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Equal Supreme Court Access for Military Personnel: An Overdue Reform

Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave

ABSTRACT. Federal law currently provides for direct Supreme Court review of criminal convictions from almost all American jurisdictions, but not of most court-martial convictions. For them, an Article I court can veto access to the Supreme Court. This Essay argues for elimination of that veto.

INTRODUCTION

One might think that every criminal defendant in the United States has a right to seek review by the Supreme Court. But Congress has largely blocked the path of a particular group of defendants: persons convicted at courts-martial. This is because, under the Military Justice Act of 1983 (the 1983 Act),¹ the only court-martial convictions eligible for Supreme Court review are cases in which a service Court of Criminal Appeals has affirmed a death sentence; cases certified by one of the Judge Advocates General (JAG); extraordinary writ cases in which relief has been granted; and cases granted discretionary review by the United States Court of Appeals for the Armed Forces (CAAF), the highest court of the military justice system.²

In this Essay, we argue that the limitation on cases within CAAF's discretionary jurisdiction, which account for the lion's share of that court's docket, is both unconstitutional and bad policy. First, by delegating to CAAF, an Article I court, the power to determine the Supreme Court's jurisdiction over appeals, Congress violated the separation of powers. Second, in making a comparatively small class of cases nonreviewable for the ostensible purpose of reducing the Supreme

1. Pub. L. No. 98-209, 97 Stat. 1398 (1983).

2. *Id.* § 10.

Court's caseload, Congress acted irrationally and violated Fifth Amendment equal protection. Third, by creating a category of unappealable cases that is essentially coterminous with the universe of military cases, and by conferring on CAAF a vague and effectively nonreviewable standard for granting review, Congress violated the Exceptions Clause.³ Finally, by allowing the Supreme Court to exercise jurisdiction over cases certified for review by a JAG, but not cases in which an accused⁴ seeks review unless CAAF chooses to exercise its discretion to grant review, the system provides asymmetric access to justice in favor of the government.

In light of these defects, Congress should remove the jurisdictional limitations that currently deprive military personnel and anyone else subject to court-martial jurisdiction⁵ equal access to the Supreme Court. Whether or not a court might find the limitations unconstitutional (assuming the issue is litigable),⁶ Congress has an independent obligation to uphold constitutional norms.⁷

This Essay proceeds as follows. Part I describes the process of appellate review of courts-martial under the Uniform Code of Military Justice (UCMJ),⁸ as well as the significant change in Supreme Court jurisdiction that Congress enacted in 1983. Part II argues that a central feature of these changes is both un-

3. U.S. CONST. art. III, § 2, cl. 2.

4. In courts-martial, the defendant is called "the accused." *E.g.*, 10 U.S.C. § 838(b) (2018) (Art. 38(b), UCMJ).

5. *See id.* § 802(a) (Art. 2(a), UCMJ) (enumerating categories of persons who are subject to trial by courts-martial). The constitutionality of the provision for jurisdiction over retirees is currently undergoing litigation. *See* Larrabee v. Braithwaite, No. 19-654, 2020 WL 6822706 (D.D.C. Nov. 20, 2020), *appeal docketed sub nom.* Larrabee v. Harker, No. 21-5012 (D.C. Cir. Jan. 22, 2021); United States v. Begani, 79 M.J. 620 (N-M. Ct. Crim. App. 2019), *petition for review granted*, 80 M.J. 200 (C.A.A.F. 2020), *supplemental issue granted*, 80 M.J. 463 (C.A.A.F. 2020).

6. The authors are hard-pressed to see how the issue could be litigated, since the 1983 Act's limitations prevent the Supreme Court from addressing the constitutional issues, and no other court can rule on the Supreme Court's jurisdiction. Even if there were a forum to adjudicate the validity of the 1983 Act's limitations, the Supreme Court would still lack jurisdiction: absent an affirmative statutory grant of appellate jurisdiction, there is none. *See, e.g., Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513-14 (1868). Simply invalidating the 1983 Act's limitations could not *create* jurisdiction and would therefore be a Pyrrhic victory.

7. *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").

8. The UCMJ appears at 10 U.S.C. §§ 801-946a (2018).

constitutional and unfair on four grounds. The Essay concludes with an explanation of what should be done to remedy that defect and identifies other changes Congress might consider with respect to appellate review of court-martial convictions.

I. BACKGROUND: THE MILITARY JUSTICE ACT OF 1983

Enacted in 1950, the UCMJ prescribed for the first time a single disciplinary statute for all of the United States Armed Forces. Congress created the Court of Military Appeals to serve as a civilian court of last resort for those convicted at courts-martial for a broad array of civilian- and military-type offenses. Congress did not initially provide for direct appeal from the Court of Military Appeals to the Supreme Court. The only way a decision of the Court of Military Appeals could reach the Supreme Court was if the accused sought collateral review, such as habeas corpus,⁹ back-pay actions under the Tucker Act or the Little Tucker Act,¹⁰ or a federal-question civil action in district court.¹¹ But in 1983, Congress expanded the Supreme Court's certiorari jurisdiction to include direct appellate review of decisions of the Court of Military Appeals. That court, created under Article I of the Constitution,¹² was renamed the "Court of Appeals for the Armed Forces" in 1994.¹³

Current law provides for direct appellate review of four categories of CAAF decisions by the Supreme Court: (1) cases in which a Court of Criminal Appeals has affirmed a death sentence, (2) cases certified for review by a JAG, (3) cases in which CAAF has granted discretionary review, and (4) any other case in which CAAF has granted relief, typically on petition for an extraordinary writ.¹⁴ Congress's grant of jurisdiction is constitutional in the sense that Congress has the

9. 28 U.S.C. § 2241 (2018); *e.g.*, *Parker v. Levy*, 417 U.S. 733, 740-42 (1974).

10. 28 U.S.C. §§ 1346(a)(2), 1491 (2018); *e.g.*, *United States v. Augenblick*, 393 U.S. 348, 348 (1969).

11. 28 U.S.C. § 1331 (2018); *e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 752-53 (1975).

12. *See* 10 U.S.C. § 941 (2018) (Art. 141, UCMJ).

13. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

14. 28 U.S.C. § 1259 (2018) 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:

(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.

constitutional authority to extend the Supreme Court’s appellate jurisdiction to CAAF cases.¹⁵ But the Supreme Court’s jurisdiction over the enumerated categories is limited. CAAF’s docket is overwhelmingly discretionary, so most courts-martial are not afforded civilian appellate review within the military justice system. And CAAF’s decision to grant or deny a petition for review determines whether the Supreme Court can in turn exercise its certiorari jurisdiction. Article 67a,¹⁶ which Congress added to the UCMJ through the 1983 Act, expressly bars Supreme Court review of CAAF orders that deny petitions for review.¹⁷ Thus, only those Article 67(a)(3) cases in which CAAF grants discretionary review are eligible for Supreme Court review.¹⁸

Discretionary review cases account for the overwhelming majority of CAAF’s caseload. Unlike other federal or state appellate courts,¹⁹ CAAF enjoys veto

(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.

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

16. 10 U.S.C. § 867a (2018) (Art. 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.

(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.

17. The *Manual for Courts-Martial, United States* (2019 ed.) reflects both Article 67a and section 1259 in Rule for Courts-Martial (R.C.M.) 1205(a).

18. 10 U.S.C. § 867 (2018) (Art. 67, UCMJ) (“The Court of Appeals for the Armed Forces shall review the record in . . . 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.”).

19. 28 U.S.C. § 1257(a) (2018) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”); 28 U.S.C. § 1254 (2018) (“Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”).

power over access to the Supreme Court.²⁰ From time to time, litigants have sought certiorari despite the 1983 Act's limiting provisions. But these appeals are routinely denied.²¹ As we argue below, CAAF's veto power offends various constitutional provisions and principles and is inequitable.

II. UNCONSTITUTIONAL LIMITATIONS

A. Separation of Powers

The 1983 Act's jurisdictional limitations violate the separation of powers. In the recent case of *United States v. Ortiz*, the Supreme Court held that direct appellate review of CAAF decisions by the Supreme Court comports with Article III, even though both the military justice system and CAAF are situated within the executive branch.²²

There is, however, an additional dimension to the military justice system's placement in one of the political branches. Congress has authorized both CAAF and the four JAGs – the chief uniformed executive-branch lawyers – to substantially control the Supreme Court's military justice docket. As mentioned above,

20. In its October 2019 Term, 382 of the 439 cases CAAF disposed of (eighty-seven percent) arose on petition for review under Article 67(a)(3). REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES: OCTOBER 1, 2019, TO SEPTEMBER 30, 2020, at 6 (2020).

21. See, e.g., *United States v. Brimeyer*, 72 M.J. 3 (C.A.A.F. 2012) (mem.), *reconsideration denied*, 72 M.J. 99 (C.A.A.F. 2013) (mem.), *cert. denied*, 571 U.S. 909 (2013) (mem.); *United States v. Manciagonzalez*, 73 M.J. 198 (C.A.A.F. 2014) (mem.), *cert. denied*, 574 U.S. 884 (2014) (mem.); *United States v. Grafmuller*, 71 M.J. 308 (C.A.A.F. 2012) (mem.), *cert. denied*, 568 U.S. 993 (2012) (mem.); *United States v. Almejo*, 65 M.J. 423 (C.A.A.F. 2007) (mem.), *cert. denied*, 552 U.S. 1188 (2008) (mem.); *United States v. Gowanlock*, 64 M.J. 435 (C.A.A.F. 2007), *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. 1987) (mem.), *cert. denied*, 485 U.S. 978 (1988) (mem.)). The same thing can happen under section 1259(4). For example, the Supreme Court denied certiorari when a petitioner sought review of CAAF's 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 Article 67(a)(3) petition. See *Dale v. United States*, 19 C.M.A. 254 (C.A.A.F. 1970) (on petition for a writ of habeas corpus), *cert. denied*, 398 U.S. 914 (1970) (mem.); *United States v. Crawford*, 15 C.M.A. 31 (C.A.A.F. 1964) (on granted petition for review), *leave to file petition for cert. denied*, 380 U.S. 970 (1965) (mem.).

22. 138 S. Ct. 2165, 2179-81 (2018).

CAAF, an Article I court located in the executive branch,²³ can block Supreme Court review by denying a petition for grant of review under Article 67(a)(3). Similarly, a JAG may prevent review by refusing to “certify” a case to CAAF.²⁴ Although the former circuit courts could control access to the Supreme Court by refusing to issue a certificate,²⁵ they at least were part of the judicial branch. The same is true of the gatekeeping arrangements at issue in *Hohn v. United States*²⁶ and *Felker v. Turpin*.²⁷ Authorizing executive-branch officials like CAAF judges and JAGs to insulate specific cases from direct appellate review by the Supreme Court is thus unprecedented. If the arrangement ever came before the Supreme Court, at least three current Justices would likely object on the ground that Congress had conferred “the Government’s ‘judicial Power’ on entities outside Article III.”²⁸

“[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another.”²⁹ For nearly a century (that is, since the Judges’ Bill of 1925³⁰), one of the Supreme Court’s “central prerogatives” has been to select the cases it wishes to decide.³¹ The 1983 Act’s jurisdictional limitations therefore improperly place a “central prerogative” of the judicial branch in the hands of executive-branch officials.

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23. See 10 U.S.C. § 941 (2018) (Art. 141, UCMJ); see also *Edmond v. United States*, 520 U.S. 651, 664 n.2 (1997) (“Although the statute does not specify the court’s ‘location’ for non-administrative purposes, other provisions of the UCMJ make clear that it is within the Executive Branch.”).
 24. 10 U.S.C. § 867(a)(2) (2018) (Art. 67(a)(2), UCMJ).
 25. See Lester B. Orfield, *Federal Criminal Appeals*, 45 YALE L.J. 1223, 1224 & n.7 (1936) (referring to 2 Stat. 159-60 (1802)); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 27 & n.38 (7th ed. 2015) (“[T]he Justices sometimes deliberately created divisions when riding circuit, in order to permit Supreme Court review on certificate of decisions that otherwise were not reviewable.”).
 26. 524 U.S. 236 (1998) (holding that a denial of certificate of appealability under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) is reviewable by the Supreme Court).
 27. 518 U.S. 651 (1996) (holding that the AEDPA bar on reviewing an appeal of a second federal habeas petition did not deprive the Supreme Court of jurisdiction over an original habeas petition).
 28. *Gundy v. United States*, 139 S. Ct. 2116, 2142 & n.77 (2019) (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting) (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995)).
 29. *Miller v. French*, 530 U.S. 327, 341 (2000) (citing *Loving v. United States*, 517 U.S. 748, 757 (1996)); *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976) (per curiam)).
 30. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.
 31. The Supreme Court has repeatedly 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

B. Equal Protection

Because the 1983 Act's jurisdictional limitations deny military personnel equal protection of the law, they also violate due process.³²

There is no constitutional right to appellate review,³³ and until 1879 federal criminal convictions were not subject to appellate review at all.³⁴ Review of such convictions by writ of certiorari dates to the Evarts Act,³⁵ while appellate review of courts-martial by multimember boards dates to 1920, when Congress enacted Article of War 50½.³⁶

Congress has broad authority under the Exceptions and Regulations Clause, and no duty to expand the Supreme Court's certiorari jurisdiction to provide direct appellate review for courts-martial. Indeed, until the 1983 Act, there was no certiorari jurisdiction over courts-martial.³⁷ But like any federal legislation, the 1983 extension of jurisdiction must comport with the Constitution. Put differently, Congress cannot restrict the scope of its expansions of the Supreme Court's jurisdiction in ways that violate the equal-protection component of Fifth Amendment due process.

The 1983 Act's limitations reflected a fear that the Supreme Court might be burdened by military certiorari petitions. A House Report noted: "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."³⁸

U.S. 1027 (1981); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)). *But see* *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.) ("Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction."); *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).

32. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding, in a D.C. school desegregation case, that "discrimination may be so unjustifiable as to be violative of due process" even though the Fifth Amendment, unlike the Fourteenth Amendment, has no Equal Protection Clause).

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

34. *See* Orfield, *supra* note 25, at 1224.

35. *Id.* at 1224-25. *See generally* FALLON ET AL., *supra* note 25, at 24-30.

36. Pub. L. No. 66-242, art. 50½, 41 Stat. 759, 797 (1920).

37. *See supra* Part I.

38. H.R. REP. NO. 98-549, at 16-17 (1983).

It is difficult to accept that justification given the absence of a comparable concern over any other category of litigants seeking direct appellate review.³⁹ For example, it seems unreasonable to afford every federal or state misdemeanor untrammelled access to the Supreme Court, while denying that same access to military personnel who have been convicted of serious offenses—offenses that may be familiar civilian crimes and may have no service connection⁴⁰—leading to prison terms in the double digits or even life without parole.

In the fiscal year preceding enactment of the 1983 Act, the Court of Military Appeals denied 2,421 petitions for grant of review, dismissed another 46, and either granted or remanded 310.⁴¹ Thus, as many as 2,467 additional cases might have been eligible for certiorari but for the limitations imposed by the 1983 Act.

But the actual number of eligible cases would have been substantially smaller than 2,467 because the Court of Military Appeals had long accepted Article 67(a)(3) petitions that did not identify any errors,⁴² even though the UCMJ has always required a showing of “good cause.”⁴³ Because petitions for certiorari require good cause (and then some),⁴⁴ many Article 67(a)(3) petitions would have been dead on arrival anyway. Indeed, CAAF’s Clerk of Court has estimated that twenty percent or less of Article 67(a)(3) petitions are submitted “on the merits”—that is, without identifying any particular errors.⁴⁵ Startling as that figure is, it has been even higher in the past.⁴⁶

Even assuming Congress’s caseload rationale could pass muster in principle, changed circumstances can render unlawful what was once lawful.⁴⁷ And circumstances have indeed changed. CAAF’s last three annual reports chronicle a

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39. 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 SUP. 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, 182 (2020) (discussing the “reality of increased pro se litigation” experienced by the Supreme Court since 1990).
40. See generally *Solorio v. United States*, 483 U.S. 435 (1987) (holding that courts-martial may convict defendants for offenses that lack a service connection).
41. REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS: OCTOBER 1, 1982, TO SEPTEMBER 30, 1983, at 14 (1983) (statistical report for Fiscal Year 1983).
42. See C.A.A.F.R. 21(e).
43. See 10 U.S.C. § 867(a)(3) (2018) (Art. 67(a)(3), UCMJ).
44. See SUP. CT. R. 10 (certiorari “will be granted only for compelling reasons”).
45. Email from Joseph R. Perlak, Clerk of Court, CAAF, to Dwight H. Sullivan & Eugene R. Fidell (Feb. 5, 2020, 9:39 AM EST) (on file with authors).
46. 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 213, 215 (Matthew Bender & Co. 19th ed. 2020).
47. See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 550–53 (2013).

dramatic decline from 1983. In fiscal years 2018, 2019, and 2020, CAAF denied or dismissed only 328, 369, and 336 Article 67(a)(3) petitions, respectively. On average, this represents an eighty-six percent decline from 1983. The data show that any incremental burden on the Supreme Court would be much lower than when the 1983 Act was passed.

To the extent that the enactment of jurisdictional limitations reflected a prediction about how many certiorari petitions would be filed once the law took effect, experience again teaches that Congress's fears were unfounded. According to the Pentagon's Military Justice Review Group (headed by a respected former Chief Judge of CAAF), "Even in those cases eligible for Supreme Court review, petitions to the Supreme Court have been filed in only a fraction of the cases."⁴⁸ "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 [67a] according to data compiled by the U.S. Court of Appeals for the Armed Forces."⁴⁹ In 2010, the Congressional Budget Office predicted that a bill then under consideration "would make several hundred servicemembers 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)."⁵⁰

Even without adjusting the data for (i) the roughly twenty percent of cases that state no issues,⁵¹ (ii) the dismissals involving time-barred petitions or petitions plainly outside CAAF's jurisdiction, and (iii) the fact that many Article 67(a)(3) petitioners who could seek certiorari do not do so, invalidating the 1983 Act's jurisdictional limitations would make no discernible difference in the Supreme Court's certiorari caseload, which fell to 5,411 cases in the October 2019 Term.⁵² Even if the changes Congress made to the first tier of appellate review in

48. Mil. Just. Rev. Grp., *Military Justice Review Group Report*, U.S. DEP'T DEF. 628 (Dec. 22, 2015), <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf> [<https://perma.cc/T42U-UWK9>]. 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.

49. *Id.* at 628 n.9; *see also* FIDELL & SULLIVAN, *supra* note 46, § 19.03[19], at 190 ("In Fiscal Years 2013-15 . . . only 27 certiorari petitions were filed.").

50. H.R. REP. NO. 111-547, at 9-10 (2010).

51. *See supra* note 45 and accompanying text.

52. *See* John Roberts, *2020 Year-End Report on the Federal Judiciary*, U.S. SUP. CT. 5 (Dec. 31, 2020), <https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf> [<https://perma.cc/4RPD-8RSC>].

the Military Justice Act of 2016⁵³ lead to an uptick in the number of Article 67(a)(3) petitions, the rationale for the limitations, as weak as it was in 1983, will still have been seriously eroded.

The caseload-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.⁵⁴ Most of those jurisdictions are now subject to the Court's direct appellate review.⁵⁵ Except for individuals prosecuted in American Samoa, the Wake Island Court, and Native American tribal courts, every criminal defendant in the United States now has the right to apply for a writ of certiorari.⁵⁶ This includes individuals convicted in the district courts, territorial courts, the local courts of the District of Columbia, state courts, and even the military commissions being tried at Guantanamo Bay, Cuba. It seems incomprehensible that Congress has afforded convicted enemy belligerents⁵⁷ freer access to the Supreme Court than American military personnel. Given that general and special courts-martial are criminal proceedings, render judgments of conviction, and have the power to impose prison terms up to life without parole,⁵⁸ preventing military personnel from accessing the Supreme Court is irrational on its face.

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53. See Military Justice Act of 2016, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2932-34 (codified at 10 U.S.C. § 866(b)); David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 84-88 (2017) (summarizing the changes).
54. See *The Military Justice Act of 1982: Hearing on S. 2521 Before the Subcomm. on Manpower & Personnel of the S. Comm. on Armed Services*, 97th Cong. 231-51 (1982) (responses of the American Civil Liberties Union to questions for the record).
55. 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).
56. 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. §§ 935.50-.53 (2020). The Midway Islands Code was removed from the Code of Federal Regulations twenty years ago. See 65 Fed. Reg. 53171 (Sept. 1, 2000) (removing 32 C.F.R. pt. 762). The former United States Court for Berlin, an occupation court, experienced a controversial endgame and expired in 1991 when the Treaty on the Final Settlement with Respect to Germany took effect. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U.N.T.S. 123; see also HERBERT J. STERN, *JUDGMENT IN BERLIN* (1984) (chronicling controversial proceedings that led to the demise of the U.S. Court for Berlin).
57. See 10 U.S.C. § 948c (2018) (authorizing military-commission jurisdiction over alien unprivileged enemy belligerents).
58. See *Ortiz v. United States*, 138 S. Ct. 2165, 2174-75 (2018). At least Congress has cleared the path to the Supreme Court for military defendants with affirmed death sentences. Although "death is different," it is difficult to justify distinguishing such cases from those in which defendants are sentenced to double-digit prison terms, life, or life without parole for the purpose of access to the nation's highest court.

Finally, the limitations' capricious effect is manifest not only on the face of the 1983 Act, but also in CAAF's exercise of its authority. CAAF regularly grants review (and clears the path for potential certiorari petitions) for the sole purpose of correcting typographical or similar minor errors in proceedings below.⁵⁹

C. Exceptions Clause

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.”⁶⁰ The 1983 Act's jurisdictional limitations create an Exceptions Clause “exception” that is unconstitutional for three reasons.

First, an exception must be an exception, rather than a general rule. “An ‘exception’ implies a minor deviation from a surviving norm; it is a nibble, not a bite.”⁶¹ The 1983 Act's limitations are no legislative nibble. For CAAF's most recent term, discretionary review was denied in over eighty-nine percent of the cases that were filed under Article 67(a)(3).⁶²

Second, the class of cases that the 1983 Act excludes is effectively undefined. Article 67(a)(3) only requires review for “good cause,” a phrase that does little to guide or limit the exercise of CAAF's discretion.⁶³ As a result, the jurisdictional

59. See FIDELL & SULLIVAN, *supra* note 46, § 21.03[7], at 216-20 (collecting cases).

60. U.S. CONST. art. III, § 2.

61. Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981).

62. See REPORT OF THE UNITED STATES COURT OF APPEALS OR THE ARMED FORCES, *supra* note 20, at 7.

63. See Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 51, 71-72, 78-79 (2007). It is no answer that the considerations CAAF's 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) (stating that there is “good cause” to grant a petition where “the court below has . . . decided a question of law which has not been, but should be, settled by this Court”), with SUP. CT. R. 10 (stating that the Supreme Court should grant petitions for certiorari where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . as to call for an exercise of this Court's supervisory power”). Like the Rule 10 “considerations,” CAAF's 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* note 46, § 21.02, at 197. For example, for a time the court granted review whenever the sentence was at least thirty years, *id.*, § 25.03[2], at 270, and it has often granted review to correct minor errors, *id.*, § 21.03[9], at 222; see also *United States v. Livingstone*, 79 M.J. 41, 41 n.* (C.A.A.F. 2019)

limitations improperly delegate legislative authority.⁶⁴ Indeed, “good cause” is a capacious concept, which vests significant discretion in officials exercising their pertinent powers.

Third, good-cause determinations are ordinarily subject to judicial or appellate review.⁶⁵ With Article 67a(a), however, Congress has insulated CAAF’s 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 arrangement creates yet another constitutional problem by vesting the power to determine the metes and bounds of an Exceptions Clause exception in a court that is subordinate to the Supreme Court. This violates the One Supreme Court Clause.⁶⁶ “[T]he Constitution provides for *one* Supreme Court, quite as clearly as it provides for one President.”⁶⁷

Unless CAAF grants discretionary review, a case that falls within Article 67(a)(3) is outside the Supreme Court’s appellate jurisdiction. CAAF thus controls a part of the Supreme Court’s docket. This arrangement improperly makes it *pro tanto* coequal with the Supreme Court.⁶⁸

To be sure, a lower court could attempt to influence the likelihood that the Supreme Court would grant certiorari by a variety of means, such as disposing of a case by a *per curiam* or unpublished opinion or by 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. This arrangement is in special tension with our constitutional framework when the court enjoying

(mem.) (correcting promulgating order), *cert. denied*, 140 S. Ct. 253 (2019) (mem.). Moreover, CAAF can suspend the rule on application or *sua sponte*. See C.A.A.F.R. 33.

64. 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. 327, 332 (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”).

65. 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).

66. U.S. CONST. art. III, § 1.

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

68. Worse yet, as we explain in Section II.D, *infra*, Congress has also given the JAGs, who are in no sense judges, see, e.g., 10 U.S.C. § 7037 (2018) (prescribing duties), a gatekeeping function because they have power under Article 67(a)(2) to certify cases to CAAF, and such cases are eligible for certiorari under section 1259(2). See *infra* notes 75-80 and accompanying text.

that extraordinary power is an Article I court and the officials exercising it are in the executive branch.⁶⁹

Remarkably, since 2010, CAAF has gone so far as to require petitioners whose cases it previously remanded and who are back before it for discretionary review to “specify” the “issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision.”⁷⁰ It has then proceeded to deny appellate review, even when petitioners who intended to seek certiorari have complied with its rules.⁷¹ Plainly, CAAF exercises its own judgment as to whether such petitioners have an issue that warrants review by the Supreme Court. This is gatekeeping with a vengeance.⁷² It is also circumstantial evidence that when a case comes before CAAF for discretionary review the first time around (that is, before a remand), CAAF may consider whether it is certworthy, since there is no obvious basis for applying a different standard of “good cause” before and after a remand.

Whether CAAF is a good or bad judge of certworthiness is immaterial given the One Supreme Court Clause.⁷³ The only officials who can permissibly decide whether a petition meets the Supreme Court’s standards for certiorari are the Justices.⁷⁴

D. Due Process

The 1983 Act’s jurisdictional limitations favor the prosecution. This is a result of the JAGs’ certification power. Under Article 67(a)(2), each JAG has the power to send a case to CAAF.⁷⁵ Cases decided by CAAF on certificate for review are

69. See *supra* notes 22-31 and accompanying text.

70. See C.A.A.F.R. 21(b)(5)(G).

71. See *United States v. Nerad*, 71 M.J. 321 (C.A.A.F. 2012) (mem.); see also *United States v. Kelly*, 140 S. Ct. 2515 (2020) (mem.) (denying a petition for a writ of certiorari from the Court of Appeals for the Armed Forces).

72. See generally FIDELL & SULLIVAN, *supra* note 46, § 21.03[10], at 222 (describing the 2010 rule change as “deeply misconceived”). Worse yet, CAAF applies the rule, *beyond its text*, to cases that reached it initially on certificate for review rather than on petition for review. See Brief for National Institute of Military Justice as Amicus Curiae Supporting Petitioner at 7 n.9, *McMurrin v. United States*, 574 U.S. 936 (2014) (mem.). See generally *id.* at 6-11 (discussing the 2010 rule change).

73. U.S. CONST. art. III, § 1; see *supra* notes 66-67 and accompanying text.

74. The poor track record of defense certiorari petitions in Article 67(a)(3) cases does not in itself call into question CAAF’s ability to evaluate certworthiness. Some cases may well satisfy its amorphous “good cause” yardstick, but fall short of the Supreme Court’s more exacting standard for granting certiorari. See SUP. CT. R. 10.

75. See generally FIDELL & SULLIVAN, *supra* note 46, § 8.03[14], at 86-88 (collecting cases).

within the Supreme Court's certiorari jurisdiction.⁷⁶ The JAGs rarely exercise their power to certify for the benefit of an accused.⁷⁷ All but one of the twelve certificates the JAGs filed in CAAF's last three terms were for the benefit of the prosecution.⁷⁸ This is not surprising since, as Judge Baker observed in *United States v. Arness*, the JAGs "are not independent and impartial judicial entities," but rather "represent the government" and "are closely aligned with the government."⁷⁹ In practical terms, therefore, the certification provision affords the prosecution an appeal as of right, in contrast to the discretionary review hurdle a petitioner must overcome under the standard review provision. This produces a major asymmetry in the parties' access to certiorari review.⁸⁰

To our knowledge, in no other jurisdiction can the prosecution 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.⁸¹ 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 CAAF (unless, for example, it is moot or academic),⁸² but the latter's need not be. Nothing inherent in the military justice system, the crimes it punishes, the interests it vindicates, or the history of the discriminatory provisions here at issue justifies this glaring disparity.⁸³

76. See 28 U.S.C. § 1259(2) (2018).

77. See FIDELL & SULLIVAN, *supra* note 46, § 4.03[8], at 29, § 22.03[5], at 239.

78. 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, the power to certify remains far more likely to be used by the JAGs for the benefit of the prosecution.

79. 74 M.J. 441, 447 (C.A.A.F. 2015) (Baker, J., concurring).

80. The asymmetry is not without irony, since the 1983 Act's 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. The measure was an administration proposal and reflected concern that the then-Court of Military Appeals might decide important questions from which the government had no right of appeal. See H.R. REP. NO. 98-549, at 16 (1983); S. REP. NO. 98-53, at 9 (1983); Andrea Nishi, Ortiz and the Problem of Intra-branch Litigation, 120 COLUM. L. REV. F. 118, 121 & nn.23-26 (2020).

81. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (holding that the Sixth Amendment requires unanimous jury verdicts in state courts without noting that the military justice system permits nonunanimous verdicts).

82. See FIDELL & SULLIVAN, *supra* note 46, § 8.03[14], at 86-88 (collecting cases).

83. Cf. *Kennedy v. Louisiana*, 129 S. Ct. 1, 4 (2008) (Scalia, J., dissenting) (observing that some offenses may be more serious when committed by a member of the armed forces).

Finally, the JAGs' power to certify a case to CAAF and thereby render it eligible for certiorari suffers even more severely from a delegation defect than CAAF's power to deny a petition for grant of review. This is so because the UCMJ has never prescribed a standard for certification. Congress has not "la[id] down by legislative act an intelligible principle" with which the JAGs are "directed to conform."⁸⁴ Not even "good cause," as vague as it is,⁸⁵ is required, and the *Manual for Courts-Martial* and service regulations, unlike CAAF's Rule 21(b)(5), do not even attempt to shed light on the matter.⁸⁶

Beyond requiring that the issue certified be one of law, the JAGs' discretion under Article 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.⁸⁷

The Court of Military Appeals long ago rejected an equal-protection challenge to Article 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."⁸⁸ Whether or

84. See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) (rejecting a nondelegation challenge to the Sex Offender Registration and Notification Act's registration requirements).

85. See *supra* notes 63-64 and accompanying text.

86. 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 CAAF may "take action only with respect to matters of law." 10 U.S.C. § 867(c)(4) (2018) (Art. 67(c)(4), UCMJ). Regardless of whether the Supreme Court would or should find an impermissible delegation if the question were ever presented in litigation, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (rejecting the claimed originalist basis for the nondelegation doctrine), Congress should independently take account of the lack of standards when deciding whether to remove the 1983 Act's limitations. And even if Congress were to prescribe some "intelligible principle" to control the JAGs' Article 67(a)(2) discretion, the limitations' other fatal defects would remain. Fixing Article 67(a)(2), in other words, would not fix Article 67(a) or section 1259(3).

87. 10 U.S.C. § 867(a)(2) (2018) (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." R.C.M. 1204. "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. 425, 429 n.2 (C.A.A.F. 2021).

88. See *United States v. Monett*, 36 C.M.R. 335, 337 (C.M.A. 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)).

not that explanation sufficed with respect to that subset of the parties' lopsided access to CAAF 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 (we do not believe it was), it is now beyond dispute that the 1983 Act's limitations are unfair, shockingly discriminatory, and serve no substantial federal interest. If anything, they undermine efforts to promote morale within the military by treating military personnel as second-class citizens. After nearly forty years of shortchanging military personnel, those limitations should be repealed.

Congress should enact legislation that provides military personnel with equal access to the Supreme Court. This was recommended over a decade ago by the blue-ribbon nongovernmental Commission on Military Justice.⁸⁹ More recently, a 2018 workshop conducted at Yale Law School updated the 2006 UN Draft Principles Governing the Administration of Justice Through Military Tribunals,⁹⁰ and included a specific recommendation that "[a]ccess to the State's highest court with jurisdiction over criminal cases should be available to persons convicted by military courts on an equal footing with persons convicted by civilian courts."⁹¹ Congressional action placing military personnel on an equal footing with other criminal defendants with respect to Supreme Court access is thus long overdue. Achieving equal footing requires repealing the second sentence of Article 67a(a) and amending Article 67(a)(3). The only potential complication

89. See Nat'l Inst. Mil. Just. & Mil. Just. Comm., *Report of the Commission on Military Justice*, A.B.A. 3, 7 (Oct. 2009), https://www.nimj.org/uploads/1/3/5/5/135587129/2009_final_report_of_the_commission_on_military_justice__2009_cox_commission_.pdf [<https://perma.cc/T7KS-KM4A>]. The Commission, also known as the Cox Commission, was chaired by retired Chief Judge Walter T. Cox III of CAAF. *Id.*

90. U.N. Econ. & Soc. Council, *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity*, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006), <https://digitallibrary.un.org/record/571377?ln=en> [<https://perma.cc/93QH-BJH>].

91. Decaux Principles Workshop, *The Yale Draft*, YALE L. SCH. (2018), <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf> [<https://perma.cc/44PV-6EPN>]; see also FIDELL & SULLIVAN, *supra* note 46, § 22.03[5], at 239 (suggesting that "the parties should at the very least be put on an equal footing by eliminating the certification power and allowing whichever party loses before the Court of Criminal Appeals to seek discretionary review from [CAAF]").

is the political one that corrective legislation would have to pass through both the armed services and judiciary committees – hardly an insuperable obstacle.

To be sure, there are other questions that Congress could usefully address in connection with the appellate review of courts-martial. For example, it could conclude, in an era of austerity, that CAAF’s caseload has so diminished over time that its docket should be transferred lock, stock, and barrel to the U.S. Court of Appeals for the District of Columbia Circuit.⁹² Barring that, it would make sense to streamline CAAF’s discretionary jurisdiction by permitting an appeal as of right by either side from all final decisions of the four Courts of Criminal Appeals.⁹³ Under such a system, CAAF could still dispose of many cases summarily (and without oral argument), just as the Article III courts of appeals may do.⁹⁴ This change would not only end its improper role as a gatekeeper – an outcome we strongly endorse – but would also remove the need for two cycles of briefing, first at the petition stage and then again after review has been granted.⁹⁵

Changes like those would serve the interest of efficiency and judicial economy, but have little to do with either fairness or the demands of the Constitution. Whether or not Congress takes these other steps, it should delay no further in fixing the fundamental flaw examined in this Essay.

92. As one of us has observed:

The Court of Appeals for the Armed Forces decided 46 cases on full opinion in the September 2010 Term; for the October 2019 Term the number had fallen significantly to a mere 25. Moreover, the overwhelming majority of those cases concerned sex or child pornography offenses, categories of crime for which any claim that a specialized court is needed is weak at best. Only one of the 25 cases involved offenses of a classic military character. Between the same two Terms, the number of petitions for grant of review plummeted from 720 to 368. Nonetheless, there is no known current congressional support for abolishing the court or permitting its judgeships to remain vacant as part of a program of attrition.

Eugene R. Fidell, *The Next Judge: US Court of Appeals for the Armed Forces’ Looming Vacancy*, JUST SEC. (Mar. 1, 2021), <https://www.justsecurity.org/75028/the-next-judge-us-court-of-appeals-for-the-armed-forces-looming-vacancy> [<https://perma.cc/K3JM-7N58>].

93. See FIDELL & SULLIVAN, *supra* note 46, § 4.03[8], at 29. Doing so would remove the current exclusion of All Writs Act cases in which CAAF has denied relief. See 28 U.S.C. § 1259(4) (2018). According to the court’s annual reports, an average of only eighteen cases per year fell in this category over the last three years.

94. See, e.g., D.C. CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES § VIII(G) (2020); 4TH CIR. R. 27(f)(1). See generally Christopher S. Perry, *Summary Disposition on Appeal*, 29 APP. PRAC. J. 2 (2010) (discussing motions for summary disposition in the circuit courts).

95. Indeed, CAAF could “collaps[e] the petition and plenary stages” of its review without legislation. See FIDELL & SULLIVAN, *supra* note 46, § 19.03[26], at 193–94.

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