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Testimony of Dwight H. Sullivan

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

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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

[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.

[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.