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9 Stetson J. Advoc. & L. 52 (2022)

Lights, Lights, Lights! Illuminating the Need for Military Exceptions and Equitable Access to the Supreme Court Post-*Ortiz*

Stefano J. Cavallaro

First Lieutenant
United States Marine Corps
Student Judge Advocate

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I. Introduction

52. The highly publicized courts-martial of Navy SEAL Chief Petty Officer Edward Gallagher and the former President's involvement in his case has once again placed the military justice system in the national spotlight.[2] Making a much smaller splash in the news, the United States Supreme Court in *Ortiz v. United States*, heard a direct appeal from a service member for the first time in twenty-four years.

53. In *Ortiz*, the seven-member majority held that although not an Article III court, the Court has jurisdiction to review decisions of the Court of Appeals for the Armed Forces ("CAAF"), the highest court in the military justice system. The majority focused on the "constitutional pedigree" and "judicial nature" of the military justice system that allows the Court to review the military's court of last resort.

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1 Stefano J. Cavallaro serves as a First Lieutenant in the United States Marine Corps, Student Judge Advocate, and as a licensed attorney in Florida. He received his B.S. from the Florida State University and his J.D. from the University of Florida. The views and opinions expressed in this article are those of the author and do not reflect the official policy or position of any agency of the U.S. Government or the United States Marine Corps.

2 Dave Phillips*, Who Is Edward Gallagher, the SEAL the Navy Wants to Expel?*, N.Y. TIMES A11, Nov. 24, 2019.

54. The dissent, authored by Justice Alito, focused on the Executive Branch's purpose of courts-martials, particularly the command and discipline functions as well as the traditional "military exception" the courts have respected.[3] *Ortiz* has renewed focus on the military appellate system and has spotlighted the present glaring and unfair limitation placed on service members to access the Court on direct appeal.[4]

55. The American military justice system is older than the Constitution. Recognizing the historical uniqueness of military justice, the Founders intended for a separate system by giving Congress the power to "make rules" for the regulation of the armed forces in Article I. In the Bill of Rights, the Founders exempted courts-martials from the grand jury requirement of the Fifth Amendment. The historical beginnings of the military justice system, the Article I power to regulate the military, and the explicit exemption in the Fifth Amendment form the earliest basis for the concept of the military exception from Article III adjudication and review for courts-martials.[5]

56. The modern courts-martial and military appellate system is a much newer concept.[6] Today's military justice system is statutorily defined primarily through the Uniform Code of Military Justice ("UCMJ"). Passed in 1950, and amended several times since, the UCMJ guides the military legal process including the appeals process.[7] Prior to the UCMJ, judicial review of courts-martials could only be obtained through collateral claims, usually in the form of habeas corpus claims in civilian federal courts.[8] Today, direct appeals to the Court are allowed but are severely limited by the Military Justice Act of 1983.[9] Habeas relief does remain, but not until direct appeals — which are more restricted for service members than civilians — are exhausted.[10]

57. The Court has long treated the military justice system as a separate entity from Article III courts. In *Burns*, the Court made clear that "[m]ilitary law, like state law, is a

3 *Ortiz v. United States*, 138 S. Ct. 2165, 2173, 2189–206 (2018).

4 Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019.

5 U.S. CONST. art. I, §{} 8, cl. 14; U.S. CONST. amend. V; See Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 298 (1957); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 937 (2015).

6 See Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 14 (1987).

7 10 U.S.C. §§{} 801–950.

8 *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); see also Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019; Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 940 (2015).

9 28 U.S.C. §{} 1259; see also 10 U.S.C. §{} 867(a): "The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review."

10 See Eugene R. Fidell, Brenner M. Fissel & Dwight H. Sullivan, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, 20 LEXISNEXIS 149, 150 (2002).

jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[11]This separation has often been justified due to the unique status of service members and the need for "good order and discipline" in the armed forces. However, today's court-martial system is often noted as being similar to the civilian system, especially with the expansion to prosecute non-service related crimes. The military's overall movement towards coordinating courts-martial rules and procedure with civilian standards has been called the "civilianization" of military justice and has led some scholars to question the justification of the military exception.[12]

58. This paper will argue that Congress should expand service member's current certiorari access to the Court as the next appropriate evolution in military justice. Congressional action provides measured Article III review of courts-martials as well as continuing the deference to the military exception. This paper focuses only on the courts-martial system for service members and does not address other aspects of military law such as military tribunals or the adjudication of non-service members in courts-martials. Part II explains the historical and current courts-martial system. Part III discusses the legal development of military justice and more modern Court precedent. Part IV emphasizes the importance of the military exception, the value of good order and discipline, and the need for a separate system of military justice. Part IV argues for greater access to the Court for service members. Part VI proposes congressional action as a solution that will balance the Article I nature and purpose of military justice with the need for proper Article III review.

II. The Courts-Martial System

59. The courts-martial system predates the Constitution. The Second Continental Congress promulgated the first code punishing military offenses through courts-martial.[13] One of the earliest and most notable courts-martials was that of Benedict Arnold — his frustration over what he considered an unfair and politically driven trial likely contributed to his motive for his later acts that led his name to become the infamous American

11 *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

12 Criminal Law Dep't, *Criminal Law Deskbook Practicing Military Justice*, TJAGLCS, U.S. ARMY 1–2 (2019); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 937, 962–63 (2015); Albert N. Cavagnaro, *Solorio v. United States: A Return to the Unrestrained Subject Matter Jurisdiction of Military Courts*, 66 N.C. L. REV. 1023, 1030–31 (1988); see, e.g., Michael P. Connors, *The Demise of the Service-Connection Test: Solorio v. United States*, 37 CATH. U. L. REV. 1145, 1168 (1988); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L. J. 1398, 1402 (1973).

13 William Winthrop, *Military Law and Precedents*, LIBRARY OF CONGRESS 47–48 (2d rev. ed. 1920); United States. Continental Congress et al., *Journals of the Continental Congress,* 1774–89*,* 2 WASHINGTON, U.S. GOVT. 111 (1904–37).

metonym for treason.[14]

60. After the Revolutionary War, the Constitutional Convention continued the courts-martial system by giving Congress in Article I the power to "make rules" for the regulation of the "land and naval Forces."[15] At the time, the sole reason recorded explaining the decision to give Congress this power was that it was "added from the existing Articles of Confederation."[16] In the Bill of Rights, the courts-martial system was specifically exempted from the grand jury requirement in the Fifth Amendment.[17] Scholarship has argued that the Founders did not intend the Bill of Rights to apply to the courts-martial system at all. What is apparent, however, is the American military justice system was founded with the intent to be treated separate from the common law and remain unique to the military.[18]

61. After the Second World War, numerous issues concerning the lack of due process and unfairness with the historic courts-martial system were brought to light by veteran's organizations and state bar associations.[19] In 1950, Congress responded by passing the UCMJ, which remains the modern framework of the courts-martial system.[20]

62. The UCMJ starts with three levels of courts-martials for varying seriousness of crimes. A summary courts-martial may only involve an enlisted service member, who must consent to the proceeding, and covers only charges of minor misconduct. A special courts-martial involves crimes that impose a maximum punishment of under twelve months confinement or a bad conduct discharge; special courts-martials are presided by a judge, may include a jury, and are considered alike to civilian misdemeanor trials. For the most serious charges, a general courts-martial is convened with a judge presiding and a jury of at least five members (twelve members for a capital case, unless exigent circumstances exist). Generally, all service members and attached civilians are subject to courts-martial.[21] In *United States v. Ali*, the court upheld Congress's 2006 expansion of court-martials to a noncitizen contractor tried outisde the United States.

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14 Nathaniel Philbrick, *Why Benedict Arnold Turned Traitor Against the American Revolution*, SMITHSONIAN MAG. (2016).

15 U.S. CONST. art I, §{} 8, cl. 14.

16 Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 299 n.9 (1957).

17 U.S. CONST. amend. V.

18 Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 49 n. 30 (1958).

19 The Cox Commission, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, NAT'L INST. OF MIL. JUST (May 2001).

20 10 U.S.C. §§{} 801–950 .

21 10 U.S.C. §§{} 802, 816, 818–20.

Courts-martials operate under rules outlined in the Manual for Courts-Martial, which is issued by the President.[22]

63. Courts-martials are convened by a commander (the convening authority) to address misconduct case-by-case. Unlike standing courts, the criminal incident(s) at hand cause a convening authority to decide whether or not to convene a courts-martial. The convening authority selects the court members (the jury), but trial counsel and the judge are selected separately according to service regulations. Improper influence from the convening authority over the outcome of a courts-martial is expressly prohibited. The trial and defense counsel must be commissioned officers who are certified as judge advocates, requiring them to have attended an accredited civilian law school and be a member of any state or federal bar. Defendants may retain a civilian licensed attorney at their own cost.[23]

64. In 1968, the role of military judges was codified.[24] Military judges are comparable to civilian judges and are judge advocates, who have been certified by their respective branch's Judge Advocate General ("JAG") for the billet, are paid just as any other commissioned officer in their grade, and do not have fixed terms as judges. Each branch of the military has a JAG, who serves as the lead judge advocate (military lawyer).[25]

65. Except for the limited number of cases involving removal from the military or crimes of sexual assault, the verdict is first reviewed by the convening authority, who may accept, mitigate, or commute the sentence. Once the post-trial result is confirmed by the convening authority, the UCMJ sets forth a two-tiered review system with appeals first going to the respective service department's Court of Criminal Appeals ("CCA"). CCA judges may be civilians or military judges, are assigned by their service's JAG to serve for an unspecified time, and may be removed without cause.[26]

66. CCAs are required to review some cases and have discretion to review others. For example, the Court of Criminal Appeals automatically reviews cases in which the judgment entered into the record includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable discharge or bad-conduct discharge, or confinement for two years or more. The Court of Criminal Appeals may review eligible cases for plain error, upon request of the JAG, timely requests for cases in which the sentence involves more than six months confinement and is not automatically reviewed, or when

22 *United States v. Ali*, 71 M.J. 256, 268–69 (C.A.A.F. 2012)*; Manual for Courts-Martial United States*, JOINT SERV. COMM. ON MILITARY JUSTICE (2019 ed.).

23 10 U.S.C. §§{} 822–27; §{} 837; see also *Manual for Courts-Martial United States*, JOINT SERV. COMM. ON MILITARY JUSTICE II-55 (2019 ed.).

24 Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

25 10 U.S.C. §{} 7037; 10 U.S.C. §{} 826.

26 10 U.S.C. §§{} 860(a), 866.

the CAAF grants extraordinary relief.[27] CCAs apply a de novo standard of review and have the authority to overturn convictions and sentences.

67. The CAAF hears appeals from the various CCAs, cases ordered to be heard by any branch's JAG, and death penalty cases. The CAAF is considered the military's court of last resort. The Court of Military Appeals differs in its role from the CAAF in name only. The CAAF is comprised of five civilian judges appointed by the President and confirmed by the Senate for terms of roughly fifteen years. CAAF judges are paid similar to Article III judges and may only be removed for misconduct or other failure to discharge the duties of their office. As limited by statute, decisions of the CAAF may only be reviewed by the Court in cases that the CAAF has granted review or extraordinary relief.[28] This limited access to the Court has been noted as more restrictive than the access afforded to direct appeals of criminal convictions in federal and state civilian courts, and even convictions of enemy combatants in military tribunals. Only a tiny minority of service members convicted by courts-martial are entitled to appeal their conviction to the Supreme Court. In that regard service members are not only treated worse than every other criminal defendant in state and federal courts, they're also treated worse than the noncitizen enemy combatants being tried at Guantánamo.[29]

III. Modernization and Current Constitutional Understandings of the Courts-Martial System

68. As the Court stated in *Ortiz*, "courts-martial are now subject to several tiers of appellate review, thus forming part of an integrated 'courts-martial system' that closely resembles civilian structures of justice."[30] The military legal community's overall movement towards coordinating military law procedural and evidentiary rules with civilian standards has been called the "civilianization" of military law.[31] For example, the Mili-

27 *Manual for Courts-Martial United States*, JOINT SERV. COMM. ON MILITARY JUSTICE II–190–91 (2019 ed.).

28 10 U.S.C. §§{} 866(d), 867(a); 941; 942(c)–(d); 28 U.S.C. §{} 1259. See also *Ryder v. United States*, 515 U.S. 177, 187 (1995).

29 Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, EVOLVING MIL. JUST. 149, 151 n. 14 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). See also Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019; Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, EVOLVING MIL. JUST. 149, 151 n. 14 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

30 *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018).

31 See Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 38–49 (1970); see also Stephen I. Vladeck, *The Civilianization of Military Jurisdiction* in THE CONSITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 287, 288 (John T. Parry & L. Song Richardson eds., 2013).

tary Rules of Evidence ("MRE") were drafted after the Federal Rules of Evidence ("FRE") were passed in 1975, and the MRE drafting committee intended the military rules to be similar to the new civilian rules. This concept was codified at MRE Rule 1102, where changes to the FRE generally change corresponding sections in the MRE.[32]

69. In fact, the military justice system has often been ahead of the civilian system in assuring constitutional protections. Both UCMJ Article 31(b), the military's equivalent of the "Miranda warning," and Article 38(b), which guarantees access to counsel, were in effect well before the Court recognized these rights.[33] Additionally, the courts-martial system has been criticized for its culture of an excess of due process, leading to courts-martials being considered too time-consuming. The government routinely pays for many discovery costs for the defense such as witness travel, and the military's discovery process is regarded as having higher standards than the civilian process. Commanders have been electing to choose non-judicial punishments or administrative discharges at higher rates due to the perceived cumbersome nature of courts-martials. In 2013, court-martials were only utilized for 2.77 soldiers, 2.48 sailors or marines, and 2.33 airmen per thousand as compared to 588 soldiers and 239 sailors or marines per thousand in 1913.[34]

70. Despite this "civilianization" of the system that has occurred since 1950, the courts have continued to treat the courts-martial system as a "separate society."[35] As Chief Justice Warren Burger stated in *Chappell v. Wallace*:

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.[36]

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32 See MIL. R. EVID. 1102(a); see also *Manual for Courts-Martial United States*, JOINT SERV. COMM. ON MILITARY JUSTICE III-51 (2019 ed.); Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 13 (1990).

33 Compare *Act of May 5, 1950*, Pub. L. Ch. 169, 64 Stat. 118, 120 (1950) with *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also *United States v. Kemp*, 13 U.S.C.M.A. 89, 97 (1962): "Fully conscious of the fact that a person in the military service might not know of his right to refuse to answer and thereby unwittingly waive such privilege, and of his unique position while under interrogation, Congress went much further than the Fifth Amendment."

34 Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485, 511–12, 507 (2014); see also Elizabeth Cameron Hernandez & Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems,* 67 A.F. L. REV. 187, 198 (2011).

35 *Parker v. Levy*, 417 U.S. 733, 743 (1974).

36 *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

71. The seminal decision that expanded the military exception, much to the chagrin of some scholarship, was *Solorio v. United States*, which held that "service members may be court-martialed for any offense, whether or not the crime had any relationship to their military service."[37] In *Solorio*, the Rehnquist Court abandoned the prior "service-connection test" and held that service members may be courts-martialed for any offense, regardless of the nature of the offense. The Court focused its decision on the "make rules" clause from Article I and explicitly stated, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[38]

72. In 1994, the Court continued the military exception and solidified the Article I status of the CCAs. In 1997, the Court re-affirmed its position on the Article I nature of CCAs as well as explicitly declaring that the CAAF was also an Article I court and an "Executive Branch entity."[39] Moving to the present day, the Court has made clear its jurisdiction to review the CAAF as well as its nature as an Article I court. In *Clinton v. Goldsmith*, a unanimous Court stated that Congress created the CAAF under its expressed rulemaking power in Article I, since when the Court has continued to preserve that Court's authority to review the CAAF based on the statutory scheme Congress created.[40]

73. In 2018, the Court heard a direct appeal from a service member for the first time in twenty-four years. The *Ortiz* Court offered its most recent and most robust analysis of the CAAF as an Article I court and the Court's certiorari jurisdiction. In analyzing the appropriateness of the Court's appellate review, the Court started with the statutory authorization from Congress. Then, the Court likened the military appeals system to other Article I courts, such as territorial courts and the District of Columbia courts, citing the Court's longstanding ability to review these Article I courts. Specifically, the Court relied on *United States v. Coe* to point at the longstanding ability of Congress to have Article I courts be subjected to the appellate jurisdiction of the Court. Conclusively, the Court reasoned that the "judicial character" paired with Congress creating the CAAF as a "permanent court of record" allows the CAAF as an "Executive Branch entity" to be

37 See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 937, 962–63 (2015); see e.g. Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT L. REV. 265, 293 (1994); *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1917 (1990).

38 *Solorio v. United States*, 83 U.S. 435, 447, 450 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969).

39 *Edmond v. United States*, 520 U.S. 651, 664 (1997); see also *Weiss v. United States*, 510 U.S. 163, 164 (1994).

40 *Clinton v. Goldsmith,* 526 U.S. 529, 533–34 (1999). See also *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018); *United States v. Denedo*, 556 U.S. 904 (2009); *United States v. Scheffer*, 523 U.S. 303 (1998).

reviewed by the Court.[41]

74. In his concurrence, Justice Thomas concentrated on the fact that courts-martials' ability to adjudicate private rights does not encroach on the Vesting Clause of Article III because the Constitution gave Congress "exceptional" power to create military courts that can exercise judicial power outside of Article III. Since the CAAF has "judicial power," Justice Thomas reasoned that the statutory authorization from Congress is sufficient to justify the Court's review jurisdiction.[42]

75. The dissent, authored by Justice Alito and joined by new-at-the-time Justice Gorsuch, focused on the lawful exercise of "judicial power." The dissent contended that Executive Branch officers in a courts-martial cannot exercise judicial power, and therefore their decisions may not be reviewed by the Court. Justice Alito stated that the CAAF is an agent of executive power that serves as a tool of discipline to assist the President as Commander-in-Chief, and rejected the weight given to the "judicial nature" of the CAAF by the majority as a mere "looks like test." The dissent rejected the comparison to the territorial or D.C. courts as Congress acts as all three branches for these jurisdictions and thus can use judicial power. Further, the dissent points out that military offenses are "exceptions" to Article III. Interestingly, the dissent does offer a solution in the form of Congress changing the structure of the CAAF to match those of Article III courts (making the CAAF a true Article III court) or by placing its decisions under review by a lower existing federal court.[43] Ultimately, a seven-member majority definitively held the Court's jurisdiction over the CAAF.

IV. The Value of the Military Exception

76. The title of this paper is more than just figurative language; the wake-up call of a Marine Drill Instructor (or equivalent for any branch) will long remain a distinct memory from basic training for many service members. Less than 0.5% of the US population serve actively in the armed forces. As of 2016, roughly 7% of the population are veterans compared to 18% in 1980.[44] None of the current justices are veterans. When Justice John Paul Stevens resigned in 2010, the Court was left with no justice with any

41 *Ortiz v. United States*, 138 S. Ct. 2165, 2186–2197 (2018); *United States v. Coe*, 155 U.S. 76, 86 (1894).

42 See *Ortiz v. United States*, 138 S. Ct. 2165, 2184–2189 (2018).

43 See *Ortiz v. United States*, 138 S. Ct. 2165, 2190, 2197, 2205 (2018).

44 Lance Cpl. Carlin Warren, *Charlotte, N.C., natives strengthen their brotherhood while training on Parris Island, S.C.*, Marine Corps Recruit Depot, Parris Island, USMC (2018); George M. Reynolds & Amanda Shendruk, *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELATIONS (2018); Kristen Bialik, *The changing face of America's veteran population*, PEW RESEARCH CENTER (2017); see generally Douglas L. Kriner & Francis X. Shen, *Invisible Inequality: The Two Americas of Military Sacrifice*, 46 U. MEM. L. REV. 545 (2016).

active wartime experience for the first time since 1936.[45] As the gap between those who have and have not served increases, the legal system will be composed of more decision-makers who have not experienced and may not understand the distinctiveness of military life and culture.[46]

A. The Legal Argument for the Military Exception

77. As Chief Justice Burger wrote in *Chappell*, the longstanding military exception has been treated as "too obvious" to debate.[47] Professor Stephen Vladeck has explained that the Court has traditionally reasoned the need for a separate military justice system through "some combination of four distinct — but related — normative justifications: . . . 'physical' separation, 'philosophical' separation, 'legal' separation, and 'remedial' separation."[48]

78. Physical separation is the need for a legal system as part of the command structure for when military units are deployed or generally isolated from the civilian population. Philosophical separation involves the differences of experiences and understandings between civilians and service members. Legal separation refers to the distinctions between the civilian and military legal system. Remedial separation refers to differences in the central goal of each legal system such as the civilian goal of punitive or rehabilitative justice in contrast to the military's goal of preserving good order and discipline.

79. The legal beginning of the military exception starts with Congress' Article I power to "make rules" for the armed forces as well as the historical understanding of courts-martials. Very few powers are expressly stated in the Constitution, so the weight that the Founders gave military justice through its explicit mention in not just the Constitution, but also the Bill of Rights, offers a foundation for the courts-martial system's exception from Article III.[49]

80. The UCMJ's "punitive articles" include multiple offenses from military-specific to conventional criminal misconduct. Examples of military-specific offenses include Desertion, Contempt Toward Officials, Failure to Obey an Order, Mutiny or Sedition, and Misbehavior Before the Enemy. Examples of crimes recognizable in the civilian system that

45 Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC, Aug. 13, 2012.

46 Sabrina Tavernise, *As Fewer Americans Serve, Growing Gap Is Found Between Civilians and Military*, THE GAINESVILLE SUN, Nov. 24, 2011.

47 *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

48 Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 948 (2015).

49 *Dynes v. Hoover*, 61 U.S. 65, 82–83 (1858); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

the UCMJ criminalizes include forgery, murder, rape, robbery, and kidnapping. However, only a service member would have the understanding to serve as a court member for a courts-martial over not only the military-specific offenses, but also some of the more subjective, but constitutional, offenses such as Conduct Unbecoming an Officer and a Gentleman and the contentious Article 134 General Article.[50] As the court noted in *Parker v. Levy*, the petitioner, an Army officer, had "fair notice" that the conduct he engaged in would be punishable under the UCMJ. A civilian would likely not understand the context and expectations involved when evaluating the culpability of a UCMJ offense, and the Court in *Parker* implied that the separateness of the military justice system adheres to due process stating that "[w]hile a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community."[51]

81. In *Solorio*, the Court furthered the military exception by overruling its previous precedent of the "service-connection test," holding that courts-martial jurisdiction is based on the military status of the accused. The Court described Congress's Article I police power over the military as plenary, therefore justifying Congress's regulation of all service member conduct. Further the Court emphasized historical practice to support the constitutionality of courts-martial jurisdiction over civilian offenses.[52] With *Solorio*, the Court centered the military exception on Congress's police powers instead of relying on the exclusion found in the Fifth Amendment by using the language of the Make Rules Clause to countenance a broadening of the Article III excpetion. The *Ortiz* Court acknowledged this expansion of jurisdiction to include "garden-variety" crimes as part of its formulation of the judicial nature of today's courts-martials having stated:

> The jurisdiction and structure of the courts-martial system likewise resemble those of other courts whose decisions we review. Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service.[53]

B. The Sociological Need for the Military Exception

82. Other factors play into the need for the military exception from Article III jurisdiction, specifically the philosophical differences between the civilian and military system

50 10 U.S.C. §§{} 933–34; *Parker v. Levy*, 417 U.S. 733 (1974); see generally Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline*, 66 CLEV. ST. L. REV. 123 (2017).

51 C.f. *Parker v. Levy*, 417 U.S. 733, 749, 755 (1974).

52 *Solorio v. United States*, 483 U.S. 435, 436, 441, 444–45 (1987).

53 *Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018); see also Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 963 (2015).

as well as the abstruse concept of good order and discipline.

83. First, the "civilianization" of the military justice system does not cut against the need, philosophically or otherwise, for the military exception. Since the experience of World War II brought the military justice system into the popular consciousness and shook confidence in the system's fairness, those designing the system have made enhancing the perceived legitimacy of the system a central principle of its development.[54] The modern military justice system has attempted over time to balance the primary need for commanders to enforce discipline with the rights of service members. The convening authority convenes the court-martial but cannot interfere in the trial. As retired Brigadier General John S. Cooke, U.S. Army JAG, said, "discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures."[55] Outside of specific military law training, the military expects judge advocates to gain a majority of their education from civilian law schools. The pragmatism of the military legal community to conform military rules and procedure similar to civilian rules is logical and was specifically intended.[56] Not only does the similarity offer military lawyers the breadth of civilian jurisprudence to guide their decision-making, but also allows them to gain experience in a system similar to what they learned in law school and will practice in upon retirement. Just because courts-martials operate under rules and procedures that are similar to the civilian system does not negate the foundational goal of a separate system of military justice. Judge Everett, who was Chief Judge of the CAAF from 1980–1990, responded to a question on the civilianization of military justice by saying:

> [I]f to 'civilianize' meant ignoring the uniqueness of the military society and its needs, then I was opposed; but if the term referred to the acknowledgement that certain basic ethical norms apply to the military, as well as to the civilian, society, then I was in favor.[57]

84. Looking at the unit level, commanders need to maintain discipline and cannot assume obedience from their subordinates, especially when asking them to act against human nature by killing, charging into danger, or not responding with force when threatened. Leaders must also gain buy-in from their subordinates. Studies of veterans have shown that "being told to fire" by their superior is the crucial factor in their decision to fire their weapons in combat, and that the fighter's respect for their leader directly

54 *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 958 (2010); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 963 (2015).

55 See John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW. 1, 2 (2000); 10 U.S.C. §{} 837.

56 10 U.S.C. §{} 837. See also Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 38–49 (1970); Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, in THE CONSTITUTION AND THE FUTURE OF CRIMINAL LAW IN AMERICA (John T. Parry & L. Song Richardson eds., 2013).

57 See Robinson O. Everett, *Some Comments on the Civilization of Military Justice*, ARMY LAW. 1, 3 (1980).

impacts their obedience to orders.[58] Beyond command authority, service members of the same rank rely on each other to complete the mission and are told that they always represent their service whether on or off duty.[59]

85. Though "good order and discipline" is often maligned as a platitude, the concept at its core is incredibly important to the function of an effective and lethal military. The logic of *Solorio* to expand jurisdiction of courts-martials to cover all offenses under the UCMJ based on the military status of the offender as well as the "fair notice" rationale from *Levy* presents a more practical consideration of maintaining "good order and discipline" in the Armed Forces. Take the offense in *Solorio*: sexual abuse of a minor (separating the fact that the defendant abused a fellow service member's daughters).[60] It does not take a stretch of logic to know that once the unit learns about this "non-service connected" offense, the defendant's command ability will be impaired, his trust among his or her peers will be eradicated, and his superiors will be suspicious of his or her ability to faithfully discharge orders.

86. For purposes of the military justice system, that distinction between common law offenses and military offenses is meaningless. Service members who commit crimes such as larceny, sexual assault, and murder pose as significant a threat to good order and discipline as do the crimes of desertion, disobedience of an order, and conduct unbecoming an officer and a gentleman. The casual observer who asks what business the military has in trying service members who have stolen fellow service members' belongings does not understand the real problem posed by such "barracks thieves."[61]

87. The harm caused to the unit by improper acts, regardless of their connection to the service, can only be fairly judged by a jury of one's peers in fellow service members. Further, commanders rely on the discipline purpose of the UCMJ to ensure that that breaks of good order are clearly punished.[62] The effects to the unit from an offense that can be easily recognized as a civilian crime involve impacts that are tenfold and

58 Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, 143–44 (2009). See also Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice*, 90 N.D. L. Rev. 485, 522 (2014); Headquarters, Department of the Army, *FM 6-22 Leader Development*, U.S. Army, (Nov. 21, 2019).

59 See, e.g., General Robert B. Neller, *Message to the Force 2018: "Execute,"* U.S. Marine Corps (Jan. 26, 2018).

60 See *Solorio v. United States*, 483 U.S. 435, 449, 452 (1987); see also *Parker v. Levy*, 417 U.S. 733, 755 (1974) and Colonel Jeffery S. Weber, USAF, *The Disorderly, Undisciplined State of the "Good Order and Discipline" Term*, Air War College (Nov. 21, 2019).

61 David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. Rev. 193, 215–16 (2015).

62 *United States v. Morgan*, 40 C.M.R. 583, 586 (1969; *Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services, Commanders of the Combatant Commands*, Sec'y of Def. (Aug. 13, 2018).

unconsidered in civilian adjudication of justice, thus requiring the military exception for courts-martials.

88. Most service members, enlisted and officers, understand the real damage to moral and discipline in a unit where an accused has stolen a possession from a fellow service member, a comrade in arms. It undermines trust and confidence in the ranks, qualities that are indispensable for good order and discipline.[63]

V. The Need for Fair Access to the Court for Service Members

89. The necessity of the military exception from Article III does not negate the importance of some Article III review, nor does it demand a complete separation, akin to Colonel Nathan Jessup unequivocally declaring "I run my unit how I run my unit" in the classic Rob Reiner film, *A Few Good Men*.[64] Though military appeals courts are Article I courts, *Ortiz* held that all roads, at least all *statutorily opened* roads, lead to the Supreme Court. Nevertheless, the Court noted its jurisdiction over the CAAF derives from more reasons than just statutory sanction.[65] The Court's emphasis on the judicial nature of the CAAF stands in stark ideological contrast to the continued limitation of access to the Court for service members.

90. Congress currently limits appeals from the CAAF to the Court to cases in which the CAAF has granted review or extraordinary relief.

91. However, the Supreme Court review by writ of certiorari is limited to those cases where CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief. The Court does not have jurisdiction to consider denials of petitions for extraordinary relief. Servicemembers whose petitions for review or for extraordinary relief are denied by CAAF may seek additional review only through collateral means, for example, petitioning for habeas corpus to an Article III court, which could provide an alternate avenue for Supreme Court review.[66]

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63 David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 215–16 (2015)

64 *A Few Good Men* (Columbia Pictures 1992).

65 See *Ortiz v. United States*, 138 S. Ct. 2165, 2172–73, 2180 (2018).

66 Criminal Law Dep't, *Criminal Law Deskbook Practicing Military Justice*, TJAGLCS, U.S. ARMY 1-2 (2019). See 28 U.S.C. §{} 1259.

92. Compared to civilian criminal appeals, Congress limits service member appeals far more strictly. This constraint has essentially made the CAAF the "doorkeeper" for the Court. Criminal defendants in federal court, state court, and even noncitizen enemy combatants in military commissions have easier access to the Court than do service members seeking direct review of CAAF decisions.[67]

93. Although the "civilianization" of the courts-martial system has been used to question the need for a separate military justice system, the logic behind the military justice system resembling parts of the civilian system lends weight to the appropriateness of expanding access to the Court.

> Although the procedures deployed by courts-martial still differ in substantial ways from those one would find in a federal (or state) civilian court . . . U.S. military tribunals have, perhaps surprisingly, been active participant — if not trailblazers — in the articulation of constitutionally grounded principles of both criminal law and procedure. This phenomenon, which some have described as the "civilianization" of military law, may well have been precipitated by Congress's progressive investiture of civilian appellate courts — including the Court of Appeals for the Armed Forces (CAAF) and the U.S. Supreme Court — with direct appellate jurisdiction over . . . military courts.[68]

94. Military justice has purposefully moved itself to a place past its "rough" origins through reforms and adoption of aspects of the civilian criminal justice system when appropriate.[69] The Court today considers the courts-martial system as judicial and falling under the Court's appellate review jurisdiction.[70] With the question of jurisdiction over the CAAF settled, the next evolution of the military appeals system is to make access to the Court as accessible as the civilian system.

95. By removing the current statutory restraints, Congress will fix a glaring injustice to our service members. A quantitative study found that the CAAF currently focuses substantially more on correcting case-specific errors and too often denies review for cases involving substantive legal questions.[71] By removing the present restrictions, Congress would be encouraging the CAAF, a court that is closer in placement and with greater

67 See Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in EVOLVING MIL. JUST., 149, 150 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). See also 28 U.S.C. §{} 1259.

68 Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L. J. 933, 950–51 (2015).

69 *Reid v. Covert*, 354 U.S. 1, 35 (1957); see also Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice*, 90 N.D. L. REV. 485, 504 (2014).

70 *Ortiz v. United States*, 138 S. Ct. 2165, 2175, 2180 (2018).

71 Rodrigo M. Caruço, *In Order to Form a More Perfect Court*, 41 VT. L. REV. 71, 122 (2016). See also See Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019.

expertise on military matters, to be more active in answering legal disputes arising from the courts-martial system. Additionally, Congress would allow the military justice system to benefit from the Court's guidance on disputes of law. Since today's courts-martial system is increasingly similar to the civilian system, the Court could suitably answer salient issues facing both systems. Expansion of the Court's jurisdiction aligns with the military's historical progression to conform with civilian legal rules when appropriate.[72]

96. Though some concerns exist in expanding access, many of the current system's flaws could be cured with greater access to the Court. In 1983, when the access to the Court was codified by Congress, the primary concern driving the limitation of Court access was the quantity of cases that might come from the military justice system for review.[73] The concern of the Court's docket being overburdened with military appeals are unfounded as expansion would not change the Court's current exercise of its power of discretion. The Court's current certiorari review of the CAAF will generally be limited to the cases the Supreme Court deems worthy of review.[74] Importantly, any certiorari expansion must continue to respect the military exception, which would alleviate concerns for the Court becoming too involved in a military command function. Since the Court has a long-standing history of respecting the military exception, opening direct appeal access to the Court should not threaten this convention.[75]

VI. Harmonizing the Military Exception with Fair Court Access

97. With the Court in *Ortiz* not only affirming the statutory authorization from Congress to review the CAAF but also focusing on the judicial character of the Court, the current limitations on service member appeals do not appear to be indicative of a fair judicial system. Limiting service member access to the Court more restrictively than enemy combatants is not representative of the values we ask our service members to risk life and limb to defend.[76] For most cases today, the current statutory restrictions are simply too burdensome to overcome.

72 James A. Young, *Court-Martial Procedure: A Proposal*, 41 REPORTER 20, 24 (2014); John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW. 1, 4 (2000). See also *United States v. Scheffer*, 523 U.S. 303, 305 (1998) (addressing the admissibility of polygraph evidence with wide-ranging civilian effects); *Davis v. United States*, 512 U.S. 452, 454 (1994) (addressing the ambiguous requests for counsel requiring law enforcement to stop questioning a suspect).

73 Military Justice Review Grp., *Part I: UCMJ Recommendations*, DEP'T. OF DEF. (2015).

74 H.R. Rep. No. 111-547

75 Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice*, 90 N.D. L. REV. 485, 522 (2014); *Solorio v. United States*, 483 U.S. 441 (1987).

76 See *Summary of the 2018 National Defense Strategy*, DEP'T OF DEF. (2018).

98. While the chances of Supreme Court review in any military case seem to be slight indeed on the evidence to date, it is still wrong to bar the door to certiorari based on denial of certiorari in some other case, since that other case may not have framed the issue properly or may have had complications or procedural problems that rendered it an inappropriate vehicle for plenary review even though the issue itself might have been certworthy.[77]

99. The most direct solution is congressional action expanding the Court's certiorari jurisdiction over the CAAF. The dissent in *Ortiz* suggested transforming the CAAF into an Article III court or placing the CAAF under a lower, existing Article III court:

> If Congress wants us to review CAAF decisions, it can convert that tribunal into an Article III court or it can make CAAF decisions reviewable first in a lower federal court — perhaps one of the regional Courts of Appeals or the Federal Circuit — with additional review available here.[78]

100. However, solutions beyond direct congressional action could threaten the current status of the military exception.

101. Any expansion of certiorari to the Court necessitates the Court to continue preserving the military exception. The courts-martial system is and must remain an executive function, and the Court must continue to allow for a "special and exclusive system of military justice."[79] When Congress enacted and has over time revised the UCMJ, the primary goal was to balance the needs of commanders to maintain discipline with the rights of service member. Nevertheless, military justice is ultimately a command tool.[80] If certiorari jurisdiction for service members were to expand, the Court must continue to respect the military exception. The expansion of access to the Court should be treated as Congress continuing to balance and consider the rights of service members, and not a call to drastically change the underpinnings of the system.

102. The most direct process would be for Congress to change the law and make access to the Court similar to the civilian process.[81] Congress has considered expanding the Court's jurisdiction over the CAAF several times since 2005 with the most recent version

77 Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in EVOLVING MIL. JUST., 149, 150 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

78 *Ortiz v. United States*, 138 S. Ct. 2165, 2205 (2018). See also Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019.

79 *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

80 David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1, 4 (2013); Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice*, 90 N.D. L. REV. 485, 504–05 (2014).

81 See 28 U.S.C. §§{} 1291–92.

being a proposed amendment made in 2020 to National Defense Authorization Act for Fiscal Year 2021 that received no action in committee.[82] Opposition to the legislation has focused on the bill's potential to burden the Court's docket, the cost for staffing to account for an increase in appeals, potential unintended consequences from expanded appellate jurisdiction, and suggested that current avenues for redress are sufficient.[83] However, concerns of overburdening the Court are misplaced and the Congressional Research Office found that costs would be negligible and limited to those few cases the Court decides to review.[84] Further, the Court's continued respect for the military exception counters concerns of unintended consequences, and basic notions of fairness should entitle our service members to equitable access to the Court.

103. In his dissent in *Ortiz*, Justice Alito proffers two options on changing the appeal structure of the CAAF, albeit focusing more on Constitutional grounds. To allow for the "proper exercise" of judicial power, the dissent suggests that the CAAF be converted into an Article III court with the requisite structure such as life-tenured judges. The dissent also suggests that the CAAF could be moved under an existing Article III court of appeal. These two solutions would expand appellate access for service members as the CAAF would fall under the current, more expansive certiorari rules for civilian courts. Though the dissent uses these suggestions to correct, in its opinion, the constitutional flaws of the Court reviewing decisions of the CAAF, due to the authority who offered these suggestions, this paper will address them. Converting the CAAF into an Article III court would change the current nature of military justice as an Executive function, would not fit with the Court's treatment of other Article I courts, lacks constitutional basis, and would threaten the military exception. If the CAAF was changed to an Article III court, the CAAF would be more distant from the military, would likely lose the JAG's ability to order a case reviewed, and would essentially signal that military justice is no longer part of the Commander-in-Chief's toolbox to preserve good order and discipline.[85] Since the Court has already asserted its jurisdiction over the CAAF, adjusting the nature of the CAAF into an Article III court does not truly address the injustice facing service members and would threaten the military exception.

104. Similarly, organizing the CAAF under the various regional courts of appeal or placing it under the Court of Appeals for the Federal Circuit would cut against the purpose of military justice, lead to confusion in jurisprudence, and would threaten the military exception. Availing the CAAF to regional court review would cause variance and confusion

82 See Amend. to Rules H. Comm., Print 116-57f; see also Equal Justice for Our Military Act of 2017, H.R. 2783, 115th Congress (2017); H.R. 2828, 114th Cong. (2015); H.R. 1435, 113th Cong. (2013); H.R. 3133, 112th Cong. (2011); H.R. 569, 111th Cong. (2010); H.R. 3174 110th Cong. (2007); H.R. 1364, 109th Cong. (2005).

83 See H.R. Rep. No. 111-547, 12 (2009); see also 114 Cong. Rec. H10, 162 (daily ed. Sept. 27, 2008); Bernie Becker, *Military Appeal Process is Challenged*, N.Y. TIMES, Nov. 27, 2008.

84 H.R. Rep. No. 111-547, 6–7 (2009).

85 *Ortiz v. United States*, 138 S. Ct. 2165, 2170, 2190, 2205 (2018).

in standards between the differing circuits, which cuts against long-standing treatment and consensus for a separate system of military justice. Even moving the CAAF under the Federal Circuit would force the courts-martial system to be subject to another level of Article III oversight, which could dissipate the military exception and make appellate access to the Court another step farther away. While providing access to the Court for service members, placing the CAAF under an existing court of appeal adds another burdensome step and moves the system away from its purpose.

105. Congressional action increasing access to the Supreme Court for service members does not threaten the Article I nature of military appeals courts nor the military exception. When Congress creates Article I courts, Congress may also grant direct appellate review to the Court, especially for a court of record such as the CAAF.[86] Some concerns, constitutionally and functionally, exist regarding decisions of CAAF being subject to some action by the service secretary or the President.[87] After the highly publicized trial of Chief Petty Officer Gallagher and the President's intervention in the resulting punishment of the Navy SEAL's courts-martial, the President's ability to become involved in military justice was displayed nationally.[88] However, the civilian leadership of the military is the ultimate "convening authority" and the purpose of the courts-martial system is command's need to preserve good order and discipline. The courts-martial system is designed solely to serve this function (regardless of the prerogative of the intermittent individuals in charge). Further, any of the President's or service secretary's potential discretion cuts in favor of the accused as they can likely only revise or set aside the sentence.[89]

106. A driving motive for the military to adopt a civilian-like courts-martial and appellate system was to remove the capricious nature of the older courts-martial system. By expanding access to the Court, Congress is utilizing its Article I authority, as defined in *Coe* and continued in *Ortiz*, to have the CAAF, an Article I military appellate court, reviewed by the Court. In this manner, the military exception continues, and Congress is carrying on military law's tradition of appropriately utilizing features of civilian law to improve the courts-martial system.

107. The current situation for our service members runs against our general notions of fairness. Roughly 90% of special and general court-martials are ineligible for Supreme

86 *United States v. Coe*, 155 U.S. 76, 86 (1894). See also *Ortiz v. United States*, 138 S. Ct. 2165, 2176–77 (2018).

87 10 U.S.C. §{} 867(e); see also *Article III — Federal Courts — Ortiz v. United States*, 132 HARV. L. REV. 317, 322 (2018).

88 Dave Phillips, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, N.Y. TIMES, Nov. 21, 2019.

89 David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1, 74 (2013); *Article III — Federal Courts — Ortiz v. United States*, 132 HARV. L. REV. 317, 325 (2018).

Court review due to the present limitations.[90] Further, the CAAF acts far too often as an error-correcting court, and not a true appellate court that answers legal questions. In the 2014–2015 term, the CAAF acted nearly half of the time as an error-correcting court, and historically has not answered many of the substantive legal and policy questions that would be expected from a court of last resort.

108. A study found that the CAAF issued 152 decisions in the 1951–1952 term, 195 in the 1968–1969 term, 110 in the 1994–1995 term, and 37 in the 2014–2015 term. Error-correcting decisions when eliminating all decisions beyond the CAAF's discretionary docket in a were 112 in 1951–1952, 175 in 1968–1969, 94 in 1994–1995, and 29 in 2014–2015. The percentage of error-correcting decisions per term was 75% in 1951–1952, 89% in 1968–1969, 73% in 1994–1995, and 43% in 2014–2015. In contrast, the Supreme Court issued no error-correcting decisions in the 2014–2015 term and rarely does.[91]

109. If the CAAF will not fill this need, the Supreme Court is well-equipped and experienced in this role. The military system needs an appellate court than can answer the specialized questions that will arise as well as ones that just will not gain the Court's attention. Not only is this a proper use of civilian institutions, but by opening access to the Court, Congress also can incentivize the CAAF to act more accordingly as the military's court of last resort.

110. Congress should not change the Article I status of military appeals courts, nor should it place the CAAF under an existing Article III court. Moreover, the Court should not expand access via judicial means as it would have no basis to do so with an Article I court. Only through legislation should access to the Court be expanded. Congress, and only Congress, must act. In *Ortiz*, the Court definitively held that it can hear appeals from the CAAF, however access remains limited.[92] Now Congress can open the door.

VII. Conclusion

111. The case of Chief Petty Officer Gallagher has once again brought military justice into the spotlight. Not only is national attention back on the system, but so is judicial attention with the Court hearing a direct appeal from a service member for the first time in twenty-four years in *Ortiz*. By asserting its jurisdiction over the CAAF, the Court indirectly sheds light on the glaring inequity that exists for our service members in the

90 Eugene Fidell, *How "Robust" is Appellate Review of Courts-Martial*, BALKINIZATION BLOG, May 8, 2013. See also Bernie Becker, *Military Appeal Process Is Challenged*, N.Y. TIMES, Nov. 27, 2008.

91 Rodrigo M. Caruço, *In Order to Form a More Perfect Court*, 41 VT. L. REV. 108 (2016).

92 *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018). See also Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557 (1994).

military appellate process. The majority found that the "constitutional pedigree" and "judicial nature" of the CAAF joined with statutory authority allows the Court to review the CAAF. Responding, the dissent placed greater emphasis on the command functions as well as the traditional military exception. Ultimately, the seven-member majority held the Court's jurisdiction over the CAAF.[93]

112. However, the current access to the Court remains insufficient and unfair to service members. The Court is presently limited to only hearing cases that the CAAF has granted review or extraordinary relief.[94] Since the CAAF too often hears error-correcting cases, leaving many worthy questions unanswered, access to the Court is necessary. Service members are presently severely limited from getting redress from the Court, which stands in stark contrast to the access afforded to civilians and even enemy combatants.[95]

113. As the Court emphasized in *Solorio*, the courts-martial system derives from Congress's police powers to "make rules" from Article I.[96] Any expansion of access to the Court must be paired with the continuation of the military exception that the Court has applied historically. The courts-martial system must remain a "special and exclusive system" and be based primarily on the commander's need to preserve good order and discipline.[97]

114. Congress has already spoken to the importance of some certiorari access to the Court for service members. However, the access that military justice offers our service members is inadequate and unjust. Expanding access to the Supreme Court is simply Congress utilizing the most established court of last resort to continue to maintain the balance between the need for good order and discipline while providing a fair and just legal system that our service members deserve.

93 *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018).

94 28 U.S.C. §{} 1259.

95 Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES, Mar. 20, 2019.

96 *Solorio v. United States*, 483 U.S. 435, 441 (1987).

97 *Parker v. Levy*, 417 U.S. 733, 743 (1974).