



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 682-1780

Statement of

H. THOMAS WELLS, JR.
President

on behalf of the

AMERICAN BAR ASSOCIATION

for the record of the hearing

on

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

before the

Subcommittee on Courts and Competition Policy

Committee on the Judiciary

of the

U.S. House of Representatives

June 11, 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 inviting me to testify before this subcommittee in person; I regret that my schedule prevented me from accommodating the rescheduled date of this important hearing. I am grateful for the opportunity to submit this written statement for the hearing record 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-martial 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

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).

law arising from trials by courts-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 “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

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

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 martial 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

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:

- For the period October 1, 2007 to September 30, 2008, the latest period for which an Annual Report is available, 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.

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 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.
- Similarly, accused service members only have an opportunity to petition the CAAF for discretionary review of denials of relief in both extraordinary writ and writ-appeal cases. If denied relief by the CAAF, the service member is

⁸ *Supra*, note 4.

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

statutorily denied the right to seek a writ of certiorari to the Supreme Court. In contrast, the government has the right of direct appeal to the Supreme Court whenever a service member is granted extraordinary relief.

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.

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 lose 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. 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

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).

uniform. To do otherwise demeans their service and denigrates the democratic ideals for which they risk their lives.

A likely argument that will be mustered against the legislation is that it will be costly. While enactment of H.R. 569 would not result in any direct government spending, some additional legal expenses will be incurred by the military if service members file petitions for certiorari or if petitions are accepted for review by the Supreme Court. However, we strongly disagree with a 2008 Congressional Budget Office (CBO) cost estimate that enactment of such a bill would cost about \$1 million a year (more if the Supreme Court granted certiorari), despite its statement that the estimate is “based on information provided by the Department of Defense...and the American Bar Association.”¹¹

We believe that the CBO cost estimate is erroneously predicated on an assumption that several hundred cases will be filed, when in fact the number of petitions that will be prompted by enactment of this legislation is likely to be minimal, based on an extrapolation of past patterns.¹² For the small number of service members who will attempt to file a petition and who qualify for the assistance of the Defense Appellate Division, the resulting burden on military resources will be limited by three factors: (1) some service members will not request the legal assistance of the Defense Appellate Division, as happened in eight of the 20 certiorari petitions filed by service members in 2007; (2) a request for help from the Defense Appellate Division will be denied if military appellate defense counsel believe that the appeal is based on frivolous claims, an outcome mandated by 1994 Supreme Court case;¹³ and (3) while the Defense Appellate

¹¹ The ABA information in question, obtained from the ABA’s website, was a resolution and explanatory report prepared by the ABA Standing Committee on Federal Judicial Improvements. The resolution was adopted as policy by the ABA House of Delegates in August 2006. (The accompanying explanatory report does not constitute official policy.) The resolution provides the basis for our support for H.R. 569. Both are available at: <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredsixteen.doc>.

In our estimate, neither the resolution nor the report contains data supporting the CBO estimate. Following publication of the cost estimate, the ABA conveyed this view to CBO staff and expressed concern that the statement creates the false impression that the ABA supports the CBO cost estimate.

¹² Dwight Sullivan, who testified in person on June 11 before this subcommittee, provided a detailed and credible analysis of the probable increase in certiorari filings if this legislation is enacted.

Division offers this service now, it is important to remember that the government is not constitutionally required to provide counsel for military defendants who wish to petition the U.S. Supreme Court for review.¹⁴

If counsel is not provided by the government, the cost of filing a petition is borne solely by the defendant. Many petitions for certiorari filed by defendants *pro se* are not even answered by the government; they are summarily denied by the Court. Thus, in many cases in which service members seek review, there will be no response required by the government. Instead, the government will wait and only file if 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 alter the Supreme Court's workload.

We, of course, cannot say that there will be no costs associated with expanding service members' right to seek Supreme Court access. But 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 provides the impetus for swift action on H.R. 569 and that the 111th Congress succeeds in passing this much needed remedial legislation this session. Thank you for allowing me to share the views of the ABA with your subcommittee.

¹³ *Austin v. Texas*, 513 U.S. (1994).

¹⁴ *Ross v. Moffitt*, 417 U.S. 600 (1974). The Supreme Court has held that a defendant has no Sixth Amendment right to counsel with respect to discretionary petitions for review.