Why Military Justice Doesn't Get Enough Academic Attention

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Rodrigo M. Caruço, *In Order to Form a More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success as a Court of Last Resort*, 41 **Vt. L. Rev.** 71 (2016).

The military justice system receives embarrassingly little attention from the legal academy in general and from legal scholarship in particular. Part of that may be the Supreme Court's fault; it has been 35 years since Congress gave the Court direct appellate jurisdiction over the Court of Appeals for the Armed Forces ("CAAF"), the Article I court that sits atop the court-martial system. In that time, the Court has taken ten cases from CAAF—almost all of which, including *Ortiz* from this Term (which I argued on behalf of the Petitioner), have involved structural questions about the jurisdiction of military courts, the appointments of military judges, or both. There are compelling reasons why the Justices can and should take more (and more substantive) cases from CAAF, but there are important limits on their power to do so. Under current law, CAAF has discretion to choose which cases it hears (it has mandatory jurisdiction only in capital cases and those referred to CAAF by service-branch Judge Advocates General), and the Supreme Court can grant certiorari only if CAAF itself reviewed a court-martial appeal. As a result, a direct constitutional challenge to a criminal conviction cannot get to the Supreme Court if it arises from a court martial that CAAF does not review—the only context in the entire federal system today in which that is true. And as I have argued elsewhere, it is not because these cases are unimportant. Instead, "there are plenty of cases that the Court can take from CAAF but doesn't, and there are even more cases that it can't take but otherwise should."

But the dearth of Supreme Court attention to the military justice system hardly explains the dearth of scholarship about it. After all, the Court has decided exactly one case arising out of the Guantánamo military commissions since they were established in November 2001, which have produced exactly eight convictions, all or parts of five of which have not survived appeal. Yet the pages of law reviews and legal monographs are replete with detailed analyses of the various disputes arising from those proceedings. Instead, the best that can be said about the paucity of good military justice scholarship is that, for whatever reason, there is not the same interest among non-military lawyers in the myriad substantive, procedural, and evidentiary issues that arise in the court-martial system. This is true even though that system has (1) increasingly focused its work on offenses that look less and less like the classic military offenses subjected to military justice at the Founding and that therefore increasingly raise legal questions of general applicability; and (2) recently undergone some of the most important and sweeping reforms since the enactment of the Uniform Code of Military Justice (UCMJ) in 1950. Instead, almost all of the best military justice scholarship these days has come from military lawyers—such as Captain Brittany Warren's 2012 Military Law Review article.

The latest example is a 2016 article by Rodrigo M. Caruço, a Captain and lawyer in the U.S. Air Force Judge Advocate General's corps, which offers a quantitative and qualitative assessment of the role of CAAF within the military justice system. As Caruço documents, CAAF both is, and sees itself as, "the supreme court of the military judicial system," which is why Congress created its predecessor as part of the UCMJ. But rather than act like a "court of last resort," CAAF "acts as an intermediate error-correction court…far too often." Even though CAAF only conducts plenary review of approximately 40 convictions per year, Caruço's quantitative analysis suggests that somewhere between half and 90% of its decisions in such cases entail little more than modest error correction. And because of the aforementioned limits on the Supreme Court's appellate jurisdiction, the net effect is to dramatically reduce the incidence of "law declaration" within and without the military justice system. Instead, the overwhelming majority of cases (and issues) within the military justice system get no further than the intermediate appeals courts—the service-branch courts of criminal appeals—which themselves dispense of most appeals summarily.

The indirect but inescapable takeaway from Caruço's insightful analysis is that much of the most important law in the military justice system is made by trial courts and does not become the subject of appeals (or, at least, of detailed appellate opinions that tend to provide fodder for academic commentary). It therefore may not be surprising that these rulings receive less scholarly attention—they are both less accessible and non-precedential. Indeed, although its focus is on whether CAAF truly behaves as a "court of last resort," one of the most important takeaways from Caruço's article is the more general conclusion that too many legal issues are resolved on a case-specific basis by military trial judges without the rigors of meaningful appellate oversight. To fix that deficiency, Caruço proposes a series of procedural reforms that would principally increase the number of cases CAAF takes, with a specific eye toward increased law declaration from that court.

But real reform may need to come from Congress, which has the unquestioned authority to increase the size of CAAF's mandatory (as opposed to discretionary) docket and to allow servicemembers to seek review from the Supreme Court even if they are turned away by CAAF. If necessary, Congress could also add judges to CAAF (which currently has five seats—the fewest of any circuit-level federal appeals court) to handle the increased caseload. Until and unless some combination of these reforms take place, it may well be that military justice continues to receive short shrift from scholars. Not because military law is uninteresting or unimportant or because it is irrelevant to broader assessments of contemporary criminal law and procedure, but for the far less interesting—and far more important—reason that its shape and scope are harder for outside observers to see.

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