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Reversing a Devolutionary Pathway of Shoddy History Protecting Commander in Chief
“Authorities” in the Article I Courts: A Dual Call for Judicial Rigor and a Broader Amicus
Practice in Adjudicating Military and Veterans Appeals

ABSTRACT: This paper/law review article focuses on how three Article I courts, and in particular the Court of Appeals for the Armed Forces (CAAF), shields presidential authority through the use poorly crafted historical narratives. While it is true that the CAAF and the Court of Federal Claims, and Court of Appeals for Veterans Claims represents a small jurisdiction, the three courts issue rulings that impact on, and shape, commander in chief authority. And all three courts have been cited by the Article III judiciary. The article has a dual focus: First, the article calls for greater and a more intellectually honest scholar rigor of a historic nature in the decisions of the courts. The second aspect is for the Article I courts, to open further to amicus practice as a “bookend” to ensuring a greater rigor in the decisional processes of the courts. I examine *United States v. New*, *United States v. Bergdahl*, and *United States v. Begani* in the article as well as several decisions issued by the claims and veterans courts. In one instance, I analyze why in a statutory interpretation case, the veterans court unnecessarily incorporated *Nixon v. Fitzgerald* in which the Supreme Court determined that a president is immune from civil suit while in office. Given that the judges on these three courts may be removed in processes far short of impeachment and solely contained in the executive branch, such a rigor as called for in this article, would give a greater assurance of judicial independence than is currently held.

Prior to joining the UNM Law School faculty this September, Professor Joshua Kastenberg had a 20-year career as a lawyer and judge in the U.S. Air Force. He served as an advisor to the Department of Defense on cyber security and cyber warfare matters, twice deployed to Iraq and oversaw the military’s compliance with international law. Professor Kastenberg served as a prosecutor and defense counsel in over 200 trials and as a judge in over 200 trials. He has been cited by the Washington Post and appeared on Fox News, and written over a dozen law review articles as well as four books. Prior to joining the faculty he taught graduate and undergraduate level courses in national security law and systems as well as legal history. Professor Kastenberg's interests are in the field of criminal law and procedure, evidence, legal history, and judicial ethics.