

Treating Members of the Military at Least as Well as Inmates and Students: Determining When Military Necessity Requires Infringing Upon Constitutional Rights in Cases Before the Court of Appeals for the Armed Forces

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I. INTRODUCTION

For substantially similar reasons, three communities in American society are not entitled to the full panoply of rights protected by the Constitution of the United States: inmates, students, and members of the United States military. The individuals within these communities do not give up their rights due to membership. The compelling need for order, discipline, and safety, however, requires that the Constitution be applied to each community differently than how it is applied to the remaining members of American society. For student and inmate communities, the Supreme Court of the United States (“the Court”) has remained actively involved in this process. Not only has the Court determined that the needs of these two communities require a different application of the Constitution, it has also articulated the framework that specifically delineates how the Constitution is to be applied.

That has not been the case with regard to the Court’s involvement in the military community. Instead, the Court has largely deferred supervision of service member rights to the United States Court of Appeals for the Armed Forces (“CAAF”), the highest court in the military criminal justice system. This Article proposes that the existence of CAAF makes it unnecessary for the Court to supervise the military community as actively as it has in both the inmate and student communities. Unlike the Court in

these communities, however, CAAF has yet to adequately develop its framework for how the Constitution interacts with the military community in regards to criminal law.

Cases and controversies within the inmate and student communities arise under existing state and federal judicial systems, and the Court has declared that the unique need for order, discipline, and safety requires that the Constitution be applied to these communities differently than how it is applied to broader American society. Concerning the inmate community, the Court's decision in *Turner v. Safley*¹ encapsulates its understanding of that community and includes the applicable framework to virtually all circumstances that arise in the inmate community.² In slight contrast, the Court's understanding of the student community, as well as the appropriate framework to be applied in an individual case, is best understood through a series of decisions arising in various contexts.

Regardless of which community is the subject of description, it is remarkable how similarly the needs of each community are described. Good order and discipline is paramount. It is, in actuality, the judiciary's response to this compelling interest that is worthy of study.

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1. 482 U.S. 78 (1987).

2. *Turner* remains the landmark expression of the Court's understanding of the inmate community and its principal articulation of how the Constitution is to be applied to that community, though some recent decisions have applied the traditional constitutional rule rather than the *Turner* framework. See Michael Keegan, *The Supreme Court's "Prisoner Dilemma:" How Johnson, RLUIPA, and Cutter Re-Defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279 (2007) (examining how recent decisions applying strict scrutiny to certain categories of cases impact the traditional *Turner* framework).

A. The Inmate Community

Though the Court has admitted that prison officials are better positioned to manage and respond to the needs of the inmate community, it has not hesitated to specify the source of inmate rights and the standards to be applied when those rights are infringed. Inmates are not stripped of their constitutional rights solely due to incarceration. The nature of the community, however, requires a different application of those rights. The need for discipline and the imperative of ensuring safety serve as the basis for deferring to the decisions of prison officials. Though those officials are afforded great deference to those ends, their actions are governed by a reasonableness standard. The Court has articulated a multi-factor test for reviewing courts to apply to regulations and actions by prison officials in the inmate community.

Turner remains the leading decision that explores the interplay between the Constitution and the inmate community. In that case, the Missouri Division of Corrections adopted two problematic regulations.³ The first concerned correspondence between inmates at different institutions.⁴ The Division of Corrections allowed inmates to correspond with family members incarcerated in other institutions.⁵ It also allowed correspondence concerning legal matters.⁶ All other correspondence, however, depended upon how good a particular inmate was, rather than the content of an individual message.⁷ The second regulation allowed inmates to marry only upon receiving permission from the superintendent of the prison, which was only given if there was a “compelling reason.”⁸

3. *Turner*, 482 U.S. at 81–82.

4. *Id.* at 81.

5. *Id.*

6. *Id.*

7. *Id.* at 82 (“Trial testimony indicated that as a matter of practice, the determination whether to permit inmates to correspond was based on team members’ familiarity with the progress reports, conduct violations, and psychological reports in the inmates’ files rather than on individual review of each piece of mail.”).

8. *Id.* The District Court applied the strict scrutiny standard of review and found both regulations to be unconstitutional. *Id.* at 83. The Eighth Circuit affirmed and “held that the District Court properly used strict scrutiny in evalu-

The Court began by reaffirming a series of principles that frame the analysis of constitutional claims asserted by inmates. First, federal courts are charged with recognizing the valid constitutional claims of inmates.⁹ Second, they must protect these fundamental guarantees when unconstitutionally abridged by a prison regulation or practice.¹⁰ Third, it declared that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”¹¹

The Court went on to outline why courts must ultimately defer to those charged with administering the prison system. The issues in prison administration were “complex and intractable,” and “not readily susceptible of resolution by decree.”¹² Consequently, courts must adopt judicial restraint.¹³ The Court’s role, thus, was to “formulate a standard of review for prisoners’ constitutional claims that is responsive both to the ‘policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.’”¹⁴ It did so in *Turner v. Safely* by synthesizing four prior decisions that separately addressed inmate rights.¹⁵

ating the constitutionality of the Missouri correspondence and marriage regulations.” *Id.*

9. *Id.* at 84 (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”).

10. *Id.* (“Because prisoners retain these rights, [w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.” (quoting *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974))).

11. *Id.* (quoting *Martinez*, 416 U.S. at 405).

12. *Id.* (“As the *Martinez* Court acknowledged, ‘the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.’” (quoting *Martinez*, 416 U.S. at 404–05)). The Court went on to state that “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.” *Id.* at 84–85.

13. *Id.* at 85. Even further deference is required to state officials. *Id.* (“Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities.” (citing *Martinez*, 416 U.S. at 405)).

14. *Id.* (alteration in original) (quoting *Martinez*, 416 U.S. at 406).

15. *Id.* at 85–87. The Court recognized that its decision in *Martinez* established “the proper standard of review” without addressing the “broad questions of ‘prisoners’ rights.” *Id.* at 85 (quoting *Martinez*, 416 U.S. at 408).

Prison regulations abridging inmates' constitutional rights were to be subject to rational basis review. So long as a regulation remained "rationally related" to the "objectives of prison administration," it would be upheld.¹⁶ This was because decisions regarding prison security are "peculiarly within the province and professional expertise of corrections officials."¹⁷ Thus, they are entitled to substantial deference.¹⁸ Consequently, courts must defer to those officials unless "substantial evidence" indicates that the Government has "exaggerated [its] response" to prison conditions.¹⁹

The Court went on to articulate a multi-factor test for courts to utilize to determine when a regulation is rationally related to prison administration objectives.²⁰ There must first "be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."²¹ Thus, regulations that are "arbitrary or irrational" will not survive.²² The objective "must be a legitimate and neutral one."²³

Second, a prison regulation is more likely to survive scrutiny if "other avenues' remain available for the exercise of the asserted right."²⁴ Third, courts must look to the effect equal application of the Constitution will have on other inmates and the general allocation of prison resources.²⁵ Courts should be "particularly deferential" if acknowledging a particular constitutional right "will have a significant 'ripple effect' on fellow inmates or on prison staff."²⁶

16. *Id.* at 86 (quoting *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977)).

17. *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

18. *Id.* at 87 ("[T]he considered judgment of these experts must control . . .") (quoting *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)).

19. *Id.* at 86 (quoting *Pell*, 417 U.S. at 827).

20. *Id.* at 89–91.

21. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

22. *Id.* at 89–90.

23. *Id.* at 90.

24. *Id.* (citing *Jones*, 433 U.S. at 131). This is clearly more applicable to regulations infringing upon an inmate's First Amendment rights.

25. *Id.*

26. *Id.* (citing *Jones*, 433 U.S. at 132–33).

Finally, a regulation's validity is bolstered if there is no ready alternative.²⁷ The Court was careful not to employ a "least restrictive means" analysis; it explained that "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."²⁸ Accommodations that result in a "*de minimis* cost to valid penological interests," however, should always be considered.²⁹

This framework, the Court further explained, was necessary in light of the unique needs of the inmate community. Consequently, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."³⁰ It would subject every decision by prison administration to Monday morning quarterbacking by a court far removed from the facts on the ground.³¹ Thus, courts would become prison administrators—meddling, incompetent administrators.³²

The Court explained that prison officials are charged with the difficult task of maintaining discipline in the inmate community while ensuring the safety of prison officials and the inmates themselves. To this end, prison officials must enjoy a large degree of deference to accomplish that compelling societal interest. The Court, however, has not hesitated to step in to establish the standard to be applied to decisions by those officials, and to articulate its steps. The student community has received similar treatment.

27. *Id.* In contrast, obvious alternatives make it more likely that the challenged regulation is an "exaggerated response." *Id.*

28. *Id.* at 90–91.

29. *Id.* at 91.

30. *Id.* at 89.

31. *Id.* ("The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.")

32. *Id.* ("Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" (alteration in original) (quoting *Procunier v. Martinez*, 416 U.S. 396, 407 (1974))).

B. The Student Community

In a fashion similar to the inmate community, the Court has developed and articulated the framework to be applied to constitutional cases in the student community. Students receive the full panoply of constitutional rights; however, the unique needs of the community warrant a different application of the Constitution than that enjoyed by broader American society. Consequently, the need for flexibility in application and deference to leaders of the community requires this different application. In addition, school officials have an obligation to the greater society. They must educate students and inculcate the greater society's values in students in order to prepare them to be productive members of the American democracy. In doing so, school officials must maintain discipline and order in the school. This is imperative to the community's mission of ensuring the health and safety of those it leads. As in the inmate community, the Court has gone further than simply describing why a different application is necessary; it has articulated the specific test, as well as its breadth and depth. Unlike the inmate community, however, the Court's view of the student community is expressed over multiple decisions.

An early example of the Court's view of the student community, and the test it articulated, involved political speech. In December 1965, parents and students in a Des Moines, Iowa school district decided to protest the Vietnam War by wearing black armbands during the holiday season.³³ Upon discovering this plan, school officials met and adopted a policy that required a student wearing such an armband to remove it, or be suspended.³⁴ Undeterred, three students wore black armbands to school and were subsequently suspended.³⁵

The Court acknowledged that the First Amendment applied to students,³⁶ however, it applied "in light of the special character-

33. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

34. *Id.*

35. *Id.*

36. *Id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate."). Full recognition was the default. *Id.* at 511 ("In the absence of a

istics of the school environment.”³⁷ The Court did not elaborate on these special characteristics in its decision, but made it clear that discipline was essential to the community. Consequently, it articulated the test courts should apply to regulations that infringe upon a student’s First Amendment rights.³⁸ Attempts to prohibit conduct that are nothing more than “a mere desire to avoid the discomfort and unpleasantness that . . . accompany an unpopular viewpoint” will not survive scrutiny.³⁹ However, rules or regulations that prohibit conduct that would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” will be upheld.⁴⁰

The Court fleshed out these special characteristics in a series of subsequent decisions. One such decision involved a challenge to an Ohio statute that empowered a school principal to suspend or expel a student without any sort of due process.⁴¹ Under this statute, the principal need only notify the student’s parents within twenty-four hours and state his reasons for the discipline.⁴²

Writing for the majority, Justice White acknowledged that “schools are vast and complex.”⁴³ Thus, “[s]ome modicum of discipline and order is essential if the educational function is to be performed.”⁴⁴ The need for discipline, he continued, arose frequently and at times needed “immediate, effective action.”⁴⁵ Due process procedures common in criminal proceedings just were not compatible in these situations.⁴⁶ Incidents requiring low-level dis-

specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”).

37. *Id.*

38. *Id.* at 509.

39. *Id.*

40. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

41. *Goss v. Lopez*, 419 U.S. 565, 567 (1975).

42. *See* OHIO REV. CODE ANN. § 3313.66 (West 1972).

43. *Goss*, 419 U.S. at 580.

44. *Id.* In fact, the Court used language in a later decision that, as will be seen later in this Article, appears often in the military setting. *See* *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (“A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining *discipline, health, and safety.*” (emphasis added)).

45. *Goss*, 419 U.S. at 580.

46. *Id.* at 583 (“We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must

cipline such as suspension occurred too frequently.⁴⁷ To require “even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.”⁴⁸ Turning the suspension process into a formal, adversarial process threatened to “make it too costly as a regular disciplinary tool” and may “destroy its effectiveness as part of the teaching process.”⁴⁹ However, though school officials’ authority in the schoolhouse community remained very broad, Justice White concluded, it must comply with constitutional requirements.⁵⁰ The Constitution must bend, it seemed, but it shall not break.⁵¹

afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.”).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 574 (“The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.”).

51. Four justices dissented on the grounds that the majority did not go far enough in its deference to school officials. *Id.* at 585 (Powell, J. dissenting) (“The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline”). School officials, the dissent argued, needed “wide latitude with respect to *maintaining discipline and good order.*” *Id.* at 590 (emphasis added). The dissenting justices, who at other times would be in the majority in cases involving the student and military community, expressed a parochial view that sounds eerily familiar to the ears of a member of the military. *Id.* at 593.

One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. . . . When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher’s authority

Id. Students must obey. *Id.* (“Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto.”). To the civilian reader, these words carry little to no precedent. To the military lawyer, however, these principles are asserted time and again in the abridgment of certain constitutional rights for the sake of military discipline.

The Court further explained the special needs of the student community in a subsequent decision that determined “the proper standard for assessing the legality of searches conducted by public school officials.”⁵² A high school teacher in New Jersey discovered two students smoking in the bathroom, a violation of school policy.⁵³ One admitted violating the policy, but the second, T.L.O., maintained her innocence.⁵⁴ The assistant vice principal subsequently escorted T.L.O. to a private office and demanded to see her purse.⁵⁵ A visual inspection inside the purse revealed a pack of cigarettes.⁵⁶ As he reached into the purse for the cigarettes, the assistant vice principal “noticed a package of cigarette rolling papers.”⁵⁷ The assistant vice principal thus proceeded to thoroughly search the purse for “further evidence of drug use.”⁵⁸ He subsequently discovered a small amount of marijuana, a pipe, empty plastic bags, a substantial number of one-dollar bills, an index card listing people that owed T.L.O. money, and letters implicating T.L.O. in drug dealing.⁵⁹

The Court recognized that the Fourth Amendment applied to students⁶⁰ and the touchstone of that amendment is reasonableness.⁶¹ However, “what is reasonable depends on the context within which a search takes place.”⁶² Thus, to determine the appropriate standard of reasonableness for a given class of searches, a court must balance “the need to search against the invasion which the

52. *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 334 (“It is now beyond dispute that ‘the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.’ Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials” (quoting *Elkins v. United States*, 364 U.S. 206, 213 (1960))).

61. *Id.* at 337 (“[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable . . .”).

62. *Id.*

search entails.”⁶³ What is noteworthy is the Court did not diminish student rights *solely because* of a citizen’s status as a student. Instead, the compelling need for good order and discipline required some sort of abridgment of rights to the extent necessary to succeed in the educational mission.

Though the need for order and discipline existed in both the schoolhouse and correctional communities, students retained a legitimate expectation of privacy in their personal items, unlike inmates in their prison cells.⁶⁴ But this expectation of privacy, the Court held, must be weighed against the “substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”⁶⁵ A proper educational environment requires enforcing rules curtailing conduct that “would be perfectly permissible if undertaken by an adult.”⁶⁶ “[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and [the Court has] respected the

63. *Id.* (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967)). “On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.” *Id.*

64. *Id.* at 338. Here, the Court appears to acknowledge that the Government retains the same interest in both communities, though there should be a distinction between the two:

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that “[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.” We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Id. at 338–39 (quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1977)).

65. *Id.* at 339.

66. *Id.* (“Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”).

value of preserving the informality of the student-teacher relationship.”⁶⁷

The interest in maintaining order and discipline in the schoolhouse community “is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.”⁶⁸ To assist lower courts in applying this standard, the majority specifically articulated the framework.⁶⁹ First, a court must determine if the search was “justified at its inception.”⁷⁰ This threshold is met if “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”⁷¹ Second, a court must determine if the actual search was reasonably related “to the cir-

67. *Id.* at 340. Justices Powell and O’Connor concurred but argued that school officials stood in a patriarchal (or matriarchal) role vis-à-vis students:

The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

Id. at 350 (Powell, J., joined by O’Connor, J., concurring). Even the dissent agreed that officials had a legitimate need to swiftly enforce order and discipline:

When viewed from the institutional perspective, “the substantial need of teachers and administrators for freedom to maintain order in the schools” is no less acute. Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship.

Id. at 376 (Stevens, J., joined by Marshall, J., joined by Brennan, J. as to Part I, concurring in part and dissenting in part) (citation omitted). These views appear again in the Court’s decisions on the military community and are applied daily in the application of military discipline. *See infra* note 74.

68. *T.L.O.*, 469 U.S. at 341–42 (majority opinion).

69. *Id.*

70. *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

71. *Id.* at 342.

cumstances which justified the interference in the first place.”⁷² Thus, “a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁷³

The preceding paragraphs demonstrate that the Court looks at the inmate and student communities in substantially similar fashion. Though the membership of the two communities stand in substantially different positions, the leaders of the student community are charged with a compelling governmental interest—educating and inculcating students. They consequently need the ability to maintain order and discipline while ensuring the health and safety of those in their charge.

As in the inmate community, the Court has not only declared the framework lower courts are to apply, it has also expanded on its explanation in substantial detail in subsequent decisions. At great length, and over multiple decisions, the Court has explained why order, discipline, and safety are of utmost importance in these communities. It has not approached the military community with the same level of engagement.

C. The Military Community

In contrast to both the inmate and student communities, the Court has never expressly declared that the Constitution applies to members of the military.⁷⁴ Instead, it has largely relied upon a

72. *Id.* at 341 (quoting *Terry*, 392 U.S. at 20).

73. *Id.* at 342.

74. The Court has charged military courts with protecting the constitutional rights of service members. *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (“The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights.”). However, just four years later, the Court was unsure to what extent the Bill of Rights applied to the members of the military. *Reid v. Covert*, 354 U.S. 1, 37 (1957) (“As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.”). A few years later, the military’s highest court declared that the Bill of Rights did apply. *United States v. Jacoby*, 11 U.S.C.M.A. 428, 429 (1960). Since then, the Court appears to assume, without deciding, that the Constitution applies. *See, e.g., Parker v. Levy*, 417 U.S. 733, 758 (1974) (“While the members of the military are not excluded from the protection granted by the First Amendment, the

unique lower court's decisions in that area. Congress created The Court of Appeals for the Armed Forces ("CAAF") in 1950 when it enacted the Uniform Code of Military Justice ("UCMJ").⁷⁵ This Article I court, composed of five civilians, supervises a three-tiered military justice system with jurisdiction over three million individuals.⁷⁶ In 1960, CAAF declared that the Constitution did apply to service members.⁷⁷ Since that declaration, the Court's approach to the military community has been to assume, without deciding, that the Constitution applies.⁷⁸

The existence of CAAF explains the Court's approach to the military community. Unlike in the inmate and student communities, which have no separate judicial system, the Court has not articulated a framework for military courts to apply in constitutional cases. Instead, applying what has been described as the military deference doctrine, the Court has left the development of military law to CAAF.⁷⁹ Essentially, the Court has treated the mil-

different character of the military community and of the military mission requires a different application of those protections.").

75. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) ("An Act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice.").

76. 10 U.S.C. §§ 866–67 (2013); DEP'T OF DEF., 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 3 (2013), <http://www.militaryone source.mil/12038/MOS/Reports/2013-Demographics-Report.pdf>.

77. *Jacoby*, 11 U.S.C.M.A. at 429.

78. *Compare Reid*, 354 U.S. at 37 ("As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."), *with Parker*, 417 U.S. at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."). *Parker* is just one example. There, the Court explained this statement by citing to CAAF's case law, not to any authority in the Constitution itself. *Id.* at 758 ("The United States Court of Military Appeals has sensibly expounded the reason for this different application of First Amendment doctrines in its opinion in *United States v. Priest*." (citation omitted)).

79. Further explained in Part II, the military deference doctrine describes the Court's deference to military courts regarding the rights of service members vis-à-vis the Constitution. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000). It has evolved from complete non-interference, to patent skepticism of the military justice sys-

itary community as if it were a state, with CAAF as its highest court, rather than as a part of the federal judicial system.

This makes CAAF a worthy subject of study. Unlike the Court in student and inmate cases, CAAF has not articulated a clear test to determine when military necessity exists and, when it is found, how to determine the boundaries of a rule created due to such necessity. This article seeks to advance the literature toward establishing a clearer framework.⁸⁰ As stated earlier, it proposes that the existence of CAAF makes it unnecessary for the Court to inject itself into the military community to the same degree as it has in both the inmate and student communities. Like a state court of last resort, CAAF is entrusted by the Court with supervising the military community, albeit limited to military justice. This is apparent in the Court's more recent decisions, which rely on CAAF's description of the military community, rather than the Court's own understanding of it. Consequently, CAAF is the necessary legal institution to study in order to understand how the Constitution interacts with the military community. Part II turns to CAAF, the Constitution, and the military. It begins with the Court's view of its relationship with the military community, best described as the

tem, to the modern day professional deference akin to that given to a state court of last resort. *Id.* at 164.

80. To some degree, this study builds upon John T. Willis's brilliant three article study of CAAF in the 1970s, particularly his second article on the court that studied its development of a constitutional philosophy and the emerging issue of military necessity. See John T. Willis, *The United States Court of Military Appeals: Its Origin, Operations and Future*, 55 MIL. L. REV. 39 (1972); John T. Willis, *The Constitution, The Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972); John T. Willis, *The United States Court of Military Appeals—"Born Again,"* 52 IND. L.J. 151 (1976). Around this same time period, Professors Imwinkelried and Zillman compared certain aspects of military and civilian society in response to the Court's decision in *Parker*, 417 U.S. at 744, in which the Court reiterated that the military is a "society apart" from civilian society. Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396 (1976). The authors identified seven areas in which an argument could be made that require different rules in each society. *Id.* at 396. Though the authors cited some of CAAF's opinions, their focus was not on how it addressed military necessity. It was, instead, a topical approach drawn from a larger universe. The author has been unable to uncover articles specifically analyzing how CAAF itself has addressed military necessity.

military deference doctrine. Next it describes how the Court has described the community in light of that doctrine. Then, after an introduction to CAAF, it turns to the evolution of CAAF's constitutional interpretation that began with grounding service member rights in the prerogative of Congress and ultimately resulted in grounding service member rights in the Constitution. The analysis then turns to the development of the military necessity doctrine. Two subsequent Parts review CAAF's decisions and group them into three broad categories and six more specific examples of military necessity. Part III begins this process by summarizing some existing attempts by CAAF to define military necessity, the research methods employed by the author in this study, and some initial results that are obstacles to understanding and applying the military necessity doctrine. This section attempts to move the literature forward toward a clear definition of military necessity, particularly in the absence a comprehensive definition developed by CAAF.⁸¹ Part IV separates out three overarching themes and six broad examples of military necessity. It organizes the results of this study into three themes and six examples of military necessity that exist in CAAF's jurisprudence. Practitioners may utilize these examples immediately. In addition, military courts, particularly CAAF itself, may build on these themes and examples to further develop the military necessity doctrine. These results may serve to continue the scholarly discussion toward not only where the doctrine should be today, but also where it is likely to lead tomorrow. Finally, Part V recommends an analytic framework similar to strict scrutiny that can be used to determine when and how to apply a different constitutional standard to the military community.

II. THE CONSTITUTION AND THE MILITARY

The Court has described the needs of the military community in similar terms as used to describe both the inmate and student communities. The needs and characteristics of the student and military communities and the deference that must be given to their leaders are described in particularly similar ways. The Court,

81. Advocates may also advance this literature through appellate advocacy before CAAF by advancing well-researched and reasoned extensions of the definition.

however, has intervened in the military community differently than in the inmate and student communities, arguably, because of the existence of CAAF. As mentioned earlier, the Court has assumed, without deciding, that the Constitution applies to the military community. Like the previously discussed communities, the military requires obedience and discipline. Its leaders must also ensure the safety of its members, as well as the safety of the broader society. However, the Court does not go much further than declaring the principle that the needs of the military community, like the inmate and student communities, require a different application of the Constitution. It has not articulated a framework and defined its boundaries as it has for the inmate and student community.

CAAF applies the Constitution to the military in light of the need for order and discipline through what can be termed the military necessity doctrine. This doctrine, however, is not as developed as the Court's doctrine regarding the inmate and student communities. The remainder of this article seeks to advance the development of the military necessity doctrine. At the conclusion of this Part, the reader should understand how the Court views the military community, CAAF's role as the leading legal institution in this community, and CAAF's development of a constitutional framework relative to the Court's actions in the previously discussed inmate and student communities.

A. The Military Deference Doctrine

This selective overview of the military deference doctrine primarily relies on John O'Connor's 2000 study, *The Origins and Application of the Military Deference Doctrine*.⁸² He argues that the doctrine can be classified into three chronological periods: non-interference, patent skepticism, and professional deference.⁸³ For purposes here, the transition between each period resulted in a shift in the Court's level of engagement with the military community.⁸⁴

82. O'Connor, *supra* note 79, at 161.

83. *See id.* at 164.

84. The transitions may also characterize a general shift in society's views toward the military, but that question is beyond the scope of this Article.

Until the 1950s, the Court maintained a nearly complete hands-off approach to military justice cases.⁸⁵ So long as the court-martial was convened according to proper procedure, civilian courts were precluded from any sort of substantive review.⁸⁶ O'Connor referred to this as the "doctrine of non-interference."⁸⁷ O'Connor's analysis of this period is encyclopedic, covering a line of decisions from 1828 to 1953.⁸⁸ In sum, the Court held during this period that the Constitution placed complete control over the military in the political branches.⁸⁹ Congress raised and supported the army and navy; the President served as Commander-in-Chief.⁹⁰ The Constitution, however, said nothing of the judiciary's role in military affairs.⁹¹ Therefore, according to the Court, the Constitution had no legitimate role to play. The need for discipline required this non-interference. Thus, "the military's extraordinary need for obedience and discipline within the ranks was inconsistent with the availability of judicial review for soldiers aggrieved by military practices."⁹² As a result, if a court-martial convened in accordance with proper procedure, proceeded according to that procedure, and did not issue a punishment forbidden by law, civilian courts would not interfere.⁹³

The pendulum swung to the complete opposite end of the spectrum by the mid-1950s as the Court transitioned from non-interference to patent skepticism. Over the subsequent two decades, the Court appeared to have lost faith in the military justice system as a whole.⁹⁴ Thus, in a series of decisions, it sought to

85. See O'Connor, *supra* note 79, at 164.

86. See *id.*

87. See *id.*

88. See *id.* at 165–97.

89. *Id.* at 166.

90. *Id.*

91. *Id.*

92. *Id.* at 167.

93. *Id.* at 175 (quoting *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857)). It is important to note that at this point in military legal history, no judicial appellate system existed. Courts-martial were reviewed administratively within the particular service. See *Dynes*, 61 U.S. (20 How.) at 74 ("No reviewing tribunal has been established, although the Secretary of the Navy and the President, in effect, act as revising officers, where their concurrence is required before the adjudication of the court can be carried into effect.").

94. See O'Connor, *supra* note 79, at 164.

limit the reach of military courts to the maximum extent possible.⁹⁵ This period culminated in Justice Douglas's majority decision in *O'Callahan v. Parker*, which required the military to prove a service connection between the offense and military service in order for the military to have jurisdiction over the offense.⁹⁶ Consequently, crimes committed by service members off base and out of uniform, without any connection to the member's military service, were now beyond the reach of military courts. Nearly two decades after Congress enacted monumental and sweeping reforms to military justice through the Uniform Code of Military Justice (UCMJ), the Court doubted "the legitimacy of the entire process of military justice."⁹⁷ It was a system necessary for maintaining discipline, and thus inept at ensuring justice.⁹⁸

By the 1970s, the Court's membership changed yet again, and so did its view of the military justice system.⁹⁹ Over the next two decades, and primarily through the pen of then-Justice Rehnquist, the Court firmly established the modern day military deference doctrine.¹⁰⁰ It is not quite complete non-interference. Today, the Court will entertain substantive constitutional challeng-

95. *See id.*

96. 395 U.S. 258, 273–74 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435, 450–51 (1987).

97. O'Connor, *supra* note 79, at 198. For one scholar's argument on Justice Douglas's anti-military ideology and its impact on the *O'Callahan* decision, see Joshua E. Kastenber, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker*, 26 T.M. COOLEY L. REV. 163 (2009).

98. *O'Callahan*, 395 U.S. at 265–66.

99. *See* O'Connor, *supra* note 79, at 164.

100. *See id.* at 216–17 ("It was Justice Rehnquist who deftly wove together precedents from the Court's era of noninterference and from the Warren Court's era of skepticism to create the Court's modern military deference doctrine."). Justice Rehnquist's majority opinion in *Solorio* expressly overruled *O'Callahan*, eliminating the service connection requirement and granting jurisdiction to military courts solely on the military status of the service member. *Solorio*, 483 U.S. at 450–51. Justice Rehnquist's approach to military justice was buoyed by legislative enactments, such as the creation of a military judge in the Military Justice Act of 1968. O'Connor, *supra* note 79, at 217. "Thus, by the 1970s, courts-martial resembled civilian court proceedings much more than they had prior to the creation of the office of the military judge." *Id.*

es; however, it grants tremendous deference to military courts.¹⁰¹ This professional deference, as will be seen in subsequent paragraphs, is due to the extraordinary need for discipline and order in the military community.

Whether the military's existence is necessary to fight and win wars or is a danger to the Bill of Rights, the Court has articulated a consistent vision of the community and its needs. Its quibbles have been with the military as an institution and its justice system, not with the community it controls. With that in mind, it is now possible to compare the Court's engagement with the military community to its engagement with the inmate and student communities.

B. The Military Community

A sampling of decisions in the middle to later twentieth century encapsulates the Court's modern vision of the military community, and its unwillingness to engage at the same breadth and depth as the inmate and student communities. An initial example involved an Army doctor that filed a petition for a writ of habeas corpus in a U.S. district court, requesting that the court order the Army to discharge the doctor because he had not been "assigned to the specialized duties nor given the commissioned rank to which he claim[ed] to be entitled."¹⁰² Perhaps as part of working through the transition from non-interference to patent skepticism, the Court wasted little time disposing of the case.¹⁰³ However, the following description of the military community would find itself often repeated in later military courts as the justification for a different application of the Constitution to service members: "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."¹⁰⁴ Later in the same term, the Court de-

101. See O'Connor, *supra* note 79, at 215–16 ("There would be a substantive review to constitutional challenges of military legislation, but that review would be particularly solicitous of Congress's estimation of the needs of a well-functioning military.")

102. Orloff v. Willoughby, 345 U.S. 83, 84 (1953).

103. See *id.* at 93 ("[J]udges are not given the task of running the Army.")

104. *Id.* at 94.

clared that civilian habeas corpus review will only reach whether the military system gave fair consideration to an accused's claims.¹⁰⁵ In doing so, it reinforced why the military community needed different rules, but unlike in inmate and student cases, the Court also declared that it would not be the one to determine the parameters of this framework:

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.¹⁰⁶

In later decisions, the Court began describing the military community in more detail, though never to the extent it did in inmate and student cases.

One such decision involved the military's attempt to court-martial a civilian for crimes committed prior to his honorable discharge from the United States Air Force ("USAF"). The USAF convicted Robert W. Toth for a murder he committed in Korea while on active duty.¹⁰⁷ At the time of his arrest and subsequent court-martial, Toth was a civilian, honorably discharged from service five months prior to his arrest.¹⁰⁸ At that time, Article 3 of the UCMJ allowed the military to prosecute former service members

105. *Burns v. Wilson*, 346 U.S. 137, 144 (1953) ("[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." (citing *Whelchel v. McDonald*, 340 U.S. 122 (1950))).

106. *Id.* at 140.

107. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955).

108. *Id.*

for offenses committed while on active duty, if that offense carried a maximum punishment of five years or more in confinement.¹⁰⁹

The *Toth* decision occurred during the Court's period of patent skepticism of military justice. The Court determined that the military could not exercise court-martial jurisdiction over a civilian no longer connected to military service.¹¹⁰ In describing why military courts were insufficient in judicial matters, the Court described the military as a monolithic community with a single, overriding purpose for existence. It began by stating that "[i]t is the primary, indeed the sole business of [Article III] courts to try cases and controversies between individuals and between individuals and the Government."¹¹¹ In contrast, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."¹¹² Criminal prosecution as a means to maintain discipline is but an incidental part of the military community's existence.¹¹³ At the time, the Court stated, military justice amounted to an additional duty, one that diverts those involved from their primary function.¹¹⁴ The *Toth* decision then turned briefly to the needs of the military community:

Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. Even as late as the Seventeenth Century standing armies and courts-martial were not established institutions in England. Court-martial jurisdiction sprang from the belief that within the military ranks there is need for

109. *Id.* at 13 n.2.

110. *Id.* at 23.

111. *Id.* at 15.

112. *Id.* at 17.

113. *Id.* ("But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function.").

114. *Id.* ("To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.").

a prompt, ready-at-hand means of compelling obedience and order.¹¹⁵

In a sense, this view makes sense. *Toth* was decided in 1955, with World War II and the Korean War fresh in the minds of American society, as well as the Court. The military of that era looked far different than the military of today.¹¹⁶ The mobilization required to fight those wars was unheard of in American society. It thus makes sense to understand the military community of that time as existing solely for the purpose of fighting wars. As those wars gave way to the guerilla warfare of Vietnam, however, the Court had additional opportunities to examine the military community.

The standard bearer of the Court's patent skepticism decisions, *O'Callahan v. Parker*, provides some of that additional insight into its theory of the military community. Off base and in civilian clothes, James O'Callahan, a member of the United States Army, broke into a hotel room and tried to rape a young girl.¹¹⁷ Honolulu police turned him over to military police after determining that he was a member of the military.¹¹⁸ The Army subsequently convicted O'Callahan of a number of offenses, including Article 134 of the UCMJ.¹¹⁹ Article 134 prohibits conduct that

115. *Id.* at 22. The dissent might have disagreed with the majority's legal analysis, but it did not disagree with the needs of the military community:

War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline. The power to regulate the armed forces must have been granted to Congress so that it would have the authority over its armed forces that other nations have long exercised, subject only to limitations of the Constitution.

Id. at 29.

116. A social history of military life in earlier eras relative to modern military life would be particularly relevant to understanding the role of military legal institutions. However, that is beyond the scope of this Article.

117. *O'Callahan v. Parker*, 395 U.S. 258, 259–60 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987).

118. *Id.* at 260.

119. *Id.*

results in prejudice to good order and discipline or tends to bring discredit to the armed forces.¹²⁰

After a scathing rebuke of the military justice system, Justice Douglas's majority opinion held that in order for the military to have jurisdiction to prosecute a military member, there must be a connection between the offense and military service; finding no such connection, the Court overturned O'Callahan's conviction.¹²¹

The Court began by reinforcing the principle that military society required a different application of the Constitution.¹²² The opinion subsequently explained why the majority was prepared to accept this principle, though only to the extent necessary to maintain order:

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere¹²³

After all, the majority noted, "military law has always been and continues to be primarily an instrument of discipline, not justice."¹²⁴ It was, essentially, a necessary evil.¹²⁵

120. *Id.* at 260 n.1.

121. *Id.* at 273–74.

122. *Id.* at 261 ("[The Constitution] recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply.").

123. *Id.* at 265.

124. *Id.* at 266 (quoting Glasser, Justice and Captain Levy, 12 COLUM. F. 46, 49 (1969)).

125. Though the dissent strenuously objected to the majority's creation of the service connection requirement, it appeared to agree with the majority's characterization of the military community. *Id.* at 274 (Harlan, J., joined by

With the addition of Justice Rehnquist to the Court in 1971, its view of the military transitioned to one of professional deference. Though the lens changed, the description of the military community remained relatively the same. This is best demonstrated in a landmark military justice opinion that reviewed the court-martial of an Army doctor who refused to execute his duties and attempted to dissuade Special Forces personnel from participating in the Vietnam War.¹²⁶

Captain (CPT) Howard Levy served as the Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson, South Carolina.¹²⁷ Disagreeable to the Vietnam War, he refused a direct order to train members of the Army Special Forces.¹²⁸ He also made a series of public statements thought to be

Stewart, J., and White, J., dissenting). Justice Harlan argued that “[t]he United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services.” *Id.* at 281. This requires controlling what service members can do both on and off base:

[B]ecause its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty.

Id. (footnote omitted). The military’s mission, the dissent continued, required different rules. Thus, the military had “a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base, and by rehabilitating offenders to return them to useful military service.” *Id.* at 282. The soldier, the dissent argued, must remain with his unit:

A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires.

Id. at 282–83.

126. *Parker v. Levy*, 417 U.S. 733, 735–37 (1974).

127. *Id.* at 735–36.

128. *Id.* at 736.

disloyal to the United States.¹²⁹ Consequently, the Army charged and convicted him of disobeying a lawful order and promoting disloyalty and disaffection among the troops, in violation of Articles 133 and 134 of the UCMJ.¹³⁰ In upholding Congress's enactment of these two Articles, the Court synthesized all its prior military community decisions and arguably also synthesized its description of the military community.

Writing for the majority, Justice Rehnquist began by blending prior non-intervention and patent skepticism decisions into his theme of a separate community with a nearly unquestionable need for discipline and obedience.¹³¹ What is notable for purposes here is Justice Rehnquist's selected quotes from two prior non-intervention decisions. The first sheds light on the majority's perception of the military community: "[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."¹³² It is noteworthy that the majority opinion neglected to address what, if any, differences existed between the Army of 1890 (the army in *In re Grimley*) and the Army of 1974. The inclusion of this quote, however, may indicate that the majority did not really care to address any differences in the community. The second selected quote from the opinion reinforced the concept that maintaining discipline is "essen-

129. *Id.* at 736–37. The Court provided a sampling of those comments: The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Id.

130. *Id.* at 737–39. Article 133 is a rather broad statute that prohibits conduct determined to be unbecoming of an officer. *See* 10 U.S.C. § 933 (2013).

131. *Levy*, 417 U.S. at 734–44 (citations omitted).

132. *Id.* at 743 (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)).

tial.”¹³³ This passage served to support the Court’s conclusion that it “has long recognized that the military is, by necessity, a specialized society separate from civilian society.”¹³⁴

In addition to repurposing passages from arguably outdated or at least questionable precedent, the majority further explored some of the differences that exist between the civilian and military community. One such difference was that the relationship of the Government to service member was different than that of Government to civilian: “It is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities.”¹³⁵ It is safe to assume that the purpose of the military community referred to in *Levy* was to fight and win wars, which was quite different than any purpose for a civilian community. Because of that fighting purpose, the military community simply could not have the same autonomy as that found in civilian life:

While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.¹³⁶

133. *Id.* at 744 (“And to maintain the discipline essential to perform its mission effectively, the military has developed what ‘may not unfitly be called the customary military law’ or ‘general usage of the military service.’” (quoting *Martin v. Mott*, 12 Wheat. 19, 35 (1827))).

134. *Id.* at 743.

135. *Id.* at 751.

136. *Id.*

The job of the military community, the majority re-asserted, was to obey.¹³⁷ As a consequence of these differences, the Court held that Congress was entitled to more flexibility when Articles of the UCMJ enacted by that body were challenged as unconstitutionally vague.¹³⁸

Two additional principles emerged from the majority opinion in *Parker v. Levy*. First, the Court's description of the military community remains one of its only efforts to explain why the community is different:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. 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.¹³⁹

The second principle that emerged is the Court's reliance on CAAF to provide the necessary substance. In *Levy*, the Court quoted CAAF's decision in *United States v. Priest* to explain the reasons for the differences alluded to in the Court's earlier declaration that the military community was different, in this case regarding free speech rights:

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech,

137. *Id.* (“As we observed in *In re Grimley*, the military ‘is the executive arm’ whose ‘law is that of obedience.’” (quoting *Grimley*, 137 U.S. at 153)).

138. *Id.* at 756–57 (“Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs.”). This standard would uphold a statute if, in light of the conduct with which an individual was charged, he could have reasonably understood that his conduct was prohibited. *Id.* at 757 (citations omitted).

139. *Id.* at 758.

even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.¹⁴⁰

This reliance on CAAF to essentially do the “heavy lifting” of explaining the need for a different application of the Constitution to the military community supports this Article’s hypothesis that the reason for the Court’s hands off approach to articulating and refining a framework for lower courts is due to the existence of a supreme court that operates more akin to a state supreme court than a federal circuit court of appeals.¹⁴¹

Though its view of the military community remained consistent and abridged, the Court rejected the service connection requirement established by *O’Callahan* in 1987 through its decision in *Solorio v. United States*.¹⁴² As discussed earlier, this occurred

140. *Id.* at 758–59 (citations omitted) (quoting *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (1972)).

141. The concurring opinion saw the community in the same light. Justice Blackmun wrote that the prospect of war required a different standard: “however unfortunate it may be, it is still necessary to maintain a disciplined and obedient fighting force.” *Id.* at 763 (Blackmun, J., concurring). Even the dissent agreed with the view of the community. Justice Douglas noted that the military community required discipline and obedience. *Id.* at 768 (Douglas, J., dissenting) (“The military by tradition and by necessity demands discipline; and those necessities require obedience in training and in action.”). Orders thus had to be obeyed. *Id.* (“A command is speech brigaded with action, and permissible commands may not be disobeyed.”). Dissent was simply not a part of the military community. *Id.* at 770 (“The military, of course, tends to produce homogenized individuals who think—as well as march—in unison.”). This was a direct consequence of a draft army. *Id.* at 772 (“The power to draft an army includes, of course, the power to curtail considerably the liberty of the people who make it up.”).

142. *Solorio v. United States*, 483 U.S. 435, 450–51 (1987).

during the Court's formulation of the modern day military deference doctrine. In doing so, the Court proclaimed why it must grant substantial deference to the decisions of military courts. It concluded that, "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."¹⁴³

Though the Court has viewed the military in different lights over the years, it has been hesitant to engage this community at the same breadth and depth as the inmate and student communities. Even during periods of patent skepticism, the Court sought to limit its deference to the extent necessary to maximize the liberty of service members, but it never stepped into a complete supervisory role of the military justice system.

The advent and evolution of CAAF legitimized this shallow level of engagement. The Court could continue to make general statements that the military community required a different application of the Constitution due to the overriding need for discipline and order, because a court now existed that had the jurisdiction and experience to interpret the relationship between the Constitution and service members similar to the Court's role in interpreting the relationship between the Constitution and students and inmates, and to articulate the framework lower courts should apply when determining whether to sanction the infringement of a student's or inmate's rights.

C. The Court of Appeals for the Armed Forces

CAAF, the highest court in the military community, has jurisdiction and must review all court-martial convictions resulting in a sentence of death and decisions by military intermediate appellate courts ordered reviewed by the Judge Advocate General of either service.¹⁴⁴ In addition, CAAF has jurisdiction to review decisions by these intermediate appellate courts if the accused demonstrates good cause in his petition.¹⁴⁵ Decisions by CAAF are reviewable by the Court.¹⁴⁶ In contrast, the denial of a petition

143. *Id.* at 447.

144. 10 U.S.C. § 867(a)(1)-(2) (2013).

145. *Id.* at § 867(a)(3).

146. *Id.* at § 867a(a).

for review is final; no further relief is available within the military justice system.¹⁴⁷

CAAF has come a long way in the approximately sixty years since its creation.¹⁴⁸ In fact, its name symbolizes CAAF's journey from arguably simply an administrative agency to a federal court of appeals in nearly every substantive way. The original draft of the UCMJ called CAAF the "Judicial Council."¹⁴⁹ After much debate concerning how naming CAAF a "council" may affect its stature (as well as whether to include life tenure for its judges), Congress officially named the new court the Court of Military Appeals ("CMA").¹⁵⁰ This was a compromise of sorts between advocates of a strong independent court made up of civilians, and those who wanted something much less ambitious.¹⁵¹ Attempts to make CAAF a "court of the United States," thus constituted under Article III, were opposed by senators such as Senator Estes Kefauver, who expressed concern that the initial membership would be made up of "lame ducks" and who argued that experience may eventually demonstrate the necessity of changing CAAF's membership.¹⁵² But in 1968, Congress answered the question of CAAF's status as a court. It renamed the Court of Military Appeals the United States Court of Military Appeals, a court established under Article I of the Constitution and located within the Department of Defense only for administrative purposes.¹⁵³ The House made it clear:

One of the purposes of this bill is to make it abundantly clear in the law that the Court of Military Appeals is a court . . . that the Court of Military

147. *Id.*

148. Professor Jonathan Lurie's two-volume work on CAAF remains one of the few comprehensive published studies of that legal institution. See JONATHAN LURIE, *ARMING MILITARY JUSTICE* (Princeton Univ. Press 1992); JONATHAN LURIE, *PURSUING MILITARY JUSTICE* (Princeton Univ. Press 1998).

149. John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 61-62 (1972).

150. *See id.* at 63-71.

151. *See id.*

152. *Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 313 (1949); 95 CONG. REC. 1293, 1442-43 (1950).

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

Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under [A]rticle III of the Constitution.¹⁵⁴

However, proposals to solidify CAAF's status continued. In one example, then-Chief Judge Everett, a leading military law scholar, argued that CAAF should be renamed once again and its jurisdiction expanded.¹⁵⁵ His proposal included renaming CAAF the United States Court of Appeals for the Military Circuit, with jurisdiction over all legal issues that fit within military related categories established by Congress.¹⁵⁶ To an extent, Congress listened. In 1994, CAAF was renamed again, this time to the United States Court of Appeals for the Armed Forces.¹⁵⁷ Today CAAF, with a few glaring exceptions, such as 15 year terms rather than life tenure and a requirement that no more than three seats come from the same political party, looks and acts just like an Article III court.¹⁵⁸ As such, it has taken the lead in interpreting how the Constitution interacts with the military community in the area of military justice.

D. Evolution from Congressional Prerogative to Constitutional Roots

It has long been settled in military courts that the Constitution applies to service members.¹⁵⁹ But it was not always this way. For a time, service members did not have the same constitutional

154. H.R. Rep. No. 90-1480, at 2054 (1968).

155. Robinson O. Everett, *Some Observations on Appellate Review of Court-Martial Convictions—Past, Present and Future*, 31 FED. B. NEWS & J. 420, 421 (1984).

156. *Id.* at 421–22.

157. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663.

158. *See Weiss v. United States*, 510 U.S. 163, 179 (1994) (“Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice . . .”).

159. *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430 (1960).

rights guaranteed to their fellow citizens; Congress could grant, or exclude, any right it wanted through the UCMJ.¹⁶⁰

CAAF addressed the origin of service members' rights in its first term. A special court-martial convicted Hospitalman ("HN") Raymond Clay of improperly wearing the uniform and disorderly conduct for getting into a fight with locals in Korea.¹⁶¹ However, the president of the court¹⁶² did not instruct it "on the elements of the offense, the presumption of innocence, and the burden of proof, as required" by the UCMJ and the Manual for Courts-Martial ("MCM").¹⁶³ While deciding whether the president

160. *United States v. Clay*, 1 U.S.C.M.A. 74, 77 (1951). To be sure, the Constitution has always applied to the military. It grants Congress the authority to "make rules for the government and regulation of the land and naval forces." U.S. CONST. art. 1, § 8, cl. 14. In addition, the president, as commander-in-chief, retains authority to command the military. U.S. CONST. art. 2, § 2, cl. 1. Until CAAF first addressed the issue in 1951, it only mattered that the court-martial had jurisdiction over the person and the offense. *Johnson v. Sayre*, 158 U.S. 109, 118 (1895). If so, such court's decision would be unreviewable by civil courts. *Id.*

161. *Clay*, 1 U.S.C.M.A. at 76–77.

162. Prior to the Military Justice Act of 1983, which created the military judge, the president of the court-martial was the closest to the role of judge in a special court-martial. This individual, the highest ranking member of the panel (the military jury), instructed the rest of the panel as required (i.e. elements, presumptions of innocence, reasonable doubt, burden of proof, etc.) and ruled on interlocutory questions. MANUAL FOR COURTS-MARTIAL, UNITED STATES 57–58 (1951) [hereinafter 1951 MCM]. Today, the president of a panel will preside over a special court-martial only in the rare case that a military judge is not appointed to it. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(b)(2)(C) (2012) [hereinafter MCM]. In fact, at least one service expressly requires all special courts-martial to include a detailed military judge. *See* U.S. DEP'T OF ARMY, REG. AR 27-10, MILITARY JUSTICE 37 (2011) [hereinafter AR 27-10], http://www.apd.army.mil/pdffiles/r27_10.pdf ("In each special court-martial (SPCM), a military judge shall be detailed except when a military judge cannot be detailed because of physical conditions or military exigencies . . .").

163. *Clay*, 1 U.S.C.M.A. at 76. Clay pleaded guilty to improper wear of the uniform and not guilty to the disorder offense, so the court-martial proceeded to trial only on the disorder offense. *Id.* The intermediate appellate court affirmed the conviction and held that Clay was not substantially prejudiced; The Judge Advocate General ("TJAG") of the Navy certified to CMA. *Id.* Article 67, UCMJ, authorizes TJAG of each service to "certify" cases to CAAF. 10 U.S.C. § 867(a)(2) (2013). Certification means that CAAF must hear all cases

of the court violated the provision within the MCM and the UCMJ, CAAF addressed service members' rights.

In a unanimous opinion, CAAF held that service members are only entitled to the rights granted them by Congress, not the Constitution.¹⁶⁴ Through the UCMJ, Congress established a series of rights CAAF described as "military due process,"¹⁶⁵ but nothing more. A congressional right that is also a constitutional right might be interpreted in the same way, but a constitutional right not found in the UCMJ simply did not exist in the military.¹⁶⁶

decided by an intermediate appellate court (today known as a Court of Criminal Appeals) that any TJAG orders reviewed.

164. "[W]e do not bottom those rights and privileges on the Constitution. We base them on the laws enacted by Congress." *Clay*, 1 U.S.C.M.A. at 77.

165. *Id.* Military due process included the following rights:

To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; to challenge members of [CAAF] for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have [CAAF] instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.

Id. at 77–78. However, CAAF seemed to carve out an escape valve if it decided to one day change its mind:

[W]e have not intended to make the list all-inclusive, nor to imply others might not be substantial. We have merely enumerated those which are of such importance as to readily catalogue in that category. . . . [W]e need go no further than to hold that the failure to afford to an accused any of the enumerated rights denied him military due process and furnishes grounds for us to set aside the conviction.

Id. at 78.

166. *See, e.g.,* *United States v. Rosato*, 3 U.S.C.M.A. 143, 145 (1953) ("Dispelling any doubt of its application to the military services, Congress included the substance of the Fifth Amendment in the Uniform Code of Military Justice, as Article 31 . . .").

CAAF again rejected the notion that the Constitution applied to service members two years later in 1953.¹⁶⁷ It agreed that military due process included the right to confront witnesses, but since Congress limited that right in the UCMJ rather than apply the full constitutional standard, CAAF remained “powerless.”¹⁶⁸ Therefore, so long as a deposition transcript complied with the requirements of the UCMJ, it would be admitted as evidence against the accused as a substitute for the live testimony of the deponent,¹⁶⁹ regardless of his availability. Thus, in a conflict between the UCMJ provision and a constitutional provision, the UCMJ controlled.

167. *United States v. Sutton*, 3 U.S.C.M.A. 220, 222–23 (1953) (“In [*United States v. Clay*], we specifically stated we were building ‘military due process’ on the laws enacted by Congress and not on the guarantees found in the Constitution. Particularly, we were speaking of the Uniform Code of Military Justice as the source and strength of military due process.”). The intermediate appellate court set aside the offense of malingering after it held that admitting a deposition transcript as done in the trial below violated the accused’s right to be confronted by witnesses. *Id.* at 221. TJAG certified the case for review. *Id.*

168. CAAF reiterated that it was unwilling to challenge Congress’s plenary power in this area:

Therefore, when we enumerated confrontation of witnesses as one of the privileges accorded an accused by Congress, we had to be considering it in the light of any limitations set out in the Code. Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level.

Id. at 223.

169. After all, it had always been done this way:

With an historical background of that length and consistency [referring to the use of depositions as testimony since the Articles of War of 1806 forward], it would take a positive expression by Congress to the contrary before we would feel justified in inferring that a change in the law was intended. But Congress did not express a desire for change. On the contrary, it re-enacted, in substance, the time honored rule [referring to Article 49, which continued to allow the use of deposition testimony].

Id. at 224.

This time, Chief Judge Quinn disagreed.¹⁷⁰ His view was clear: “I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.”¹⁷¹ These exclusions were the express exception within the Fifth Amendment that excluded service members from the grand jury requirement and the implied limitation on the right to trial by jury because only an indictment or presentment required a jury.¹⁷² All other constitutional provisions applied to the military community.¹⁷³

170. *Id.* at 228–31 (Quinn, C.J., dissenting). Chief Judge Quinn had previously joined the unanimous *Clay* decision that limited service members’ rights to those granted them by Congress. *See Clay*, 1 U.S.C.M.A. at 82. However, his reasons for doing so in light of this later position have yet to be studied.

171. *Sutton*, 3 U.S.C.M.A. at 228 (Quinn, C.J., dissenting) (citing *Burns v. Lovett*, 202 F.2d 335, 341 (D.C. Cir. 1952), *aff’d sub nom. Burns v. Wilson*, 346 U.S. 137 (1953)).

172. Chief Judge Quinn’s articulation was apparently based on a plain reading of the text of the Constitution:

With only a single express exception, there is no withholding of the protection of these rights and privileges from an accused because he is, at the time, serving with the armed forces of his country. Under the express exception, set out in the Fifth Amendment, an accused in the armed forces may be held to answer for a capital, or otherwise infamous crime, without presentment or indictment of a grand jury. To this express exception may be added the implied limitation of the right of trial by jury, as protected by the Sixth Amendment, to the extent that a jury trial is required only where presentment or indictment is necessary.

Id. (citations omitted).

173. *Id.* (“No other recognized exceptions have been cited and I know of none. The opinions of the appellate courts in the *Burns* case support the conclusion that there are no other exceptions.”). Chief Judge Quinn continued that the D.C. Circuit in *Burns* found “no intimation in the Constitution itself that [the clause empowering Congress to make rules for the armed forces] and proceedings pursuant thereto are exempt from the requirements and prohibitions of the Fifth and Sixth Amendments.” *Id.* (quoting *Burns*, 202 F.2d at 341). He noted that the Court seemed to agree. *Id.* at 229 (“The military courts . . . have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights.” (quoting *Burns*, 346 U.S. at 142)). The Chief Judge further noted that Justice Douglas made the point more explicit in his dissent.

Chief Judge Quinn's dissent became law seven years later¹⁷⁴ through the pen of Judge Homer Ferguson.¹⁷⁵ Early in his tenure, Judge Ferguson had initially joined an opinion upholding the *Sutton* rule that withheld constitutional protections from service members.¹⁷⁶ As he had since 1953, Chief Judge Quinn maintained his full throated dissent that the Constitution fully applied.¹⁷⁷ By 1960, Judge Ferguson became convinced that Chief Judge Quinn was right.

Like Private ("PVT") Sutton before her, a special court-martial convicted Airman Third Class ("A3C") Loretta Jacoby without providing her the opportunity to confront the witnesses

Id. (citing *Burns*, 346 U.S. at 152 (Douglas, J., dissenting)) ("But never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces.").

174. The Chief Judge's view did, on one occasion, make it into a majority opinion. *United States v. Adams*, 5 U.S.C.M.A. 563, 570 (1955) ("No reason in law, logic or military necessity justifies depriving the men and women in the armed forces of a fundamental right to which they would be entitled as civilians."). Though this decision has been cited thirty-six times since 1955, this claim seems to have been lost to history. *See, e.g.*, *United States v. Shepherd*, 33 M.J. 66, 69 (C.M.A. 1991); *United States v. Richey*, 20 M.J. 251, 252 (C.M.A. 1985); *United States v. Clark*, 22 U.S.C.M.A. 576, 579–80 (1973); *United States v. Lincoln*, 17 U.S.C.M.A. 330, 334 (1967); *United States v. Bullcock*, 12 U.S.C.M.A. 142, 143 (1961). Court watchers at the time did not address what impact, if any, this assertion may have had in the relationship between the Constitution and the military community. An argument can be made that because Chief Judge Quinn did not attempt to specifically overrule *Clay*, the remaining court membership felt it unnecessary to write separately. Instead, this phrase can be interpreted as asserting that, regardless of whether in the military or civilian community, an individual is "entitled to stand his ground against a trespasser to the same extent that a civilian is entitled to stand fast in his civilian home." *Adams*, 5 U.S.C.M.A. at 570. In any event, *Clay* was not specifically overruled until 1960. *United States v. Jacoby*, 11 U.S.C.M.A. 428, 429 (1960).

175. Judge Ferguson joined CAAF in 1956 after serving as a United States Senator and, most recently, Ambassador to the Philippines. David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 312 (2005).

176. *United States v. Parrish*, 7 U.S.C.M.A. 337, 342 (1956) ("Judge Ferguson has chosen to follow the principle announced by the majority [in *Sutton*] and no good purpose would be served by repeating what was there said.").

177. *Id.* at 348–49 (Quinn, C.J., dissenting).

against her.¹⁷⁸ Writing for the two judge majority,¹⁷⁹ Judge Ferguson adopted the rationale from Chief Judge Quinn's *Sutton* dissent: "It is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."¹⁸⁰ From that day forth, the Bill of Rights applied to members of the United States armed forces.¹⁸¹

Since *Jacoby*, it has been beyond question that the Bill of Rights applies to service members unless expressly or by necessary implication excluded.¹⁸² As noted earlier, the text of the Constitu-

178. *Jacoby*, 11 U.S.C.M.A. at 429. In this case, the Government sought to introduce interrogatories as a substitute for live testimony. *Id.*

179. Originally a three judge court, Congress expanded CAAF's membership to five in 1989. See National Defense Authorization Act for Fiscal Years 1990-1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1570 (1989).

180. *Jacoby*, 11 U.S.C.M.A. at 430-31. Prior to adopting the *Sutton* dissent as the new majority rule, Judge Ferguson addressed why his position changed from *Parrish* to *Jacoby*. *Id.* at 430. *Parrish* was written out of respect for stare decisis, but the court noted, "[I]t should never be applied in order to perpetuate a mistaken view. Indeed, it is our duty to overrule and modify decisions which are erroneous, although there has been no legislative change in the law as originally construed." *Id.* (citations omitted). However, it is noteworthy that Judge Ferguson did not cite the *Sutton* dissent for the rule he just established. See *id.* at 430-31. Instead, he relied on the Supreme Court's holding in *Burns*, which is what Chief Judge Quinn had relied on as well. *Id.*

181. Considering that *Jacoby* adopted the specific language out of Chief Judge Quinn's *Sutton* dissent, it seems to follow that the Chief Judge's explanation of the only exceptions to the rule are, at least, highly persuasive. Therefore, it may appear that, save for the two exceptions listed in Chief Judge Quinn's *Sutton* dissent, the rest of the Constitution would apply completely. See *United States v. Sutton*, 3 U.S.C.M.A. 220, 228-29. The *Jacoby* decision has held fast in military justice. See, e.g., *United States v. Marcum*, 60 M.J. 198, 200, 206 (C.A.A.F. 2004) ("Constitutional rights generally apply to members of the armed forces unless by their express terms, or the express language of the Constitution, they are inapplicable. . . . Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997) ("[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." (quoting *Jacoby*, 11 U.S.C.M.A. at 430-31)).

182. See, e.g., *United States v. Easton*, 71 M.J. 168, 177 (C.A.A.F. 2012) (Erdmann, J., dissenting in part and concurring in part) ("[T]his court has long held that the Bill of Rights applies to servicemembers except for those that are

tion itself excludes members of the armed forces from the right to indictment by grand jury.¹⁸³ Furthermore, the right to trial by a jury composed of a cross-section of society is by necessary implication excluded.¹⁸⁴ Finally, the Court has determined a summary court-martial to be a disciplinary proceeding, not a trial; therefore, the Sixth Amendment right to counsel does not apply in that forum any more than it would to an administrative proceeding in the civilian world.¹⁸⁵

A straightforward reading of *Jacoby* indicates that constitutional issues in the military and civilian communities, with the exception of the inmate and student communities, should be analyzed similarly. For example, laws infringing the First Amendment rights to speech, association, and religious liberty are subject to strict scrutiny.¹⁸⁶ In order for the Government to infringe one of these rights, it must assert a compelling interest and the enacted law must be the least restrictive means to accomplish that compel-

‘expressly or by necessary implication inapplicable.’” (citing *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976)); *United States v. Cendejas*, 62 M.J. 334, 344 (C.A.A.F. 2006) (“[O]ur Court has long maintained vigilance in preserving the rights of servicemembers in [CAAF-martial] process.” (citing *Jacoby*, 11 U.S.C.M.A. at 430–31)); *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992) (“This Court’s position is clear and well established: ‘[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.’” (alteration in original) (citations omitted) (citing *Jacoby*, 11 U.S.C.M.A. at 430–31); *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (quoting *Jacoby*, 11 U.S.C.M.A. at 430–31)).

183. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . .”).

184. *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) (“The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial.” (first citing *Ex parte Quirin*, 317 U.S. 1, 39–41 (1942); and then citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137–38 (1866))).

185. *Middendorf v. Henry*, 425 U.S. 25, 42 (1976) (“[W]e conclude that a summary court-martial is not a ‘criminal prosecution’ for the purposes of the Sixth Amendment.”).

186. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006).

ling interest.¹⁸⁷ Fourth Amendment issues are reviewed for reasonableness.¹⁸⁸ Sixth, Seventh, and Eighth Amendment issues are subject to categorical rules.¹⁸⁹ This means that, if the individual sufficiently demonstrates that the right is violated, the denial of that right is unconstitutional.¹⁹⁰ The analysis for each Amendment is certainly more complex than just described, however, for the purposes of this study it is enough to say that *Jacoby* reasonably asserted that a similar analysis should occur in the military community.¹⁹¹ CAAF, however, has not applied *Jacoby* this strictly in constitutional cases. Instead, it has applied the military necessity doctrine.¹⁹²

E. The Military Necessity Doctrine

The military necessity doctrine evolved from CAAF's *Jacoby* decision.¹⁹³ As noted above, the language used in *Jacoby* mirrors the language used by Chief Judge Quinn in his *Sutton* dis-

187. See, e.g., *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985).

188. Winkler, *supra* note 186, at 229–30.

189. *Id.* at 230–31.

190. See *id.*

191. It is unclear whether intermediate, strict, or some other standard of review should be applied to Second Amendment cases. See Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: "Historical Guideposts" and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L. & POL'Y 7 (2010).

192. It is noteworthy to recognize that CAAF has applied a different approach in specific circumstances. CAAF has applied the Court's "extraordinarily weighty factors" balancing test to general due process challenges under the Fifth Amendment in cases that challenge the general fairness of a court-martial. See generally *United States v. Vazquez*, 72 M.J. 13, 18–19 (C.A.A.F. 2013); *United States v. Gray*, 51 M.J. 1, 50 (C.A.A.F. 1999); *United States v. Witham*, 47 M.J. 297, 300–01 (C.A.A.F. 1996); *United States v. Mitchell*, 39 M.J. 131, 133, 135–45 (C.M.A. 1994). It has also created a three factor test to apply the Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 563 (2003), to the military community in cases involving private sexual acts between members of the same sex. *United States v. Marcum*, 60 M.J. 198, 206–07 (C.A.A.F. 2004).

193. See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430–31 (1960) ("[T]he protections of the Bill of Rights, except those which are expressly or by necessary implication, are available to members of our armed forces.").

sent.¹⁹⁴ It is thus arguable that the only exceptions to the full application of the Constitution to the military community are the express exclusion of the right to indictment by a grand jury and the necessarily implied exclusion of the right to trial by jury.¹⁹⁵ This position appears consistent with Congress's intent in enacting the UCMJ. One of the primary purposes of the UCMJ was to civilianize the military justice system to the extent practical.¹⁹⁶ However, CAAF has since declined, though not expressly, to apply *Jacoby*'s this way. Instead, it appears to have walked back from *Jacoby*'s bright-line rules by referencing military necessity as the basis for a different rule in the military community.¹⁹⁷ Though a statutory interpretation case rather than a constitutional one, the case of Lieutenant Thomas Dowty is such an example of CAAF moving away from *Jacoby*'s language and toward military necessity.¹⁹⁸

On active duty service in the Naval Medical Service Corps, Dowty operated a private business called Health Care Associ-

194. See *United States v. Sutton*, 3 U.S.C.M.A. 220, 228 (1953) (Quinn, C.J., dissenting) ("I have absolutely no doubt in my mind that accused persons in the military service . . . are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.").

195. *Id.* (Quinn, C.J., dissenting). Since Chief Judge Quinn penned the test in an earlier dissent, his explanation of this phrase is most informative. In addition, the Court has held that a service member is not entitled to his Sixth Amendment right to counsel in summary courts-martial. *Middendorf v. Henry*, 425 U.S. 25, 34 (1976).

196. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 7 (1970) ("Substantial civilianization resulted from the passage of the Uniform Code of Military Justice (UCMJ) in 1950 . . .").

197. It is unclear what legal basis CAAF relied on to transition from *Jacoby*'s "expressly or by necessary implication excluded" standard to the modern standard of "military necessity." CAAF began incorporating the military necessity language into its opinions over time while still citing *Jacoby* as the basis for that assertion. Arguably, this could have been the result of the Court's decision in *Parker v. Levy*. See Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 12-21 (1980). However, CAAF has not explicitly articulated the reason for this shift. Thus, the lack of scholarly scrutiny during CAAF's transition was a missed opportunity. As noted in this Article, CAAF has welcomed and eagerly sought scholarly attention toward its jurisprudence.

198. See *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998).

ates.¹⁹⁹ His ex-wife anonymously called the Defense Fraud, Waste, and Abuse Hotline and alleged that Dowty's company had submitted fraudulent claims to the Government for the past three years.²⁰⁰ As part of the Naval Criminal Investigative Service's ("NCIS") investigation, agents requested the Department of Defense Inspector General ("DoD IG") to issue an administrative subpoena under the Right of Financial Privacy Act ("RFPA") to obtain the bank records of Health Care Associates, which it issued on July 27, 1994.²⁰¹ Dowty challenged the Government's access to the records by filing a motion in the United States District Court for the District of Columbia on September 9, 1994.²⁰² The district court dismissed Dowty's motion eight months later on May 17, 1995, and the Navy preferred charges against Dowty on January 17, 1996.²⁰³

At his general court-martial, Dowty moved to dismiss twelve of the sixteen charged specifications because the charged offenses occurred beyond the five year statute of limitations.²⁰⁴ Under the UCMJ, the military generally could only prosecute offenses that occurred within the previous five years.²⁰⁵ However, the statute of limitations tolled upon the commander exercising summary court-martial convening authority receiving the charges.²⁰⁶ The Government argued that the RFPA tolled the statute of limitations during the eight month and two day period in which Dowty's motion was litigated in federal court.²⁰⁷ Consequently, all offenses properly occurred within the five year statute of limitations.²⁰⁸

199. *Id.* at 104.

200. *Id.* Dowty's ex-wife claimed that he defrauded the Government out of \$15,000 and deposited each check into his personal checking account. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 104–05.

204. *Id.* at 105.

205. *Id.* (citing 10 U.S.C. § 843 (2013)).

206. *Id.*

207. *Id.*

208. *Id.* The relevant provision tolled any applicable statute of limitations if the litigation caused a delay in the Government's access to the requested financial records. *Id.*

The military judge disagreed.²⁰⁹ He ruled that Article 43 controlled the issue.²¹⁰ That article established the military's five year statute of limitations, and nothing in the text of that article "permits consideration of the RFPA to toll the running of the statute."²¹¹ Even if the RFPA's provision did apply, the military judge ruled, the approximate eight month period did not toll the running of the statute.²¹² Since the Government could have obtained Dowty's financial records through his ex-wife, a joint owner of the accounts, the litigation did not delay the Government's access.²¹³ The Government appealed this ruling, and the intermediate appellate court rejected the military judge's reasoning.²¹⁴ In deciding the questions presented, CAAF disclosed an example of its philosophy behind its military necessity doctrine.²¹⁵

CAAF began with the principle that Congress has broad discretion over the military community.²¹⁶ Its plenary powers are buttressed by the individual protections found in the Constitution, but "the different character of the military community and of the military mission requires a different application of those protections."²¹⁷ CAAF went on to explain how this balancing works:

While members of the armed forces do not enjoy the full panoply of constitutional and statutory rights available to others, they are no less citizens of the United States. In the absence of a *valid military*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 105–06.

215. *Id.* at 106–07. CAAF ultimately decided that the accused properly invoked the provisions of the RFPA and such action tolled the running of the statute. *Id.* at 111–12 ("When appellant affirmatively invoked the protections of the RFPA in an effort to block government access to his financial records, he submitted himself to the integrated provisions of that statute, including the provision under which the applicable statute of limitations was tolled.").

216. *Id.* at 106 ("Under the Constitution, 'Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'") (quoting *Weiss v. United States*, 510 U.S. 163, 177 (1994)).

217. *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

purpose requiring a different result, generally applicable statutes normally are available to protect servicemembers in their personal affairs.²¹⁸

Though *Dowty* did not deal with a constitutional protection under the Bill of Rights, CAAF's analysis sheds light into its philosophy underlying its military necessity doctrine. Though CAAF still often cites *Jacoby*,²¹⁹ it often has not taken the opportunity to go further than it did in *Dowty* to develop this doctrine.

III. SHAPING AN UNDERSTANDING OF MILITARY NECESSITY

With a foundational understanding of CAAF and its role in constitutional cases, it is now possible to turn to its development and application of the military necessity doctrine. This Part begins by summarizing CAAF's difficulties in defining military necessity. To advance the development of this doctrine, a summary of the research method employed in this study to categorize themes and examples of military necessity in CAAF's jurisprudence follows. The remainder of this Part, as well as the subsequent Part, discusses the results of this study.

A. Defining Military Necessity

While *Dowty* demonstrates CAAF's modern application of *Jacoby*, it has yet to flesh out a definition of military necessity. On one occasion, one of its judges noted that the phrase "military necessity" was often used by CAAF, as well as civilian courts, but rarely explained.²²⁰ On a separate occasion, CAAF recognized that

218. *Id.* at 107 (emphasis added).

219. *See, e.g.*, *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004); *United States v. Rendon*, 58 M.J. 221, 225 (C.A.A.F. 2003); *Dowty*, 48 M.J. at 107 (C.A.A.F. 1998); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Rexroat*, 38 M.J. 292, 294–95 (C.M.A. 1993); *United States v. Lopez*, 35 M.J. 35, 41 n.2 (C.M.A. 1992); *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976).

220. Judge Matthew Perry said so in some detail in the majority opinion in *Harris*:

While the term "military necessity" has appeared in many cases in this Court as well as in civilian appellate courts, discussion of its meaning has been rare. *See United States v. Russell*, 13 Wall. 623, 627–28 (1871); *Korematsu v. United*

“military necessity” is an “amorphous term,” but it knew it when it saw it.²²¹ Members of CAAF have also criticized the majority at times for citing military necessity as a basis to ignore a constitutional rule without proper justification.²²²

States, 323 U.S. 214, 233, 234 (Murphy J., dissenting) (1944). In context some cases may provide insight into its meaning: *United States v. Grow*, 3 U.S.C.M.A. 77 (1953); *United States v. Hooper*, 5 U.S.C.M.A. 391, 396-8 (1955); *United States v. Robinson*, 6 U.S.C.M.A. 347, 352-3 (1955); *United States v. Milldebrandt*, 8 U.S.C.M.A. 635, 638 (1958); *United States v. Davis*, 19 U.S.C.M.A. 217, 223-4 (1970); *United States v. Howard*, 19 U.S.C.M.A. 547, 551 (1970); *United States v. Mohr*, 21 U.S.C.M.A. 360, 367 (1973); *United States v. Ruiz*, 23 U.S.C.M.A. 181, 183 (1974). Other cases merely mention the term without any discussion. They will be referred to only by C.M.A. citation (CMR/page) since they are only of academic interest: 6/92; 17/22; 18/187; 21/149; 21/201; 22/41; 24/240; 27/316; 29/275; 33/68; 226; 36/309; 37/64; 38/78; 40/74; 45/163. The term has also been mentioned in the following Supreme Court decisions: *Sterling v. Constantin*, 287 U.S. 378, 390-2 (1932); *Hirabayashi v. United States*, 320 U.S. 81, 86 (1943); *Korematsu v. United States*, *supra* at 227, 235, 240-1 (1944); *In re Yamashita*, 327 U.S. 1, 14, 24, 27, 46, 50, 78 (1946); *Duncan v. Kahanamoku*, 327 U.S. 304, 328 (1946); *NLRB v. Jones and Laughlin Corp.*, 331 U.S. 416, 426 (1947); *Libby et al. v. United States*, 340 U.S. 71, 73-5 (1950); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 661, 686 (1952); *Reid v. Covert*, 354 U.S. 1, 46 (1957); *Laird v. Tatum*, 408 U.S. 1, 20 (1972); *Parker v. Levy*, 417 U.S. 733, 788 (1974). See also *United States v. Pierce*, 505 F.2d 1053, 1055-6 (1st Cir. 1974); *Hess v. Schlesinger*, 486 F.2d 1311, 1313 (1973); *Anderson v. Laird*, 466 F.2d 283, 297, 304, 310 (1972), cert. denied, 409 U.S. 1076.

United States v. Harris, 5 M.J. 44, 64 n.28 (C.M.A. 1978) (parallel citations omitted) (*overruled on other grounds by United States v. Jones*, 24 M.J. 294, 296 (C.M.A. 1987)). Judge Perry would resign from CAAF one year later to accept an appointment as a United States District Judge in South Carolina. See *In Memoriam, In Memoriam: Matthew J. Perry, Jr.*, 63 S.C. L. REV. 769, 771 (2012).

221. See *United States v. Alleyne*, 13 M.J. 331, 336 (C.M.A. 1982) (“Obviously, ‘military necessity’ is an amorphous term, but whatever it means, we are sure that [a gate search OCONUS is included].”).

222. See *Tulloch*, 47 M.J. at 289-90 (C.A.A.F. 1997) (Crawford, J., dissenting) (“[T]he majority refuses to follow Supreme Court precedent and con-

The lack of a definition or framework is problematic. Unlike the inmate and student communities, the Court does not wade into the military community to articulate a specific standard to be applied by military courts. Instead, it relies on CAAF to administer the Constitution in the military community. The absence of an articulated framework presents at least two concerns. First, practitioners have no guide to frame issues for CAAF's review. This increases the probability of unfocused briefs that fail to narrow the issues before CAAF, or fail to address CAAF's concerns. Additionally, providing clear standards enables practitioners to properly narrow issues for CAAF, resulting in more effective briefs, consistent application of legal principles, and stability and predictability in military justice. Second, the absence of a clear framework can be a roadblock to CAAF's administration of military justice as a whole. While a particular court membership may understand each other's views on military necessity, it is less able to connect CAAF's jurisprudence throughout its institutional history.

A study of CAAF's jurisprudence uncovers numerous decisions in which it has found sufficient military necessity. As will be discussed below, some of those findings may no longer stand in the face of the evolving nature of the military community and the Court's interpretation of the Constitution. However, the results of this study provide some clarity to the process. The proceeding sections thus discuss the research methodology undertaken, and the results themselves.

B. Research Method

An initial search of the Court of Appeals for the Armed Forces database in Westlaw was conducted to by the author to uncover every reference to the phrase, "military necessity."²²³ After

tinues this Court's practice of fashioning a different rule for the military without adequate justification . . .").

223. The decision to search for the phrase "military necessity" rather than "military purpose" was intentional. Though "military purpose" appears in decisions such as *Dowty* and the two phrases are at times used interchangeably, the author's experience with CAAF led to the decision that "military necessity" would be more often used and would accurately capture the development of the doctrine without the need to broaden the pool of decisions to review. That said, testing this study against the use of the phrase "military purpose" is a worthwhile endeavor.

eliminating decisions that did not cite the phrase for the purpose of determining whether to apply a civilian constitutional or statutory rule to the military community, the remaining decisions were grouped into categories. A second analysis was then conducted to determine which categories were considered by CAAF to be valid assertions of military necessity. These were grouped into three overarching themes: injury avoidance, good order and discipline, and mission accomplishment. A third analysis was then conducted to further break down each overarching theme into two broad examples of military necessity. These examples do not comprise all possible valid assertions of military necessity. They are as they are aptly described here—examples.

C. Some Initial Observations on the Results

Before turning to the results of this study, three observations on the study are discussed below. First, the study uncovered that at least one decision complicates the understanding of the military necessity doctrine by asserting that military necessity is just one of many factors in a balancing test CAAF undertakes to determine whether to apply a civilian statutory or constitutional rule.²²⁴ Though not relied upon in subsequent cases, that proposition has yet to be expressly overruled or discarded.²²⁵ Second, the results at least demonstrate that merely asserting military necessity, without more, is not enough. The absence of a developed framework for the military necessity doctrine illustrates that this rule is likely both ignored by practitioners and not regularly enforced by CAAF. However, this rule supports the proposition that a working military necessity doctrine requires more than a mere assertion of military necessity. A third and final observation discussed below is that there exists a small number of decisions asserting military necessity that, as stated earlier, may no longer be consistent with the evolution of both the military community and the Court's interpretation of the Constitution in certain areas.

224. *Harris*, 5 M.J. at 64.

225. Admittedly, it could be argued that this proposition has been discarded in practice.

1. Inconsistent Articulation of When and How the Military Necessity Doctrine is Applied

An initial observation that complicates understanding the military necessity doctrine is that CAAF has not consistently articulated how the doctrine is to be applied. On at least one occasion, CAAF proclaimed that though military necessity is a significant and even overriding factor, it is but one factor in a balancing test.²²⁶ In *United States v. Harris*, CAAF disagreed with the Government's assertion of military necessity for certain procedures undertaken at a military gate for searches of vehicles attempting to enter a military installation.²²⁷ Private (PVT) Charles Harris rode as a passenger in a vehicle seeking to enter the main gate at Marine Base Twentynine Palms in California.²²⁸ The Marine Corps prosecuted PVT Harris for possession of marijuana when, as he exited the vehicle for it to be inspected, he dropped two bags of the controlled substance.²²⁹ CAAF agreed that military necessity could require invasive procedures during a gate search that would not otherwise be allowed in the broader civilian community, but that was not the end of the matter.²³⁰ It went on to say that "military necessity is only a factor, rather than a determinant, in the balancing process."²³¹ Rather than first determining whether military necessity required a different application of Fourth Amendment jurisprudence and then applying a reasonableness test in light of its threshold decision, CAAF explained that military necessity, whatever it was and however it should be evaluated, was just one factor in a balancing test that also was not explained.

As a result, there is at least one decision that complicates a straightforward application of the military necessity doctrine in a constitutional challenge.²³² However, this analysis has largely

226. *Harris*, 5 M.J. at 64.

227. *Id.* at 45 ("We have determined that the procedures utilized by the authorities which led to the discovery and seizure of the marijuana rendered it inadmissible.").

228. *Id.*

229. *Id.*

230. *Id.* at 65.

231. *Id.*

232. In another decision, CAAF has implied that public policy may require a different application. *United States v. Obligation*, 17 U.S.C.M.A. 36, 39

been ignored by CAAF in subsequent decisions. In fact, it may arguably have been abrogated by later decisions that do not consider military necessity as one factor in a balancing test. Ultimately, a well-defined doctrine will address these uncertainties and make explicit what should no longer be implied.

2. Simple Assertion is Not Enough

A second observation is that CAAF has, on at least one occasion, required more than a simple assertion of military necessity. In *United States v. Grunden*, CAAF explained that simply asserting “security” or “military necessity” was not enough to infringe on the accused’s right to a public trial under the Sixth Amendment.²³³ The facts of *Grunden* are relatively straightforward. Airman First Class (“A1C”) Oliver Grunden, Jr. attempted to pass national defense information to undercover agents, in violation of an Air Force Regulation.²³⁴ During his court-martial for failing to report contact with what Grunden believed to be agents of a foreign government and for attempted espionage,²³⁵ the military judge closed the courtroom for essentially the entire trial on the basis that the espionage charges would go into classified information.²³⁶ Nine witnesses testified during the closed proceeding, but only one witness discussed classified matters at length.²³⁷

(1967) (“In the ordinary case, the accused is entitled to look upon his accusers and to have the court weigh their demeanor in testifying. Occasionally, this requirement must give way to public policy.”).

233. 2 M.J. 116, 121 (C.M.A. 1977) (*abrogated by* United States v. Torres, 2001 WL 36264237, *7–8 (C.A.A.F. May 25, 2001) (“The simple utilization of the terms ‘security’ or ‘military necessity’ cannot be the talisman in whose presence the protections of the *Sixth Amendment* and its guarantee to a public trial must vanish.” (emphasis added))).

234. *Id.* at 119.

235. *Id.*

236. *Id.* at 120 (“Thus, despite the objection of the defense counsel, and the trial judge’s own assurances that he would ‘bend over backwards’ to protect the appellant’s rights, the public was excluded from virtually the entire trial as to the espionage charges.”).

237. *Id.* Four made passing references, and the remaining four made no references at all. *Id.*

CAAF's analysis began with the text of the Sixth Amendment, which guarantees the right to a public trial.²³⁸ It recognized that a court may be closed, partially or completely, for security or other good reasons.²³⁹ However, it further noted that such actions must be taken sparingly and only to the extent necessary.²⁴⁰ CAAF's then applied these principles to the Government's simple assertion of military necessity. CAAF recognized that a threshold burden existed that the Government must meet. Thus, simple assertion was not enough.²⁴¹ It then acknowledged that recognition of the uniqueness of the military community does not erase the requirement for reason and analysis when reviewing the constitutional protections service members retained:

This Court recognizes that the Supreme Court [has] acknowledged the uniqueness of the military society, and that it has reaffirmed that belief in recent decisions. Yet, this Court once again must state that analysis and rationale will be determinative of the propriety of given situations, and that the mere uniqueness of the military society or military neces-

238. *Id.* (“The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States.” (citation omitted)).

239. *Id.* at 121 (“Unless otherwise limited by the directives of the Secretary of a Department, the convening authority, the military judge, or the president of a special court-martial without a military judge may, for security or other good reasons, direct that the public or certain persons thereof be excluded from a trial.”). CAAF went on to say that “all spectators may be excluded from an entire trial, over the accused’s objection, only to prevent the disclosure of classified information.” *Id.*

240. *Id.* (“The authority to exclude should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion.”).

241. *Id.* (“The simple utilization of the terms ‘security’ or ‘military necessity’ cannot be the talisman in whose presence the protections of the Sixth Amendment and its guarantee to a public trial must vanish.”).

sity cannot be urged as the basis for sustaining that which reason and analysis indicate is untenable.²⁴²

A balancing test was required to examine and analyze the need for, and scope of, any exclusion of the public.²⁴³ Under this test, the Government must meet a heavy burden.²⁴⁴ As applied to the instant case involving the right to a public trial, one of the military judge's tasks was to "determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh 'the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.'"²⁴⁵

CAAF's acknowledgment of a threshold requirement was not, in and of itself, particularly noteworthy. The Court subjects closures of a courtroom challenged under the Sixth Amendment to strict scrutiny review.²⁴⁶ Consequently, the party seeking to close a courtroom must assert "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."²⁴⁷

What is noteworthy is that CAAF required the Government to meet that threshold rather than address military necessity *sua sponte* in its decision. Though CAAF has appropriately placed the burden of persuasion on the party seeking a different rule due to

242. *Id.* at 121 n.9 (citations omitted). CAAF's use of the phrase "once again" appears to be a re-assertion of an earlier passage in the same opinion, as this phrase is not followed by a citation to an earlier decision.

243. *Id.* at 121 ("Unless an appropriate balancing test is employed with examination and analysis of the need for, and the scope of any suggested exclusion, the result is, as here, unsupportable.").

244. *Id.* at 122 ("[T]he government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right.").

245. *Id.* (quoting *Stamicarbon v. Am. Cyanamid Co.*, 506 F.2d 532, 539 (2d Cir. 1974)).

246. *Waller v. Georgia*, 467 U.S. 39, 44-47 (1984).

247. *Id.* at 45 (quoting *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 510 (1984)).

military necessity,²⁴⁸ it has not always continued to require that party to further allege specific facts explaining what the exact necessity is and why it was important enough to justify the different rule. Thus, a more fully developed doctrine should also require more than asserting the phrase “military necessity.”

3. Military Necessity Examples in Light of the Evolution in the Military Community and the Court’s Constitutional Interpretation

Readers attempting to replicate this study are likely to uncover additional decisions in which CAAF found sufficient military necessity to apply a different rule that are not included in the results discussed in Part V. These include preventing statutory conflict within the UCMJ,²⁴⁹ public policy,²⁵⁰ and preventing the introduction of drugs onto an installation.²⁵¹ For reasons discussed below, these examples are less likely to be a successful assertion of military necessity today.

Though CAAF recently held that conflict with other UCMJ articles is a sufficient articulation of military necessity, this appears problematic. In *United States v. Easton*, CAAF upheld Article 44(c) of the UCMJ, declaring that double jeopardy does not attach in the military until the introduction of evidence.²⁵² This was at

248. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (“[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.” (citation omitted)).

249. *United States v. Easton*, 71 M.J. 168, 176 (C.A.A.F. 2012).

250. *United States v. Oblacion*, 17 U.S.C.M.A. 36, 39 (1967); *United States v. Gladwin*, 14 U.S.C.M.A. 428, 433 (1964).

251. *United States v. Acosta*, 11 M.J. 307, 313 (C.M.A. 1981); *United States v. Middleton*, 10 M.J. 123, 129 n.11 (C.M.A. 1981); *United States v. Hessler*, 7 M.J. 9, 10 (C.M.A. 1979); *United States v. Unrue*, 22 U.S.C.M.A. 466, 469 (1973).

252. *Easton*, 71 M.J. at 170. Interestingly, the MCM described why the military provides one oath to the venire that includes the instructions to the ultimate panel, rather than separate the two, as is done in civilian practice. This is done for administrative convenience. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, A21-50 (2012). In sum, it is easier to execute the oath of the venire to tell the truth in voir dire and the oath swearing in the ultimate panel at one time, rather than at the start of voir dire and then once the venire is reduced to the panel selected to hear the case.

odds with the constitutional rule that double jeopardy attaches earlier, once the military jury is empaneled and sworn.²⁵³ CAAF upheld Article 44(c) in large part because ruling it unconstitutional would bring other articles into question and possibly require finding them unconstitutional as well.²⁵⁴ Any specific critique of CAAF's reasoning in *Easton* is beyond the scope of this article, but it is enough to say that Congress cannot ignore the Constitution.²⁵⁵ Though there is arguably recent precedent allowing for the proposition that statutory consistency is a military necessity, a fully developed doctrine should not test the principle that the Constitution will always supersede a statutory scheme.

Secondly, public policy remains far too general a term to justify an otherwise constitutional violation. At least one court has defined the phrase as concerning "what is right and just and what affects the citizens of the State collectively."²⁵⁶ Black's Law Dictionary defines the phrase as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."²⁵⁷ Consequently, it is just as ambiguous as "military necessity." It adds nothing to the endeavor to better understand the phrase. As such, advocates are best left to focus on more concrete examples that help narrow the definition of that phrase.²⁵⁸

Finally, preventing the introduction of drugs onto a military installation is unlikely to be a sufficient assertion of military necessity justifying infringing constitutional rights in the modern military community. In a series of prior decisions during the 1970s and early 1980s, CAAF relied on this general reason to justify searches and seizures that would otherwise violate the Fourth

253. *Crist v. Bretz*, 437 U.S. 28, 35 (1978).

254. *Easton*, 71 M.J. at 176 ("Were we to mechanically apply the holding in *Crist* to the military context, we would negate numerous portions of the UCMJ . . .").

255. *United States v. Graf*, 35 M.J. 450, 461 (C.M.A. 1992) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)).

256. *Belline v. K-Mart Corp.*, 940 F.2d 184, 187 (7th Cir. 1991) (quoting *Palmateer v. Int'l Harvester Corp.*, 421 N.E.2d 876, 878–79 (Ill. 1981)).

257. *Public Policy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

258. This is not to say public policy arguments shouldn't be made as part of an overall argument. However, the advocate relying solely on a public policy argument is less likely to be successful.

Amendment.²⁵⁹ However, more recent decisions by the Court appear to undercut this reasoning.

Two landmark Confrontation Clause decisions, *Crawford v. Washington*²⁶⁰ and *Melendez-Diaz v. Massachusetts*,²⁶¹ substantially affected federal and state criminal prosecutions in drug cases; the military community was no different. CAAF subsequently began interpreting the impact of *Crawford* and *Melendez-Diaz* on military drug prosecutions in a series of cases that determined which parts of a drug test report were testimonial hearsay and thus required live testimony.²⁶²

None of this further analysis would be necessary if preventing the introduction of drugs onto a military installation, as articulated in prior cases, sufficed as military necessity. If articulating that necessity justified a Fourth Amendment violation, why not also a Sixth Amendment violation? This is not to say the military has no justifiable interest in preventing the introduction of drugs onto an installation. The point here is that the basis, as articulated in prior cases, may be undercut by more recent case law.

With these three observations in mind, it is now possible to turn to the three themes and six examples of military necessity that emerge from CAAF's jurisprudence.

IV. THEMES AND EXAMPLES OF MILITARY NECESSITY

We now turn to the three overarching themes and six broad examples of military necessity. To be sure, these are not specific formulations to be applied mechanically. However, though the specific articulation will likely always be case-specific,²⁶³ each

259. See, e.g., *United States v. Middleton*, 10 M.J. 123, 129 n.11 (C.A.A.F. 1981); *United States v. Acosta*, 11 M.J. 307, 312–13 (C.M.A. 1981); *United States v. Hessler*, 7 M.J. 9, 10 (C.M.A. 1979); *United States v. Unrue*, 22 U.S.C.M.A. 466, 469 (1973).

260. 541 U.S. 36 (2004).

261. 557 U.S. 305 (2009).

262. See, e.g., *United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013); *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011); *United States v. Cavitt*, 69 M.J. 413 (C.A.A.F. 2011); *United States v. Dollar*, 69 M.J. 411 (C.A.A.F. 2011); *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010); *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010).

263. Note that in a facial challenge, the analysis is much more broad. In contrast to an as-applied challenge, in which the focus is on the particular case, a

example provides an avenue to articulate a specific military necessity that exists within CAAF's jurisprudential history. The challenge for the party seeking a different rule, generally the Government, will be to articulate a reasonably direct and detailed nexus between the conduct at issue and one of the following six examples.²⁶⁴ Each is subsequently addressed in turn, grouped by overarching theme. Every subsection begins with an articulation of the example followed by a demonstration of it in action.

A. Mission Accomplishment

1. Essential to Mission Accomplishment

CAAF has held that the infringement of a constitutional right may be justified if such action was essential to mission accomplishment. Of course, such necessity requires a reasonably direct and detailed nexus to mission accomplishment. Some examples illustrate how this nexus can be successfully articulated.

In one example that concerned statutory interpretation, the Army court-martialed Private First Class ("PFC") Elmer Robinson for willful disobedience of a lawful command, in violation of Article 90 of the UCMJ.²⁶⁵ PFC Robinson served as a cook at his unit's mess.²⁶⁶ Dissatisfied, he eventually accepted an offer to serve as a cook's helper at the Officers' Mess.²⁶⁷ He soon became dissatisfied again.²⁶⁸ After showing up late to work on October 12, 1954, he refused to obey an order to begin performing his duties.²⁶⁹

statute will be upheld unless there is not a single application of the statute that is constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

264. To be sure, this is not a Government-focused article. Defense advocates will also benefit from tools allowing them to specifically crystallize for CAAF how the Government has failed to articulate a sufficient compelling interest.

265. *United States v. Robinson*, 6 U.S.C.M.A. 347, 349 (1955).

266. *Id.* at 349. A "mess" is a now-outdated term for the facility in which military members can eat. These facilities may now be called dining facilities or Officers' or Enlisted Clubs, or a joint club.

267. *Id.* at 350. Officers created a closed mess by pooling together funds to provide meals for their members. Open messes are now dining facilities or Officer or Enlisted Clubs.

268. *Id.*

269. *Id.*

PFC Robinson challenged the legality of the order on appeal on the basis that a federal statute prohibited officers from using enlisted men as servants.²⁷⁰

CAAF, however, disagreed with PFC Robinson's interpretation of the statute.²⁷¹ Its reasoning articulated a distinct and detailed nexus between the need to assign enlisted men to the Officers' Mess and the mission. Under conditions that existed in 1955, it was "absolutely essential that officers be fed either in unit messes or in officers' messes."²⁷² Therefore, an officers' mess whose principal purpose was "to feed officers so there will be less interruption with their official duties" that employs enlisted individuals does not offend the statute because it served an "essential military purpose."²⁷³ CAAF noted that "[s]trained manpower conditions" required it to revisit its previous interpretation of the statute.²⁷⁴ Specifically, "national conditions and the necessities of the Service [had] changed to such an extent that to follow the early interpretations would unnecessarily interfere with the building of an armed force capable of carrying out present day missions."²⁷⁵ PFC Robinson served in an Officers' Mess located at Fort McNair, a location heavily used for training and education programs.²⁷⁶ Consequently, the growth in personnel had outpaced similar growth in facilities.²⁷⁷ Adopting PFC Robinson's interpretation "would so

270. *Id.* (citing 10 U.S.C. § 608, prohibiting the use of enlisted men in an officers' open mess).

271. *Id.* CAAF acknowledged that early interpretation of the statute are no longer consistent with changes in circumstances. *Id.* ("[I]t is doubtful that the interpretations found in the early cases offer persuasive authority for a present day construction."). Early cases interpreted the statute literally. *Id.* Due to changed circumstances within the military society, that would no longer do. *Id.* at 351. The modern approach looked to "whether the employment was a military task beneficial to the Army, or a personal service rendered to an individual officer or group of officers." *Id.*

272. *Id.* at 353.

273. *Id.*

274. *Id.* at 351.

275. *Id.*

276. *Id.*

277. *Id.* For example, the Army had 4,604 officers in 1912. *Id.* Twenty-six years later, that number grew to 13,304 just before World War II. *Id.* At the time of CAAF's opinion in 1955, the officer corps had exploded to 128,208 soldiers. *Id.*

circumscribe the military community that the preparation for, or the waging of, war would be impossible.”²⁷⁸ The Officers’ Mess, in this case, was just as essential to the mission as guarding officers’ “barracks, polic[ing] their area, dispos[ing] of their garbage, polic[ing] their latrine, and transport[ing] them from place to place.”²⁷⁹

CAAF also reasoned that the open mess was “an integral part of the Army establishment, an instrumentality of the Government and necessary to the interests of the armed forces.”²⁸⁰ Requiring officers sent to a training base temporarily, for a specific military purpose, to leave the base in search of commercial eating options took them away from too much of their duty day.²⁸¹ From that viewpoint, it is no different than a “garrison or field ration mess” that is available to the enlisted corps.²⁸²

In addition to the preceding example of military necessity, a sufficient “unusual circumstance” unique to the mission may also warrant infringing upon a constitutional right in a particular case.²⁸³ An example of this analysis can be found in *United States v. Milldebrandt*.²⁸⁴ Burdened with substantial personal financial problems, Disbursing Clerk Second Class (“DK2”) James R. Milldebrandt requested a thirty-day leave of absence to earn some additional money as a civilian employee.²⁸⁵ His commander granted the request but ordered DK2 Milldebrandt to submit weekly reports on his financial condition.²⁸⁶ After DK2 Milldebrandt failed to comply, his commanding officer ordered him back to his station, where he faced court-martial for failing to obey a lawful order.²⁸⁷

278. *Id.* at 352.

279. *Id.*

280. *Id.* at 353. CAAF also noted that the mess’s “purpose is to provide services essential to the messing, billeting, morale and welfare of its members and all other officers who are temporarily on post.” *Id.*

281. *Id.* It is important to understand this reasoning in the context of when it was decided. This was shortly after World War II ended, with all those experiences fresh in mind.

282. *Id.*

283. *See, e.g., United States v. Milldebrandt*, 8 U.S.C.M.A. 635, 638 (1958).

284. *Id.*

285. *Id.* at 636.

286. *Id.*

287. *Id.* at 636–37.

During its review, CAAF determined that a sufficient unusual circumstance, such as what occurred in this case, might subject a military member on leave to military orders:

Undoubtedly there may be instances when complete freedom from military duties cannot be the rule, for a serviceman on leave must hold himself amenable to orders of revocation and a commander should be authorized to direct him to furnish changes of address or to report where he may be reached for recall to duty if an emergency arises.²⁸⁸

But to be sufficient, the order must be “necessary to the successful pursuit of [a] military mission.”²⁸⁹ It must be “required to maintain the morale, discipline, or good order of the unit or to keep the military free from disrepute.”²⁹⁰

Robinson and *Milldebrandt* serve as examples of articulating why a challenged statute or rule is *essential* to mission accomplishment, thus requiring a different application. The Government may also defend a statute or rule by arguing that applying the constitutional rule would significantly *impede* mission accomplishment. *United States v. Stuckey*²⁹¹ is such an example. As in both approaches, a reasonably direct and detailed nexus is required.

2. Impedes Mission Accomplishment

The infringement of a constitutional right in a particular case may also be justified if the civilian constitutional rule would materially impede mission accomplishment.²⁹² An example of this nexus can be found in the general court-martial²⁹³ of Private

288. *Id.* at 638.

289. *Id.*

290. *Id.*

291. 10 M.J. 347 (C.M.A. 1981).

292. *See United States v. Davis*, 19 U.S.C.M.A. 217, 223 (1970) (quoting Felix Larkin, member of the UCMJ drafting committee).

293. There are three types of courts-martial: summary, special, and general. At the most basic level, a summary court-martial is akin to a county court-type offenses, a special court-martial to misdemeanor offenses, and a general court-martial mostly reserved for felony offenses. The primary distinction is that maximum potential punishment available. *See generally* 10 U.S.C. §§ 816–

(“PVT”) Nathaniel Stuckey.²⁹⁴ The relevant issue on appeal concerned whether the military rule allowing a search authorization²⁹⁵ to be issued without requiring law enforcement to establish probable cause under an oath or affirmation violated the Fourth Amendment.²⁹⁶ PVT Stuckey argued that the civilian rule “impose[d] only a trivial burden on the Armed Services.”²⁹⁷ A simple oath was all that was needed, and the information need not be reduced to writing.²⁹⁸ In addition, the UCMJ allows service regulations to easily grant to commanders the authority to administer oaths when necessary to establish probable cause.²⁹⁹

CAAF disagreed. Requiring a *per se* rule presented “formidable administrative difficulties” to the military justice sys-

20 (2013). As the maximum potential punishments increase from a summary court-martial to a general court-martial, the legal protections increase. *See, e.g.*, 10 U.S.C. § 832 (2013 & Supp. 2014) (requiring a formal pre-trial investigation before convening a general court-martial); § 834 (2013 & Supp. 2014) (requiring written legal advice from the chief legal advisor on an installation before convening a general court-martial); § 826 (2013) (requiring a military judge to be assigned to a general court-martial, while merely allowing one to be assigned to a special court-martial); § 838 (2013) (acknowledging that an accused has a right to legal representation in a special and general court-martial but omitting a similar right in a summary court-martial); § 866 (2013) (establishing a formal appellate process, akin to the civilian appellate structure, in certain special and general courts-martial depending on the punishment received).

294. *Stuckey*, 10 M.J. 347. The court convicted PVT Stuckey of unpremeditated murder, auto theft, and robbery. *Id.* at 348. It sentenced him to a “dishonorable discharge, confinement at hard labor for [fifty] years, total forfeitures, and reduction to the lowest enlisted grade.” *Id.*

295. The civilian equivalent to a search authorization is the search warrant.

296. *Stuckey*, 10 M.J. at 347. The Fourth Amendment commands that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.” U.S. CONST. amend. IV. CAAF required probable cause for a search authorization to be established upon an oath or affirmation in 1980. *United States v. Fimmano*, 8 M.J. 197, 202 (C.M.A. 1980) (*abrogated by Stuckey*, 10 M.J. at 364). However, it did so prospectively. *Stuckey*, 10 M.J. at 348. PVT Stuckey’s search occurred in 1974. *Id.* After determining that retroactive application of such a requirement would likely have “a significant impact on military justice and require setting aside many convictions,” CAAF turned to the central holding in *Fimmano* requiring an oath or affirmation to establish probable cause. *Id.* at 349.

297. *Id.* at 362.

298. *Id.*

299. *Id.*

tem.³⁰⁰ The system must be deployable.³⁰¹ But “the conditions in which [the armed] forces operate will vary dramatically from place to place and between large organizations and small detachments.”³⁰² Sometimes, the information needed for probable cause would come from foreign nationals “unfamiliar with oaths” and “reluctant to speak under oath.”³⁰³ Federal magistrates that routinely relied on such oaths simply did not have to deal with the multiple language and cultural barriers faced by military commanders in deployed environments.³⁰⁴ In addition, commanders who are tasked with making these decisions are not lawyers. Federal magistrates must record oral testimony received under oath in support of a search warrant.³⁰⁵ Burdening a commander “at some farflung installation with such a procedure may be more onerous than for a Federal magistrate . . . [who is] a trained lawyer.”³⁰⁶ The

300. *Id.* at 364. The Army and the Air Force have since developed magistrate programs to deal with search authorizations. AR 27-10, *supra* note 162, at 52–58; U.S. DEP’T OF AIR FORCE, AFI 51-201, ADMINISTRATION OF MILITARY JUSTICE 28–47 (2013) [hereinafter AFI 51-201], http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf.

301. *Stuckey*, 10 M.J. at 364 (stating that the consequences of violating the rule “will be the same wherever American armed forces are stationed”); see Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 425 (2008) (“Another, sometimes overlooked goal of a military justice system is that it must be deployable.”).

302. *Stuckey*, 10 M.J. at 364.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* CAAF also noted additional obstacles in requiring such a *per se* rule considering that a commander will often already have relevant information prior to the application for a search authorization:

Judge Cook has written that in military justice “a commander may consider information previously known to him in determining whether probable cause exists to justify a search.” If this observation is correct, how can it be reconciled with the requirement that probable cause be based only on sworn testimony? If, on the other hand, the statement is inaccurate, what is the means, if any, by which relevant information already known to the commander who has been requested to issue a search warrant may be considered in making his probable cause decision? Must the commander who possesses this information, in turn, refer the request for search authority to a

oath requirement simply materially impeded mission accomplishment.

B. Injury Avoidance

The military may also infringe upon a constitutional right in order to prevent grave danger to society or manifest injury to the particular armed service or the military in general. These examples are applicable to circumstances in which the armed service has prevented or required conduct in violation of the Bill of Rights. The creative advocate, however, may export this theme into other situations.

1. Grave Danger to Society

A challenged article or rule may survive a challenge if its purpose or application prevents a grave danger to society. This theme has most often appeared in cases that involve preventing an individual's freedom of action. Prior cases have specifically involved preventing the spread of an infectious disease through sexual contact.³⁰⁷

In one case, CAAF upheld the legality of a military order known as a safe sex order.³⁰⁸ The Air Force court-martialed Staff Sergeant ("SSgt") Amos A. Womack for forcible sodomy and willful disobedience of a lawful order requiring him to inform sexual partners of his HIV infection for sexual acts involving himself and

higher echelon and then submit to the superior commander his own sworn recitation of the information which he possesses? Further, if official records or business records contain information relevant to a probable cause decision, will it be necessary that someone swear before the commander that the documents say what they purport to say, rather than merely submitting the records to the commander for his consideration?

Id. at 363 (citation omitted).

307. *See, e.g.*, *United States v. Bygrave*, 46 M.J. 491, 497 (C.A.A.F. 1997); *United States v. Dumford*, 30 M.J. 137, 137-38 (C.M.A. 1990); *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989).

308. *Womack*, 29 M.J. at 90-91. This order required Staff Sergeant ("SSgt") Amos Womack to inform all present and future partners of his HIV infection, inform all medical professionals of his infection, engage in safe sex, refrain from sodomy or homosexuality, refrain from illegal drug use, and refrain from donating bodily fluids. *Id.* at 89.

another Airman.³⁰⁹ He pleaded guilty in a general court-martial and the military judge sentenced him to a dishonorable discharge, five years confinement, forfeiture of all his pay, and demotion to the lowest enlisted rank.³¹⁰ SSgt Womack challenged the legality of the safe sex order on appeal.³¹¹ CAAF held that “[t]he military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty.”³¹² Consequently, the order served a valid military purpose: “to preserve unit readiness and to protect and safeguard the health of Air Force members.”³¹³

The key to this theme is the gravity of the danger. In the example above, the danger of spreading HIV was so grave it justified infringing a member’s freedom of action through a specific and definite military order.³¹⁴ The danger need not be limited to the military community. It includes the civilian population as well.³¹⁵ Thus, the more grave the articulated danger, the more likely CAAF will find it sufficient military necessity.

2. Manifest Injury to the Armed Forces

The Government may also infringe a constitutional right to avoid manifest injury to an armed service. CAAF’s case law, however, leaves us without a definition of manifest injury. CAAF referenced manifest injury while interpreting Article 17 of the

309. *Id.* at 88–89. Airman T awoke after accepting an invitation to sleep in SSgt Womack’s dorm room to SSgt Womack performing fellatio upon him. *Id.* at 89.

310. *Id.* at 89 n.1.

311. SSgt Womack argued that the order had no valid military purpose and it interfered with his “private rights and personal affairs.” *Id.* at 90.

312. *Id.*

313. *Id.* (“[T]he written order state[d] its purpose [was] ‘to safeguard the overall health of members of a military organization to insure unit readiness and the ability of the unit to accomplish its mission.’”). In addition, CAAF has held that “preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective.” *United States v. Dumford*, 30 M.J. 137, 138 n.2 (C.M.A. 1990).

314. CAAF in *Womack* found the order to be “specific, definite, and certain.” *Womack*, 29 M.J. at 90.

315. *See Dumford*, 30 M.J. at 138 n.2.

UCMJ in 1955.³¹⁶ The article established that one armed service may court-martial a member of another armed service only pursuant to regulations prescribed by the President.³¹⁷ The MCM stated that an accused in a joint force environment³¹⁸ must be delivered to his armed force unless doing so results in a manifest injury to the armed force to which he is attached.³¹⁹ In addition, a convening authority in a joint force environment can appoint members of another service to serve on a court-martial if doing so prevents manifest injury to the convening armed service.³²⁰ CAAF did not delve into what constitutes a manifest injury. However, it at least provided a starting point for legal scholars to flesh out and for advocates to exploit.

For the purposes of prompting the dialogue, Black's Law Dictionary defines "manifest" as "easily understood or obvious."³²¹ Therefore, it appears insufficient to proclaim some general injury to the service. The advocate seeking to assert military necessity on the basis of avoiding manifest injury must demonstrate a reasonable connection to an obvious and distinct injury in order to articulate a manifest injury.

C. Good Order and Discipline

CAAF's jurisprudence also demonstrates that the military community is different. It is not the civilian community. It exists for a singular purpose—to wage war—though, the rationale for this fact as a basis to limit service members' constitutional rights has been called into question.³²² That said, the military community

316. United States v. Hooper, 5 U.S.C.M.A. 391, 400–01 (1955).

317. *Id.* at 396 (quoting Article 17(a) of the UCMJ).

318. A joint force environment simply means an organization, command, or task force comprised of members of multiple military services.

319. *Hooper*, 5 U.S.C.M.A. at 400.

320. *Id.*

321. See *Manifest Error*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "manifest error" as "error that is plain and indisputable"); *Manifest Injustice*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "manifest injustice" as error that is "direct, obvious, and observable").

322. Mr. O'Connor noted that this phrase, taken from *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), took the quote out of context and turned it on its head. O'Connor, *supra* note 79, at 229. The original purpose of the quote was to recognize that, because of this primary purpose, armies and navies are "not particularly well-suited to operate a professional system of crim-

existed before there was a United States and has developed its own laws and traditions.³²³ At the core of this community is good order and discipline.

Good order and discipline, however, is often quoted, yet rarely, if ever, defined. The most general of explanations, that “[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier,”³²⁴ appears inadequate in many areas of the modern military. That is certainly the case for the warfighter, when discipline is put to the test under hostile fire, but it becomes less adequate an explanation for the much larger number of personnel that support the warfighter in the relative safety of large, hardened bases, or stateside garrisons.³²⁵

Judge advocates are not immune from this ambiguous principle. Neither is CAAF. However, though the case law is thin, two themes emerge that may assist advocates in framing the issue for CAAF in a way that leads to detailed analysis.

1. Demand for Discipline and Duty

An overriding demand for discipline and duty has been determined to be a sufficient military necessity. Military society’s needs are different in some respects than its civilian counterpart. Consequently, its jurisprudence “is and has always been separated from the ordinary Federal and State judicial systems in this country.”³²⁶ For the vast majority of military legal history, the Court

inal justice.” *Id.* However, the Court used this same quote to support its declaration that this primary purpose required “a greater power to criminalize conduct than would exist in civilian society.” *Id.*

323. *United States v. Tempia*, 16 U.S.C.M.A. 629, 633 (1967) (“Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.” (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953))).

324. *Parker v. Levy*, 417 U.S. 733, 744 (1974) (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)).

325. More than forty years ago, scholars noted that the contemporary military society would be unrecognizable to the “society apart” that existed in the 19th century. See Zillman & Imwinkelried, *supra* note 80, at 399–401.

326. *Tempia*, 16 U.S.C.M.A. at 633 (citing *Burns*, 346 U.S. at 140).

has played no role in its development.³²⁷ The needs in this separate society include a high demand for discipline.

Beyond agreeing with the Court that, due to these needs, “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty,”³²⁸ CAAF has provided little in the way of examples.

One such example can be found in CAAF’s application of *Miranda v. Arizona*³²⁹ to the military justice system. One year after the Court decided *Miranda*, CAAF determined that the principles enunciated there “appl[ied] to military interrogations of criminal suspects.”³³⁰ CAAF began its analysis by reaffirming that it would no longer consider the argument that service members can be deprived of their rights under the Bill of Rights simply due to their status as military members.³³¹ It then pivoted to assert the long held view that military society was different.³³² Consequently, “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”³³³ That, however, was as far as CAAF went. It subsequently returned to its main point: “That military law exists and has devel-

327. *Id.* Notably, the Military Justice Act of 1983 granted the Court discretionary review of CAAF’s decisions. Prior to that, the Court maintained a hands-off approach to military cases. See O’Connor, *supra* note 79, at 165–261.

328. *Tempia*, 16 U.S.C.M.A. at 633 (quoting *Burns*, 346 U.S. at 140).

329. 384 U.S. 436 (1966).

330. *Tempia*, 16 U.S.C.M.A. at 631 (citing *Miranda*, 384 U.S. 436). Interestingly, CAAF determined in *Tempia* that *Miranda* was a constitutional decision. *Id.* at 635. This was twenty-five years prior to federal court attention. See *United States v. Pugh*, 25 F.3d 669, 675 (8th Cir. 1994); *United States v. Christopher*, 956 F.2d 536, 538–39 (6th Cir. 1991). Notably, the Court’s decision in *United States v. Dickerson* did not refer to CAAF’s *Tempia* decision in its ultimate conclusion that *Miranda* constituted a constitutional decision. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). It is noteworthy that the Court referred to the military justice system in the Opinion in *Miranda*. 384 U.S. at 489 (“[The UCMJ] has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.”). However, it did not in this instance. Why sister federal circuit courts do not cite to broad constitutional analysis by CAAF is worth further study.

331. *Tempia*, 16 U.S.C.M.A. at 633.

332. *Id.*

333. *Id.* (quoting *Burns*, 346 U.S. at 140).

oped separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights.”³³⁴

The lack of a developed jurisprudence does not mean that demand for discipline and duty is not a viable theme of military necessity. In addition to relying on the separate society principle, CAAF has at least acknowledged, in other settings, some acceptable restrictions that can be attributed to the demand for discipline and duty.³³⁵ The need for discipline and duty can justify requiring a service member to be inoculated against disease, even though doing so violates his religious beliefs.³³⁶ It can also be the reason the military can violate a military trainee’s right of freedom of association when going through a reception station or during initial training.³³⁷ Finally, this theme justifies “regulat[ing] relationships between officers and enlisted personnel.”³³⁸

The creative advocate can likely build on this list. However, to shape CAAF’s analysis, the advocate will need to articulate a sound reason and direct nexus for CAAF. A conclusory statement will be insufficient. Doing so will assist CAAF in developing a body of law in this area useful for practitioners, as well as CAAF itself.³³⁹

2. Responsiveness to Command

CAAF has held that “[t]he armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.”³⁴⁰ Therefore, an article of the UCMJ or a rule may infringe a constitutional right if applying it a different way will “directly affect the capacity of the Government to discharge its responsibilities.”³⁴¹

334. *Id.*

335. *United States v. Womack*, 29 M.J. 88, 91 (C.M.A. 1989).

336. *See id.*

337. *See id.*

338. *Id.* (citing *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985)).

339. Subsequent scholarly study in this area will also make a positive contribution.

340. *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (1972).

341. *Id.*

This was the case in the court-martial of Journalist Seaman Apprentice (“JOSA”) Roger Priest.³⁴² He edited, published, and distributed to service members an underground newsletter that protested United States involvement in Vietnam while on active duty.³⁴³ This newsletter:

[E]xpressly sought a breakdown in military discipline, called attention to methods by which those subject to military jurisdiction might safely flee from military control, heaped maledictions upon the United States, called into disrespect all military superiors and particularly those who had chosen the defense of the Country as their life’s vocation, implicitly advocated assassination of the President and Vice President, and appealed to readers to take to the streets in violent revolution against the Government.³⁴⁴

JOSA Priest argued that his conduct was not directly prejudicial to good order and discipline.³⁴⁵ CAAF disagreed.³⁴⁶

The majority began by declaring that “[d]isrespectful and contemptuous speech” is protected in the civilian world unless it incites and is likely to produce lawless action.³⁴⁷ This was so because such conduct “does not directly affect the capacity of the Government to discharge its responsibilities.”³⁴⁸ The military was different. Speech that “undermine[s] the effectiveness of response to command” is not protected.³⁴⁹

342. *Id.*

343. *Id.* at 566.

344. *Id.* at 571.

345. *Id.* at 569. The Navy charged JOSA Priest with making statements disloyal to the United States. *Id.* at 566.

346. *Id.* at 569.

347. *Id.* at 570.

348. *Id.*

349. *Id.* *But see* Zillman & Imwinkelried, *supra* note 80, at 410 (“If there is a lesson from Vietnam for military attorneys and commanders, it would be that mindless censorship often is the policy most disruptive of military discipline and morale.”).

Thus, CAAF found JOSA Priest's conduct unprotected.³⁵⁰ It stated that "[t]he hazardous aspect of license in this area is that the damage done may not be recognized until the battle has begun. At that point, it may be uncorrectable or irreversible."³⁵¹ Because this newsletter had a direct impact on the response of service members to command, CAAF upheld JOSA Priest's conviction.³⁵²

V. A PROPOSED FRAMEWORK FOR THE MILITARY NECESSITY DOCTRINE

With the foregoing results in hand, it is now possible to discuss how a proposed framework couple be employed in the future. We begin with the burden.

A. Meeting the Burden for a Different Application of a Rule

CAAF's existing placement of the burden remains conducive to a framework for analyzing when and how to deviate from constitutional or statutory norms. The party that seeks the deviation bears the burden of persuasion.³⁵³ As the *Grunden* Court declared, this will require more than a simple assertion of military necessity. The burden is a heavy one; sufficient reason and analysis must be required of the party seeking a different application of a constitutional or statutory rule. The party seeking relief must provide enough such reason and analysis to allow CAAF to determine whether the assertion of military necessity is of sufficient magnitude to outweigh the danger of a miscarriage of justice that may result from depriving an American citizen of his or her constitutional rights.

The corollary of this requirement is that CAAF must hold itself to the same standard when articulating why it found sufficient military necessity to warrant a different application. This not only reinforces the need for practitioners to be exacting in their

350. *Priest*, 21 U.S.C.M.A. at 571–72.

351. *Id.* at 571.

352. *Id.* at 572, 573.

353. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (“[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.” (citing *Kauffman v. Sec’y of the Air Force*, 415 F.2d 991 (1969))).

efforts, but also provides consistency and predictability in the law of military justice.

*B. The Proposed Framework in Which to Argue
Military Necessity*

This proposed framework borrows from the well-known strict scrutiny standard of review. That is, a government may infringe upon certain fundamental constitutional rights if it does so in the pursuit of a compelling interest that is narrowly tailored toward accomplishing that interest.³⁵⁴ It is true that not all rights protected within the Bill of Rights receive strict scrutiny review when abridged. However, the purpose of this recommendation is to provide a framework that is consistent with the *Grunden* Court's requirements and understandable to practitioners. Thus, the strict scrutiny approach provides a ready-made solution to determining how to analyze whether a separate military rule is tenable.

1. *Similar Threshold Requirements*

The requirements within strict scrutiny review are similar to the *Grunden* requirement. In his empirical study of strict scrutiny as applied in federal courts, Professor Adam Winkler described a compelling interest as one that describes the “‘societal importance’ of the government’s reasons” for enacting a particular law or taking a particular action.³⁵⁵ He concluded that “only the most pressing circumstances can justify the government action.”³⁵⁶

This threshold requirement is similar to that required by *Grunden*. An assertion of military necessity must be accompanied by reason and analysis “of sufficient magnitude” to overcome the danger of a miscarriage of justice.³⁵⁷ It is a correspondingly heavy burden.

354. See *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985) (“To withstand strict scrutiny a statute must be precisely tailored to serve a compelling state interest.” (citing *Plyler v. DOE*, 757 U.S. 202, 216 (1982))).

355. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (citation omitted).

356. *Id.*

357. *United States v. Grunden*, 2 M.J. 116, 121, 122 (C.M.A. 1977).

Thinking in terms of a strict scrutiny approach requires no newly formulated test. Instead, it blends in a standard well-known to military and civilian practitioners alike. In addition, military necessity can be easily articulated if the preceding themes and examples are used, at least as a starting point.

2. Military Necessity is a Compelling Interest

Military necessity and the military mission easily fit within a most pressing circumstance of high societal importance. However, as indicated earlier, the key is to properly articulate a direct nexus between the challenged law, regulation, or action and one of the demonstrated themes and examples of military necessity currently existing within CAAF's jurisprudence. It cannot be sufficient to assert a theme. An argument should also include why the necessity exists and rely on citations to appropriate sources such as prior decisions and studies, to name just a few.

3. The Value of a Narrow Tailoring Approach

The aspect of this framework least familiar to the military practitioner is likely to be that of narrowly tailoring a deviation from traditional constitutional law interpretation. Though well-known to civilian practitioners and a potentially smaller number of military practitioners that remain engaged in constitutional law, CAAF has not historically cabined deviations to the least restrictive necessary. Rather, decisions often conclude the analysis upon finding military necessity and do not reach the additional question of whether the law, regulation, or action was the least restrictive means to accomplishing the compelling interest.

Adopting a narrowly tailored approach as part of the maturation of the military necessity doctrine is not without precedent. In *Parker v. Levy*, discussed earlier, CPT Levy challenged his convictions under Articles 133 and 134 of the UCMJ, on the basis that the two statutes were "void for vagueness under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment."³⁵⁸ The Court disagreed in part due to the fact that the Manual for Courts-Martial and CAAF itself have narrowed

358. *Parker v. Levy*, 417 U.S. 733, 752 (1974).

the application of two criminal statutes that literally prohibit a broad swath of conduct.³⁵⁹

A narrowly tailored approach is also consistent with the goal of the UCMJ of civilianizing military justice to the extent practical and corresponds to the evolving nature of the military society. Diminishing resources in an all-volunteer military requires asking those who serve to do more with less. One of the central tenets to maintaining a fighting force is a legitimate criminal justice system. Citizens who are confident that the military will only infringe on their freedoms to the minimum extent necessary to protect the Nation are more likely to sign up and stay in the armed forces.

VI. CONCLUSION

The existence of CAAF relieves the Court of the burden to supervise the relationship between the Constitution and the military community to the degree it has supervised the similarly situated inmate and student communities. CAAF has subsequently worked through the contours of this relationship in over sixty years of jurisprudence. This study has sought to advance the understanding of military necessity and when it is enough to apply a different rule in the military community than that required by the Court. Existing decisions appear to coalesce around three general themes and six more specific examples of military necessity that compel a different application of a constitutional rule or principle. However, additional study may broaden or restrict the number of examples on the path toward a more articulable and workable military necessity doctrine. Though certainly not the only available framework, the strict scrutiny styled framework proposed here offers two solutions. First, it provides the military community with a specific yet flexible framework that can be replicated throughout military courts, not to mention the benefit such guidance would have on judge advocates advising commanders on whether certain orders not directly related to military duty are lawful and enforceable un-

359. *Id.* at 754 (“The effect of these constructions . . . by [CAAF] and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover.”).

der the UCMJ. Second, it respects the uniqueness of the military community while staying true to the purpose of the UCMJ and the long held view that members of the military, no less than inmates or students, are entitled to the protections of the United States Constitution.