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EQUAL JUSTICE FOR OUR MILITARY ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 569

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EQUAL JUSTICE FOR OUR MILITARY ACT OF 2009

THURSDAY, JUNE 11, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:03 a.m., in room 2141, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Conyers, Gonzalez, Jackson Lee, and Coble.

Staff present: Eric Garduno, Majority Counsel; Rosalind Jackson, Majority Professional Staff Member; and David Whitney, Minority Counsel.

Mr. JOHNSON. The Subcommittee on Courts and Competition Policy will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing.

And I will now yield so much time to myself as I may consume.

Good morning and welcome to the Subcommittee's hearing on H.R. 569, the "Equal Justice for Our Military Act of 2009."

H.R. 569 is intended to allow all members of the Armed Forces broader access to discretionary review of courts-martial decisions by the United States Supreme Court.

It is important to highlight for this hearing that there are two categories of cases where accused service members do not currently have the right to seek Supreme Court review.

The first are cases that the court of appeals for the Armed Forces, CAAF, decides not to review. In essence, if the CAAF refuses to hear a case, the Supreme Court is precluded from hearing it on direct appeal.

According to the Defense Department statistics, approximately 84 percent of all cases appealed to the CAAF are denied review and, thus, are denied the opportunity to seek further direct appellate review by the Supreme Court.

The second category of cases are those that involve petitions for extraordinary relief or interlocutory appeals in which the CAAF denies relief.

In other words, if the CAAF denies an accused service member extraordinary relief or an interlocutory appeal, that decision cannot be reviewed by the Supreme Court.

This is particularly troubling because in these cases, the government has the right to appeal CAAF decisions to the Supreme Court if they are granted relief, thus creating what some might consider a double standard in favor of the government.

The bill before us, H.R. 569, would permit direct Supreme Court review in both these types of cases.

The central question before this Committee today is whether the current limits on judicial review are justifiable.

Opponents of H.R. 569 argue that removing these limits may increase the government's costs and result in a substantial workload for military lawyers, the Department of Justice, and the United States Supreme Court.

Opponents say these additional burdens are unnecessary because the military offers a comprehensive appellate process that provides greater review than what is available in the civilian justice system.

Some also say that permitting such opportunity for review lessens the authority of the CAAF and the military justice system, which could ultimately threaten the discipline and order of the military.

Proponents of H.R. 569 counter that service members who risk their lives protecting our freedoms and rights should also have those same freedoms and rights available to them to the fullest extent possible, even if it means additional costs.

Proponents further point out that greater access to the Supreme Court will not negatively impact the authority of the CAAF or the military justice system, since the Supreme Court already has jurisdiction to review many of the cases decided by the CAAF.

Today, we have three witnesses to testify regarding H.R. 569. When we originally scheduled this hearing, we had a total of five witnesses; but due to scheduling conflicts, the ABA president and his designee were not able to attend and the Administration has decided not to send a witness.

While I was initially disappointed that the Administration was not able to send a witness, I take it as a sign that the Obama administration is taking a hard look at the legislation and will ultimately take a different position regarding the legislation than the previous Administration.

I now recognize my colleague, Howard Coble, the distinguished Ranking Member of the Subcommittee on Courts and Competition Policy for his opening remarks.

[The bill, H.R. 569, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 569

To amend titles 28 and 10, United States Code, to allow for certiorari review of certain cases denied relief or review by the United States Court of Appeals for the Armed Forces.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 15, 2009

Mrs. DAVIS of California (for herself, Mr. SKELTON, Mr. HOLT, Ms. BORDALLO, Mr. GRIJALVA, Mr. LOEBSACK, Mr. HINCHEY, Ms. WOOLSEY, and Mr. SCOTT of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend titles 28 and 10, United States Code, to allow for certiorari review of certain cases denied relief or review by the United States Court of Appeals for the Armed Forces.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Justice for Our Military Act of 2009".

SEC. 2. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES.

(a) IN GENERAL.—Section 1259 of title 28, United States Code, is amended—

(1) in paragraph (3), by inserting "or denied" after "granted"; and

(2) in paragraph (4), by inserting "or denied" after "granted".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 867a(a) of title 10, United States Code, is amended by striking "The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.".

○

Mr. COBLE. Thank you, Mr. Chairman. And I move to strike the last word.

Today's hearing, folks, will focus on H.R. 569, a bill that proposes amendments to the Federal judicial code and the uniform code of military justice, properly known as UCMJ.

The purpose of these proposed amendments is to grant the Supreme Court greater discretionary jurisdiction to review appeals from service members who have been court-martialed and sentenced to a bad conduct or dishonorable discharge, dismissal or confinement to 1 year or more.

I commend the sponsor of H.R. 569, Representative Susan Davis, our colleague, for her commitment to improving the circumstances and conditions of those who volunteer their service and, in some cases, their lives in the defense of our Nation.

This is the third Congress that Representative Davis has introduced legislation on this topic.

In the past, we have elicited views from the affected agencies, departments and the judiciary branch to evaluate the legislation before us.

If there is no objection, Mr. Chairman, I would like to ask that letters from the Department of Defense and the Supreme Court be made a part of the official record, regarding the issue at hand.

Mr. JOHNSON. Without objection.

Mr. COBLE. That said, it is regrettable, and you just touched on it, Mr. Chairman, that while today's hearing marks the first real legislative review of this legislation, the Administration has refused to send a witness to testify, and I think this is a mistake.

And it appears to me that the Administration has chosen to go AWOL on this matter today. This marks the second time in 90 days that the Administration has been missing in action before this Subcommittee, in a hearing where Members are reviewing proposals that relate directly to our service members.

I am sure General Altenburg and Colonel Sullivan, who have arranged their schedule three times so they could be with us, can probably tell us the range of penalties the UCMJ prescribes for failure to report for duty, if you will pardon my inserting a little humor in this. But unfortunately, the civilian employees of the Office of Management and Budget and the Department of Justice are not subject to the UCMJ's disciplinary provisions.

Mr. Chairman, in closing, I want to note that we need to insist that the Administration does, in fact, take seriously its obligation to respond to our requests for information.

This is particularly true when matters before this Subcommittee and the full Committee, for that matter, directly impact the rights of service members, their resources and requirements of our armed services, and the administration of our judicial system.

I look forward to learning more about the intricacies of the matter from the witnesses who are here today and hope for the Administration to come back to us in the near future with any further thoughts that they may have on the subject before us.

This concludes my opening remarks, Mr. Chairman, and I yield back.

Mr. JOHNSON. Thank you, Mr. Ranking Member, for your statement.

And without objection, other Members' opening statements will be included in the record.

I am now pleased to introduce the witnesses for today's hearing. Our first panel will feature Congresswoman Susan Davis. Representative Davis represents California's 53rd congressional district, which encompasses large portions of San Diego.

Representative Davis has a deep understanding of military affairs, as she serves with me and others on the Armed Services Committee, where she Chairs the Subcommittee on Military Personnel.

She has also had substantial personal exposure to military life as the daughter of a World War II medic and wife of an Air Force doctor.

Welcome, Representative Davis.

Mrs. DAVIS. Thank you.

Mr. JOHNSON. And I really appreciate your evenhandedness in dealing with all of the issues that come before our Subcommittee, and you are a great leader.

Now, our second panel will begin with Colonel Dwight H. Sullivan. Colonel Sullivan is a civilian senior appellate defense counsel at the Air Force Appellate Defense Division and he is a Colonel in the United States Marine Corps Reserve.

He has served as the Chief Defense Counsel for the Office of Military Commissions and he has also served as a Managing Attorney with the ACLU of Maryland.

He is a co-author of "Military Justice: Cases and Materials," which is a case book published by LexisNexis in 2007, and he is co-editor of "Evolving Military Justice," which is an anthology published by the Naval Institute Press back in 2002.

Welcome, sir.

Second will be Major General John D. Altenburg, Jr., who is now retired from the United States Army and is a principal with the Washington, D.C. office of Greenberg Traurig, an international law firm.

Before joining Greenberg Traurig in 2002, he was a consultant on governance and ethics issues to the President and the World Bank Group.

General Altenburg has served as the Appointing Authority for Military Commissions. General Altenburg also concluded a 28-year Army career in 2001 as the Deputy Judge Advocate General of the Army.

Welcome, General.

Thank you all for your willingness to participate in today's hearing.

Without objection, your statements, your written statements will be placed into the record, and we would ask that you limit your oral arguments or your oral remarks to 5 minutes.

You will note that we have a lighting system that starts with a green light and at 4 minutes, it turns yellow, then red at 5 minutes.

After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions, subject to the 5-minute rule.

Representative Davis, would you please proceed?

TESTIMONY OF THE HONORABLE SUSAN A. DAVIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. DAVIS. Thank you very much. Thank you, Chairman Johnson, Ranking Member Coble, and Members of the Committee. I certainly do want to thank you for taking the time to hold this hearing, as well as giving me the opportunity to testify and submit my remarks for the record.

When American men and women decide to serve their Nation in the Armed Forces, they make many sacrifices, from lost time with families to injury to irreplaceable loss of life.

Most Americans, however, are not aware that active duty service members also sacrifice one of the fundamental legal rights that all civilian Americans enjoy.

Under current law, members of the military who are convicted of offenses under the military justice system do not have the legal right to appeal their cases to the U.S. Supreme Court.

After exhausting their appeals to the United States Court of Appeals for the Armed Forces, what we know as CAAF, most have no recourse.

This issue was brought to the attention of my office years ago by a then constituent of mine, a former service member who had concerns about the military justice system.

He has since become a tireless champion for this issue and other military justice reform issues on behalf of the service members and veterans that fall under the jurisdiction of those courts.

As the Chairwoman of the Subcommittee on Military Personnel, a long-time advocate for service members, and a representative of San Diego, one of the largest military communities in the Nation, I feel an obligation to fight to ensure that the members of our military are treated fairly.

It is unjust to deny members of our Armed Forces access to our system of justice as they fight to preserve this very system.

The Equal Justice for Our Military Act, H.R. 569, amends U.S. Code to permit convicted service members to appeal to the Supreme Court in cases where their petitions for review by the Court of Appeals for the Armed Forces have been denied, as well as in situations where the military court has denied an extraordinary writ or writ appeal.

This remedial approach would provide service members with due process, access to discretionary Supreme Court review similar to that which is permitted the government.

This legislation has been endorsed by the American Bar Association, the Military Officers Association of America, and many other military and legal advocates.

Last Congress, this bill was passed by voice vote on the House floor and, in addition, the Senate Judiciary Committee unanimously approved companion legislation introduced by Senator Dianne Feinstein.

I believe it is fundamentally unjust to deny to those who serve in uniform on behalf of our country one of the basic rights afforded to all other Americans. They deserve better.

I certainly hope that you will join me in support of this legislation to attain equal treatment for those who fight for our country.

Chairman Johnson, once again, thank you very much, Mr. Coble and others, for the opportunity to submit my remarks for the record, and I look forward to working together on this issue.

Thank you.

[The prepared statement of Ms. Davis follows:]

PREPARED STATEMENT OF THE HONORABLE SUSAN A. DAVIS,
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The Honorable Susan A. Davis

June 5, 2009

Testimony before the House Judiciary Committee
Subcommittee on Courts and Competition Policy

H.R. 569, the "Equal Justice For Our Military Act of 2009"

Chairman Johnson, Ranking Member Coble, and members of the Committee, I would like to thank you for taking the time to hold this hearing as well as giving me the opportunity to testify and submit my remarks for the record.

When American men and women decide to serve their nation in the Armed Forces, they make many sacrifices – from lost time with families to injury to irreplaceable loss of life.

However, most Americans are not aware that active-duty service members also sacrifice one of the fundamental legal rights that all civilian Americans enjoy.

Under current law, members of the military who are convicted of offenses under the military justice system do not have the legal right to appeal their cases to the U.S. Supreme Court.

After exhausting their appeals through the United States Court of Appeals for the Armed Forces (CAAF), most have no recourse.

This issue was brought to the attention of my office years ago by a then-constituent of mine, a former service member who had concerns about the military justice system.

He has since become a tireless champion for this issue and other military justice reform on behalf of the service members and veterans that fall under the jurisdiction of those courts.

As the Chairwoman of the Subcommittee on Military Personnel, a long-time advocate for service members, and a representative of San Diego - one of the largest military communities in the nation - I feel an obligation to fight to ensure that the members of our military are treated fairly.

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I believe it is fundamentally unjust to deny to those who serve in uniform on behalf of our country one of the basic rights afforded to all other Americans.

<u>They deserve better.</u>

I hope that you will join me in support of this legislation to attain equal treatment for those who fight for our country.

Chairman Johnson, thank you again for the opportunity to submit my remarks for the record, and I look forward to working together on this issue.

Mr. JOHNSON. Thank you, Madam Chair, and we thank you for your appearance today.

And I will now call forward the second panel.

Colonel Sullivan, are you ready to proceed, sir?

Colonel SULLIVAN. Yes, sir.

Mr. JOHNSON. Please.

TESTIMONY OF DWIGHT H. SULLIVAN, ATTORNEY, WASHINGTON, DC

Colonel SULLIVAN. Mr. Chairman, Ranking Member Coble, Members of the Committee, I am grateful for the opportunity to speak with you this morning about the Equal Justice for Our Military Act.

At the outset, I would like to emphasize that I am speaking strictly in my personal capacity. I am not speaking for the Air Force, the Marine Corps, DOD, and nothing I say should be imputed to anyone but myself.

For the last 2 years, I have represented Air Force members appealing court-martial convictions as a civilian lawyer. And as a reserve lawyer in the Marine Corps, I have represented sailors and Marines appealing court-martial convictions.

Now, before that, I was the chief defense counsel for the Office of Military Commissions. So I was the head of the office that provided defense counsel for Guantanamo detainees being tried by military commissions.

In 2006, in the Military Commissions Act, Congress gave every alien, unlawful, enemy combatants the right to seek Supreme Court review if they are convicted by a military commission, and that is codified at 10 USC 950g.

But most American service members who are convicted by court-martial have no right to seek Supreme Court review on direct appeal.

So alien, unlawful, enemy combatants at Guantanamo Bay have a greater right to seek Supreme Court review than do the American soldiers, sailors, Marines and airmen who guard them.

Members of the U.S. military also have less of a right to seek Supreme Court review than do civilian state defendants, civilian defendants in U.S. district courts, and they also have less of a right to seek Supreme Court review than does the prosecution in a court-martial case. And H.R. 569 would largely correct these imbalances.

Now, perhaps it would be helpful to the Committee to have an overview of the military justice system, using fiscal year 2008 as an example, to see how this plays out in practice.

Worldwide, in fiscal year 2008, the five branches of the armed services, combined, tried about 3,000 courts-martial, a little bit more than 1,000 general courts-martial, which is the felony forum, a little bit less than 2,000 special courts-martial, for a combined total of 3,008 court-martial cases worldwide.

Now, of those, a little bit more than 2,000 resulted in a conviction and a sentence that authorized the case to go on appeal under 10 USC 866.

And what happens is after the same officer who convenes the court approves the results, the case goes on appeal to one of the four Courts of Criminal Appeals, which are intermediate appellate

courts that sit in the Washington, D.C. area, most of which are comprised of senior uniformed military lawyers.

And again, about 2,000 cases went on appeal to those four courts in fiscal year 2008.

Now, once the case is done at that level, the service member can petition the Court of Appeals for the Armed Forces, or what we call CAAF, for further review.

Now, CAAF consists of five civilian judges—by statute, they must be civilians—appointed by the President, confirmed by the Senate, for 15-year terms.

It is an Article I court, but it functions much like one of the geographic courts of appeals reviewing criminal convictions, but with one crucial difference, and, that is, if you are convicted in U.S. district court, you have a right of appeal to one of the courts of appeals.

If you are convicted by a court-martial and your case goes on appeal to the Court of Criminal Appeals, you have to file a petition and ask CAAF to exercise discretionary review.

Now, there are two categories of cases that CAAF must hear. If there is an approved death sentence in a case, CAAF has to hear that case. Congress has said so.

And then, also, the Judge Advocate General of the service, the top uniformed lawyer in each of the military services, can require CAAF to review a case.

And so in practice, that provides the prosecution with a guaranteed right of appeal to CAAF, because if the prosecution loses at the intermediate appellate court, the Judge Advocate General can require CAAF to review that case.

Once the case goes through CAAF's door and review is granted, it qualifies for Supreme Court review. So again, the prosecution has an automatic avenue to the Supreme Court, because the Judge Advocate General can certify the case to CAAF, which then results in Supreme Court review.

So turning, again, to fiscal year 2008, there were a total of 134 cases that CAAF reviewed either because they granted a petition, part of their discretionary docket, or because one of the Judge Advocates General directed that they review that case, 134 cases.

Now, of those 134 cases, ultimately, 20 went on to qualify—20 went on to file cert petitions. So most of these cases do not result in cert petitions, even after the door to the Supreme Court has been opened.

There were another 715 cases where CAAF denied review and, as best as I can tell, those 715 service members whose petitions were denied are the only Americans convicted in a criminal court who did not have the right to seek Supreme Court review, and they didn't have that right because they were members of the U.S. military.

And again, H.R. 569 would largely correct that imbalance and provide U.S. service members with a similar right to seek access to the Supreme Court.

Thank you.

[The prepared statement of Colonel Sullivan follows:]

PREPARED STATEMENT OF DWIGHT H. SULLIVAN

Hearing on H.R. 569, The Equal Justice for Our Military Act of 2009

Testimony of Dwight H. Sullivan[1]

Mr. Chairman, Ranking Member Coble, and Members of the Subcommittee:

Every criminal defendant convicted in a state court has a right to seek Supreme Court review.[2] So does every criminal defendant convicted in a federal district court.[3] So, too, does every alien unlawful enemy combatant convicted by a military commission.[4] It appears that the only people tried in criminal cases in the United States who do not have a right to seek Supreme Court review are those individuals – principally members of the U.S. military – who are tried by courts-martial.[5] It is inappropriate and – experience has taught us – unnecessary to deprive members of the U.S. military of the same right to Supreme Court access that their civilian counterparts and even alien unlawful enemy combatants enjoy. H.R. 569 would largely correct this disparity.

Historical Context

Until Congress passed the Military Justice Act of 1983,[6] the Supreme Court had no statutory certiorari jurisdiction over the military justice system. Collateral reviews of court-martial convictions would infrequently reach the Supreme Court, but the Court applied an extremely narrow scope of review in such cases.[7] The prosecution had no practical means to seek further review of the Court of Military Appeals' decisions. In 1983, Congress adopted legislation advocated by the Department of Defense to authorize Supreme Court review of only those court-martial cases that were reviewed by the Court of Military Appeals.[8] This limitation was significant in two respects. First, in the vast majority of non-capital cases that come to it,[9] the Court of Appeals for the Armed Forces (as the Court of Military Appeals is now known) chooses not to review the case. That forecloses the possibility of Supreme Court review for most servicemembers. Second, each of the four Judge Advocates General has the power to require the

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[1] For informational purposes only, Dwight H. Sullivan is a civilian senior appellate defense counsel in the Air Force Appellate Defense Division. He is also a colonel in the United States Marine Corps Reserve. The views expressed are his own and are offered in his private capacity; he does not purport to speak for, and his views should not be imputed to, the Air Force, the Marine Corps, the Department of Defense, or any other entity.

[2] *See* 28 U.S.C. §1257 (2000).

[3] See 28 U.S.C. §1254 (2000).

[4] *See* 28 U.S.C.A. § 950g(d) (West Supp. 2008).

[5] Under a recent amendment to the Uniform Code of Military Justice (UCMJ), some civilians accompanying the U.S. military in hostile areas may now also be prosecuted by court-martial. *See* 10 U.S.C. § 802(a)(10) (West Supp. 2008). But such prosecutions have been rare in practice.

[6] Pub. L. No. 98-209, 97 Stat. 1393.

[7] *See, e.g., Burns v. Wilson*, 346 U.S. 137 (1953).

[8] That legislation is now codified at 28 U.S.C. §1259 (2000), and 10 U.S.C. § 867a (2000).

[9] CAAF must review cases in which an intermediate military appellate court has affirmed a death sentence. *See* 10 U.S.C. § 867(a)(1) (2000). Thus, every affirmed military death sentence is eligible for certiorari review by the Supreme Court under existing law.

Court of Appeals for the Armed Forces (CAAF) to hear a case.[10] This power is exercised almost exclusively for the benefit of the prosecution.[11] This means, as a practical matter, the United States can almost always ensure that a case it cares about will qualify for Supreme Court review. A servicemember tried by a non-capital court-martial, on the other hand, has no such right.

Experience Under Current Law

During Congress's consideration of the Military Justice Act of 1983, concerns were raised about the effect that the legislation might have on the Supreme Court's case load, as well as the work load of military appellate counsel and the Solicitor General's office. By creating a narrow opening for Supreme Court review, Congress initiated an experiment. Twenty-five years later, we can examine that experiment's results.

First, certiorari petitions arising from military cases have been rare. In the first nine years of practice under the Military Justice Act of 1983, only 200 petitions for certiorari were filed seeking review of Court of Military Appeals decisions.[12] Military certiorari petitions continue to be rare. During the Supreme Court's last full Term—the October 2007 Term – only twenty military certiorari petitions were filed. (While the Court's current Term is not complete, this Term's statistics for military certiorari petitions appear on pace to be almost identical to last Term's.) But even that small number overstates the burden on the military appellate defense divisions to prepare those petitions. Six of the twenty certiorari petitions were filed by the petitioner pro se—no doubt after their appellate defense counsel determined that there were no non-frivolous issues in the case. And in another two cases, the servicemember was represented by a retained civilian counsel. Thus, in just twelve cases during the October 2007 Term did military appellate defense counsel prepare a certiorari petition. The Department of Defense's appellate defense function is divided among four different appellate defense offices—one for the Army, the Air Force, the Navy and Marine Corps, and the Coast Guard. No office filed more than five certiorari petitions during the October 2007 Term. The Military Justice Act of 1983's burden on the Solicitor General's office was even more negligible. The Solicitor General responded to every one of the twenty military certiorari petitions during the October 2007 Term by waiving the United States' right to file an opposition. The Court called for a response in two of those cases.[13] The Court ultimately denied certiorari in both cases.[14] Nor has military certiorari practice been burdensome for the Supreme Court. During the October 2007 Term, the

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[10] *See* 10 U.S.C. § 867(a)(2) (2000).

[11] From January 1, 2004 through June 1, 2009, the Judge Advocates General certified 23 cases to CAAF. Twenty-two of these cases were certified for the prosecution's benefit after the defense prevailed before the intermediate military appellate court.

[12] *See* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, *in* EVOLVING MILITARY JUSTICE, 149, 156 (Eugene R. Fidell & Dwight H. Sullivan, eds. 2002).

[13] *Stevenson v. United States*, No. 07-1397, and *Foerster v. United States*, No. 07-359.

[14] *Stevenson v. United States*, 129 S. Ct. 69 (2008); *Foerster v. United States*, 128 S. Ct. 1066 (2008).

Supreme Court disposed of 8,374 cases.[15] The twenty military certiorari petitions constituted less than one-quarter of one percent of that total.

Second, grants of certiorari petitions arising from military cases have been rare. The Court has granted plenary review of only nine cases under the authority provided by the Military Justice Act of 1983.[16] In the three most recent certiorari grants, the United States was the petitioning party. In the remaining six, a servicemember was the petitioner.

Third, the vast majority of servicemembers convicted by court-martial have no ability to petition the Supreme Court for certiorari. Over the past five years combined, CAAF has granted a total of 752 petitions for review. It has denied a combined total of 3,473 petitions. The 3,473 servicemembers who filed those petitions had no right to seek Supreme Court review. Most of those cases, no doubt, contained no important issues. But some of them included unresolved constitutional issues that could not be presented to the Supreme Court on direct review due to CAAF's denial of the petition.[17]

Fourth, the language of the current statute[18] authorizing Supreme Court review of military justice cases is confusing. Because the Military Justice Act of 1983 appears to have been gerrymandered to protect the United States' ability to seek certiorari without providing similar access to the defendant, its language departs from that authorizing certiorari for federal and state civilian cases. This gerrymandered language has led to significant confusion in the statute's application. For example, consider a state criminal defendant who raises three issues on a certiorari petition to the state supreme court. If the state supreme court were to grant review of only one of those issues, the criminal defendant could nevertheless seek Supreme Court review of the two denied issues. But the Solicitor General has taken the position that the statute authorizing writs of certiorari to CAAF provides the Supreme Court with jurisdiction to review only the particular issues upon which CAAF granted review.[19] Others have disagreed with this

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[15] *See The Statistics*, 122 Harv. L. Rev. 516, 523 (2008).

[16] *United States v. Denedo*, 129 S. Ct. 622 (2008) (order granting certiorari); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Scheffer*, 523 U.S. 303 (1998); *Edmond v. United States*, 520 U.S. 651 (1997); *Loving v. United States*, 517 U.S. 748 (1996); *Ryder v. United States*, 515 U.S. 177 (1995); *Davis v. United States*, 512 U.S. 452 (1994); *Weiss v. United States*, 510 U.S. 163 (1994); *Solorio v. United States*, 483 U.S. 435 (1987).

[17] *See, e.g.*, *United States v. Sanford*, 2006 CCA LEXIS 303, 2006 WL 4571896 (N-M Ct. Crim. App. Nov. 6, 2006), *petition denied*, 64 M.J. 428 (C.A.A.F. 2007) (due process challenge to constitutionality of recent UCMJ amendment authorizing special courts-martial with as few as three members to impose up to a year of confinement); *United States v. Paulk*, 66 M.J. 641 (A.F. Ct. Crim. App.), *petition denied*, 67 M.J. 169 (C.A.A.F. 2008) (equal protection challenge arising from Air Force trial and appellate judges' lack of fixed terms of office).

[18] 28 U.S.C. § 1259 (2000).

[19] *See, e.g.*, Brief for the United States in Opposition, *Stevenson v. United States*, No. 07-1397, at 7-8, *available at* http://www.usdoj.gov/osg/briefs/2008/0responses/2007-1397.resp.pdf; Brief for the United States in Opposition, *McKeel v. United States*, No. 06-58, at 5-6, *available at* http://www.usdoj.gov/osg/briefs/2006/0responses/2006-0058.resp.pdf.

interpretation.[20] The Supreme Court has not ruled on whether it agrees with the Solicitor General's position. Another statutory ambiguity is whether the Supreme Court has jurisdiction to review a case where CAAF initially granted review, but then vacated that grant of review. Again, the Supreme Court has yet to decide that issue. Such ongoing confusion over 28 U.S.C. § 1259's scope further demonstrates the appropriateness of amending the current statute.

Implications for Practice Under the Equal Justice for Our Military Act of 2009

The 25 years of experience under the Military Commissions Act of 1983 suggest the likely consequences of the Equal Justice for Our Military Act, were it to become law.

First, certiorari petitions would remain rare. Under current practice, few military justice cases that qualify for Supreme Court review actually result in the filing of a certiorari petition. Even though CAAF granted 181 petitions for review in 2006, during the Supreme Court's 2007 term, just 20 military certiorari petitions were filed. Were H.R. 569 to become law, the percentage of cases in which a certiorari petition is filed where CAAF denies review would no doubt be far smaller than the already small percentage of cases in which a certiorari petition is filed where CAAF grants review. This is because members of the Supreme Court bar are precluded from filing certiorari petitions in cases that include no non-frivolous issue.[21] This is a prohibition that military appellate defense counsel take very seriously. The percentage of cases containing no non-frivolous issue (and thus not permitting counsel to file a certiorari petition) will be far higher among those cases in which CAAF declines to exercise its discretionary jurisdiction than in those cases that the court accepts for review. Even if the number of certiorari petitions prepared by counsel (as opposed to pro se) doubled—and it seems extremely unlikely that the increase would be anywhere near that great—the result would be an increase from just 14 certiorari petitions to 28. With the resulting increased workload spread among four different appellate defense offices, this should be easily accommodated with existing personnel resources. Given the Solicitor General's practice of waiving the United States' right to respond to every military certiorari petition, the increased burden on that office would be truly negligible and would require no increase in staffing. And the burden on the Supreme Court would be inconsequential. Even a quadrupling of military certiorari petitions—a farfetched possibility—would increase the Supreme Court's case load by less than 1%.

Second, the fiscal cost of the Equal Justice for Our Military Act would be miniscule. Recent experience demonstrates that the cost of printing a certiorari petition is approximately $1,000. Assuming again that the number of certiorari petitions were to double, the resulting rise in printing costs would be approximately $14,000. (Pro se petitions are not printed, thus the increased printing costs are limited to those cases in which counsel file a certiorari petition.) There would be absolutely no increase in labor costs, since the military appellate defense counsel who prepare certiorari petitions are paid the same regardless of how many hours they work and the retained civilian counsel who prepare certiorari petitions receive no compensation from the

[20] *See, e.g.*, Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in EVOLVING MILITARY JUSTICE 149, 150-51 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) (endnotes omitted).
[21] *See Austin v. United States*, 513 U.S. 5 (1994).

United States. The principal cost that this bill would create is some rise in expenditures due to prolonged appellate leave while convicted servicemembers seek certiorari or while the United States waits to see whether those servicemembers will exercise their right to seek certiorari. Appellate leave is a no-pay-due status, thus reducing the resulting cost.

Third, the number of granted military certiorari petitions would remain small. Indeed, the percentage of granted military certiorari petitions would likely diminish, since it is likely that fewer cert-worthy issues would be presented by those cases where CAAF denied review than by those cases where CAAF chose to exercise its discretionary jurisdiction.

Fourth, the inequality between servicemembers tried by court-martial and those individuals tried in state and federal civilian criminal proceedings and alien unlawful enemy combatants tried by military commission would greatly diminish. Even under the Equal Justice for Our Military Act, not every servicemember convicted by court-martial would qualify for appellate review and thus not every servicemember would have access to the Supreme Court.[22] But the vast majority of convicted servicemembers would.

Fifth, the ongoing confusion generated by 28 U.S.C. § 1259 would largely be eliminated. The scope of CAAF's grant or CAAF's vacation of a grant of review would no longer impact a servicemember's ability to seek Supreme Court review.

Conclusion

The Equal Justice for Our Military Act is aptly named. Under current law, access to the Supreme Court is unequal in several respects. First, the defense's access is inferior to that of the prosecution. Second, servicemembers' access is inferior compared to that of civilian criminal defendants. Third, and perhaps most perversely, U.S. servicemembers' access is inferior compared to that of alien unlawful enemy combatants tried by military commission.

Passage of H.R. 569 would largely eliminate these inequalities. Experience under the Military Justice Act of 1983 teaches that it would do so without the need for additional personnel resources and with minimal additional cost.

While actual Supreme Court review of military justice cases is rare and would no doubt remain rare under H.R. 569, the principle that the legislation promotes is an important one: with all of the sacrifices that U.S. servicemembers are called upon to make, a reduced right of access to the United States Supreme Court should not be among them.

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[22] A military justice case generally qualifies for appellate review only if the accused receives an approved sentence that includes death, a punitive discharge, or a year or more of confinement. *See* 10 U.S.C. § 866(b)(1) (2000). Those cases resulting in a conviction but a sentence below these limits are generally not reviewed by an appellate court. Such "subjurisdictional" cases account for approximately 20% of all court-martial convictions. Even under H.R. 569, these cases would generally remain ineligible for Supreme Court review.

Engraved above the Supreme Court's entrance are the words, "EQUAL JUSTICE UNDER LAW." That promise should include providing equal access to the Supreme Court for our servicemembers.

Mr. JOHNSON. Thank you, Colonel Sullivan.
General Altenburg, are you ready, sir?
General ALTENBURG. I am, sir.
Mr. JOHNSON. Please proceed.

TESTIMONY OF MAJOR GENERAL (RET.) JOHN D. ALTENBURG, JR., ATTORNEY, WASHINGTON, DC

General ALTENBURG. Chairman Johnson, Ranking Member Coble, and distinguished Members of the Subcommittee on Courts and Competition Policy, I thank you for the opportunity to discuss the proposed Equal Justice for Our Military Act of 2009.

I request that my written statement be made a part of the record of this hearing. I would also like to provide a context for the Committee's review and discussion when considering the proposed legislation.

I served as an enlisted soldier in the 1960's for several years and then subsequently, after I attended law school, I came back and served as an officer for 28 years, and I think that gives me not a unique perspective, but certainly a little different perspective on these matters.

For purposes of this discussion, I am going to assume that I am an accused soldier and then an accused civilian, and I am going to compare and contrast my appellate rights as a military service member both before the 1983 amendments and after, and then compare them, also, to my appellate rights as a civilian.

In the military, if the sentence includes either a punitive discharge or confinement exceeding a year, then my military case is appealed automatically to the intermediate appellate court, both before and after the 1983 amendments to the UCMJ.

If I am a civilian, there is no automatic appeal, unless it is a capital case, and I must exercise my right to appeal to the intermediate appellate court. There is no automatic appeal.

In the military, all costs of an appeal to the intermediate appellate court are borne by the government, both before and after the 1983 amendments.

Unless I am indigent, I must pay all those costs, like filing fees and court costs, associated with an appeal to the civilian intermediate appellate court.

In the military, I am provided an appellate counsel through all levels of appeal at no expense to me, both before and after the 1983 amendments.

In the civilian sector, I must retain my own attorney to appeal to the civilian intermediate appellate court, again, unless I am able to establish that I am indigent.

Both before and after 1983, I may retain, in addition to my military appellate counsel, a civilian appellate counsel at my own expense.

In the civilian sector, I may retain, at my own expense, a civilian appellate counsel for the civilian appellate court, unless I have been appointed a counsel based on my being indigent.

In the military, the intermediate appellate court, both before and after 1983, conducts not only a legal review, but, also, a factual review of the entire record of trial and has the authority to make factual findings in addition to reviewing the record for legal sufficiency.

In fact, the convening authority in the military system who reviews the case after my trial court has convicted me must disapprove any finding, any guilty filing, unless he or she is convinced beyond a reasonable doubt that I am guilty.

There are three different entities that must be convinced beyond a reasonable doubt of each element of the offense to convict and to uphold my conviction.

The trial court must be convinced beyond a reasonable doubt, the convening authority must be convinced beyond a reasonable doubt upon the review, and the intermediate appellate courts must be convinced beyond a reasonable doubt upon review.

There is no corollary in the civilian sector. The civilian appellate court is almost always limited to finding legal errors only in my record of trial. There is no factual review.

I may choose to appeal the decision of the intermediate appellate military court by petition to the highest military court, as we have said earlier, the CAAF, both before and after 1983.

I may choose to appeal the decision of the intermediate appellate court in the civilian sector by petition to the next higher appellate court.

My appeal in the military to the highest military appellate court is free. My military appellate counsel is provided for me. I may also retain civilian appellate counsel at my own expense. This is true both before and after the 1983 amendments.

In the civilian sector, I must pay all expense and I must pay my appellate attorney to appeal to the next higher appellate court, unless I am indigent.

If the petition to the highest military appellate court is denied, then I may bring a collateral attack in Federal district court both before and after 1983.

The collateral attack may proceed through Federal district—through Federal intermediate appellate court and then to the Supreme Court of the United States.

If the petition to the next higher civilian appellate court is denied in the civilian sector, then I may petition the Supreme Court of the United States, as Mr. Sullivan has indicated.

In the military, after 1983, if my petition to the highest military appellate court is granted, but the appeal itself was denied, then I may petition directly to the Supreme Court of the United States.

To review the differences today, in the military, there is an automatic appeal of all cases by either an SJA or the Judge Advocate General and, if more than a year confinement, then by the court of criminal appeals.

In the civilian, there is only an automatic review in capital cases.

In the military, counsel is provided. In the civilian, they are not provided, unless indigent.

In the military, all costs are paid by the government. In civilian, the costs are paid by the appellant.

In the military, there is an appellate court factual review. In a civilian court, there is no factual review.

This concludes my comments.

[The prepared statement of General Altenburg follows:]

PREPARED STATEMENT OF MAJOR GENERAL JOHN D. ALTENBURG, JR.

STATEMENT BY

MAJOR GENERAL JOHN D. ALTENBURG, JR., US ARMY, RETIRED
Former DEPUTY JUDGE ADVOCATE GENERAL

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

H.R. 569
EQUAL JUSTICE FOR OUR MILITARY ACT OF 2009

FIRST SESSION, 111TH CONGRESS

JUNE 11, 2009

NOT FOR PUBLICATION
UNTIL RELEASED
BY THE COMMITTEE
ON THE JUDICIARY

Introduction

Chairman Johnson, Ranking Member Coble, and distinguished members of the Subcommittee on Courts and Competition Policy, thank you for this opportunity to discuss the proposed Equal Justice for our Military Act 2009. I oppose the bill because it offers the illusion of expanded authority to contest courts-martial convictions when the real impact is likely to be inconsequential, encouraging a cynical perspective that the proposed legislation offers the appearance of reform but no enhanced ability to ensure a reliable criminal trial process, a process that already provides Congressionally mandated unique protections that exceed those of civilian jurisdictions.

The New York Times recently quoted a former Chief Judge of the Court of Appeals for the Armed Forces as saying "It's a symbol that a service member has the exact same rights as anyone else. That seems worth opening the door." This bill, if passed, might represent to some a symbolic expansion of rights, but it is not true to say that passage of this bill would provide servicemembers the exact same rights as their civilian sector counterparts, because servicemembers are afforded greater appellate rights by the Uniform Code of Military Justice (UCMJ) than are civilians in US justice systems. The assertion that lack of direct petition to the Supreme Court from a Court of Appeals denial renders the military justice system unjust might be rephrased as whether the lack of guaranteed no-cost appellate counsel, the lack of automatic review at no expense to the convicted, and appellate courts' lack of authority to correct egregious factual errors render our civilian systems fundamentally unfair in comparison to the military system of justice under the UCMJ.

It's also important to note that Congress has provided other protections to servicemembers that make the military justice system markedly better than its civilian counterparts at protecting those accused of crimes. Comparing the pre-trial processes one will find that the military pre-trial investigation process (Article 32, UCMJ) provides an open hearing, representation by counsel, the right to cross examine all witnesses, and the opportunity to call witnesses on behalf of the defense before there is a probable cause determination that the charges should be brought to trial at a general court-martial. In most civilian jurisdictions the Grand Jury process is closed and the accused has no right to be present or to cross examine witnesses; moreover, the accused in the military already knows his charge before the Article 32 Investigation begins.

The military system permits a Convening Authority to disapprove a finding of guilty if he is not convinced beyond a reasonable doubt that the accused is guilty of an offense for which he was convicted at court-martial. Then the intermediate appellate court must also be convinced beyond a reasonable doubt of each element of each offense. Civilian jurisdictions require the court to be convinced of each element of each offense beyond a reasonable doubt, but appellate issues are limited to legal error, not factual determinations. This extraordinary military justice system enacted by Congress may explain why Congress itself in 1983 provided that petitions to the Supreme Court would be limited to those cases accepted for appellate review by the Court of Appeals for the Armed Forces; that is, cases that had already had several reviews for factual error and two appellate court reviews for legal error.

The title of this bill is somewhat misleading because there is little, if any, empirical or historical evidence to suggest that lack of such direct appeal under the UCMJ results in any injustice to military members when compared to civilians. The transparency and scrutiny applied to U.S. courts-martial is exacting and unrivalled. I don't believe that anyone can state persuasively that civilians enjoy a better system simply because they enjoy a potential opportunity directly to petition the Supreme Court in all cases.

The equality purportedly achieved by this bill already exists, in that a servicemember has long had the ability to initiate, in Federal District Court, a collateral attack against a court-martial conviction. It is there that the servicemember achieves parity with our civilian counterparts because as a matter of practice and regulation, it is in that context that the servicemember is equal to the civilian counterpart. In bringing a collateral attack the serviceman must generally fend for himself in several respects more similar to civilians. He must secure the services of a civilian attorney and pay filing fees and court costs. The only Soldiers (I'm uncertain of the practice of other service JAG Corps) who enjoy the assistance of assigned military counsel on collateral attack in Federal District Court are those that have been sentenced to death. This possibility is offered as a matter of TJAG discretion under UCMJ Article 70(e). Otherwise, servicemembers enjoy assigned counsel only before the military courts and the Supreme Court. Much like a litigant challenging a State court decision, a military member enjoys equal opportunity to mount such a collateral attack and ultimately reach the Supreme Court. Though the scope of review on collateral attack may vary between military and civilians depending upon the vehicle of attack, issues presented, and the

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Mr. JOHNSON. Thank you, General Altenburg.

And I will now begin questioning, granting myself so much time as I may consume.

I want to ask you both. There currently is no effective date indicated in the text of the bill or language discussing how pending cases may be dealt with.

Assuming the bill is passed, how do you think pending cases should be handled?

Colonel SULLIVAN. You raise a very good point, Mr. Chairman, because if this bill was passed, there would actually need to be a change to the Supreme Court rules to provide the time within which the cert petition would be filed.

So there would need to be some opportunity after the date of enactment to provide the Supreme Court with that opportunity.

When Congress passed the Military Justice Act of 1983, it made the bill take effect on the first day 8 months from the date of enactment. And so it seems that it would probably be wise to have a similar standoff period built into the bill, Mr. Chairman.

Mr. JOHNSON. Thank you.

General ALTENBURG. I agree, Mr. Chairman.

Mr. JOHNSON. Okay, that was easy. All right.

Now, there are conflicting opinions and uncertainty in the written testimony concerning how much H.R. 569 is going to cost.

Can each of you provide your best guess as to whether additional costs will be substantial and whether you think they are worth the greater access to Supreme Court review provided by H.R. 569?

Colonel SULLIVAN. The cost of filing a cert petition consists mainly of printing costs. It costs about $1,000 to print a cert petition.

So the main cost of this bill will be 1,000 times however many additional cert petitions are filed by counsel. And I say by counsel, because the—right now—I mentioned that there were 20 cert petitions filed in the last term by military members.

Twelve of them were written by military appellate defense counsel, two of them were written by civilian counsel hired by the service member, and the other six were filed pro se.

And why these cases get filed pro se is—a member of the Supreme Court bar may not file a frivolous cert petition. The Supreme Court has been emphatic about that, in cases like *Austin v. United States*.

So what happens in some cases is the client says, "I want to go to the Supreme Court." The defense counsel says, "I can't petition your case, because there is no non-frivolous issue." And then in that instance, the counsel helps the client file a pro se petition.

Those the government doesn't pay anything for, because they are just typed out at the U.S. Disciplinary Barracks or wherever the member is.

So if the number of Supreme Court petitions doubles under this bill, if the number of petitions prepared by military counsel doubled, it would be an additional expenditure of about $15,000, which seems to be a drop in the bucket.

And certainly, the principle of equal access, I would say, is worth far more than that.

General ALTENBURG. I would defer to Mr. Sullivan's experience and knowledge about the appellate system, as I don't have the direct experience in appellate work that he does.

And I have talked to people in the military, and I think I have seen a document about a month ago that talked about over $1 million to do this, and I can't say personally as to what I think it would cost.

I do think that there would be more than double the number of petitions. There are, by Mr. Sullivan's own account, 715 were denied and to think that only 20 of them or 30 of them would want to petition the Supreme Court, I think, is seriously underestimating what would happen with this legislation.

More significant, I think, than the filing costs and the cost to have appeals or to petition the Supreme Court is the fact that it would take additional manpower resources. And I think that is one of the reasons that the Congress might consider going a little bit slow on this legislation and at least having some type of analysis and empirical study of what the costs would be to implement this legislation.

Each major or captain in the JAG corps of one of the services that would have to be provided to make sure that this is a meaningful benefit or advantage to the individual military member.

It is going to be one who is not going to be advising a combat brigade in the Balkans or on a peacemaking operation or in Afghanistan or somewhere else in the world.

And I have personal knowledge that the legal resources of all the services are stretched quite a bit based on the contingencies that we address around the world, both combat and otherwise.

And so I think that that is something that must be looked at hard, is what resources is it going to require from the military in terms of their respective JAG corps to make this work.

And there will be people on both the defense side to advise all the petitioners and then the government is going to have to provide counsel, also.

I don't know what it would cost, but I believe that the Congress should look at that very carefully.

Mr. JOHNSON. So basically, what I have heard is that somewhere between $30,000 and perhaps as high as $1 million.

Colonel Sullivan, General Altenburg indicates in his written testimony that because service members are allowed to attempt a collateral attack in Federal courts, they, in effect, already have an equal opportunity to the Supreme Court review.

Do you agree with this statement and can you describe the difficulty in mounting a collateral attack of a court-martial in the Federal courts?

Colonel SULLIVAN. Yes, Mr. Chairman. Collateral review is not a substitute for certiorari on direct appeal, and this is true for two reasons.

First, there is an extremely narrow scope of review on collateral review. So, for example, in the 10th Circuit, where the United States Disciplinary Barracks is located and, hence, the circuit that handles most collateral attacks, if an issue has been fully and fairly considered by the military courts, the 10th Circuit won't revisit it.

If the issue wasn't raised before the military courts, then the issue is considered waived and the court won't revisit it.

So the scope of review functions as a catch-22. Essentially, it weeds out almost every single claim a service member can make, because either it was raised in the military courts and then the Article III court won't revisit it or it isn't raised in the military courts and then it is considered waived.

The other reason why collateral review is not an adequate substitute is because of the familiar issue of preclusion or limitation rules in retroactivity regarding *Teague v. Lane*.

The Supreme Court case in *Teague v. Lane* said that a new rule will not be applied retroactively on collateral review.

So even if a service member was able to escape from that catch-22, they still would not have the ability to get a court to recognize a new rule in a collateral attack, whereas that can happen on direct appeal.

So it is not an adequate substitute, Mr. Chairman.

Mr. JOHNSON. Thank you.

General Altenburg, why shouldn't cases that qualify for collateral attack in Federal courts be raised directly with the Supreme Court?

Isn't taking a case through the Federal court system, after it has been through the military justice system, a waste of judicial resources?

General ALTENBURG. I might say the same thing about all the petitions that might be filed at the Supreme Court, Mr. Chairman.

But I agree with Mr. Sullivan that a collateral attack is not a substitute for a direct petition to the Supreme Court.

My concern is the balance between the resources that would be required, which are unknown and, as I suggested, may be analyzed more carefully, against the likelihood of a petition being granted.

And it is my sense that this legislation, first of all, assumes inequality, and both my written statement and my oral comments point out the fact that if there is inequality in the appellate systems, the military has the advantage, but for this one aspect.

And when you consider the number of petitions that are granted by the Supreme Court, less than 2 percent, less than 1 percent, it simply is a—it is a hollow advantage.

It is a—it looks like it is an advantage, but in reality, it wouldn't be and it would—and I think, arguably, it would mislead a lot of people into thinking they have got something that they don't really have, when you look at the statistics for a Supreme Court granting certiorari.

Mr. JOHNSON. Thank you, General.

I will ask all of you—or both of you. Some have taken note that the court of appeals for the Armed Forces is an Article I court.

Why is this fact important for our discussion today?

Either one of you, or both, may respond.

Colonel SULLIVAN. Mr. Chairman, in practice, right now, I don't believe that CAAF's status as an Article I court plays into the legislation, and here is why.

As we know, most Article I courts can't hold a statute unconstitutional. So if CAAF were like other Article I courts in that respect, that would present a greater need for Supreme Court review.

But CAAF, in a case called *United States v. Matthews*, actually held the old military death penalty system unconstitutional and said it did have the power to declare a statute unconstitutional.

So unless that changes, I think that CAAF's status as an Article I court—it has not really—it hasn't greatly limited its powers, Mr. Chairman.

Mr. JOHNSON. Some might argue that the Court of Appeals for the Armed Forces was supposed to serve essentially as the supreme court for the military legal system and, as such, the due process rights of service members is accounted for.

How do you respond to this, Colonel Sullivan?

Colonel SULLIVAN. Well, Mr. Chairman, I am a member of the Maryland bar and, of course, in Maryland, the Maryland Court of Appeals is the supreme court of Maryland, and, yet, its decisions can still be reviewed by the Supreme Court when it deals with a Federal question or a matter of Federal constitutional law.

So one would expect that even if the Supreme Court's review was broadened over military justice cases, that CAAF would remain the primary body to construe the Uniform Code of Military Justice, to construe the Manual for Courts-Martial, which provides the regulations that govern the military justice system.

But for constitutional questions that are sort of above the UCMJ, it is appropriate for the Supreme Court to be the Supreme Court in the same way that it is appropriate for the Supreme Court to step in sometimes and speak to the Maryland Court of Appeals when it disagrees with what the Maryland Court of Appeals—with how the Maryland Court of Appeals construes the Constitution.

Mr. JOHNSON. General Altenburg, would your reservations about the costs that H.R. 569 would impose on military justice resources be lessened if we gave service members the right to appeal to the Supreme Court, as provided in H.R. 569, but require them to pay for their own court costs associated with such an appeal?

General ALTENBURG. Well, that would address the financial resource aspect. If we were still going to do what the military does and no civilian counterpart does, and, that is, provide the counsel, I am, quite frankly, more concerned about the lawyers, the JAG officers that need to represent both the accused and the government in an appellate process.

To me, that is the real cost that the Congress might address itself to, again, because of the constrained manpower resources of all the military services.

But to directly answer your question, yes, that would take care of the court filing costs and purely monetary resource issues.

Mr. JOHNSON. All right. Thank you, General.

Anything you would like to add, Mr. Sullivan?

Colonel SULLIVAN. I think there is one important point. Actually, there are a couple important points in dealing with the cost issue.

One, if you—again, looking at what happened with the 20 cert petitions filed last year, as well as the 18 cert petitions filed by service members this year, in every single case, the Solicitor General waived the United States' right to reply. So they filed literally a one-page piece of paper in response.

Now, last year, there were two cases where the Supreme Court called for a response. They said to the Solicitor General, "No, we want your views." There has been one this year.

But in reality, there is no great burden on the government. They read the cert petition and prepare a one-page sheet of paper.

And then in reality, again, the only cert petitions that will be filed by counsel are those with a non-frivolous issue, which will be

a very small subset of the number of cases that are now authorized er this legislation, authorized to go to the Supreme Court.

So really what is going to happen is there is going to be a very small number—increase in the number of cert petitions prepared by military defense counsel, probably a greater increase in the number of pro se, in forma pauperis cert petitions filed mainly by service members who are confined, more one-page responses from the Solicitor General and then some miniscule increase in the Supreme Court's overall docket.

The Supreme Court receives more than 8,000 cert petitions a year. If this legislation quadrupled the number of military cert petitions that were filed, which doesn't seem realistic, but even if it did, that would result in less than a 1 percent increase in the Supreme Court's burden.

Mr. JOHNSON. It would be about, what, 150 or so cases a year?

Colonel SULLIVAN. Well, sir, the average, I crunched the numbers and the average number of cert petitions filed since the Military Justice Act of 1983 was passed is 22.

Even if it quadrupled, and I don't think there is any chance it would be that great an increase, that would be an increase of 88, it is not going to be that great a burden.

Mr. JOHNSON. All right. Well, I thank you both for responding to my questions.

I will now recognize our Ranking Member, my good friend, Mr. Coble, for as much time as he may consume.

Mr. COBLE. Thank you, Mr. Chairman.

And, gentlemen, as the Chairman has already noted, we appreciate your appearing with us today.

Colonel, given the existing protections in the military justice system and the extensive appellate process already in place, how do you respond to those who may harbor the belief that the civilian justice system is inherently superior to that already provided to our men and women in uniform?

Colonel SULLIVAN. Sir, I love the military justice system. I was on active duty for 13 years. I have practiced most of my life in the military justice system.

It is a wonderful system. And so nothing I say should be taken as in any way denigrating the system.

Mr. COBLE. And I didn't take it that way.

Colonel SULLIVAN. Oh, yes, sir, and I wasn't suggesting that.

Mr. COBLE. Yes.

Colonel SULLIVAN. Right. But I do want to preface my remarks by saying having greater Supreme Court review is not saying that we distrust the military justice system and we need the Supreme Court to ride herd on them. I mean, that is not the point at all.

The point is looking at the rights of the individual litigant in the system and to say should an individual litigant have less rights because they have done the extremely honorable thing of taking an oath to protect and defend the Constitution and join the United States military, and I think the answer to that question is no.

And we also have to remember—I am counsel in a cert petition that is pending at the Supreme Court right now that was filed on behalf of a Marine who hasn't even been tried yet. He is presumptively innocent, and the government appealed an issue in his case.

Well, he is—because the Court of Appeals chose to grant review in his case, he could file a cert petition at the Supreme Court.

But he shouldn't have had that right barred, cut off, if CAAF had exercised its discretion not to grant review.

The fact that he is a United States Marine who was being tried for actions that he took in combat, he shouldn't have a less right to Supreme Court access than would a civilian being tried for something they did on the streets of the United States.

Mr. COBLE. Thank you, Colonel.

General Altenburg, even if you are correct, General, that the legislation offers the illusion of expanded authority to contest courts-martial convictions and that few service members will actually benefit in any meaningful way from its enactment, what, General, is the real harm that you can think of that would result if the Congress enacts this measure?

General ALTENBURG. Thank you, sir. Well, first of all, in direct response to that, I should point out that I dissociate myself with anyone who has stated that to give this right to soldiers, to military people would, in some way, undermine discipline or undermine authority or lower discipline or harm the military.

I don't believe any of those things—and I don't agree with anybody that has said that, and I don't know if it has been somebody as high as the secretary of the chief of staff or it is just been somebody in the appellate branch.

But I don't agree with any of that. It would in no way harm the military. My sole concern is the lawyer resource issue. That is my sole concern, and the fact that we don't really know what it is going to take and how many people are going to take advantage of this.

And I would say this. If there is a study that we are confident is accurate, and it says we are going to need X amount of resources in each service in order to support this legislation and to make this meaningful to the military member, and the Congress authorizes that kind of support, whether it is five judge advocates in a service or 20 judge advocates in a service, whatever it might be that would allow them to conduct their other missions, then my only concern about this legislation is the fact that it is hollow.

I would have no objection, other than the fact that I think it may be a false hope.

Mr. COBLE. And it is the unknown, I guess, General, that bothers you.

General ALTENBURG. Yes, sir.

Mr. COBLE. General, let me ask you this. The colonel stated that, in his statement, that it is inappropriate to deprive members of the U.S. military of the same right to Supreme Court access that their civilian counterparts and even alien, unlawful, enemy combatants enjoy.

Now, General, that is a powerfully equitable argument. How do you respond to that assertion?

General ALTENBURG. Well, sir, I think, on its face, it has great attraction. But if you analyze the facts, as I tried to do in my oral statement in talking about what really happens in our systems and how much protection there is, I would say a couple of things.

One, with regard to unlawful combatants, a commission process that wasn't done very well in terms of the way it was conceived and created early in this century, in 2001 and 2002, completely immature, needing development. And so the fact that these people have direct appeal to the Supreme Court, I think, is—it makes it sound worse for soldiers, but the fact is, I think, one of the reasons that the Supreme Court doesn't defer—it doesn't defer to anyone.

But the fact is our appellate system in the military is very well developed and has matured over the years.

Two major, major sets of amendments by this Congress in 1968 and 1983 enhanced that, along with the development of case law, especially in the last 50 years and especially since 1982 or 1983.

And it has made it a unique appellate system and a unique appellate process in terms of the protections afforded the military members.

And I think that when you take into consideration all the reviews, all the reviews done for free, all the advantages that a military accused has, that there is an assumption, I think, that the CAAF is going to take any issue that is really significant, in the same way that the Supreme Court is charged not with doing justice in every case, but deciding which cases, where there is a split among the circuits, needed to be reviewed for the jurist prudence of this country. And I think that we look to the CAAF to do the same thing, to look at the differences among the service courts of appeal and to take those significant cases and to take those cases where there really is an important issue to review, and all those cases are going to be able to petition the Supreme Court.

There was one other thing I wanted to say about the numbers of cases, because, again, on its face, it sounds really unfair that any accused doesn't get to petition the Supreme Court unless he or she is one of those that has been accepted for review by the CAAF.

But the big, bad prosecutors get to appeal any case they want to. All they have to do is have TJAG certify it. True enough.

But the numbers of cases that the Judge Advocate General has certified is miniscule. It is not like they certify every case where the government loses on appeal at the circuit court—I mean, at the criminal court of appeals in the service.

There is like 12 in the last 5 years among all five services have been certified by TJAG. Dwight will, I am sure, correct me with what the accurate numbers are, but the numbers are—whether it is 12 or whether it is 30, it is miniscule when you take it over the fiscal years and you show that there are five services—they just don't do it that often.

And another example of just how sound this system is is that not only can the TJAGs, if they choose to, certify a case on behalf of an accused, that is not hollow.

They have done it on at least two occasions, where they felt, for the advantage of the accused and because of the circumstances and the nature of the case, we are going to certify this case so that the accused gets heard at the CAAF, and they have certified cases on behalf of the accused person.

Mr. COBLE. Thank you, General.

General ALTENBURG. Yes, sir.

Mr. COBLE. Mr. Chairman, I see my time has expired. Could I have one final question?

Mr. JOHNSON. Certainly, Mr. Coble. Take as much time as——

Mr. COBLE. Thank you. Just one question.

General, let me put a hypothetical to you. Let's assume that the Congress does determine to enact something along the lines of H.R. 569.

Do you have any ideas for how it might be modified to mitigate some of the harms that concern you?

General ALTENBURG. Oh, yes, sir, just to make sure that the services have the resources to do this.

If that issue was addressed, if we were able to discern rather than guess, but to discern this is what the likely costs are in terms of resources, and the Congress were to approve those resources, I don't have an objection. I think it would work.

Mr. COBLE. Thank you both for your appearance today.

Mr. Chairman, I yield back.

Mr. JOHNSON. Thank you, Mr. Coble.

Next, we will have questions from our esteemed colleague from the great state of Texas, Congressman Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

This topic will not get as a thorough debate and discussion than we are having today, and so I want to start with that.

It is not going to get any better for any of the other Members of Congress, and it is going to be up to us and this Subcommittee to go to the full Committee and then the full Committee to go to all Members.

And I really appreciate, General, what you said. And that was, should we be so inclined to pass this piece of legislation, it is not the end of military culture. It is not the end of military readiness or effectiveness, because there will be those that will advance that argument, I can assure you.

So I really appreciate your testimony.

We are not doing anything really new here, in a way. It is substantial, don't get me wrong. But what I am saying is, there is already Supreme Court review.

The problem, as Mr. Sullivan has pointed out, and as our colleague, Congresswoman Davis, is that it is not balanced; that there is an inferior right between the parties. And that is going to be fundamentally objectionable to many of us.

I understand that there is going to be additional costs and the resources are going to be required, and that will be our obligation and our duty, and that is to meet the increased costs and demands as a result of what we do on the floor of Congress.

That is a given. Now, hopefully, we will rise to that particular responsibility.

But, General, let me ask you, do you agree that there is an inferior right between the two parties as far as seeking Supreme Court review?

General ALTENBURG. I think that technically, on the face of it, there appears to be an inferior right, yes.

I think in reality, it doesn't play out that way. But I agree that, certainly, on the face of it, it looks like there is an issue there.

Mr. GONZALEZ. And I understand what you have said. What is provided the service member throughout the process, I am not going to say it is incredible, I think it is deserving, and it is appropriate given the circumstances.

But when it is all said and done, what is available to one party is not available to the other, and I think that is what causes us the discomfort, and I think that is what was the inspiration and the motive for Congresswoman Davis to get so involved.

Mr. Sullivan, obviously, that is your whole point, the inferior right, and that is what this act would balance and bring a more just result to the whole process.

Colonel SULLIVAN. Yes, sir.

Mr. GONZALEZ. Do any of you have anything further to add?

Colonel SULLIVAN. No, sir.

General ALTENBURG. I don't either, sir.

Mr. GONZALEZ. Thank you very much.

Mr. JOHNSON. There being no further questions, I would like to thank all the witnesses for their testimony today.

And without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer as promptly as you can.

And those responses, as well as the questions, will be made a part of the record.

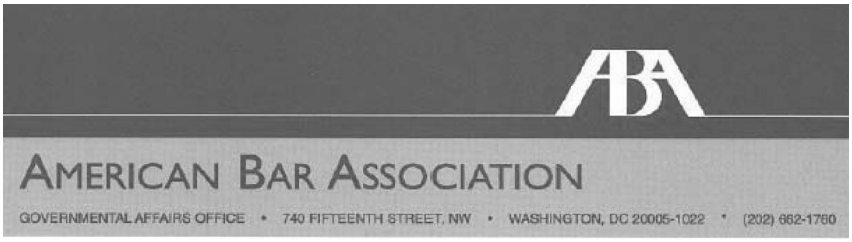
Without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

And with that, this hearing on the Subcommittee on Courts and Competition Policy is adjourned.

[Whereupon, at 10:58 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record



Statement of

H. THOMAS WELLS, JR.
President

on behalf of the

AMERICAN BAR ASSOCIATION

before the

Subcommittee on Courts and Competition Policy

Committee on the Judiciary

of the

U.S. House of Representatives

for the hearing on

H.R. 569, THE EQUAL JUSTICE FOR OUR MILITARY ACT OF 2009

June 5, 2009

Mr. Chairman, Ranking Member Coble, and Members of the Subcommittee:

My name is H. Thomas Wells, Jr. I am the President of the American Bar Association (ABA) and a practicing attorney and partner in the firm of Maynard, Cooper and Gale, P.C., in Birmingham, Alabama. Thank you for the opportunity to submit this written statement for the hearing record and to testify before you today on behalf of the ABA and its more than 400,000 members in support of H.R. 569, legislation that will provide equal access to the Supreme Court of the United States for members of our military who have been court-martialed and sentenced to a bad conduct or dishonorable discharge, dismissal or confinement for a year or more. At present, only a small percentage of service members facing such serious sentences may petition the Supreme Court for review of adverse courts-martial rulings, whereas the government routinely has the opportunity to petition the Supreme Court in any case where the charges are severe enough to make a punitive discharge possible. We commend the subcommittee for holding this hearing and focusing public attention on this troubling inequity.

In August 2006, the American Bar Association adopted policy urging Congress to enact legislation that would eliminate this disparity in treatment by permitting all court-martialed service members who face dismissal, punitive discharge or deprivation of liberty for a year or more to petition the Supreme Court for discretionary review through writ of certiorari. This policy is the basis for our unequivocal support for H.R. 569, introduced by Representative Susan Davis (D-Ca). Long concerned about this problem, Representative Davis introduced the first bill on this subject in 2005. It addressed only part of the problem. We are pleased that H.R. 569, modeled after the ABA policy, offers a more comprehensive legislative solution, and we thank her for her perseverance and leadership on this issue.

The Current System of Appellate Review of Courts-Martial Convictions

The nation's modern military justice system is governed by the Uniform Code of Military Justice (UCMJ), originally enacted by Congress in 1950 and is comprised of military

courts-martial, a Court of Criminal Appeals (CCA) for each branch of the Armed Services, and the U.S. Court of Appeals for the Armed Forces (CAAF).[1] The UCMJ provides that criminal charges against members of the Armed Services will be tried before courts-martial, and that convictions are subject to varying levels of military review, depending on the severity of the punishment imposed.

Courts-martial convictions resulting in a sentence of death, dismissal, bad conduct or dishonorable discharge, or confinement for a year or more require review by the CCA, which constitutes each Service's highest appellate reviewing authority and is comprised of panels of military judges. A defendant has no right of appeal to the CCA if his or her court-marital results in the imposition of a lesser sentence. The CCA also must hear any case referred by the Judge Advocate General and has discretionary jurisdiction to hear interlocutory appeals by the government and petitions for extraordinary relief sought by the defendant under the All Writs Act in cases that could result in punitive discharge.[2]

The Court of Appeals for the Armed Forces is an Article I federal court comprised of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate.[3] The Court's jurisdiction is worldwide, encompassing only questions of law arising from trials by court-martial in the United States Army, Navy, Air Force, Marine Corps, and Coast Guard.

The CAAF is required to review all cases in which the sentence, as affirmed by the CCA, extends to death and all cases reviewed by the CCA in which any issue is

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[1] Pub. L. No. 81-506, 64 Stat. 107 (1950).

[2] 28 U.S. C. §1651. "Common issues addressed by means of an extraordinary writ in military cases include jurisdictional issues, vacation proceedings, Article 32 investigations, speedy trial issues, enforcement of pretrial agreements, pre- or post-trial confinement, grants of immunity, and command influence. " Jennifer K. Elsea, *Supreme Court Review of Decisions of the U.S. Court of Appeals for the Armed Forces Under Writs of Certiorari*, CRS Memorandum at 3 (February 27, 2006).

[3] Prior to 1994, the CAAF was called the Court of Military Appeals, which was created by Congress when it enacted the Uniform Code of Military Justice to provide meaningful civilian appellate review of courts martial convictions. Pub. L. 103-337, §924, 108 Stat. 2663 (1994).

"certified" to it by the Judge Advocate General. The CAAF also has discretionary jurisdiction to review, upon petition and good cause shown, those convictions of service members that have been reviewed by the CCA.[4] In addition, like the CCA, the CAAF also exercises "extraordinary writs" jurisdiction under the All Writs Act.[5] The accused may petition the Court to appeal a denial of relief by the CCA. Decisions resolving interlocutory questions in favor of the accused may be certified by the Judge Advocate General to the CAAF, in which case review becomes mandatory.

Historically, certification by the Judge Advocate General almost always inures to the benefit of the government and essentially grants the government a virtual guaranteed right of appeal to the CAAF in any case it chooses, while the accused may only petition for discretionary review. The CAAF denies most of these petitions: it has granted review in less than 20 percent of the cases in which a petition for review has been filed."[6]

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[4] 10 U.S. C. § 867. Art. 67, Review by the Court of Appeals for the Armed Forces, states

(a) The Court of Appeals for the Armed Forces shall review the record in:

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

[5] *Supra*, note 2. Service members whose petitions for extraordinary relief have been denied may also seek to challenge certain court-martial convictions through collateral review in other federal courts, e.g., in the Court of Federal Claims for pay lost as a result of a court-martial at which a constitutional right was denied or in a federal court to seek habeas corpus review.

[6] *See* Kevin Barry, *A Face Lift (And Much More) For An Aging Beauty: The Cox Commission Recommendations To Rejuvenate The Uniform Code Of Military Justice*, 2002 L. Rev. M.S.U. – D.C.L. 57, 82 n.101(2002). His report states that over the years, the CAAF has granted review in only about ten percent or fewer of the cases in which a petition for review has been filed. This has changed over the past decade.

According to statistics available in the Annual Reports of the Code Committee on Military Justice to the U.S. Congress, during the past decade, the number of petition filings has declined significantly and the percentage of CAAF grants of review have increased. While the statistics vary significantly year-to-year, it is an accurate generalization to state that CAAF has granted review in less than 20 percent of the cases in which a petition for review has been filed. Consider these statistics:

Service Members Lack Equal Opportunity to Petition the U.S. Supreme Court

The U.S. Supreme Court has discretion to review certain classes of cases involving courts marital convictions, as specified in 28 U.S.C. § 1259:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under § 867 (a) (1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under § 867 (a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under §867 (a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.[7]

Thus, Supreme Court review by writ of certiorari is limited to cases where the CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief. The Court does not have jurisdiction to review a denial of discretionary review by the CAAF, nor does it have jurisdiction to consider denials of petitions for extraordinary relief.[8] "For this reason, the CAAF's discretion over the acceptance or denial of appeals often functions as a gatekeeper for appellant's access to

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- For the period October 1, 2007 to September 30, 2008, the latest period for which an Annual Report, there were 836 petitions filed for grant of review 128 of which were granted, which means that 15 percent of the total petitions for grant of review were granted.
- In comparison, for the 1997-98 year, 2285 petitions for grant of review were filed and 175 -- or 15.3 per cent -- were granted.
- For the 1987-88 year, 2,185 petitions for grant of review were filed, and 117 -- or 4.95 percent -- were granted.

For additional statistical analysis of military court appeals during the years 1983 to 1994, *see also Legislative Research Incorporated, The Military Justice System: 1983-84 Through 2004-05: Twenty Years of Key Statistical Findings* (March 30, 2006). This research paper, prepared for and at the behest of Norbert Basil MacLean III, certainly affirms that the CAAF denies petitions for grant of review and petitions for relief far more often than it grants them.

[7] This statutory provision providing limited opportunity to petition for a writ of certiorari for direct review of courts-martial by the Supreme Court in any case reviewed by the CAAF reflects an amendment to the Uniform Code of Military Justice that was enacted in 1983. Prior to 1983, there was no certiorari jurisdiction in courts-martial cases.

[8] *Supra*, note 4

Supreme Court review. If CAAF denies an appeal, the Supreme Court typically lacks authority to review that decision."[9]

This statutory framework creates a disparity in our laws governing procedural due process whereby the government has far greater opportunity to obtain Supreme Court review of adverse courts-martial decisions than is afforded court-martialed service members. Specifically, other than cases involving the death penalty, service members have no right of appeal to CAAF, only the opportunity to petition for discretionary review. If CAAF does not grant a petition for review – and CAAF does not grant them in 80 percent or more of the cases in which a petition is filed – the accused is precluded from ever obtaining direct review by the Supreme Court. In contrast, the Judge Advocate General can assure that any issue that the government desires to raise will be heard by the CCA and by CAAF by certifying that issue for appellate review. In other words, the government can secure full appellate review, including the right of access to the Supreme Court, simply through the Judge Advocate General's certification, whereas a service member only has guaranteed access to CAAF when the death penalty is imposed and is denied access to the Supreme Court in all other cases unless the CAAF has granted a petition for review.

This is a blatantly unfair procedural system stacked against the service member. While we recognize that the military system of justice is governed by its own rules and procedures that are purposely distinct from those of the Article III judicial system, we do not believe there is any justification for a system that permits the government access to the Supreme Court on any issue certified by a Judge Advocate General and completely denies access in all non-capital cases to service members who cannot persuade the CAAF to grant discretionary review. Nor do we believe that there is any justification for according service members less due process rights than they would be entitled to out of uniform.

[9]Anna C. Henning, *Supreme Court Appellate Jurisdiction over Military Court Cases,* CRS Memorandum at 4 (March 5, 2009).

All criminal defendants in Article III courts have an automatic right of appeal to federal courts of appeal, and a right to petition the Supreme Court for discretionary review if they loose on appeal. Even enemy combatants tried before military commissions under the Military Commission Act of 2006 (which suffered from many due process shortcomings) were given greater rights to petition the Supreme Court for review than members of our military.

In most states, defendants have a right to appeal a conviction to an intermediate appellate court but must petition the highest court in the state for further review. This is similar to the military system in which a defendant has access to a CCA but must petition for review in the CAAF. The key difference is that a state court defendant who is denied discretionary review in the state's highest court may nonetheless seek review in the United States Supreme Court.

While the extent to which the protections of the Bill of Rights extend to service members has been hotly debated over the years, according to Senior Judge Walter T Cox, III, retired Chief Judge of the CAAF, the long-standing general trend has been to extend due process and other protections to service members subject to the jurisdiction of the military courts. As President Johnson said on the occasion of signing the Military Justice Act of 1968 into law, "The man who dons the uniform of his country today does not discard his right of fair treatment under law."[10]

The 111th Congress Should Enact Remedial Legislation Promptly

Mounting concern for the due process inequities faced by court-martialed service members propelled the 110th Congress to take action on identical remedial bills that were introduced in the House and Senate as H.R. 3174 (Davis, D-Ca) and S. 2052 (Feinstein, D-Ca). The House passed its bill under suspension of the rules on September 27, 2008.

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[10] For additional discussion of the issue , *see* Kevin Barry, *A Face Lift (And Much More) For An Aging Beauty: The Cox Commission Recommendations To Rejuvenate The Uniform Code Of Military Justice*, 2002 L. Rev. M.S.U. – D.C.L. 57 at 82-83 (2002).

The Senate Judiciary Committee approved its bill on September 12, but the full Senate failed to act before adjournment *sine die*. Both bills were reintroduced as H.R 569 and S. 357 by the same sponsors during the opening weeks of the 111th Congress.

H.R. 569 (and its Senate counterpart) is a straight-forward, narrowly tailored, remedial legislative proposal that will restore due process and equal treatment under the law to our military service members. Patterned after the ABA's 2006 policy recommendation, it would expand the Supreme Court's appellate jurisdiction over military cases under 28 U.S. C §1259 by permitting all court-martialed service members who face dismissal, punitive discharge or confinement for a year or more to petition the Supreme Court for discretionary review through writ of certiorari, regardless of any action taken by the CAAF.

Our military service members regularly place their lives on the line in defense of freedoms that we frequently take for granted. The very least they deserve is to be accorded the same due process rights in uniform to which they would be entitled out of uniform. To do otherwise demeans their service and denigrates the democratic ideals for which they risk their lives.

The only argument mustered against the legislation is that it will be costly. We doubt very much the estimate put forward by the Congressional Budget Office. The Supreme Court has held that a defendant has no Sixth Amendment right to counsel with respect to discretionary petitions for review.[11] Thus, the United States is not constitutionally required to provide counsel for military defendants who wish to petition the United States Supreme Court for review. If counsel is not provided by the government, the cost of filing a petition is borne solely by the defendant. In our experience, many (perhaps most) petitions for certiorari filed by defendants *pro se* are not even answered by the government; they are summarily denied by the Court itself. Thus, in many (perhaps most) cases in which service members seek review, there will be no response required by

[11] *Ross v. Moffitt*, 417 U.S. 600 (1974).

the government. Instead, the government will wait and file no response unless one is requested by the Court, which will not happen in a large number of cases. The Supreme Court has shown that it can handle thousands of petitions filed by criminal defendants with relative ease, using a certiorari pool of law clerks and other methods. The small number of cases that would come from the military would hardly make a dent in the Supreme Court's workload.

We cannot say that there will be no costs associated with expanding service members' right to seek Supreme Court access. Be we can say with confidence that the costs will be small, and they are justified given the result: namely, that men and women who wear the uniform of the United States and who are charged with serious crimes will have the same right of access to the only court mandated by the United States Constitution as defendants in every civilian court in the nation. This is equal justice and those who choose to serve their country deserve it.

We again want to applaud the chair for refocusing congressional attention on the issue by scheduling this hearing. We hope that it will provide impetus for swift action on H.R. 569 and that the 111th Congress will succeed in passing this much needed remedial legislation this session.

Thank you for allowing me to share the views of the A BA with your subcommittee.

Supreme Court of the United States
Washington, D. C. 20543

COUNSELOR TO
THE CHIEF JUSTICE

June 18, 2009

The Honorable Hank Johnson
Chairman
Subcommittee on Courts and
Competition Policy
1133 Longworth House Office Building
Washington, D.C. 20515

The Honorable Howard Coble
Ranking Member
Subcommittee on Courts and
Competition Policy
2468 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Johnson and Mr. Coble:

I am writing to address the impact of H.R. 569, which would expand the Supreme Court's authority, under 28 U.S.C. § 1259, to review cases from the United States Court of Appeals for the Armed Forces.

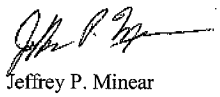
The Court of Appeals for the Armed Forces (CAAF) has authority to review specified types of decisions by the four Courts of Criminal Appeals for the different branches of the military. See 10 U.S.C. § 867(a). The CAAF is required to review all cases in which the death penalty is imposed and all cases in which the relevant Judge Advocate General orders review. See §§ 867(a)(1) and (2). The CAAF also has the discretion to review any other case decided by a Court of Criminal Appeals. See § 867(a)(3). Additionally, it has jurisdiction to consider petitions for extraordinary writs under the All Writs Act. See 28 U.S.C. § 1651.

The Supreme Court's jurisdiction to review CAAF decisions is governed principally by 28 U.S.C. § 1259. That statute allows the Court to review by writ of certiorari cases that the CAAF must review under sections 867(a)(1) and (2). See 28 U.S.C. §§ 1259(1) and (2). It also allows the Court to review by certiorari cases in which the CAAF has *granted* a petition for discretionary review under section 867(a)(3) or otherwise *granted* relief, such as through an extraordinary writ. See 28 U.S.C. §§ 1259(3) and (4). H.R. 569 would amend section 1259 to allow the Supreme Court to review additional cases from the CAAF. Specifically, the bill would amend subsections (3) and (4) to allow the Court to review by certiorari cases in which the CAAF granted *or denied* a petition for discretionary review or granted *or denied* other relief.

If enacted into law, this change would potentially increase the Supreme Court's caseload. Between October 1, 2005, and August 31, 2008, the CAAF denied 2,274 petitions for discretionary review, an average of 780 per year. It also denied, on average, about 21 petitions for extraordinary relief each year during that period. Consequently, if H.R. 569 were enacted, approximately 800 additional cases per year would be eligible for Supreme Court review through a petition for a writ of certiorari. Historical records indicate that from ten to fifteen percent of the individuals whose convictions and sentences are upheld by the CAAF after discretionary review have filed a petition for a writ of certiorari in the Supreme Court. If a similar percentage of individuals who are denied discretionary review or extraordinary relief file petitions for certiorari, there may be as many as 120 additional Supreme Court petitions each year.

I hope that this information is helpful. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,



Jeffrey P. Minear

Supreme Court of the United States
Washington, D. C. 20543

ADMINISTRATIVE ASSISTANT TO
THE CHIEF JUSTICE

December 5, 2005

The Honorable Lamar Smith
Chairman
Subcommittee on Courts, the Internet,
and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515-6219

Dear Chairman Smith:

I am writing in response to your November 4 letter to Cordia Strom, which was forwarded to me for a response. You asked for an analysis of H.R. 1364, which would expand the scope of the Supreme Court's certiorari review over cases from the United States Court of Appeals for the Armed Forces under 28 U.S.C. § 1259.

Background

The Court of Appeals for the Armed Forces (CAAF) has the authority to review specified types of decisions by the four Courts of Criminal Appeals for the different branches of the military. See generally 10 U.S.C. § 867(a). The CAAF must review all cases in which the death penalty is imposed, and all cases in which the relevant Judge Advocate General orders the case referred to the CAAF. The CAAF has the discretion to grant a petition to review any other case decided by a Court of Criminal Appeals. The CAAF also has jurisdiction to consider petitions for extraordinary writs under the All Writs Act, 28 U.S.C. § 1651.

Review of CAAF decisions by the Supreme Court of the United States is governed principally by 28 U.S.C. § 1259. H.R. 1364 would amend § 1259 to allow the Supreme Court to review additional cases from the CAAF. Specifically, the bill would amend § 1259(a)(4) by striking "granted relief" and inserting "granted or denied relief." It is clear that this legislation would authorize the Supreme Court to review cases in which the CAAF denied a petition for extraordinary relief or for a writ appeal. It is unclear whether the legislation would also authorize the Supreme Court to review cases in which the CAAF denied a petition for review. If the intent is to allow review only in cases in which the CAAF denied a petition for extraordinary relief or for a writ appeal, it

could be clarified by adding at the end of 28 U.S.C. § 1259(4): "The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review."

The potential impact on the Supreme Court of this legislation -- under each interpretation of the statute -- is addressed below.

Analysis

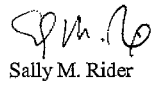
The impact on the Supreme Court of allowing review of cases in which the CAAF denies a petition for extraordinary relief would be minimal. CAAF records reveal that the CAAF denied 75 petitions for extraordinary relief between October 1, 2002 and September 30, 2005, an average of 25 per year. Even if each of those unsuccessful petitioners were to file a cert. petition challenging the CAAF ruling, current Supreme Court staffing levels would be adequate to process the additional workload.

If H.R. 1364 is interpreted to expand the Supreme Court's certiorari jurisdiction to cases in which the CAAF denied a petition for review, the potential burden upon the Supreme Court is greater. Between October 1, 2002 and September 30, 2005, the CAAF denied 1880 petitions for discretionary review, an average of 627 per year. When added to the 25 petitions for extraordinary relief that are denied in a typical year, approximately 650 additional cases per year would be eligible for filing a petition for certiorari under this interpretation of H.R. 1364.

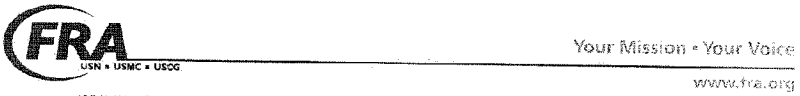
In practice, most of the individuals with the right to petition for certiorari do not do so. Historical records from the CAAF and from the Supreme Court reveal that approximately 10-20% of the individuals whose conviction and sentence are upheld by the CAAF after full discretionary review have filed a petition for certiorari in this Court. If a similar percentage of individuals whose petition for discretionary review or extraordinary relief was denied file petitions for certiorari, there may be as many as 130 additional petitions for certiorari each year if H.R. 1364 is enacted into law. This additional volume of cases would eventually require the addition of one case analyst in the office of the Supreme Court Clerk.

I hope that this information is helpful. Please do not hesitate to have your staff contact me if you have questions or need additional information.

Sincerely,



Sally M. Rider



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June 18, 2009

The Honorable Henry "Hank" Johnson
U.S. House of Representatives
1133 Longworth Office Building
Washington, DC 20515

Dear Representative Johnson:

The Fleet Reserve Association (FRA) supports, "The Equal Justice for Our Military Act" (H.R. 569) that would eliminate the prohibition that the US Supreme Court may not review by a writ of certiorari actions of the Court of Appeals for the Armed Forces.

The impact of this measure would be to allow court-martialed service members whose cases involve extraordinary circumstances to appeal to the US Supreme Court for review. By contrast, only the government currently has the right to appeal for Supreme Court review in these cases.

The Association appreciates your leadership on this issue. The FRA point of contact is John Davis, FRA's Director of Legislative Programs at john@fra.org.

Sincerely,

JOSEPH L. BARNES
National Executive Director

JLB:jrd:aal

Jewish War Veterans of the United States of America
Chartered By an Act of Congress

1811 R Street, NW • Washington, DC 20009 • (202) 265-6280 • Fax (202) 234-5662 • Email: inovoselsky@jwv.org • Website: www.jwv.org

June 17, 2009

The Honorable Hank Johnson
Chairman
Subcommittee on Courts and Competition Policy
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515
United States of America

Dear Chairman Johnson:

On behalf of, the Jewish War Veterans of the USA I wish to express support for the Equal Justice for Our Military Act of 2009, HR 569. As I said in March 2009 in testifying before the Joint House and Senate Veterans Affairs Committees:

Under current law, military members convicted under the Uniform Code of Military Justice are denied the same appeal rights to the U.S. Supreme Court that all other Americans are afforded in our country's justice system. Since the individual filing the appeal is almost always no longer in service, and thus a veteran, JWV asks the Veterans' Affairs Committees to weigh in on this important issue. JWV supports legislation that will restore due process and equal treatment under the law for our service members and veterans.

Sincerely,

Ira Novoselsky

Ira Novoselsky
National Commander

VADM Norbert R. Ryan, Jr. USN (Ret)
President

June 16, 2009

The Honorable John Conyers
Chairman, Committee on Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the 375,000 members of the Military Officers Association of America (MOAA), I am writing to join the Chairman of the Armed Services Committee in seeking your support for prompt floor action on H.R. 569, the Equal Justice for Our Military Act of 2009.

Under current law, military members convicted under the Uniform Code of Military Justice are denied the full appeal rights to the U.S. Supreme Court that all other Americans are afforded in our country's justice system.

MOAA endorses this legislation. It is straightforward and narrowly tailored to restore due process and equal treatment under the law for our service members. Its enactment will not cause any increase in direct spending.

We urge you to secure passage of H.R. 569 to ensure military members are provided the same appeal rights to the U.S. Supreme Court that all other U.S. citizens enjoy.

Sincerely, & with Respect

Norbert R Ryan

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June 16, 2009

The Honorable Henry Johnson, Jr.
The Honorable Howard Coble
Subcommittee on Courts and Competition Policy
Committee on the Judiciary
House of Representatives
B-352 Rayburn House Office Building
Washington, D.C. 20515

Re: *H.R. 569*

Dear Chairman Johnson and Ranking Member Coble:

My name is Eugene R. Fidell. I am president of the National Institute of Military Justice. I also teach military law at Yale Law School. I deeply regret that I was unable to testify in person at the Subcommittee's June 11, 2009 hearing on H.R. 569, but I was trying a lengthy general court-martial in California. I appreciate the opportunity to submit this letter for the record.

In my judgment, the legislation before you is long overdue. When I testified before the Senate Armed Services Committee when Congress passed the Military Justice Act of 1983, and I had grave reservations about the fact that the path to the Supreme Court could be blocked if the Court of Appeals denied discretionary review. In the intervening years, the unfairness of that limitation has only grown more obvious. It is time to fix it.

The current state of the law represents a "triple whammy" for court-martial defendants. First, of course, if the Court of Appeals denies review of a petition for grant of review, a GI cannot even knock on the Supreme Court's day. We all know that it is extremely hard to gain the four votes needed for a grant of certiorari. Many petitions are filed, but fewer than 100 are typically granted. But most GIs who seek review by the Court of Appeals are denied even the right to try for Supreme Court review. This means the only way they can gain review by an Article III court is through collateral relief under 28 U.S.C. § 1331 or through an action for money damages in the U.S. Court of Federal Claims under the Tucker Act. I need not belabor the

point that collateral review is considerably more limited than direct review. Hence, it is a serious matter to deprive a criminal defendant of even the chance of direct review in the Supreme Court, especially where the other courts in the appellate pyramid—and this is the case with the military justice system—are mere Article I courts.

That is the first "whammy."

The second "whammy" concerns how the present limitation on Supreme Court review is applied. Even though the present statute permits review of "cases" in which the Court of Appeals has granted review, the Solicitor General has adopted the surprising position that not only must the "case" have been granted review, but the particular "issue" the petitioner seeks to raise in the Supreme Court also have been granted review by the Court of Appeals. In other words, according to the Executive Branch, an ungranted issue in a granted case is ineligible for review by the Supreme Court. This incorrect reading has been repeatedly advanced by the government in opposing certiorari petitions by GIs who obtained only partial grants of review from the Court of Appeals, but the Supreme Court has never clarified the matter. The result, if the Solicitor General is correct, is to narrow even further the already unduly narrow grant of certiorari jurisdiction, despite the fact that the Supreme Court only recently in *Denedo v. United States* cautioned that the jurisdictional grant should not be given a "parsimonious" reading.

The third "whammy" lies in the fact that many courts-martial are excluded even from review by the Court of Appeals (and the service courts of criminal appeals) because of the jurisdiction threshold for direct appellate judicial review of any kind. Absent a punitive discharge or a sentence to confinement for a year or more, a court-martial conviction never even enters the appellate pipeline unless the Judge Advocate General elects to refer it to the service court, a matter that lies entirely in his or her discretion.

As I hope this shows, the limits on access to the highest court of the land are severe.

The question then is: are those limits justified? In my opinion, they are not.

First, as a matter of principle, there is simply no reason for giving GIs who have gotten in trouble with the law less appellate review than others. They are, with some exceptions, our fellow citizens or at least lawful immigrants. They have the same rights to due process and equal protection as the rest of us, and in my view the current disparity between access of civilian federal and state defendants to the Supreme Court, on the one

hand, and GIs' access, on the other, lacks any rational basis. It is, in my view, a clear violation of Fifth Amendment equal protection.

Second, and also as a matter of principle, it is shocking to me that unlawful enemy combatants tried by military commission have a right to direct review by the Supreme Court regardless of what the District of Columbia Circuit and Court of Military Commission Review may do, while many GIs have no such right. This is not to say that the MCA should be amended to impose a limit on Supreme Court direct review of military commissions, but rather than GIs should at least be treated no worse than enemy combatants. (For the record, in my opinion, if there are to be military commissions, civilian appellate review should be afforded by the Court of Appeals for the Armed Forces, rather than the District of Columbia Circuit—but that is another hearing.)

Third, as a matter of resource allocation, are the limits on Supreme Court review justified? Certainly not. Passing over the fact that we should not be pinching pennies when it comes to the due process rights of GIs, any cost associated with putting Supreme Court review on an equal footing with Supreme Court review of other criminal cases will be very modest. In many cases, counsel will properly conclude that a petition would be frivolous, leaving submission of a brief to the accused in accordance with settled practice in cases involving assigned counsel. Pro se certiorari petitions are rarely granted, and it is unlikely that responding to such petitions will be an onerous task for the government. Of course, there may be another *Gideon v. Wainwright* lurking in this category, but who among us would want a comparably important issue to be ineligible for Supreme Court review?

And what of the cases that GIs' appellate defense counsel deem not frivolous and wish to submit a certiorari petition? Experience teaches that in the vast majority of such cases, the Solicitor General will exercise her right to waive filing a brief in opposition, submitting a pro forma letter so advising the Supreme Court and offering to file a brief if the Court wishes. If, every so often, the Court directs the SG to file a brief, what is there to complain about?

I have a single suggestion to improve this bill. As you may know, last week Chief Judge Robinson O. Everett passed away. "Robbie," as he was universally known, was the Nation's preeminent military justice expert of the last half of the 20th Century. This Tarheeler led the Court of Appeals into a new era, and worked indefatigably to put military justice front and center with our other, more familiar systems of criminal justice.

He worked to build bridges to the civilian bench and bar. At the same time he taught generations of students at Duke Law School, thus ensuring a lasting influence on the law.

He was a leader of the American Bar Association and the Judge Advocates Association, and was active in the American Law Institute and other leading organizations for improvement of the law. He offered encouragement to the National Institute of Military Justice. I imagine that one day the building that houses the Court of Appeals for the Armed Forces will be named for him. But as a down payment on our debt to him, I respectfully suggest that H.R. 569 be titled "The Robinson O. Everett Military Justice Act of 2009."

I hope these observations will assist the Subcommittee in taking prompt and positive action on this important legislation.

Very truly yours,

Eugene R. Fidell

Eugene R. Fidell

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123 Birrell Street
Waverley, New South Wales 2024
Australia
Tel 61(0)2-8003-5582 • USA Tel 1-202-470-0976
norb.maclean@yahoo.com.au

12 June 2009

VIA EMAIL

The Honorable Hank Johnson
Chairman
Subcommittee on Courts and Competition Policy
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515
United States of America

Re: *Equal Justice for Our Military Act of 2009, HR 569 (111th Congress)*

Dear Chairman Johnson:

I write from Australia as I am a dual American-Australian citizen and presently live at home in Sydney. I applaud you for holding yesterday's hearing on the *Equal Justice for Our Military Act of 2009*, HR 569. I respectfully request that you consider incorporating this letter into the Congressional record on HR 569. Access to the Supreme Court of the United States was denied to me, under 28 U.S.C. § 1259(4), despite excellent *pro bono* representation by a prominent international law firm and two Navy Judge Advocate General Corps officers who served as my appellate defense attorneys.

In March 2004 I first brought the inequity, in both 28 U.S.C. §§ 1259(3)-(4), to the attention of Congresswoman Susan A Davis (California – 53rd District) and Senator Dianne Feinstein (California) as I then resided in San Diego, California. I requested that Congresswoman Davis and Senator Feinstein introduce legislation to correct the inequity in the law. Senator Feinstein introduced companion legislation, the *Equal Justice for United States Military Personnel Act of 2009*, S. 357. Over the years, both Congresswoman Davis and Senator Feinstein have worked hard on this issue. Despite my move home to Australia in 2007, I continue to bring public attention to this issue and lobby U.S. lawmakers to correct the disparity.

From 1989 through 1994 I served on active duty in the United States Navy as an enlisted cryptologic technician. In 1988 I received Congressional appointments from former Congressman H. James Saxton (New Jersey – then

13th District) to the U.S. Coast Guard Academy, U.S. Merchant Marine Academy at Kings Point, and U.S. Military Academy at West Point. I declined those appointments, enlisted in the U.S. Navy, and in 1991 received a nomination from Congressman Saxton to the U.S. Naval Academy. In 1992 I was due to enter the Naval Academy Preparatory School. That same year I was awarded the Joint Service Achievement Medal by then-Secretary of Defense Dick Cheney for "meritorious service for the Armed Forces of the United States" during my temporary assignment to the staff of then-Ambassador-at-Large Richard L. Armitage at the U.S. Department of State.

When I returned to the Navy in late 1991 from my temporary assignment at the U.S. Department of State, I experienced harassment from a superior Naval officer, which included a wrongful demotion in rank and reduction in pay. With the assistance of a judge advocate general corps officer I filed a formal Uniform Code of Military Justice ("UCMJ") article 138 [10 U.S.C. § 938] complaint against this officer, which was later found meritorious. In 1993 I was reinstated to my previous rank by the Assistant Secretary of the Navy. *MacLean v. United States*, 57 Fed.Cl. 14, 15 (2005).

In April 1992, several months after I filed the UCMJ article 138 complaint against the superior officer, the same officer brought charges against me of writing bad check on my own bank accounts, UCMJ article 123a [10 U.S.C. § 823a], and recommended my general court-martial over contrary finding of an impartial UCMJ article 32 [10 U.S.C. § 832] investigating officer ("IO"). The IO found "in general the evidence [against me] was weak or nonexistent" and checked a "no" box where it asked if reasonable grounds existed to believe the accused committed the offenses alleged. Nevertheless charges were still referred to a general court-martial.

During court-martial proceedings certain evidence became missing despite granted motions to compel. This evidence included, but was not limited to, missing pay records which showed thousands of dollars in my pay being sent to a wrong account (the routing and account numbers were erroneous) and returned to the Navy. Due to the missing evidence in the military justice system and the superior officer's involvement I pled guilty to three counts of violating UCMJ article 123a [10 U.S.C. § 123a] pursuant to a pre-trial agreement. I lost complete faith in the military justice system and believed it unfair. It was apparent to me that the officer involved in my court-martial had an "other than official" interest in my court-martial. (See generally *U.S. v. Nix*, 40 M.J. 6 (CMA 1994))

Almost a decade after my general court-martial conviction missing evidence became available, including the pay records to substantiate what I had been saying all along that pay wasn't making it into my account despite Navy leave and earnings statements indicating I was being paid. I thought I was being paid, but actually wasn't. For over a decade my Navy pay records were buried in Air Force pay records in Denver, Colorado. They were supposed to be in Navy records held in Cleveland, Ohio. But most importantly documentary evidence showing the meritorious UCMJ article 138 complaint against the special court-martial convening who recommended my general court-martial became available. In 2003, two attorneys, one a retired U.S. Marine Corps Reserve lieutenant colonel and a former Navy Judge Advocate General Corps lieutenant provided sworn declarations that the evidence was never made available to my defense at my 1992 court-martial trial and during direct appellate review in 1992 through1994.

In 2002 and 2003, the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") re-opened my court-martial conviction through a petition for writ of error coram nobis and in two separate orders, ordered the government to show cause why it should not vacate my court-martial. The military appellate court granted a motion to compel missing documents, granted several motions to attach newly discovered evidence to the record and ordered the Navy Judge Advocate General to appoint military counsel to assist my civilian attorneys. NMCAA ultimately denied my petitions. (*MacLean v. U.S.*, 2002 CCA LEXIS 182 (N-M.C.C.A. 2002), 2003 CCA LEXIS 290 (N-M.C.C.A. 2003) A writ-appeal was taken to CAAF but was denied. The denial precluded me from accessing the Supreme Court. (MacLean v. U.S., 57 M.J. 469 (C.A.A.F. 2002), 59 M.J. 340, 2004 CAAF LEXIS 167 (C.A.A.F. 2004), 62 M.J. 230, 2005 CAAF LEXIS 1131 (C.A.A.F. 2005)). I was denied Supreme Court access under 28 U.S.C. § 1259(4). Notably the military courts omit either applying or rejecting *U.S. v. Nix, supra,* 40 M.J. at 6, to my case given the discovery of documentary evidence showing the special court-martial convening authority had an "other-than-official" interest in my prosecution. Under *Nix*, I had a Constitutional due process right to a court-martial free from bias and prejudice.

The inequity in the law regarding Supreme Court access couldn't be demonstrated better than here: If CAAF had granted my writ appeal and/or relief; the government could have appealed to the Supreme Court. Most recently this is exactly what occurred in the case of *United States v. Denedo,* 66 M.J. 114 (C.A.A.F. 2008), *affirmed and remanded* 08-267 ____ U.S. ____ (8 June 2009). CAAF granted relief in a sharply divided 3-2 decision. The government sought appeal to the Supreme Court in order to reverse CAAF under 28 U.S.C.

§ 1259(4). But the Supreme Court upheld CAAF's decision by a 5-4 decision. Had ex-servicemember Jacob Denedo lost at CAAF, with just one majority judge switching to the dissent he would have been precluded from ever accessing the Supreme Court. Thus the Supreme Court would have never had the opportunity to hold that military courts had jurisdiction to correct their own errors after a court-martial is final.

Yesterday, retired U.S. Army Major General John D. Altenburg, Jr. testified before your subcommittee to the effect that current collateral review of courts-martial by the civilian courts is sufficient. I respectfully dispute that assertion by General Altenburg. In my case no court outside the military had jurisdiction to collaterally review my court-martial. (See *e.g.*, *MacLean v. United States*, case no. 02-cv-2250-K(AJB) (S.D. Calif. 2003), 57 Fed.Cl. 14 (2005), *affirmed* 454 F.3d 1334 (Fed. Cir. 2006)). To be clear, absolutely no federal civilian court had jurisdiction to review my court-martial conviction upon the merits after the military courts had re-opened my case on two separate occasions in 2002 and 2003, and issued new opinions.

When I sought a collateral attack in the civilian courts, the Court of Federal Claims and Federal Circuit declined to apply equitable tolling to the statute of limitations and time barred the action. Interestingly, under the Federal Circuit's published opinion in my case, 434 F.3d 1334, ex-service-member, Mr. Denedo, would have also been precluded from challenging his court-martial conviction under the Tucker Act or Little Tucker Act in the article I U.S. Court of Federal Claims and any article III U.S. district court because his court-martial was final and also passed the six year statute of limitations. Moreover, there can be no redress of grievance with the military boards of correction because in 1984 Congress took away the boards jurisdiction to redress a wrongful court-martial conviction when it passed the Military Justice Act of 1983. (*See* 10 U.S.C. § 1552(f)) In the real world, collateral review as suggested by General Altenburg, on the merits, by a federal civilian court of courts-martial on Constitutional questions is extremely rare to nearly impossible. My case demonstrates it was impossible.

Most troubling, under the current law, is that fellow Aussie David Hicks who had trained with al Qaeda-linked camps and served in the Taliban had an ability to have greater access to the Supreme Court of the United States than someone like me who is an actual American citizen and served five years in a U.S. Navy uniform to protect and defend America. (*Cf.* 10 U.S.C. § 950g(d); 28 U.S.C. §§ 1259(3)-(4)). Make no mistake, as an Australian citizen, I feel chagrin

and am disgusted with Mr. Hicks' traitorous actions of providing material support for terrorism. Certainly, as both an American and Aussie I'm glad that the United States brought him to justice. But to provide Mr. Hicks, a non-U.S. citizen-al Qaeda-affiliated-trained-Taliban-convicted-enemy-combatant, with an avenue to directly access our Supreme Court (10 U.S.C. § 950g(d)); and then turn around and deny me and other servicemembers the same avenue for access completely defies any reasonable logic. This cannot be reconciled.

To add insult to injury, if I had not served in the American military and instead chose to serve in the Defence Force of my other home country Australia; and the same situation occurred to me I would have been able to access the High Court of Australia – the equivalent of the Supreme Court of the United States – because Australia affords its uniformed citizens full procedural due process protections. Back in 1982 Congress was also informed that other common law countries permit their uniformed citizens access to their nation's highest courts. In 1982, then-American Civil Liberties Union attorney Eugene Fidell (who would later become a leading expert in military law) testified before Congress:

> "[T]hat some of our sister common law countries, people with whom we share important legal and cultural traditions, have tended to permit their highest courts to review courts-martial appeals directly, The House of Lords, which is the highest court of England, has such a procedure, the Supreme Court of Canada has such a procedure, and the High Court, which is the highest court in Australia, has such a procedure."

(*See* Hearing Before Subcommittee on Manpower and Personnel of the Committee of the Armed Forces United States Senate on S.2521 (97th Congress) (9, 16 September 1982) at p. 199).

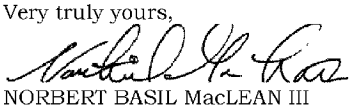
As these democratic nations' uniformed citizens fight alongside American troops in the Global War on Terrorism they enjoy greater procedural due process protections than that of their American allied forces. In this regard, the United States seems to fall short as world leader in demonstrating full procedural due process protections for all its citizens to newly emerging democratic countries. Currently the majority of America's court-martialed uniformed citizens are left in the lurch. That is not a good example to set for new democracies that may look to the United States for guidance and leadership in the establishment of a democracy.

For nearly 200 years we utterly denied our servicemembers direct appellate review of courts-martial to the Supreme Court of the United States. Over the last quarter century, with the passage of the Military Justice Act of 1983, Congress provided only limited direct Supreme Court review that skewed the law in favor of the government so it could appeal its loses. And then in 2006, with the passage of the Military Commissions Act of 2006, Congress saw fit to give our enemies the right to direct review by our highest court after conviction by military commission.

In the United States "it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Chief Justice John Marshall observed that the United States "will cease to deserve [] high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163. That statement by the Fourth Chief Justice of the United States smacks squarely in the face of denying our servicemembers, who protect and defend America and our Constitution, access to the Supreme Court.

I thank you and the members of the subcommittee for holding the hearing on HR 569. Certainly I hope both the upper and lower Houses of this Congress passes HR 569 and that President Barack Obama signs it into law. This legislation is long overdue – one could arguably say it's more than 220 years overdue. American troops who serve to protect and defend our great nation deserve full procedural due process. The cornerstone of any democracy is due process. Under the current system our U.S. servicemembers are short changed of that due process. Congress can rectify this with the enactment of HR 569.

Very truly yours,



NORBERT BASIL MacLEAN III

cc: Hon. Susan A. Davis (chief sponsor of HR 569)
Hon. Dianne Feinstein (chief sponsor of S. 357)

THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
1016 16th Street, NW
Suite 101
Washington, DC 20036
Phone (202) 223-6600

June 5, 2009

The Honorable Susan Davis
House Judiciary Subcommittee on Courts and Competition Policy
1526 Longworth House Office Building
Washington, DC 20515
Facsimile: 202-225-2948

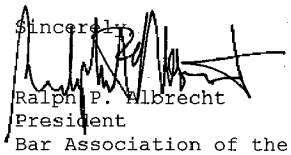
Subject: Equal Justice for Our Military Act of 2009 and Equal Justice for United States Military Personnel Act of 2009.

Dear Representative Davis:

The Bar Association of the District of Columbia supports the Equal Justice for Our Military Act of 2009, HR 569, and the Equal Justice for United States Military Personnel Act of 2009, S. 357, to amend the federal judicial code to allow for review by writ of certiorari of certain cases denied relief or review by the U.S. Court of Appeals for the Armed Forces. We urge Congress to permit discretionary review by the Supreme Court of the United States of decisions rendered by the United States Court of Appeals for the Armed Forces (CAAF) that deny petitions for review of courts-martial convictions or deny extraordinary relief. Now, the Court does not have jurisdiction to review a denial of discretionary review by the CAAF. Our service members deserve better than this disparity in our laws governing procedural due process whereby the government has far greater opportunity to obtain Supreme Court review of adverse courts-martial decisions than is afforded convicted service members. Our bar association seeks the fairness and full due process in the military judicial system offered by your legislation and the Bar

Association of the District of Columbia supports your legislation. We look forward to working with you. Please do not hesitate to contact me, Ralph Albrecht at 703-760-1681 or Bill Aramony, Chair of our Military Law Committee at 703-299-8496 if you need anything at all from us on this issue.

Sincerely,



Ralph P. Albrecht
President
Bar Association of the District of Columbia

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

May 19, 2009

The Honorable John Conyers, Jr., Chair
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Patrick Leahy, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Lamar Smith
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Jeff Sessions
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear House and Senate Leaders:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing to endorse the Equal Justice for Our Military Act of 2009 (H.R. 569, S. 357). The bill enjoys broad congressional support and has been endorsed by an array of military and legal advocacy organizations. In the 110th Congress, the full House passed identical legislation (H.R. 3174) and the Senate Judiciary Committee approved its counterpart (S. 2052) by unanimous voice vote. Sadly, the full Senate failed to take further action. It is time to finally pass the Equal Justice for Our Military Act and give our military personnel the same appellate rights as civilians.

The Equal Justice for Our Military Act of 2009 would even the appellate playing field by permitting court-martialed service members to petition for certiorari at the Supreme Court. Under existing law, a defendant in the military justice system may only petition for discretionary review at the U.S. Court of Appeals for the Armed Forces (CAAF). Absent review on the merits by CAAF, an accused cannot directly seek review at the Supreme Court. By contrast, the government may certify a case for review by CAAF and is free to seek Supreme Court review. H.R. 569 and S. 357 would change the law to allow an accused to seek certiorari at the Supreme Court even if CAAF does not grant review. This change reflects the civilian appellate process, eliminates the inequity between the appellate rights of the

government and the accused, and gives our uniformed men and women the same access to the Nation's highest court as the civilians they fight to protect.

As a defender of the Constitution and a national bar association whose more than 12,000 include military defense attorneys, NACDL is committed to preserving due process and equal treatment under the law. NACDL therefore strongly supports the Equal Justice for Our Military Act and urges the House and Senate Judiciary Committees to move forward with H.R. 569 and S. 357 and take whatever action is necessary to ensure that this long overdue reform becomes law.

Sincerely,

John Wesley Hall
President, National Association of Criminal Defense Lawyers

Donald G. Rehkopf, Jr.
Co-Chair, NACDL Military Law Committee

cc: Members of the House and Senate Judiciary Committees

Legal Times WEEK OF JUNE 9, 2008 • VOL. XXXI, NO. 23
ALM

Who Hears the Troops?

Not the Supreme Court, unless Congress acts to give court-martial convictions the highest review.

BY NORBERT BASIL MACLEAN III

Nobody finds it easy to obtain review in the nation's highest court. The chance to get your case heard by the justices is doled out very sparingly. But there's one group of Americans who are prohibited from "taking it to the Supreme Court."

By law (with few exceptions), the members of our armed forces cannot ask the Supreme Court to review convictions by court-martial. Enemy combatants have a clearer road to the Court than those serving in the U.S. military do.

When this problem is explained to the average American, the answer seems clear: Fix the law. Bipartisan bills to stop second-class legal treatment of service members have been introduced in the House and the Senate. Now the legislation must be acted upon before the next soldier or sailor is denied his day in the high court.

SUPREME COURT BOUND?

Under the Uniform Code of Military Justice, service members can appeal court-martial convictions up to the highest military tribunal, the U.S. Court of Appeals for the Armed Forces. An Article I court, it is composed of five civilian judges appointed by the president to terms of 15 years. It reviews decisions from each service branch's intermediate appellate court.

Currently, the Supreme Court may review only those cases out of the Court of Appeals in which one of the following circumstances applies: (1) The defendant could receive the death penalty. (2) The case was certified to the Court of Appeals by the judge advocate general for review. (3) The appeals court granted the accused's petition for review. (4) Or the appeals court otherwise granted relief to the accused.

That looks like a lot more opportunity to be heard than it is. The death penalty is not on the table in most cases. The judge advocate general does not certify many cases for review—and when he does, this almost always benefits the government, not the service member. The Court of Appeals only rarely *otherwise* grants relief. Most of the time, a convicted service member can hope to reach the high court only if he can first show good cause to persuade the Court of Appeals to grant his petition for review.

Good luck. The Court of Appeals declines to hear about 90 percent of cases, so about 90 percent of court-martialed service members are completely sealed off from the Supreme Court. For those service members, the high court simply does not exist.

On the other hand, if that service member does manage to get his case before the Court of Appeals and then prevails, the government is permitted to appeal the decision to the Supreme Court. And therein lies the inequity.

A LEGISLATIVE FIX

In August 2006, the American Bar Association issued a report and its House of Delegates unanimously passed a resolution urging Congress to correct this inequity.

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Some members of Congress heard that appeal. Last year, Sens. Dianne Feinstein (D-Calif.) and Arlen Specter (R-Pa.) introduced the Equal Justice for U.S. Military Personnel Act, while Reps. Susan Davis (D-Calif.) and Ike Skelton (D-Mo.) introduced the Equal Justice for Our Military Act. Skelton chairs the House Armed Services Committee. Davis, who also sits on that committee, represents the city of San Diego, which is home to major Naval installations.

The two bills, which are identical except for their titles, provide that the Supreme Court could review cases where the lower court had denied (not just granted) the accused's petition for review or where the lower court had otherwise denied (not just granted) relief to the accused.

To date, the bills languish in their respective judiciary committees with no scheduled hearings. The Military Officers Association of America (an independent group representing active, reserve, and retired officers), the National Institute of Military Justice (a nonprofit entity affiliated with American University that focuses on the military justice system), and three former chief judges of the Court of Appeals all support the legislation. But the Bush administration opposes it.

RESISTANCE IN COURT

And it's not just in Congress that the executive branch is not eager to give service members full judicial review. In court, too, the government has been arguing to further limit the ability of convicted service members to get their cases reviewed.

Recently the Court of Appeals issued two sharply divided opinions regarding its own jurisdiction to hear military appeals: *United States v. Lopez de Victoria*, decided Feb. 26, and *Denedo v. United States*, decided March 11.

The two cases address different issues, but in both cases, a divided court sided with the service member on the jurisdictional question. In both cases, Judge Margaret Ryan wrote well-reasoned dissents finding no statutory basis for review and noting the limits on the power of an Article I court. And in both cases, the government appeared ready to keep pushing for narrower jurisdiction.

In the case of Jacob Denedo, a lawful permanent resident and onetime member of the U.S. Navy, the jurisdictional issue was whether the court could hear his appeal given that he is no longer a member of the military and the case had seemed final years earlier. Claiming ineffective assistance of counsel, Denedo attempted to reopen his case eight years after he had pleaded guilty to conspiracy and larceny because the government, out of the blue, initiated deportation proceedings based on that plea.

On the merits question, the appellate court's response was less than definitive: It concluded that it needed "a more fully developed record" and remanded to the intermediate court. But first the Court of Appeals concluded that Denedo was entitled to pursue this appeal in the military justice system.

In the case of Eric Lopez de Victoria, a sergeant in the U.S. Army, the jurisdictional issue was whether the appeals court could hear interlocutory appeals of adverse lower appellate court rulings after a military judge had ruled in favor of the service member. The appeals court said yes. The court also sided with Lopez de Victoria on the merits, a matter of retroactive application of an extension of the statute of limitations.

Because the service members won in *Denedo* and *Lopez de Victoria*, the government could appeal to the Supreme Court. Despite initial rumblings to the contrary, it seems that the government will not exercise that option in *Lopez de Victoria*. Perhaps because the court did not rule for Denedo on the merits but remanded for further proceedings, the government is apparently seeking Supreme Court review in his case.

SIMPLE JUSTICE

The government will argue that decisions reached under the Uniform Code of Military Justice deserve respect. But the government won't rush to note that, with the exception of a death penalty case, a court-martial conviction does not require a unanimous verdict—only two-thirds of the military jurors must agree. And those jurors are hand-picked by the same commanding officer who referred the charges to court-martial.

Moreover, although military justice is designed mainly to preserve good order and discipline in the armed services, its effects are not restricted to military life. Convicted service members face significant civil disabilities. They cannot vote in some states, they lose the right to bear arms, they lose the right to hold certain professional licenses, they lose veterans benefits, and, of course, they carry the stigma of a court-martial.

Questions of military justice strike especially close to home for me, because I spent five years in the U.S. Navy as a cryptologist, along the way earning the Joint Service Achievement Medal. And then I was court-martialed and discharged on charges of writing bad checks after experiencing problems with my military pay. (I believe this all happened because I brought a written complaint against a commanding officer for harassment, which was later found to be meritorious.) I've tried to fight back but ran up against the same wall: Sorry, there's no jurisdiction to hear your arguments.

That legal barrier should come down. It's wrong for the United States to send uniformed citizens off to war to defend this nation and promote democracy worldwide, and then not to afford those same uniformed citizens the due process protections they are defending and promoting. Our allies who do provide full procedural due process to their military—including Australia, Canada, Israel, and the United Kingdom—must be shaking their heads at the inequity. Our troops deserve better.

Norbert Basil MacLean III, a dual American-Australian citizen, served in the U.S. Navy from 1989 to 1994. He is now enrolled at the University of Sydney (Australia) studying economics and law.

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

GENERAL COUNSEL

JUN 27 2008

The Honorable Carl Levin
Chairman
Committee on the Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter provides the views of the Department of Defense on S. 2052, a bill "To allow for certiorari review of certain cases denied relief or review by the United States Court of Appeals for the Armed Forces." This letter will analyze not only the relative merits of the legislation, but also for illustrative purposes of the potential impact, the number of appeals that would have been eligible for a petition of certiorari for each of the first five fiscal years of this decade that ended September 30, 2005.

The Department of Defense does not keep aggregate statistics of the number of appeals requested, but the United States Court of Appeals of the Armed Forces (USCAAF) annually publishes in the Military Justice Reporter statistics regarding its appellate court activities. Enclosed are USCAAF statistics for the first half of this decade regarding petitions for grant of review filed and cases in which writ petitions and writ appeals were filed.

During those five fiscal years, the number of cases in which USCAAF denied review or dismissed a petition for review totaled 3,377, with another 368 cases in which USCAAF affirmed without granting relief. In addition, a total of 143 extraordinary writ petitions or appeals of extraordinary writ petitions were denied or dismissed. The legislation does not limit the proposed right to petition the Supreme Court to those cases in which writ petitions or appeals of extraordinary writ petitions were denied or dismissed. Even if the proposed legislation was limited in that manner, the attached statistics still reflect what would be an average increase of potential petitions to the Supreme Court of 29 cases per year. On its face, while this increase may appear to be a relatively low number of cases, a focus that is on the aggregate number of cases alone would be misleading in that it would not adequately take into consideration the time and effort required for Supreme Court review of petitions for certiorari. Opening this additional avenue of Supreme Court appeal will also require legal reviews and briefs from numerous counsel in the military departments' Government and Defense Appellate Divisions, the Department of Defense Office of General Counsel, as well as within the Office of the Solicitor General, and the Supreme Court. As unlimited, the potential impact of the proposed legislation would increase significantly if all 3,377 cases in which USCAAF denied review or dismissed a petition for review (or multiple petitions for review) qualified for petitions for Supreme Court review.

These statistics may also be misleading as an indicator of future appellate activity in the form of writ petitions/appeals if it is presumed that the number of writ petitions/appeals currently denied would remain relatively the same. In fact, this new potential avenue for Supreme Court review may "spawn" a host of USCAAF writ petitions/appeals (regardless of merit), if only to acquire the necessary "dismissal or denial" necessary for requesting Supreme Court review. Appellants, with nothing further to lose, might file multiple USCAAF writ petitions/appeals in the hope of eventually obtaining Supreme Court review. In addition, many of these extraordinary writs are interlocutory in nature and brought during the trial of an active court-martial. Because adding an additional level of appeal during an active court-martial will necessitate an additional period of delay, the potential exists for introducing truly excessive delay into the resolution of cases tried by courts-martial. The potential impact on the military justice system, military appellate counsel and resources, the Department of Defense Office of General Counsel, the Office of the Solicitor General and the Supreme Court may prove far more extensive than currently envisioned. For extraordinary writs brought by petitioners who have an adjudged court-martial sentence, extending avenues for the appellate review of cases lengthens the time before the case may be considered "final" and the sentence fully executed; administrative discharges may be delayed and appellants on appellate leave will continue to enjoy the military benefits afforded service members in that status. The legislation does not provide clear safeguards precluding these possibilities.

Congress has established a comprehensive appellate review process for the Uniform Code of Military Justice (UCMJ) judicial system and administration of military justice. Since 1983, the UCMJ has provided for the possibility of additional review by the Supreme Court upon petition for a *writ of certiorari*. Enclosed is a more detailed discussion of the legislative intent behind that limited right to review.

There is no apparent justification to modify the current review process, thereby increasing the burden upon the Supreme Court and counsel to address the myriad of matters that would be encountered with expanded *certiorari* jurisdiction. The Department of Defense opposes the proposed legislation.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this letter for the committee's consideration.

Sincerely,

Daniel J. Dell'Orto
Acting

cc: The Honorable John McCain
Ranking Member

Enclosures:
As stated.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
(Fiscal Years 2001 – 2005)

	FY '01	FY ' 02	FY '03	FY '04	FY '05	TOTAL
Petitions for Grant of Review Filed:	898	957	693	801	776	4,125
Cases Denied Review or Dismissed:	742	747	682	620	586	3,377
Cases Granted Review:	126	101	133	130	145	635
Granted Cases Where Some/Total Relief Granted:	35	41	41	71	51	239
Granted Cases That Were Affirmed (No Relief):	105	69	70	63	61	368
Writ Petitions and Writ Appeals Filed:	39	30	23	29	44	165
Writ Petitions/Appeals Granted or Remanded:	2	3	1	2	8	16
Writ Petitions/Appeals Denied or Dismissed:	37	28	19	25	34	143

Summary of the Courts-Martial Appeals Process and U. S. Supreme Court Review

Congress established a comprehensive appellate review process for the UCMJ judicial system and administration of military justice. After a court-martial, the record of trial is reviewed by a judge advocate or legal officer. The case must then be reviewed by the court-martial convening authority, who determines whether to approve the conviction and sentence. Within the military justice system, each military department has established a Court of Criminal Appeals to provide automatic review of the most serious cases (those resulting in an approved sentence to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more). These appellate courts have the unique authority to make independent findings of facts and conclude whether the evidence presented during trial established the accused's guilt beyond a reasonable doubt, as well as resolve questions of law asserted on appeal or raised within the record of trial. Without expense to themselves, convicted military members are provided experienced military appellate defense counsel to represent them throughout the appellate review of their case. In addition, convicted military members may retain civilian counsel at no expense to the government to assist in their appeal.

For those other courts-martial that do not meet the statutory requirement for automatic Court of Criminal Appeals review, Article 64, UCMJ, requires a review by a judge advocate who was not previously involved in the case. Thereafter, there is an automatic review of general courts-martial by the Judge Advocate General under Article 69, UCMJ. An accused convicted by special court-martial may, under certain circumstances, request a Judge Advocate General review under Article 69, UCMJ.

In addition to review by a Court of Criminal Appeals or the military department's Judge Advocate General, Congress established a further possibility for appellate review by the USCAAF. The five USCAAF judges, who are appointed by the President from civilian life, by and with the advice and consent of the Senate, serve for a term of fifteen years. No more than three judges of the Court may be from the same political party. USCAAF appellate review is required in all cases in which the sentence as affirmed by a Court of Criminal Appeals extends to death, all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to USCAAF for review, and all cases reviewed by a Court of Criminal Appeals for which, upon petition of the accused for good cause shown, USCAAF has granted review.

Beginning in 1983, the UCMJ provided for the possibility of additional review by the Supreme Court upon petition for a writ of certiorari. Congress limited this avenue of possible Supreme Court review to those cases in which USCAAF granted review and excluded those cases that USCAAF declined to hear. Article 67a, UCMJ; 28 U.S.C.§ 1259. This limited avenue of Supreme Court review was a deliberate congressional decision. The Committee on Armed Services, in House Report No. 98-549 accompanying the Military Justice Act of 1983, stated:

"The Court of Military Appeals (now USCAAF) regularly applies decisions of the Supreme Court in resolving appellate issues . . . in view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review. Cases in which the Court of Military Appeals declined to grant a petition for review are excluded, and the Supreme Court will have complete discretion to refuse to grant

petitions for writs of certiorari. Control over government petitions will be exercised by the Solicitor General. This formulation has been endorsed by the Department of Justice as well as the Department of Defense. The committee is of the opinion that the impact on the docket of the Supreme Court would not be substantial, and the Court of Military Appeals will remain the primary source of judicial authority under the Uniform Code of Military Justice." (Emphasis added.)

The 1988 Supreme Court Case Selections Act (Public Law 100-352) substantially revised, or repealed, various sections of title 28, United States Code, in an effort to eliminate the demands upon the Supreme Court caused by existing mandatory Supreme Court jurisdiction. The intent was to give the Supreme Court more control over its docket by favoring discretionary review ("certiorari") jurisdiction. Significantly, in the face of these major revisions in the appellate avenues to the Supreme Court, the one section of title 28, United States Code, that Congress left unchanged was section 1259, which governs the Supreme Court's limited certiorari review of military justice cases. The decision not to modify section 1259 was not an oversight. The Committee on the Judiciary, in House Report No. 100-660 accompanying Public Law 100-352, "Review of Cases by the Supreme Court," stated, "Finally, many cases that now require the Supreme Court's attention can better be considered by the courts of appeals with plenary briefing and argument. This is particularly true in light of the new burdens recently placed on the Supreme Court by legislation authorizing a writ of certiorari to the Court of Military Appeals (now USCAAF), 97 Stat. 1393, and other expected increases in Supreme Court's workload." As further explanation of the Supreme Court's revised appellate jurisdiction, the Committee stated, "The Supreme Court - which of course sits at the apex of the Federal judicial system - can devote plenary consideration only to about 150 cases a year . . . Furthermore, the Committee agrees with the proposition that the Court's workload is at the saturation point. Elimination of the Court's mandatory jurisdiction, although not a panacea to the Court's problems, is a necessary step to relieving the Court's calendar crisis."

In support of the proposed changes in an earlier bill, in 1982 the Supreme Court justices urged the House Committee on the Judiciary, "Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by having to deal with cases that are of significance only to the individual litigants but of no 'wide public importance'." House Report No. 100-660 accompanying Public Law 100-352, "Review of Cases by the Supreme Court."

In 1989 and 1994, Congress passed the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189) and the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337), respectively. While addressing several matters that revised military appellate procedures, expanding the number of judges on the then-Court of Military Appeals, and later designating the military appellate courts as the United States Court of Appeals for the Armed Forces and Courts of Criminal Appeals, Congress took no action to modify the statutory standards for Supreme Court review of military justice cases.

Before a court-martial of major significance is postured for possible review by the Supreme Court, the record of trial has received the benefit of several post-trial reviews. Following authentication by the military judge, the court-martial convening authority conducts a review in which findings of guilty may be dismissed, reduced to a lesser offense, or a rehearing

directed, and the sentence is approved, disapproved, or modified. Thereafter, a Court of Criminal Appeals and the Court of Appeals for the Armed Forces, upon petition for review or upon mandatory review, consider any asserted errors. In the exercise of its intended oversight responsibility as the "primary source of judicial authority under the Uniform Code of Military Justice," and "regularly applying the decisions of the Supreme Court in resolving appellate issues," USCAAF is empowered, and relied upon, to determine which cases represent the requisite importance and possess the legal merit that warrants its review. Supreme Court review is dependent upon this merit-based analysis of the thousands of courts-martial that are addressed annually.

The Supreme Court may review any court-martial in which USCAAF granted a petition for review under Article 67(a)(3), UCMJ, and any other cases not described by 28 U.S.C. § 1259(1) - (3) in which USCAAF granted relief. Neither avenue of review is reserved for only government petitions for a writ of certiorari.

A rigorous review and coordination process between the Departments of Defense and Justice is required before a petition for writ of certiorari involving a military court-martial case will be filed with the Supreme Court. When a military department's Government Appellate Division seeks review of a USCAAF decision by the Supreme Court, the requirements of Department of Defense Instruction 5030.7, "Coordination of Significant Litigation and Other Matters Involving the Department of Justice," requires a comprehensive review and brief in support of the request, a summary of the views of the other military departments' Government Appellate Divisions and Judge Advocates General, the recommendation of the Judge Advocate General of the military department concerned, an internal review by the Office of the General Counsel of the Department of Defense, and approval by the General Counsel of the Department of Defense to transmit the request to the Office of the Solicitor General. Only after review and concurrence by the Office of the Solicitor General will a petition and accompanying briefs be prepared and filed. The same is not required by a military accused, who may file pro se or with military counsel assistance at no expense.

In obvious consideration of the Supreme Court's demanding docket, Congress has considered the current formulation for possible review by the Supreme Court to be appropriate. There is no apparent justification to modify the current review process, thereby increasing the burden upon the Supreme Court and counsel who would be required to address the myriad of matters that would be encountered with expanded certiorari jurisdiction.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

FEB 06 2006

The Honorable Lamar Smith
Chairman, Subcommittee on Courts,
the Internet and Intellectual Property
U.S. House of Representative
Washington, DC 20515-6216

Dear Mr. Chairman:

This responds to your letter to the Secretary of Defense, dated November 4, 2005, requesting the Department's views of H. R. 1364, a bill "to amend title 28, United States Code, to enable the Supreme Court to review decisions in which the Court of Appeals for the Armed Forces denied relief." Your letter requested an analysis of the relative merits of the legislation and asked for the Department's analysis of the number of appeals that would have been eligible for a petition of certiorari if the proposal had been enacted and in force for each of the last five fiscal years that ended September 30, 2005. I have been asked to provide you a response.

The Department of Defense does not keep aggregate statistics of the number of appeals requested, but the United States Court of Appeals of the Armed Forces (USCAAF) annually publishes in the Military Justice Reporter statistics regarding its appellate court activities. As requested, enclosed are USCAAF statistics for the past five fiscal years regarding petitions for grant of review filed and cases in which writ petitions and writ appeals were filed.

Over the past five fiscal years, the number of cases in which USCAAF denied review or dismissed a petition for review totaled 3,377, with another 368 cases in which USCAAF affirmed without granting relief. Additionally, a total of 143 extraordinary writ petitions or appeals of extraordinary writ petitions were denied or dismissed. If, as your letter states, the legislation makes clear that Supreme Court review would only cover the latter category of writ petitions or appeals of writ petitions denied or dismissed, the current annual impact would appear to be roughly 29 cases per year, on average. While this may appear to be a relatively low number of cases, focusing on the aggregate number of cases alone is misleading in that it does not adequately take into consideration the time and effort required for Supreme Court review of petitions for certiorari. Opening this additional avenue of Supreme Court appeal will require legal reviews and briefs from numerous counsel in the Military Departments' Government and Defense Appellate Divisions, the Department of Defense Office of General Counsel, as well as within the Office of the Solicitor General, and the Supreme Court.

These current statistics may also be misleading as an indicator of future appellate activity in the form of writ petitions/appeals if it is presumed that the number of writ petitions/appeals currently denied would remain relatively the same. In fact, this new potential avenue for Supreme Court review may "spawn" a host of USCAAF writ petitions/appeals (regardless of merit), if only to acquire the necessary "dismissal or denial" necessary for requesting Supreme Court review. Appellants, with nothing further to lose, might file multiple USCAAF writ petitions/appeals in the hope of eventually obtaining Supreme Court review. Additionally, many of these extraordinary writs are interlocutory in nature and brought during the trial of an active court-martial. Because adding an additional level of appeal during an active court-martial will necessitate an additional period of delay, the potential exists for introducing truly excessive delay into the resolution of cases tried by courts-martial. The potential impact on the military justice system, military appellate counsel and resources, the Department of Defense Office of General Counsel, the Office of the Solicitor General and the Supreme Court may prove far more extensive than currently envisioned. For extraordinary writs brought by petitioners who have an adjudged court-martial sentence, extending avenues for the appellate review of cases lengthens the time before the case may be considered "final" and the sentence fully executed; administrative discharges may be delayed and appellants on appellate leave will continue to enjoy the military benefits afforded service members in that status. The legislation does not provide clear safeguards precluding these possibilities.

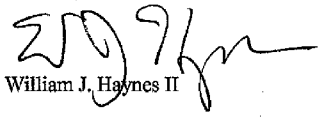
It is also important to note that no service member with a meritorious legal issue is denied USCAAF or Supreme Court review of that issue. USCAAF denies most extraordinary writ petitions because they do not raise issues that are truly extraordinary, but merely allege errors that can be addressed in the ordinary course of appellate review. Indeed, most such issues are later raised in the course of ordinary appellate review, and appellants do have an opportunity to petition the Supreme Court for review of assignments of error in which USCAAF denies relief. To the extent that the legislation purports to rectify an "inequity" in that the Government has the right to appeal USCAAF's extraordinary writ decisions while individual appellants do not, it should be noted that only 16 cases in the last five years have granted relief to an appellant or remanded a case, and in no such case has the Government obtained Supreme Court review of such a decision. There is no demonstrable inequity that needs to be rectified by enacting this legislation.

Congress has established a comprehensive appellate review process for the UCMJ judicial system and administration of military justice. Since 1983, the UCMJ has provided for the possibility of additional review by the Supreme Court upon petition for a *writ of certiorari*. Enclosed is a more detailed discussion of the legislative intent behind that limited right to review.

There is no apparent justification to modify the current review process, thereby increasing the burden upon the Supreme Court and counsel to address the myriad of matters that would be encountered with expanded *certiorari* jurisdiction. We oppose the proposed legislation.

The Office of Management Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,



William J. Haynes II

Enclosures:
As stated.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
(Fiscal Years 2001 – 2005)

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Granted Cases That Were Affirmed (No Relief):	105	69	70	63	61	368
Writ Petitions and Writ Appeals Filed:	39	30	23	29	44	165
Writ Petitions/Appeals Granted or Remanded:	2	3	1	2	8	16

Writ Petitions/Appeals Denied or Dismissed:	37	28	19	25	34	143

Summary of the Courts-Martial Appeals Process and U. S. Supreme Court Review

Congress established a comprehensive appellate review process for the UCMJ judicial system and administration of military justice. After a court-martial, the record of trial is reviewed by a judge advocate or legal officer. The case must then be reviewed by the court-martial convening authority, who determines whether to approve the conviction and sentence. Within the military justice system, each Military Department has established a Court of Criminal Appeals to provide automatic review of the most serious cases (those resulting in an approved sentence to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more). These appellate courts have the unique authority to make independent findings of facts and conclude whether the evidence presented during trial established the accused's guilt beyond a reasonable doubt, as well as resolve questions of law asserted on appeal or raised within the record of trial. Without expense to themselves, convicted military members are provided experienced military appellate defense counsel to represent them throughout the appellate review of their case. In addition, convicted military members may retain civilian counsel at no expense to the government to assist in their appeal.

For those other courts-martial that do not meet the statutory requirement for automatic Court of Criminal Appeals review, Article 64, UCMJ, requires a review by a judge advocate who was not previously involved in the case. Thereafter, there is an automatic review of general courts-martial by the Judge Advocate General under Article 69, UCMJ. An accused convicted by special court-martial may, under certain circumstances, request a Judge Advocate General Review under Article 69, UCMJ.

In addition to review by a Court of Criminal Appeals or the Military Department's Judge Advocate General, Congress established a further possibility for appellate review by the United States Court of Appeals for the Armed Forces (USCAAF). The five USCAAF judges, who are appointed by the President from civilian life, by and with the advice and consent of the Senate, serve for a term of fifteen years. No more than three judges of the Court may be from the same political party. USCAAF appellate review is required in all cases in which the sentence as affirmed by a Court of Criminal Appeals extends to death, all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to USCAAF for review, and all cases reviewed by a Court of Criminal Appeals which, upon petition of the accused for good cause shown, USCAAF has granted review.

Beginning in 1983, the UCMJ provided for the possibility of additional review by the Supreme Court upon petition for a *writ of certiorari*. Congress limited this avenue of possible Supreme Court review to those cases in which USCAAF granted review and excluded those cases that USCAAF declined to hear. Article 67a, UCMJ; 28 U.S.C.§

1259. This limited avenue of Supreme Court review was a deliberate congressional decision. The Committee on Armed Services, in House Report No. 98-549 accompanying the Military Justice Act of 1983, stated:

> "The Court of Military Appeals (now USCAAF) regularly applies decisions of the Supreme Court in resolving appellate issues . . . in view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review (Emphasis added.) Cases in which the Court of Military Appeals declined to grant a petition for review are excluded,
> and the Supreme Court will have complete discretion to refuse to grant petitions for writs of certiorari. Control over government petitions will be exercised by the Solicitor General. This formulation has been endorsed by the Department of Justice as well as the Department of Defense. The committee is of the opinion that the impact on the docket of the Supreme Court would not be substantial, and the Court of Military Appeals will remain the primary source of judicial authority under the Uniform Code of Military Justice." (Emphasis added.)

The 1988 Supreme Court Case Selections Act (Public Law 100-352) substantially revised, or repealed, various sections of title 28, United States Code, in an effort to eliminate the demands upon the Supreme Court caused by existing mandatory Supreme Court jurisdiction. The intent was to give the Supreme Court more control over its docket by favoring discretionary review ("*certiorari*") jurisdiction. Significantly, in the face of these major revisions in the appellate avenues to the Supreme Court, the one section of title 28, United States Code, that Congress left unchanged was section 1259, which governs the Supreme Court's limited certiorari review of military justice cases. The decision not to modify section 1259 was not an oversight. The Committee on the Judiciary, in House Report No. 100-660 accompanying P. L. 100-352, "Review of Cases by the Supreme Court," stated, "Finally, many cases that now require the Supreme Court's attention can better be considered by the courts of appeals with plenary briefing and argument. This is particularly true in light of the new burdens recently placed on the Supreme Court by legislation authorizing a *writ of certiorari* to the Court of Military Appeals (now USCAAF), 97 Stat. 1393, and other expected increases in Supreme Court's workload." As further explanation of the Supreme Court's revised appellate jurisdiction, the Committee stated, "The Supreme Court - which of course sits at the apex of the Federal judicial system - can devote plenary consideration only to about 150 cases a year . . . Furthermore, the Committee agrees with the proposition that the Court's workload is at the saturation point. Elimination of the Court's mandatory jurisdiction, although not a panacea to the Court's problems, is a necessary step to relieving the Court's calendar crisis."

In support of the proposed changes in an earlier bill, in 1982 the Supreme Court justices urged the House Committee on the Judiciary, "Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by having to deal with cases that are of significance only to the individual litigants but of no 'wide public importance'." House Report No. 100-660 accompanying Public Law 100-352, "Review of Cases by the Supreme Court."

In 1989 and 1994, Congress passed the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189) and the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337), respectively. While addressing several matters that revised military appellate procedures, expanding the number of judges on the (then) Court of Military Appeals, and later designating the military appellate courts as the United States Court of Appeals for the Armed Forces and Courts of Criminal Appeals, Congress took no action to modify the statutory standards for Supreme Court review of military justice cases.

Before a court-martial of major significance is postured for possible review by the Supreme Court, the record of trial has received the benefit of several post-trial reviews. Following authentication by the military judge, the court-martial convening authority conducts a review in which findings of guilty may be dismissed, reduced to a lesser offense, or a rehearing directed, and the sentence is approved, disapproved, or modified. Thereafter, a Court of Criminal Appeals and the Court of Appeals for the Armed Forces, upon petition for review or upon mandatory review, consider any asserted errors. In the exercise of its intended oversight responsibility as the "primary source of judicial authority under the Uniform Code of Military Justice," and "regularly applying the decisions of the Supreme Court in resolving appellate issues," USCAAF is empowered, and relied upon, to determine which cases represent the requisite importance and possess the legal merit that warrants its review. Supreme Court review is dependent upon this merit-based analysis of the thousands of courts-martial that are addressed annually.

The Supreme Court may review any court-martial in which USCAAF granted petition for review under Article 67(a)(3), UCMJ, and any other cases not described by 28 U.S.C. § 1259(1) - (3) in which USCAAF granted relief. Neither avenue of review is reserved for only government petitions for a *writ of certiorari*.

A rigorous review and coordination process between the Departments of Defense and Justice is required before a petition for *writ of certiorari* involving a military court-martial case will be filed with the Supreme Court. When a Military Department's Government Appellate Division seeks review of a USCAAF decision by the Supreme Court, the requirements of Department of Defense Instruction 5030.7, "Coordination of Significant Litigation and Other Matters Involving the Department of Justice," first requires a comprehensive review and brief in support of the request, a summary of the views of the other Military Departments' Government Appellate Divisions and Judge

Advocates General, the recommendation of the Judge Advocate General of the Military Department concerned, an internal review by the Office of the General Counsel of the Department of Defense, and the General Counsel of the Department of Defense approval to transmit the request to the Office of the Solicitor General. Only after review and concurrence by the Office of the Solicitor General will a petition and accompanying briefs be prepared and filed. The same is not required by a military accused, who may file pro se or with military counsel assistance at no expense.

In obvious consideration of the Supreme Court's demanding docket, Congress has considered the current formulation for possible review by the Supreme Court to be appropriate. There is no apparent justification to modify the current review process, thereby increasing the burden upon the Supreme Court and counsel who would be required to address the myriad of matters that would be encountered with expanded certiorari jurisdiction.

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