EQUAL SUPREME COURT ACCESS FOR MILITARY PERSONNEL: AN OVERDUE REFORM

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INTRODUCTION

While one might think that every criminal defendant in the United States has the opportunity to eventually appeal their conviction to the Supreme Court, Congress has largely blocked the path of perhaps the most deserving category of defendants: military personnel convicted at courts-martial. This is because under the 1983 law granting certiorari jurisdiction over military cases, only court-martial convictions that are *granted* review by the nation's highest military court may be appealed; those in which that court *denies* review are excluded from access to the Supreme Court.

In this Article, we argue that this jurisdictional limitation is both bad policy and unconstitutional for several reasons, and that Congress should remove it. Whether or not a court would find the limitation unconstitutional is not the point.[1] Congress has an independent obligation to avoid violating constitutional norms.[2]

By delegating to an executive branch court—the United States Court of Appeals for the Armed Forces (CAAF)—the power to determine the Supreme Court's jurisdiction over court-martial appeals, Congress violated the separation of powers. In carving out a comparatively small class of cases as non-reviewable for the ostensible purpose of reducing the Supreme Court's workload, Congress acted irrationally and violated equal protection. By making this category nearly coterminous with the universe of military cases (since almost all are denied review by CAAF), and conferring on that court a vague and non-reviewable standard for granting review, Congress violated the Exceptions Clause. Finally, by providing for Supreme Court jurisdiction over cases in which a Judge Advocate General certifies a case for review, but not over those in which an accused seeks review, the system unfairly provides asymmetric access to justice in favor of the government.

I. BACKGROUND: THE MILITARY JUSTICE ACT OF 1983

Current law provides for direct appellate review of court-martial convictions by the Supreme Court on petition for a writ of certiorari jurisdiction over four categories of decisions by CAAF, the country's highest military court.[3] That grant of appellate jurisdiction, which dates to the Military Justice

Act of 1983,[4] is constitutional as far as it goes.[5] But CAAF's docket is mostly discretionary, and therefore most military cases are not granted review by that court. According to the 1983 Act, this decision to grant or deny review by CAAF has an outcome determinative effect with respect to certiorari jurisdiction at the Supreme Court. The relevant provision[6] precludes Supreme

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[1] Any effort to litigate the constitutional issues would be pointless because even if the 1983 Act limitation were invalidated, there would still be no Supreme Court jurisdiction over cases in which CAAF had denied review. Absent an affirmative statutory grant of appellate jurisdiction in the Supreme Court, there is none. *E.g., Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1869). Simply invalidating the 1983 Act limitation would therefore be a Pyrrhic victory.

[2] *See, e.g.*, Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 594 (1975) (arguing that even if there is no caselaw limiting congressional power over the jurisdiction of federal courts, "[f]or the conscientious legislator, the central question must be the purely substantive one, whether particular jurisdictional legislation is consistent with the purposes underlying Congress'[s] article III powers and the roles of the federal judiciary in our constitutional scheme.").

[3] 28 U.S.C. § 1259 provides:

> 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:
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> (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.

[4] Pub. L. No. 98-209, 97 Stat. 1398 ("the 1983 Act").

[5] *Ortiz v. United States*, 138 S. Ct. 2165, 2172-80 (2018).

[6] Article 67a, UCMJ, provides:

> (a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review.

Court review of orders by CAAF that deny review of petitions for discretionary review.[7] Thus, unlike in state cases,[8] granted cases are eligible for review on certiorari while denied cases are not. This category of discretionary-review cases accounts for the overwhelming majority of the Court of Appeals' caseload, but it is in this category that CAAF enjoys an effective veto power over access to the Supreme Court.[9] While from time to time litigants have sought certiorari despite § 1259(3) and Art. 67a(a), these are routinely denied.[10] As we argue below, this offends various constitutional provisions and principles.

II. SEPARATION OF POWERS

> (b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

[7] Art. 67(a)(3).

[8] 28 U.S.C. § 1257(a).

[9] In its October 2019 Term, 382 of the 439 cases the Court of Appeals disposed of (87%) arose on petition for review under Art. 67(a)(3). C.A.A.F. Ann. Rep. 6 (2020).

[10] *E.g., United States v. Manciagonzalez*, 73 M.J. 98 (C.A.A.F.) (mem.), *cert. denied*, 574 U.S. 884 (2014) (mem.); *United States v. Grafmuller*, 71 M.J. 308 (C.A.A.F.) (mem.), *cert. denied*, 568 U.S. 993 (2012) (mem.); *United States v. Almejo*, 65 M.J. 423 (C.A.A.F.) (mem.), *cert. denied*, 552 U.S. 1188 (2007) (mem.); *United States v. Gowanlock*, 64 M.J. 435 (C.A.A.F.), *cert. denied*, 552 U.S. 1018 (2007); *see also* 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 & n.10 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002) (citing *United States v. Beattie*, 25 M.J. 198 (C.M.A.) (mem.), *cert. denied*, 485 U.S. 978 (1988)). The same thing can happen under § 1259(4). *See* note __ *infra*. For example, the Supreme Court denied certiorari when a petitioner sought review of the Court of Appeals' denial of a petition for extraordinary relief. *See Roukis v. United States*, 77 M.J. 70 (C.A.A.F. 2017) (mem.), *cert. denied sub nom. Roukis v. Dep't of the Army*, 138 S. Ct. 1024 (2018) (mem.). Before the 1983 Act, the Court had denied certiorari in at least two cases from the then Court of Military Appeals, although neither arose on denial of an Art. 67(a)(3) petition. *See Dale v. United States*, 19 C.M.A. 254, 41 C.M.R. 254 (on petition for writ of habeas corpus), *cert. denied*, 398 U.S. 914 (1970) (mem.); *United States v. Crawford*, 15 C.M.A. 31, 35 C.M.R. 3 (1964) (on granted petition for review), *leave to file petition for cert. denied*, 380 U.S. 970 (1965) (mem.).

First, the 1983 Act limitations violate the separation of powers. The recent Supreme Court case *United States v. Ortiz* held that the nature of the military justice system and the Court of Appeals is such that direct appellate review by the Supreme Court comports with Article III, even though the system and that court lie within the Executive Branch.[11] There is, however, a further dimension to their placement in one of the political branches: Congress has authorized both the Court of Appeals and the four Judge Advocates General—the chief uniformed executive branch lawyers—to substantially control the Supreme Court's military justice docket. As mentioned above, the Court of Appeals, an Article I court located in the Executive Branch,[12] can block Supreme Court review by denying a petition for grant of review under Art. 67(a)(3); similarly, the JAG of the service concerned may also prevent review by refusing to "certify" a case to CAAF.[13] Although the former circuit courts could control access to the Supreme Court by refusing to issue a certificate,[14] they at least were part of the Judicial Branch. The same is true of the gatekeeping arrangements at issue in *Hohn v. United States*[15] and *Felker v. Turpin*.[16] Authorizing Executive Branch officials like the judges of the Court of Appeals and the JAGs to insulate specific cases from direct appellate review by the Supreme Court is thus unprecedented.

For nearly a century (*i.e.*, since the Judges' Bill of 1925), one of the Court's "central prerogatives" has been the ability to determine which cases

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[11] 138 S. Ct. at 2179-81; *see also Edmond v. United States*, 520 U.S. 651, 664 n.2 (1997).

[12] *See Edmond v. United States*, 520 U.S. 651, 664 n.2 (1997); 10 U.S.C. § 941 (Art. 141, UCMJ).

[13] 10 U.S.C. § 867(a)(2) (Art. 67(a)(2)).

[14] *See* Lester B. Orfield, *Federal Criminal Appeals*, 45 YALE L.J. 1223, 1224 & n.7 (1936) (citing 2 Stat. 59 (1802)); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 27 & n.83 (7th ed. 2015) ("the Justices sometimes deliberately created divisions when riding circuit, in order to permit Supreme Court review on certificate of decisions that otherwise were not reviewable").

[15] 524 U.S. 236 (1998).

[16] 518 U.S. 651 (1996).

it will decide.[17] The 1983 Act limitations place a "central prerogative" of the Judicial Branch into the hands of Executive Branch officials, erode that prerogative.

III. EQUAL PROTECTION AND IRRATIONALITY

In addition to violating the separation of powers, the 1983 Act limitations violate due process because they are irrational and deny military personnel the equal protection of the laws.[18]

There is no constitutional right to appellate review,[19] and for many years federal criminal convictions were not subject to appellate review at all.[20] Review of such cases by writ of certiorari dates to the Evarts Act.[21] Appellate review of courts-martial by a multimember board of review dates to 1920, when Congress enacted Article of War 50.[22]

Congress has broad authority under the Exceptions and Regulations Clause and no duty to extend the certiorari jurisdiction to provide direct appellate review for courts-martial. But once it chose to do so, as it did in 1983, it had to comply with constitutional limitations. It could not restrict the scope of that expansion of the Supreme Court's jurisdiction in ways that are either irrational or a violation of equal protection.

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[17] The Supreme Court has exercised that prerogative even with respect to cases that are within its exclusive original jurisdiction. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citing *Arizona v. New Mexico*, 425 U.S. 794 (1976); *California v. West Virginia*, 454 U.S. 1027 (1981); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)). *But see, e.g., Texas v. Pennsylvania*, 141 S. Ct. ____ (2020) (No. 155, Orig.) (statement of Alito, J.); *Arizona v. California*, 140 S. Ct. 684, 685 (2020) (Thomas, J., dissenting); *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) (Thomas, J., dissenting); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Thomas, J., dissenting); *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (White, J., dissenting).

[18] *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

[19] *Ross v. Moffitt*, 417 U. S. 600, 610-11 (1974).

[20] *See* Orfield, *supra* note __, 45 YALE L.J. at 1224.

[21] *Id.* at 1224-25; *see generally* THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note __, at 24-30.

[22] 41 Stat. 759, 797 (1920).

The 1983 Act limitations reflected a fear that the Supreme Court might be burdened by military certiorari petitions. "In view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review."[23]

It is difficult to accept that justification given the absence of a comparable concern over any other category of litigants seeking direct appellate review.[24] For example, it is irrational to afford every federal or state misdemeanant untrammeled access to the Supreme Court while denying that same access to military personnel who have been convicted of serious offenses—which may be familiar civilian crimes and need have no service connection[25]—leading to prison terms in the double digits or even life without parole. This is so regardless of the number of cases that might be added to the Court's certiorari caseload if the limitations were invalidated.

When Congress passed the 1983 Act, the most recent data (for FY83) showed that the Court of Military Appeals had denied 2421 petitions for grant of review, dismissed another 26, and either granted or remanded 310. Thus, as many as 2447 cases would have been eligible for certiorari.

The actual number would have been substantially less because the Court of Appeals has long accepted Art. 67(a)(3) petitions that do not identify any errors,[26] even though the statute requires a showing of "good cause." Plainly, a petition for certiorari in such a case would be dead on arrival; it would not cause the Solicitor General to prepare an opposition absent a request and would either be returned without action, dismissed, or denied. The Clerk of

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[23] H.R. Rep. No. 98-549, at 16-17 (1983).

[24] Moreover, to the extent that the fear was grounded in an expectation of vexatious frivolous appeals, there is a mechanism at the Supreme Court for dealing with such litigants—at least if they are proceeding in forma pauperis. See S. Ct. R. 39.8; see also Jona Goldschmidt, *Who Sues the Supreme Court, and Why? Pro Se Litigation and the Court of Last Resort*, 8 IND. J. L. & SOC. EQUAL. 181 (2020).

[25] *Solorio v. United States*, 483 U.S. 435 (1987).

[26] *See* C.A.A.F.R. 21(e).

the Court of Appeals has estimated that roughly 20% of Art. 67(a)(3) petitions are submitted "on the merits," *i.e.*, without assigning any particular errors. Startling as that figure is, it has been even higher in the past.[27]

Assuming the caseload rationale is sufficient to pass muster in principle, changed circumstances can render unlawful what was once lawful.[28] And circumstances have indeed changed. Data from the Court of Appeals' last three annual reports show a dramatic decline from 1983. In FY18, FY19 and FY20, respectively, it denied or dismissed only 328, 369, and 336 Art. 67(a)(3) petitions. On average, this is an 86% decline from 1983.

To the extent that enactment of the limitations reflected a prediction about how many certiorari petitions would be filed once the law took effect, experience teaches that Congress's fears were unfounded. According to the Pentagon's Military Justice Review Group (headed by a respected former Chief Judge of the Court of Appeals), "[e]ven in those cases eligible for Supreme Court review, petitions to the Supreme Court have been filed in only a fraction of the cases."[29] "On average over the past five years, fewer than a dozen petitions per year have been filed with the Supreme Court for review under Article 67[(]a[)] according to data compiled by the U.S. Court of Appeals for the Armed Forces."[30] In 2010, the Congressional Budget Office predicted that a bill then under consideration "would make several hundred service members eligible to file petitions each year, but that only a small portion of those individuals would pursue review by the Supreme Court (based on the experience of individuals whose cases currently qualify for Supreme Court review)."[31]

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[27] *See* EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 21.03[6], at 215 (Matthew Bender & Co. 19th ed. 2020).

[28] *E.g., Shelby County v. Holder*, 570 U.S. 539, 550-53 (2013).

[29] Dep't of Defense, Military Justice Review Group Report, pt. 1, at 628 (Dec. 22, 2015). There would also be little if any additional effort by the Office of the Solicitor General. That Office already waives response in most cases coming up from CAAF, and it is rare for the Supreme Court to require it to submit a brief in opposition. The Solicitor General would be even more likely to waive response where CAAF had denied review.

[30] *Id*. at 628 n.5. *See also* Fidell & Sullivan, *supra* note __, § 19.03[19], at 190.

[31] H.R. Rep. No. 111-547, at 9 (2010).

Even without adjusting the data for (i) the roughly 20% of cases that state no issues,[32] (ii) the dismissals that involve time-barred petitions or petitions that are plainly outside the Court of Appeals' jurisdiction, and (iii) the fact that many Art. 67(a)(3) petitioners who *could* seek certiorari do not do so, invalidating the limitations would make no discernible difference in the Court's certiorari caseload, which fell to 5411 in the October Term 2019. Even if the changes Congress made to the first tier of appellate review in the Military Justice Act of 2016[33] lead to an uptick in the number of Art. 67(a)(3) petitions, the rationale for the limitations, weak as it was in 1983, will still have been seriously eroded.

Moreover, the "workload-reduction" rationale appears even more irrational when considered alongside other jurisdictional schemes granting litigants certiorari access. When Congress passed the 1983 Act, a handful of minor jurisdictions were still outside the reach of a writ of certiorari from the Supreme Court.[34] Most of these are now subject to the Court's direct appellate review.[35] Except for individuals prosecuted in American Samoa, the Wake Island Court, and Native American tribal courts, every criminal defendant in this country now has the right to apply for a writ of certiorari.[36] This includes individuals convicted in the district courts, territorial courts, the local courts of the District of Columbia, state courts, and even military commissions. It is incomprehensible that Congress thus afforded convicted "alien

[32] *See* note __ *supra.*

[33] *See* Art. 66(b), UCMJ.

[34] *See The Military Justice Act of 1982, Hearings on S. 2521 Before the Sen. Subcomm. on Manpower & Personnel, Comm. on Armed Services* 231 (1982) ("*1982 Hearings*") (responses of the American Civil Liberties Union to questions for the record).

[35] *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE § 3.1, at 3-4 n.3 (11th ed. 2019).

[36] The Wake Island Court's criminal jurisdiction is limited to petty offenses, motor vehicle violations, and certain other minor matters, with penalties up to six months' imprisonment and a $500 fine. 32 C.F.R. subpt. F. The Midway Islands Code was removed from the Code of Federal Regulations 20 years ago. *See* 65 Fed. Reg. 53,171 (Sept. 1, 2000) (removing 32 C.F.R. pt. 762). The former United States Court for Berlin, an occupation court, experienced a controversial endgame, *see* HERBERT J. STERN, JUDGMENT IN BERLIN (1984), and expired in 1991 when the Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U.N.T.S. 123, took effect.

unprivileged enemy belligerents"[37] freer access to the Supreme Court than it previously gave (and still gives) to American military personnel. To single out military personnel, *of all people*, for discriminatory exclusion from access to the Supreme Court is on its face irrational; general and special courts-martial are criminal proceedings, render judgments of conviction, and have powers that include lengthy imprisonment and even the death penalty.[38]

Finally, the capricious effect of the limitations is manifest not only on the face of the statute but also in CAAF's exercise of its authority. That court regularly grants review (and clears the path for a potential certiorari petition) for the sole purpose of correcting typographical or similar minor errors in the proceedings below.[39]

IV. EXCEPTIONS CLAUSE DIFFICULTIES

Article III, section 2, of the Constitution provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The 1983 Act limitations create an Exceptions Clause "exception" that is unconstitutional for three reasons.

An exception is supposed to be an exception, rather than the general rule. "An 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite."[40] The limitations are no legislative nibble. For the Court of Appeals' most recent Term, discretionary review was denied in over 89% of the cases filed under Art. 67(a)(3).

Beyond this, the class of cases the 1983 Act limitations exclude is effectively undefined, since Art. 67(a)(3) refers only to "good cause," a phrase that in no way channels the exercise of discretion.[41] As a result, the limitations

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[37] 10 U.S.C. § 948c.

[38] *See generally Ortiz*, *supra*, 138 S. Ct. at 2174-75.

[39] *See* Fidell & Sullivan, *supra* note __, § 21.03[7], at 216-20 (collecting cases).

[40] Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981).

[41] *See* Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J. L. & TECH. 50, 52, 71, 78-79 (2007). It is no answer that the considerations the

improperly delegate legislative authority.[42] "Good cause" is certainly a familiar term in the law, and the concept is capacious. The difficulty is that it is so malleable that it vests great discretion in whatever officials exercise the pertinent power.

Finally, good cause determinations are ordinarily subject to judicial or appellate review.[43] With Art. 67a(a), however, Congress has insulated the Court of Appeals' denials of review—which are by definition findings that good cause does not exist—from the only court that can properly review those denials: *the Supreme Court*. This generates a further constitutional problem because it vests the power to determine the metes and bounds of an Exceptions Clause exception in court that is subordinate to the Supreme Court. This violates the One Supreme Court Clause.[44] "[T]he Constitution provides for *one* Supreme Court, quite as clearly as it provides for one President."[45]

Court of Appeals' rules identify as bearing on whether there is good cause largely track the Supreme Court's Considerations Governing Review on Certiorari. *Compare* C.A.A.F.R. 21(b)(5) *with* S. Ct. R. 10. Like the Rule 10 "considerations," that list is not exhaustive. As its Rules Advisory Committee has explained, "[t]hese are not requirements, and good cause may be shown without satisfying any of the seven items listed" in the rule. Fidell & Sullivan, *supra*, § 21.02, at 197. For example, for a time the court granted review whenever the sentence was at least 30 years, *id*. § 25.03[2], at 270, and it has often granted review to correct minor errors. *Id*. § 21.03[9], at 222. *E.g., United States v. Livingstone*, 79 M.J. 41 & n.* (C.A.A.F.) (mem.) (correcting promulgating order), *cert. denied*, 140 S. Ct. 253 (2019) (mem.). Moreover, the Court of Appeals can suspend the rule on application or *sua sponte. See* C.A.A.F.R. 33.

[42] *Cf.* Eugene Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951, 969 (1973); Note, *The National Court of Appeals: A Constitutional "inferior" Court?*, 72 MICH. L. REV. 290, 305-11 (1973); Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 6 IND. L.J. 326, 332 & n.13 (1976) (noting argument that "except for those classes of cases over which the Constitution grants original jurisdiction to the Supreme Court, final appellate jurisdiction is vested in the Supreme Court and that it cannot constitutionally be delegated").

[43] *See, e.g.*, Miriam R. Stiefel, *Invalid Harms: Improper Use of the Administrative Procedure Act's Good Cause Exemption*, 94 WASH. L. REV. 927, 938-46 (2019).

[44] U.S. Const. art. III, § 1.

[45] Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 885 (1974).

Unless the Court of Appeals grants discretionary review, a case that falls within Art. 67(a)(3) is (if the limitations are valid) outside the Supreme Court's appellate jurisdiction. The Court of Appeals thus controls a part of the Supreme Court's docket. The arrangement improperly makes it *pro tanto* co-equal with the Supreme Court.[46]

To be sure, a lower court may strongly influence the likelihood that the Supreme Court will grant certiorari by a variety of means, such as disposing of a case by a per curiam or unpublished opinion or calling attention to various prudential factors that militate against a grant of certiorari. But it is a different matter entirely for a lower court to possess explicit, formal power to insulate a case from direct appellate review by the Supreme Court. It is especially in tension with the constitutional design when the court enjoying that extraordinary power is an Article I court and the officials exercising it are in the Executive Branch.[47]

Remarkably, since 2010 the Court of Appeals has gone so far as to require petitioners whose cases it has remanded to the service courts of criminal appeals to "specify," following the proceedings on remand, "the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision."[48] It has denied review even though a party intending to seek certiorari has complied with the rule.[49] This is gatekeeping with a vengeance.[50]

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[46] Worse yet, as we explain at pp. __-__ *infra*, Congress has also given the four JAGs, who are in no sense judges, *see, e.g.*, 10 U.S.C. § 7037 (prescribing duties), a gatekeeping function because they have power under Art. 67(a)(2) to certify cases to the Court of Appeals, and such cases are eligible for certiorari under § 1259(2).

[47] *See* pp. __-__ *supra*.

[48] *See* C.A.A.F.R. 21(b)(5)(G).

[49] *See United States v. Nerad*, 71 M.J. 321 (C.A.A.F. 2012) (mem.); *see also* Petition for a Writ of Certiorari, *United States v. Kelly*, 140 S. Ct. 2515 (2020) (mem.).

[50] *See generally* Fidell & Sullivan, *supra* note __, § 21.03[10], at 226-27 (2010 rule change is "deeply misconceived"). Worse yet, the Court of Appeals applies the rule, *beyond its text*, to cases that reached it initially on certificate for review rather than petition for review. *See* Brief for Nat'l Inst. of Mil. Just. in Support of Petitioner at 7 n.9, *McMurrin v. United States*, 574 U.S. 936 (2014) (mem.). *See generally id*. at 6-11 (discussing 2010 rule change).

Whether the Court of Appeals is a good, bad, or indifferent judge of whether an issue is certworthy is immaterial given the One Supreme Court Clause. The only officials who can properly be permitted to decide whether a petition meets the Supreme Court's standards for certiorari are the Justices.[51]

V. ASYMMETRIC ACCESS TO JUSTICE

The 1983 Act limitations are unfair: they are one-sided, in favor of the prosecution. This is a result of the "certification" power possessed by the Judge Advocates General. Under Art. 67(a)(2), UCMJ, the JAGs have the power to send a case to the Court of Appeals.[52] Cases decided by the Court of Appeals on certificate for review are within the Supreme Court's certiorari jurisdiction.[53] The power to certify is infrequently used for the benefit of an accused.[54] All but one of the 12 certificates filed in the Court of Appeals' last three Terms were for the benefit of the prosecution.[55] This is not surprising since, as Judge Baker observed in *United States v. Arness*,[56] the JAGs "are not independent and impartial judicial entities," that "they represent the government," and "are closely aligned with the government." In practical terms, therefore, the certification provision affords the prosecution an appeal as of

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[51] The poor track record of defense certiorari petitions in Art. 67(a)(3) cases does not in itself call into question the Court of Appeals' ability to evaluate certworthiness. Some cases may well satisfy the Court of Appeals' amorphous "good cause" yardstick but fall short of the Supreme Court's more demanding standards for granting certiorari.

[52] *See generally* Fidell & Sullivan, *supra* note __, § 8.03[14], at 85-88 (collecting cases).

[53] *See* 28 U.S.C. § 1259(2).

[54] *See* Fidell & Sullivan, *supra* note __, §§ 4.03[8], at 29, 22.03[5], at 239.

[55] The pro-prosecution tendency may vary from one service branch to another, *see* Daniel H. Benson, *The United States Court of Military Appeals*, 3 TEX. TECH L. REV. 1, 8 & nn.42-44 (1971), but across the board it remains far more likely to be used for the benefit of the prosecution.

[56] 74 M.J. 441, 447 (2015) (Baker, J., concurring in the result).

right, in contrast to the discretionary review hurdle a petitioner must overcome under the standard review provision. The result is a major asymmetry in the parties' access to review on certiorari.[57]

We know of no jurisdiction in which the prosecution may appeal a final judgment of conviction as of right while the defendant must show good cause in order to obtain discretionary review. That American appellate justice speaks with one voice on this structural question is evidence that a solitary exception (here, the military justice system) offends due process.[58] Nothing inherent in that system, the crimes it punishes, the interests it vindicates, or the history of the discriminatory provisions here at issue justifies the glaring disparity.[59]

This systemic asymmetry is aggravated by the fact that a JAG may cross-certify an issue for review in a case in which the accused has filed a petition for a (discretionary) grant of review in that same case. The former's issue must be addressed by the Court of Appeals; the latter's need not be.

Finally, the JAGs' power to certify a case to the Court of Appeals and thereby render it eligible for certiorari suffers even more severely from a delegation defect than the Court of Appeals' power to deny a petition for grant of review.[60] This is so because the UCMJ has never prescribed a standard for certification. "Good cause," as vague as it is,[61] is not required, and the *Manual for Courts-Martial* and service regulations, unlike the Court of Appeals' Rule 21(b)(5), do not even attempt to shed light on the matter.[62]

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[57] The asymmetry is not without irony, since the 1983 expansion of the certiorari jurisdiction was itself enacted to remedy an imbalance according to which an accused might have greater access to the courts than the prosecution would.

[58] *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

[59] *See Kennedy v. Louisiana*, 554 U.S. 945, 949-50 (2008) (Scalia, J., respecting the denial of rehearing).

[60] *See* pp. __-__ *supra*.

[61] *See* pp. __-__ *supra*,

[62] Thus, the *Manual* provides, "The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to *any matter of law*." R.C.M. 1203(e)(1) (emphasis added). This simply reflects the fact that the Court of Appeals may "take action only with respect to matters of law." Art. 67(c)(4), UCMJ.

Beyond requiring that the issue certified be one of law, the JAGs' individual discretion under Art. 67(a)(2) is completely unfettered. All they need do is "appropriate[ly] notif[y]" one another and the Staff Judge Advocate to the Commandant of the Marine Corps. Art. 67(a)(2), UCMJ. "Notification ensures that the views of each of the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps are taken into consideration before the certification process is used to present a case to the Court of Appeals for the Armed Forces."[63]

The Court of Military Appeals long ago rejected an equal protection challenge to Art. 67(a)(2), reasoning that the asymmetry was warranted in the interest of fostering "certainty in, and uniformity of, interpretation of the Uniform Code in each armed force, as well as for all the armed forces."[64] Whether or not that explanation sufficed with respect to that subset of the parties' lopsided access to the Court of Appeals before Congress expanded the scope of the Supreme Court's certiorari jurisdiction in 1983, it falls far short of justifying the disparate access that has existed since then.

CONCLUSION

Congress acted too cautiously when it expanded the Supreme Court's certiorari jurisdiction in 1983. Whether or not the result was fair to military personnel at the time, it is now beyond dispute that the 1983 Act limitations are unfair, shockingly discriminatory, and serve no substantial federal interest. If anything, they disserve the interest in promoting morale. After nearly 40 years of shortchanging GIs, they should be repealed.

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[63] R.C.M. 1204 (Discussion). "The provisions of a discussion section to the R.C.M. are not binding but instead serve as guidance." *United States v. Chandler*, 80 M.J. ___, ___ n.2 (C.A.A.F. 2021).

[64] *See United States v. Monett*, 16 C.M.A. 179, 181, 36 C.M.R. 335, 337 (1966). *See also United States v. Schoof*, 37 M.J. 96, 98 (C.M.A. 1993) ("Having not requested certification of any question of law by the Judge Advocate General, Schoof lacks standing to challenge application of Article 67(a)(2) on the grounds that it denies him equal opportunity with the Government to reach this Court."); *United States v. Caritativo*, 37 M.J. 175, 183 (C.M.A. 1993) (declining to address the JAG's refusal to certify because the court granted review under Art. 67(a)(3)).

Congress should also address the related question of whether CAAF's discretionary jurisdiction should be abandoned in favor of permitting an appeal as of right from all final decisions of the Courts of Criminal Appeals. CAAF could dispose of many cases summarily, just as the Article III courts of appeals do. This would end its inappropriate role as a gatekeeper and remove the need for the current two cycles of briefing in cases CAAF deems worthy of oral argument. Congress should, in any event, examine the appellate process for courts-martial holistically, since changes in one stage are likely to militate in favor of changes in the others.