A BRIDGE TOO FAR: TERMINATING THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES WOULD HARM NATIONAL SECURITY AND CAUSE INEFFICIENT ADMINISTRATION OF MILITARY AND CIVILIAN JUSTICE

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This article is a rebuttal to Professor Eugene Fidell's article,[1] which calls for the termination of the United States Court of Appeals for the Armed Forces (the CAAF)[2] and transfer of its jurisdiction to the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit).[3] It is also a stand-alone defense of the integrated military justice system.

"Misunderstood and, frankly, disapproved of by many legal 'elites,'" this intentionally separate system of law is a punching bag for those who do not appreciate its purpose.[4] And Professor Fidell does not even address that purpose in his article. He argues that the CAAF must go because (1) it has interpreted most of the Uniform Code of Military Justice (the UCMJ), (2) the civilian and military justice systems have procedural

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1. *See* Eugene R. Fidell, *The Case for Termination of the United States Court of Appeals for the Armed Forces*, 23 J. APP. PRAC. & PROCESS 263 (2023).

2. Formerly the Court of Military Appeals.

3. *See* Fidell, *supra* note 1, at 267.

4. *See* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 162 (2000).

similarities, (3) Article III generalists can comprehend military law, (4) society has changed since 1950, (5) many CAAF judges have prior military service, (6) unlawful command influence still exists, (7) Congress has accommodated societal changes with structural changes to the CAAF, (8) international standards support a different construct, (9) the CAAF hears fewer cases than it used to, and (10) it costs too much.[5]

Professor Fidell's practical observations have some merit. In fact, I agree with most of them. And if one were examining another Article I court, one could rightly use those observations as justification for terminating it and transferring its jurisdiction to a generalist Article III court. But Professor Fidell purports to terminate and transfer jurisdiction from the CAAF, which is charged with supervising military law.[6] Military law has "been understood from the beginning to be different, and to warrant separate constitutional treatment" from other types of law.[7]

It is crucial to understand *why* military justice warrants separate treatment before modifying it. So that gap in Professor Fidell's argument is where this article begins: analyzing military law's primary purpose, then using that purpose to inform the CAAF's purpose. Part I demonstrates that, contrary to Professor Fidell's assertion that Congress created the CAAF simply to "put flesh on the bare bones of the [UCMJ]"[8] and act as a "bulwark" against command influence,[9] Congress

5. *See* Fidell, *supra* note 1, at 271–93.

6. *See* Noyd v. Bond, 395 U.S. 683, 695 (1969) ("Congress . . . confided primary responsibility [in the CAAF] for the supervision of military justice in this country and abroad.").

7. Scott W. Stucky, *Appellate Review of Courts-Martial in the United States*, 69 CATH. U. L. REV. 797, 798–99 (2020).

8. Fidell, *supra* note 1, at 267. Professor Fidell cites to no authority for the proposition that the CAAF's purpose is to "put flesh on the bare bones of the [UCMJ]." *Id.*

9. *Id.* (citing United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)) (internal quotation marks omitted). Professor Fidell cites generally to *Thomas* for the proposition that the CAAF was created to act as a bulwark against unlawful command influence. *See id.* at 267, 267 n.31. *Thomas* does claim this

created the CAAF to oversee an integrated military justice system and thereby to serve as an instrument of the national defense.

After accepting the CAAF's instrumental purpose, Part II examines constitutional and structural repercussions of terminating the CAAF and assigning the D.C. Circuit primary supervisory jurisdiction of military justice matters. Part II first focuses on enduring reasons that the founders trusted supervision of military law to Congress and the President instead of Article III courts, then offers sobering implications of removing that trust. Part II shows that Congress and the President, not generalist Article III courts, are best suited to marshal the CAAF's purpose.

Only after understanding the CAAF's purpose can one analyze Professor Fidell's practical reasons for terminating it. By attacking the problem in that order, those practical concerns pale in comparison to the risk of making such an unprecedented structural change to military law. But even assuming Professor Fidell's proposed change withstands scrutiny on its face, Part III argues that terminating the CAAF and transferring its jurisdiction to the D.C. Circuit is unworkable.

I. MILITARY JUSTICE, AND THEREFORE THE CAAF, IS AN INSTRUMENTALITY OF THE NATIONAL DEFENSE

American military justice was established as an instrumentality for military commanders justified by the need for discipline in the armed forces.[10] It was "a commander's weapon against the insurgency of criminal activity in the ranks, rather than a forum in which due

was a "prime motivation," but in a single sentence of dicta unrelated to the court's holding. *See Thomas*, 22 M.J. at 393.

10. David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 72 (2013) ("Historically, starting with the Articles of War, the system was treated as a way to permit the commander to exercise his powers to provide good order and discipline in his unit." (citing EDWARD M. BYRNE, MILITARY LAW 1 (2d ed. 1976)).

process permits justice to happen."[11] That weapon was "inherently necessary for commanders, who require strict obedience to orders and a willingness among the troops to expose themselves to danger."[12]

In response to perceived due process shortcomings during World War II, Congress resolved to prevent military justice from being "*only* an instrumentality of the commander."[13] The resulting UCMJ and its subsequent amendments provide a uniform and comprehensive system of military law bolstered by procedural due process protections. Courts-martial now operate in "strict accordance with a body of federal law"[14] that, in some instances, closely resembles its civilian counterparts.[15] "The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal."[16] And attorneys "play a pervasive and essential role" at every level of the military justice system.[17]

Because of these reforms, "it is possible today to mistake a military tribunal for a regular court and thus to forget its fundamental nature as an instrument of military discipline."[18] But even if military law can be an

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11. Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 695 (2021) (citing JUDGE ADVOC. GEN.'S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, 3–4 (1975)).

12. *Id.* at 702. (citing United States v. Grimley, 137 U.S. 147, 153 (1890)).

13. *See Uniform Code of Military Justice: Hearings Before a Subcomm. of the Comm. on Armed Servs. H. of Reps. on H.R. 2498*, 81st Cong., 1st Sess. 605 (1949) [hereinafter *UCMJ Hearings*] (statement of Dr. Edmund M. Morgan, Jr., Professor of Harv. Univ. L. Sch. & Drafting Comm. Chairman) (emphasis added).

14. Ortiz v. United States, 138 S. Ct. 2165, 2174 (2018).

15. *See, e.g.*, U. S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES (2019) [hereinafter MCM]; MIL. R. EVID. 101(b).

16. *Ortiz*, 138 S. Ct. at 2174 (quoting DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-7, at 50 (9th ed. 2015)).

17. Schlueter, *supra* note 10, at 66. *See generally* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1692 (2021) (divesting commanders of certain convening authority responsibilities and shifting those burdens to military attorneys).

18. *Ortiz*, 138 S. Ct. at 2200 (Alito, J., dissenting); *see also* Weiss v. United States, 510 U.S. 163, 174 (1994) (emphasizing that despite resembling the civilian justice system, military justice remains "specialized" and "separate"

"exercise [of] judicial power, of the same kind wielded by civilian courts,"[19] it remains an important "agency-like instrumentality" of the national defense.[20] So while military law has evolved to procedurally align with its civilian counterparts in some respects, it ultimately serves a different purpose: to instill discipline and thereby enable the military establishment to fight and win wars.[21]

The Supreme Court has long emphasized this unique purpose. As the Court explained in *Parker v. Levy*,[22] "the military is, by necessity, a specialized society separate from civilian society."[23] And 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.'"[24] To excel at its primary business, "the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military

(quoting Parker v. Levy, 417 U.S. 733, 743 (1974) (internal quotation marks omitted))).

19. *Ortiz*, 138 S. Ct. at 2175 (quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576 (2007)) (internal quotations omitted).

20. *See* Maurer, *supra* note 11, at 703 n.243.

21. *See Ortiz*, 138 S. Ct. at 2176 n.5 (describing military justice's essential *character* as "judicial" while acknowledging the disciplinary *purpose* the system serves); *see also* MCM, *supra* note 15, at I-1 ("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*." (emphasis added)); MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 16 (2015) [hereinafter REVIEW GROUP REPORT] ("Since its inception in 1775, military law in the United States has evolved to recognize that all three components are essential *to ensure that our national security is protected and strengthened by an effective, highly disciplined military force*." (emphasis added)).

22. 417 U.S. 733 (1974).

23. *Id.* at 743; *see also* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian.").

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

exigencies as powerful now as in the past."[25] Military law is borne out of military necessity: the need for a means to ensure a highly disciplined and effective fighting force.[26] By necessity, then, military law must enable the military establishment to achieve its primary warfighting purpose.[27]

As the appellate tribunal tasked with "supervision of military justice,"[28] the CAAF must shepherd military law's purpose to aid warfighting agility. It fulfils that charge by remaining an instrument—like military law generally—accessible to those responsible for ensuring national security.

A. Congress Created the CAAF as an Instrumentality of the National Defense

Congress codified the UCMJ and created the CAAF as important tools of the national defense.[29] Though the UCMJ drafting committee aimed to "strike a fair balance" between the interests of justice and military exigency, its precept was to strike such a balance "without undue interference with appropriate military

25. Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

26. *See Parker*, 417 U.S. at 758 ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); *see also Ex Parte* Milligan, 71 U.S. 2, 123 (1866) ("The discipline necessary to the efficiency of the army and navy, require[] other and swifter modes of trial than are furnished by the common law courts.").

27. *See Schlesinger*, 420 U.S. at 757; *see also Toth*, 350 U.S. at 17 ("[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function."); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." (citations omitted)). *Cf.* Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("Due Process Clause . . . tests and limitations to be applied may differ because of the military context.")

28. *See* Noyd v. Bond, 395 U.S. 683, 695 (1969).

29. REVIEW GROUP REPORT, *supra* note 21, at 17 ("This separateness of purpose and mission has shaped the values and traditions that are embodied in the UCMJ.").

functions."[30] The resulting uniform system of law was therefore designed to afford servicemembers due process protections "within the framework of a military organization" and to ultimately achieve "maximum military performance."[31] At its apex, the CAAF was composed of civilians to mirror civilian control of the armed forces and designed as the "supreme civilian tribunal on questions of [military] law."[32] Creating the CAAF was "necessary to [e]nsure uniformity of interpretation and administration throughout the armed services."[33] But by designating it as the supreme arbiter of military law, Congress also implicitly charged the CAAF with serving military law's instrumental purpose.[34]

This implicit charge is further evidenced by the CAAF's subservience to legislative and executive bodies charged with the national defense. "[L]egislative jurisdiction over the [CAAF] and the UCMJ lies with the Armed Services Committees of Congress, not the Judiciary Committee."[35] CAAF judges are appointed by the President for 15-year terms, and the President has "very broad" authority to remove them for cause.[36] Those

30. *UCMJ Hearings*, *supra* note 13, at 605–06 (statement of Dr. Edmund M. Morgan, Jr., Professor of Harv. Univ. L. Sch. & Drafting Comm. Chairman).

31. *Id.* at 597 (statement of James Forrestal, Sec'y of Def.); *see also id.* at 1122 (statement of Hon. W. John Kenney, Under Sec'y of the Navy) ("An army is organized to win victory in war and the organization must be one that will bring success in combat. . . . The army has other functions such as feeding, medical care, and justice, but they are subordinate." (quoting Judge Robert P. Patterson) (internal quotation marks omitted)).

32. *Id.* at 606 (statement of Dr. Edmund M. Morgan, Jr., Professor of Harv. Univ. L. Sch. & Drafting Comm. Chairman); *see also id.* at 609 (statement of Dr. Edmund M. Morgan, Jr., Professor of Harv. Univ. L. Sch. & Drafting Comm. Chairman) ("They are really a military court of last resort.").

33. *Id.* at 604 (statement of Dr. Edmund M. Morgan, Jr., Professor of Harv. Univ. L. Sch. & Drafting Comm. Chairman).

34. *See id.* at 1271 (statement of Hon. Overton Brooks, Subcomm. No. 1 Chairman) ("I feel very strongly that the success or the failure of the whole [UCMJ] is going to lie in the [CAAF], and it seems to me you ought to have a strong court.").

35. Stucky, *supra* note 7, at 805.

36. *See* Ortiz v. United States, 138 S. Ct. 2165, 2204 (2018) (Alito, J., dissenting) (quoting Bowsher v. Synar, 478 U.S. 714, 729 (1986)) (internal quotation marks omitted); *see also* U.S. CT. OF MIL. APPEALS CT. COMM., UNITED

judges must hear any case a Judge Advocate General orders them to hear.[37] And decisions by the CAAF first go to the appropriate Judge Advocate General, then to the "convening authority" for action.[38] The convening authority can then disregard certain orders from the CAAF if they deem such an order "impracticable."[39]

This process concludes "unless there is to be further action by the President or the Secretary concerned."[40] Likewise, 10 U.S.C. § 876 says that appellate review is "final and conclusive," but qualifies that finality is subject to the "authority of the President."[41] Death sentences "may not be executed until approved by the President";[42] and sentences extending to dismissal of a "commissioned officer, cadet, or midshipman . . . may not be executed until approved by the Secretary concerned."[43] This subservience to congressional armed services committees and the executive branch indicates the CAAF's instrumental purpose.

B. CONGRESS'S AMENDMENTS TO THE UCMJ PRESERVED THE PRIMACY OF NATIONAL SECURITY AND LEFT THE CAAF'S EDICT UNTOUCHED

Recognized as the first major amendment to the UCMJ, the Military Justice Act of 1968 provided for the military judiciary, created a mechanism for "judge-alone trials," and required that judges and "counsel be

STATES COURT OF MILITARY APPEALS COMMITTEE REPORT 23–24 (1989) ("[T]he military justice system is an integral part of the armed services, of which the President is the Commander-in-Chief. Thus, the Committee has recommended, for example, continuation of the President's power to remove judges for cause, as specified by the Congress in Article 67.").

37. 10 U.S.C. § 867(a)(2).
38. *Id.* § 867(e).
39. *See id.*
40. *Id.*
41. *Id.* § 876.
42. *Id.* § 857(a)(3).
43. *Id.* § 857(a)(4).

appointed for special courts-martial."[44] Though Congress emphasized these due process improvements, military law's unique purpose remained in full focus.[45] During a congressional hearing about the eventual 1968 reforms, the Assistant Secretary of Defense for Manpower implored Congress that "any legislation enacted pursuant to these hearings should accomplish the desired objectives without adversely affecting the military effectiveness of our forces."[46]

The chairman of the Subcommittee on Constitutional Rights promised the Assistant Secretary of Defense that Congress had not lost sight of military law's ultimate purpose:

> Mr. Secretary, I want to assure you that it is not the purpose of the subcommittees or my purpose to do anything whatever which would impair in any way the capacity of the Armed Forces to maintain discipline. The members of the subcommittee and myself recognize that the protection of the Nation depends upon the capacity of the armed services to maintain and enforce discipline.
>
> The overall purpose of our proceedings is to ascertain whether or not we can bring that necessary function and the administration of criminal justice into harmony with each other.[47]

So even when improving due process protections for servicemembers, Congress's priority was to ensure national security through a disciplined military.

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44. David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 12 (2017) (citing Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); SCHLUETER, *supra* note 16, at § 1-6[D]).

45. *See Military Justice: Joint Hearings Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary and a Spec. Subcomm. of the Comm. on Armed Servs. U.S. S. on S. 745, S. 746, S. 747, S. 748, S. 749, S. 750, S. 751, S. 752, S. 753, S. 754, S. 755, S. 756, S. 757, S. 758, S. 759, S. 760, S. 761, S. 762, S. 2906, & S. 2907*, 89th Cong., 2d Sess. 12 (1966) (statement of Hon. Thomas D. Morris, Assistant Sec'y of Def. for Manpower).

46. *Id.* at 12.

47. *Id.* at 14 (statement of Hon. Sam J. Ervin, Jr., U.S. Sen. & Chairman of the Subcomm. on Const. Rights).

That trend continued in 1983 when Congress provided for direct Supreme Court review of court-martial appeals.[48] While the right to petition the Supreme Court via writ of certiorari improved due process for military defendants, the Department of Defense supported the legislation—and, in fact, proposed it a year earlier[49]—for a different reason: to enable review of CAAF decisions adverse to the government.[50] An opportunity for the government to seek direct review was necessary because "issues decided adversely to the government by the [CAAF] can have a substantial effect on the state of discipline in the armed forces."[51]

And as Professor Fidell laments,[52] Congress prohibited military defendants from petitioning the Supreme Court if the CAAF first refused to hear their appeal.[53] Proposed by the Department of Justice, this "gatekeeping with a vengeance"[54] limited appeals to

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48. *The Military Justice Act of 1982: Hearings Before the Subcomm. on Manpower and Pers. of the Comm. on Armed Servs. U.S. S. on S. 2521*, 97th Cong., 2d Sess. 20 (1982) [hereinafter *1982 Hearings*] (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.); *see also id.* at 14 (statement of Sen. Roger Jepsen, Chairman) ("I believe very strongly that discipline is the cornerstone of an effective fighting force and the fabric that binds the military community together. The system of law to [e]nsure that discipline is maintained must not only be fair, but also effective and efficient.").

49. *See id.* at 38 (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.). The applicable legislation was approved by the House of Representatives, "but the session ended prior to formal Senate consideration." *See* H.R. REP. NO. 98-549, at 16 (1983).

50. *1982 Hearings*, *supra* note 48, at 39 (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.) ("If there is a determination adverse to the government in the [CAAF], there is no other tribunal to which the government can appeal. This leaves the government at a very substantial disadvantage. . . . To correct this deficiency, the legislation will permit discretionary review of decisions of the [CAAF] by the Supreme Court through writs of certiorari.").

51. *Id.* (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.).

52. *See* Fidell, *supra* note 1, at 298, 298 n.179.

53. *See* 28 U.S.C. § 1259(3). The government faces no similar obstacle to Supreme Court review. *See id.* § 1259(2). The 2024 NDAA removes this barrier. *See infra* text accompanying notes 63–70 for a full discussion of this amendment.

54. Eugene R. Fidell et al., *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. F. 1, 13 (2021) (citing EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 21.03[10], at 222 (Matthew Bender & Co. 19th ed. 2020)).

"circumstance[s] in which a decision of the [CAAF] affect[ed] military jurisprudence."[55] And, more importantly, it "preserv[ed] the role of the [CAAF] as the primary civilian interpreter of the [UCMJ]."[56] Such preservation was intentional. The General Counsel of the Department of Defense emphasized:

> I would also like to add that it is not our intention to displace the [CAAF] as the primary interpreter of military law. . . . The Solicitor General will [e]nsure that the government only seeks review in occasional cases of great importance. It is unlikely that the Supreme Court will grant review at the behest of the accused in a substantial number of cases. In such circumstances, the [CAAF], like the highest court of a state, will be the principal source of authoritative interpretations of the law.[57]

So while it was important to Congress to limit undue expansion of the Supreme Court's caseload, it was equally important to ensure the CAAF "remain[ed] the primary source of judicial authority under the [UCMJ]."[58]

The Military Justice Act of 2016 and subsequent National Defense Authorization Acts (NDAAs) of 2022 and 2023 similarly did not alter the CAAF's precept to serve the national defense. The Military Justice Act of 2016 made significant procedural changes to the military appellate process[59] but did "not . . . alter the jurisdiction of the [CAAF]."[60] The 2022 and 2023 NDAAs divested commanders of certain prosecutorial and quasi-judicial responsibilities, but then vested those responsibilities with *military* attorneys answerable to the President

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55. *1982 Hearings*, *supra* note 48, at 39 (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.) (quoting the Department of Justice) (internal quotation marks omitted).

56. *Id.* (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.) (quoting the Department of Justice) (internal quotation marks omitted).

57. *Id.* at 39–40 (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.).

58. *See* H.R. REP. NO. 98-549, at 17.

59. *See* Schlueter, *supra* note 44, at 83.

60. REVIEW GROUP REPORT, *supra* note 21, at 624.

through service Secretaries.[61] Those NDAAs also expanded intermediate appellate rights for military accused. But like The Military Justice Act of 2016, Congress did not purport to change the CAAF's jurisdiction or purpose.[62]

Section 533 of the 2024 NDAA allows servicemembers to petition the Supreme Court via writ of certiorari in cases where the CAAF denies their petition for review.[63] This amendment is troubling for two primary reasons. First, it appears to have passed both houses of Congress without much deliberation or media attention.[64] And second, there is no evidence that Congress considered a primary reason for limiting Supreme Court jurisdiction over military appeals in the first place: preserving the CAAF as "the principal source of authoritative interpretations of [military] law."[65]

But the CAAF will remain that principal source. When Section 533 takes effect, "servicemembers must still exhaust CAAF's discretionary jurisdiction."[66] The only difference is that "a denial by CAAF will not foreclose the Supreme Court's ability to review the

61. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–39C, 135 Stat. 1541, 1692–99 (2021); *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541(c), 136 Stat. 2395, 2580 (2024).

62. *See* National Defense Authorization Act for Fiscal Year 2022 § 531; *see* National Defense Authorization Act for Fiscal Year 2023 § 541(c).

63. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533(a)–(b), 137 Stat. 136, 261–62 (2024).

64. *See* Steve Vladeck, *58. Congress Quietly Expands the Supreme Court's Jurisdiction Over Courts-Martial*, ONE FIRST (Dec. 18, 2023), https://stevevladeck.substack.com/p/58-congress-quietly-expands-the-supreme [https://perma.cc/Q7ST-M4XK]. Neither the House Armed Services Committee nor the Senate Armed Services Committee summaries of the 2024 NDAA mention Section 533. *See* U.S. S. COMM. ON ARMED SERVS., SUMMARY OF THE FISCAL YEAR 2024 NATIONAL DEFENSE AUTHORIZATION ACT (2023), https://www.armed-services.senate.gov/imo/media/doc/fy24_ndaa_conference_executive_summary1.pdf [https://perma.cc/R93F-TRGT]; H. ARMED SERVS. COMM., FY24 NATIONAL DEFENSE AUTHORIZATION ACT (2023), https://drive.google.com/file/d/1DBbuHJUI3L5FrwR91xM_Me9v6GHqIJn7/view [https://perma.cc/XYR8-A9AQ].

65. *See 1982 Hearings*, *supra* note 48, at 39–40 (statement of William H. Taft IV, Gen. Couns. of the Dep't of Def.).

66. *See* Vladeck, *supra* note 64 (emphasis omitted).

servicemember's appeal via certiorari."[67] Not only has the Supreme Court been extraordinarily selective when exercising its existing statutory authority to grant petitions for review,[68] but as discussed in Part II.B., it steadfastly defers to Congress when it does grant petitions.[69] Congress erred by not considering the full historical justification for the Supreme Court's limited jurisdiction of military appeals. But the CAAF will nevertheless remain an instrument of the national defense because even with expanded jurisdiction, the Supreme Court will not supplant the CAAF as the "supreme civilian tribunal on questions of [military] law."[70]

Military justice has clearly evolved to ensure a greater degree of due process for servicemembers and alleged victims. But through that evolution, the CAAF's instrumental purpose endured because Congress never changed "the primary purpose and function of the [integrated military justice] system."[71] More importantly, Congress never relinquished the authority to direct that purpose and function.

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67. *Id.* (emphasis omitted).

68. In fact, the Supreme Court has only granted *one* petition from a military accused via writ of certiorari since 1996. *See* Steve Vladeck, *9. The Missing Court-Martial Docket*, ONE FIRST (Jan. 9, 2023), https://stevevladeck.substack.com/p/9-military-justice-andat-the-supreme [https://perma.cc/JSK5-U4Y5].

69. *See infra* text accompanying notes 95–100.

70. *UCMJ Hearings*, *supra* note 13, at 606 (Statement of Dr. Edmund M. Morgan, Jr., Professor of Harv. Univ. L. Sch. & Drafting Comm. Chairman).

71. Schlueter, *supra* note 10, at 74; *see* OFF. OF THE GEN. COUNS. DEP'T OF DEF., REPORT OF THE DEPARTMENT OF DEFENSE STUDY GROUP ON THE UNITED STATES COURT OF MILITARY APPEALS 35 (1988) [hereinafter DOD REPORT] ("Even in the face of changing circumstances, the specialized nature of military justice with its emphasis on duty and discipline remains viable.").

II. CONGRESS AND THE PRESIDENT ARE BEST SUITED TO MARSHAL MILITARY LAW'S INSTRUMENTAL PURPOSE

Congress has never relinquished the authority to regulate military law generally, and the CAAF specifically, for good reason. As General William T. Sherman explained:

> The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.
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> These objects are as wide apart as the poles, and each requires its own separate system of laws—statute and common. "An army is a collection of armed men obliged to obey one man." Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence.[72]

Because of military justice's unique purpose and the attendant risks of betraying that purpose, the Constitution vests Congress—and not the judiciary—with plenary authority for its regulation.[73]

The President, as Commander-in-Chief of the armed forces, bears ultimate responsibility for enforcement of those congressionally adopted rules.[74] It is no accident,

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72. Letter from Gen. William T. Sherman to Gen. W. S. Hancock, President of the Mil. Serv. Inst. (Dec. 9, 1879), *in* GENERAL WILLIAM T. SHERMAN, MILITARY LAW 130 (1880) (reprinted from THE JOURNAL OF THE MILITARY SERVICE INSTITUTION OF THE UNITED STATES) [hereinafter GENERAL SHERMAN LETTER].

73. *See* U.S. CONST. art. I, § 8, cl. 14; *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." (citations omitted)).

74. *See* U.S. CONST. art. II, § 2; *see also* Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) ("'[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress and with the President." (citations omitted)).

then, that the supreme arbiter of military justice is an Article I court housed in the Department of Defense.[75] This deliberate structure, which mirrors Constitutional authority to provide for the national defense, allows Congress and the President to effectively utilize the CAAF as a tool to ensure the nation's security.

If Congress were to terminate the CAAF and transfer its responsibilities to the D.C. Circuit, it would cede control of an important instrumentality of national defense—military justice—to a branch of government not charged with ensuring the nation's security.

A. Relinquishing Control of Military Law to the Article III Judiciary Would Defeat Military Law's Instrumental Purpose

If military justice is to effectively serve as a tool for ensuring national security, it must "be under the direction of the same councils which are appointed to preside over the common [defense]."[76] As Alexander Hamilton explained, this rationale "rests upon axioms, as simple as they are universal . . . the means ought to be proportioned to the end; the persons from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained."[77] So because the Constitution appoints Congress and the President to preside over the common defense, they must possess the means by which to fulfil that responsibility. Those means include control of the military's system of government and regulation—military justice.

It is especially important that Congress and the President retain the means to control military justice "because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary

75. 10 U.S.C. § 941.

76. THE FEDERALIST NO. 23, at 113 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed., Liberty Fund 2001).

77. *Id.* (emphasis omitted).

to satisfy them."[78] Because of its nature and purpose, removing the military justice arrow from Congress's quiver would undoubtedly restrict any effort to respond to future exigency. Thus, Congress and the President cannot fulfil their Constitutional duties to defend the nation without the means to control military law.

Congress would surrender those means by terminating the CAAF and transferring its jurisdiction to the D.C. Circuit. "An Article III court must decide (1) the whole federal question (2) independently and (3) finally, based on (4) the whole supreme law, and (5) impose a remedy that, in the process of binding the parties to the court's judgment, effectuates supreme law and neutralizes contrary law."[79] And "in cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."[80] A wholesale transfer of all military appellate matters to the D.C. Circuit might therefore result in a dramatic expansion of the limited jurisdiction described in 10 U.S.C. § 867, even if Congress wanted to so restrict that jurisdiction.[81] "[T]he whole" of military law could be on the table,[82] including "administrative discharge proceedings, nonjudicial punishment, military tort

78. *Id.*

79. James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 696 (1998).

80. Crowell v. Benson, 285 U.S. 22, 60 (1932).

81. *See id.* at 60–61; *see also* Parisi v. Davidson, 405 U.S. 34, 48 (1972) (Douglas, J., concurring) ("What courts may do is dependent on statutes, save as their jurisdiction is defined by the Constitution. What federal judges may do, however, is a distinct question. Authority to protect constitutional rights of individuals is inherent in the authority of a federal judge, conformably with Acts of Congress."). *Cf.* Stern v. Marshall, 564 U.S. 462, 502–03 (2011) ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

82. *See* DOD REPORT, *supra* note 71, at K-5 (citation omitted) (internal quotation marks omitted).

actions, prisoner disciplinary hearings, . . . line of duty determinations, . . . and other military-related issues."[83]

Decisions in those—and indeed all—areas would be insulated from Congressional and Presidential control because "Article III permits federal courts to exercise power only in circumstances in which the judicial department is to have the last word, free from revision at the hands of the political departments."[84] The judicial power exercised by Article III courts "'can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress [can] share with the Judiciary the power to override a Presidential veto.'"[85]

Article III requires complete independence from the political branches exclusively responsible for the nation's defense. If Congress transfers the CAAF's jurisdiction to the D.C. Circuit—an Article III court—military justice would therefore cease to be an instrumentality of the national defense. If military justice were no longer an instrumentality of the national defense, it would blend into "the civil law" as General Sherman described it.[86] And by doing so, it would "defeat[] the very object of its existence."[87]

B. The D.C. Circuit, as an Article III Court, Is Not Equipped to Effectively Serve Military Law's Overarching Purpose

Even if Congress would not defeat military law's purpose by ceding control of appellate matters to an Article III court, the D.C. Circuit is not suited to marshal

83. *Id.* at 38–39.

84. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 652 (2004).

85. *Stern*, 564 U.S. at 483 (quoting United States v. Nixon, 418 U.S. 683, 704 (1974)).

86. *See* GENERAL SHERMAN LETTER, *supra* note 72, at 130. In fact, this is exactly what Professor Fidell presumes when he describes the "merg[ing]" of military and civilian law. *See* Fidell, *supra* note 1, at 273.

87. GENERAL SHERMAN LETTER, *supra* note 72, at 130.

that purpose. Article III's charge is to "do[] justice and resolv[e] controversies."[88] It treats due process norms as a starting point without emphasizing discipline, portability, or speed.[89] On the other hand, military law, as discussed in Part I, treats due process considerations "as side constraints [to military exigency] . . . rather than those due process norms as a starting point and baseline unaffected by goals of efficiency."[90] Balancing those side constraints with military exigency is "essentially [a matter of] professional military judgment[]."[91] It is therefore "difficult to conceive of an area of governmental activity in which the courts have less competence"[92] because they are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[93] That is why the Constitution rightly grants Article III "no influence over either the sword or the purse."[94]

This lack of competence is why the Supreme Court, even when exercising its statutory authority to hear direct appeals from the CAAF, consistently defers to Congress on matters of military law.[95] From the country's founding until Congress provided for direct Supreme Court review of courts-martial cases in 1983, Article III review was limited to collateral attack.[96] Review was limited to questions of jurisdiction "or some

88. *See* Stucky, *supra* note 7, at 799.

89. *See id.*

90. Maurer, *supra* note 11, at 699 (citations omitted).

91. *See* Austin v. U.S. Navy Seals, 142 S. Ct. 1301, 1302 (2022) (mem.) (Kavanaugh, J., concurring) (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)) (internal quotation marks omitted).

92. Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (quoting *Gilligan*, 413 U.S. at 10) (internal quotation marks omitted).

93. Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)) (internal quotation marks omitted).

94. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed., Liberty Fund 2001).

95. *See generally* O'Connor, *supra* note 4, at 161 (describing the Supreme Court's history of deference to Congress regarding military justice matters).

96. *See* United States v. Denedo, 556 U.S. 904, 918–19 (2009) (Roberts, C.J., concurring in part and dissenting in part).

other equally fundamental defect."[97] The Supreme Court "adhered to 'the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts.'"[98] And since 1983, the Court has been "exceedingly deferential to determinations by Congress and the President that they have struck the proper balance between military necessity and [countervailing interests]"[99] because "civil courts are not the agencies which must determine the precise balance to be struck in this adjustment."[100]

Though Article III courts may be able to *comprehend* "military arcana" as Professor Fidell described it,[101] that does not end our inquiry. An Article III court may practically *understand* a given issue, but that does not mean it is able to act *in a manner that serves military justice's overarching purpose*. Because Article III is necessarily independent of the political branches charged with ensuring national security, and because Article III's purpose is inherently different than military law's purpose, Article III is not equipped to exercise unrestricted supervision of military law. Its "comparative lack of competence," therefore, is not just practical; it is also constitutional.[102] The D.C. Circuit, by virtue of its Article III status, is not equipped to make "professional military judgments."[103] So why would we ask it to?

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97. *Id.* at 919 (Roberts, C.J., concurring in part and dissenting in part) (quoting Schlesinger v. Councilman, 420 U.S. 738, 747 (1975)) (internal quotation marks omitted).

98. *Id.* at 919 (Roberts, C.J., concurring in part and dissenting in part) (quoting Smith v. Whitney, 116 U.S. 167, 177 (1886)).

99. *See* O'Connor, *supra* note 4, at 306.

100. Solorio v. United States, 483 U.S. 435, 440 (1987) (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)) (internal quotation marks omitted).

101. Fidell, *supra* note 1, at 269, 273.

102. *See* O'Connor, *supra* note 4, at 265.

103. *See* Austin v. U.S. Navy Seals, 142 S. Ct. 1301, 1302 (2022) (mem.) (Kavanaugh, J., concurring).

C. Congress Has Repeatedly Declined to Cede Control of Military Justice to the Judiciary Because Military Law's Purpose Does Not Align with That of Article III

Congress has repeatedly recognized the importance of maintaining control of military law. It had the opportunity to transfer supervision of military justice to Article III in 1984 and again in 1987. Congress declined each time.

In addition to providing for direct Supreme Court review of court-martial appeals, the Military Justice Act of 1983 established a commission to "study and report on the question of whether the [CAAF] should be an Article III Court."[104] That commission rejected a wholesale shift to Article III status because it was not acceptable for the CAAF to become a court of "general jurisdiction."[105] The commission ultimately recommended the shift to Article III status, but "with the caveat that the enacting legislation expressly limit the jurisdiction of the Court [to the then current jurisdiction], and that specific language be included . . . to preclude the Court's exercise of jurisdiction over administrative discharge matters and nonjudicial punishment actions."[106] It was clearly important to the commission that (1) the CAAF remain an exclusively military court, and (2) its jurisdiction not be expanded to encompass adjudication of administrative matters or "minor"[107] offenses.[108]

But as Colonel Charles Mitchell and Captain E. M. Byrn explained in their minority report, and as discussed in Part II.A, Congress would be hard pressed to "create an Article III Court in such a way that the Court could not go beyond [the] specific authority" recommended by

104. H.R. REP. NO. 98-549, at 17.

105. 1 MIL. JUST. ACT OF 1983 ADVISORY COMM'N, ADVISORY COMMISSION REPORT: THE MILITARY JUSTICE ACT OF 1983 11 (1985) [hereinafter ADVISORY REPORT].

106. *Id.*

107. *See, e.g.*, 10 U.S.C § 815(b).

108. *See* ADVISORY REPORT, *supra* note 105, at 11.

the commission.[109] Regardless, such an expansion would consequently extinguish the CAAF's "role in the military justice system as the primary arbiter of the balance between individual rights and military necessity."[110] According to the minority report, terminating that role and shifting responsibility to Article III could "severely impair the preparedness of our Armed Forces."[111] The commission's report, along with the minority report, went to "the [UCMJ] Code Committee for comment."[112] A "clear majority" of the Committee opposed a shift to Article III status.[113] Most importantly, by its inaction, Congress adopted the minority view.

Congress again considered reconstituting the CAAF under Article III after legislation to that effect was introduced in the House and the Senate in 1987.[114] In response, the Department of Defense commissioned a formal study group to analyze the prospect of Article III control of military justice.[115] That study group found that the CAAF was "properly accountable to the Executive branch" and Congress and not the Judiciary.[116] According to the study group's report:

> The Judiciary must be able to exercise its functions free from governmental influence or threat of interference. Military judges, including civilian judges sitting atop an exclusively military system, simply do not require the same accoutrements of independence as do Article III judges who are tasked with preserving our tripartite system and the

109. *See* ADVISORY REPORT, *supra* note 105, at 63 (Minority Report of Colonel Charles H. Mitchell & Captain Edward M. Byrn).

110. *Id.* at 65. (Minority Report of Colonel Charles H. Mitchell & Captain Edward M. Byrn).

111. *Id.*

112. DOD REPORT, *supra* note 71, at 15.

113. *Id.* (quoting C.J. Everett, Comments to the House Committee on Armed Services (Feb. 28, 1985)) (internal quotation marks omitted).

114. *See* United States Court of Military Appeals Improvements Act of 1987, S. 1625, 100th Cong. (1987); United States Court of Military Appeals Improvements Act of 1987, H.R. 3310, 100th Cong. (1987).

115. *See generally* DOD REPORT, *supra* note 71 (reporting on the impact of proposed legislation that would subject the CAAF to Article III control).

116. *Id.* at 21.

> doctrine of federalism. Military courts are justified on the basis of executive and congressional supremacy in military affairs and the special need for swift and flexible military discipline.[117]

This same separateness of purpose that justified a distinctly separate system of military justice in 1950 was equally relevant 40 years later. And Congress again declined to shift the CAAF's jurisdiction to Article III. Apparently, it hasn't formally considered the issue since.

D. Contemporary Global Instability Demands that Military Law Remain True to Its Purpose and Subordinate to Congress and the President

A flexible and lethal fighting force, responsive and subordinate to those responsible for the national defense, has never been more important. Currently, two active conflicts threaten global stability: the war between Russia and Ukraine[118] and the war between Israel and Hamas.[119] The United States is indirectly involved in both conflicts.[120] In addition to active conflicts, Iran continues to intentionally destabilize the Middle East,[121]

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117. *Id.* at 23.

118. *See Ukraine in Maps: Tracking the War with Russia*, BBC (Dec. 20, 2023), https://www.bbc.com/news/world-europe-60506682 [https://perma.cc/4UTJ-3ASM].

119. *See* Julia Frankel, *These Numbers Show the Staggering Toll of the Israel-Hamas War*, ASSOCIATED PRESS (Nov. 5, 2023, 10:51 AM), https://apnews.com/article/israel-hamas-war-death-toll-numbers-injured-5c9dc40bec95a8408c83f3c2fb759da0 [https://perma.cc/C247-RECG].

120. *See* Eric Cortellessa & Brian Bennett, *Biden and Congress Craft $2 Billion Aid Package as Israel Vows to 'Crush' Hamas*, TIME (Oct. 11, 2023, 7:35 PM), https://time.com/6322820/israel-aid-biden-Congress-hamas/ [https://perma.cc/59Z2-MC29]; *see also* Jonathan Masters and Will Merrow, *How Much Aid the U.S. Has Sent to Ukraine, in 6 Charts*, PBS (Oct. 1, 2023, 9:14 PM), https://www.pbs.org/newshour/world/how-much-aid-the-u-s-has-sent-to-ukraine-in-6-charts [https://perma.cc/8UEN-HJBT] ("[S]ince Russia's invasion [of Ukraine], Ukraine has become far and away the top recipient of U.S. foreign aid.").

121. *See* Jon Gambrell, *Analysis: Iran-Backed Yemen Rebels' Helicopter-Borne Attack on Ship Raises Risks in Crucial Red Sea*, ASSOCIATED PRESS (Nov. 21, 2023, 8:43 AM), https://apnews.com/article/israel-palestinians-red-sea-ship-yemen-houthis-65b611ff878a411900037e7c9a8ee17b [https://perma.cc/84V4-M62F].

China continues to show aggression in the South China Sea,[122] and North Korea continues to threaten stability on the Korean Peninsula.[123]

Rather than be crippled by a prolonged conflict with Ukraine, "Russia appears to have the ability to adapt and be surprisingly resilient."[124] In fact, it is "moving toward a total war footing and is ready for a long war."[125] And by virtue of the Israel–Hamas war and Iranian destabilization efforts, "the United States is careening closer to the very real possibility of direct involvement in a regional Middle Eastern war."[126] Add increasing instability in the Pacific theater and "[t]he United States is a heartbeat away" from engaging in another world war.[127] If China decides to attack Taiwan—which could be imminent[128]—the United States would be either directly or indirectly involved in a global war on at least three fronts.[129]

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122. *See Addressing China's Military Aggression in the Indo-Pacific Region*, U.S. DEP'T OF ST., https://2017-2021.state.gov/chinas-military-aggression-in-the-indo-pacific-region/ [https://perma.cc/4PWG-5769] (last visited Dec. 27, 2023).

123. Brad Dress, *South Korea Suspends No-Fly Zone Near Border After Purported North Korea Spy Satellite Launch*, THE HILL (Nov. 22, 2023, 10:40 AM), https://thehill.com/policy/defense/4322913-south-korea-north-korea-no-fly-zone-suspended/ [https://perma.cc/N999-C8PN].

124. Nate Ostiller, *Danilov: Russia May Begin Full Mobilization After 2024 Presidential Election*, THE KYIV INDEP. (Nov. 20, 2023, 5:57 PM), https://kyivindependent.com/danilov-russia-may-begin-total-mobilization-after-2024-presidential-election/ [https://perma.cc/HVZ2-RCR3].

125. *Id.*

126. Ben Wedeman, *The US is Dangerously Close to Being Pulled into a Middle East War*, CNN: MIDDLE EAST (Oct. 20, 2023, 7:23 AM), https://www.cnn.com/2023/10/20/middleeast/us-middle-east-danger-israel-hamas-war-mime-intl-hnk/index.html [https://perma.cc/S4HE-Z3LA].

127. *See* A. Wess Mitchell, *America Is a Heartbeat Away from a War It Could Lose*, FOREIGN POL'Y (Nov. 16, 2023, 5:34 AM), https://foreignpolicy.com/2023/11/16/us-russia-china-gaza-ukraine-world-war-defense-security-strategy/ [https://perma.cc/Y5J9-4BBB].

128. Chinese leader Xi Jinping recently warned that "China will realize reunification [with Taiwan], and this is unstoppable." *See* Aadil Brar, *Xi Jinping's Ominous Warning for America*, NEWSWEEK: WORLD (Nov. 16, 2023, 6:44 AM), https://www.newsweek.com/china-warning-us-taiwan-xi-jinping-joe-biden-apec-summit-1844217 [https://perma.cc/3W4J-ABRJ] (quoting Xi Jinping's remarks to President Joe Biden) (internal quotation marks omitted).

129. Mitchell, *supra* note 127.

This war could be much different than past global conflicts. The last world war ended with only the United States possessing nuclear capabilities; this one would begin with at least two major adversaries holding hundreds—and, in Russia's case, thousands—of nuclear warheads.[130] Nuclear weapons aside, our adversaries have dramatically expanded conventional military capabilities and made significant advances in the areas of space and cyberspace warfare.[131] Given the substance and scope of a potential conflict, "[w]aging this fight would require a scale of national unity, resource mobilization, and willingness to sacrifice that Americans and their allies have not seen in generations."[132] And this fight "is a real and foreseeable, if not imminent, possibility."[133]

This powder keg of actual and potential conflict requires that Congress and the President have unfettered flexibility to respond to military exigency. Given the dynamic and complex risk of war, it is impossible to determine "the means which may be necessary"[134] to prevail if the United States is forced to engage at a deeper level in any one conflict, much less multiple conflicts simultaneously. So in order to preserve all such means—or all warfighting tools at Congress's disposal—Congress must not divest itself or the President of the responsibility to control military justice.

And as discussed in Part II.B, the D.C. Circuit is ill-equipped to supervise military justice matters even when the United States is not engaged in global war.

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130. Mathias Hammer, *U.S. Is Not Ready for Growing Nuclear Threat from Russia and China, Report Says*, TIME (Oct. 12, 2023, 1:28 PM), https://time.com/6323059/us-china-russia-nuclear-threat/ [https://perma.cc/EN96-XURE].

131. Joseph Clark, *U.S. Focuses on Deterrence as China Raises Stakes in Indo-Pacific*, U.S. DEP'T OF DEF.: DOD NEWS (Oct. 24, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3566970/us-focuses-on-deterrence-as-china-raises-stakes-in-indo-pacific/ [https://perma.cc/4BRK-5SPJ].

132. Mitchell, *supra* note 127.

133. *Id.*

134. *See* THE FEDERALIST NO. 23, *supra* note 76, at 113.

When such a scenario comes to fruition, considerations of discipline, portability, and speed—considerations Article III takes for granted[135]—become paramount.[136] This "delicate task"[137] of balancing military exigency and individual rights rests with Congress because "courts are ill-suited to second-guess military judgments that bear upon military capability or readiness."[138] Global war would demand a heightened deference to such judgments that only Congress is constitutionally equipped to navigate.

III. EVEN IF CONGRESS COULD TRANSFER MILITARY APPELLATE JURISDICTION TO THE D.C. CIRCUIT WITHOUT HARMING NATIONAL SECURITY, SUCH A TRANSFER IS UNSUITABLE FOR PRACTICAL REASONS

If Constitutional and existential reasons weren't enough, terminating the CAAF and transferring its jurisdiction to the D.C. Circuit would be unworkable for practical reasons. First, such a transfer could place an undue burden on the dockets of both the D.C. Circuit and the Supreme Court. And second, the D.C. Circuit lacks the practical competence to field military appellate matters.

135. *See supra* note 89 and accompanying text.

136. *See* Maurer, *supra* note 11, at 724 (quoting CLARENCE E. BRAND, ROMAN MILITARY LAW xix (Univ. of Tex. Press 1968)) ("[I]n time of war[,] . . . speed and certainty of appropriate disciplinary action would appear to be of higher importance to the survival of the state than assurance of the last drop of abstract justice to the individual accused.").

137. *See* Solorio v. United States, 483 U.S. 435, 447 (1987).

138. Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998).

A. Terminating the CAAF and Transferring Its Jurisdiction to the D.C. Circuit Could Have an Adverse Impact on the Dockets of the D.C. Circuit and Supreme Court

While the "CAAF's caseload has tanked"[139] since 1951, that fact is not justification for its termination. Because Congress purposely created the CAAF as a specialized court overseeing an exclusively military system of law,[140] a mere decline in caseload is insufficient to cause its termination. Even if it were sufficient, the CAAF's caseload may rebound.

Today's military is much smaller than it was in 1951, and fewer cases are funneled through courts-martial proceedings.[141] That may change, especially as the threat of global war increases. In fact, Congress has already recommended adjusting the "size, type, and posture" of the military in preparation for widespread conflict.[142] And during his recent tenure as Secretary of Defense, General James Mattis urged commanders to avoid using administrative measures to resolve misconduct and instead rely on courts-martial.[143] Finally, the 2022 and 2023 NDAAs combined to make appellate review much more accessible to servicemembers.[144] Any one of these developments could increase the CAAF's caseload, but all of them together will likely have an impact.

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139. *See* Fidell, *supra* note 1, at 287.

140. *See supra* note 31 and accompanying text.

141. *See, e.g.*, Steven Kosiak, *Is the U.S. Military Getting Smaller and Older?*, CTR. FOR A NEW AM. SEC. (Mar. 14, 2017), https://www.cnas.org/publications/reports/is-the-u-s-military-getting-smaller-and-older#:~:text=In%20the%20mid%2D1950s%2C%20after,to%20some%201.4%20million%20troops [https://perma.cc/N4PK-XM9U].

142. *See* THE CONG. COMM'N ON THE STRATEGIC POSTURE OF THE U.S., AMERICA'S STRATEGIC POSTURE 48, 65 (2023).

143. *See* Memorandum from Gen. James Mattis, Sec'y of Def., to the Secretaries of the Mil. Dep'ts, Chiefs of the Mil. Servs., & Commanders of the Combatant Commands (Aug. 13, 2018).

144. *See supra* note 62.

It would be reckless to subject the D.C. Circuit to this potential caseload variance. The CAAF's architects were very concerned with the court being able to adapt to such variance, and they spent considerable time on the subject.[145] The CAAF is therefore designed and has been adapted to accommodate swings in caseload due to military exigency.[146] The D.C. Circuit has not.[147] So to simply transfer military appellate matters to the D.C. Circuit risks a catastrophic scenario where the military justice system *and* the D.C. Circuit become less efficient and less effective at precisely the wrong time. And an increase in military law cases at the D.C. Circuit would inevitably mean an increase in military law cases at the Supreme Court. Congress has been very sensitive to military matters clogging the Supreme Court's docket.[148] As noted in Part I.B, that sensitivity was a primary reason that Congress limited availability of Supreme Court review in the first place.

B. The D.C. Circuit Is Not Practically Suited to Field Military Justice Matters

In addition to being constitutionally unsuited to supervise military justice,[149] the D.C. Circuit is also practically unsuited to that task. Even among generalist Article III courts, "[t]he D.C. Circuit is . . . an outlier in . . . criminal cases,"[150] with such matters making up "less than 10% of its docket, or just over a third of the national rate."[151] Conversely, "[a]pproximately half of the D.C. Circuit's docket is administrative appeals or civil suits challenging the constitutionality of a federal program,

145. *See UCMJ Hearings*, *supra* note 13, at 1280–88.

146. *See id.* at 1288; *see also* 10 U.S.C. § 942(e)–(f).

147. *Cf. supra* notes 89 and 92 and accompanying text.

148. *See supra* note 58 and accompanying text.

149. *See supra* Part II.B.

150. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 138 (2013).

151. *Id.* (citation omitted).

while the nationwide average is a mere 20%."[152] The D.C. Circuit's orbit of practical competence couldn't be more different than the CAAF's.

Professor Fidell argues that the D.C. Circuit's military commissions practice proves its practical competence and justifies its supervision of military justice.[153] But the two are very different. "Unlike courts-martial, which are directed at ensuring discipline *within* the military, military commissions apply to non-soldiers: i.e., enemy combatants and civilians in times of war."[154] They also derive their authority from different constitutional provisions.[155] Because of the unique and specialized nature of military law,[156] there really is no comparison short of direct supervision of military law itself.

Combined with the unpredictable volume of military cases the D.C. Circuit might hear, the D.C. Circuit's lack of practical competence would undoubtedly lead to decreased efficiency. Even if transferring supervision of military justice matters to the D.C. Circuit were constitutionally appropriate, Congress should not make that reform at the risk of military justice becoming less efficient and less effective. "[P]roposals to change military justice should carry a burden of proof that they will not materially delay" the administration of military law.[157] Professor Fidell's proposal does not meet that burden.

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152. Ryan Kirk, *A National Court for National Relief: Centralizing Requests for Nationwide Injunctions in the D.C. Circuit*, 88 TENN. L. REV. 515, 552 (2021) (citing Fraser et al., *supra* note 150, at 138).

153. Fidell, *supra* note 1, at 296.

154. Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 583 (2022) (emphasis added).

155. *See id.* at 583–84.

156. *See supra* note 23 and accompanying text.

157. DOD REPORT, *supra* note 71, at 39 (quoting Robinson O. Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 649, 701 (1973)).

IV. CONCLUSION

By starting with an examination of military justice's purpose and allowing that purpose to inform the CAAF's purpose, it is evident that Congress must not terminate the CAAF and transfer its jurisdiction to the D.C. Circuit. Constitutional and practical concerns dictate that the CAAF is properly accountable to Congress and the President because, like military justice, it is an instrumentality of the national defense. Generalist Article III courts are not equipped, either constitutionally or practically, to supervise this warfighting tool that only Congress and the President can properly wield.

Some practical considerations regarding the CAAF's operations like those raised by Professor Fidell are well taken. Similar concerns resulted in Congress creating a uniform system of military law and a civilian appellate court responsible for its supervision in the first place. They also set the stage for a multitude of amendments since that time. Evaluating concerns and adjusting the system is paramount, but Congress must not cede the authority to evaluate and adjust. Such an abdication of Constitutional responsibility would impair the object of military law and thus be "a bridge too far."