DIGITIZE OR DIE: THE QUIXOTIC BATTLE FOR CAMOUFLAGE PATTERNS IN THE UNITED STATES MILITARY

ABSTRACT

Military uniforms serve a multitude of purposes in the twenty-first century. In the United States, they are a ubiquitous symbol of patriotism and military might. Individual military service branches use military uniforms to distinguish each from the other. In its quest for distinctiveness, the Marine Corps initiated a power struggle for unique uniform designs with its intellectual property protection of MARPAT, its proprietary digital camouflage uniform. Some twenty years and billions of taxpayer dollars later, most of the other service branches' hastily developed camouflage uniforms have been abandoned. As there is a dearth of legal scholarship addressing this issue, this Note provides the first foray into this murky territory.

In Part I, this Note delves into the history of military camouflage uniforms, discussing the key factors and decisions that led to the twenty-first century's camouflage arms race. Part II traces the history of uniform intellectual property protection in the United States. The Marine Corps's intellectual property protection of the MARPAT uniform is then discussed and analyzed in Part III. Finally, Part IV provides three potential options to restructure and reform the military's current intellectual property protection scheme. Each of these options has its own advantages and disadvantages. One of these options should be selected before such a uniform arms race occurs once again.

INTRODUCTION

Military uniforms have been employed in theaters of war for over 5,000 years.[1] Uniforms hold a special significance in the human race's collective psyche.[2] They also provide a variety of inter- and intraorganizational functions, from stripping an individual's familial and socioeconomic status to providing legitimacy to military action.[3] The removal of individual distinction assimilates military members into a group, reinforcing the subordination of individuality while emphasizing respect for the hierarchical chain of command.[4] Externally, this function of standardization is joined by an element of legitimatization: military members in uniform are seen as professionals, as opposed to a ragtag band of mercenaries.[5]

George Washington's blue overcoat has been described as the genesis of U.S. military uniforms.[6] This blue uniform stood in stark contrast to the scarlet jackets worn by the British Army "red coats" during the American Revolution.[7] Washington's garb spawned a multitude of U.S. military uniforms, the descendants of which are the military uniforms of the twenty-

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1. Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L. REV. RED CROSS 93, 95 (2004) ("In Mesopotamia, exposed to outside intrusion, warfare dominated Sumerian life in the third millennium BC and led to military specialization; an army of more than 5,000 soldiers wore metal helmets, cloaks and fringed kilts.").

2. *See generally* Nathan Joseph & Nicholas Alex, *The Uniform: A Sociological Perspective*, 77 AM. J. SOCIO. 719 (1971). While military uniforms are discussed at length in this piece, Messrs. Joseph and Alex also discuss sociological underpinnings of other types of uniforms, including an illuminating discussion of the potency of police uniforms.

3. *Id.* at 722–24.

4. *Id.*; *see* Pfanner, *supra* note 1, at 94. The donning of uniforms in recruit training is but one aspect of military training; the most important function of military training is to program "automated responses" into service members that take over when that individual is in crisis or in a stressful situation. *See* R. Delahaij, A.W.K. Gaillard & J.M.L.M. Soeters, *Stress Training and the New Military Environment*, *in* HUMAN DIMENSIONS IN MILITARY OPERATIONS – MILITARY LEADERS' STRATEGIES FOR ADDRESSING STRESS AND PSYCHOLOGICAL SUPPORT 17A-1 to 17A-10 (2006).

5. Joseph et al., *supra* note 2, at 722–23.

6. John Wills, *History & Evolution of Military Uniforms*, ST MAG. (Aug. 5, 2020), https://st-magazine.com/history-evolution-of-military-uniforms/ [https://perma.cc/K436-SG6N].

7. *Id.* This distinction is ironic today, as many of the modern U.S. Navy's uniforms are quite similar to their Royal Navy counterparts. *Compare U.S. Navy Male Officer Uniforms*, MYNAVYHR, https://www.mynavyhr.navy.mil/References/US-Navy-Uniforms/Uniform-Regulations/Chapter-3/Male-Officer/ [https://perma.cc/SY2S-DSK8] (last visited Aug. 23, 2022) *with Royal Navy Officers and Ratings* 39A-7, ROYAL NAVY, https://www.royalnavy.mod.uk/-/media/royal-navy-responsive/documents/reference-library/br-3-vol-1/chapter-39.pdf [https://perma.cc/N6JM-FA9W] (last visited Aug. 23, 2022). Besides cosmetic differences like the design of rank braids and the placement of ribbons, the similarities between the U.S. Navy and Royal Navy's service dress blue uniforms are striking.

first century.[8] Especially in the United States, these uniforms are often a potent symbol of military power and pride.[9]

The evolution of military uniforms in the twenty-first century has produced a curious (and unexpected) result: economic and political fratricide within the U.S. military over digital camouflage uniforms.[10] In the past twenty years, individual service branches within the U.S. military have wasted substantial time and resources on the development of separate camouflage utility uniforms, many of which were discontinued after a lifetime of less than ten years.[11] These follies drew the ire of those within and outside of the federal government and shifted focus away from combat readiness.[12] Part I of this Note will first trace the development of digital camouflage uniforms in the American military.[13] Part II will dive into the statutory law and caselaw governing the intellectual property associated with uniforms and military equipment while Part III discusses the Marine Corps's strategy, in particular.[14] Finally, Part IV discusses proposals to reform the schism in American military uniform development and provide a framework to reform this broken system.[15] Because of the time and resources that have been wasted in the development of defunct camouflage uniforms, it is critical that this process be reformed before disaster strikes again.

I. THE UNIFORM CONUNDRUM

The armed forces of the United States are presently organized into six branches—the U.S. Army, Navy, Marine Corps, Coast Guard, Air Force, and Space Force, in order of establishment.[16] Each service branch performs a specific function in the modern American military, from ground forces (Army); forces on, above, and below the ocean (Navy); amphibious operations and power projection from sea to land (Marine Corps); coastal

8. Wills, *supra* note 6.

9. *See* Joseph et al., *supra* note 2, at 721; *see also Army Uniforms*, U.S. ARMY, https://www.army.mil/uniforms/ [https://perma.cc/P9CH-BRAC] (last visited Aug. 23, 2022).

10. *See infra* Part I.

11. *See infra* Part I.

12. *See infra* Part I. "Defending the homeland" and "[d]eterring strategic attacks against the United States, Allies, and partners" are the first two priorities of the 2022 National Defense Strategy. U.S. DEP'T OF DEF., *Fact Sheet: 2022 National Defense Strategy* (Mar. 28. 2022), https://www.defense.gov/News/Releases/Release/Article/2980584/dod-transmits-2022-national-defense-strategy/#:~:text=The%20NDS%20is%20the%20capstone,Guidance%2C%20released%20in%20March%202021 [https://perma.cc/FD7Z-S6RB].

13. *See infra* Part I.

14. *See infra* Parts II & III.

15. *See infra* Part IV.

16. *Our Forces*, U.S. DEP'T OF DEF., https://www.defense.gov/About/Our-Forces/ [https://perma.cc/63CE-XWG9] (last visited Aug. 23, 2022).

forces (Coast Guard); air and space capabilities (Air Force); to satellites and space command-and-control (Space Force).[17] The National Defense Authorization Act (NDAA) provides funding for the Department of Defense (DoD) as a whole,[18] and all six branches compete for funding from Congress.[19]

Since 1775, the armed forces of the United States have maintained separate branch identities to foster *esprit de corps*, defined as a "common spirit existing in the members of a group and inspiring enthusiasm, devotion, and strong regard for the honor of the group."[20] Thus, each individual service branch has its own insignia, history, and culture.[21] Each branch has also maintained its own service and dress uniforms to distinguish

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17. *Id.* While there are additional complexities and specific missions conducted by each branch, there is considerable overlap, especially as forces from multiple branches are often organized into so-called "combatant commands." *See infra* note 145. Suffice to say, this broad-strokes discussion is sufficient for our current purposes. As an aside, many functions are performed "in-house" by each respective service branch the Army, Navy, Marine Corps, Air Force, and Coast Guard all operate helicopters and train pilots, for example. *See, e.g.*, *Helicopter Pilots*, TODAY'S MILITARY, https://www.todaysmilitary.com/careers-benefits/careers/helicopter-pilots [https://perma.cc/3P89-QALC] (last visited Aug. 23, 2022). However, some functions are not duplicated. As an example, the Marine Corps does not have its own physicians; it uses Navy medical personnel, instead. *See* Nicole Stetler, *How to Become a Doctor with the Marines*, CAREER TREND (Dec. 29, 2018), https://careertrend.com/how-6180395-become-doctor-marines.html [https://perma.cc/KN79-78AK]. The Marine Corps does have its own attorneys, however. *Marine Judge Advocates*, MARINES.COM, https://www.marines.com/about-the-marine-corps/roles/judge-advocate-division.html [https://perma.cc/79YL-YJDV] (last visited Aug. 23, 2022).

18. U.S. CONST. art. I, § 8, cl. 12. ("To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ."). This has been interpreted by Congress to require annual military spending bills, the modern incarnation of which is the NDAA omnibus bill. *See* VALERIE HEITSHUSEN & BRENDAN W. MCGARRY, CONG. RSCH. SERV., IF10515, DEFENSE PRIMER: THE NDAA PROCESS (Dec. 6, 2021).

19. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021); Mackenzie Eaglen, *Is Army Richest Service? Navy? Air Force? AEI's Eaglen Peels Back Budget Onion*, BREAKING DEF. (Feb. 5, 2020), https://breakingdefense.com/2020/02/is-army-richest-service-navy-air-force-aeis-eaglen-peels-back-budget-onion/ [https://perma.cc/LWN7-LK98]. For an interesting proposal for leveraging interservice rivalry to meet the military's national defense goals, see Susanna V. Blume & Molly Parrish, *Interservice Rivalries: A Force for Good*, DEF. NEWS (Jan. 21, 2020), https://www.defensenews.com/opinion/commentary/2020/01/21/interservice-rivalries-a-force-for-good/ [https://perma.cc/P78H-TDNX]; Susanna V. Blume & Molly Parrish, *Make Good Choices, DoD: Optimizing Core Decisionmaking Processes for Great-Power Competition*, CTR. FOR NEW AM. SEC. (Nov. 20, 2019), https://www.cnas.org/publications/reports/make-good-choices-dod [https://perma.cc/67VM-MTD6].

20. *Esprit de corps*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/esprit%20de%20corps [https://perma.cc/4UCX-V33K] (last visited Aug. 23, 2022); *see also Our Forces*, *supra* note 16.

21. *See Our Forces*, *supra* note 16. This cultural separation between military branches takes a variety of forms, from different names for individual military ranks, different protocols related to the treatment of officers, and various types of awards, patches, and symbology. *See, e.g.*, *U.S. Military Rank Insignia*, U.S. DEP'T OF DEF., https://www.defense.gov/Resources/Insignia/ [https://perma.cc/5F43-PQ6D] (last visited Aug. 23, 2022).

its servicemembers and equipment.[22] This policy of specialization did not extend to camouflage utility uniforms in the latter half of the twentieth century, as all service branches utilized the same camouflage uniforms.[23] That changed in 2002.[24]

In 1997, the Canadian Defense Force became the first military service worldwide to adopt digital camouflage uniforms.[25] Compared to the ubiquitous "tricolor" woodland and desert uniforms employed in the 1980s and 1990s,[26] digital camouflage uniforms have a computer-designed camouflage pattern of individual pixels.[27] Testing of these uniforms showed that the digital patterns were highly effective in concealment compared to traditional camouflage uniforms.[28] The Canadian Disruptive Pattern (CADPAT) uniform was designed with green and brown tones ideal for

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22. *See Guide to Military Uniforms*, MILITARY.COM, https://www.military.com/join-armed-forces/uniform-and-insignia-guide.html [https://perma.cc/AEP6-PH48] (last visited Aug. 23, 2022). There are multiple different varieties of military uniforms: dress uniforms are for formal occasions (approximately equivalent to white or black tie); service uniforms are for day-to-day wear (approximately equivalent to business formal or business casual attire); utility uniforms are for working use; and physical training uniforms are worn during military-sponsored exercise. Working and utility uniforms have a wide variety of forms for specific purposes and include camouflage uniforms, coveralls, surgical scrubs, flight suits, diving dress, and other types of specialized equipment. *See, e.g.*, *U.S. Navy Male Officer Uniforms*, *supra* note 7.

23. Jessica Durando, *A Brief History of U.S. Military Camouflage*, USA TODAY (Aug. 1, 2014), https://www.usatoday.com/story/news/nation-now/2014/08/01/history-camouflage-military-united-states/13485491/ [https://perma.cc/S438-YGQF]; Matt Fratus, *A Brief History of U.S. Military Camouflage Uniforms*, COFFEE OR DIE MAG. (June 18, 2020), https://coffeeordie.com/military-camouflage-uniforms/ [https://perma.cc/SFN8-NJWW]. Besides the clear financial and logistical incentives associated with using one utility uniform, there are tactical considerations as well. The Government Accountability Office noted concerns about personnel from other branches assigned to Army or Marine Corps commands (e.g., interpreters) being distinguishable from other personnel in the unit, making them easy targets. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-669R, WARFIGHTER SUPPORT: OBSERVATIONS ON DOD'S GROUND COMBAT UNIFORMS 3, 49 (2014) [hereinafter GAO REPORT].

24. *See* Fratus, *supra* note 23.

25. *Canadian Disruptive Pattern (CADPAT TM) Uniform*, NAT'L DEF. AND THE CANADIAN FORCES (Feb. 4, 2002), https://archive.ph/20130115232541/http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?id=341 [https://perma.cc/XYF6-X86B]; *see also* Guy Cramer, *Digital Camouflage History – Who Did It First; Canada or the US?*, HYPERSTEALTH BIOTECHNOLOGY CORP. [hereinafter Cramer, *Digital Camouflage History*], https://www.hyperstealth.com/CADPAT-MARPAT.htm [https://perma.cc/62SG-7BER] (last visited Aug. 23, 2022). Even though the Canadian military was the first to adopt a digital uniform pattern, a pixelated pattern called Dual Texture Camouflage ("Dual-Tex") was used in Europe by the U.S. Army 2nd Armored Cavalry Regiment in Europe in the late 1970s to the early 1980s. Guy Cramer, *Dual Texture – U.S. Army Digital Camouflage*, UNITED DYNAMICS.COM, http://www.uniteddynamics.com/dualtex/ [https://perma.cc/X4VN-JU3Z] (last visited Aug. 23, 2022).

26. *See* Fratus, *supra* note 23.

27. U.S. Patent No. 6,805,957 col. 10 (filed Nov. 7, 2001) (issued Oct. 19, 2004).

28. *Id.* col. 7.

camouflage in forest environments.[29] CADPAT soon became the archetype for camouflage uniforms in the United States.[30]

In 2002, The Marine Corps introduced a proprietary camouflage uniform based on the Canadian design: Marine Pattern camouflage or "MARPAT."[31] The Marine Corps adopted two separate MARPAT varieties: a woodland version for use in forested environments and a desert pattern for use in arid climates.[32] Unlike U.S. military combat utility uniforms of the past, which were shared among service branches, the Marine Corps refused to allow any other service branch to use MARPAT.[33] In fact, the Marine Corps both trademarked the pattern in MARPAT and obtained a patent for the manufacturing process of the uniform.[34] This intellectual property protection served various purposes. First, the Marine Corps believed such intellectual property protection would prevent other military branches from using the Marine Corps's design.[35] Additionally, this protection allowed the Marine Corps to license its uniform design as a means to obtain revenue via

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29. *Id.* col. 5.

30. Cramer, *Digital Camouflage History*, *supra* note 25. An anonymous Canadian Project Manager indicated that the CADPAT pattern was provided directly to the Marine Corps via an Exchange Agreement between Canada and the United States. *Id.*

31. David W. Brown, *Why Is the Marine Corps Fighting with the Navy Over a Camouflage Pattern?*, ATLANTIC (Jan 17, 2013), https://www.theatlantic.com/national/archive/2013/01/why-is-the-marine-corps-fighting-with-the-navy-over-a-camouflage-pattern/267232/ [https://perma.cc/PQR3-4Z8D]; *see* U.S. Patent No. 6,805,957 col. 9 l. 11–12 (filed Nov. 7, 2001) (issued Oct. 19, 2004).

32. *See generally* U.S. MARINE CORPS, ORDER 1020.34H, MARINE CORPS UNIFORM REGULATIONS (May 1, 2018), https://www.marines.mil/portals/1/Publications/MCO%201020.34H%20v2.pdf?ver=2018-06-26-094038-137 [https://perma.cc/SL8S-7W59]. The Marine Corps maintains the intellectual property rights to a third camouflage pattern (for urban environments) but did not approve the pattern for use. *See* U.S. Patent No. 6,805,957 col. 12 l. 43–55 (filed Nov. 7, 2001) (issued Oct. 19, 2004) ("Woodland pattern composed of shades of coyote, green, black and khaki, Desert color pattern composed of shades of light coyote, urban tan, desert light tan and highland and Urban pattern composed of shades of black, medium and light gray and coyote. The pattern for all three of the color schemes is the same, i.e. the MARPAT pattern. The selected colors are chosen to provide superior camouflage for any zone of operation having a general environment designated Woodland, Desert or Urban regardless of where in the world that environment is found."); David W. Brown, *The Irresponsibly Stupid and Dangerous Camouflage Patterns of the U.S. Military*, WEEK (Jan. 8, 2015), https://theweek.com/articles/468625/irresponsibly-stupid-dangerous-camouflage-patterns-military [https://perma.cc/WA6K-TQSJ] ("Though an urban variety was developed, it was not approved."). Additionally, the Marine Corps employs a separate (non-MARPAT) snow camouflage uniform. *See* Brown, *supra*. ("[T]here is no arctic variation; the Marines use a different pattern entirely for snowy terrain."); *see also Marine Snow Camouflage Uniform*, MILITARY.COM, https://www.military.com/equipment/marine-snow-camouflage-uniform [https://perma.cc/7WQG-DHHG] (last visited Aug. 23, 2022); Dan Fitzgerald, *Snow Camouflage Uniform*, U.S. MARINE CORPS (July 7, 2007) (on file with author).

33. Brown, *supra* note 32 ("In recent years, [the Marine Corps] has resisted efforts by the Army and Navy to derive uniforms from MARPAT and its colors. This is an intellectually indefensible position made entirely for purposes of marketing and recruiting.").

34. *See generally* U.S. Patent No. 6,805,957 (filed Nov. 7, 2001) (issued Oct. 19, 2004).

35. *See* Brown, *supra* note 31; *see infra* notes 121–122.

sales of licensed merchandise bearing the Marine Corps's insignia.[36] Compared to its sister branch, the Navy, the Marine Corps's budget is considerably smaller, making raising revenue a prime consideration.[37] Additionally, the Marine Corps wanted to distinguish itself from its counterparts for political and recruiting reasons, including maintaining the Marine Corps's image.[38]

With other service branches seeking to cash in on the futuristic and distinctive appeal of digital camouflage uniforms, the Army, Navy, and Air Force each pursued their own digital patterns.[39] The Army developed a version called the Universal Camouflage Pattern (UCP) that attempted to

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36. *See Frequently Asked Questions – USMC Trademark Licensing Program*, U.S. MARINE CORPS OFF. OF COUNS. FOR THE COMMANDANT, U.S. MARINE CORPS [hereinafter *USMC Licensing FAQ*], https://www.hqmc.marines.mil/ousmcc/Units/Marine-Corps-Trademark-Licensing-Program/FAQ/ [https://perma.cc/QE33-M5EF] (last visited Oct. 8, 2022) (stating that licensing allows the Marine Corps "to generate revenue from the sale of merchandise bearing its logos and marks. The revenue is used to support the trademark licensing program and enhance Morale, Welfare and Recreation programs for America's Marines world wide [sic]."). According to this same source, organizations submit license applications to the Trademark Licensing Office in order to obtain approval for their use of Marine Corps trademarks. *Id.* While supporting leisure programs for Marines is certainly a noble goal, the question is raised of why revenue is needed to fund a program to generate said revenue in the first place, a seemingly circular argument. *See also* Carl Prine, *Marine Corps Tells Company to Quit Using its Name to Sell Promotional Baseball Jerseys*, SAN DIEGO UNION-TRIB. (May 22, 2018, 3:40 PM), https://www.sandiegouniontribune.com/military/sd-me-marine-trademark-20180522-story.html [https://perma.cc/3VHB-LY4X] (providing an example of the Marine Corps's protection of its insignia and iconography).

37. *Budget of the U.S. Navy and U.S. Marine Corps from Fiscal Year 2001 to 2022*, STATISTA.COM, https://www.statista.com/statistics/239290/budget-of-the-us-navy-and-the-us-marine-corps/ [https://perma.cc/CLE2-Q47B] (last visited Aug. 23, 2022).

38. *See* Brown, *supra* note 31 (discussing "adding distinction" to Marines as one of the goals of MARPAT). Presumably, the Marine Corps's search for a new combat utility uniform provided the service with the opportunity they needed to once again distinguish the Marine Corps from other branches (but especially the Army). *See About the Marine Corps – Values*, U.S. MARINE CORPS, https://www.hqmc.marines.mil/hrom/New-Employees/About-the-Marine-Corps/Values/ [https://perma.cc/2YMY-5VQY] (last visited Aug. 23, 2022) ("The heart of our Core Values, courage is the mental, moral, and physical strength ingrained in Marines that sees them through the challenges of combat and the mastery of fear, and to do what is right, to adhere to a higher standard of personal conduct, to lead by example, and to make tough decisions under stress and pressure. It is the inner strength that enables a Marine to take that extra step."); *see infra* note 142.

39. *See* Durando, *supra* note 23. As an aside, the Coast Guard did not adopt digital camouflage uniforms, instead switching to solid blue fatigues (called the Operational Dress Uniform or "ODU") in 2004. *Special Uniform Issue 2006*, U.S. COAST GUARD RESERVIST MAG., 2006 https://web.archive.org/web/20131103062858/http://www.uscg.mil/reservist/issues/2006/06/issue.pdf [https://perma.cc/55T8-PY3C]. Ironically, the Navy is in the process of issuing a two-piece non-camouflage utility uniform to its sailors. *See infra* note 56. As of 2022, the Space Force is using the Army and Air Force's Scorpion-W2 uniforms. *See, e.g.*, Meghann Myers, *These Space Force Uniforms Look Awfully Familiar*, MIL. TIMES (Jan. 21, 2020), https://www.militarytimes.com/news/your-military/2020/01/21/these-space-force-uniforms-look-awfully-familiar/ [https://perma.cc/SM2Z-UHXU].

provide a single uniform for both woodland and desert environments.[40] While the uniform had the best average scores across measured criteria, it did not perform as well as other uniforms in individual environments; nevertheless, it was adopted by the Army based on the strength of its average scores.[41] Public criticism of the uniform focused on the ugliness of its pattern.[42] The design proved ineffective in both Iraq and Afghanistan and was phased out in the 2010s.[43] Its replacement was the Operational Camouflage Pattern (OCP). While OCP is known colloquially as "MultiCam," it is actually a separate pattern called Scorpion-W2.[44] Ironically, it was one of the contenders from initial uniform testing that the Army rejected in favor of UCP.[45]

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40. *See* Hope Hodge Seck, *Say Goodbye to the Hated Army UCP Uniform*, MILITARY.COM (Oct. 1, 2019), https://www.military.com/daily-news/2019/10/01/say-goodbye-hated-army-ucp-uniform.html [https://perma.cc/57Q4-MPPC].

41. *See* Robin J. Wharton, Barriers to Implementing a Single Joint Combat Camouflage Uniform 9 (Dec. 2017) (MBA Professional Report, U.S. Naval Postgraduate School) (Defense Technical Information Center). This showcases a key issue in the Army's decision-making: average scores are often not the best indicator for performance in specific environments. One author "contends that the cost savings from the Army's sole pattern perhaps outweighed the reduced effectiveness of individual concealment." *Id.* (citing MARTIN J. BRAYLEY, CAMOUFLAGE UNIFORMS: INTERNATIONAL COMBAT DRESS 1940–2010 12 (2009)). In other words, having one camouflage uniform for all environments is cheaper than having version for each.

42. *See* Seck, *supra* note 40 ("[The uniform] blended in well with grandma's couch, but had its drawbacks in the combat zone."); Daniel Engber, *Lost in the Wilderness: The Military's Misadventures in Pixelated Camouflage*, SLATE (July 5, 2012, 3:53 PM), https://slate.com/technology/2012/07/camouflage-problems-in-the-army-the-ucp-and-the-future-of-digital-camo.html [https://perma.cc/YQ2C-U3TA] ("Standard-issue uniforms come instead in a pixelated marble of gray and khaki, as if they were made to blend into a gravel pit or a slice of Valdeon cheese."); *see also* Wharton, *supra* note 41, at 9–18, (discussing the process via which UCP was adopted).

43. Jared Bounds, *ACU Pattern Officially Retired; New Uniform Improvements on the Way*, U.S. ARMY (Oct. 10, 2019), https://www.army.mil/article/228411/acu_pattern_officially_retired_new_uniform_improvements_on_the_way#:~:text=ACU%20pattern%20officially%20retired%3B%20new%20uniform%20improvements%20on%20the%20way,-By%20Spc.&text=Soldiers%20of%20the%20U.S.%20Army,as%20of%20October%201%2C%202019. [https://perma.cc/5EYB-VNM2]; *see* Wharton, *supra* note 41, at 9–11. Not only was the uniform ineffective at concealment, but its color actually made the wearer more distinguishable from the surrounding terrain. *See* Wharton, *supra* note 41, at 9.

44. *See* Christian Beekman, *The Army Can't Escape Its Camouflage Controversy*, TASK & PURPOSE (Oct. 6, 2014), https://taskandpurpose.com/news/army-cant-escape-camouflage-controversy/ [https://perma.cc/G926-TVM8]. One of the issues is that Scorpion-W2 (manufactured by Crye Precision, *see infra* notes 102–106 and accompanying text) is a prototypical version of the originally tested MultiCam pattern developed by the Army's Natick Soldier Systems Center. While MultiCam performed admirably in testing and in Afghanistan as an unofficial uniform, Scorpion-W2 had not undergone the same rigorous testing, as it was essentially a prototype of MultiCam. *See* Beekman, *supra*.

45. *See* Pagan Kennedy, *Who Made That Digital Camouflage?*, N.Y. TIMES (May 10, 2013), https://www.nytimes.com/2013/05/12/magazine/who-made-that-digital-camouflage.html [https://perma.cc/3SDB-CQED] ("'Everybody suddenly wanted digital camouflage' . . . . The problem was that 'everybody didn't know how to do it.'"); Beekman, *supra* note 44; Brown, *supra* note 31. Reading between the lines, it is plausible that the Army developed its camouflage uniform to compete with the Marine Corps.

The Navy's digital camouflage uniform, called the Naval Working Uniform (NWU), originally had three separate varieties—a blue version for shipboard use (Type I), a desert variant (Type II), and a green woodland variant (Type III).[46] The blue version was designed to hide paint and oil stains from shipboard use, thus extending the life of the uniform.[47] Like the Army's UCP uniforms, it was universally criticized by sailors and by commentators for a variety of reasons, from being uncomfortable, to not being fire resistant (a major concern onboard ships), and because it would camouflage sailors who fell overboard, making it harder to see them when conducting rescue operations.[48] The Type I NWU was phased out of service in the mid-2010s, with Navy service members switching to the Type III woodland variant.[49]

The Air Force's version was the Airman Battle Uniform (ABU).[50] It's green and blue "tiger stripe" pattern was specifically designed to be distinctive, a purpose antithetical to tactical camouflage uniforms in the first place.[51] It was also poorly received by airmen and was replaced by the Army's Scorpion-W2 pattern.[52] Thus, less than two decades after the

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46. *See Navy Working Uniform (NWU) Concepts Frequently Asked Questions*, TASK FORCE UNIF. PUB. AFFS. (Dec. 21, 2012) (on file with author); NAVY WORKING UNIFORM TYPE II AND III, NAVADMIN 374/09 (Dec. 29, 2009), https://web.archive.org/web/20120829122720/http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2009/NAV09374.txt [https://perma.cc/SR54-LXZU].

47. *See Navy Working Uniform (NWU) Concepts Frequently Asked Questions*, *supra* note 46. It is worth noting that the Type I NWU replaced seven different uniforms that had been issued to U.S. Navy servicemembers. Wharton, *supra* note 41, at 12 (citing BRAYLEY, *supra* note 41, at 90).

48. Brown, *supra* note 31 ("To make matters worse, the new Navy Working Uniform has been found to be highly flammable, and 'will burn robustly' if exposed to fire. In fact, it turns into a 'sticky molten material.'"); Brown, *supra* note 32 ("The Navy as a whole wears an inexplicably blue digital print, which looks not unlike that of rushing, turbulent water — precisely the colors you wouldn't want to be wearing if you fell overboard."); Mark D. Faram, *The U.S. Military is Dumping the Dumbest Uniform Ever*, NAVY TIMES (Aug. 4, 2016, 3:47 PM), https://www.navytimes.com/news/your-navy/2016/08/04/the-u-s-military-is-dumping-the-dumbest-uniform-ever/ [https://perma.cc/LQA6-J5GR] ("They failed to reduce the number of uniforms sailors must maintain. Their threads put sailors at risk for worsening burn injuries by melting. And sailors said they were uncomfortable and that the only camouflage they offered was when someone fell overboard."). Put simply, "[t]he objective of designing a single working uniform for wear aboard ship and when ashore was not met by the Type I uniform." Wharton, *supra* note 41, at 12.

49. *See* Faram, *supra* note 48; *see generally U.S. Navy Male Officer Uniforms*, *supra* note 7.

50. *See* Brown, *supra* note 32.

51. David A. Jablonski, *Air Force Unveils New Uniform Plan*, AIR FORCE NEWS, (Aug. 6, 2003), https://www.af.mil/News/Article-Display/Article/138762/air-force-unveils-new-uniform-plan/ [https://perma.cc/AB5C-6PNW] ("'Our intent is to create a uniform that will be distinctive, practical, easy to maintain, comfortable and, most important, a uniform you will be proud to wear,' said Air Force Chief of Staff Gen. John P. Jumper.").

52. *See* Oriana Pawlyk, *It's Official: The Air Force Is Switching to the Army's OCP Uniform*, MILITARY.COM (May 14, 2018), https://www.military.com/daily-news/2018/05/14/its-official-air-force-switching-armys-ocp-uniform.html [https://perma.cc/4EDB-S3EU].

inception of MARPAT, the Army, Navy, and Air Force fielded ten different branch-specific digital camouflage uniforms, many of which did not survive longer than a decade.[53] The military needlessly spent billions of dollars on the development of these defunct uniforms.[54]

Congress has been aware of this issue since 2013.[55] The fiscal year 2014 NDAA contained explicit language eliminating individual service branch uniform development and tasking the Secretary of Defense to issue guidance implementing the development of a common camouflage uniform.[56] This particular provision repealed language in the 2010 NDAA authorizing individual service branches to field their own camouflage uniforms.[57] Camouflage utility uniforms were subsequently addressed three

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53. *See* Wharton, *supra* note 41, at 1. The uniform arms race has stabilized (at least, for now) with the Army, Air Force, and Space Force utilizing Scorpion-W2 and the Navy predominantly using the Type III NWU pattern. *See id.*

54. *See id.*; GAO REPORT, *supra* note 23, at 11; Sydney J. Freedberg, Jr., *Army Drops Universal Camouflage After Spending Billions*, BREAKING DEF. (June 25, 2012, 5:00 PM), https://breakingdefense.com/2012/06/army-drops-universal-camouflage-after-spending-billions/ [https://perma.cc/EZ2Q-EBSD]; *see also* Ryan Browne, *Military's Fashion Don'ts Cost Hundreds of Millions*, CNN (Aug. 29, 2016), https://www.cnn.com/2016/08/29/politics/military-uniform-redesign-aquaflage/index.html [https://perma.cc/SRF3-5PR9]. While these costs are related to the development and issuance of military camouflage uniforms, it likely does not include additional "hidden costs"; not only were the uniforms themselves replaced, but all ancillary uses of obsolete patterns were also eliminated (e.g., backpacks, padfolios, business cards, recruiting materials, etc.), a process that likely paid millions to various defense contractors. The Army's UCP was ubiquitous in recruiting materials in the 2000s. *See generally* U.S. Army Media Ctr., Army Strong, YOUTUBE (Apr. 4, 2009), https://www.youtube.com/watch?v=cq-ZVIZJaI8 [https://perma.cc/T4F7-ZAVM]. As shown in this recruiting video, not only are soldiers wearing UCP, but the pattern itself is part of the recruiting pitch.

55. VALERIE BAILEY GRASSO, CONG. RSCH. SERV., RS20550, MILITARY UNIFORM PROCUREMENT: QUESTIONS AND ANSWERS 3 (2014).

56. *Id.* (quoting National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 352, 127 Stat. 672, 742 (2013) [hereinafter 2014 NDAA]). The relevant provision reads:

> It is the policy of the United States that the Secretary of Defense shall eliminate the development and fielding of Armed Force-specific combat and camouflage utility uniforms and families of uniforms in order to adopt and field a common combat and camouflage utility uniform or family of uniforms for specific combat environments to be used by all members of the Armed Forces.

2014 NDAA, *supra*, § 352(a); *see* Beekman, *supra* note 44. Beekman indicates that it was this provision that forced the Army to use an existing camouflage pattern (Scorpion-W2) as opposed to continuing with its development of yet another camouflage uniform in 2013. *Id.* Additionally, the Navy is issuing yet another uniform variant *without* a pixelated pattern. Gina Haskins, *100 Sailors Set to Participate in New Navy Uniform Wear Test*, MILITARY.COM (Feb. 27, 2019), https://www.military.com/daily-news/2019/02/27/100-sailors-set-participate-new-navy-uniform-wear-test.html [https://perma.cc/6F4V-GHCH]. This new working uniform (called the "2POC," believe it or not) is currently being issued to sailors. *See* Diana Stancy Correll, *Navy to Start Releasing New Flame Retardant Uniform to the Fleet*, NAVY TIMES (Sept. 29, 2022), https://www.navytimes.com/news/your-navy/2022/09/29/navy-to-start-releasing-new-flame-retardant-uniform-to-the-fleet/ [https://perma.cc/B83F-GTQJ]. The 2014 NDAA aside, the Marine Corps has interpreted federal law to mean that other services are prohibited from wearing the uniforms of another branch. *See infra* note 121.

57. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 352, 123 Stat. 2190, 2262 (2009).

times in the NDAAs from 2015–2022.[58] The 2017 and 2019 NDAAs impose additional limitations on the development and acquisition of new camouflage utility uniforms.[59] However, the 2021 NDAA eliminated one of the notification requirements imposed by the 2019 NDAA.[60] Congress has thus taken legislative steps to curtail military spending on camouflage utility uniforms.[61] Line items are not inserted into the NDAA unless brought up by (a) the Member of Congress or one of their policy advisors, (b) a lobbying group, or (c) constituents.[62] Even with all of the individual line items included in omnibus bills, it is striking that Congress sought to specifically curtail camouflage uniform development. While additional action has not been taken on either the military or legislative side, the fact that Congress explicitly addressed this issue may have been enough to force individual military branches to reassess their strategy, as no new camouflage designs have been developed since.[63] However, as is often said in the military, hope is not a strategy.

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58. *See* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, , § 349, 130 Stat. 2000, 2087 (2016) [hereinafter 2017 NDAA]; National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 356, 132 Stat. 1636, 1732 (2018)) [hereinafter 2019 NDAA]; National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 348, 134 Stat. 3388, 3542 (2021) [hereinafter 2021 NDAA], National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

59. *See* 2017 NDAA, *supra* note 58, § 349; 2019 NDAA, *supra* note 58, § 356. § 349 in the 2017 NDAA states the following:

> None of the funds authorized to be appropriated by this Act or otherwise made available for the Department of Defense may be obligated or expended to develop or field new camouflage uniforms, new utility uniforms, or new families of uniforms until the date that is one year after the date on which the Secretary of Defense submits to the congressional defense committees notice of the intent of the Secretary to develop or field such uniforms.

§ 356(a) in the 2019 NDAA requires the "Secretary of a military department" to inform the Defense Logistics Agency no later than three years before the implementation of a new uniform update. 2019 NDAA, *supra*, § 356(a).

60. *See* 2021 NDAA, *supra* note 58, § 348. Section 348 eliminates the requirement in § 356 of the 2019 NDAA requiring notification by the military branch to the Defense Logistics Agency three years before any proposed uniform update. *Id.*

61. *Id.*

62. *See* Mark Pacilio, *Omnibus Legislation, AKA the 'Big Uglies' – Is This the Right Move for Congress Now?*, UTICA U. CTR. PUB. AFFS. & ELECTION RSCH., https://www.ucpublicaffairs.com/home/2020/3/24/omnibus-legislation-aka-the-big-uglies-is-this-the-right-move-for-congress-now-by-mark-pacilio [https://perma.cc/A9AX-LL2Z] (last visited Aug. 23, 2022).

63. *See* discussion *supra* note 56.

The executive and legislative branches have displayed an inability to adequately address the development and proliferation of operational uniforms in the twentieth century. With these initial conditions in place, the judiciary stands as a possible avenue in which such uniform disputes could be resolved.[64]

II. DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

A. Statutory Basis

To fully appreciate the extent of the Marine Corps's intellectual property protection of the MARPAT uniform, it is necessary to discuss the underlying doctrines of trademark, trade dress, and patent law. While it is unlikely that one military branch would file suit against another, it is not impossible that this could occur.[65] Thus, discussion of the current intellectual property landscape is helpful to understand the uniform battlefield as it stands today.

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64. This does raise the specter of the political question doctrine established by the federal judiciary. Matters related to the declaration of war and military policy-related matters are often determined by the courts to be nonjusticiable. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ."); Nixon v. United States, 506 U.S. 224, 228 (1993) ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it . . . ."). Providing the military with funding is clearly Congress's role and equipping the military is clearly the role of the Executive Branch. *See infra* note 65.

65. There are a few concerns here. While the internal workings of military branches would seem to clearly be a nonjusticiable political question in the vein of *Baker* and *Nixon*, the federal judiciary has recently weighed in on a variety of issues directly affecting the military, with vaccine mandates being the most poignant. *See Baker*, 369 U.S. at 217; *Nixon*, 506 U.S. at 228; Nina Totenberg, *Pentagon Asks Supreme Court to Allow It to Stop the Deployment of Unvaccinated SEALs*, NPR (Mar. 7 2022, 5:18 PM), https://www.npr.org/2022/03/07/1084999251/pentagon-supreme-court-vaccine-mandate-navy-seals [https://perma.cc/L2KT-HGPU]; Geoff Ziezulewicz, *Destroyer Can't Deploy Because CO Won't Get COVID Vaccine, Navy Says*, NAVY TIMES (Mar. 8, 2022), https://www.navytimes.com/news/your-navy/2022/03/08/destroyer-cant-deploy-because-co-wont-get-covid-vaccine-navy-says/ [https://perma.cc/66FF-8KHL]. In both of these cases, federal district judges have waded into military policy. Thus, while the internal operations of military branches would seem to be the domain of the executive branch, this may no longer be the case. That being said, the Supreme Court recently granted a partial stay while the Fifth Circuit considers the case of U.S. Navy SEALs claiming a religious exemption to the Biden administration's Covid vaccine mandate. Austin v. U. S. Navy Seals 1-26, No. 21A477, 2022 WL 882559 (U.S. Mar. 25, 2022); *see* Adam Liptak, *Supreme Court Rules Against Navy SEALs in Vaccine Mandate Case*, N.Y. Times (Mar. 25, 2022), https://www.nytimes.com/2022/03/25/us/politics/supreme-court-navy-covid-vaccines.html [https://perma.cc/2MWL-G9DT]. The final disposition of the case remains to be seen.

Trademarks are defined by the Lanham Act of 1946.[66] This definition is used by both federal law and state common law.[67] The purpose of a trademark is to set a person or entity's goods apart from others in the marketplace, even if the seller is unknown.[68] Types of common trademarks include letters, words, images, and colors.[69] A three-element test is used to qualify a word or symbol as a trademark: the court must analyze the symbol itself, the type of use, and the purpose.[70] The trademark has to be "distinctive" in designating and distinguishing the product in question.[71] There are four "tasks" performed by trademarks: to distinguish one seller's goods, to show a unified source for these goods, to show a specific and uniform level of quality, and perhaps most importantly for our purposes, to advertise the goods in question.[72]

While similar to trademarks, trade dress relates more to product packaging and shape.[73] Before the twentieth century, trademarks were capable of registration and trade dress was not.[74] While the two originally represented distinct doctrines, the distinction is now "largely historical."[75] Trade dress can qualify as a type of trademark and take advantage of the protection available to trademarks.[76] Trade dress has been used to cover an extremely wide variety of concepts, from the physical shape of items to clothing designs.[77]

As opposed to trademarks and trade dress, patents confer property rights to the inventor of a unique product or design.[78] A patent performs a different function than a trademark, with the patent system existing to incentivize innovation, specifically in new technologies.[79] The key difference between the application of inventive ideas in patent law and trademark law is that

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66. Lanham Act § 45, 15 U.S.C. § 1127 ("Trademark" is defined as a designation that serves "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.").

67. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1, Westlaw (database updated June 2022).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* § 3:2.

73. *Id.* § 8:1. "The oldest and most traditional definition of trade dress was limited to the overall appearance of labels, wrappers, and containers used in packaging a product." A common example of trade dress is athletic uniforms. *See infra* notes 86–93 and associated text.

74. MCCARTHY, *supra* note 67, § 8:1.

75. *Id.*

76. *Id.* § 8:7.

77. *Id.* § 8:4.50.

78. *General Information Concerning Patents*, U.S. PATENT AND TRADEMARK OFF., https://www.uspto.gov/patents/basics/general-information-patents [https://perma.cc/9P3Y-FGKP] (last visited Aug. 23, 2022).

79. MCCARTHY, *supra* note 67, § 6:3.

both trademark and trade dress exist to prevent "customer confusion and protect the value of identifying symbols" and patents do not.[80]

The legal basis of the Lanham Act has remained stable since its inception. However, intellectual property statutory law has been amended various times since its passage.[81] While the Act itself is transparent about what constitutes a trademark and trademark infringement, the federal courts have expanded the reach of the Act over the past seventy years.[82] The current structure of the Act provides civil remedies to enforce trademarks and criminalizes certain behavior.[83] Certain intellectual property, such as that which exists in the public domain, is excluded from the purview of the Lanham Act.[84]

Now that the framework of the applicable statutes and caselaw governing intellectual property have been analyzed, a discussion of the current status of intellectual property in the federal judiciary is helpful to comprehend, as the federal courts system is the most likely venue for suit should an issue with military intellectual property arise.[85]

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80. *Id.*

81. *See, e.g.*, Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 98 Stat. 2178 (1984) (making intentional use of counterfeit trademark a crime under Title 18 of the U.S. Code); Anticybersquatting Consumer Protection Act, Pub. L. No. 106-133, 133 Stat. 1501 (1999) (creating a cause of action to be used against parties who intentionally create confusingly similar domain names to make money).

82. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 287 (1952) (expanding scope of the Lanham Act to cover actions of defendant taken outside of U.S.); *see, e.g.*, Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105 (2005) (discussing the expansion of trademark doctrine in opposition to the original scope and sweep of Lanham Act). The Roberts Court has also struck down provisions in the Lanham Act interpreted to inhibit applicants' freedom of speech. *See* Claire Bosarge, Iancu v. Brunetti*: The First Amendment Takes Precedence Over Lanham Act's Prohibition of Trademarks Composed of Immoral or Scandalous Matter*, 22 TUL. J. TECH. & INTELL. PROP. 225 (2020); *see also* Matal v. Tam, 137 S. Ct. 1744 (2017) (holding provision of Lanham Act prohibiting trademarks disparaging the living or dead was facially invalid under the First Amendment); Iancu v. Brunetti, 139 S. Ct. 2294 (2019) (holding Lanham Act's prohibition of immoral or scandalous trademarks violated applicants' freedom of speech).

83. *See, e.g.*, Trademark Counterfeiting Act, *supra* note 81 (establishing criminal penalties for intentional use of counterfeit trademarks); Lanham Act §§ 42–43, 15 U.S.C. §§ 1124–25 (providing civil remedies for enforcement of trademarks).

84. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 23, 33–38 (2003) (holding that Lanham Act does not protect uncopyrighted television series that existed in public domain).

85. The political question doctrine is a potential concern here. *See supra* notes 64–65.

B. Current Federal Caselaw

Armed with this basic framework of intellectual property law, analogous cases applying these legal doctrines must be discussed. As neither state nor federal courts have addressed any of the described conflicts between military branches with respect to military uniforms, comparable federal caselaw will be analyzed to glean an understanding for how federal law *would* be applied were individual military branches to engage in a court battle over uniforms patterns. Although it is unlikely that such an interbranch intellectual property dispute will find its way into the federal judiciary,[86] current caselaw provides insight on the scope and ubiquity of intellectual property disputes in the United States. Were the Army to sue the Marine Corps for intellectual property infringement, for example, the federal courts would likely utilize the following caselaw to adjudicate the matter in dispute.

The U.S. Supreme Court recently addressed uniform trademarks in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*[87] In his opinion, Justice Thomas assessed whether features incorporated into a copyrighted item can be distinguished from "the utilitarian aspects" of that same item.[88] Using the Supreme Court's caselaw[89] and interpretation of the Copyright Act,[90] Justice Thomas determined that, because designs on cheerleading uniforms could be reproduced on a two-dimensional canvas and qualify for copyright protection, they are capable of being protected separately from the uniforms themselves.[91] Although this case addressed intellectual property issues involving cheerleading uniforms rather than military uniforms, it provides insight into how the Supreme Court addresses issues involving the functionality of trade-specific clothing.[92] In relation to military uniforms, *Star Athletica* shows that uniform designs—like a camouflage pattern—can be protected separately from the function of the uniform itself, hence supporting the Marine Corps's intellectual property protection strategy.[93]

In *AM General LLC v. Activision Blizzard, Inc.*, the District Court for the Southern District of New York addressed whether military equipment was trademark-protected when used in a video game.[94] In 1983, AM General

86. *See supra* notes 64–65.
87. 137 S. Ct. 1002 (2017).
88. *Id.* at 1010.
89. Mazer v. Stein, 347 U.S. 201 (1954).
90. 17 U.S.C. § 101.
91. *Star Athletica*, 137 S. Ct. at 1012.
92. *See id.* at 1010–16.
93. *USMC Licensing FAQ*, *supra* note 36.
94. 450 F. Supp. 3d 467 (S.D.N.Y. 2020).

("AMG"), the trademark holder, contracted to provide High Mobility Multipurpose Wheeled Vehicles for the U.S. Military, vehicles commonly known as "Humvees."[95] AMG granted licenses to use Humvees in various media including television, film, and video games.[96] The defendant, Activision, used Humvees in its video games as early as in the 1990s.[97] This litigation, however, concerned Activision's use of Humvees in the hugely popular *Call of Duty* video game series.[98] The court utilized both trademark and trade dress analyses in *AM General*, denying relief to the trademark holder on both claims.[99] Key to the analysis was that a wide range of other militaries used Humvees; their use was not exclusively American.[100] Additionally, the court found it highly unlikely consumers would confuse a vehicle portrayed in a video game with an actual military machine.[101] This case shows that trademarked military equipment can be used in other media with impunity, so long as the equipment is used in a general fashion and not used to influence the market share of the supplier in question. It is highly unlikely, although certainly not impossible, that *Call of Duty* consumers are also making individual multibillion dollar purchases of military equipment. Overall, *AM General* would likely hurt the Marine Corps's case for intellectual property protection. Use of the Marine Corps's proprietary camouflage uniform by another military branch would not confuse customers looking to purchase uniforms; the only possible analogy would be to equate military recruits with customers, which is likely a thorny proposition.

The Southern District of New York addressed a dispute between manufacturers of MultiCam uniforms in *Navajo Air, LLC v. Crye Precision, LLC*.[102] The defendant, Crye Precision, was the original creator of the MultiCam camouflage pattern.[103] In this case, Navajo Air, a textile converter, sued Crye Precision under trademark law, claiming that Crye violated an agreement between the two companies by printing camouflage patterns after the period of a licensing agreement between the two had

95. *Id.* at 475.

96. *Id.*

97. *Id.* at 476.

98. *Id.* at 475–76. The Call of Duty series had earned $27 billion in sales as of December 2020. J. Clement, *Call of Duty (CoD) - Statistics & Facts*, STATISTA (Mar. 24, 2022), https://www.statista.com/topics/8300/call-of-duty-cod/#dossierKeyfigures [https://perma.cc/62HP-2YE2].

99. *AM Gen.*, 450 F. Supp. 3d at 485–86.

100. *Id.* Thus, the use of Humvees by other countries means that portraying a Humvee was not a necessary component to patent infringement here. *See id.*

101. *Id.*

102. 318 F. Supp. 3d 640 (S.D.N.Y. 2018).

103. *Id.* at 643.

expired.[104] The District Court ruled that Crye's argument was without merit, as the original patent was not owned by Crye in the first place—it was owned by the United States Government.[105] Thus, Crye's license from the U.S. Government to print camouflage patterns (using Navajo Air as a subcontractor) did not give them control over the copyright itself. The court granted Navajo's motions for summary judgement, stating that "it is far from clear whether there is anything left of this case."[106] *Navajo Air* illustrates that the federal judiciary will strictly enforce patents held by the United States Government, preventing private companies from claiming patent infringement when they are not the actual patent holder. It is unclear, however, how this might be applied to a dispute within the federal government itself.

The federal judiciary's analysis of military intellectual property issues provides insight into how the courts would address a suit involving military uniforms. While it is unlikely that the Marine Corps—or another service branch—would bring suit against another individual service branch, it is possible that litigation could arise from other plaintiffs and from other legal catalysts as discussed below. Additionally, even if one military branch is unlikely to sue another over a uniform pattern, military service branch policies are developed using existing statutes and caselaw.[107] The relevant intellectual property caselaw may therefore have a deterrent effect, as service branches are likely uninterested in airing their grievances in the federal court system. Caselaw thus provides a normative framework to understand military branches' policy decisions regarding uniforms.

104. *Id.* at 645. The circuitous dispute relates to the Army's switch in 2014 from using MultiCam for select units to providing OCP to all soldiers. Navajo printed MultiCam on license from Crye. Once the switch to OCP occurred, Navajo obtained a license from the government directly. Crye sought to enjoin their printing of OCP because of the expiration of a 2014 license. Navajo sued, seeking a declaration that Navajo was not infringing on any of Crye's rights. *Id.* at 646.

105. *Id.* at 652.

106. *Id.* at 653.

107. *See* GAO REPORT, *supra* note 23, at 11. *See infra* notes 121–122.

III. MARINE CORPS PROTECTION OF INTELLECTUAL PROPERTY

A. Within the DoD

The Marine Corps's patent application for MARPAT was filed in 2001.[108] The Marine Corps sought intellectual property protection for the development of the camouflage pattern as well as for the pattern itself.[109] Part of the uniqueness of the uniform comes from a small Marine Corps eagle, globe, and anchor insignia that is integrated into the pattern of the individual uniforms.[110] The approval of the Marine Corps's patent (including the trademarked eagle, globe, and anchor insignia) permits the service's Trademark Licensing Office to regulate the use of MARPAT.[111]

Following the lead of the Marine Corps, the Navy also sought to trademark its own camouflage pattern.[112] In *In re Navy Exchange Service Command*, the Navy sought to trademark its NWU pattern itself.[113] Examining attorneys at the U.S. Patent and Trademark Office had questioned, *inter alia*, whether the NWU pattern displayed a unique functionality, as other patterns would be able to hide paint and oil stains in a similar manner as does the NWU pattern.[114] The Trademark Trial and Appeal Board reversed the rulings of the examining attorneys, granting the NWU pattern trademark protection.[115]

The Marine Corps's opposition to other service branches' use of MARPAT extends to uniforms perceived to be "too close" to MARPAT.[116] The Navy's Type II NWU was the primary focus of the Marine Corps's ire

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108. U.S. Patent No. 6,805,957, at [73] (filed Nov. 7, 2001) (issued Oct. 19, 2004). The patent lists the assigned party as the "United States of America as represented by the Secretary of the Navy." *Id.* at [73]. It would seem that individual branch control of branch-specific patents (like military uniforms) is the current status quo. *See infra* Part IV.

109. U.S. Patent No. 6,805,957, at [57] (filed Nov. 7, 2001) (issued Oct. 19, 2004).

110. *Id.*; *see also* Wharton, *supra* note 41, at 9.

111. James Clark, *USM©: Inside The Marine Corps' Heated Campaign To Protect Its Sacred Brand*, TASK & PURPOSE (Jan. 22, 2018, 6:35 PM), https://taskandpurpose.com/news/marine-corps-trademark-veteran-businesses/ [https://perma.cc/C5GX-9HF7] ("When someone attempts to claim legal ownership of one of the Corps' registered trademarks, the service files a letter of protest with the United States Patent and Trademark Office."); *see Marine Corps Trademark Licensing Office*, U.S. MARINE CORPS OFF. OF COUNS. FOR THE COMMANDANT, U.S. MARINE CORPS, https://www.hqmc.marines.mil/ousmcc/trademark/ [https://perma.cc/7GNQ-ETE8] (last visited Aug. 23, 2022) (discussing the duties and responsibilities of the Marine Corps Trademark Licensing Office).

112. *In re* Navy Exch. Serv. Command, 2012 WL 4832272 (T.T.A.B. 2012).

113. *Id.* at *1.

114. *Id.* at *5.

115. *Id.* at *9 (holding that the Navy's descriptions of the marks were adequately represented, contrary to the initial determination of the examining attorneys).

116. Brown, *supra* note 31 ("But when the Navy decided to migrate to a digital pattern three years ago, it chose a desert scheme a few shades too close to that of the Marines, and the Corps balked. The Navy has since restricted its digital desert pattern to Special Warfare units.")

once it was issued to service members.[117] Originally designed for all Navy personnel in desert environments, it was restricted for use by U.S. Special Warfare personnel (U.S Navy SEALs and Special Warfare Combatant Craft Crewmen) only. The Navy spent $80 million in uniform development only to restrict its use to a few thousand personnel.[118] This means that, paradoxically, Navy personnel deployed in desert environments outside of Special Warfare units cannot wear the Type II desert camouflage uniform that was developed expressly for that purpose.[119]

Interestingly, the U.S. Government Accountability Office determined that there would be "no legal barrier" to other services using the Marine Corps's patented uniform.[120] The Marine Corps disagrees, with unnamed officials indicating their belief that U.S. federal law prohibits other services from using the Marine Corps's uniform.[121] This contention has never been tested in federal court.[122]

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117. *Id.*

118. Bryan Black, *NWU? AOR? What's the Deal with the New Navy Uniforms?*, IMMINENT THREAT SOLS. (Aug. 11, 2010), https://www.itstactical.com/gearcom/camouflage/nwu-aor-whats-the-deal-with-the-new-navy-uniforms/ [https://perma.cc/7DAX-X7BM].

119. *See* NAVY WORKING UNIFORM TYPE II AND III, NAVADMIN 374/09, *supra* note 46.

120. GAO REPORT, *supra* note 23, at 11.

121. *Id.* The report indicates that the Marine Corps believes that 10 U.S.C. § 771 "prohibits a member of one service from wearing the uniform or a distinctive part of the uniform belonging to another service." The statute reads:

> Except as otherwise provided by law, no person except a member of the Army, Navy, Air Force, Marine Corps, or Space Force, as the case may be, may wear—
>
> (1) the uniform, or a distinctive part of the uniform, of the Army, Navy, Air Force, Marine Corps, or Space Force; or
>
> (2) a uniform any part of which is similar to a distinctive part of the uniform of the Army, Navy, Air Force, Marine Corps, or Space Force.

10 U.S.C. § 771.

122. While the Marine Corps believes that 10 U.S.C. § 771 covers such conduct, the federal courts have never interpreted it in this way. *See* Hoskin v. Resor, 324 F. Supp. 271, 273 n.3 (D.D.C. 1971) (stating that Russian Railway Service officers issued U.S. Army uniforms were not U.S. military members); Gaston v. United States, 143 F.2d 10 (D.C. Cir. 1944) (holding that former Captain in New York State Guard not entitled to wear U.S. Army uniform), *cert. denied* 322 U.S. 764 (1944); United States v. Herting, 48 F. Supp. 607 (S.D. Fla. 1943) (holding that defendant was not authorized to wear U.S. Army uniform as discharged member of the Maryland National Guard). As this case law shows, the federal courts have interpreted 10 U.S.C. § 771 to govern wear of the uniform by an *individual civilian* who does *not* meet the definition of a military servicemember. It has never been interpreted to cover wear of one service's uniform by a member of a different service branch. This is especially curious, as Navy personnel (e.g., medical technicians and physicians) deployed to Marine units are authorized to wear Marine Corps uniforms (including MARPAT), providing that they adhere to the more-restrictive Marine Corps grooming standards. *See* SPECIAL UNIFORM SITUATIONS: 6501 – PERSONNEL SERVING WITH MARINE CORPS, MYNAVYHR, https://www.mynavyhr.navy.mil/References /US-Navy-Uniforms/Uniform-Regulations/Chapter-6/6501/ [https://perma.cc/9J9G-4K3Y] (last visited Aug. 23, 2022) ("Navy Personnel assigned to Marine Corps units who elect to wear and are issued Marine Corps service uniforms at no expense will abide by grooming standards established for Marines.").

B. Outside the DoD

The Marine Corps's aggressive safeguard of its trademarks extends to the civilian sector, as well.[123] The ubiquitous mall-based headwear retailer Lids was forced to withdraw MARPAT-themed jerseys from sale because they had not licensed use of the camouflage pattern through the Marine Corps.[124] This restrictive policy similarly extends to online retailers.[125] One of these retailers, Etsy, implemented a restrictive intellectual property policy because the Marine Corps Trademark Licensing Office insisted on the removal of all unlicensed Marine Corps products marketed by individuals on the Etsy platform.[126] Warnings about the use of Marine Corps products can be found on sites aimed at military spouses and family members, as well.[127]

While protection of its intellectual property is a key element of the Marine Corps's external strategy, cease and desist letters have not been used against other service branches. There are likely two primary reasons for this: first, no service has actively attempted to utilize MARPAT uniforms; and second, there is an issue with lack of available remedies. It is unclear whether the Marine Corps would (and could) file suit against another branch in federal court and whether a cease-and-desist letter could be enforced. All of the Marine Corps's pushback against other branches has been in the intragovernmental context.[128]

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123. *See USMC Licensing* FAQ, *supra* note 36. The Trademark Licensing Office is explicit that neither the Marine Corps's insignia nor its uniforms are in the public domain and must be licensed for sale. Because the Marine Corps is so aggressive in protecting its trademarks (as the office itself makes money by ensuring that proper licenses are granted), it may be assumed that all retailers of Marine Corps' goods are either licensed or will be contacted shortly by the Marine Corps to obtain a license. *Id.*

124. *See* Prine, *supra* note 36.

125. The online retailer Etsy has developed a special Q&A specifically to address the sale of Marine Corps products. *See* MARINE CORPS PRODUCTS Q&A, HEADQUARTERS, U.S. MARINE CORPS, available at https://www.hqmc.marines.mil/portals/134/docs/etsy%20faqs.docx [https://perma.cc/9HLB-G4SX] (last visited Aug. 23, 2022). This source provides questions and answers regarding Etsy products sporting Marine Corps insignia that had been removed for trademark infringement.

126. *Id.*

127. *Show Your Pride, But Don't Violate Military Trademark*, ARMY WIFE NETWORK (Aug. 12, 2013), https://armywifenetwork.com/show-your-pridebut-dont-violate-military-trademark/ [https://perma.cc/JMH8-BKAV].

128. *See supra* notes 116–119 and relevant discussion about wear of the Type II NWU.

IV. REFORM PROPOSALS

Even with Congressional action, the interbranch uniform conflict has not been addressed from within individual military service branches. Without institutional reform, there is the distinct possibility of a resurgent interbranch uniform debacle like that in the 2000s, presumably whenever a service branch attempts to change its uniforms again.[129]

With this overarching concern in mind, three separate proposals for institutional reform of military uniform development are discussed below. The first option would consolidate intellectual property protection and management at a higher level than individual service branches.[130] The second option would create a new uniform acquisition infrastructure.[131] Finally, the third option would involve merging the Marine Corps's intellectual property office with the Navy's office.[132]

A. Shift Individual Service Branch Intellectual Property to the DoD

The first proposal involves a restructure of the current intellectual property paradigm in the DoD. Instead of individual service branches maintaining their own trademark offices,[133] branch-specific trademarks would be consolidated under the banner of the DoD.[134] As the DoD already has a trademark office to govern its own trademarks,[135] this would not require the creation of new military unit or command from scratch.[136] This shift of military intellectual property resources would likely require an order from the Secretary of Defense.[137]

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129. Even with the limitation provisions in the NDAAs, there is still the possibility that the military branches will find a way around these requirements. *See supra* notes 56–59. The Navy's development of non-camouflage utility uniforms was potentially conceived as a way to get around the NDAA camouflage uniform restrictions. *See* Haskins, *supra* note 56; Correll, *supra* note 56.

130. *See infra* Section IV.A.

131. *See infra* Section IV.B.

132. *See infra* Section IV.C.

133. *See, e.g.*, *Marine Corps Trademark Licensing Office*, *supra* note 111 (discussing the duties and responsibilities of the Marine Corps Trademark Licensing Office).

134. *See DOD Branding and Trademarks*, U.S. DEP'T OF DEF., https://www.defense.gov/Resources/Branding-and-Trademarks/ [https://perma.cc/B2R8-6B62] (last visited Aug. 23, 2022).

135. *Id.* This includes intellectual property like the logo and branding for the Department of Defense.

136. *Id.* 10 U.S.C. § 161 governs the creation of unified and specified combatant commands. *See* discussion *infra* note 145. Combatant commands are created by the President with the advice and consent of the Chairman of the Joint Chiefs of Staff via the Secretary of Defense. *See* 10 U.S.C. § 161.

137. As 10 U.S.C. § 161 governs the creation of combatant commands, it is reasonable to analogize this action as being similar enough (and far-reaching enough) to require buy-in from the Secretary of Defense and from the President.

There are a variety of advantages that would result from shifting intellectual property management from individual services branches to the DoD as a whole. Such advantages include a vastly streamlined process by which patents, trademarks, and copyrights could be licensed because one administrative entity would control all facets of this mechanism.[138] All service branch intellectual property would be placed on an equal playing field, thereby removing the disastrous interbranch competition that occurred in the 2000s because of the intellectual property rights associated with MARPAT.[139] Additionally, the DoD already has its own trademark office to handle DoD-specific marks, so new administrative infrastructure would not need to be created from scratch.[140]

The proposal to shift intellectual property control to the DoD is not without major disadvantages. One of the key pressure points is that time and resources would be required to restructure a system already in place. Like many large, bureaucratic organizations, there is a significant amount of inertia associated with processes that work "well enough."[141] There would be significant cultural backlash from the Marine Corps if their much-vaunted uniforms and trademarks were removed from direct Marine control.[142] This would require a significant cultural shift for which a significant change management campaign would need to be developed. Indeed, other service branch officials have indicated they would not use the Marine Corps's MARPAT uniform even if they were permitted to do so.[143]

B. Completely Restructure Military Uniform Development and Acquisition

As opposed to the transfer of military intellectual property control to the DoD, this second option would take a much broader approach. Instead of

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138. As opposed to individual service branches each having trademark offices under the auspices of their service chief (i.e., the Commandant of the Marine Corps, Chief of Naval Operations, etc.), this office could be integrated into the Office of the Secretary of Defense.

139. *See supra* Part I.

140. *See DOD Branding and Trademarks*, *supra* note 134.

141. TOM GALVIN, LEADING CHANGE IN MILITARY ORGANIZATIONS: PRIMER FOR SENIOR LEADERS 27–28 (1st ed. 2018).

142. The Marine Corps has consistently pushed to maintain MARPAT as a hallmark of the Marine Corps, and explicitly responded when the Army began to test new uniforms (including MARPAT) to replace UCP in 2010. "Marine Sgt. Maj. Carlton Kent said the MARPAT design is 'proprietary.' 'It's important those designs are reserved for Marines. We just need to make sure each of our designs is unique to each service,' he said, according to the Army Times." Judson Berger, *Army Backs Off Talk of Using Marine Camouflage Pattern*, FOX NEWS (Dec. 23, 2015, 10:42 AM), https://www.foxnews.com/politics/army-backs-off-talk-of-using-marine-camouflage-pattern [https://perma.cc/4FJG-2PL9]. *See supra* notes 121–122.

143. *See* GAO REPORT, *supra* note 23, at 11 ("According to officials from all four services, it is unlikely that the services would choose to wear the same camouflage uniform because it is a symbol of the individual service and its uniqueness.").

shifting resources within the existing infrastructure, restructuring military uniform development and acquisition would involve more wide-reaching change than simply shifting individual service branch trademarks to DoD control. This proposal involves a consolidation of all military service branch uniform management infrastructure under one roof, not unlike the role performed by the General Services Administration (GSA) in handling facilities management for the federal government.[144] There are a few options to execute this proposal.

First, a new combatant command could be created to handle either military uniforms or, more likely, all military acquisitions.[145] This brings up a key issue in the implementation of this proposal: combatant commands represent operational—not administrative—military chains of command.[146] To create a separate combatant command for uniforms and equipment would represent a tectonic shift in the current military bureaucratic infrastructure.[147]

An alternate proposal would be to create a separate DoD agency solely to handle military uniform development.[148] With the inherent difficulty in

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144. *See About Us*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/about-us [https://perma.cc/2KEZ-LA8D] (last visited Aug. 23, 2022). The GSA handles the federal government's office buildings and related infrastructure (thus, each individual agency does not have to have contract specialists, facilities managers, and other related personnel to handle the requirements associated with maintaining office buildings). While not directly analogous, the same could be done with military uniforms.

145. *See Combatant Commands*, U.S. DEP'T OF DEF., https://www.defense.gov/About/combatant-commands/ [https://perma.cc/7P2X-76PS] (last visited Aug. 23, 2022). The eleven current unified combatant commands cover either specific geographic regions (Africa, Central, Europe, Indo-Pacific, Northern, and Southern) or handle specific missions (Cyber, Space, Special Operations, Strategic, Transportation). This would permit all decisions about military acquisitions to be handled at a high operational level using a unified command structure, as combatant commands are led by a four-star admiral or general, the highest rank in the U.S. military. *Id.*

146. *See* Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 908–09 (2019). The military is (broadly) organized into two separate hierarchies. One is the so-called "operational" chain of command, which governs the tactical and strategic utilization and deployment of military forces. *See id.* at 909–10. The other is the "administrative" chain of command which governs the training and equipping of military members. *See id.* at 910–11. Thus, individual units and personnel are simultaneously under the command of two separate chains of command. *See id.* at 908. The creation of a combatant command for uniforms would not follow the traditional path of streamlining the tactical employment of military personnel and equipment, as uniform development is a traditionally administrative role in the military. *See id.* at 910 ("The administrative military's origins can be found in the Constitution, statutes, and military doctrine. Its functions include personnel management, staffing, recruiting, testing, training, health care, equipping and hardware acquisition.") (footnotes omitted); *see also Air Force Doctrine Publication (AFDP) 3-30: Command and Control* 6, U.S. AIR FORCE CURTIS E. LEMAY CTR. FOR DOCTRINE DEV. & EDUC. (Jan. 7, 2020), https://www.doctrine.af.mil/Portals/61/documents/AFDP_3-30/3-30-D15-C2-Commanding-Airpower.pdf [https://perma.cc/6YDB-R67Y] (describing the operational and administrative chains-of-command in the Air Force).

147. This would require an order by the Secretary of Defense on behalf of the President in accordance with 10 U.S.C. § 161. *See* discussion *supra* note 136.

148. *See About Us*, U.S. GEN. SERVS. ADMIN., *supra* note 144.

establishing a separate combatant command,[149] a smaller-scale DoD agency may be the better option in the short term. This option would involve not only the unification of acquisition processes, but also a consolidation of military uniforms. Perhaps a single line of uniforms could be created for all military branches; each service would maintain its own distinguishing ribbons, patches, and insignia, but each branch's uniforms would be significantly more similar than the current process.[150]

Instead of creating a new combatant command or DoD agency from the ground up, a third option would be to graft or retrofit additional responsibilities onto an existing DoD agency. The Defense Logistics Agency (DLA) is an example of an existing DoD-affiliated agency that may be a prime target to host the additional responsibility of coordinating uniform development.[151] While the DLA handles the logistics of uniform deployment and distribution, it does not handle the development of military uniforms.[152]

While each of these plans would require significant investment of time and resources, they would each create a less costly system in terms of man-hours and capital. This complete reimagination of DoD uniform development and acquisition would completely remove each service branch's uniform acquisition infrastructure. Compared with the option involving the transfer of intellectual property control from individual service branches to the DoD, there would be a much larger time and resource cost associated with such a large-scale restructuring of military administrative infrastructure.[153] Additionally, the cultural shifts that would be required would be even more significant than those required in a shift of control to the DoD.

C. Merge the Marine Corps and Navy Trademark Licensing Offices

While the options of either shifting intellectual property control or uniform development away from individual services branches are possible, a smaller-scale and more feasible solution would be to merge the Navy and Marine Corps intellectual property infrastructure. The Navy and Marine

149. *See supra* notes 136–137, 145.

150. *See supra* notes 22–23 and associated text.

151. The DLA is the DoD agency responsible for equipping military branches. *See Defense Logistics Agency Fact Sheet*, DEF. LOGISTICS AGENCY (Nov. 2021) (on file with author) ("DLA procures items from manufacturers and suppliers and provides them to DoD and other federal/state customers, with services such as warehousing, packaging and transportation [and] provides more than $41.8 billion in goods and services annually on behalf of its customers . . . .").

152. *See* GRASSO, *supra* note 55, at 1–2.

153. While an exact resource cost is unavailable, it is presumable that this cost would be in the millions of dollars and take months to years to fully implement.

Corps's trademark offices could be unified under the direct control of the Department of the Navy. At present, this is the arrangement of the Air Force's and the Space Force's shared trademark office.[154]

The restructuring of the Navy and Marine Corps's intellectual property systems would provide some of the benefits of the shift of intellectual property control to the DoD, but with much more limited infrastructure changes required. As the Marine Corps is formally part of the Department of the Navy,[155] this option may be less odious than a complete consolidation of all services' trademark offices. Unlike the other proposals, as the Navy and Marine Corps are both within the Department of the Navy, it may be possible for the Secretary of the Navy to authorize this change.[156]

The Marine Corps's previous recalcitrance regarding use of its trademarks would likely not be remedied by a simple trademark office merger. This would also likely not resolve the issue of the Marine Corps's vehement protection of its own trademarks. Additionally, even if this would eliminate the issue of the Navy and Marine Corps having different camouflage uniforms, it would not resolve the issues with the Army, Air Force, or Space Force.[157]

D. Recommendations

Among the three reform options discussed above, transfer of military intellectual property from individual service branches to the DoD is the most viable option when cost and cultural inertia are both taken into account. While it would involve shifting resources, the infrastructure already exists to accommodate this reallocation. Additionally, it would not

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154. *See DOD Branding and Trademarks*, *supra* note 134. This arrangement is undoubtedly because the newly created Space Force is still getting on its feet. However, this arrangement would provide sufficient justification for merging other branches' offices housed under the same banner (recall that the Marine Corps, while a separate branch, is part of the Department of the Navy, a concept mirrored by the Space Force being a subsidiary of the Department of the Air Force).

155. The MARPAT patent lists the "Secretary of the Navy" as the assignee. U.S. Patent No. 6,805,957, at [73] (filed Nov. 7, 2001) (issued Oct. 19, 2004). As a sidenote, a variety of colorful anecdotes abound relating to the Marine Corps being part of the Department of the Navy. While President Andrew Jackson proposed merging the Marine Corps into the Army in 1834, the Marine Corps was instead merged into the Department of the Navy. *See* Claudette Ruolo, *Why Are Marines Part of the Navy?*, U.S. DEP'T OF DEF. (Feb. 21, 2019), https://www.defense.gov/News/Feature-Stories/story/Article/1763150/why-are-marines-part-of-the-navy/ [https://perma.cc/D7DL-A9G6].

156. *See* 10 U.S.C. § 8013 (stating the duties and responsibilities of the Secretary of the Navy). While the Secretary of the Navy has administrative control over the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps are the operational heads of the Navy and Marine Corps, respectively. Any decision would likely require buy-in from both. *See supra* notes 116–119 (discussing the Marine Corps's displeasure with Type II NWU); *supra* note 142 (discussing the Marine Corps's opposition to use of MARPAT by the Army).

157. That being said, the Army, Air Force, and Space Force all use the Scorpion-W2 camouflage uniform at present. *See supra* Part I.

interfere with existing operational or administrative chains of command regarding the development and implementation of new uniform designs. Finally, this would avoid singling out the Marine Corps, especially since the Marine Corps's uniform implementation, while being the catalyst for the uniform arms race of the twenty-first century, did indeed produce a highly capable and successful uniform.[158]

As previously discussed, such a shift would require input from both the President and the Secretary of Defense.[159] While legislation would not be required, the question remains whether this issue is "the alligator closest to the boat,"[160] requiring immediate action on the part of the executive branch. As the uniform arms race is in homeostasis in 2022,[161] it is possible the President or Secretary of Defense will not want to expend valuable political capital to address an issue that has stabilized.

It is clear that the Marine Corps is willing to go great lengths to protect its investment in trademarks and intellectual property related to its brand identity.[162] Its policies are informed by analysis of federal statutory law relevant to military uniforms and it is willing to address unlicensed use of its intellectual property by civilians in both individual and corporate capacities.[163] While the Marine Corps has not yet used litigation in federal court to protect its insignia and uniforms, it is conceivable that facts could exist which would make such a suit possible. As such litigation would be resource-intensive and would damage the reputation of a military already dogged by various issues,[164] it is critical that a solution be implemented that would entirely prevent a uniform arms race from happening again, even if the possibility seems to be remote.

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158. *See* Wharton, *supra* note 41, at 9–18 (providing quantitative data on the U.S. Military's uniform tests). MARPAT consistently scored above other tested camouflage patterns. *See id.*

159. *See supra* notes 136–137.

160. "You have to shoot the alligators closest to the boat first" is a colorful military aphorism heard (and used) by the author on many occasions during his active-duty military service. Especially in the Navy, colorful metaphors are (unsurprisingly) ubiquitous.

161. *See supra* Part I.

162. *See supra* Part III.

163. *See supra* Part III.

164. The military is increasingly becoming more politicized. *See supra* note 65 (discussing the federal judiciary adjudicating Covid vaccine mandates). The Navy, in particular, has experienced high-profile mishaps in the past few years, the most spectacular of which was the collision of two U.S. Navy destroyers with merchant ships in separate incidents in 2017. *See* Robert Faturechi, Megan Rose & T. Christian Miller, *Years of Warnings, Then Death and Disaster: How the Navy Failed Its Sailors*, PROPUBLICA (Feb. 7, 2019), https://features.propublica.org/navy-accidents/us-navy-crashes-japan-cause-mccain/ [https://perma.cc/4EUN-4FP7] ("The fleet was short of sailors, and those it had were often poorly trained and worked to exhaustion. Its warships were falling apart, and a bruising, ceaseless pace of operations meant there was little chance to get necessary repairs done. The very top of the Navy was consumed with buying new, more sophisticated ships, even as its sailors struggled to master and hold together those they had. The Pentagon, half a world away, was signing off on requests for ships to carry out more and more missions.").

While the shift of trademark offices from individual service branches to the DoD could likely be accomplished by an order from the Secretary of Defense,[165] the mechanics of taking this action is overshadowed by the politics involved in such a shift. The military is a highly institutionalized and hierarchical entity with a great deal of inertia. This reality makes it challenging to shift its infrastructure unless there is an overriding and immediate concern.[166] With the pushback that has occurred from within the military in regard to uniform designs, it is likely that a shift in intellectual property protection would frustrate high-ranking military officers.[167] While the mechanics seem simple, "simple" and "easy" are not equivalent terms.[168]

CONCLUSION

While the Marine Corps's use of intellectual property law to protect their uniforms is legal and has undoubtedly been beneficial to a service battling for funding and recruiting numbers, it has had deleterious consequences for the rest of the Department of Defense. Despite the MARPAT uniform's contribution to the image and prestige of the Marine Corps, it has embroiled the Pentagon in "embarrassing copyright battles [best left] to the smartphone industry."[169] Not only has this diminished the standing of the military in the eyes of an already-skeptical public, but it has also wasted government resources in the research and development of clearly inferior uniforms while simultaneously providing a windfall to the manufacturers of these camouflage uniforms.[170]

Especially since each service branch has its own dress uniforms, iconography, history, and traditions, the Marine Corps distinguished itself at the expense of the rest of the armed forces. Even though each military branch prizes its individuality, military uniform trademarks should be managed by the Department of Defense as a whole, instead of by each individual service branch. Moving beyond intellectual property

165. *See supra* notes 136–137.

166. Tim Stobierski, *Organizational Change Management: What It Is & Why It's Important*, HARV. BUS. SCH. ONLINE (Jan. 21, 2020), https://online.hbs.edu/blog/post/organizational-change-management#:~:text=Change%20management%20drives%20the%20successful,of%20both%20time%20and%20resources [https://perma.cc/78VE-CSEM].

167. *See supra* notes 116–119 (discussing wear of the Type II NWU).

168. This is another common military aphorism heard during the author's military service.

169. Brown, *supra* note 31.

170. *See* Wharton, *supra* note 41, at 9–11; GAO REPORT, *supra* note 23, at 11; *see also President Dwight D. Eisenhower's Farewell Address (1961)*, NAT'L ARCHIVES https://www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address [https://perma.cc/H5E5-HG5M] (last visited Aug. 23, 2022) (warning of the dangers of the military-industrial complex).

considerations, camouflage uniforms should be standardized across the entire Department of Defense to eliminate any further issues.

Even with Congress' attempt to regulate uniform spending and with implementation of one of the reform proposals in this section, the attitude of the individual service branches is a key confounding factor.[171] Any attempt to change this system would have to appeal to the "hearts and minds" of American military members.[172]

Thomas R. Farrell[†]

171. GAO REPORT, *supra* note 23, at 11.

172. Use of "hearts and minds" in reference to military operations likely dates from John Adams. Letter from John Adams to Hezekiah Niles (Feb. 13, 1818), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Adams/99-02-02-6854 [https://perma.cc/P428-ZVWP] (last visited Aug. 23, 2022).

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