mrs. Covert's conviction due to prejudicial errors surrounding the preclusion of her insanity defense. *Id.* at 4. Her counsel filed her petition for a writ of habeas corpus while awaiting retrial in the United States. *Id.* Mrs. Smith's father filed her petition for a similar writ after the Court of Military Appeals approved the judgment. *Id.*

81. *Id.* at 1; *Toth*, 350 U.S. at 15.

82. *Toth*, 350 U.S. at 22.

83. *Toth*, 350 U.S. at 17. The Court did not find much comfort in the recent advances in military justice in light of the history of the military:

But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that 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. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the

Because military trials are only incidental to that function, they “have not been and probably never can be constituted in such way [sic] that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”⁸⁴ Therefore, the Court declared, military courts should be limited “to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”⁸⁵

In its subsequent decision in *Reid v. Covert*, the Court progressed from limiting military jurisdiction based on structural differences to discounting the extent to which military courts can preserve justice at all.⁸⁶ In a tone arguably more stern than in *Toth*, the Court acknowledged the nation’s historical distrust of the military.⁸⁷ This distrust carried over into military justice. The Court described the military justice system as a “rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.”⁸⁸ While it noted the improvements implemented by the UCMJ, the Court quickly dismissed them as statutory and not constitutional, and thus easily reversible.⁸⁹ Rather than lending support to the nascent revolution in

Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

Id. It is noteworthy that this excerpt, in particular the sentence describing the “primary business of armies and navies,” would later be turned on its head and used to *support* the competency of military courts to prosecute military members consistent with constitutional requirements. *See Parker v. Levy*, 417 U.S. 733, 743, 758 (1974) (upholding the military court’s statutory interpretation and its conviction of an enlisted man). *See also O’Connor, supra* note 66, at 229 (“The *Toth* Court, of course, had relied on this specialized purpose of armies and navies to *limit* the power of courts-martial on the grounds that armies and navies were not particularly well-suited to operate a professional system of criminal justice. In *Levy*, the Court turned the reasoning of *Toth* on its head, and argued that the military’s need for unflinching obedience in the ranks called for a greater power to criminalize conduct than would exist in civilian society.”) (footnote omitted).

84. *Toth*, 350 U.S. at 17.

85. *Id.* at 22.

86. The structural difference that concerned the Court was that an accused in a court-martial did not retain the right to trial by jury. *Reid*, 354 U.S. at 21–22.

87. *Id.* at 23–29.

88. *Id.* at 35–36. Though historically true, this misconception of the military justice system still persists. *See United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Reid*, 354 U.S. at 35–36).

89. *Reid*, 354 U.S. at 37. The Court also noted it was unclear to what extent the Bill of Rights and other constitutional provisions applied to military trials. *Id.* Of note, three years later CAAF would declare that the Constitution applies to the military unless it is expressly or by necessary implication excluded. *United States v. Jacoby*, 29 C.M.R. 244, 247 (C.M.A. 1960). Subsequent Court decisions would assume, without deciding, that the Constitution applied. *See, e.g., Winters v. United States*, 89 S. Ct. 57, 60 (1968) (Douglas, J., in chambers) (“A member of the Armed Forces is entitled to equal

military justice, of which CAAF was a part, the Court focused on the historical role of military justice, which placed less emphasis on protecting individual rights than its civilian counterpart.⁹⁰

Arguably, *Toth* and *Reid* are anomalies. They involve the prosecution of a civilian in a military court. But the Court went further than simply declaring that constitutional safeguards make civilian courts the appropriate forum.⁹¹ It expressed a lack of confidence in the military's courts.⁹² Interestingly, it made no mention of military appellate courts generally, or CAAF specifically.⁹³ This leads to at least three potential conclusions. The first is that the Court found CAAF just as incompetent as courts-martial and thus unable to remedy errors and supervise cases within its jurisdiction. A second conclusion is that the Court was simply unaware of CAAF and its early efforts to make military justice more uniform and more like civilian courts. A third conclusion could be that the Court felt CAAF was not adequately independent and too jurisdictionally limited to be effectual. Absent additional research into the justices' writing and correspondence, the reason will remain unclear. But perhaps due to the passage of time and an increase in CAAF's experience, as well as structural improvements to CAAF, the Court may again acknowledge CAAF as a court of last resort, albeit one with very limited jurisdiction.

In two decisions in 1969, the Court deferred to CAAF in cases in which there was a military service connection. The Court felt this deference was necessary because of military society's specialized nature, but still distrusted the system as a whole to address constitutional issues appropriately.⁹⁴ The first involved the conviction of SGT James O'Callahan

justice, under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws."); *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."); *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) ("Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial . . . and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions."); 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* § 1-52.00 (4th ed. 2015) ("Although the Supreme Court has assumed that most of the Bill of Rights does apply, it has yet to squarely hold it applicable.") (footnote omitted).

90. *Reid*, 354 U.S. at 36.

91. *Reid*, 354 U.S. at 21; *Toth*, 350 U.S. at 15.

92. *Reid*, 354 U.S. at 36-37, 39; *Toth*, 350 U.S. at 17.

93. *Reid*, 354 U.S. 1; *Toth*, 350 U.S. 11.

94. *O'Callahan v. Parker*, 395 U.S. 258, 263-65 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435, 436 (1987); *Noyd v. Bond*, 395 U.S. 683, 694 (1969).

for attempted rape, housebreaking,⁹⁵ and assault with the intent to rape.⁹⁶ While serving his prison sentence, SGT O’Callahan filed a petition for a writ of habeas corpus in district court and argued that military courts lacked jurisdiction because these were non-military offenses, committed outside a military installation, and involved a civilian victim.⁹⁷ In its subsequent decision, the Court expressed deep concern over the competency of military courts and thus sought to restrict military jurisdiction to the maximum extent possible.⁹⁸

Writing for the majority, Justice Douglas acknowledged that exigencies in military service required a “special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply.”⁹⁹ But, he wrote, it is a system grounded in discipline, not justice; thus, “expansion of military discipline beyond its proper domain carries with it a threat to liberty.”¹⁰⁰ Justice Douglas

95. In contrast to burglary, which requires the breaking and entering of the dwelling of another with the intent to commit a felony therein, housebreaking prohibits the unlawful entry of a building or structure of another with the intent to commit any criminal offense therein. 10 U.S.C. §§ 929–930 (2012).

96. *O’Callahan*, 395 U.S. at 260.

97. *Id.* at 261. Denied by the district court and after the Third Circuit affirmed that decision, the Court granted certiorari on the following question:

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., 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?

Id.

98. See generally Kastenberg, *supra* note 77 (arguing that Douglas played a large role in distrust and reduction of the military legal system).

99. *O’Callahan*, 395 U.S. at 261.

100. *O’Callahan*, 395 U.S. at 265. Arguments of political purposes aside, Justice Douglas’s argument ignored some major developments in military justice implemented by the time of *O’Callahan*. The Preamble of the UCMJ, enacted nearly 20 years earlier, for the first time declared that military law existed to ensure *both* discipline *and* justice. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL I-1 (2012), http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”). See also THE COMM. ON THE UNIF. CODE OF MILITARY JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER SECRETARY OF THE ARMY 11–12 (1960), https://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf (“In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.”); *United States v. Littrice*, 3 U.S.C.M.A. 487, 491 (1953) (“It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws.”); 10

concluded by declaring that “courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . .” with only a passing reference to CAAF’s efforts in balancing military discipline with constitutional principles.¹⁰¹ Thus, absent a specific-service connection, military courts had no jurisdiction to prosecute service members during peacetime while civil courts were open.¹⁰²

Though the Court expressed deep concern over the competency of military courts and appeared to discount the role of CAAF in its *O’Callahan* decision, it expressed remarkable confidence in CAAF as the highest court in the military legal system just two weeks later.¹⁰³ This case arose from the conviction of Captain (CPT) Dale Noyd who, disillusioned by Vietnam, repeatedly refused orders to train a junior officer to fly. The court-martial convicted him of willful disobedience of a lawful order.¹⁰⁴

U.S.C. § 830(b) (2012) (“Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof *in the interest of justice and discipline . . .*”) (emphasis added). CAAF sat atop this system and declared nearly a decade earlier that the Constitution applied to the military. *United States v. Jacoby*, 29 C.M.R. 244, 246–47 (C.M.A. 1960). The Court even acknowledged the forward leaning nature of the UCMJ and CAAF by relying on the military legal system as a model to follow in the seminal criminal procedure decision of *Miranda v. Arizona*:

Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals. There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules.

Miranda v. Arizona, 384 U.S. 436, 489 (1966) (footnotes omitted).

101. *O’Callahan*, 395 U.S. at 265. This passage appears to exhibit a lack of understanding of, or appreciation for, the role a court of last resort plays in remedying these sorts of deficiencies. It had been only a decade since CAAF declared that the Constitution applied to military law. *Jacoby*, 11 U.S.C.M.A. at 430–31. Most recently, the Military Justice Act of 1968 had created the military judiciary. Pub. L. No. 90-632, § 2, 82 Stat. 1335 (codified as amended at 10 U.S.C. § 826). Though they do not receive lifetime tenure, military judges exercise independence outside the chain of command of the officer who convenes the court-martial. See Comment, *The Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence*, 18 CATH. U. L. REV. 429, 438 (1969) (“Article 26 of the Code has been amended to provide, in new subsection (c), for an independent field judiciary, an independent group of professionals who are responsible only to the Judge Advocate General for directions and fitness reports.”) (footnote omitted). While one could argue lack of life tenure and the nature of military service brought a different caliber of person to the bench, both civilian and military judges were legally trained in the same institutions. Certainly, one could have argued that federal courts were similarly inept in the subtleties of constitutional law in 1799 or 1801, approximately ten years after the ratification of the Constitution and the Bill of Rights, respectively. Yet I would argue that no one would have similarly ignored the Court’s role during that time supervising and leading federal courts through the development of constitutional law, and providing remedies when lower courts failed in the application of constitutional law.

102. *O’Callahan*, 395 U.S. at 273–74.

103. *Id.* at 284.

104. *Noyd v. Bond*, 395 U.S. 683, 684–85 (1969).

Rather than petition the intermediate court reviewing his appeal, or CAAF itself, CPT Noyd filed a petition for a writ of habeas corpus in district court.¹⁰⁵ By the time his petition reached the Court and it subsequently decided his case, CAAF had granted his petition for review of the lower court's affirmance of his conviction in the normal military appellate process and was considering his case.¹⁰⁶

The Court refused to intervene. In doing so, and in contrast to *O'Callahan*, the Court expressed substantial confidence in CAAF's competence as the highest court in the military legal system.¹⁰⁷ Congress, the Court declared, granted supervisory authority over the military legal system to CAAF, not the Court.¹⁰⁸ CAAF was a court comprised of "disinterested civilian judges [that] could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces."¹⁰⁹ These traditions, the Court noted, were "radically different from that which is common in civil courts."¹¹⁰ In its role as a court of last resort, the Court explained, CAAF had previously asserted its authority to issue extraordinary writs.¹¹¹ Thus, the Court would defer to CAAF just as it would to a state court of last resort.¹¹²

Taken together, *O'Callahan* and *Noyd* demonstrate the Court's substantial deference to a capable and competent court of last resort, but only in the very limited area in which the criminal offense had a specific

105. *Id.* at 686.

106. *Id.*

107. *Id.* at 691.

108. *Id.* at 694. Congress granted the Court jurisdiction over CAAF decisions in the Military Justice Act of 1983. Act of Dec. 6, 1983, Pub. L. No. 98-209, § 10(a)(1), 97 Stat. 1393 (codified as amended at 28 U.S.C. § 1259).

109. *Noyd*, 395 U.S. at 694.

110. *Id.*

111. *Id.* at 695.

112. *Id.* at 693-94 (1969). To emphasize the point, the majority relied on an earlier decision authored by Justice Douglas:

An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgment rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

Id. at 693 (quoting *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950)).

connection to military service. This limited deference expanded over subsequent years, particularly after the arrival of then-Justice William Rehnquist. One such example of this growing deference is the seminal case of *Parker v. Levy*.¹¹³

Like *Noyd*, *Levy* originated from the willful disobedience of a lawful order.¹¹⁴ CPT Howard Levy served as Chief of the Dermatological Service in the Army during Vietnam.¹¹⁵ Also disillusioned, CPT Levy refused to train members of the Army Special Forces deploying to Vietnam, even after being specifically ordered to do so.¹¹⁶ He also made statements that appeared to advocate that African-American enlisted personnel should refuse to deploy to Vietnam.¹¹⁷ In addition to charges of willful disobedience, the Army charged CPT Levy with violating Article 133, conduct unbecoming an officer and a gentleman, and Article 134, conduct that prejudiced good order and discipline.¹¹⁸ After CAAF declined to grant

113. *Parker v. Levy*, 417 U.S. 733 (1974).

114. *Id.* at 736.

115. *Id.* at 735–36.

116. *Id.* at 736.

117. *Id.* at 736–37. The Court provided one example of such comments:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murders of women and children.

Id.

118. *Id.* at 737–38. The specific relevant allegations were as follows:

In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children," or words to that effect, which statements [which] were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

his petition for review of the Army intermediate court's decision, CPT Levy filed a petition for a writ of habeas corpus in district court.¹¹⁹ Ultimately, the Court granted his petition to consider whether Articles 133 and 134 were vague and overboard, and thus unconstitutional.¹²⁰

In the process of upholding both criminal statutes, the Court demonstrated an increased confidence in CAAF's ability to operate as a court of last resort in the military legal system.¹²¹ Levy is remembered for articulating a vision of military society, which is often used as the basis for

Id. at 738 n.5.

[Did] at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,'" or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army.

Id. at 738 n.6.

119. *Id.* at 740.

120. *Id.* at 752. The plain text of each Article covers a broad range of conduct. Article 133 prohibits conduct that is "unbecoming an officer and a gentleman . . ." 10 U.S.C. § 933 (2012). Likewise, Article 134 prohibits conduct "to the prejudice of good order and discipline in the armed forces, . . ." and conduct "of a nature to bring discredit upon the armed forces . . ." *Id.* § 934.

121. *Levy*, 417 U.S. at 757–58.

requiring a different application of constitutional principles.¹²² Moreover, the Court relies on CAAF's interpretation of Articles 133 and 134 in justifying its holding, much like it would rely on a state court of last resort's interpretation of state statutes.¹²³

The Court explained that CAAF had historically interpreted these Articles in order to narrow their otherwise broad scope.¹²⁴ This interpretation and the consequent executive¹²⁵ and congressional¹²⁶ adherence to this interpretation, saved an otherwise broad statute.¹²⁷ The

122. *Id.* at 743–44. Military justice practitioners will be very familiar with the following passage:

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.” In *In re Grimley*, 137 U.S. 147, 153 (1890), the Court observed: “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” More recently we noted that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” . . . and that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”

Id. (citations omitted). For decisions that have repeatedly relied on this passage, see, e.g., *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981) (allowing a search of an Army Specialist's locker based on probable cause), *United States v. Weiss*, 36 M.J. 224, 239–40 (C.M.A. 1992) (involving a court martial that convicts a Marine Corps Private for stealing), and *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009) (finding a Navy Lieutenant guilty of conduct unbecoming an officer).

123. *Levy*, 417 U.S. at 754.

124. *Id.* at 752 (“Each of these articles has been construed by the United States Court of Military Appeals or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope.”).

125. *Id.* at 753 (“The [MCM] restates these limitations on the scope of Art. 134.”). The MCM is published under the authority of the President of the United States. 10 U.S.C. § 836 (2012)

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts

Id.

126. It is worth noting that, though well within its prerogative, Congress did not overrule CAAF by statute.

127. *Levy*, 417 U.S. at 754 (“And there also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both articles clearly apply without vagueness or imprecision.”). In further support of this conclusion, the Court also relied on a specific CAAF decision to defend its reliance on CAAF's interpretation of Articles 133 and 134 in constitutional challenges. *Id.* at 758 (citing *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972)).

Court agreed that Articles 133 and 134 were constitutional, but reversed on other grounds.¹²⁸

This increase in respect continued. In a subsequent decision, Justice Rehnquist declared, seemingly for the first time, that CAAF decisions on constitutional questions concerning service members “are normally entitled to great deference.”¹²⁹ The Court’s respect for CAAF’s competence as a court of last resort fully blossomed in the Court’s 1987 decision, *Solorio v. United States*.¹³⁰

Solorio arose out of the prosecution of Yeoman First Class (Y1C) Richard Solorio for sexually abusing numerous children of his fellow Coastguardsmen.¹³¹ The issue the Court considered was whether the service connection requirement of *O’Callahan* should survive.¹³² The Court held it should not. Military status alone granted courts-martial appropriate jurisdiction to prosecute a criminal case.¹³³ The substantial deference to military courts is attributable to the Court’s confidence in CAAF’s capability as a court of last resort.¹³⁴ For example, the Court has repeatedly deferred to CAAF in its application of the Constitution to the military service since *Solorio*.¹³⁵

128. *Id.* at 761–62.

129. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (“Dealing with areas of law peculiar to the military branches, the Court of Military Appeals’ judgments are normally entitled to great deference.”).

130. *Solorio v. United States*, 483 U.S. 435, 436 (1987).

131. *Id.* at 436.

132. *Id.*

133. *Id.* at 440–41.

134. Alternatively, another hypothesis could be that this was simply an extension of Chief Justice Rehnquist’s strong belief in federalism, but that is a subject for another day.

135. *See, e.g., Weiss*, 510 U.S. at 181 (“[CAAF] has demonstrated its vigilance in checking any attempts to exert improper influence over military judges.”); *Davis v. United States*, 512 U.S. 452, 457 n.* (“Because [CAAF] has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial . . . and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.”); *Ryder v. United States*, 515 U.S. 177, 187 (1995) (“The court of last resort in the military justice system is the Court of Military Appeals.”); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (acknowledging CAAF’s ability to issue extraordinary writs under the All Writs Act); *Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006) (examining Congress’s intent in creating the CAAF).

Second, federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created “an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges ‘completely removed from all military influence or persuasion . . .’” Just as abstention in the face of ongoing state criminal proceedings is justified by our expectation that state courts will enforce federal rights, so abstention in the face of ongoing court-martial proceedings is justified by our expectation that the military court system established by Congress—with its substantial procedural

The preceding paragraphs demonstrate that the Court has viewed CAAF as a court of last resort throughout most of its history. This was true even during periods in which the Court distrusted the military's legal system as a whole and sought to severely limit its jurisdiction.¹³⁶ The following paragraphs demonstrate that CAAF also views itself as a court of last resort rather than an intermediate error correction court. This is true even after Congress expanded the Court's jurisdiction to include review of CAAF decisions.¹³⁷

B. CAAF's View of Itself

CAAF has asserted itself as a court of last resort in a number of ways.¹³⁸ In some cases, it explicitly identifies itself as such.¹³⁹ In others, CAAF addresses itself as the supreme court of the military.¹⁴⁰ Finally, CAAF has also identified itself as a supervisory judicial body.

1. A Court of Last Resort

In three decisions, CAAF explicitly asserted that it was a court of last resort.¹⁴¹ The first arose out of a conflict between the MCM and the Court's precedent. An Air Force court-martial convicted Basic Airman (BA) Donald Mims of wrongful use of heroin.¹⁴² On appeal, Mims argued his confession was not properly corroborated, and thus inadmissible.¹⁴³ The MCM required corroborating evidence "on each element of the crime alleged, save only the identity of the perpetrator."¹⁴⁴ However, the Court's

protections and provision[s] for appellate review by independent civilian judges—"will vindicate servicemen's constitutional rights"

Hamdan, 548 U.S. at 586 (citations omitted) (quoting *Schleinger v. Councilman*, 420 U.S. 738, 758 (1975)).

136. *Reid v. Covert*, 354 U.S. 1, 21 (1957).

137. Before this, petitioners needed to file a petition for a writ of habeas corpus in district court if CAAF denied review or affirmed its conviction. *Noyd v. Bond*, 395 U.S. 683, 693 (1969). *See also* *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) (requiring petitioners to file a petition for a writ of habeas corpus in district court if CAAF denied review or affirmed CAAF's conviction).

138. *United States v. Byrd*, 53 M.J. 35, 36 (C.A.A.F. 2000).

139. *United States v. Mims*, 24 C.M.R. 126 (C.M.A. 1957).

140. *United States v. Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960).

141. *Mims*, 24 C.M.R. at 129 (Ferguson, J., concurring); *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976); *Byrd*, 53 M.J. 35.

142. *Mims*, 24 C.M.R. at 127.

143. *Id.* at 128.

144. *United States v. Villasenor*, 19 C.M.R. 129, 132 (C.M.A. 1955) (citation omitted). In *Mims*, CAAF felt its rationale in *Villasenor* needed no further elaboration. *Mims*, 24 C.M.R. at 128. Thus, CAAF simply cited *Villasenor* and felt no need to defend its existing reasoning. *Id.* ("A reading of

precedent only required the Government to offer “substantial independent evidence which would tend to establish the trustworthiness of the [confession]”¹⁴⁵ CAAF concluded it was bound by the MCM and thus could not adopt the Court’s precedent into the military legal system.¹⁴⁶ Because Mims’s confession was not corroborated in accordance with the MCM, CAAF set aside his conviction.¹⁴⁷

Judge Homer Ferguson agreed that the MCM standard was the “better rule for the military”¹⁴⁸ but disagreed that CAAF was bound by the MCM.¹⁴⁹ In his concurring opinion, Judge Ferguson described CAAF as a court of last resort:¹⁵⁰ “This Court, as the court of last resort in the military, has the exclusive jurisdiction to set the law in [questions of criminal law] in the absence of action by the Congress.”¹⁵¹

Two decades later, CAAF again declared itself a court of last resort.¹⁵² PVT Billy Washington appealed his conviction for larceny and conspiracy to commit larceny, arguing that the separate punishments were unjust.¹⁵³ CAAF disagreed and stated it was “long and well settled” under its precedent, as well as the Court’s, that the two offenses were separately punishable.¹⁵⁴ CAAF then described itself as a court of last resort:¹⁵⁵ “It is axiomatic that the Congress is presumed to notice how its statutes are interpreted, especially by courts of last resort, and is presumed to be in agreement therewith when it then proceeds to reenact a given piece of legislation in identical form.”¹⁵⁶

Certainly, the Court decided both *Mims* and *Washington* before Congress granted the Court jurisdiction to hear direct appeals of CAAF

Villasenor will furnish one with the reasons why we concluded that the Manual for Courts-Martial, United States, 1951, stated the law in the military, and we stand firm on that rule.”)

145. *Villasenor*, 19 C.M.R. at 132 (citation omitted).

146. *Mims*, 24 C.M.R. at 128.

147. *Id.* at 129.

148. *Id.* (Ferguson, J., concurring) (“I [concur] because I consider the corpus delicti rule expressed in the Manual for Courts-Martial, United States, 1951, paragraph 140a, a better rule for the military”).

149. *Id.* (“The Manual treatment of questions of criminal law has never been considered to be binding on this Court.”).

150. *Id.*

151. *Id.*

152. *United States v. Washington*, 1 M.J. 473, 475 (C.M.A. 1976).

153. *Id.* at 473–74.

154. *Id.* at 474–75.

155. *Id.* at 475.

156. *Id.* The legislation reference was the UCMJ, which by the time of *Washington* had been amended once by Congress in 1968. *Id.* at 475 n.6.

decisions.¹⁵⁷ But CAAF has never retreated from this view of itself.¹⁵⁸ In fact, it repeated this view in 2000.¹⁵⁹

In *United States v. Byrd*,¹⁶⁰ CAAF cited legislative history supporting its status as a court of last resort.¹⁶¹ Hospital Corpsman Third Class (HM3) Derreck Byrd, Jr. appealed his conviction, claiming ineffective assistance of counsel.¹⁶² CAAF set aside HM3 Byrd's conviction and remanded his case down to the lower court for further consideration in light of a prior CAAF decision.¹⁶³ Nearly a year later, the intermediate court dismissed HM3 Byrd's appeal and re-imposed the original conviction after concluding he failed to comply with CAAF's filing requirements in his initial petition for review.¹⁶⁴ Seemingly perturbed that the lower court concluded it "unknowingly granted review where it had no apparent jurisdiction to do so,"¹⁶⁵ CAAF cited the House Armed Services Committee's report to assert that CAAF is the court of last resort and alone determines compliance with its rules.¹⁶⁶ The report said the court established under Article 67 "is to be a judicial tribunal and to be the court of last resort for court-martial cases"¹⁶⁷

The decisions summarized in the preceding paragraphs demonstrate that CAAF views itself as a court of last resort and has specifically referred to itself as such. Even after Congress permitted its decisions to be reviewed by the Court,¹⁶⁸ CAAF never expressly retreated from this view.¹⁶⁹ In fact, CAAF reinforced that view nearly two decades after the Court began receiving petitions for writs of certiorari involving CAAF decisions.¹⁷⁰ In addition to specifically referring to itself as a court of last resort, CAAF has also described itself as the supreme court of the military legal system.¹⁷¹

157. *United States v. Denedo*, 556 U.S. 904, 912 (2009).

158. *Id.* at 919.

159. *Id.* at 912.

160. *Byrd*, 53 M.J. at 35.

161. *Id.* at 36.

162. *Id.*

163. *Id.* at 38–39.

164. *Id.* at 36.

165. *Id.* at 39.

166. *Id.* at 36.

167. *Id.* (quoting H.R. REP. NO. 491, at 6–7 (1949)).

168. *United States v. Denedo*, 556 U.S. 904, 909 (2009).

169. *Id.* at 908.

170. *Id.* at 909.

171. *United States v. Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960).

2. The Supreme Court of the Military Justice System

One decision where CAAF described itself as a court of last resort, responded to an arguable challenge to CAAF's authority.¹⁷² In *Byrd*, the intermediate court questioned CAAF's knowledge of its own rules.¹⁷³ In two early decisions, CAAF asserted itself as the supreme court of the military legal system after direct challenges to its authority.¹⁷⁴

The first case involved a dismissive slight by a commander's principal legal advisor.¹⁷⁵ Private First Class (PFC) Arcola Plummer, Jr., pled guilty to stealing \$140 from a fellow soldier in the barracks and to being absent without leave for 14 days.¹⁷⁶ Consequently, the court-martial sentenced him to two years in confinement and a dishonorable discharge.¹⁷⁷ In the military legal system, the commander that convened the court-martial retains the authority to reduce an adjudged sentence.¹⁷⁸ In this case, the record of trial was initially reviewed by an Assistant Staff Judge Advocate (ASJA), who recommended the commander suspend the dishonorable discharge because of PFC Plummer's potential for rehabilitation.¹⁷⁹ His boss, the Staff Judge Advocate (SJA), strongly disagreed and recommended the adjudged sentence be approved.¹⁸⁰ In his recommendation, the SJA argued that barracks theft ranked among the worst offenses since it destroyed trust and morale in the unit.¹⁸¹ He then expressed doubt that CAAF would understand his view:¹⁸² "While this view may not be shared by civilian agencies because they do not understand the problems involved, and while the theory may not be understood by our highest appellate agency, nevertheless in this command I strongly recommend that we adhere to elimination of all

172. *United States v. Byrd*, 53 M.J. 35, 36 (C.A.A.F. 2000).

173. *Id.* at 39.

174. Professor Jonathan Lurie discusses CAAF's early battles to secure its legitimacy as a judicial institution in his biography of the court. JONATHAN LURIE, *PURSUIING MILITARY JUSTICE* xii (1998).

175. *United States v. Plummer*, 23 C.M.R. 94, 95 (C.M.A. 1957).

176. *Id.* at 95.

177. *Id.*

178. 10 U.S.C. § 860 (2012).

179. *Plummer*, 23 C.M.R. at 95. The ASJA recommended the suspension for a number of reasons. PFC Plummer returned the money within two hours of the theft. *Id.* He also had a very good service record. *Id.* Finally, PFC Plummer stated he had learned his lesson and desired the chance to earn an honorable discharge after serving his time in prison. *Id.* Though barracks theft was serious, the ASJA felt the facts were not aggravated and concluded PFC Plummer was a good candidate for rehabilitation. *Id.*

180. *Id.* at 95–96.

181. *Id.*

182. *Id.* at 96.

barracks thieves.”¹⁸³ CAAF was not impressed when it received the record of trial, which included the SJA clemency recommendation:

We are appalled at the Staff Judge Advocate’s suggestion that neither we, as the supreme appellate tribunal in the military courts-martial system, nor civilian authorities generally, can understand the disciplinary and morale problems of the military establishment. The record so overwhelmingly demolishes that contention that the only response it deserves is reference to the Constitution, which makes the President of the United States the Commander-in-Chief of the armed forces, and which grants to Congress the right to make rules and regulations for the military However, we confess to considerable concern at the mere fact that such sentiments still obtain among high-ranking personnel. We are particularly disturbed to find legal officers in sympathy with those views. Presumably at least they read our opinions. And time and again we have demonstrated our awareness of the fact that conditions peculiar to the military may require a result different from that in the civilian community. We hope that eventually all military personnel, legal and nonlegal, will realize that they have a joint obligation with civilians to shape military law “as an integral part of American jurisprudence.”¹⁸⁴

After expressing its deep concern and asserting itself as the military’s supreme court, CAAF easily found a risk of prejudice and remanded the case to be sent to a different commander to review.¹⁸⁵ Just a few years later, CAAF would again remind lower courts and the DoD itself, that it was the supreme court of the military legal system after a direct attack on its authority in the case of *United States v. Armbruster*.¹⁸⁶ The underlying legal issue concerned the Air Force’s authority to automatically increase an accused’s sentence, which included a reduction in rank.¹⁸⁷ However, the broader issue concerned whether the Air Force or DoD was bound by CAAF decisions.¹⁸⁸ But before turning to the facts of *Armbruster*, some background is necessary.

183. *Id.*

184. *Id.* (citations omitted) (quoting Benjamin Feld, *Courts-Martial Practice: Some Phases of Pretrial Procedure*, 23 BROOK. L. REV. 25, 37 (1956)).

185. *Plummer*, 23 C.M.R. at 96–97.

186. *United States v. Armbruster*, 29 C.M.R. 412 (C.M.A. 1960).

187. *Id.* at 413.

188. *Id.*

In *United States v. Simpson*,¹⁸⁹ CAAF reviewed the conviction of an Airman whose sentence included a reduction in rank from Technical Sergeant (E-6) to Airman First Class (E-3) and discharge from service.¹⁹⁰ During the clemency process, the commander that convened the court-martial suspended the discharge. However, if the court later vacated the suspension due to any future misconduct, it would automatically reduce to E-1, the lowest enlisted rank.¹⁹¹ CAAF granted review to determine whether this automatic contingent reduction was lawful.¹⁹² The Government relied on a specific reading of a provision in the MCM and argued that the automatic reduction “is purely *administrative* in nature and outside the judicial operation of the courts-martial system.”¹⁹³ CAAF disagreed with that interpretation. Rather, it held the provision described a judicial act.¹⁹⁴ Thus, a reduction in rank adjudged by a court-martial may not be increased by any subsequent administrative action.¹⁹⁵ With that background, we can return to the facts and circumstances of *Armbruster*.

After *Simpson*, the DoD requested the Comptroller General re-interpret the same provision in the MCM.¹⁹⁶ The Comptroller General reached the opposite conclusion, finding the provision described an administrative act and thus operated independent of the court-martial system.¹⁹⁷ This then became USAF policy.¹⁹⁸ Thus, when an Air Force court-martial reduced Airman First Class (A1C) Adolph Armbruster’s rank to Airman Second Class (A2C), the Government contended his automatic additional reduction to the lowest grade was lawful.¹⁹⁹ Before CAAF, the Government boldly argued that the Air Force policy would continue until the Court of Claims decided an appeal of the Comptroller General’s ruling.²⁰⁰ The Government then directly challenged CAAF’s authority as the court of last resort in the military legal system.²⁰¹ The Government argued that, in the ongoing appeal before the Court of Claims, “the decision of this Court in *Simpson* is

189. *United States v. Simpson*, 27 C.M.R. 303 (C.M.A. 1959).

190. *Id.* at 305.

191. *Id.*

192. *Id.*

193. *Id.* at 306 (emphasis added).

194. *Id.*

195. *Id.*

196. *United States v. Armbruster*, 29 C.M.R. 412, 413 (C.M.A. 1960).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

not binding upon the Court of Claims, and that paragraph 126e of the Manual is administrative not judicial in operation and effect.”²⁰²

Thus, the Government’s argument directly challenged CAAF’s authority and the finality of its decisions. In its ensuing decision, CAAF clarified its role in the military legal system, and the American judicial system:

This Court was created by Congress to sit in review of courts-martial on matters of law. In essence, it is the Supreme Court of the military justice system. Our decisions are binding upon the military. And, subject only to review by the Supreme Court of the United States on constitutional issues, our decisions are also binding “upon all departments, courts, agencies, and officers of the United States.”²⁰³

CAAF proceeded to ensure its authority was unquestionable:

Construing provisions of the Manual for compliance and conformity with the Uniform Code is the responsibility of this Court. Unless Congress changes the law, our decisions, like those of the Supreme Court of the United States, set out the governing principles. Congress has made it the duty of The Judge Advocate General of each service to effectuate the mandate of this Court in the particular case. But it is the responsibility of every person in the armed forces concerned with military justice to adhere to settled principles of law. Indeed, a knowing and intentional failure to enforce or to comply with these principles may constitute a violation of Article 98 of the Uniform Code We find no authority in the statutory powers of the Comptroller General to disregard a decision of this Court in a matter relating to courts-martial and the Uniform Code of Military Justice Be that as it may, a ruling by an agency or officer of the Government relating to the powers of a court-martial, which is contrary to the decisions of this Court, has no place in a court-martial proceeding.²⁰⁴

In both *Plummer* and *Armbruster*, CAAF responded to challenges to its authority by explicitly proclaiming it was the supreme court of the military legal system.²⁰⁵ In addition to specifically describing itself as a court of last

202. *Id.*

203. *Id.* at 414 (citation omitted) (quoting 10 U.S.C. § 876 (2012)).

204. *Id.* (citations omitted).

205. *Id.*; *United States v. Plummer*, 23 C.M.R. 94, 96 (C.M.A. 1957).

resort, CAAF also describes itself as the supreme court of the judicial system. CAAF has also described itself as the supervisory judicial body of the military legal system.²⁰⁶

3. A Supervisory Authority

On occasion, CAAF has expressed its views on whether it has a supervisory role in the military legal system and the extent of that role. It has done so in two circumstances.²⁰⁷ First, CAAF has asserted that it retained certain powers not specifically granted within the UCMJ.²⁰⁸ Second, CAAF has claimed authority under the All Writs Act to issue extraordinary writs in aid of its jurisdiction.²⁰⁹ Both circumstances support the conclusion that CAAF views itself as a court of last resort.

a. Inherent Powers

One instance in which CAAF described its supervisory role arose out of a personal disagreement between two lawyers.²¹⁰ The Air Force had previously certified Lieutenant Colonel (Lt Col) John Taylor to serve as a law officer or trial counsel in general courts-martial.²¹¹ In his petition to CAAF, Lt Col Taylor argued that the Air Force decertified him after an improperly run investigation into his professional ability when, in reality, the issue was a personal dispute between Taylor and the SJA.²¹² Lt Col Taylor's petition envisioned a very broad view of CAAF's supervisory powers.²¹³ He sought "such 'relief in equity and law' as is necessary to correct injustices in the 'public interest' and for the protection 'of an officer of this Court.'"²¹⁴ CAAF did not view its powers that broadly.²¹⁵ But it did assert it had supervisory powers beyond that expressly listed in the UCMJ.²¹⁶ "Undoubtedly, [this court] has incidental powers, the limits of which, however, we have not attempted to define."²¹⁷ Because Lt Col

206. *Plummer*, 23 C.M.R. at 96.

207. *In re Taylor*, 31 C.M.R. 13, 16 (C.M.A. 1961).

208. *Id.*

209. *Id.*

210. *Id.* at 14.

211. *Id.*

212. *Id.*

213. *Id.* at 16.

214. *Id.* at 15–16.

215. *Id.* at 16 ("[T]his Court is not a court of original jurisdiction with general, unlimited powers in law and equity.").

216. *Id.*

217. *Id.*

Taylor's decertification was an administrative and not a judicial matter, it was not in aid of CAAF's jurisdiction and thus not reviewable.²¹⁸

The specific facts of *In re Taylor* allowed CAAF to avoid defining its incidental powers, but the case demonstrates CAAF's belief that it had such powers. CAAF has not yet had to define these incidental powers. However, about a decade later, CAAF would again declare it retained such supervisory powers.²¹⁹ This occurred through an unusual circumstance where the judge assigned to write the court's opinion also wrote separately for himself.²²⁰

This unusual case arose out of a court-martial conviction for frequenting an off-limits establishment known as "Fat Mamasan's House," a known prostitution house.²²¹ The issue that reached CAAF concerned whether the Government violated PVT Wilson Mason's right to a speedy trial and whether he had a right to consult counsel upon his request while in pretrial confinement.²²² On four occasions while in confinement, PVT Mason requested to consult counsel to no avail.²²³ In addition, 131 days elapsed between when PVT Mason was placed in pretrial confinement and his ultimate trial.²²⁴ CAAF concluded the Government violated PVT Mason's right to a speedy trial and thus did not resolve whether he had a right to consult counsel while in pretrial confinement.²²⁵

Judge Robert Duncan wrote for the court.²²⁶ In an unusual approach, he separated his opinion into two parts—speaking for the court and then speaking for himself.²²⁷ In his separate opinion, Judge Duncan stated he would have answered the question concerning access to counsel.²²⁸ Relying on an earlier precedent, Judge Duncan described CAAF as having supervisory responsibilities.²²⁹

In an earlier decision, a unanimous CAAF agreed that "the intent of Congress [was] to confer upon this Court a general supervisory power over

218. *Id.*

219. *United States v. Mason*, 45 C.M.R. 165, 165 (C.M.A. 1972).

220. *Id.* at 168.

221. *Id.* at 165.

222. *Id.*

223. *Id.* at 166.

224. *Id.*

225. *Id.* at 168.

226. *Id.* at 165.

227. *Id.* at 168. Judge Duncan stated he "wish[ed] to make it clear that what follows is my opinion, not that of the other members of the Court." *Id.*

228. *Id.*

229. *Id.* at 171.

the administration of military justice.”²³⁰ Judge Duncan argued CAAF should have used that power in this case.²³¹ Like the Court, CAAF has “an obligation . . . to insist on ‘civilized standards of procedure and evidence.’”²³² Though neither the UCMJ nor the MCM entitled an accused to consult an attorney prior to being charged,²³³ Judge Duncan would have asserted CAAF’s supervisory power to require the Government to grant such a request.²³⁴

As seen in this section, CAAF has argued its inherent supervisory powers on a handful of occasions.²³⁵ CAAF has also asserted it retained supervisory powers pursuant to the All Writs Act.²³⁶ The Court has arguably supported this belief.²³⁷

b. Supervisory Powers Under the All Writs Act

The All Writs Act states “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”²³⁸ In a series of decisions, CAAF asserted its authority under this Act in support of its supervisory authority.²³⁹ Consistent with its view of CAAF as a court of last resort, the Court has endorsed this view.²⁴⁰

Two examples demonstrate CAAF’s view of its authority under the All Writs Act.²⁴¹ Both involved issues of potentially unlawful command influence.²⁴² The first involved a challenge to the independence of a

230. *Id.* (alteration in original) (quoting *Gale v. United States*, 37 C.M.R. 304, 306 (C.M.A. 1967)).

231. *Id.*

232. *Id.* (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)).

233. *Id.* at 168.

234. *Id.* at 173. CAAF codified this reasoning six years later in *United States v. Jackson*, 5 M.J. 223, 226 (C.M.A. 1978).

235. *E.g.*, *United States v. Mason*, 45 C.M.R. 165, 171 (C.M.A. 1972) (noting that Congress intended the C.A.A.F. to have supervisory power).

236. *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969).

237. *Id.*

238. 28 U.S.C. § 1651(a) (2012).

239. *McPhail v. United States*, 1 M.J. 457, 460 (C.M.A. 1976), *overruled by United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015); *U.S. Navy-Marine Corps. Court of Military Review v. Carlucci*, 26 M.J. 328, 340 (C.M.A. 1988).

240. *Noyd*, 395 U.S. at 695 n.7.

241. *McPhail*, 1 M.J. at 462; *Carlucci*, 26 M.J. at 335.

242. In its most basic sense, Article 37, UCMJ, prohibits any person subject to the UCMJ from coercing or otherwise influencing any action by a court-martial. 10 U.S.C. § 837 (2012). CAAF has held that it is not only a statutory prohibition, but unlawful command influence “can also raise due process concerns, where for example unlawful influence undermines a defendant’s right to a fair trial or the

military judge.²⁴³ The second involved a challenge to the independence of the military judiciary itself.²⁴⁴

The first example, *McPhail v. United States*, arose out of a military judge's decision to grant a defense motion to dismiss for lack of jurisdiction. The court granted the motion because there was no service connection between the charged offense and military service.²⁴⁵ In response, the trial counsel appealed the military judge's ruling under the then-existing version of Article 62(a), UCMJ.²⁴⁶ At the time of *McPhail*, an Article 62 appeal went to the commander who ordered the court-martial for review, rather than to a military court such as the intermediate appellate court.²⁴⁷ In response, the convening authority had the power to return the record to the military judge for "reconsideration of the ruling and any further appropriate action."²⁴⁸ In *McPhail*, the convening authority returned the record to the military judge, informing him that it "disagreed with [the judge's] ruling."²⁴⁹ The court-martial reconvened and the military judge "deemed himself bound to accede to the convening authority's decision."²⁵⁰ The military judge subsequently convicted SGT Willie McPhail "to restriction to the limits of Charleston Air Force Base for [one] month, and to perform hard labor without confinement for [three] months."²⁵¹ Because this sentence did not entitle SGT McPhail to review by the intermediate appellate court,²⁵² his appeal went to The Judge Advocate General (TJAG)

opportunity to put on a defense." *United States v. Salyer*, 72 M.J. 415, 423 (C.M.A. 2013). Unlawful command influence can be actual or perceived:

The test for the appearance of unlawful influence is objective. "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." An appearance of unlawful command influence arises "where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."

Id. (citations omitted) (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

243. *Salyer*, 72 M.J. at 420, 428.

244. *Carlucci*, 26 M.J. 328.

245. *McPhail* was decided during the period when the Court required a service connection in order for military courts to have jurisdiction to prosecute a court-martial. *O'Callahan v. Parker*, 395 U.S. 258, 272–73 (1969).

246. *McPhail*, 1 M.J. at 458. Article 62, UCMJ, permits certain interlocutory appeals by the Government. 10 U.S.C. § 862(a)(1) (2012).

247. 10 U.S.C. § 862(a) (1976).

248. *Id.*

249. *McPhail*, 1 M.J. at 458.

250. *Id.* at 459.

251. *Id.*

252. In order for a conviction to be reviewed by a military intermediate appellate court, the accused must receive either more than a year in confinement, death sentence, or a punitive discharge. 10 U.S.C. § 866(b)(1) (2012).

for review, who denied his petition.²⁵³ CAAF, however, granted review of SGT McPhail’s petition.²⁵⁴

The Government argued CAAF had no jurisdiction to review SGT McPhail’s appeal.²⁵⁵ Because SGT McPhail’s case could not reach CAAF under the specific text of Article 67, UCMJ,²⁵⁶ the case was not “in aid of its jurisdiction” and thus CAAF was essentially powerless.²⁵⁷ CAAF disagreed; in doing so, it summarized its precedent asserting its supervisory authority under the All Writs Act.²⁵⁸

Relying on a series of prior decisions, CAAF asserted itself, once again, as the “supreme court of the military courts-martial system.”²⁵⁹ As such, its “jurisdiction extended beyond the ordinary appellate review of courts-martial.”²⁶⁰ “[A]n accused,” CAAF further explained, “who has been deprived of any fundamental right under the Uniform Code ‘need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary.’”²⁶¹ Congress created CAAF in order to serve as the court of last resort for each of the armed forces.²⁶² In this role, “Congress has confined primary responsibility for the supervision of military justice in this country and abroad”²⁶³ This responsibility included the “authority to relieve a person subject to the Uniform Code of the burdens of a judgment by an inferior court that has acted contrary to constitutional command and decisions of this Court”²⁶⁴ To deny such authority was to “destroy the ‘integrated’ nature of the military court system and to defeat the high purpose Congress intended this Court to serve.”²⁶⁵ Whatever the limits were to its authority, “as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, [CAAF retained]

253. *McPhail*, 1 M.J. at 459.

254. *Id.*

255. *Id.*

256. CAAF has jurisdiction to hear appeals from the intermediate appellate courts, and must hear all appeals in which a court-martial sentenced an accused to death. 10 U.S.C. § 867(a)(1) (2012).

257. *McPhail*, 1 M.J. at 460.

258. *Id.* at 460–63.

259. *Id.* at 460 (“The perceptions of *Gale*[,] *Bevilacqua*[,] and *Johnson* are not aberrations from the concept of action in ‘aid’ of the Court’s jurisdiction as the supreme court of the military courts-martial system.”). This view, CAAF further explained, was no different than the Court’s view of a court of last resort. *Id.* (“The same view expressed in them of the supervisory function of the highest court of a judicial system was taken by the United States Supreme Court as early as 1869, and was reaffirmed as recently as last June.”).

260. *Id.* (citing *Gale v. United States*, 37 C.M.R. 304, 307 (C.M.A. 1967)).

261. *Id.* (citing *United States v. Bevilacqua*, 39 C.M.R. 10, 12 (C.M.A. 1968)).

262. *Id.* at 461.

263. *Id.* at 462 (quoting *Noyd v. Bond*, 395 U.S. 683, 695 (1969)).

264. *Id.*

265. *Id.*

jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.”²⁶⁶ Finding such constitutional error in the case of SGT McPhail, CAAF vacated his conviction and restored him to duty.²⁶⁷

A second example of CAAF’s assertion of supervisory powers pursuant to the All Writs Act involved a more sweeping challenge to military judicial independence.²⁶⁸ It arose out of the conviction of a Navy surgeon for various offenses related to his negligence in a number of open heart surgeries, some of which resulted in the death of the patient.²⁶⁹ In accordance with its unique fact-finding powers,²⁷⁰ the intermediate appellate court set aside the conviction because it was not convinced beyond a reasonable doubt that the surgeon was criminally negligent.²⁷¹ Subsequently, the Inspector General (IG) received a complaint concerning potentially improper influence on the intermediate court and initiated an investigation.²⁷² TJAG then ordered all judges on the court to report to the IG in order to discuss the court’s deliberative process.²⁷³ In response, the judges on the intermediate court petitioned CAAF and sought an injunction.²⁷⁴ The Government argued CAAF lacked jurisdiction to entertain the petition.²⁷⁵ In its subsequent decision, CAAF exhaustively defended its use of supervisory powers under the All Writs Act and its role in the three-tier military legal system.²⁷⁶

Congress, CAAF explained, granted it “considerable responsibility for maintaining the independence, integrity, and fairness of the military justice system.”²⁷⁷ This included the “authority to issue extraordinary writs to prevent members of the Executive Branch from interfering with military justice system”²⁷⁸ To support these conclusions, CAAF relied on some legislative history and Court decisions acknowledging CAAF’s supervisory power.²⁷⁹

266. *Id.* at 463.

267. *Id.*

268. U.S. Navy-Marine Corps. Court of Military Review v. Carlucci, 26 M.J. 328, 340 (C.M.A. 1988).

269. United States v. Billig, 26 M.J. 744, 746, 750 (N.M.C.M.R. 1988).

270. 10 U.S.C. § 866(c) (1988).

271. *Billig*, 26 M.J. at 761.

272. *Carlucci*, 26 M.J. at 340.

273. *Id.*

274. *Id.*

275. *Id.* at 330.

276. *Id.* at 330–36.

277. *Id.* at 330.

278. *Id.*

279. *Id.* at 330–31.

CAAF argued that the history of its name, as well as congressional responses to its actions, demonstrated Congress's intent.²⁸⁰ It began as the Court of Military Appeals rather than other less-judicial suggestions.²⁸¹ Later, CAAF asserted it has supervisory powers pursuant to the All Writs Act.²⁸² Rather than curtail CAAF's authority, Congress enhanced it.²⁸³ It renamed CAAF the United States Court of Military Appeals.²⁸⁴ According to statements submitted to Congress by two CAAF judges, the court's membership certainly believed this provision made its supervisory power clear.²⁸⁵ Referencing the then-existing controversy surrounding whether CAAF was a court or a federal agency, Chief Judge Quinn wrote that this provision increased CAAF's "standing and prestige in the judicial hierarchy and, by implication, gives it the full powers of a U.S. court."²⁸⁶ Judge Kilday agreed, writing that "[t]his provision establishes the status of the court as a court in the true sense and under the Constitution."²⁸⁷

Other legislative history, CAAF continued, supported this conclusion.²⁸⁸ It noted that the House Report accompanying the legislation renaming CAAF "stated that '[t]he bill makes it clear that the Court of Military Appeals is a court and *does have the power to question . . . any executive regulation or action as freely as though it were a court constituted under article III of the Constitution.*'"²⁸⁹ Both Congress and the Court approved of CAAF's assertion of supervisory power.²⁹⁰ In fact, CAAF explained, the Court required issues to at least reach CAAF before a district court could appropriately hear any collateral attack.²⁹¹

Furthermore, CAAF explained that the legislation authorizing direct review by the Court of CAAF decisions enhanced CAAF's stature rather than diminished it.²⁹² Congress intended CAAF to review constitutional

280. *Id.* at 330.

281. *Id.*

282. *Id.* at 331.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* (emphasis omitted).

287. *Id.* (alteration in original).

288. *Id.*

289. *Id.*

290. *Id.* ("In 1969, the Supreme Court recognized that the All Writs Act applies to the Court of Military Appeals.")

291. *Id.* ("Indeed, in *Noyd* it required that all review procedures available within the military justice system be exhausted before any collateral attack was allowed in a Federal district court.")

292. *Id.* at 332.

issues.²⁹³ By providing direct review of CAAF decisions, there was even less reason for service members to seek remedies outside the military legal system.²⁹⁴

Turning to the case at hand, CAAF declared that “Congress could hardly have intended that this Court would be helpless to take action to protect the independence and impartiality of military tribunals—which are essential in assuring a servicemember’s right to due process”²⁹⁵ As a result, CAAF used its asserted supervisory powers pursuant to the All Writs Act to appoint one of its judges a Special Master to investigate the claims of judicial misconduct. This effectively granted the lower court’s petition for extraordinary relief.²⁹⁶

The preceding paragraphs demonstrate that both CAAF and the Court view CAAF as a court of last resort in the military legal system. CAAF has repeatedly and specifically referred to itself as such.²⁹⁷ It has also described itself as the supreme court of the military justice system.²⁹⁸ And finally, CAAF has not hesitated to declare supervisory powers.²⁹⁹ Though most but not all of these positions by CAAF pre-date Congress’s grant of direct review by the Court, CAAF continues to view itself as a court of last resort.³⁰⁰

The next step is to examine whether CAAF *acts* as such a court. Part III describes the methodology used in this study. This is based in large part on the characteristics of a court of last resort discussed in Part I, *supra*. Part IV then discusses and analyzes the results.

III. METHODOLOGY

There are three terms in which CAAF should have been most aware of its role as the court of last resort in the military justice system. The 1951–52 term was the court’s initial term. This should have been an ideal time to assert itself as the court CAAF believed it was. The 1968–69 term occurred

293. *Id.* (“Congress meant for this Court to consider constitutional issues involved in a court-martial proceeding—even when a statute or a regulation having the force and effect of law was involved.”).

294. *Id.* (“Since review of our decisions is now available directly from the Supreme Court, there is even less reason than previously to require that litigants within the military justice system seek relief from the Article III courts.”).

295. *Id.*

296. *Id.* at 342.

297. *United States v. Byrd*, 53 M.J. 35, 36 (C.A.A.F. 2000).

298. *McPhail v. United States*, 1 M.J. 457, 462 (C.M.A. 1976), *overruled by United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015).

299. *United States v. Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960).

300. *Byrd*, 53 M.J. at 36.

immediately after passage of the Military Justice Act of 1968, which renamed the court the United States Court of Military Appeals.³⁰¹ Furthermore, the court was again renamed the United States Court of Appeals for the Armed Forces just prior to the 1994–95 term.³⁰² Each of these three terms present the circumstances in which CAAF would be most cognizant of its role in both the military justice system and the American judicial system. Finally, the 2014–15 term is included to assess the court’s most recent term against its historical conduct.

This study focused on the cases on CAAF’s discretionary docket in order to assess how CAAF articulates the basis for granting review. TJAG of each service can certify cases to CAAF for mandatory review.³⁰³ Because CAAF has no discretion over these cases, they were excluded from the pool of applicable decisions. In addition, petitions for extraordinary writs were also excluded. Though courts of last resort entertain such writs, the purpose of this study is to understand why CAAF grants review of petitions and how it addresses them. Therefore, only decisions when CAAF exercised full discretionary review in the ordinary process of appellate review were included.

Utilizing the criteria established in Part I, *supra*, the applicable decisions were given one of the following codes:³⁰⁴

1	Conflict with Court of Criminal Appeals decision
2	Conflict with CAAF decision
3	Conflict with a Court decision
4	Issue of first impression
5	Issue of national importance
6	Specific construction of a regulation or statute
7	Courts below so departed from the norm that it requires supervisory review
8	Dissent below

301. Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178.

302. U.S. COURT OF APPEALS FOR THE ARMED FORCES ET AL., ANNUAL REPORT ON MILITARY JUSTICE 1 n.1 (1995).

303. 10 U.S.C. § 867(a)(2) (2012).

304. To measure this criteria’s accuracy in measuring the effectiveness of a court of last resort, this study also reviewed the Court’s 2014–15 term.

9	Specific request to overrule a prior decision
EC	An error correction decision

The analysis first focused on how CAAF framed the issue. Traditionally, the Court frames issues in the following manner: “The question presented is”³⁰⁵ CAAF generally accomplishes this by using the following phrase: “We granted . . . review to determine whether”³⁰⁶ If that did not identify the appropriate code, the analysis then looked to the issue or issues raised by the respective appellate division. The third level of analysis looked to the text of the decision itself to determine whether it was one of law declaration or error correction. If CAAF did not reference the lower court’s reasoning or analysis, this analysis will not assume it did so.

IV. RESULTS AND ANALYSIS

A. A Court of Last Resort Focused On Error Correction

CAAF issued a total of 570 decisions during the four terms selected for review.³⁰⁷ Eliminating all decisions beyond CAAF’s discretionary docket reduces the pool to a total of 410 applicable decisions.³⁰⁸ Applying the methodology described in Part III, *supra*, CAAF overwhelmingly decides cases as if it were an intermediate court focused on error correction. Discussed in Part V, *infra*, this presents both problems and opportunities for CAAF and the military legal system.

It is difficult to ascertain any pattern across the selected terms. Just over 75% of CAAF’s decisions in its 1951–52 term were coded as error-correction decisions. This number rose to a surprising 89% of decisions in the 1968–69 term. By the 1994–95 term, however, this number dropped to nearly the percentage found in the 1951–52 term, approximately 73%. That percentage further fell in CAAF’s 2014–15 term to approximately 43%, which is still nearly half of all applicable decisions.

There are a number of potential explanations for such a high percentage of error correction decisions in CAAF’s initial term. First, the

305. *Gulf, M. & N. R. Co. v. Helvering*, 293 U.S. 295, 296 (1934).

306. *United States v. Tearman*, 72 M.J. 54, 55 (C.M.A. 2013).

307. It issued 152 decisions in the 1951–52 term, 195 in the 1968–69 term, 110 in the 1994–95 term, and 37 in the 2014–15 term.

308. The applicable decisions per relevant term were 112 in 1951–52, 175 in 1968–69, 94 in 1994–95, and 29 in 2014–15.

UCMJ, enacted in 1950, revolutionized military justice.³⁰⁹ It seems reasonable that such a change would result in some growing pains. CAAF struggled during this early period to secure its authority as a court as opposed to an administrative agency.³¹⁰ A court cannot assert itself as a court of last resort if it is not seen as a court at all. Thus, fighting this battle could not have been more paramount. Second, as a new governmental organization, one could hardly blame CAAF for possibly granting as many cases as it could in order to justify its existence and budget. Third, perhaps CAAF did not understand its role as the court of last resort in the military legal system. However, its early descriptions of itself indicate that CAAF viewed itself as such a court. Fourth, this could be evidence of a lack of competence, real or perceived, in the intermediate appellate courts. There may be some truth to this point. In one decision, CAAF despaired that

[i]t is not this Court alone that is endowed by Congress with responsibility for insuring [sic] that courts-martial are conducted in accordance with required procedures. The reforms intended by the [UCMJ] will not be carried out until officers concerned with ordering, conducting and reviewing courts-martial observe scrupulously their duties and responsibilities under the Code and the Manual.³¹¹

To be fair, the lower courts were relatively new as well. The military services did not have much history grooming officers to develop a judicial temperament. Intermediate appellate judges did not have experience with the UCMJ. In addition, they did not, and still do not, enjoy lifetime tenure.³¹² These are traditional military assignments, lasting approximately two years.³¹³ This is hardly enough time to develop a deep understanding of military criminal law.

Fewer potential explanations exist for such a high percentage of error-correction decisions in the 1968–69 term, let alone a substantial increase in them. The Military Justice Act of 1968 renamed the Court of Military Appeals the United States Court of Military Appeals.³¹⁴ Its

309. Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 U. MICH. L. REV. 229, 230, 246, 271 (2013).

310. LURIE, *supra* note 174, at xii.

311. *United States v. James*, 3 C.M.R. 113, 114–15 (C.M.A. 1952).

312. Lawrence M. Friedman, *Benchmarks: Judges on Trial, Judicial Selection and Election*, 58 DEPAUL L. REV. 451, 470 (2009).

313. Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 646 n.90 (1994).

314. Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178.

legislative history confirmed that Congress intended CAAF to be a court just as if it were “a court constituted under article III of the Constitution.”³¹⁵ At least two of the three CAAF judges provided written statements to Congress in support of the legislation, demonstrating that the court understood the importance of the legislation and the name change.³¹⁶ Thus, CAAF no longer needed to secure its authority as a court.

In contrast to the 1951–52 term, the services, and CAAF itself, did not suffer from a lack of experience with the UCMJ by the 1968–69 term. Nearly two decades had passed since its enactment. In addition to the renaming of CAAF, intermediate service courts were renamed from Boards of Review to Courts of Military Review for similar reasons.³¹⁷ Increases in prestige and experience should have been accompanied by an increase in competence and recognition that something had changed.

The questions concerning the 1968–69 term persisted through CAAF’s 1994–95 and 2014–15 terms. The continued increase in prestige and experience at both levels of appellate courts has not been accompanied by a corresponding substantial decrease in, or near elimination of, error correction decisions. The number of such decisions has decreased, to be sure. The fact that nearly half of CAAF’s most recent term consisted of error correction decisions leads to at least three potential conclusions. CAAF may no longer view itself as a court of last resort. For that to be true, one must conclude that CAAF’s law declaration decisions are accidental and it has simply neglected to assert it is no longer the court of last resort in the military legal system. This is not likely. Instead, two other potential explanations are more likely. On the one hand, CAAF may not understand how to act as a court of last resort. On the other hand, the problem may lie with the competence of the service intermediate courts and the respective appellate agencies. The answer is likely somewhere in between these two explanations.

B. A Court of Last Resort, But More Work Lies Ahead

An analysis of CAAF’s law declaration decisions during the selected terms demonstrate it is not likely that CAAF has abandoned its perceived role as the court of last resort in the military justice system. To be sure, these decisions do not read like those authored by the Court. But the substance of these decisions, as well as the downward trend in

315. H.R. REP. NO. 90-1480, at 2 (1968).

316. U.S. Navy-Marine Corps. Court of Military Review v. Carlucci, 26 M.J 328, 331 (C.M.A. 1988).

317. Military Justice Act of 1968, Pub. L. No. 90-632, § 2(27), 82 Stat. 1335.

error correction decisions, makes it less likely that these decisions are merely accidental. Before turning to CAAF's decisions, it will be helpful to begin with a review of the Court's 2014–15 term because it is the model for courts of last resort.

The Court's decisions in its most recent term are those of a mature court of last resort, experienced and comfortable in its role. It issued 73 applicable decisions during the term;³¹⁸ none were coded as error correction. Twenty-one decisions (28.77%) involved the specific construction of a statute or regulation. Fourteen decisions (19.18%) concerned a split among two or more lower courts. Eleven decisions (15.07%) issued by the Court involved a conflict with a Court decision; the same number of decisions involved an issue of national importance. It also issued decisions—each less than 10% of total decisions—based on the dissent below, a question of first impression, conduct that so departed from the norm, and a specific request to overrule Court precedent.

A number of differences between the Court's and CAAF's dockets make it much less likely that the Court will issue an error correction decision. While CAAF's jurisdiction is limited to criminal law, criminal procedure, and the rules of evidence,³¹⁹ the Court hears appeals in all areas of federal and constitutional law.³²⁰ It also entertains appeals from 13 intermediate appellate courts and 50 state courts of last resort.³²¹ CAAF entertains appeals from three service intermediate courts.³²² These structural differences create a much larger pool of lower court decisions for the Court. This numerical advantage and the Court's limited resources substantially reduce the likelihood it will select an error correction issue. Thus, the Court can be highly selective and only rule on clear law declaration issues while still publishing a relatively high number of decisions.

Additional structural circumstances at the intermediate level of the two judicial systems also contribute to the unlikelihood that the Court will grant an issue of error correction.³²³ Unlike the military justice system, the

318. Three decisions were excluded as inapplicable for the purposes of this study. Two of them involved cases of original jurisdiction. *See Kansas v. Nebraska*, 135 S. Ct. 1042 (2014); *Kansas v. Nebraska*, 135 S. Ct. 1255 (2015). The third was a supplemental decree. *United States v. California*, 135 S. Ct. 563 (2014).

319. U.S. CT. OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited Nov. 22, 2016).

320. U.S. CONST. art. III, § 2.

321. *See* SUP. CT. R. 10 (showing that the Supreme Court entertains appeals from intermediate appellate courts and all state courts of last resort).

322. *See* 10 U.S.C. § 867 (2012) (showing the three intermediate appellate courts that entertain appeals).

323. Tom S. Clark & Jonathan P. Kstellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 150–51 (2013).

President appoints and the Senate confirms federal district and circuit judges.³²⁴ This level of scrutiny often results in nominees with prior judicial experience, academic experience, or both.³²⁵ Federal judges also serve for life, which allows for them to develop substantial judicial experience.³²⁶ In contrast, the respective service selects military judges and their appellate colleagues.³²⁷ With few exceptions, these individuals do not have an academic background or record of publication.³²⁸ Due to the nature of military assignments, very few, if any, have prior judicial experience.³²⁹ Also, military assignments for officers tend to last approximately two years.³³⁰ All of this contributes to the hypothesis that federal appellate courts have more judicial experience and maturity, resulting in intermediate court decisions more likely to clarify issues for the Court.

Finally, those filing petitions with the Court differ from those in the military justice system. In most cases, it costs money to take a case to the Court.³³¹ Thus, those who want clients must be effective, experienced advocates. Even those who take appeals at no cost to the client need a continued source of funding to continue their pro bono service. In both

324. U.S. CONST. art. II, § 2, cl. 2.

325. See, e.g., Vicki C. Jackson, *Fair and Independent Courts: A Conference on the State of the Judiciary: Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO L.J. 965, 981–84 (2007) (asserting that “one would expect greater scrutiny of Supreme Court nominees’ predispositions than of lower court judges”); James Lindgren, *Examining the American Bar Association’s Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J. L. POL. 1, 2 (2001) (discussing how the ABA reviews qualifications such as judicial experience and academic experience for prospective nominees); Charles W. Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 567–68, 575, 583 (2011) (explaining that the current confirmation process favors nominees with prior judicial experience).

326. U.S. CONST. art. III, § 1.

327. Lederer & Hundley, *supra* note 313, at 630.

328. Lt Col Joshua Kastenberg, a sitting trial judge in the Air Force, is one of these exceptions. See, e.g., JOSHUA E. KASTENBERG, *SHAPING US MILITARY LAW: GOVERNING A CONSTITUTIONAL MILITARY*, xii (2014) (giving an introductory anecdote of the author’s career as a military judge); JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP 1* (The Scarecrow Press, Inc. 2009) (Winthrop is one of these exceptions as a scholar and author of *Military Law and Precedents*—a key foundation of military law); Joshua E. Kastenberg, *A Sesquicentennial Historic Analysis of Dynes v. Hoover and the Supreme Court’s Bow to Military Necessity: From its Relationship to Dred Scott v. Sanford to its Contemporary Survival*, 39 U. MEM. L. REV. 595, 595 (2009); Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Psychiatric and Psychological Expert Testimony in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 783 (2003) (examining current and contemporary false confession studies).

329. Lederer & Hundley, *supra* note 313, at 674.

330. This assertion is based on the author’s recent professional experiences as an Assistant Staff Judge Advocate in the 20th Fighter Wing from June 30, 2012 to July 2, 2014 and in the 11th Wing from July 9, 2014 to June 30, 2016.

331. Robert Barnes, *A Priceless Win at the Supreme Court? No, It Has a Price*, WASH. POST (July 25, 2011), https://www.washingtonpost.com/politics/a-priceless-win-at-the-supreme-court-no-it-has-a-price/2011/07/25/gIQAvOsPZI_story.html.

cases, money can drive effectiveness. In contrast, it does not cost a military appellant anything to file an appeal to the intermediate court or a petition to CAAF.³³² This, along with the never-ending stream of new business because their services are free, reduces the incentive for military appellate advocates to produce a product that will bring in subsequent clients. Like military judge assignments, short appellate assignments put these advocates at a similar disadvantage with respect to their civilian counterparts.³³³

But even with all of these distinctions, the Court's decisions are markedly consistent with the criteria discussed in Part III, *supra*, establishing these criteria as a realistic measure of the effectiveness of a court of last resort. In each decision, the Court did not describe the issues presented in the specific form framed by the parties. Instead, each decision framed the issue as the Court felt necessary to issue a law declaration decision. For example, the Court framed the issue in *Warger v. Shauers* as “whether Rule 606(b) precludes a party seeking a new trial from using one juror’s affidavit of what another juror said in deliberations to demonstrate the other juror’s dishonesty during *voir dire*.”³³⁴ At other times, the decisions framed the issue a little differently, but still as one of law declaration:

Federal law establishes enhanced penalties for anyone who “forces any person to accompany him” in the course of committing or fleeing from a bank robbery. 18 U.S.C. § 2113(e). We consider whether this provision applies when a bank robber forces someone to move with him over a short distance.³³⁵

The Court also clearly identified conflicts in the lower courts in its decisions addressing conflicting decisions among two or more lower courts. For example, in *Rodriguez v. United States*, the Court “granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff.”³³⁶ Even when the Court refers to the specific issue, the Court broadens the issue to become

332. 10 U.S.C. § 870(c) (2012).

333. One such example of this experience gap is the pending case of *United States v. Sterling*, in which a military officer, likely senior in rank but with one or two years in appellate practice, will square off against Paul Clement, Lance Corporal (LCpl) Sterling’s pro bono appellate counsel and former Solicitor General to the United States. BANCROFT PLLC, www.bancroftpllc.com/who-we-are/paul-clement/ (last visited Nov. 22, 2016).

334. *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014). This would be an example of reviewing the specific construction of a statute or regulation.

335. *Whitfield v. United States*, 135 S. Ct. 785, 787 (2015).

336. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

one of law declaration. For example, in *Young v. United Parcel Service, Inc.*, it stated that “Young filed a petition for certiorari essentially asking us to review the Fourth Circuit’s interpretation of the Pregnancy Discrimination Act. In light of lower-court uncertainty about the interpretation of the Act, we granted the petition.”³³⁷ This last example is perhaps the best example of the Court as a court of last resort. It did not grant review because Young requested it review the Fourth Circuit’s interpretation of the Pregnancy Discrimination Act. It did so because the conflicting interpretations by lower courts caused uncertainty about the interpretation of the Act.³³⁸

For the reasons discussed in the preceding paragraphs, the Court is perhaps the most appropriate judicial body to measure the effectiveness of the criteria elaborated in Part III, *supra*. Though it is the standard for how a court of last resort should act, it is not appropriate to measure CAAF’s conduct as such a court against the modern Court. The Court developed its institutional identity over centuries. It has also benefited from substantial scholarly critique.³³⁹ But in terms of experience with its relevant body of law and institutional maturity, CAAF is more likely to resemble the Court of the 1840s than the Court of the 21st century.³⁴⁰ Furthermore, though military service and civilian law journals publish articles about military law, few have focused on CAAF’s institutional role within the military justice system. Thus, it has not benefited from a similar scholarly critique. CAAF’s efforts as a court of last resort must be viewed through this lens.

The effect of the lack of sustained scholarly attention contributes to the shortcomings in CAAF’s law declaration decisions. They generally do not frame the issues to be decided as any of the criteria categories discussed in Part I and set out in Part III, *supra*. The reader must often read the entire decision to determine whether it is an error correction or law declaration

337. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1348 (2015).

338. *Id.*

339. See, e.g., NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES xi (2010) (highlighting the author’s attempt at portraying the relationship between four Supreme Court justices and FDR); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2008) (tracing the modern history and internal dynamics of the Supreme Court); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS xiii (2000) (focusing on the relationship between Supreme Court decisions and national politics); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES 2 (1994) (describing the political ramifications of agenda setting); Mark C. Miller, *Law Clerks and Their Influence at the U.S. Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 L. & SOC. INQUIRY 741, 741 (2014) (highlighting that the article is a scholarly critique of the Court’s institutional identity); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 40–41 (1993) (discussing theories of constitutional change at the Supreme Court).

340. CAAF, along with the UCMJ, is a little over 65 years old. Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107. This is approximately the age the Court would have been in the 1840s.

decision. In nearly every decision, the focus is on the alleged error at trial rather than on the lower court's interpretation of the law. Sometimes the decision usefully articulates the question presented as a law declaration, but well into the decision instead of in the opening paragraphs. In later terms, CAAF began including the issues as raised by the appellant in its opinions.³⁴¹ With some exceptions in certain Navy and Marine Corps appeals, nearly every issue raised by the parties and cited by CAAF as the basis for granting review was focused on trial error, not law declaration.³⁴² Some examples from each selected term, described below, highlight these conclusions.

In its initial term, CAAF granted review of an appeal in which the appellant alleged the law officer erred by failing to instruct the panel on self-defense, *sua sponte*.³⁴³ Early in its subsequent decision, CAAF stated it granted the "petition for review in order to consider substantial issues of military law raised by petitioner."³⁴⁴ This does not tell the reader why this court of last resort granted review. The decision itself addressed three issues.³⁴⁵ Eventually, the reader understands that one raised an issue of first impression.³⁴⁶ Two pages into its decision, CAAF stated "[t]he necessity of instructions by the law officer on affirmative defenses is a novel issue."³⁴⁷

341. *United States v. Ginn*, 47 M.J. 236, 240 (C.A.A.F. 1997).

342. *See United States v. Schuler*, 50 M.J. 254, 255–56 (1999) (members of the military can raise the defense of mistake); *United States v. Rorie*, 58 M.J. 399, 400, 404, 407 (2003) (proceedings can continue despite appellant's death).

343. *United States v. Ginn*, 4 C.M.R. 45, 47 (C.M.A. 1952). Corporal (CPL) Charles Ginn attempted to intervene in an argument between CPL McAdoo and local nationals over the price of laundry. *Id.* at 46. During the fight that ensued, witnesses heard CPL McAdoo say, "I'll kill you." *Id.* at 47. It ended, at least for the time being, when CPL McAdoo knocked CPL Ginn to the ground and rendered him unconscious. *Id.* Later that night, CPL McAdoo entered CPL Ginn's tent armed with a pistol. *Id.* He approached CPL Ginn and said, "[I]et's have it called off, let's shake the thing off." *Id.* After CPL McAdoo walked away and sat in a chair across the tent, CPL Ginn left the tent, re-entered with a larger caliber pistol, and confronted CPL McAdoo. *Id.* CPL Ginn pointed his pistol at CPL McAdoo and ordered him to remove his hands from his pockets. *Id.* CPL Ginn later testified that he thought CPL McAdoo's subsequent arm movement was an attempt to pull out his own pistol, so CPL Ginn fired one shot at CPL McAdoo. *Id.* CPL McAdoo stood and took a couple of steps, to which CPL Ginn responded by firing two to three more rounds into CPL McAdoo. *Id.* CPL McAdoo later died from his wounds. *Id.* CPL Ginn's defense counsel did not request a self-defense instruction at trial. *Id.*

344. *Id.* at 46.

345. *Id.* at 47–51.

346. *Id.*

347. *Id.* at 48. Interestingly, and a bit of military legal history trivia, CAAF gave the military a break in adjusting to the more rigorous legal tradition of the UCMJ. "Congress . . . has endeavored, whenever possible, to bring courts-martial procedure into conformity with that obtaining in civilian criminal courts." *Id.* At the heart of such a legal system lies the law officer, the precursor to today's military judge. *Id.* at 47–48 ("This is especially true as to the functions and duties of the law officer."). CAAF then showed its pragmatism. "In so far as the law of instructions is concerned, however, we have tempered this principle with a realization of the practical factors inherent in court-martial trials, as well

Ginn is one of a number of examples of CAAF's law declaration decisions in its initial term. The issue in this decision has the right substance for law declaration, but requires a concerted effort to understand that it is a law declaration decision.

CAAF addressed issues of first impression similarly in its 1968–69 term. In this selected example, the issue involved the use of an inadmissible pretrial statement to impeach the accused at trial.³⁴⁸ By this term, CAAF included the appellant's wording of the issue raised in every published decision. In this case, appellate defense counsel framed the issue before the military's highest court as one of error correction:

Whether prejudicial error was committed against appellant when trial counsel was permitted to impeach him on cross-examination by the use of a pretrial statement for which no showing had been made of compliance with Tempia.³⁴⁹

Rather than reframe the question presented by the advocate as one of law declaration, the reader must wade through three pages of the decision to understand the issue before CAAF may be one of first impression, and thus law declaration:

The question remains whether the privilege against self-incrimination demands exclusion of a pretrial statement, not used on the merits in any way, from being used during the sentencing proceedings to offset affirmative evidence intended to mitigate punishment of the accused.³⁵⁰

Even this statement does not clearly signify this is an issue of first impression; that requires reading the entire decision and interpreting its

as the newness of the instruction concept to military justice in general, and law officers in particular." *Id.* In addition, under the rules in place at the time, it was not uncommon for the highest ranking member of the military jury to serve as a sort of judge in place of a law officer. *Id.* ("We are mindful, also, that our rules in regard to instructions must perforce apply also to special courts-martial, where the president is, more often than not, without legal training."). Therefore, the military deserved a bit of a learning curve. *Id.*

348. *United States v. Caiola*, 40 C.M.R. 48, 49 (C.M.A. 1969). PVT Jefferey Caiola pled guilty to forgery and larceny. *Id.* During sentencing, he testified that he wanted to remain in the Army. *Id.* The Government challenged him on cross-examination with a statement he made when entering the detention facility—obtained without the proper rights advisement under Article 31(b), UCMJ, and thus not otherwise admissible—in which he stated he did not wish to remain in the service. *Id.*

349. *Id.* (emphasis omitted).

350. *Id.* at 51.

substance.³⁵¹ This approach to publishing decisions continued into CAAF's 1994–95 term.

One example of CAAF's law declaration decisions in its 1994–95 term involved a split among the lower courts.³⁵² The particular issue concerned the alleged improper introduction of outside knowledge into the panel's deliberation process.³⁵³ During sentencing deliberations, one panel member mentioned it was his understanding that an accused might only serve a third of his sentence due to the existence of parole.³⁵⁴ As a result, the panel agreed to sentence the accused to 15 years in confinement in order to ensure he would serve at least five years, the panel's original agreed upon sentence.³⁵⁵

The appellate defense counsel adequately directed CAAF's attention to the conduct of the lower court, rather than the common approach of re-litigating the alleged trial error.³⁵⁶ The second issue argued that the lower court decision conflicted with a decision from the Air Force intermediate court.³⁵⁷ However, CAAF did not handle this issue as one would expect a court of last resort would.³⁵⁸ It did not state that it granted review to settle the conflict amongst lower courts. Instead, it appeared to address the

351. *Caiola*, 40 C.M.R. 48.

352. *United States v. Straight*, 42 M.J. 244, 246 (C.M.A. 1995). The facts of *Straight* are grim. Data Systems Technician Second Class (DS2) Keith Straight attempted suicide after another sailor broke off their romantic relationship. *Id.* Consequently, his command ordered him to stay away from that sailor. *Id.* Instead, DS2 Straight kidnapped her at knifepoint a few weeks later, forcing her to engage in a number of sexual acts in multiple locations. *Id.* at 246–47. He eventually tried to kill his victim and himself by cutting both their wrists open with a razor. *Id.* at 247. Luckily, he phoned his command and paramedics were able to intervene before DS2 Straight's victim died. *Id.* The subsequent general court-martial convicted him of a number of offenses and sentenced him to, among other punishment, 15 years in confinement. *Id.* at 245–46.

353. *Id.* at 248–49.

354. *Id.* at 248.

355. *Id.*

356. *Id.* at 246. Counsel raised three issues, properly directed toward the lower court's conduct:

I. Whether The Navy–Marine Corps Court Of Military Review Conflicted With The Supreme Court's Holding In *Coker V. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) By Summarily Affirming The Capital Referral Of Appellant's Case For The Rape Of An Adult Woman.

II. Whether The Navy–Marine Corps Court Of Military Review's Summary Holding On The Extrinsic Evidence Considered By The Members Conflicted With *United States v. Wallace*, 28 MJ 640 (AFCMR 1989).

III. Whether The Navy–Marine Corps Court Of Military Review Erred By Summarily Holding That Trial Defense Counsel's Failure To Research The Rules Of Reconsideration Did Not Deny Appellant His Sixth Amendment Right To Effective Assistance Of Counsel.

Id. (emphasis omitted).

357. *Id.* at 249.

358. Before turning to the legal issue before it, CAAF focused on post-trial declarations rather than the lower court's reasoning. *Id.* at 248.

question in the first instance.³⁵⁹ CAAF could not discuss the lower court's reasoning, likely because it appears there was none: the lower court issued a summary disposition.³⁶⁰ In addition, it only summarily addressed the Air Force court's *Wallace* decision.³⁶¹ It noted that Data Systems Technician Petty Officer 2nd Class (DS2) Straight relied on this decision and the Government argued it was wrongly decided.³⁶² CAAF also included the *Wallace* court's holding, but nothing more.³⁶³ It then turned to federal case law and concluded there was no prejudice in the deliberations.³⁶⁴

In *Straight*, CAAF, in substance, addressed a lower court split. But without a lower court published decision and discussion of the Air Force court's reasoning, it is difficult for CAAF to address such splits as the Court did in *United States v. Kwai Fun Wong*.³⁶⁵ Early in its decision, the Court noted that it consolidated two Ninth Circuit decisions in order to resolve a split between the Fifth and Seventh Circuits concerning whether courts may equitably toll the statute of limitations of the Federal Tort Claims Act (FTCA).³⁶⁶ After stating that premise, it then relied on its precedent, the FTCA's text, and legislative history to resolve the conflict.³⁶⁷

The Court provides the standard for a court of last resort in *Kwai Fun Wong*, though its decision should not be compared to the decision in *Straight*. CAAF did not frame the question presented early on in its decision, nor could it properly address the lower court split without a lower court decision in the case before it. However, its actions highlight the importance of resolving such splits and present an opportunity to improve its supervision of the military justice system.

359. *Id.* ("As a threshold matter, this Court must answer the question whether the declarations are admissible under Mil.R.Evid. 606(b), Manual, *infra* Appendix.").

360. *Id.* at 249.

361. *Id.*

362. *Id.*

363. *Id.* ("In *Wallace* the Court of Military Review held that the court members' consideration of information regarding post-trial upgrading of a bad-conduct discharge was extraneous prejudicial information.").

364. *Id.* ("We hold that the members' statements regarding parole do not constitute extraneous prejudicial information or outside influence.").

365. *United States v. Wong*, 135 S. Ct. 1625 (2015).

366. *Id.* at 1630 ("We granted certiorari in both cases . . . to resolve a circuit split about whether courts may equitably toll § 2401(b)'s two time limits."). To demonstrate this split, the Court compared a Fifth Circuit decision holding that tolling was not available with a Seventh Circuit decision holding that such tolling was allowed. *Id.* ("Compare, e.g., *In re FEMA Trailer Formaldehyde Prods. Liability Litigation*, 646 F.3d 185, 190–191 (C.A.5 2011) (*per curiam*) (tolling not available), with *Arteaga v. United States*, 711 F.3d 828, 832–833 (C.A.7 2013) (tolling allowed).").

367. *Wong*, 135 S. Ct. at 1630–38.

CAAF issued a similar decision in its most recent term.³⁶⁸ This time it involved, in substance, a specific request to overrule a prior decision.³⁶⁹ Technical Sergeant (TSgt) David Gutierrez, who was HIV positive, and his wife were “swinger[s]”: “they engaged in group sexual activities with other couples and individuals.”³⁷⁰ His commanding officer ordered him “to, among other things, ‘verbally inform sexual partners that [he is] HIV positive’ and ‘use proper methods to prevent the transfer of body fluids during sexual relations, including the use of condoms providing an adequate barrier for HIV (e.g. latex).’”³⁷¹ TSgt Gutierrez did not follow these specific orders and sometimes did not even use a condom.³⁷² As a result, the Government charged TSgt Gutierrez with aggravated assault.³⁷³ At the time of TSgt Gutierrez’s court-martial, the prevailing precedent on aggravated assault in HIV transmission cases was “not the statistical probability of HIV invading the victim’s body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim’s body.”³⁷⁴ At trial, the Government’s medical expert testified that the risk of transmission through the various sexual acts TSgt Gutierrez engaged in was low, but the military judge ultimately found him guilty.³⁷⁵

When the appeal reached CAAF, its opinion did not acknowledge a specific request to overrule its prior decision. Neither did appellate defense counsel. Early on, the opinion noted that appellate defense counsel framed the issue as follows:

I. WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT
TO FIND BEYOND A REASONABLE DOUBT THAT
APPELLANT COMMITTED ASSAULT LIKELY TO RESULT
IN GRIEVOUS BODILY HARM.³⁷⁶

The appellant made no specific request to overrule CAAF’s prior decision in *United States v. Joseph*.³⁷⁷ Nor did CAAF acknowledge this request. Instead, it acknowledged the lower court’s reliance on *Joseph*,³⁷⁸

368. *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015).

369. *Id.* at 68.

370. *Id.* at 63.

371. *Id.* (alteration in original).

372. *Id.*

373. *Id.* at 64.

374. *United States v. Joseph*, 37 M.J. 392, 397 (C.M.A. 1993) (emphasis in original).

375. *United States v. Gutierrez*, 74 M.J. 61, 64 (C.A.A.F. 2015).

376. *Id.* at 63.

377. *Id.* at 64–65.

378. *Id.* at 64 (“On appeal, the CCA looked to this Court’s 1993 decision in *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), to conclude that ‘the military judge sitting as the trier of fact could

and then addressed the issue in the first instance.³⁷⁹ Upon reading the remainder of CAAF's decision, one understands that it is overruling its prior decision in *Joseph*.³⁸⁰ But the court never makes it clear up front that it is being asked to overrule prior precedent, or that it is considering doing so *sua sponte*.

CAAF has demonstrated that it can address issues as a court of last resort. But the preceding highlights the gap between where the court is and where it can be. If adopted, the following proposal would help close that gap.

V. A CHANGE IN PROCEDURAL RULES AND INCORPORATING SIGNPOSTING INTO DECISIONS

CAAF is a uniquely positioned court of last resort. Its specialized jurisdiction and the public misconceptions of military society³⁸¹ have resulted in little oversight. The Court largely defers to CAAF in all matters relating to military law.³⁸² CAAF has also largely escaped serious scholarly attention. As a court of last resort, however, its high rate of error correction decisions is concerning. As discussed throughout this article, this is likely because CAAF does not know how to act as a court of last resort or the competence of the lower courts require CAAF to engage in more error correction than a court of last resort should.³⁸³ A separate study is required to understand whether the competence of lower courts require CAAF to grant more error correction issues than one would expect from a court of last resort. But it does not appear that CAAF does not know how to act as a

have found all the essential elements beyond a reasonable doubt.”) (quoting *United States v. Gutierrez*, 2014 WL 842651, at *3 (A.F. Crim. App. Feb. 25, 2014).

379. *Id.* at 65 (“The question in this case is not whether HIV, if contracted, is likely to inflict grievous bodily harm The critical question in this case . . . is whether exposure to the risk of HIV transmission is ‘likely’ to produce death or grievous bodily harm.”).

380. *Id.* at 68.

381. For some examples of the growing divide in civil-military relations, see ANDREW J. BACEVICH, *BREACH OF TRUST: HOW AMERICANS FAILED THEIR SOLDIERS AND THEIR COUNTRY* 52–53 (2013) (showing the growth of mistrust of the armed forces after Vietnam); Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 401–31 (1976).

382. O’Connor, *supra* note 66, at 215. It too is not immune from modern day misconceptions of military society. See *United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part) (“Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.”) (quoting *Reid v. Covert*, 354 U.S. 1, 35–36 (1957)).

383. A third possibility could be that CAAF is seeking to justify its existence by keeping its workload as high as possible. This, however, is unlikely. CAAF has not published more than fifty decisions in each of the past three terms. This is hardly the conduct of a court seeking to artificially increase its workload.

court of last resort. Each term contained numerous law declaration decisions. These decisions showed, in substance, a court concerned with unifying military law among the uniformed services and addressing important issues. But there is room to improve.

Rule 21 of CAAF’s Rules of Practice and Procedure require the appellant to demonstrate “good cause” for granting review.³⁸⁴ It does not define the term but does list additional requirements.³⁸⁵ The first substantive requirement related to good cause is the requirement to demonstrate “with particularity why the errors assigned are materially prejudicial to the substantial rights of the appellant.”³⁸⁶ Only when “applicable” should the appellant also include the criteria generally considered by a court of last resort as the basis for granting review, making these factors a secondary—and optional—concern.³⁸⁷ This drives the focus primarily to error correction. But it does not need to do so. Article 59, UCMJ, states that “[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.”³⁸⁸ An intermediate court reviews alleged trial errors for material prejudice. A court of last resort uses the criteria set out in Part III, *supra*, or something similar, to clarify the law of its domain

384. C.A.A.F. R. 21(a); 10 U.S.C. § 867 (2012).

385. C.A.A.F. R. 21(b)(5); 10 U.S.C. § 867.

386. C.A.A.F. R. 21(b)(5).

387. *Id.* These secondary criteria in large part mirror the Court’s description of examples it considers “compelling reasons” for issuing writs of certiorari:

Where applicable, the supplement to the petition shall also indicate whether the court below has:

- (A) decided a question of law which has not been, but should be, settled by this Court;
- (B) decided a question of law in a way in conflict with applicable decisions of (i) this Court, (ii) the Supreme Court of the United States, (iii) another Court of Criminal Appeals, or (iv) another panel of the same Court of Criminal Appeals;
- (C) adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts;
- (D) decided the validity of a provision of the UCMJ or other act of Congress, the Manual for Courts-Martial, a service regulation, a rule of court or a custom of the service the validity of which was directly drawn into question in that court;
- (E) decided the case (i) en banc or (ii) by divided vote;
- (F) so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a court-martial or other person acting under the authority of the UCMJ, as to call for an exercise of this Court’s power of supervision; or
- (G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review from the Supreme Court of the United States

Compare id., with SUP. CT. R. 10.

388. 10 U.S.C. § 859(a).

and thus correct error when such erroneous interpretation results in material prejudice.³⁸⁹

The military's legal system will substantially benefit if CAAF amended Rule 21 to mirror the Court's Rule 10, and embrace its role as a court of last resort by signposting its decisions. A proposed revised Rule 21 is included in the Appendix. The appellant must still demonstrate good cause for CAAF to grant review. However, the specific errors alleged should be errors by the intermediate court that give rise to one or more reasons to grant review. Like Rule 10, the proposed Rule 21 would list non-exclusive reasons CAAF will consider when deciding to grant review, which largely mirror the existing rule. The primary difference is the elevation of these reasons above trial error correction. This proposed rule closes with a declaration, similar to Rule 10, that petitions are "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."³⁹⁰ This clarifies that CAAF is in the primary business of law declaration and will engage in error correction only when intermediate courts fail in their role.

Concurrent with a change in CAAF's rules, military law is best served by the court signposting its decisions. Like the Court, CAAF should state the basis for granting review using the criteria established in Part III, *supra*, or whether it is engaging in error correction, early in its decisions.³⁹¹ This has multiple advantages. The military services vary in their military justice experience. For example, the Navy provides practitioners a military justice track.³⁹² These individuals can develop a career of experience by specializing in military criminal law without losing out on promotions.³⁹³ The Army assigns trial counsel to the role for an entire year with no other responsibilities.³⁹⁴ In contrast, the Air Force practices military justice part-time.³⁹⁵ Trial counsel in legal offices have zero to four years of experience but have full time jobs in other practice areas.³⁹⁶ They prosecute cases as they arise while maintaining their existing workload.³⁹⁷ Signposting provides practitioners of varying experience with easy access to

389. Part III, *supra*.

390. *Infra* Appendix.

391. It need not be the exact criteria as listed in Part III, *supra*, as CAAF has actually articulated a number of law declaration criteria in its rules. C.A.A.F. R. 21.

392. *Supra* note 330.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

precedential decisions of law declaration, much like their civilian counterparts.

In addition to reducing the burden on practitioners to understand the status of military law, signposting furthers military law itself by continuing the development of one of its most important institutions. It has been a long road developing military law to mirror civilian practice as much as practical. Along the way, CAAF has continued to establish and advance its position as the highest court in the military's legal system, often without the benefit of academic scrutiny and suggestions.³⁹⁸ It has been left on its own to establish its role while facing the practical challenge of conforming the legal traditions of disparate institutions to the requirements of the Constitution and the modern military criminal code. By signposting its decisions to clearly identify when it is engaging in law declaration, and by clarifying to lower courts and appellate advocates that it is in the primary business of doing so, CAAF will be better positioned to further develop military law in the future.

CONCLUSION

The continued prevalence of sexual assault in the military has placed the military's legal system at the forefront of national attention. As a result, the proposed Military Justice Act of 2016, with its sweeping changes, will receive substantial congressional attention over the near- to intermediate-term. CAAF, however, will largely be ignored. This is perhaps appropriate. Though an Article I court, it is an independent institution and Congress has respected its independence.³⁹⁹ But the lack of scholarly attention should no longer be ignored. CAAF is the preeminent institution in military criminal law, and it should be equally subjected to sustained scholarly attention.

This article has sought to reverse this trend by arguing that, by all accounts, CAAF is the court of last resort of the military justice system. But the analysis of its decisions presented in this article show that it often acts as an error correction court. In each of the four selected terms, CAAF issued an extraordinary number of error correction decisions. In its initial term, just over 75% of CAAF's decisions were error correction. Those rose substantially to nearly 90% in its 1968–69 term. Though the percentage of such decisions declined in the 1994–95 and 2014–15 terms, error correction still made up nearly half of all CAAF decisions in its most recent term. This

398. See, e.g., *McPhail v. United States*, 1 M.J. 457, 462 (C.M.A. 1976) (“[T]his Court is the supreme court of the military judicial system.”).

399. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 82 (1985).

is in contrast to the Court, which issued no error correction decisions in its most recent term.⁴⁰⁰ Though numerous differences between the two courts reduce the likelihood the Court will issue an error correction decision, this article makes two recommendations that seek to reduce the instances of error correction and put CAAF squarely in the primary business of law declaration.

It may be that CAAF no longer views itself as a court of last resort and that it better serves the military legal system as an intermediate court supervised by the Court. At least one commentator has specifically recommended eliminating the current intermediate appellate court in favor of transforming CAAF into such an intermediate court.⁴⁰¹ But it does not appear that CAAF itself is heading in that direction. Though an anecdotal point, during the writing of this article CAAF made a change to its slip opinions issued during its current term that may indicate it still views itself as a court of last resort.⁴⁰² Prior year opinions⁴⁰³ were formatted similar to federal circuit courts.⁴⁰⁴ However, its 2015–16 decisions appear nearly identical in format as slip opinions by the Court.⁴⁰⁵ This is far from hard evidence, but tends to show CAAF continues to mature in its role as the military's highest court.

Until CAAF declares its intent to be an error correction court, it should embrace its role as the court of last resort in the military's legal system. The uniformed services have divergent customs and experiences. Intermediate courts enable the system to account for these differences. Subsequent study is necessary to understand the effectiveness of military intermediate appellate courts as courts of error correction. In the meantime, CAAF can account for these differences amongst the uniformed services while unifying and clarifying military law. Revising Rule 21 and adopting the practice of signposting will highlight the precedential decisions in military law and the fundamental errors in intermediate courts as they serve in their

400. Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J.F. 551, 562 (2014), <http://yalelawjournal.org/forum/justice-sotomayor-and-the-supreme-courts-certiorari-process>.

401. Young, *supra* note 77, at 24 (“I recommend eliminating the CCAs, turning the CAAF into a court consisting of three-judge panels to which an accused has a right to appeal, abolishing a factual sufficiency review, and removing the restrictions on Supreme Court review of military cases.”) (footnote omitted).

402. *United States v. Leak*, 61 M.J. 234, 240 (C.A.A.F. 2005).

403. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (formatting limited to the decision itself, does not include corrections).

404. *See Lucero v. Early*, 632 F. App'x. 142 (4th Cir. 2016) (illustrating format of federal circuit court slip opinions).

405. *Compare Amgen, Inc., v. Harris*, No. 15-278, slip op. at 1 (U.S. Jan. 25, 2016), with *United States v. LaBella*, No. 15-0413, slip op. at 1 (C.A.A.F. Dec. 11, 2015) (using similar formatting).

roles as error correction courts. These reforms will assist CAAF as it matures as a court of last resort and will provide long term benefits to the development of military criminal law.

APPENDIX

Rule 21. Supplement to Petition for Grant of Review

(a) Review on petition for grant of review is not a matter of right, but of judicial discretion. A petition for grant of review requires a showing of good cause. Good cause must be shown by the appellant in the supplement to the petition, which shall state with particularity the error(s) in the court below claimed to be materially prejudicial to the substantial rights of the appellant. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(1) a Court of Criminal Appeals decided a question of law which has not been, but should be, settled by this Court;

(2) a Court of Criminal Appeals decided a question of law in conflict with applicable decisions of (i) this Court, (ii) the Supreme Court of the United States, (iii) another Court of Criminal Appeals, or (iv) another panel of the same Court of Criminal Appeals;

(3) a Court of Criminal Appeals adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts;

(4) a Court of Criminal Appeals decided the validity of a provision of the UCMJ or other act of Congress, the Manual for Courts-Martial, a service regulation, a rule of court or a custom of the service, the validity of which was directly drawn into question;

(5) a Court of Criminal Appeals decided the case (i) en banc or (ii) by divided vote;

(6) a Court of Criminal Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a court-martial or other person acting under the authority of the UCMJ, as to call for an exercise of this Court's power of supervision; or

(7) a Court of Criminal Appeals has taken inadequate corrective action after remand by this Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review from the Supreme Court of the United States specifying the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this Court.

A petition for review is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(b) The supplement to the petition shall be filed in accordance with the applicable time limit set forth in Rule 19(a)(5)(A) or (B), shall include an Appendix containing a copy of the decision of the Court of Criminal Appeals, unpublished opinions cited in the brief, relevant extracts of rules and regulations, and shall conform to the provisions of Rules 24(b), 35A, and 37. Unless authorized by Order of the Court or by motion of a party granted by the Court, the supplement and any answer thereto shall not exceed 25 pages, except that a supplement or answer containing no more than 9,000 words or 900 lines of text is also acceptable. Any reply to the answer shall not exceed ten pages, except that a reply containing 4,000 words or 400 lines of text is also acceptable. The supplement shall contain:

(1) a statement of the errors assigned for review by the Court, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The assigned errors should be short and should not be argumentative or repetitive;

(2) a statement of statutory jurisdiction, including:

(i) the statutory basis of the Court of Criminal Appeals jurisdiction; and

(ii) the statutory basis upon which this Court's jurisdiction is invoked;

(3) a statement of the case setting forth a concise chronology, including all relevant dates. The chronology shall specify (i) the results of the trial, (ii) the actions of the intermediate reviewing authorities and the Court of Criminal Appeals, (iii) the disposition of a petition for reconsideration or rehearing, if filed, and (iv) any other pertinent information regarding the proceedings, including, if set forth in the record, the date when service upon the accused of the decision of the Court of Criminal Appeals was effected;

(4) a statement of facts of the case material to the errors assigned, including specific page references to each relevant portion of the record of trial;

(5) a direct and concise argument showing why there is good cause to grant the petition; and

(6) a certificate of filing and service in accordance with Rule 39(g).

(c)(1) Answer/reply in Article 62, UCMJ, appeals. An appellee's answer to the supplement to the petition for grant of review in an Article 62, UCMJ, 10 U.S.C. § 862, case shall be filed no later than ten days after the filing of such supplement. A reply may be filed by the appellant no later than five days after the filing of the appellee's answer.

(2) Answer/reply in other appeals. An appellee's answer to the supplement to the petition for grant of review in all other appeal cases may be filed no later than 20 days after the filing of such supplement, *see* Rule 21(e); as a discretionary alternative in the event a formal answer is deemed unwarranted, an appellee may file with the Clerk of the Court a short letter, within ten days after the filing of the appellant's supplement to the petition under Rule 21, stating that the United States does not oppose the granting of the petition (for some specific reason, such as an error involving an unsettled area of the law). A reply may be filed by the appellant no later than five days after the filing of the appellee's answer.

(d) The Court may, in its discretion, examine the record in any case for the purpose of determining whether there appears to be plain error not assigned by the appellant. The Court may then specify and grant review of any such errors as well as any assigned errors which merit review.⁴⁰⁶

(e) Where no specific errors are assigned in the supplement to the petition, the Court will proceed to review the petition without awaiting an answer thereto. *See* Rule 19(a)(5).⁴⁰⁷

(f) An appellant or counsel for an appellant may move to withdraw his petition at any time by filing a motion pursuant to Rule 30. Such a motion shall substantially comply with the requirements of Rule for Courts-Martial 1110, and be accompanied by a written request for withdrawal that includes the following:

(1) a statement that the appellant and counsel for the appellant have discussed the appellant's right to appellate review, the effect of withdrawal, and that the appellant understands these matters;

(2) a statement that the motion to withdraw the petition is submitted voluntarily and cannot be revoked; and

(3) the signatures of the appellant and counsel for the appellant.

406. This article does not address the continuing vitality of CAAF specifying errors, but it does account for the continued need to grant error correction issues the lower courts should have addressed. *See generally* Eugene R. Fidell & Linda Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 MIL. L. REV. 117 (1989) (considering the United States Court of Military Appeals' specification of appellate issues).

407. Likewise, a court of last resort generally would not entertain an appeal in which the appellant raises no specific error, but as in the previous footnote, this article accounts for the continued need, for the time being, to grant some error correction issues.