Unequal Justice: Why Congress Should Expand the Supreme Court's Jurisdiction to Review the Courts-Martial System

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INTRODUCTION

In 2018, the Supreme Court held that it has appellate jurisdiction to review decisions of the Court of Appeals for the Armed Forces (CAAF) under 28 U.S.C. §1259.[1] However, CAAF is the final court atop the "courts-martial system"[2] and §1259 limits Supreme Court review of courts-martial cases to those where CAAF has already reviewed or granted some relief.[3] In fiscal year 2020, CAAF granted review in just 10.9% of cases where it received a petition.[4] Moreover, the U.S. government has taken the position that Supreme Court review is confined to the specific *issue* CAAF decided instead of the entire *case*.[5] Thus, the Supreme Court can only hear a fraction of the issues present in the 10.9% of cases the Supreme Court is permitted to hear.

This article argues that service members should have a right to appeal to the Supreme Court even if CAAF denies a petition for review. The following three reasons underlie this argument. First, service members currently have inferior access to the Supreme Court than do civilians in other jurisdictions in the United States. Criminal defendants in federal court have a right to appeal to the Supreme Court,[6] and defendants in state courts can appeal their constitutional or federal question to the nation's highest court when a state court of last resort denies review.[7] Even suspected enemy combatants detained at Guantanamo and tried in military commissions have a statutory right to appeal to the Supreme Court.[8] Second, CAAF traditionally reviews cases where the Supreme Court is unlikely to grant certiorari. CAAF overwhelmingly focuses on correcting

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[1] Ortiz v. United States, 138 S. Ct. 2165, 2170 (2018).

[2] *Id.*

[3] *See* 28 U.S.C. § 1259.

[4] Report of the United States Court of Appeals for the Armed Forces: Oct. 1, 2019 to Sept. 30, 2020, at 7-8 (2020), https://perma.cc/Y8AT-M67M. CAAF granted 41 petitions for review and denied 336.

[5] *See* Brief for the United States in Opposition at 8, Stevenson v. United States, 555 U.S. 816 (2008) (No. 07-1397), 2008 WL 3199722, at *8; Eugene R. Fidell & Stephen I. Vladeck, *Second Class Justice in the Military*, NY TIMES, Mar. 20, 2019, https://perma.cc/M7X6-NF5V.

[6] 28 U.S.C. § 1254.

[7] *See* 28 U.S.C. § 1257; *see also* Eugene Fidell, Brenner Fissell & Philip Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 Yale L.J. Forum __, 9-10 (forthcoming 2021) (discussing state and territory criminal defendant access to the Supreme Court).

[8] *See* 10 U.S.C. § 950g(e); JENNIFER K. ELSEA, CONG. RSCH. SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 53-54 (2013) (comparing general courts-martial and the Military Commissions Act of 2009), https://perma.cc/52ZM-YQWZ; Fidell & Vladeck, *supra* note 5.

errors in individual cases instead of deciding novel questions of law.[9] Since the Supreme Court is unlikely to review an error correction case, this forecloses Supreme Court review for many of the cases that CAAF does grant. Finally, enhanced Supreme Court review will not adversely affect military readiness. An accused in a court-martial today has "virtually the same" procedural protections afforded to an accused in a civilian court,[10] and an all-civilian Supreme Court reviewing a case will not prejudice good order and discipline any more than CAAF review, a court also composed of all civilians.[11]

This article will proceed as follows. Part I will address the relevant history of the military justice system and the current appellate review process for a court-martial conviction. Part II will address the limitations on a service member's ability to petition the Supreme Court. This section will also compare a court-martial defendant's access to the Supreme Court with other criminal defendants in the United States. Part III will argue for expanded service member access to the Supreme Court and discuss objections to this conclusion. This section will conclude that the Equal Justice for Our Military Act, an amendment to 28 U.S.C. § 1259, is the appropriate vehicle to expand service member access.

I. HISTORY OF THE MILITARY JUSTICE SYSTEM

A. Early History and the British System

Military courts-martial have been around for centuries. U.S. military practice is largely derived from England, but modern day courts-martial can trace their lineage to Roman times where a range of offenses still on the books today such as mutiny carried familiar punishments, including dishonorable discharge or death.[12] Evolving from Roman practice, German chief commanders summarily administered military justice relying on unwritten customary law, primarily for offenses related to combat – like losing a shield in battle.[13] As the first written laws developed in Europe in the middle ages, civil judges served as military commanders leading to a relatively indistinguishable blend of civil and military jurisdictions.[14] As a result, a distinct military judicial system did not develop until relatively recently.[15]

Early British military laws derived from a combination of these traditional practices. The first English courts-martial developed in the 13th century in the Court of Chivalry with the Lord High

[9] Rodrigo M. Caruço, *In Order to Form A More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success As A Court of Last Resort*, 41 VT. L. REV. 71, 75 (2016); *see also* Fidell &Vladeck, *supra* note 5.
[10] *Ortiz*, 138 S. Ct. at 2174.
[11] *See* 10 U.S.C. § 942.
[12] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17 (2d ed. 1920); DAVID SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1–4 (9th ed. 2015).
[13] WINTHROP, *supra* note 12, at 12.
[14] *Id.* at 18.
[15] *Id.* at 45.

Constable and Earl Marshal serving as judges.[16] These courts blended civil and military jurisdiction to cover "all matters touching honor and arms" including civil crimes and contract claims.[17] By the early 16th century, however, the jurisdiction of these courts was severely curtailed and the tribunal was rarely used.[18] Military justice was then dispensed by royal prerogative according to both the articles of war issued by the King and the customs of war.[19] These courts convened mostly through martial courts or counsels held pursuant to articles of war, courts constructed through the issuance of royal commissions, or military courts authorized by clauses in the commissions of high-ranking commanders.[20] These courts had extensive plenary power not subject to review, but their jurisdiction was limited to wartime.[21]

While wartime jurisdiction was broad, military commanders struggled to maintain discipline in their ranks in peacetime. Indeed, after Charles I attempted to use martial law domestically in the early 17th century, concessions to the articles of war severely curtailed military peacetime jurisdiction of courts-martial.[22] Following the mutiny and desertion of a detachment of soldiers in 1689, however, Parliament passed the First Mutiny Act.[23] The Mutiny Act gave parliamentary authority for military courts' domestic peacetime jurisdiction for limited offenses such as mutiny and desertion.[24] Thus, English military court jurisdiction consisted of articles of war developed by the Crown primarily for wartime conflicts abroad, and statutory authority from parliament for peacetime military court jurisdiction domestically.[25] With periodic jurisdictional expansions over the next century, by 1803 both the articles of war and the mutiny act applied to the Army equally at home and abroad.[26]

While judgments under the articles of war were not subject to review for their merits, the English Court of High Justice was able to issue writs of prohibition and certiorari to military courts for lack of jurisdiction.[27] Despite this authority, British courts never actually granted a writ of prohibition or certiorari in a case tried by court-martial. [28] Certiorari would have been proper, however, if a party claimed the military court lacked jurisdiction because the judgment affected his civil rights as opposed to rights of a military character.[29] In addition to this authority of the Court of High Justice, the Mutiny Act of 1689 specifically recognized the right of superior courts

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[16] *Id.* at 46. Despite the "Marshal" serving as the head of the court, the precise etymology of the phrase "court-martial" is unsettled. *See* SCHLUETER, *supra* note 12, at § 1-5(C) n. 15 (citing Sisson C. Pratt, *Military Law: Its Procedure and Practice* 7 (19th ed. 1915)).
[17] WINTHROP, *supra* note 12, at 46.
[18] *Id.*
[19] *Id.* at 46-47.
[20] *Id.* at 19; SCHLUETER, *supra* note 12, § 1-5(C).
[21] SCHLUETER, *supra* note 12, at § 1-5(C).
[22] *Id.*
[23] *Id.* at § 1-5(D).
[24] WINTHROP, *supra* note 12, at 19-20.
[25] *Id.* at 20.
[26] *Id.*
[27] *Id.* at 51-52.
[28] *Id.* at 52.
[29] *Id.*

of common law to review proceedings and sentences of courts-martial.[30] Parliament passed the Mutiny Act annually, however, and no Act subsequent to 1689 contained this provision.[31]

B. The American System

While England has a long history of struggling to determine the extent of their military court jurisdiction, the American system remained consistent for its first 150 years. Essentially, the early republic adopted English practices without giving them a second look. The first written military code in America, the 1775 Massachusetts Articles of War, adopted the British 1774 Articles of war with minor changes.[32] The Second Continental Congress then largely copied the Massachusetts articles to create America's first articles of war, which remained in place through the adoption of the Constitution and into the early 1800s.[33] Like their English counterpart, the early American articles of war contained no rights for service members to appeal their military convictions on the merits to a civilian court.[34] Indeed, even by 1920, Colonel Winthrop, "the Blackstone of Military Law,"[35] described "the only real appeal" for service members as a right of appeal to the President, advised and assisted by the Judge Advocate General.[36] This structure was conducive to the 18th century system because courts-martial based on the laws of war were jurisdictionally limited to offenses based on military discipline like mutiny, desertion, or certain war offenses.[37] In fact, the articles required superior military officers to turn their subordinates over to a civil magistrate when the offense was punishable under the civil rather than military laws.[38] Thus, there was a clear divide between military cases that required military discipline and civil cases that could run through the normal civilian court system.

The clear dichotomy between the two systems changed after World War II with the adoption of the Uniform Code of Military Justice (UCMJ). Unlike the articles of war, the UCMJ broadened the range of triable offenses to include traditionally civilian offenses like murder or rape committed in peacetime in the United States.[39] In 1969, the Supreme Court limited these offenses to those

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[30] *Id.* at 51.
[31] *Id.*
[32] SCHLUETER, *supra* note 12, at § 1-6(B).
[33] WINTHROP, *supra* note 12, at 22. The articles underwent a major revision in 1786, particularly to the composition and conduct of the trial itself, but did not substantially change the jurisdiction of courts-martial. *See* SCHLUETER, *supra* note 12, § 1-6(b).
[34] WINTHROP, *supra* note 12, at 53. Service members did have a limited right to collaterally attack the *jurisdiction* of military courts. *See id.* at 52-53 (discussing availability of *habeas corpus* to collaterally attack the jurisdiction of a court-martial); *See also* Wise v. Withers, 7 U.S. 331, 337 (1806) (holding a court-martial did not have jurisdiction over a justice of the peace).
[35] Reid v. Covert, 354 U.S. 1, 19, n. 38 (1957) (plurality opinion); *Ortiz*, 138 S. Ct. at 2175.
[36] WINTHROP, *supra* note 12, at 53.
[37] *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice (pt. 1)*, 72 HARV. L. REV. 1, 10-11 (1958) [hereinafter Wiener, *Courts-Martial*].
[38] *Id.*; James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 755 n.525 (2004).
[39] *See* Solorio v. United States, 483 U.S. 435, 461 (1987) (Marshall, J., dissenting) (citing Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 12 VAND. L. REV. 435, 452–53 (1960)).

with a "service connection,"[40] but less than twenty years letter the Supreme Court overruled itself in favor of a status test in *Solorio v. United States*. There, the Supreme Court held that the jurisdiction of a court-martial depends solely on the accused's status as a service member, not the crime's connection to the military.[41] This meant that what had previously been purely civilian offenses, like common law torts committed in peacetime against a civilian, could be tried in military courts as long as the accused was in the military.

The UCMJ also provided for a new system of appeals courts within the military system. With the vast import of civilians drafted into the military, the post-World War II Congress worried the war-time military had used its courts for improper purposes and wanted to establish more oversight.[42] The UCMJ created a Court of Criminal Appeals (CCA) for each service and an overarching Court of Military Appeals (CMA), later renamed the Court of Appeals for the Armed Forces (CAAF).[43] While panels of military or civilian judges comprise the CCAs, CAAF judges are all civilians.[44] Originally, the UCMJ had no avenue for direct appeals to the Supreme Court. In 1983, however, Congress passed the Military Justice Act which allowed the Supreme Court to hear appeals from the military courts for the first time.[45] The Supreme Court already had a robust docket of mandatory appeals in the early 1980s, however, and Congress did not want to overburden a court that was already hearing up to 150 cases per year.[46] Thus, while the Supreme Court gained jurisdiction to hear appeals from the military courts, jurisdiction was limited to specific circumstances.[47] This appeals structure went largely unchallenged for the next 35 years until 2018 when the Supreme Court held that, despite the court-martial system's location in the executive branch, Congress' grant of jurisdiction to the Supreme Court was constitutional for purposes of appellate jurisdiction under Article III.[48]

Modern day American courts-martial vary dramatically from a summary battlefield judgment by a Roman commander. Indeed, the injection of civilian offense into the courts-martial system has come with "virtually the same" procedural protections afforded to an accused in a civilian court,[49] including a system of appeals that make up the "court-martial system."[50] Today, an accused subject to the UCMJ begins this system at the trial level with the court-martial itself. There, a military tribunal determines the guilt or innocence of the accused, as well as the appropriate punishment.[51] Above the trial level are three-judge panels of either military or civilian

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[40] O'Callahan v. Parker, 395 U.S. 258, 272, (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).
[41] Solorio v. United States, 483 U.S. 435, 436 (1987).
[42] *See* SCHLUETER, *supra* note 12, § 1-6(E).
[43] *See* 10 U.S.C. §941; NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1995, PL 103–337, October 5, 1994, 108 Stat 2663.
[44] *See* 10 U.S.C. §941; Pfander, *supra* note 38, at 754.
[45] *See* Military Justice Act of 1983, S. 974, 98th Cong. (1983).
[46] Fidell & Vladeck, *supra* note 5.
[47] Under 28 U.S.C. § 1259, the Supreme Court can review CAAF decisions in four circumstances: 1) cases where a CCA approved a death sentence; 2) cases that a Judge Advocate General certified to CAAF; 3) cases where CAAF granted a petition for review; and 4) cases that do not fit categories 1-3 but in which CAAF granted relief.
[48] Ortiz, 138 S. Ct. at 2170.
[49] *Id.* at 2174, (quoting Schlueter, *supra* note 12, at § 1-7).
[50] *Id.*
[51] *See* 10 U.S.C. §§ 816, 818, 856.

judges organized into four appellate courts: the CCA for the Army, Navy-Marine Corps, Air Force, and Coast Guard.[52] The CCA's automatically review all decisions imposing a dishonorable or bad-conduct discharge,[53] dismissal of an officer, cadet, or midshipman,[54] confinement for two years or more, or death.[55] The CCA's also have limited discretionary review for decisions imposing confinement for more than six months but less than two years.[56] The final step in the courts-martial system is CAAF, a panel of five civilian judges appointed to 15-year terms.[57] CAAF is required to review a case in two circumstances: cases where a CCA affirmed a death sentence and cases where a service Judge Advocate General orders the case to CAAF for review.[58] In all other cases, CAAF has discretion to grant review.[59] In fiscal year 2020, CAAF only granted review in 10.9% of cases where it received a petition.[60]After the courts-martial system, an accused can appeal to the Supreme Court, but the Supreme Court only has jurisdiction to hear a case if certain preconditions are met.[61] Those preconditions leave a few important gaps.

II. SCOTUS JURISDICTION AND ITS GAPS

A. Gaps in Direct Review

By virtue of their military status, service members have different constitutional rights than civilians. The text of the Fifth Amendment expressly excludes the land and naval forces from the "presentment or indictment of a Grand Jury" requirement.[62] Moreover, the Supreme Court upheld a narrower definition of 5th amendment due process for military courts than for their civilian counterparts.[63] Despite these limits, service members are not denied "basic rights simply because they have doffed their civilian clothes"[64] and in 1983 Congress gave the Supreme Court

[52] Ortiz, 138 S. Ct. at 2171.
[53] Dishonorable and bad-conduct discharges are punitive separations from service for enlisted service members. *See* Rule for Courts Martial (R.C.M.) 1003(a)(8)(B) and (C).
[54] Dismissal is a punitive separation from service for officers (and those training to become officers). *See* R.C.M. 1003(a)(8)(A).
[55] *See* 10 U.S.C. § 866(b)(3).
[56] *See* 10 U.S.C. § 866(b)(1)(A). The CCA's also have other limited review under § 866(b)(1) and (2). The Military Justice Act of 2016 became effective on January 1, 2019 and substantially changed post-trial appellate procedure within the court-martial system including mandatory and discretionary review criteria for the CCAs. *See* James A. Young, *Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016*, Army Law, January 2018, at 31. However, the Act did not substantially change Supreme Court review and is outside the scope of this article.
[57] *See* 10 U.S.C. § 942.
[58] 10 U.S.C. § 867(a). The Judge Advocate General is the highest-ranking military attorney in each service and may select certain cases to appear on CAAF's mandatory docket. *See* 10 U.S.C. § 867(a)(2).
[59] *Id.*
[60] Report of the United States Court of Appeals for the Armed Forces: October 1, 2019 to September 30, 2020, at 7-8 (2020), https://perma.cc/FA7L-ENQ3. CAAF grated 41 petitions for review and denied 336.
[61] *See* 28 U.S.C. § 1259.
[62] U.S. CONST. amend. V.
[63] Weiss v. United States, 510 U.S. 163, 177-81 (1994).
[64] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

jurisdiction to review certain cases to ensure these rights were intact.[65] Under 28 U.S.C. § 1259, the Supreme Court can review CAAF decisions in four circumstances: 1) cases where a CCA approved a death sentence; 2) cases that a Judge Advocate General certified to CAAF; 3) cases where CAAF granted a petition for review; and 4) cases that do not fit categories 1-3 but in which CAAF granted relief.[66] The first two circumstances are cases on CAAF's mandatory appellate docket and the second two cover CAAF's discretionary review. Essentially, if CAAF reviews a case, the Supreme Court has jurisdiction to hear an appeal, but if CAAF does not review a case, the Supreme Court does not have jurisdiction. This system leaves two distinct gaps in the Supreme Court's review. The first gap is clear. The Supreme Court does not have jurisdiction to review a case when CAAF denies discretionary review.[67] However, the government has taken the position, and the Supreme Court has yet to reject, that §1259 creates a second gap.[68] Even if CAAF grants review, Supreme Court review is limited to the specific *issues* that CAAF reviewed instead of the entire *case*.[69]

1. The Statutory Gap

The first gap is when CAAF uses its discretion to deny review. Similar to the Supreme Court, CAAF maintains a discretionary review process and only grants review in a small number of cases. For fiscal year 2020, CAAF reviewed 10.9% of the 377 cases that petitioned CAAF for review.[70] This means even if one of the 336 cases CAAF denied last term presents a perfect vehicle to decide a constitutional issue that has split the lower federal courts, the Supreme Court is statutorily barred from hearing it. This statutory gap is especially severe because, as one 2016 study found, the kinds of cases CAAF grants are not the same as the cases the Supreme Court is likely to hear.[71] As the study describes, a traditional "court of last resort" within a two-tiered judicial system focuses on creating decisions as "a means for the development of law through … decisions and explanations

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[65] *See* Military Justice Act of 1983, S. 974, 98th Cong. (1983).

[66] 28 U.S.C. § 1259 reads:

> 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) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
> (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
> (3) Cases in which the Court of Appeals for the Armed Forces granted 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 relief.

[67] *See* Fidell, Fissell & Cave, *supra* note 7, at 4 n. 10 (discussing cases where the Supreme Court denied review after CAAF denied discretionary review).

[68] *See* Fidell & Vladeck, *supra* note 5.

[69] *Id.*; Brief for the United States in Opposition at 9-10, *Larrabee v. United States of America*, 139 S.Ct. 1164 (2019) (No. 18-306), 2019 WL 157946, at *9-10.

[70] Report of the United States Court of Appeals for the Armed Forces: October 1, 2019 to September 30, 2020, at 7-8 (2020), https://perma.cc/FA7L-ENQ3. CAAF grated 41 petitions for review and denied 336.

[71] Caruço, *supra* note 9, at 75; Fidell & Vladeck, *supra* note 5.

of decisions."[72] While this process may also involve error correction of lower court decisions, this effect is "only incidental to [the] law declaring function."[73] CAAF is the final court that sits "[a]top the court-martial system,"[74] and, along with the Supreme Court, considers itself a court of last resort.[75] However, unlike other courts of last resort, CAAF overwhelmingly grants review to correct errors in individual cases.[76] Thus, CAAF's discretionary grant practice combined with an opposing grant practice by the Supreme Court functionally prevents the Supreme Court from reviewing many constitutional questions that arise in the military. Indeed, in *United States v. Gibbs*, CAAF denied review instead of granting a service member's request to summarily affirm his conviction and make his case appealable to the Supreme Court.[77] CAAF's denial prevented Gibbs from petitioning the Supreme Court to resolve a circuit split about the effects of his inability to access potentially exculpatory evidence.[78]

2. The Stevenson Gap

The second gap in Supreme Court review is based on the government's novel reading of 28 U.S.C. § 1259 to confine Supreme Court review to specific issues instead of an entire case. The government first took this position in *United States v. Stevenson*. *Stevenson* involved a defendant convicted of rape at court-martial.[79] Stevenson, however, was on the Navy's temporary disabled retirement list at the time of his conviction and appealed on two grounds.[80] First, he alleged an illegal search that violated the military rules of evidence and the 4th amendment. Second, he claimed the military courts lacked jurisdiction to try a member on the temporarily disabled retirement list.[81] CAAF granted review on Stevenson's claim of an illegal search without commenting on his claim for lack of jurisdiction.[82] Finding a violation of the military rules of evidence, CAAF remanded the case to the lower courts.[83] However, Stevenson still petitioned the Supreme Court arguing the military courts did not have jurisdiction to try him at all.[84] Stevenson based the jurisdiction for his petition on 28 U.S.C. § 1259(3) which authorizes the Supreme Court

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[72] Caruço, *supra* note 9, at 76 (quoting Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APP. PRAC. & PROCESS 105, 105 (2010)).
[73] *Id.* (quoting Thomas C. Marks, Jr., *Jurisdiction Creep and the Florida Supreme Court*, 69 ALB. L. REV. 543, 543 (2006)).
[74] *Ortiz*, 138 S. Ct. at 2171.
[75] *See* Caruço, *supra* note 9, at 80-95.
[76] *Id.* at 75.
[77] *United States v. Gibbs*, No. ARMY 20110998, 2018 WL 3241056 (A. Ct. Crim. App. June 28, 2018), *review denied*, 78 M.J. 321 (C.A.A.F. 2019), *reconsideration denied*, 78 M.J. 406 (C.A.A.F. 2019); Fidell & Vladeck *supra* note 5.
[78] *Id.*
[79] United States v. Stevenson, 66 M.J. 15, 16 (C.A.A.F. 2008).
[80] *Id.*
[81] Petition for Writ of Certiorari at 7-8, *Stevenson v. United States*, 555 U.S. 816 (2008) (No. 07-1397), 2008 WL 2032302, at *7-8 [hereinafter Stevenson petition].
[82] *See Stevenson*, 66 M.J. at 16.
[83] *Id.*
[84] Stevenson petition, *supra* note 81, at *9.

to review "[c]ases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10."[85]

The government's reply to Stevenson's petition claimed that the Supreme Court did not have jurisdiction to hear his claim.[86] Despite § 1259(3) granting authority to review "cases" where CAAF granted a petition, the government argued that this language is limited by 10 U.S.C. § 867a(a), which states that 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."[87] By granting review of Stevenson's illegal search claim but not his jurisdictional argument, CAAF refused to grant a petition to review the jurisdictional question and thus foreclosed Supreme Court review.[88]

Stevenson countered that the government's narrow reading rejected both the plain language and legislative history of 28 U.S.C. § 1259.[89] "Cases" in 1259 is clearly meant to encompass the entire case, while 10 U.S.C. § 867a(a) is clearly meant to prevent the Supreme Court from reviewing CAAF's decision to deny review, not a separate claim in a case that CAAF did grant.[90] Indeed, the legislative history of 28 U.S.C. § 1259 shows that an earlier draft would have confined Supreme Court jurisdiction to "issues" CAAF granted, but the word "issues" was rejected in favor of the word "cases."[91] Despite Stevenson's strong counterarguments, the Supreme Court denied his petition for review without comment.[92]

The government's reading of §1259 is troubling for two reasons. First, it arguably rejects the plain language of the statute and circumscribes Supreme Court review beyond what Congress intended. Given the already limited availability of Supreme Court review, reading further limitations into the statute forecloses one of the few remaining pathways. Second, in practice, this reading has been used to foreclose *jurisdictional* challenges to the reach of military courts.[93] While civilian direct review of the merits of a decision by a military court is a relatively new creation, civilian courts in America have always had the authority to review jurisdictional challenges to courts-martial.[94] Despite this historical practice, the U.S. government has continued to take the

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[85] *Id.* at *1.
[86] *See* Brief for the United States in Opposition at 8, Stevenson v. United States, 555 U.S. 816 (2008) (No. 07-1397), 2008 WL 3199722, at *8.
[87] *Id.*
[88] *See Id.*
[89] Reply to Brief in Opposition at 1-3, Stevenson v. United States, 555 U.S. 816 (2008) (No. 07-1397), 2008 WL 3991632, at *1-3.
[90] *Id.*
[91] *Id.* (quoting 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 150-51 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002)).
[92] Stevenson v. United States, 555 U.S. 816 (2008).
[93] *See* Brief for the United States in Opposition at 8, Stevenson v. United States, 555 U.S. 816 (2008) (No. 07-1397), 2008 WL 3199722, at *8 (arguing the Supreme Court could not review a challenge to the court-martial's jurisdiction).
[94] *See* WINTHROP, *supra* note 12, at 52-53 (discussing availability of *habeas corpus* to collaterally attack the jurisdiction of a court-martial); *See also* Wise v. Withers, 7 U.S. 331, 337 (1806) (holding a court-martial did not have jurisdiction over a justice of the peace).

same novel reading of §1259 in *Stevenson* in subsequent jurisdictional challenges before the Supreme Court.[95] Since the Supreme Court has not decided the correct reading of §1259, Congress could dissolve any ambiguity by expanding the Supreme Court's discretionary review to include *all* cases granted or denied by CAAF. Without Congress's clarification, the government's circumscribed view of §1259 is unlikely to change. CAAF's tendency to grant review for plain error instead of new interpretations of law coupled with the governments reading of §1259 effectively prevents the Supreme Court from deciding if the military is going beyond their authority and punishing members outside their jurisdiction.

B. Jurisdiction Compared with Other Courts

The lack of Supreme Court review may seem appropriate given the courts-martial system's location outside of Article III.[96] But the courts-martial system is not unique in this sense. In *Ortiz*, the Supreme Court confirmed that the "non-Article III court-martial system stands on much the same footing as territorial and D.C. courts."[97] Yet unlike CAAF, the District of Columbia Court of Appeals is treated as the "highest court of a state" for appeals to the Supreme Court under 28 U.S.C. § 1257 and is not confined to review in limited circumstances.[98] The Supreme Court is entitled to review constitutional questions raised in State Court decisions, even when a State Court of last resort denies review.[99] Indeed, service members join a small list alongside defendants in American Samoa, the Wake Island Court, and Native American tribal courts, as the only criminal defendants in the United States that do not enjoy a right to apply for a writ of certiorari.[100]

In terms of appeals to the Supreme Court, a service member does not even receive the same rights as suspected enemy combatants. Indeed, Khalid Sheikh Mohammed or KSM, who the government describes as the "architect" of the September 11, 2001 terrorist attacks,[101] is currently awaiting trial by Military Commission at Guantanamo Bay, Cuba.[102] Under the Military Commissions Act of 2009, if KSM is tried and convicted at Guantanamo he has a statutory right to appeal his convictions all the way to the Supreme Court.[103] This means that a right to appeal a conviction to the Supreme Court is available for the convicted architect of the 9/11 attacks, but may not be available to the American service member.[104]

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[95] *See* Brief for the United States in Opposition at 9-10, Larrabee v. United States of America, 139 S.Ct. 1164 (2019) (No. 18-306), 2019 WL 157946, at *9-10 (arguing §1259 prevented the Supreme Court from hearing challenge to court-martial jurisdiction over retired service members).
[96] *See* U.S. CONST. art. I, § 8 (giving Congress the power to "make Rules for the Government and Regulation of the land and naval Forces").
[97] *Ortiz*, 138 S. Ct. at 2178.
[98] *See* 28 U.S.C. § 1257(b).
[99] *Id.* at § 1257(a).
[100] Fidell, Fissell & Cave, *supra* note 7, at 9.
[101] Carol Rosenberg, *Trial for Men Accused of Plotting 9/11 Attacks Is Set for 2021*, N.Y. TIMES (Aug. 30, 2019), https://perma.cc/HGQ6-NM22.
[102] Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial Past 20th Anniversary of Attacks*, N.Y. TIMES (Dec. 18, 2020), https://perma.cc/GT27-6UZ4.
[103] 10 U.S.C. § 950g(e); ELSEA, *supra* note 8, at 53-54.
[104] *See* Fidell, Fissell & Cave, *supra* note 7, at 10.

C. Collateral review

Some of the gaps in the Supreme Court's jurisdiction on direct review could be reasonable if there was a rigorous system for post-conviction collateral review. This, however, is not the case. Courts-martial convictions are subject to some forms of post-conviction collateral review in Article III courts, including review by writ of habeas corpus to challenge the constitutionality of a service member's confinement.[105] However, prior to collateral review all remedies within the military justice system must be exhausted.[106] Following review in the military justice system, federal court review is extremely deferential.[107] Under Supreme Court precedent, civilian courts only review military cases by determining if "fair consideration" took place.[108] In most circuits, fair consideration is accomplished "[w]hen an issue is briefed and argued before a military board of review…even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."[109] This means that federal courts give "greater deference to the military than…to state courts in relation to [constitutional] claims."[110] This leaves a dangerous gap in the habeas review process, especially considering the circumscribed nature of direct review. Moreover, the Supreme Court decided this standard of deferential review in 1953. Since then, Congress proscribed statutory limitations on direct review in the Military Justice Act of 1983,[111] while the Supreme Court's decision in *Solorio* in 1987 expanded the jurisdiction of military courts to include non-military offenses.[112] So, despite dramatic changes to the scope of charges available in courts-martial, the Supreme Court has not reconsidered this deferential standard of habeas review.

III. THE EQUAL JUSTICE FOR OUR MILITARY ACT

It is time for Congress to amend 28 U.S.C. § 1259 to provide service members greater access to the Supreme Court and fix the discrepancies between service members and other criminal

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[105] *See, e.g., Burns v. Wilson*, 346 U.S. 137, 73 (1953) (plurality opinion) (habeas corpus available in Article III courts); *Schlesinger v. Councilman*, 420 U.S. 738, 751 (1975) (collateral review historically available for courts-martial convictions); *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008), *aff'd and remanded*, 556 U.S. 904 (2009) (courts-martial are subject to collateral review outside the military justice system).
[106] *See Gusik v. Schilder*, 340 U.S. 128, 131–32 (1950); *Williams v. Secretary of Navy*, 787 F.2d 552 (Fed. Cir. 1986); *Bowman v. Wilson*, 672 F.2d 1145 (3d Cir. 1982). The government may waive the exhaustion requirement for a criminal defendant. Middendorf v. Henry, 425 U.S. 25, 29 n.6 (1976).
[107] SCHLUETER, *supra* note 12, at § 18-12(A).
[108] Burns v. Wilson, 346 U.S. 137, 144 (1953); Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 670 (10th Cir. 2010).
[109] *Thomas*, 625 F.3d. at 671. Most Habeas cases fall under this standard due to the military prison at Fort Leavenworth's location in the 10th Circuit. John E. Theuman, *Review by Federal Civil Courts of Court-Martial Convictions—Modern Status*, 95 A.L.R. Fed. 472, § 2[a] (1989).
[110] *Thomas*, 625 F.3d at 671.
[111] Military Justice Act of 1983, Pub. L. No. 98-209, §10, 97 Stat. 1393, 1405-06 (1983).
[112] *See* Solorio v. United States, 483 U.S. 435, 436 (1987).

defendants. To this end, Congress should pass the "Equal Justice For our Military Act," originally introduced as House Resolution 3174 by Representative Susan Davis in 2007.[113] The 2010 amendment to this bill would expand the Supreme Court's discretionary review from cases where CAAF *granted* a petition for review or relief, to cases where CAAF *granted or denied* a petition.[114] The bill would allow challenges to the jurisdiction of military courts to reach the nation's highest court by eliminating the wording from 10 U.S.C. § 867a(a) that the government relied on in *Stevenson*.[115] As described below, this bill is the proper vehicle because it fixes the ineffectiveness of the current system without harming the courts or the military.

A. Effectiveness of the Current System

The current system does not allow service members sufficient access to the Supreme Court. As discussed in Section II of this article, service members currently have inferior access to the Supreme Court compared with other criminal defendants in the United States. Criminal defendants in federal court have a right to appeal to the Supreme Court,[116] and defendants in state courts can appeal their federal question to the nation's highest court even if denied review by a state court of last resort.[117] Even suspected enemy combatants detained at Guantanamo and tried in military commissions have a statutory right to appeal to the Supreme Court.[118]

Despite these gaps, some, including the dissenters in the 2010 House Judiciary Committee report on the Equal Justice for Our Military Act, argue that while the current system is not perfect, it is effective enough.[119] These dissenters argue that the current structure effectively allows CAAF to screen cases that do not warrant Supreme Court review.[120] The current review process allows CAAF to deal with cases "that are of significance only to the individual litigants" while still allowing the Supreme Court to hear "matters that are of the highest priority, those that affect constitutional law."[121] The reverse has been true. The dissenter's assumption is based on a flawed premise that CAAF exercises their discretion similarly to the Supreme Court. In reality, as discussed above in Section II of this article, CAAF overwhelmingly grants review to fix errors in individual cases rather than to resolve complex constitutional questions.[122] The dissent's reliance

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[113] *See* Equal Justice for Our Military Act of 2007, H.R. 3174, 110th Cong. (2008).
[114] *See* H.R. REP. NO. 111–547, at 2 (2010). Specifically, the bill would amend paragraph (3) of 28 U.S.C. § 1259 by inserting ''or denied'' after ''granted''; and amending paragraph (4), by inserting ''or denied'' after ''granted.'' The House Resolution would also amend 28 U.S.C. § 2101(g) to clarify the time to file an application for writ of certiorari with the Supreme Court.
[115] *Id.* The bill would amend 10 U.S.C. § 867a(a) 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.''
[116] 28 U.S.C. § 1254.
[117] *See* 28 U.S.C. § 1257.
[118] *See* 10 U.S.C. § 950g(e); ELSEA, *supra* note 8, at 53-54; Fidell, Fissell & Cave, *supra* note 7, at 10.
[119] *See* H.R. REP. NO. 111–547, at 12-17 (2010).
[120] *Id.*
[121] *Id.* at 13.
[122] Caruço, *supra* note 9, at 108.

on this argument is based on what Congress in 1983 thought CAAF *would* do, not what they have actually done.

Another argument offered by the dissenters is that the current appellate system integrates "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" with "few apparent complaints."[123] Noticeably, however, this list fails to include the defendant. The emphasis on the government's satisfaction is particularly troubling because of the Judge Advocate General (TJAG) "certification" power to CAAF.[124] Under 28 U.S.C. § 1259, one of the four circumstance where the Supreme Court has jurisdiction to hear a case is if a TJAG certified that case to CAAF. But TJAGs "are not independent or impartial judicial entities," in reality "they represent the government."[125] While TJAGs make good faith attempts to utilize the certification power impartially, the TJAG review process is "as a matter of appearance…neither independent of government interest nor impartial."[126] Indeed over CAAF's last three terms, eleven out of twelve cases certified to CAAF were "for the benefit of the prosecution."[127] Given this weighted system, it is not surprising that criminal defendants are the ones complaining.

B. The New System

1. The Supreme Court's Capacity

The Supreme Court currently receives thousands of petitions and amending 28 U.S.C. § 1259 would not "flood the court" with frivolous petitions. In 2009, the Counselor to the Chief Justice of the United States Supreme Court reported that, on average, only "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.''[128] The counselor also projected that increasing the Supreme Court's jurisdiction over military courts would only result in approximately 120 more petitions per year, with some experts estimating less than 90 extra petitions.[129] Moreover, the Supreme Court already has internal measures in place to sift through over 8,000 petitions per year to determine which are deserving of review.[130] The Supreme Court's decision in *Austin v. United States* also prevents counsel, including military counsel, from filing frivolous petitions to the Supreme Court on a client's behalf.[131] Finally, the Equal Justice For our Military Act would not force the Solicitor General's office to alter its current practices. Frequently,

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[123] *See* H.R. REP. NO. 111–547, at 13 (2010).
[124] *See* Fidell, Fissell, & Cave, *supra* note 7, at 13.
[125] *United States v. Arness*, 74 M.J. 441, 447 (C.A.A.F. 2015) (Baker, J., concurring).
[126] *Id.*; Fidell, Fissell, & Cave, *supra* note 7, at 13.
[127] *Id.*
[128] H.R. REP. NO. 111–547, at 7 (2010) (quoting Letter from Jeffrey P. Minear, Couns. to the C.J., Sup. Ct. of the U.S., to Hon. Henry C. ''Hank'' Johnson, Chairman, Subcomm. on Cts. & Competition Pol'y, U.S. House of Representatives (June 18, 2009)).
[129] *Id.*
[130] *Id.*
[131] *Austin v. United States*, 513 U.S. 5, 8 (1994).

the Solicitor General elects to waive the government's right to respond to a service member's petition until the Supreme Court requests a response, and the government would be free to continue to conserve resources by implementing this practice.[132] Some arguing against expanded Supreme Court review have cited a 1982 letter from Supreme Court Justices asking a House committee to limit Supreme Court jurisdiction "because the volume of complex and difficult cases continues to grow" and the Supreme Court did not want "to be burdened" with more cases.[133] This letter, however, relies on factual circumstances that no longer prove to be true. In the early 1980s, the Supreme Court was deciding approximately 150 cases per year.[134] However, in 1988 Congress limited the Supreme Court's mandatory appellate docket[135] and the Court now hears closer to 70 cases per term.[136] The Equal Justice For our Military Act would provide for discretionary review and would not substantially impact this number.

The minimal cost associated with expanding jurisdiction should also not serve as a barrier to equal rights for service members. Unlike civilian litigants who must pay for their appeals unless they are indigent, military members typically maintain a right to counsel and no cost litigation.[137] In response to this reality, some have raised the practical considerations of implementing new legislation; more appeals would be more expensive.[138] However, the Congressional Budget Office estimated that passing the Equal Justice for Our Military Act would only cost approximately $1 million in 2010.[139] While it may be cheaper to deny someone their day in court, the cost here is not prohibitive and should not justify denying service members equal rights.

2. Effect on Military Readiness

Expanding Supreme Court review of the courts-martial system would also not affect military readiness. Indeed, Major General John Altenburg, the former Deputy Judge Advocate General of the Army, stated that expanding Supreme Court jurisdiction "would in no way harm the military."[140] Moreover, there is no evidence that Congress's grant of Supreme Court jurisdiction over courts-martial in limited circumstances in 1983 negatively impacted good order and discipline.[141] However, Major General Altenburg's conclusion is not unanimous, even in military circles. Some, such as Colonel Frederick Wiener, have argued that civilian courts, like the Supreme

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[132] H.R. REP. NO. 111–547, at 7 (2010).
[133] *Id.* at 13.
[134] Federal Judicial Center, *Caseloads: Supreme Court of the United States, Appeals and Petitions for Certiorari, 1970-2017*, https://perma.cc/G82G-X9P.
[135] Supreme Court Case Selections Act of 1988, Pub. L. No. 100–352, 102 Stat. 662 (1988) (codified as amended at 28 U.S.C. § 1257).
[136] *See* Federal Judicial Center, supra note 134.
[137] H.R. REP. NO. 111–547, at 17 (2010).
[138] *Id.* at 14-15.
[139] *Id.* at 6.
[140] *H.R. 569, the ''Equal Justice for Our Military Act of 2009,'' Hearing Before the Subcomm. on Cts. &Competition Pol'y, Comm. on the Judiciary,* 111th Cong. 39 (2009) (statement of General John D. Altenburg, former Deputy Judge Advocate for the Army).
[141] *See* H.R. Rep. No. 111–547, at 5 (2010).

Court, should not be involved in the courts-martial system.[142] Instead, military justice should strike a balance between due process for the accused and the need for command and control in the military.[143] Efforts to "civilianize" the military would create an armed mob instead of a disciplined fighting force.[144] Proponents of this view cite the origins of the court-martial, noting that the British court-martial system was, as Blackstone described, based solely on "the necessity of good order and discipline."[145] Since the American system derived from this British practice, American military justice is also "but an agency of the power of military command to do its bidding."[146] Indeed, even the Bill of Rights does not apply equally to the military because of the unique need for military discipline. The framers "recogni[zed] and sanction[ed] existing military jurisdiction," by exempting military cases from the Fifth Amendment's Grand Jury requirement.[147] Thus, civilian courts are not equipped to wade into the intricacies of military discipline, and any attempts to do so could be detrimental to military readiness and cause a breakdown in the military chain of command.

First, it is not clear how good order and discipline would fail *now* by incrementally expanding Supreme Court review when there is already civilian review by the Supreme Court and a much more expansive review by an all civilian CAAF. [148] But a historical argument also fails to consider the dramatic changes to the American military justice system since the first American articles of war in 1775. Most dramatically, the passage of the UCMJ in 1950 and the Supreme Court's decision in *Solorio* fundamentally changed the types of crimes charged in military courts. While articles of war in the 18th century consisted of military crimes like desertion or absence without leave,[149] by 1951 the UCMJ incorporated all felonies committed by service members in both peacetime and wartime.[150] A historical argument also fails to account for the dramatic shift in the size of the military. In 1789, the United States had 672 active military service members, while at the peak of World War II this number expanded to over 12 million people.[151] Rather than a specific set of military rules to a small professional set of the population, today's military courts encompass a broad range of laws to a potentially large section of the population. Taken to its extreme, good order and discipline could be used to justify the deprivation of *all* rights. Today, however, "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal."[152]

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[142] *See* Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 Mil. L. Rev. 1, 62-74 (1989) [hereinafter Wiener, *American Military Law*]; Pfander, *supra* note 38, at 755.
[143] Pfander, *supra* note 38, at 755.
[144] *Id*.
[145] 1 WILLIAM BLACKSTONE, COMMENTARIES *400; *Ortiz*, 138 S. Ct. at 2199 (Alito, J., dissenting).
[146] *Ortiz*, 138 S. Ct. at 2199 (Alito, J., dissenting) (quoting Samuel T. Ansell, *Military Justice*, 5 Cornell L. Q. 1, 6 (1919)).
[147] *Ortiz*, 138 S. Ct. at 2175 (quoting Winthrop, *supra* note 12, at 48).
[148] *See* 10 U.S.C. § 942 (mandating that all CAAF members must be civilians).
[149] Wiener, *Courts-Martial*, *supra* note 37, at 10-11.
[150] *Id.* at 12.
[151] *Id.* at 9, 11.
[152] *Ortiz*, 138 S. Ct. at 2174 (quoting Schlueter, *supra* note 12, at § 1-7).

CONCLUSION

The preceding arguments demonstrate how many concerns about expanded jurisdiction are founded on old arguments that do not account for the present state of the courts-martial system. As the courts-martial system evolves and expands, so too does the need to ensure proper oversight. Indeed, in 2010, the House Judiciary Committee relied on recommendations from legal organizations, like the American Bar Association and the District of Columbia Bar Association, who cited procedural injustices in the lack of Supreme Court review for military members.[153] The majority also heeded the advice of former CAAF Chief Judge Walter Cox, III who described CAAF as "an unnecessary and unwise gatekeeper to Supreme Court Review."[154]

Passing the Equal Justice for our Military Act is the logical step to eliminate unnecessary procedural burdens that prevent Supreme Court review. In 2010, the House Judiciary Committee voted to pass the bill, but there was never a full House vote.[155] From 2011 to 2017, Representative Davis reintroduced the Equal Justice for our Military Act four additional times, all ending without a House vote.[156] Between 2007 and 2017, Senator Dianne Feinstein introduced a similar bill in the Senate, failing to receive a vote each time.[157] These failures to pass the Equal Justice for Our Military Act likely represent a lack of political will, rather than an agreement with arguments against its passage. Passing this Act would place courts-martial on par with state courts, D.C., and even military commissions. It is time for Congress to fill the gaps and give the members of our military access to the Supreme Court.

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[153] *H.R. 569, the ''Equal Justice for Our Military Act of 2009,'' Hearing Before the Subcomm. on Cts. & Competition Pol'y, Comm. on the Judiciary*, 111th Cong. 4 (2009) (written statement of H. Thomas Wells, Jr., President, American Bar Association).

[154] H.R. REP. NO. 111–547, at 4 (2010) (quoting Walter T. Cox III, Report of the Commission on Military Justice, 7 (Oct. 2009)).

[155] *See* Equal Justice for Our Military Act of 2010, H.R. 569, 111th Cong. (2009).

[156] *See* Equal Justice for Our Military Act of 2011, H.R. 3133, 112th Cong. (2011); Equal Justice for Our Military Act of 2013, H.R. 1435, 113th Cong. (2013); Equal Justice for Our Military Act of 2015, H.R. 2828, 114th Cong. (2015); Equal Justice for Our Military Act of 2017, H.R. 2783, 115th Cong (2017).

[157] *See* Equal Justice for United States Military Personnel Act of 2007, S. 2052, 110th Cong. (2007); Equal Justice for United States Military Personnel Act of 2009, S. 357, 111th Cong. (2009).