STATEMENT BY

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SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
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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

jurisdiction where pursued, military members can reach the Supreme Court by collateral attack the same way civilians can. The healthy opportunity to bring a collateral attack in our nation's courts is indicative of the reasonable judgment made by many litigants – that their chances upon collateral attack are probably better than any chance they may have persuading the Supreme Court to grant a petition for writ of certiorari.

The problem with providing expanded opportunity directly to petition the Supreme Court is that 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 this 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.

The actual impact of this legislation would be minimal if it generated only a few more petitions to the Supreme Court each year. However, it is impossible to forecast the actual impact and it could easily generate significantly increased demands on the Armed Forces' already limited resources. Because this bill is not necessary to address any actual injustice or shortcoming in the system, it is important that the Congress assess the potential need for greater resources to the military department Judge Advocates 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.

In addition, as passage of this bill would postpone finality of decisions in the great majority of cases decided by the Court of Appeals for the Armed Forces, Congress may wish to consider whether or not there will be a need to reconcile at least Article 71 of the UCMJ (Execution of sentence; suspension of sentence) with any effort to expand opportunity to directly petition the Supreme Court.