111TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
111–547

EQUAL JUSTICE FOR OUR MILITARY ACT OF 2010

JULY 15, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 569]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (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, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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89–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Justice for Our Military Act of 2010".

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 AMENDMENTS.—

(1) TITLE 10.—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.".

(2) TIME FOR APPLICATION FOR WRIT OF CERTIORARI.—Section 2101(g) of title 28, United States Code, is amended to read as follows:

"(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces, or the decision of a Court of Criminal Appeals that the United States Court of Appeals for the Armed Forces refuses to grant a petition to review, shall be as prescribed by rules of the Supreme Court.".

SEC. 3. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b), the amendments made by this Act shall take effect upon the expiration of the 180-day period beginning on the date of the enactment of this Act and shall apply to any petition granted or denied by the United States Court of Appeals for the Armed Forces on or after that effective date.

(b) AUTHORITY TO PRESCRIBE RULES.—The authority of the Supreme Court to prescribe rules to carry out section 2101(g) of title 28, United States Code, as amended by section 2(b)(2) of this Act, shall take effect on the date of the enactment of this Act.

PURPOSE AND SUMMARY

The purpose of H.R. 569, the "Equal Justice for Our Military Act of 2010," is to give servicemembers greater opportunity to seek Supreme Court review of court-martial decisions. Under current law, the Supreme Court has limited jurisdiction to hear appeals of court-martial decisions from the military's highest court, the Court of Appeals for the Armed Forces (CAAF). Specifically, the Supreme Court lacks jurisdiction to hear appeals of 1) court-martial decisions that were declined review by the CAAF, 2) decisions by the CAAF that deny extraordinary relief, whether on direct appeal to the CAAF or in writ appeals from lower military appellate courts, and 3) some decisions by the CAAF to deny interlocutory appeals.

In all these cases, servicemembers have an inferior right to access the Supreme Court when compared to the government within the military justice system, civilians within the civilian court system, and even enemy combatants tried by military commissions. H.R. 569 seeks to correct this imbalance by amending 28 U.S.C. § 1259 to allow servicemembers whose appeals are denied review by the CAAF, or who were denied extraordinary relief or interlocutory appeals by the CAAF, the opportunity to seek Supreme Court review of these decisions by writ of certiorari.

BACKGROUND AND NEED FOR THE LEGISLATION

The Uniform Code of Military Justice (UCMJ), enacted in 1950,[1] is the foundation of the modern military justice system. Among other things, the UCMJ authorizes the court-martial as the primary mechanism to establish the guilt or innocence of servicemembers accused of a crime. The UCMJ requires that court-martial convictions that result in sentences that include dismissal of a commissioned officer, cadet, or midshipman; dishonorable or bad-conduct discharge; confinement of 1 year or longer; or death, must be reviewed by an intermediate Court of Criminal Appeals.[2] Servicemembers may seek further appellate review from the military's highest court, the Court of Appeals for the Armed Forces (CAAF).

The CAAF is required to hear all cases where a Court of Criminal Appeals affirmed a sentence of death,[3] and all cases the Judge Advocate General (JAG) certifies for review by the CAAF.[4] The CAAF has discretion to review all other appeals coming from the Courts of Criminal Appeals where appellants make a showing of good cause.[5] Further review by the Supreme Court of appellate CAAF decisions is limited by statute.

Section 1259 of Title 28 provides the Supreme Court with jurisdiction to grant writs of certiorari to review appeals from the CAAF in four specific circumstances: (1) decisions where a death sentence was affirmed by a Court of Criminal Appeals; (2) court-martials that the JAG had earlier certified for CAAF review; (3) court-martials in which the CAAF granted a petition for review; (4) and decisions by the CAAF to grant relief that do not already fall into one of the other categories.[6] This last category generally applies to writs for extraordinary relief and writ appeals from Courts of Criminal Appeals.

Pursuant to these limitations, the Supreme Court does not have jurisdiction to review court-martial decisions that the CAAF has declined to review. Similarly, the Supreme Court does not have jurisdiction to review decisions by the CAAF that deny relief on a petition for extraordinary relief or a writ appeal. These limitations preclude hundreds of servicemembers from seeking Supreme Court review every year. According to data provided by the Department of Defense, between fiscal years 2001 and 2005, 4125 petitions were filed seeking CAAF review. Of these, 635, or roughly 16%, were granted review, while the remainder, 3377, were either denied review or dismissed.[7] More current statistics provided by the Supreme Court indicate that between October 1, 2005 and August

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

[2] 10 U.S.C. § 866(b). Each service branch has its own Court of Criminal Appeals.

[3] 10 U.S.C. § 867(1).

[4] 10 U.S.C. § 867(2). The JAG's certification process is usually used to compel the CAAF to hear a case in which the United States lost at the Court of Criminal Appeals level. Kevin J. 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 (2002).

[5] 10 U.S.C. § 867(3).

[6] 29 U.S.C. § 1259(1)–(4).

[7] Letter from Daniel J. Dell' Orto, Acting General Counsel, U.S. Dept. of Defense, to Senator Carl Levin, Chairman, Comm. on the Armed Services, U.S. Senate (Jun. 27, 2008) (on file with Committee) [Hereinafter "Dell' Orto Letter"].

31, 2008, the CAAF denied 2274 petitions for review.[8] Coupled with a yearly average of 21 extraordinary relief petition denials, there are approximately 800 court-martial decisions per year in which servicemembers are denied the opportunity to seek certiorari from the Supreme Court.

The Committee has received testimony, letters, and documents from a number of sources decrying the injustice of these limitations on the Supreme Court's jurisdiction. The American Bar Association has noted that "this is a blatantly unfair procedural system stacked against the servicemember."[9] The District of Columbia Bar Association has stated that "our servicemembers deserve better than this disparity in our laws governing procedural due process. . . ."[10] And the Commission on Military Justice, chaired by Hon. Walter T. Cox, III, former Chief Judge of the Court of Appeals for the Armed Forces (1995–1999), concluded that the "CAAF serves as an unnecessary and unwise gatekeeper to Supreme Court review."[11] Other supporters of H.R. 569 include the Military Officers Association of America, the Fleet Reserve Association, the Jewish War Veteran's Association of America, and the National Association of Criminal Defense Lawyers.[12]

INEQUITIES OF CURRENT LIMITATIONS ON THE SUPREME COURT'S JURISDICTION

The Supreme Court's limited jurisdiction over UCMJ cases gives the government significant advantage over servicemembers in access to full appellate review within the current military justice system. In this regard, servicemembers have inferior rights not only when compared to the government, but when compared to civilians, and even to enemy combatants.

First, as discussed above, JAG certification automatically places a court-martial decision within the Supreme Court's jurisdiction. Thus, through certification, the government always has the power to compel the CAAF to review any court-martial decision it chooses, and can pursue certiorari in the Supreme Court if dissatisfied with the CAAF's decision. First, as discussed above, JAG certification automatically places a court-martial decision within the Supreme Court's jurisdiction. Thus, through certification, the government always has the power to compel the CAAF to review any court-mar-

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[8]Letter from Jeffrey P. Minear, Counselor to the Chief Justice, Supreme Court of the United States, to Hon. Henry C. "Hank" Johnson, Chairman, Subcommittee on Courts and Competition Policy, U.S. House of Representatives (June 18, 2009) (on file with Committee) [Hereinafter "Minear Letter"].

[9]H.R. 569, the "Equal Justice for Our Military Act of 2009," Hearing Before the Subcomm. on Courts and Competition Policy, Comm. on the Judiciary, 111th Cong. 4 (2009) (written statement of H. Thomas Wells, Jr., President, American Bar Association) [Hereinafter "ABA Testimony"].

[10]Letter from Ralph P. Albrecht, President, Bar Association of the District of Columbia, to Representative Susan Davis, U.S. House of Representatives (June 5, 2009) (on file with Committee).

[11]Report of the Commission on Military Justice, 7 (Oct. 2009). This commission, often referred to as the Cox Commission, named after its chair, Hon. Walter T. Cox, III, was formed in November 2000 by the National Institute of Military Justice to identify and assess potential improvements to the UCMJ.

[12]During the full Committee mark-up of H.R. 569, Members of the Minority charged that the bill was introduced primarily for the benefit of a single individual, former Navy Officer Norbert Basil MacLean, III. In fact, a number of individuals and organizations have taken note of the inherent injustice of the current law. Additionally, it should be pointed out that H.R. 569 applies only to court-martials that were initiated on or after the effective date of the Act, which thereby forecloses any personal benefit to Mr. MacLean, whose court-martial was concluded well before this legislation was introduced.

tial decision it chooses, and can pursue certiorari in the Supreme Court if dissatisfied with the CAAF's decision. In contrast, most cases appealed by servicemembers to the CAAF must rely on the CAAF to exercise its discretionary review authority to review the case. If the CAAF declines to exercise its discretion to review, that decision is not reviewable and servicemembers have no direct appellate rights.

Second, virtually all petitions for extraordinary relief or writ appeals are filed by accused servicemembers asserting constitutional rights. For these petitions, a decision granting relief benefits the servicemember, and a decision denying relief upholds the government's position against the servicemember's assertion of those rights. So the fact that the Supreme Court has jurisdiction to review petitions for extraordinary relief or writ appeals when relief is granted by the CAAF, but not when relief is denied by the CAAF, further unfairly tips the scales of justice in favor of the government and against the servicemember.

In contrast with servicemembers tried in military courts, civilian criminal defendants in either the Federal or State court systems are not denied the opportunity to appeal to the Supreme Court if lower appellate courts deny relief, or decline review. In the civilian context, criminal defendants tried in the Federal court system have a right of appeal to Federal appellate courts,[13] and if they lose on appeal, they have a right to petition the Supreme Court for further review.[14] In addition, criminal defendants tried in State courts generally have the right to appeal to an intermediate appellate court and may petition their highest State court for further review.[15] If denied review by their highest State court, criminal defendants advancing a defense based on a constitutional or other Federal question may petition the Supreme Court for further review.[16]

Ironically, even the rudimentary due process given enemy combatants is denied the servicemembers who are defending our nation against them. Under the Military Commissions Act, the due process rights accorded alien enemy combatants specifically include the right to appeal to the Supreme Court if lower courts deny relief or review.[17]

IMPACT ON MILITARY READINESS

The Committee rejects assertions that this legislation would have an adverse impact on the military's morale or discipline. It is clear that the existing limitations on the Supreme Court's jurisdiction have no basis in military necessity. When Supreme Court jurisdiction to review appeals was added to the UCMJ by the Military Justice Act of 1983, there was never any mention that the scope of jurisdiction was limited for reasons of military necessity. In fact, the report accompanying the 1983 bill specifies that the limitations on the Supreme Court's jurisdiction embodied in 28 U.S.C. § 1259 were

[13] 28 U.S.C. § 1291.

[14] 28 U.S.C. § 1254. While the Supreme Court has ruled there is no constitutional right to appeal, the right to appeal has been established by statute. Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) (citing McKane v. Durston, 153 U.S. 684, 687–88 (1894)).

[15] See generally, Daniel E. Hall, Criminal Law and Procedure, 525–526 (5th Ed. 2009). See also, Griffin v. Illinois, 351 U.S. 12, 18 (1956)("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.")

[16] 28 U.S.C. § 1257.

[17] 10 U.S.C. § 950g(d).

solely intended to minimize the potential impact on the Supreme Court's docket.[18] The Committee report provided no military justification for the limitations and stated that despite granting the Supreme Court jurisdiction over some court-martial decisions, the military court system would "remain the primary source of judicial authority under the Uniform Code of Military Justice."[19] The Committee notes that H.R. 569 similarly does not overturn, amend, or change in any way the deference the Supreme Court has historically shown to military laws and regulations.

Nor is there any evidence that the original limited grant of Supreme Court jurisdiction over court martial decisions made by the Military Justice Act of 1983 had any discernable effect on military readiness. In the years following enactment, there was no evidence of damage to the military's morale, discipline, or readiness. No credible evidence has been presented to suggest that augmenting Supreme Court jurisdiction in this respect would create a different result.

In conclusion, the Committee does not believe H.R. 569 will have any negative impact on the good order and discipline of the military. This conclusion is shared by a number of experts in the field, including General John D. Alternburg, former Deputy Judge Advocate for the Army, who served as an expert witness at the Subcommittee's hearing on H.R. 569. General Alternburg, who opposes the bill on other grounds, testified that "I disassociate myself with anyone who has stated that to give this right to soldiers . . . would, in some way, undermine discipline or undermine authority or lower discipline or harm the military . . . [H.R. 569] would in no way harm the military."[20]

BURDENS AND COSTS ASSOCIATED WITH THE ACT

The Committee has explored the potential burden placed on military and other Federal legal resources by enactment of this legislation, and concludes that any additional burden or associated costs would be minimal.

In a 2008 letter to Congress, the Department of Defense raised concerns that passage of S. 2052, a similar bill, would "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."[21] However, in evaluating the current legislation, the Congressional Budget Office (CBO) stated that the bill would not affect direct spending or revenues, that it would cost less than $1 million each year to administer, and that only a small portion of the individuals who would be eligible to seek appellate review by the Supreme Court would do so. This conclusion is supported by the available evidence.

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[18]H.R. Rep. No. 98–549, at 16–17 ("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.") The Committee notes that the Supreme Court currently hears approximately one-half the number of cases that it heard in 1983.

[19]Id. at 17.

[20]H.R. 569, the "Equal Justice for Our Military Act of 2009," Hearing Before the Subcomm. on Courts and Competition Policy, Comm. on the Judiciary, 111th Cong. 39 (2009) (statement of General John D. Altenburg, former Deputy Judge Advocate for the Army).

[21]Dell' Orto Letter, supra note 7.

Experience with the current limitations to Supreme Court jurisdiction has demonstrated that most servicemembers eligible to petition for certiorari do not do so. According to a 2009 letter to Congress from Jeffrey P. Minear, Counselor to the Chief Justice of the United States Supreme Court, "[h]istorical records indicate that from ten to fifteen percent of the individuals whose convictions and sentences are upheld by the CAAF after full discretionary review have filed a petition for a writ of certiorari in the Supreme Court." [22] Extrapolating from this experience, Mr. Minear indicated that providing expanded Supreme Court review of court-martial decisions pursuant to H.R. 569 would result in approximately 120 additional petitions for certiorari each year.[23] Even lower estimates of up to 88 petitions per year were provided in the expert witness testimony of Colonel Dwight Sullivan received by the Subcommittee during the legislative hearing on H.R. 569.[24] This estimate was further endorsed in the written testimony of the American Bar Association.[25]

For court-martial decisions that are appealed, prudent limitations already established by the Supreme Court will limit when counsel may aid servicemembers in filing petitions for certiorari. In *Austin v. United States,* the Supreme Court held that if counsel does not believe there is a non-frivolous basis for appeal in a case, counsel must advise his or her client of the right to file a certiorari petition, but counsel may not file the petition on the client's behalf.[26] This prohibition on filing frivolous certiorari petitions applies equally to all counsel permitted to practice before the Supreme Court, whether they are appointed military counsel provided to servicemembers free of charge, or private counsel hired at servicemembers' expense. This prohibition serves a gatekeeping function that will limit petitions filed by counsel to only non-frivolous issues, thereby also limiting the burden and costs incurred by military legal resources and the Supreme Court.

When counsel has determined that there is a non-frivolous issue upon which to base a certiorari petition to the Supreme Court, the Solicitor General, with the support of the JAG, is responsible for responding on behalf of the government to servicemembers' petitions for certiorari. However, it is common practice for the Solicitor General to waive the government's right to respond until, and unless, the Supreme Court requests a response. As such, the costs borne by the Department of Justice and military legal resources in responding to writs of certiorari will generally be limited to those few cases the Supreme Court deems worthy of further review.

Finally, servicemembers who are without counsel but still interested in pursuing a certiorari petition to the Supreme Court may represent themselves *pro se* before the Supreme Court. While few will likely pursue appeal without counsel, those that do will most likely file certiorari petitions in *forma pauperis,* given the limited means of most servicemembers. There were 6,142 in *forma*

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[22]Minear Letter, supra note 8.
[23]Id.
[24]H.R. 569, the "Equal Justice for Our Military Act of 2009," Hearing Before the Subcomm. on Courts and Competition Policy, Comm. on the Judiciary, 111th Cong. 30 (2009) (statement of Dwight Sullivan, Civilian Appellate Defense Counsel, United States Air Force Appellate Defense Division).
[25]ABA Testimony, supra note 9.
[26]Austin v. United States, 513 U.S. 5, 8 (1994).

pauperis filings in the Supreme Court's 2008–2009 term.[27] It is unlikely that many of the additional 800 court-martial decisions made eligible for appeal to the Supreme Court per year by the Act will in fact lead to in *forma pauperis* filings. Even if a substantial portion do, they would represent a small fraction of total filings, and the Supreme Court could exercise its discretion to decline any such petitions, as is currently the case.

CONCLUSION

The Committee finds the current limitations in the Supreme Court's jurisdiction to hear court-martial decisions by writ of certiorari, as provided in 28 U.S.C. 1259(3) and (4), unfair to United States servicemembers. In the absence of a compelling military justification, and in light of the likely minimal burden to military and other government legal resources, the Committee finds no justification for maintaining these limitations. Accordingly, the Committee concludes that decisions by the CAAF to decline review of court-martial decisions, and to deny relief for extraordinary writs or writ appeals, should be appealable to the Supreme Court by writ of certiorari.

HEARINGS

The Committee's Subcommittee on Courts and Competition Policy held 1 day of hearings on H.R. 569, on June 11, 2009. Testimony was received from the Honorable Susan Davis, Member of Congress, 53rd District, State of California; Major General (Ret.) John D. Altenburg, Jr., United States Army, and of Counsel, Greenberg Traurig, LLP; and Colonel Dwight H. Sullivan, United States Marine Corps Reserve, and a Senior Civilian Appellate Defense Counsel, Air Force Appellate Defense Division. Additionally, a statement was submitted by Mr. Thomas H. Wells, Jr., President, American Bar Association.

COMMITTEE CONSIDERATION

On July 30, 2009, the Subcommittee on Courts and Competition Policy met in open session and ordered the bill H.R. 569 favorably reported, with an amendment, by voice vote, a quorum being present. On January 27, 2010, the Committee met in open session and ordered the bill H.R. 569 favorably reported without amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 569.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings

[27] John G. Roberts, Chief Justice, United States Supreme Court, 2009 Year-End Report on the Federal Judiciary 1 (Dec. 31, 2009), http://www.supremecourtus.gov/publicinfo/year-end/2009year-endreport.pdf.

and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 569, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 2, 2010.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 569, the "Equal Justice for Our Military Act of 2010."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 569—Equal Justice for Our Military Act of 2010.

H.R. 569 would allow the U.S. Supreme Court to review certain cases involving court-martialed servicemembers facing dismissal, discharge, or imprisonment. Under the bill, such servicemembers could file a petition for Supreme Court review even if the Court of Appeals for the Armed Forces (CAAF) denied review of their cases. Under current law, Supreme Court review is limited to cases the CAAF has reviewed or has granted a petition for extraordinary relief or cases with a sentence of death.

Based on information provided by the Department of Defense (DoD) and the Supreme Court, CBO estimates that implementing the bill would increase the workload of DoD attorneys and Supreme Court clerks and would cost less than $1 million each year, assuming the availability of appropriated funds. We expect that the bill would make several hundred servicemembers eligible to file petitions each year, but that only a small portion of those individuals would pursue review by the Supreme Court (based on the experience of individuals whose cases currently qualify for Supreme

Court review). CBO cannot predict whether the Supreme Court would grant review of any particular petition. If the Supreme Court agreed to review any petitions, DoD would probably spend no more than $1 million in any year from appropriated funds to defend those cases. (Any such amounts would depend on the number and complexity of such cases.) Enacting H.R. 569 would not affect direct spending or revenues.

H.R. 569 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 569 will give the Supreme Court jurisdiction to hear appeals of court-martial decisions that were declined review by the Court of Appeals for the Armed Forces, and decisions by the Court of Appeals for the Armed Forces that deny extraordinary relief or an interlocutory appeal.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 569 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Equal Justice for Our Military Act of 2010."

Sec. 2. Certiorari to the United States Court of Appeals for the Armed Forces. Section 2(a) amends paragraphs (3) and (4) of 28 U.S.C. § 1259 by adding "or denied" to the text of each paragraph. This effectively grants the Supreme Court jurisdiction, by writ of certiorari, over any case that the Court of Appeals for the Armed Forces denied review of, as well as any decision by the Court of Appeals for the Armed Forces that denied relief, including relief to extraordinary writs and writ appeals.

Section 2(b) strikes current language in 10 U.S.C. § 867a(a) that expressly denies the Supreme Court jurisdiction to review by writ of certiorari any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review. Section 2(b) also amends 28 U.S.C. § 2101(g) to grant the Supreme Court authority to prescribe rules regarding the timeliness of an application for a writ of certiorari to review a decision by a Court of Criminal Ap-

peals that the Court of Appeals for the Armed Forces refused to review.

Sec. 3. Effective Date. Section 3(a) provides that amendments made by the Act shall take effect 180-days after enactment of the Act.

Section 3(b) provides that the grant of authority to the Supreme Court to make amendments to the rules governing the timeliness of writ applications takes effect on the date of enactment of the Act. This will in effect give the Supreme Court 180 days to promulgate rules relating to the timeliness of writ applications stemming from a decision by a Court of Criminal Appeals that the Court of Appeals for the Armed Forces refused to review.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 81—SUPREME COURT

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§ 1259. Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) * * *

* * * * * * *

(3) Cases in which the Court of Appeals for the Armed Forces granted *or denied* a petition for review under section 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 *or denied* relief.

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PART V—PROCEDURE

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CHAPTER 133—REVIEW-MISCELLANEOUS PROVISIONS

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§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) * * *

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[(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.]

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces, or the decision of a Court of Criminal Appeals that the United States Court of Appeals for the Armed Forces refuses to grant a petition to review, shall be as prescribed by rules of the Supreme Court.

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SECTION 867a OF TITLE 10, UNITED STATES CODE

§ 867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. [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.]

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DISSENTING VIEWS

H.R. 569 proposes to amend the federal judicial code to allow for expanded review by writ of certiorari certain cases the U.S. Court of Appeals for the Armed Forces (CAAF) has determined do not merit formal review or extraordinary relief.

In support of the bill, the sponsor testified before the House Judiciary Committee's Subcommittee on Courts and Competition Policy that "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."

If true, it would be an outrage. If accurate, then we would support tailored amendments to the federal judicial code to provide certiorari review in appropriate instances.

But the simple fact of the matter is this statement is misleading. The U.S. Supreme Court has possessed jurisdiction to review CAAF decisions by writ of certiorari for nearly three decades. The authority[1] is not absolute and is prescribed by statute, extending only to

[1] The Counselor to the Chief Justice of the United States explained the appellate review authority of the Court as well as the expansions proposed by H.R. 569 in a letter to the Chairman and Ranking Member of the Subcommittee on Courts and Competition Policy dated June 18, 2009 :

> 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 imposes 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,

the cases for which the CAAF has granted review and excluding those the CAAF has determined do not merit consideration.[2]

The legislative history for current law unambiguously demonstrates that this limited avenue of Supreme Court review was not an oversight but the result of deliberate congressional design. The Committee on Armed Services, in House Report No. 98–549, which accompanied the Military Justice Act of 1983, explained:

"The Court of Military Appeals [now CAAF] 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 [CAAF] 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 [CAAF] will remain the primary source of judicial authority under the Uniform Code of Military Justice." (Emphasis added.)

By enacting the Military Justice Act of 1983, Congress sought to achieve several objectives. Among them was a desire to ensure there was a mechanism to appeal decisions of the highest court in the military justice system on matters that are of the highest priority, those that affect constitutional law. Writing in 1982, the Supreme Court justices urged the House Committee on the Judiciary to consider, "Because the volume of complex and difficult cases continue 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'." [3]

History demonstrates Congress intended to provide an appellate system that integrated the Office of the Solicitor General, the Department of Justice and the Department of Defense in an elaborate process of reviewing and responding to appeals from the CAAF. In recognition of the operation of this system, which has been in effect for nearly three decades with few apparent complaints [4] or defects,

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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 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.

[2] Article 67a, Uniform Code of Military Justice (hereinafter abbreviated to UCMJ); 28 U.S.C. § 1259.

[3] House Report No. 100–660 accompanying Public Law 100–352, "Review of Cases by the Supreme Court."

[4] The sponsor of H.R. 569 and earlier versions of this legislation from prior Congresses has offered this explanation for why she has repeatedly advocated this measure:

"[t]his issue was brought to my attention of my office years ago by a then-constituent of mine, a former servicemember 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 servicemembers and veterans that fall under the jurisdiction of those courts." (Emphasis added.)

Continued

the views of the Executive Branch and the Supreme Court with respect to proposed changes to the law have consistently been solicited by the Committee leadership and staff. Indeed, the Armed Services Committees of the House of Representatives and the Senate have also routinely elicited the views of the relevant departments.

In prior administrations, the Department of Defense, in particular, was forthright and forthcoming in expressing strong opposition to the enactment of this type of legislation. Regrettably, the current administration has forestalled attempts to discern its position. It has refused to cooperate with the Committee on the Judiciary's oversight into this matter as well as other matters that affect the rights of servicemembers.

This unwillingness to engage in the legislative process and lack of transparency denies the Members of the Committee the opportunity to know whether the position of the present administration is consistent with or different from that of prior administrations. It also denies the Members of the Committee any opportunity to review or consider the validity of any arguments that might underlie the position of the present administration. In the absence of any affirmative statement or justification, Members might reasonably conclude the position of the current administration and the Department of Defense is unchanged from that which has been clearly and consistently stated in the recent past.

The Department of Defense, which is the department that will be most directly affected by the enactment of H.R. 569, has regularly and strenuously objected to the measure. Among the concerns and objections we note with respect to this and prior versions of this legislation are:

- First, it will likely greatly expand the number of cases added to the already burdensome workload, and length of time taken, to conduct appellate reviews by the Service Courts of Criminal Appeals. More cases means an increase in the number of legal briefs and responses required, as well as the oral argument sessions and demands placed on appellate defense and government counsel. At the trial level, this legislation will likely require more verbatim records of the trial in support of the expanded mandatory appellate review process. As such, this may take longer to transcribe and because of the increased length, increase expenses and administrative costs.
- Second, military accused may be negatively impacted when seeking to negotiate a pretrial agreement. The government might no longer be as willing or interested in placing a "cap" on the possible sentence, while still allowing the accused to plead not guilty to one or more accompanying charges to that which the accused is willing to plead guilty. Accused typi-

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The noble description aside, the then-constituent is identified as Norbert Basil MacLean, III. After serving in the U.S. Navy for 5 years, Mr. MacLean pleaded guilty in October 1992 to writing bad checks on his personal account and was convicted by a general court martial. A dual Australian-U.S. citizen, he subsequently attempted to collaterally attack his conviction and to set aside his plea bargain, which had permitted his release from confinement for time served. In publications, he merely describes himself as having "served on active duty in the U.S. Navy from 1989–1994 and . . . an advocate for servicemembers' rights."

cally want the benefit of the pretrial agreement while also preserving appellate issues to those charges he/she wishes to contest. Sometimes, the government is willing to do this with a negotiated sentence "cap" that would not allow for an Article 66, UCMJ, appeal. If the case would, nonetheless, require a verbatim record and an automatic appellate review by the Service Court of Criminal Appeals, the prosecution might be less likely to negotiate with the accused and place a "cap" on the possible punishment in the case—this would likely inure to the accused's detriment.

- Third, no empirical support or persuasive rationale has been provided to justify such a significant change in the military's mandatory appellate review process, where free defense counsel and appellate resources are afforded an accused without regard to indigence—unlike the civilian criminal appellate system. Any reports that this proposal is necessary as to "remedy a troubling gap in military appellate jurisdiction that makes it impossible for some convicted military members to seek review of legal error" should provide irrebutable support for the conclusion that there is a "gap" in appropriate review of the case and that any gap is sufficiently "troubling" to overhaul military appellate review with its attendant costs and requirements. To maintain there would be no additional costs associated with expanding mandatory appellate court review (as practiced within the military) overlooks the obvious impact of more cases, with more free counsel and administrative procedures applicable to each case, and the diversion of government resources from existing cases. Very rarely is a request to "do more, with the same or less", less costly or without a real need for increased manpower or resources.
- Fourth, there are already multiple avenues for redress for servicemen who believe they have been wronged in the military justice system. Military members whose court-martial conviction does not now qualify for automatic review by the Court of Criminal Appeals for the relevant military service under Article 66, UCMJ, can already have their cases reviewed under Article 69, UCMJ. The Boards of Correction of Military Records can entertain a request for review, but for clemency purposes (e.g., substituting an administrative discharge for a punitive discharge, or other clemency modification of the sentence), but the Boards do not have authority to overturn courts-martial convictions. Within a period of 2 years after the court-martial convening authority approves a court-martial sentence, the accused can petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court, under Article 73, UCMJ.
- Fifth, all general courts-martial not subject to review under Article 66 are already subjected to mandatory review under 69(a) in the Office of The Judge Advocate General.
- Sixth, all special courts-martial not subject to review under Article 66 are subject to mandatory review by a judge advo-

cate under Article 64 and military members are free to apply for review in the office of their respective Judge Advocate General under Article 69(b), if not satisfied with the Article 64 review. In each instance, the case is reviewed for legal sufficiency and sentence appropriateness. This system has served the military well since the inception of the UCMJ and neither evidence presented, if any, nor actual experience suggest that the system has failed or that changing it to merely "appear" more like a civilian system would actually improve either the system or the lot of military members. In addition, military members dissatisfied with any result under either Article 64 or 69, as stated previously, are free to submit their case for review by their respective Boards of Correction of Military Records which has the power to disapprove or modify the sentence adjudged at a court-martial.

- Finally, a servicemember may always pursue a collateral attack upon a court-martial conviction in federal district court if there is a legitimate basis for doing so.

The hollowness of proponents' claims that H.R. 569 is urgently needed to address a defect in the military justice system was, ironically, illustrated by a point that was made in the testimony of Dwight Sullivan, an advocate for the bill. He made clear that its enactment, in practice, will have a negligible impact on the actual number of military petitions granted review by the Supreme Court. In his own words, Sullivan noted:

> "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." (Emphasis added.)

The critical point to note is the concession that the CAAF already performs its "gatekeeper" role well and that Sullivan has no reason to expect it to not do so in the future. It grants review to those petitions of convicted servicemembers that contain meritorious issues and denies review and extraordinary relief to those that are not, in his words, "cert-worthy."

Sullivan has also observed that 3,473 petitions had been denied review by CAAF over the past 5 years. He conceded, "[m]ost of those cases, no doubt, contained no important issues. But went on to add, "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." (Emphasis added.)

In an effort to compromise and permit direct review of constitutional issues by the Supreme Court, the minority proposed to agree to an amendment to expand certiorari jurisdiction in this class of cases, which are of the greatest significance to the accused and the public. The bill sponsor is reported to have rejected the offer to compromise.

It is indisputable that there are differences between the civilian criminal justice system and that of the military. The myopic focus on one difference without a thorough and proper examination of how a given proposed change will likely affect the entirety of the

military justice system does a disservice to our servicemembers and the legislative process.

Proponents have yet to produce any persuasive evidence that servicemembers have been adversely affected by the current structure of the military justice system. In the absence of actual evidence and a thoughtful review, examination and provision of appropriate resources to the departments that will be affected as well as the Office of the Solicitor General, we must withhold support for what amounts to an "unfunded mandate" on these entities.

Commenting on one of the salient differences between the civilian and military systems, Major General John D. Altenburg, Jr. US Army (Retired), explained:

> "the proposed bill would not merely offer the individual appellant an enhanced right but would also impose an obligation on the Armed Forces to provide the resources necessary to ensure that the ability to petition from a denial is meaningful. If the bill were truly intended to make servicemembers equal to civilians it would also need to deprive the same servicemembers of the right to assigned counsel and no cost litigation. Civilians must shoulder the costs of their collateral attacks unless they are able to establish their indigence. The last thing the military needs is to invite application of these civilian principles to the practice of military criminal law."

MG Altenburg added:

> "Because this bill is not necessary to address any actual injustice or shortcoming in the system, it is important that Congress assess the need for greater resources to the military department Judge Advocate General's Corps. The Congress would then be better situated to ensure that when and if the military departments are required to perform this more demanding mission the Congress will also provide them with the resources to accomplish that mission."

MG Altenburg also noted that he:

> "oppose[s] 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." (Emphasis added.)

For the foregoing reasons, we must oppose the changes proposed by this legislation to the operation of the administration of the military justice system in pursuit of what appears to be an "illusory" reform.

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