



MILITARY COURTS AND THE ALL WRITS ACT

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WHEN IT COMES TO THE ROLE of the federal courts in the federal system, few statutes play as significant a role – or are as routinely misunderstood – as the All Writs Act. The Act, which traces its origins to sections 13 and 14 of the Judiciary Act of 1789, empowers federal courts to issue all writs that are “necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”¹ Thus, it is the All Writs Act that rounds Article III’s sharp jurisdictional edges by investing courts of limited subject-matter jurisdiction with a species of common-law authority; as Justice Stevens has explained, “The Act was, and is, necessary because federal courts are courts of limited jurisdiction having only those powers expressly granted by Congress, and the statute provides these courts with the procedural tools – the various historic common-law writs – necessary for them to exercise their limited jurisdiction.”²

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¹ Judiciary Act of 1789, ch. 20, §§ 13-14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 1651).

² *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 186-87 (1977) (Stevens, J., dissenting in part) (footnotes omitted).

Although the All Writs Act applies on its terms to “all courts established by Act of Congress,” two recent opinions in high-profile military justice cases have rejected the power of non-Article III military courts to grant relief that is routinely available from civilian courts under the All Writs Act. In the Bradley Manning court-martial proceedings, for example, the highest court in the military justice system – the Court of Appeals for the Armed Forces (CAAF) – held that it lacked the authority under the All Writs Act to grant extraordinary relief to protect the First Amendment right of public access to criminal trials identified by the Supreme Court in *Richmond Newspapers* and its progeny.³ Similar reasoning was also offered by one of the judges of the Court of Military Commission Review (CMCR), in explaining why the CMCR lacked jurisdiction to provide analogous relief in the context of the military commission trial of the 9/11 defendants.⁴

It is easy enough to identify the analytical errors common to these two opinions, and I do so in Part II. But as Part III explains, there is more behind such analysis than a mere misreading of precedent. Ultimately, both have at their core misplaced and outdated understandings of the military justice system’s exceptionalism and relationship to the civilian courts. The flawed understanding common to these two opinions has the ironic – and surely unintended – effect of *weakening* arguments for a separate system of military justice insofar as such crabbed understandings of the All Writs Act only bolster the need for increased Article III oversight of the military justice system through actions for collateral review.

³ *Ctr. for Const’l Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013); see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); see also *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997) (applying *Richmond Newspapers* to court-martial proceedings).

⁴ See *ACLU v. United States*, No. 13-003, slip op. at 2-5 (Ct. Mil. Comm’n Rev. Mar. 27, 2013) (Silliman, J., concurring); *The Miami Herald v. United States*, No. 13-002, slip op. at 3-5 (Ct. Mil. Comm’n Rev. Mar. 27, 2013) (Silliman, J., concurring). The CMCR is the intermediate military appellate court established by Congress in the Military Commissions Act of 2006, which hears authorized appeals from military commission trial court proceedings (and is itself reviewable in some cases by the D.C. Circuit). See 10 U.S.C. §§ 950d, 950f, 950g.

I.

THE ALL WRITS ACT AND THE MILITARY

It is familiar doctrine that the All Writs Act does not create jurisdiction; it merely empowers courts to issue those extraordinary writs necessary to protect the jurisdiction that *other* laws confer.⁵ Although this distinction is central to the jurisprudence of the All Writs Act, it is not as significant as it might at first seem. Consider one of the most common examples of All Writs Act authority: Federal appeals courts may issue writs of mandamus to confine lower courts to the lawful exercise of their jurisdiction *at any point* in the lower-court proceedings, even though the circuits' appellate jurisdiction over district courts is carefully circumscribed, and generally only available after a "final" judgment.⁶ Because the appellate courts will *eventually* have the power to review the lower court's actions, the All Writs Act authorizes what is effectively (if not formally) appellate review at an interlocutory stage in order to correct those errors that would otherwise not receive meaningful appellate review – typically because the alleged injury caused by such errors would be irreparable after the fact. In this regard, although the All Writs Act does not create jurisdiction, it does promote the vindication of jurisdiction that already exists at points other than those expressly provided for by statute – to protect the court's "potential" jurisdiction, as a 1966 Supreme Court decision put it,⁷ or to vindicate jurisdiction that it already exercised.

A. The All Writs Act and Non-Article III Courts

Because the All Writs Act applies in its terms to "*all* courts established by Act of Congress," examples of non-Article III federal courts (*e.g.*, the Tax Court and bankruptcy courts) relying upon the authority it provides in appropriate cases are legion. And whereas most

⁵ See, *e.g.*, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32-34 (2002).

⁶ See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25-31 (1943) (describing in detail the relationship between mandamus and the final judgment rule).

⁷ *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966).

Article III and non-Article III federal courts only exercise limited subject-matter jurisdiction, even non-Article III federal territorial courts – which are courts of *general* jurisdiction, and therefore possess common-law powers – have the authority to issue extraordinary writs under § 1651(a).⁸

Thus, from shortly after the modern military justice system was established in 1950, military courts have recognized their authority to utilize the All Writs Act in comparable fashion to their civilian counterparts.⁹ And as early as 1969, the Supreme Court ratified that understanding. As Justice Harlan wrote for the Court in *Noyd v. Bond*, “we do not believe that there can be any doubt as to the power of the Court of Military Appeals [under the All Writs Act] to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court.”¹⁰

B. *Clinton v. Goldsmith*

The next sentence of Justice Harlan’s opinion in *Noyd* was prophetic, for, as he explained, “A different question would . . . arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes.”¹¹ Three decades later, that question was presented in *Clinton v. Goldsmith*, in which CAAF relied upon the All Writs Act to enjoin the Air Force from the purely administrative action of dropping a servicemember from its rolls.¹²

On the government’s appeal, the Supreme Court unanimously reversed, holding that CAAF’s exercise of authority under the All Writs Act was *not* “in aid of its jurisdiction.” As Justice Souter explained,

⁸ See, e.g., *Magnus v. United States*, 11 A.3d 237, 245 (D.C. 2011); *In re Richards*, 213 F.3d 773, 780-81 (3d Cir. 2000); *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998); *Apusento Garden (Guam), Inc. v. Super. Ct. of Guam*, 94 F.3d 1346, 1349 (9th Cir. 1996).

⁹ See, e.g., *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

¹⁰ *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969).

¹¹ *Id.*

¹² See *Goldsmith v. Clinton*, 48 M.J. 84 (C.A.A.F. 1998), *rev’d*, 526 U.S. 529 (1999).

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Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence" that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it.¹³

Goldsmith was easily distinguishable from a case in which "a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment In such a case, as the Government concedes, the All Writs power would allow the appellate court to compel adherence to its own judgment."¹⁴ Thus, *Goldsmith* simply reiterated what the Court had already made clear: "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."¹⁵

C. Denedo v. United States

In one sense, *Goldsmith* might therefore have been understood as nothing more than the Supreme Court bringing the military courts back into line with its All Writs Act jurisprudence. The question *Goldsmith* implicitly raised, but did not answer, was whether the military courts might have even *less* authority under the Act than civilian courts. That question remained open for nearly a decade, until the Supreme Court granted certiorari in *Denedo v. United States* to review a divided CAAF decision over the power of the military courts to issue post-conviction writs of error *coram nobis*.¹⁶

¹³ 526 U.S. at 535 (alterations in original; citations and footnote omitted).

¹⁴ *Id.*

¹⁵ *Pa. Bureau of Corrs. v. U.S. Marshal's Serv.*, 474 U.S. 34, 43 (1985).

¹⁶ *See Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009). Technically, since *Denedo* sought such relief from an appellate court, he was pursuing a writ of error *coram vobis* – a distinction that, for these purposes, is without a difference.

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Jacob Denedo was a non-citizen former serviceman whom the government sought to deport in light of his court-martial conviction and resulting dishonorable discharge. Denedo sought to challenge his conviction on the ground that he received ineffective assistance of counsel, a claim ordinarily pursued through a habeas petition. But because Denedo had already served his sentence, he was no longer “in custody” for purposes of the habeas statute.

In the civilian courts, such claims for post-release relief are usually pursued as petitions for writs of error *coram nobis* under the All Writs Act, as sanctioned by *United States v. Morgan*.¹⁷ The question in *Denedo* was whether, after and in light of *Goldsmith*, the military courts had the same power to issue such relief as their civilian counterparts.

Writing for a 5-4 Court, Justice Kennedy answered that question in the affirmative: “Because [Denedo’s] request for *coram nobis* is simply a further ‘step in [his] criminal’ appeal, the [military appellate court’s] jurisdiction to issue the writ derives from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review. . . .”¹⁸ *Goldsmith* was distinguishable, in other words, because the All Writs Act was being used in Denedo’s case merely in furtherance of the appellate jurisdiction that the military courts already possessed over Denedo’s court-martial – to revise the judgment below.

In his dissent, Chief Justice Roberts suggested that the flaw in the majority’s analysis was its assumption that the authority of military courts should be coextensive with that of their civilian counterparts. In fact, as he wrote, “The military courts are markedly different. They are Article I courts whose jurisdiction is precisely limited at every turn.”¹⁹ Thus, although the Chief Justice also offered a contrary analysis of the relevant jurisdictional provisions in the UCMJ,²⁰

¹⁷ 346 U.S. 502 (1954).

¹⁸ *Denedo*, 556 U.S. at 914 (second alteration in original; citations omitted).

¹⁹ *Id.* at 918 (Roberts, C.J., dissenting).

²⁰ See *id.* at 923-25. The Chief Justice’s statutory argument focused on Articles 73 and 76 of the UCMJ, 10 U.S.C. §§ 873, 876. In his view, Article 73, which specifies

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the unquestioned thrust of his opinion was the idea that the military is different: “military justice is a rough form of justice,” and so jurisdictional formalities should be enforced even more vigorously against military courts than against all other federal tribunals.²¹

In that regard, then, the true significance of *Denedo* is perhaps best captured toward the end of Justice Kennedy’s majority opinion: “[T]he jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed.”²² That is to say, insofar as Congress has increasingly invested the military justice system with self-supervisory power, an essential attribute of that power is the ability to cure those defects that would otherwise have to be resolved via potentially invasive collateral review by the civilian courts. In other words, and despite the government’s impassioned plea to the contrary, the potential availability of collateral review by civilian courts backstops military jurisdiction as a matter of last resort, rather than constraining it in the first instance. For All Writs

the procedures for a petition for a new trial, provides the exclusive means for pursuing post-conviction review within the military justice system – a conclusion supported by Article 76, which deals with the “finality” of court-martial judgments.

The Chief Justice’s reliance on Article 76 is belied by the Court’s own jurisprudence, which had already established that, as in the civilian system, the “finality” of a military conviction does not create a jurisdictional bar to collateral review thereof. *See, e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 749 (1975). The same flaw dooms his reading of Article 73, since, in the civilian courts, new-trial procedures are also not generally understood to displace collateral post-conviction remedies; they merely must be exhausted before collateral relief can usually be pursued. Narrower review in the military system is nevertheless permissible, the Chief Justice’s dissent concluded, because “You’re in the Army now.” *Denedo*, 556 U.S. at 924 (Roberts, C.J., dissenting).

²¹ *Denedo*, 556 U.S. at 918 (Roberts, C.J., dissenting) (quoting *Reid v. Covert*, 354 U.S. 1, 35-36 (1957) (plurality opinion)). *But see* *Loving v. United States*, 68 M.J. 1, 28 n.11 (C.A.A.F. 2009) (Ryan, J., dissenting) (disagreeing with the “rough form of justice” mentality).

²² *Denedo*, 556 U.S. at 917.

Act purposes, at least, military courts should have the same authorities as their civilian counterparts.

II.

BRADLEY MANNING AND THE 9/11 MILITARY COMMISSION

*D*enedo therefore should have settled whether the scope of relief available under the All Writs Act differs as between military and civilian courts. And yet, opinions in two recent, high-profile cases not only appear to be more consistent with the *Denedo* dissent than with the majority, but also portend a far more dependent relationship between military and civilian courts than that envisaged by Justice Kennedy.

A. CAAF's Decision in the Manning Court-Martial

For decades, the Supreme Court has recognized that the Constitution protects two different rights regarding the public nature of judicial proceedings: a First Amendment right of access on the part of members of the public and the news media, and a Sixth Amendment right to a public trial on the part of criminal defendants.²³ Whether or not these rights are coextensive,²⁴ longstanding CAAF precedent holds that both protections attach not only to all civilian criminal proceedings, but to military criminal proceedings, as well.²⁵

As importantly, because these rights arise out of the judicial proceedings – and not their outcome – their abridgement cannot be vindicated on post-conviction appeal. Thus, when a trial judge improperly restricts either of these rights, such a ruling requires interlocutory appellate intervention – through mandamus, if no other

²³ See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (First Amendment); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (same); *In re Oliver*, 333 U.S. 257 (1948) (Sixth Amendment).

²⁴ See *Presley v. Georgia*, 558 U.S. 209, 213 (2010).

²⁵ See *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

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vehicle is available – and therefore by dint of the All Writs Act.²⁶

Nevertheless, when a coalition of public interest groups, journalists, and others sought to use the All Writs Act to challenge categorical closures of various of the pre-trial proceedings in the Bradley Manning court-martial (in which the accused was tried for his role in leaking thousands of classified documents to WikiLeaks), CAAF held that it lacked jurisdiction to issue the requested relief. Writing for a 3-2 majority, Judge Stucky observed that the critical consideration was the fact that the petitioners were not parties entitled to invoke the appellate jurisdiction of the military courts – and that the accused (who *was* so entitled) had not joined in their request for relief.²⁷ Thus, CAAF distinguished its earlier decision in *ABC*, which had granted such relief to media organizations, by noting that (1) it predated *Goldsmith* (which did not compel a contrary result, but did call into question the scope of the All Writs Act); and (2) in any event, “We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief – expedited access to certain documents – that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial.”²⁸

Dissenting, Chief Judge Baker pointed out the obvious flaw in Judge Stucky’s reasoning – that “the writ before this Court appeals a specific ruling of a specific Rule for Courts-Martial in a specific and ongoing court-martial. . . . Appellate review of military judges’ rulings in courts-martial is at the core of this Court’s jurisdiction. That is what we do.”²⁹ Indeed, the majority’s crabbed reading of

²⁶ See, e.g., *In re Application of the United States*, 707 F.3d 283, 288-89 (4th Cir. 2013); *In re Boston Herald, Inc.*, 321 F.3d 174, 177 (1st Cir. 2003).

²⁷ See *Ctr. for Const’l Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013).

²⁸ *Id.* There is, in fact, a vibrant academic debate over whether “strangers” to judicial proceedings are entitled to obtain extraordinary relief as against those proceedings. But there’s little question, as the *Richmond Newspapers* line of cases demonstrates, that members of the public and press are not in fact “strangers” with regard to First Amendment challenges to the openness of trial proceedings, and therefore have standing to pursue such relief (at least in the civilian courts).

²⁹ *CCR*, 72 M.J. at 130-31 (Baker, C.J., dissenting).

Article 67 of the UCMJ, which provides that CAAF “may act only with respect to the findings and sentence as approved by the convening authority,” was not just inconsistent with *Denedo*, but would also apply with equal force even when the accused was pursuing similar relief (which he was not in *CCR*).

In any event, Chief Judge Baker explained, the whole point of *Richmond Newspapers* is to recognize the First Amendment right of access held by *non*-parties to criminal proceedings – a right that would be impossible to vindicate without extraordinary relief. As he concluded, insofar as ensuring compliance with the First and Sixth Amendments was part of CAAF’s responsibility on post-conviction review of a court-martial, the All Writs Act provided the authority to intercede at an interlocutory stage where such intervention was necessary.³⁰

More than just highlighting the majority’s lack of fealty to precedent, Chief Judge Baker’s dissent also stressed the perverse consequences that the decision would yield – that the same litigants would be forced into the Article III system, to pursue the same relief collaterally. As he explained, *first*, the military judge will face the prospect that an unknown collateral court will have the final say on trial procedures – including access to the trial and “when and whether any documents, including evidence, are disclosed to the parties or to the public,” thereby placing the military courts in a necessarily subservient role to their Article III civilian counterparts. *Second*, the collateral court’s interlocutory decision will itself be subject to post-conviction review by the military courts, raising a difficult question concerning whether the intermediate military

³⁰ See *id.* at 131-32. Indeed, just three months after *CCR*, CAAF held – again, by a 3-2 vote – that it *did* have the power to grant relief under the All Writs Act when a named victim in a sexual assault prosecution sought a writ of mandamus to challenge her lawyer’s exclusion from pre-trial evidentiary proceedings. See *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). The *LRM* majority “distinguished” *CCR* on the ground that, “unlike ‘strangers to the courts-martial,’ *LRM* is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence” *Id.* at 368; see also *id.* (“There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege.”).

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appeals courts have the power to disagree with civilian Article III courts. *Third*, he warned, “collateral courts might exercise comity and wisely avoid the prospect of interfering in an ongoing court-martial,” thereby frustrating the purpose of the First Amendment right articulated in *Richmond Newspapers*.³¹

And yet, because of a quirk in the Supreme Court’s appellate jurisdiction vis-à-vis CAAF, CAAF’s decision was not subject to review via certiorari.³² Instead, the focus shifted, as Chief Judge Baker feared, to an Article III district court, which found itself stuck between the First Amendment’s constitutional rock and comity’s prudential hard place.³³

B. Judge Silliman’s Concurrence in the 9/11 Trial

CAAF’s decision in the Manning case was the second significant opinion to so construe the All Writs Act in less than a month. Just three weeks earlier, the Court of Military Commission Review had summarily denied similar motions for extraordinary relief in the context of the Guantánamo military commission trial of the 9/11 defendants, where some of the same civil liberties groups and media organizations sought to object to the protective order governing the trial on First Amendment grounds. Although the majority held that such claims were not yet ripe, Judge Silliman’s concurrence argued that, ripeness aside, the court lacked jurisdiction.³⁴

³¹ See *CCR*, 72 M.J. at 132.

³² Under 28 U.S.C. § 1259 and 10 U.S.C. § 867(c), the Supreme Court may only exercise certiorari to review specific decisions by CAAF – not including decisions, such as *CCR*, in which CAAF concludes that it lacks jurisdiction to reach the merits. This defect does not prevent the Supreme Court from issuing its own extraordinary writ to review a decision by CAAF, *see, e.g.*, *U.S. Alkali Export Ass’n v. United States*, 325 U.S. 196, 202 (1945), but it has been decades since the last time the Court so acted.

³³ *See, e.g.*, *Ctr. for Const’l Rights v. Lind*, 954 F. Supp. 2d 389 (D. Md. 2013).

³⁴ *See ACLU v. United States*, No. 13-003, slip op. at 2-5 (Ct. Mil. Comm’n Rev. Mar. 27, 2013) (Silliman, J., concurring); *The Miami Herald v. United States*, No. 13-002, slip op. at 3-5 (Ct. Mil. Comm’n Rev. Mar. 27, 2013) (Silliman, J., concurring).

Unlike CAAF's analysis, Judge Silliman's logic was Guantánamo-specific, seizing upon the remaining jurisdiction-stripping provision of the Military Commissions Act of 2006:

[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States . . . as an enemy combatant³⁵

Because the D.C. Circuit (which supervises the CMCR) had already upheld the constitutionality of this provision (albeit in a materially different context),³⁶ Judge Silliman would have held that it also divested the CMCR of jurisdiction to issue an extraordinary writ relating to the trial of a Guantánamo detainee – the very relief sought before the CMCR.³⁷

Two distinct issues arise from Judge Silliman's analysis: *First*, and ironically, it rests on the very reading of the All Writs Act that the Supreme Court has time and again repudiated – that the Act *creates* jurisdiction. After all, Judge Silliman's reading of § 2241(e)(2) would also divest the CMCR of *post-conviction* appellate jurisdiction – even though that jurisdiction is provided by the same statute that created § 2241(e)(2). Insofar as § 2241(e)(2) does *not* affect the CMCR's appellate jurisdiction, then, it must follow that “any other action” under § 2241(e)(2) does *not* include exercises of appellate, as opposed to original, jurisdiction. And, as noted above, requests for writs of mandamus to confine lower courts to the lawful exercise of their jurisdiction are exactly that – they are not freestanding assertions of jurisdiction, but rather a means of perfecting appellate

³⁵ 28 U.S.C. § 2241(e)(2).

³⁶ See *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012) (holding that § 2241(e)(2) validly divests the federal courts of jurisdiction over *Bivens* claims brought by Guantánamo detainees); see also *Kiyemba v. Obama*, 561 F.3d 509, 512 & n.1 (D.C. Cir. 2009).

³⁷ See *ACLU*, slip op. at 4-5 (Silliman, J., concurring); *Miami Herald*, slip op. at 5 (Silliman, J., concurring).

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jurisdiction provided by other statutes. Put another way, so long as a writ of mandamus along the lines sought before the CMCR is “in aid of” the CMCR’s post-conviction appellate jurisdiction, it can only fall within § 2241(e)(2)’s bar if *all* of the CMCR’s appellate jurisdiction is also so affected – a conclusion that would raise a bevy of serious constitutional questions about § 2241(e)(2).

Second, and related, Judge Silliman wholly neglected the extent to which Congress in 2009 had repealed a far-more-specific jurisdiction-stripping provision that might well have applied to the relief sought before the CMCR. That provision, which had been codified at 10 U.S.C. § 950j(b), barred review of provided that “any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter.”³⁸

Although one could still have made the same argument as that outlined above – *i.e.*, that § 950j(b) did not also affect applications for writs of mandamus in aid of the appellate jurisdiction provided by the MCA – it certainly would have been more difficult given the specific focus on “any claim or cause of action whatsoever” (as opposed to § 2241(e)(2)’s more general “any other action” phraseology). But the Military Commissions Act of 2009 repealed this section without comment, a move that, even under ordinary principles of statutory interpretation, would ordinarily be given at least *some* meaning.

Finally, even if the above arguments are not dispositive in their own right, they are backstopped by another point neglected by Judge Silliman – the constitutional avoidance canon, and the “‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”³⁹ Given that § 2241(e)(2) may also bar collateral actions in Article III district courts, a petition for extraordinary relief of the kind pursued before the CMCR may be the only available means of vindicating the First Amendment right of public access. So long as there is a plausible alternative reading of § 2241(e)(2), then, that reading should have governed.

³⁸ 10 U.S.C. § 950j(b) (2006).

³⁹ *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citation omitted).

III.
THE PARADOX OF
CONTEMPORARY MILITARY JUSTICE

Separate from the analytical shortcomings of these two opinions, their larger view of the appropriate role of military vs. civilian courts bespeaks a troubling step back from decades of evolution in U.S. military justice. It is now settled that recent years have witnessed a marked “civilianization” of the military justice system – shifts in U.S. military law to incorporate and otherwise observe most of the procedural and substantive safeguards typical of civilian criminal proceedings.⁴⁰ And whether intentionally or not, this trend has had at its core not just procedural and substantive alignment, but *structural* harmonization of the military justice system with our ordinary courts – especially the codification of civilian appellate oversight of the court-martial system, and, later, Supreme Court supervision via certiorari.

Reasonable people will surely dispute the overall fairness of the military justice system today, especially as compared to civilian prosecutions. At a minimum, though, these advancements have dramatically increased the independence of the military justice system – both by eliminating at least some of the substantive objections to military convictions and by further empowering the military courts to resolve those challenges that remain, rather than leaving such claims for collateral Article III review. As *Denedo* underscores, the court-martial system has become a self-contained judicial apparatus – whether as cause or effect (or both) of the perceived increase in the protections that military defendants have today compared to their predecessors.

But the All Writs Act plays a vital role in preserving such independence. Under Judge Stucky’s and Judge Silliman’s logic, the only way to vindicate claims like the First Amendment access rights at

⁴⁰ See, e.g., Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL LAW IN AMERICA* 287, 287-88 & 303 n.7 (John T. Parry & Song Richardson eds., 2013).

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issue in the Manning court-martial and the 9/11 military commission is through potentially invasive collateral review in the Article III courts. Chief Judge Baker's dissent identified several of the more pernicious consequences of such an arrangement, but one more bears mention: It will undercut one of the core arguments in *favor* of a separate military justice system – that, because of the differences inherent in needing to discipline our own servicemembers, courts-martial can and should be allowed to function *separately* from the civilian courts.

Of course, this is not to say that Article III oversight is not important; it is, but as a *backstop*. What the opinions in the Manning and 9/11 cases portend is increased Article III intervention in (and interference with) ongoing trial proceedings, not just on these issues, but on any claim where interlocutory appellate relief is necessary and no statute expressly provides for such review within the military justice system. Chief Judge Baker was at pains in his *CCR* dissent to suggest – rightly – that such a result cannot possibly be what Congress intended. It would also only reinforce the idea that military justice truly is a “rough form of justice,”⁴¹ and that military courts are *not* generally capable of vindicating constitutional rights.



⁴¹ Reid v. Covert, 354 U.S. 1, 35-36 (1957) (plurality opinion).