

## MEMORANDUM

**TO: Members, Committee on the Judiciary**

**FROM: John Conyers, Jr.  
Chairman**

**DATE: December 7, 2009**

**RE: Full Committee Markup**

The Committee on the Judiciary will meet to markup H. Res. 920, Directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession regarding certain matters pertaining to detainees held at Naval Station, Guantanamo Bay, Cuba who are transferred into the United States; H.R. 3190, the "Discount Pricing Consumer Protection Act of 2009"; and H.R. 569, the "Equal Justice for Our Military Act of 2009." The markup will take place on Wednesday, December 9, 2009 at 10:00 a.m. in room 2141 of the Rayburn House Office Building.

**I. H. Res. 920, Directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession regarding certain matters pertaining to detainees held at Naval Station, Guantanamo Bay, Cuba who are transferred into the United States**

H. Res. 920 directs the Attorney General to transmit to the House of Representatives:

Any document, record, memo, correspondence, or other communication of the Department of Justice, including the Office of the Solicitor General, or any portion of any such communication, that refers or relates to--

- (1) any legal guidance or recommendations made since January 20, 2009, regarding additional legal rights or protections, including under the

- Constitution, statutes, and treaties, detainees held at Naval Station, Guantanamo Bay, Cuba, receive when transferred into the United States from such Naval Station, Guantanamo Bay, Cuba; or
- (2) pretrial detention, post conviction incarceration, or transportation within the United States, of detainees held at Naval Station, Guantanamo Bay, Cuba, who are to be transferred into the United States for prosecution and trial in the United States District Court of the Southern District of New York..<sup>1</sup>

#### **A. What is a Resolution of Inquiry**

Under the rules and precedents of the House of Representatives, a resolution of inquiry is a tool that can be used to seek information from the executive branch.<sup>2</sup> It “is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch.”<sup>3</sup> The typical practice has been to use the verbs “request” when asking for information from the President and “direct” when addressing executive department heads. Clause 7 of Rule XIII of the Rules of the House of Representatives provides that if the Committee to which the resolution is referred does not act on it within 14 legislative days, a privileged motion to discharge the resolution from the Committee is in order on the House Floor.

#### **B. Relevant Actions By the Committee and the House**

H. Res. 920 calls for the Attorney General to provide two categories of documents. First, it calls for production of legal analysis regarding “additional legal rights or protections” that Guantanamo detainees allegedly receive on transfer to the United States for prosecution. This request is limited to legal guidance and recommendations developed during the current

---

<sup>1</sup> H. Res. 920 was referred to the Judiciary Committee. On the same day that Ranking Member Smith introduced H. Res. 920, the Ranking Members of the Armed Services (Mr. McKeon), Homeland Security (Mr. King of New York), and Intelligence (Mr. Hoekstra) Committees also introduced resolutions of inquiry seeking information related to Guantanamo detainees and their possible transfer to the United States for prosecution. See H. Res. 922, H. Res. 923, and H. Res. 924.

<sup>2</sup> Christopher Davis, *House Resolutions of Inquiry*, CRS Report, November 25, 2008, at 1 (quoting U.S. Congress, House, *Deschler’s Precedents of the United States House of Representatives*, H. Doc. 94-661, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., vol. 7, ch. 24, § 8.

<sup>3</sup> *Id.*

Administration. Second, the resolution calls for production of documents regarding “pretrial detention, post conviction incarceration, or transportation within the United States” of Guantanamo detainees sent to New York for prosecution. It does not seek information regarding the detention, incarceration, or transportation of terrorist suspects tried elsewhere in the United States.

## II. H.R. 3190, the “Discount Pricing Consumer Protection Act of 2009”

### A. Purpose

This markup will also consider H.R. 3190, the Discount Pricing Consumer Protection Act of 2009. The bill’s intent is to undo the harm to consumers posed by the Supreme Court’s 2007 decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc.<sup>4</sup> In Leegin, the Supreme Court overturned 95 years of antitrust jurisprudence by reversing its 1911 decision in Dr. Miles Med. Co. v. John D. Park & Sons, Co.<sup>5</sup>, which had expressly prohibited agreements between manufacturers and distributors establishing a minimum retail price for the manufacturers’ products. Critics of the Leegin decision expect it to raise prices for consumers.<sup>6</sup> H.R. 3190 would negate the Leegin decision by again making any such agreements a violation of Section 1 of the Sherman Act. A hearing was held on this issue by the Subcommittee on Courts and Competition Policy on April 24, 2009, and the bill was passed out of Subcommittee on July 30, 2009, by voice vote.

### B. Background

#### 1. Retail price fixing and the Leegin decision

##### a. Antitrust offenses are generally evaluated by one of two standards, “rule of reason” analysis or *per se* prohibition.

Alleged antitrust offenses are generally subject to one of two classes of reviews, either a 1) *per se* or 2) rule of reason analysis. Whether an antitrust violation is subject to rule-of-reason analysis or a *per se* prohibition is significant both in terms of a policy judgment and as an evidentiary burden of proof.

*Per se* offenses<sup>7</sup> consist of a limited number of business practices deemed so harmful to competition that proof of the practice itself establishes an antitrust violation on its face without further analysis. *Per se* prohibitions are generally limited to “conduct that is manifestly anticompetitive,”<sup>8</sup> that would “always or almost always tend to restrict competition and decrease output.”<sup>9</sup>

---

<sup>4</sup> 551 U.S. 877 (2007), 127 S. Ct. 2705 (2007).

<sup>5</sup> 220 U.S. 373 (1911).

<sup>6</sup> In his dissent in Leegin, Justice Breyer estimated that even if only 10 percent of manufacturers engaged in minimum retail price fixing, the annual retail bills for the average family of four would increase by between \$750 and \$1,000. 127 S. Ct. at 2736.

<sup>7</sup> The Supreme Court first crafted the *per se* standard in the context of horizontal agreements, i.e., agreements among competitors. See e.g., United States v. Joint Traffic Ass’n, 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899).

<sup>8</sup> Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).

<sup>9</sup> Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979).

On the other hand, rule-of-reason offenses reflect a recognition that some types of business practices are not always anticompetitive, and may be, on balance, either procompetitive or anticompetitive depending upon the factual circumstances.

Rule-of-reason analysis requires a more in-depth look at the practice in question in order to weigh the competitive effects.<sup>10</sup> Such an analysis generally involves expensive and time-consuming research and analysis.

**b. Until 2007, it was illegal for manufacturers to set a threshold price at the retail level.**

In its 1911 decision in Dr. Miles,<sup>11</sup> the Supreme Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was illegal under section 1 of the Sherman Act.<sup>12</sup> For the next 96 years, Dr. Miles stood for the proposition that agreements between manufacturers and retailers that established a minimum price for the manufacturers' products were illegal on their face. In antitrust parlance, the case established a *per se* prohibition on vertical minimum price restraints, alternately referred to as "resale price maintenance," or minimum retail price fixing.

The decision was intended to apply narrowly to retail price fixing, and not restrict other legitimate business practices. Eight years after Dr. Miles, the Court clarified the reach of that opinion by holding, in United States v. Colgate & Co.,<sup>13</sup> that a manufacturer remained free to terminate a discounting retailer as long as the decision to do so was *unilateral*. The Court reasoned that firms should be free to choose with whom they will do business; therefore, a manufacturer who unilaterally refuses to continue dealing with retailers who discount its product does not violate section 1 of the Sherman Act.

Separately, what constituted an "agreement" in violation of section 1 of the Sherman Act was narrowed by the Supreme Court in 1984 to exclude activities coordinated between a company and its officers, employees, agents, and wholly-owned or -controlled affiliates and subsidiaries. In Copperweld, the Supreme Court held that "the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of §1

---

<sup>10</sup> Factors to be considered in a rule-of-reason analysis include the facts peculiar to the business to which the restraint is applied, the condition of the business before and after the restraint was imposed, and the nature of the restraint and its actual and probable effects. The history of the restraint, the threat posed, the reasons for adopting the remedy, and the ends sought to be obtained are also to be taken into consideration. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

<sup>11</sup> 220 U.S. 373 (1911).

<sup>12</sup> The Sherman Act, 15 U.S.C. §§ 1-7, prohibits contracts, combinations, and conspiracies in restraint of trade, as well as acts of monopolization.

<sup>13</sup> 250 U.S. 300 (1919).

of the Sherman Act”<sup>14</sup> because “[a] parent and its wholly owned subsidiary have a complete unity of interest.”<sup>15</sup>

Thus, for 96 years prior to Leegin, manufacturers were free to launch nationwide sales campaigns, using manufacturer’s *suggested* retail prices, or set uniform prices in their wholly-owned retail outlets. It was only the attempt of a manufacturer (e.g., Hitachi) to set the minimum retail price of a good (e.g., a television) being sold through an independent retailer (e.g., Best Buy) that was prohibited.

**c. Leegin overturns the *per se* prohibition set by Dr. Miles**

In its 2007 Leegin decision, the Supreme Court overturned Dr. Miles, holding that minimum retail price fixing would henceforth be judged under the rule of reason on a case-by-case basis. In a 5-4 decision, Justice Kennedy, writing for the majority, acknowledged that setting minimum retail prices could have anticompetitive effects, but concluded that it could also have procompetitive benefits, and that a *per se* prohibition could not be justified, as it could not be “stated with any degree of confidence that retail price maintenance ‘always or almost always tend[s] to restrict competition and decrease output.’”<sup>16</sup> The Federal Trade Commission and the Department of Justice (DOJ) filed a joint amicus brief in favor of overturning Dr. Miles’ *per se* prohibition; 37 State attorneys general filed one in favor of affirming it.<sup>17</sup>

The effect of Leegin is that minimum retail price agreements are no longer prohibited by law. This does not mean that these agreements are now necessarily always legal; they are instead subject to a case-by-case rule of reason analysis.

**d. Minimum retail price fixing has increased in the wake of Leegin.**

Approaching the two-year anniversary of Leegin, there are a number of indications that required minimum retail price policies are becoming more common.<sup>18</sup>

- Edgar Dworsky of ConsumerWorld.org, which provides price comparisons for consumers, has found numerous minimum retail price policies imposed upon retailers by manufacturers of baby goods, consumer electronics, home furnishings, and pet foods.<sup>19</sup>
- BabyAge.com reports that 100 of its 465 suppliers dictate minimum retail prices.<sup>20</sup> As a result, the Internet retailer has had to increase prices 20 to 40 percent on several popular products.<sup>21</sup>

---

<sup>14</sup> *Id.* at 771.

<sup>15</sup> *Id.*

<sup>16</sup> Leegin, 127 S. Ct. at 2708, quoting Business Electronics, 485 U.S. at 723.

<sup>17</sup> The State attorneys general who filed the amicus brief were from AK, AR, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NV, NH, NJ, NM, NY, NC, OH, OK, OR, PA, SC, SD, UT, VT, WA, WV, and WY.

<sup>18</sup> Joseph Pereira, *Price-Fixing Makes Comeback after Supreme Court Ruling*, WALL ST. J., Aug. 18, 2008, at A1.

<sup>19</sup> *Id.*

- Demand Inc., an Internet-only retailer of ergonomic office accessories, reports that at least 50 percent of its products now have a manufacturer-imposed minimum retail price, compared to 10 percent in 2006.<sup>22</sup>
  - Seventy-five percent of eHobbies' products now have a manufacturer-imposed minimum retail price.<sup>23</sup>
  - HomeCenter.com claims to have lost millions of dollars in sales because of minimum retail price policies by manufacturers such as lighting manufacturer L.D. Kichler that have made the Internet-based retailer less competitive than it used to be.<sup>24</sup>
  - Two lawsuits have been brought against eBay by manufacturers for selling their products below a manufacturer-dictated minimum price.<sup>25</sup>
- e. For the past 40 years, Congress has supported a prohibition on minimum retail price fixing.**

Congress has involved itself directly in the formulation of enforcement policy in the area of minimum retail price fixing on a number of occasions.

First, during the Depression, a number of States, as part of a general move toward price controls in response to the distressed business climate, enacted so-called "fair trade" laws permitting a manufacturer to enter into agreements with retailers stipulating the minimum price at which its products could be sold. Congress passed the Miller-Tydings Act<sup>26</sup> in 1937 to exempt agreements permitted under the State fair trade laws from the antitrust laws, followed by the McGuire Act<sup>27</sup> to extend coverage of the exemption to imposition of a "fair trade" price agreement even on retailers who had not signed it.

---

<sup>20</sup> *Id.*

<sup>21</sup> *E-Tailers Take on Price Fixing*, CONSUMER ELECTRONICS DAILY, Dec. 5, 2008.

<sup>22</sup> Don Davis, *How the Supreme Court Fractured Online Pricing*, InternetRetailer.com, Nov. 2008, <http://www.internetretailer.com/article.asp?id=28293>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Greg Beck, *Companies Claim Right to Interfere with eBay Auctions for Charging Too Little*, CONSUMER LAW & POLICY BLOG, July 17, 2007, <http://pubcit.typepad.com/clpblog/2007/07/leegin-and-ebay/comments/page/2/>

<sup>26</sup> 50 Stat. 693 (1937).

<sup>27</sup> 66 Stat. 632 (1952).

By the 1970's, State fair trade laws had come under increasing disrepute as anticompetitive and unwarranted by any legitimate business purpose.<sup>28</sup> Studies conducted by the DOJ under President Nixon indicated that retail price fixing sheltered by State fair trade laws inflated prices for the affected goods by between 18 and 27 percent, and that eliminating the fair trade laws would save consumers \$1.2 billion.<sup>29</sup> The Ford Administration's DOJ called for repealing the fair trade laws, as did the Federal Trade Commission. Former president Ronald Reagan, then a columnist for the Copley News Service, condemned retail price fixing in a column reprinted in the Congressional Record, arguing that it stifled competition, added to inflation, and was bereft of consumer benefits.<sup>30</sup>

In the Consumer Goods Pricing Act of 1975, Congress repealed the Miller-Tydings Act and the McGuire Act.<sup>31</sup> In doing so, it examined and rejected various asserted justifications for minimum retail price fixing, including assertions that it helped encourage provision of additional services, helped protect small businesses, and helped new businesses enter the market. Congress concluded that minimum retail price fixing served little purpose other than to inflate prices.

Congress strongly reaffirmed its bipartisan support for the *per se* prohibition against minimum retail price fixing during the 1980s. After the DOJ filed an amicus brief in Monsanto Co. v. Spray-Rite Service Co.<sup>32</sup> urging the Supreme Court to overturn Dr. Miles, Congress, as part of the FY 1984 appropriations bill that included DOJ funding, expressly prohibited the DOJ from using any funds to advocate overturning the *per se* prohibition.<sup>33</sup> The prohibition was reinstated as part of the FY 1986 appropriations resolution<sup>34</sup> and remained in every DOJ-funding appropriations bill thereafter until FY 1992, when the prohibition was dropped only after personal assurances from the Assistant Attorney General for Antitrust that the Department would not revive its effort to undermine the *per se* prohibition.

With the change of Administration in 1993, the Department quieted the issue by reaffirming its support for the *per se* prohibition and its intent to actively enforce it.<sup>35</sup> Only 2.5 years before the Court decided Leegin, the Antitrust Modernization Commission, tasked in legislation sponsored by House Judiciary Committee Chairman James Sensenbrenner to conduct

---

<sup>28</sup> In the interim, many States had repealed or curbed their fair trade statutes; in four States, the statutes had been declared unconstitutional; and in five States, "non-signer" clauses had been declared unconstitutional. See P. Areeda, *Antitrust Analysis*, 517 (1974).

<sup>29</sup> S. Rep. No. 94-466, 94th Cong., 1st Sess., pp. 1-3 (1975).

<sup>30</sup> 1212 Cong. Rec. 1268 (Jan. 23, 1975).

<sup>31</sup> 89 Stat. 801 (1975).

<sup>32</sup> 465 U.S. 752, 762-63 (1984).

<sup>33</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, § 510, Pub. L. No. 98-166, 97 stat. 1102-03 (1983).

<sup>34</sup> Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, § 605, Pub. L. No. 99-180, 99 stat. 1169-71.

<sup>35</sup> Antitrust Enforcement, Some Initial Thoughts and Actions, Address by Assistant Attorney General Anne K. Bingaman before Antitrust Section of the American Bar Association, August 10, 1993.

a comprehensive review of the state of the antitrust laws,<sup>36</sup> declined to examine retail price fixing because there was “a relatively low level of controversy on the subject.”<sup>37</sup>

## **2. Overview of H.R. 3190**

### **a. Effect of the bill**

H.R. 3190 restores the “state of play” as it existed with respect to threshold price agreements among manufacturers and retailers prior to the Supreme Court’s Leegin decision. It restores the *per se* prohibition set forth in Dr. Miles, declaring any agreement between a manufacturer and a retailer, wholesaler, or distributor setting a minimum price for the sale of a product or service to violate section 1 of the Sherman Act.

### **b. Legislative History of the Bill**

The House Committee on the Judiciary Subcommittee on Courts and Competition Policy held a hearing on April 24, 2009, examining the impact of the Leegin decision on consumer prices. H.R. 3190 was introduced by Chairmen Conyers and Johnson on January 7, 2009. A companion Senate bill, S. 148, was introduced on January 6, 2009, by Senators Kohl, Kaufman, Whitehouse, and Wyden.

On July 30, 2009, H.R. 3190 was passed out of the Subcommittee on Courts and Competition Policy by voice vote.

### **C. Section-by-Section of Analysis**

*Sec. 1. Short Title.* This section designates the short title of the bill as the “Discount Pricing Consumer Protection Act of 2009.”

*Sec. 2. Prohibition of Minimum Resale Price Maintenance.* This section makes any agreement between a manufacturer and a retailer, wholesaler, or distributor establishing a minimum price for the manufacturer’s product or service a violation of Section 1 of the Sherman Act.

*Sec. 3. Effective Date.* This section establishes the bill’s effective date as 90 days after the date of enactment.

## **III. H.R. 569, the “Equal Justice for Our Military Act of 2009”**

---

<sup>36</sup> Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856.

<sup>37</sup> *The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy? Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights of the H. Comm. On the Judiciary*, 110<sup>th</sup> Cong. 6 (statement of Richard M. Brunell, Director of Legal Advocacy, American Antitrust Institute), available at [http://www.antitrustinstitute.org/archives/files/aai-%20Leegin,%20Senate%20test%20by%20RB,%207-30-07\\_080120071016.pdf](http://www.antitrustinstitute.org/archives/files/aai-%20Leegin,%20Senate%20test%20by%20RB,%207-30-07_080120071016.pdf) (quoting Memorandum from the Antitrust Modernization Comm. Single-Firm Conduct Working Group 16 (December 21, 2004)).

## **A. Purpose**

H.R. 569 proposes to amend the federal judicial code<sup>38</sup> to expand United States Supreme Court jurisdiction to review courts-martial decisions. Current law does not grant Supreme Court jurisdiction to review courts-martial decisions that were not first reviewed by the Court of Appeals for the Armed Forces (CAAF). Similarly, current law does not grant Supreme Court jurisdiction to review decisions by the CAAF that deny relief to a writ for extraordinary relief or interlocutory appeal. In other words, if the CAAF refuses to review a court-martial decision, or if the CAAF denies relief to a writ for extraordinary relief or interlocutory appeal, a service member is foreclosed from seeking direct review by the Supreme Court. The government, however, has no comparable barriers to Supreme Court review. H.R. 569 thus attempts to correct this inequity by granting Supreme Court jurisdiction over courts-martial decisions that were not reviewed by the CAAF, or decisions by the CAAF to deny relief to a writ for extraordinary relief or interlocutory appeal.

## **B. Background**

### **1. Courts-Martial and Appellate Review**

The Uniform Code of Military Justice (UCMJ)<sup>39</sup> lays out a comprehensive military justice system, which includes a penal code consisting of traditional offences (e.g., theft) and military-only offences (e.g., desertion), establishes the trial-like procedure called a court-martial as the primary mechanism to determine the guilt or innocence of service members accused of a crime, and creates a multi-level military court appellate procedure. All active duty service members in the Army, Navy, Marine Corps, Air Force, and Coast Guard, regardless of where they are, are subject to the UCMJ<sup>40</sup>.

Court-martial decisions that provide a sentence that includes dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, confinement of one year or longer, or death, must be referred to a Court of Criminal Appeals for review<sup>41</sup>. Further review of a court-martial decision may be made by the military's highest court, the Court of Appeals for the Armed Forces (CAAF). The CAAF is required to hear cases involving the sentence of death or cases in which the government has referred the case to the CAAF for

---

<sup>38</sup> Specifically, H.R. 569 as amended by the Manager's amendment adopted by the Subcommittee on Courts and Competition Policy on July 30, 2009, proposes amendments to sections 1259 and 2101(g) of title 28, United States Code.

<sup>39</sup> Uniform Code of Military Justice (UCMJ), 64 Stat. 109 (1950), *codified* at 10 U.S.C. § 801, *et. al.*

<sup>40</sup> 10 U.S.C. § 802.

<sup>41</sup> 10 U.S.C. § 866(b). The Courts of Criminal Appeals include the Army Court of Criminal Appeals (ACCA), the Air Force Court of Criminal Appeals (AFCCA), the Navy-Marine Corps Court of Criminal Appeals (N-MCCA), and the Coast Guard Court of Criminal Appeals (CGCCA). Referral to a Court of Criminal Appeals is accomplished when the Judge Advocate General (JAG) (the military's legal office) for the relevant service branch certifies the court-martial to the Court of Criminal Appeals.

review<sup>42</sup>. The CAAF has discretion to hear all other appeals<sup>43</sup>. The Supreme Court may further review a court-martial decision by writ of certiorari,<sup>44</sup> but only under limited circumstances.

Specifically, section 1259 of Title 28, provides the Supreme Court with jurisdiction to consider writs of certiorari to review cases from the CAAF in four specific circumstances: 1) cases in which a death sentence has been affirmed by a Court of Criminal Appeals; 2) cases that the government referred to the CAAF; 3) cases in which the CAAF granted a petition for review; and 4) cases that do not fall in the other categories but in which the CAAF has granted relief. The first two categories represent the two circumstances in which the CAAF must grant appeals. The third category represents the cases in which the CAAF has exercised its discretion to grant an appeal. And the final category is a catch-all provision for other cases in which the CAAF might grant relief and is generally considered to refer to writs for extraordinary relief and interlocutory appeals that are ordinarily sought by an accused service member.

## **2. Overview of H.R. 569**

### **a. Purpose of the Bill**

The purpose of H.R. 569 is to broaden the scope of courts-martial decisions that may be reviewed by the Supreme Court by writ of certiorari. This broadening of Supreme Court jurisdiction is meant to correct an inequity in the opportunity to directly appeal courts-martial decisions to the Supreme Court that favors the government over service members.

As discussed above, the government has the right to appeal to the Supreme Court any case that it has referred to the CAAF, thus effectively giving the government the right to have any case it chooses eligible for Supreme Court review. However, service members convicted in a court-martial have no parallel right unless the sentence imposed is death. The CAAF has full discretion to decline to review all other courts-martial decisions that are appealed by service members. Statistics show that the vast majority of court-martial decisions appealed to the CAAF by service members were in fact not taken up by the CAAF.<sup>45</sup> In declining to review these appeals, the CAAF has foreclosed the possibility of direct review by the Supreme Court.<sup>46</sup>

Also under current law, CAAF decisions that grant relief to petitions for extraordinary relief or interlocutory appeals may be appealed to the Supreme Court, but CAAF decisions that

---

<sup>42</sup> 10 U.S.C. § 867(1)-(2). Again, it is the JAG acting on behalf of the government who certifies courts-martial decisions for CAAF review.

<sup>43</sup> 10 U.S.C. § 867(3)

<sup>44</sup> A writ of certiorari is an order to review a decision of a lower court.

<sup>45</sup> Between fiscal years 2001 and 2005, only about 16% of appeals made to the CAAF were granted. Letter from Daniel J. Dell'Orto, Acting General Counsel, U.S. Dept. of Defense, to Senator Carl Levin, Chairman, Comm. on the Armed Services, U.S. Senate (Jun. 27, 2008) (on file with Subcommittee on Courts and Competition Policy) [HEREINAFTER "Dell' Orto Letter"].

<sup>46</sup> Service members may attempt to collaterally attack a court-martial decision in a federal court, however the scope of review that federal courts apply to court-martial decisions are generally narrow and only look to whether the military courts simply addressed each constitutional claim made.

deny relief in these cases may not. As mentioned above, granting of relief in these cases generally benefit an accused service member. Here then the government is again advantaged, since it can appeal the CAAF's grant of relief to an accused service member by writ of certiorari to the Supreme Court, but a service member who has been denied relief is not permitted to any further appeal of the CAAF's decision.

The American Bar Association has noted that "this statutory framework creates a disparity in our laws governing procedural due process whereby the government has far greater opportunity to obtain Supreme Court review of adverse courts-martial decisions than is afforded convicted service members," and recommended that a broad remedial approach similar to H.R. 569 is needed "to provide service members with due process access to discretionary Supreme Court review similar to that which is permitted the government."<sup>47</sup> The District of Columbia Bar Association, the Fleet Reserve Association, the Jewish War Veterans Association, the Military Officers Association of America, the National Association of Criminal Defense Lawyers, and the National Institute for Military Justice have all echoed the American Bar Association's concerns in their written letters of support for H.R. 569.

#### **b. Effect of H.R. 569**

H.R. 569 will give the Supreme Court jurisdiction to hear appeals of courts-martial decisions that were denied review by the CAAF. H.R. 569 will also give the Supreme Court jurisdiction to hear appeals of CAAF decisions that denied relief to a writ for extraordinary relief or an interlocutory appeal.

Concerns have been raised that granting Supreme Court jurisdiction to these cases will impose unwarranted costs and strain on the military justice system, since the UCMJ already provides a robust appeal process.<sup>48</sup> In scoring a similar measure last Congress, the Congressional Budget Office (CBO) noted that while the bill did not involve any direct expenditures that would raise a pay-go issue, it did estimate that the increased workload of government attorneys and Supreme Court clerks would cost \$1 million per year.<sup>49</sup>

It was pointed out during the legislative hearing on H.R. 569 that the CBO has significantly overestimated the costs of the bill, since most courts-martial decisions will likely not be appealed, and most of those decisions that are appealed will not have the benefit of government provided attorneys. These points were also raised by the ABA in its written

---

<sup>47</sup> David Craig Landin, *Standing Committee on Federal Judicial Improvements Report to the House of Delegates*, American Bar Association Annual Meeting, Report No. 116, 5-6 (2006) [HEREINAFTER "ABA Report"].

<sup>48</sup> The Department of Defense under the Bush Administration wrote two letters to Congress opposing measures similar to H.R. 569, citing the additional costs it would mean for the military justice system and the more than appellate review procedures service members already benefit from. Dell'Orto Letter, *supra* note 6; Letter from Department of Defense General Counsel William J. Haynes II to Representative Lamar Smith, Chairman, Subcomm. on Courts, the Internet and Intellectual Property (Feb. 6, 2006). The Obama Administration has not yet taken a position on H.R. 569.

<sup>49</sup> Congressional Budget Office, *Cost Estimate for S. 2052, Equal Justice for United States Military Personnel Act of 2007* (Oct. 22, 2008).

testimony regarding H.R. 569, which concluded “[w]e believe that the CBO cost estimate is erroneously predicated on an assumption that several hundred cases will be filed, when in fact the number of petitions that will be prompted by enactment of this legislation is likely to be minimal . . .”<sup>50</sup> Furthermore, according to the Counselor of the Chief Justice of the United States Supreme Court, if historical experience concerning the rate of appeals from CAAF decisions is any guide, there should at most 120 additional Supreme Court petitions.<sup>51</sup> This represents a tiny fraction of the thousands of appeals the Supreme Court receives every year.

### **c. Legislative History of H.R. 569**

In the 109<sup>th</sup> Congress, H.R. 1364 was introduced by Rep. Susan Davis. H.R. 1364 sought to amend paragraph (4) of 28 U.S.C. § 1259 to grant Supreme Court jurisdiction over writs for extraordinary relief or interlocutory appeals that have been granted or denied by the CAAF. The bill was referred to the Judiciary Committee, but no action was taken on it.

In 110<sup>th</sup> Congress, H.R. 3174 was introduced by Rep Susan Davis. H.R. 3174 sought to amend paragraphs (3) and (4) of 28 U.S.C. § 1259 to grant Supreme Court jurisdiction over any case that the CAAF granted or denied review in, as well as over writs for extraordinary relief or interlocutory appeals that have been granted or denied by the CAAF. H.R. 3174 was passed by the House of Representatives under suspension of the rules on September 27, 2008. An identical measure, S. 2052, was introduced in the Senate and was reported without amendment by the Senate Committee on the Judiciary on September 12, 2008, but was not considered by the full Senate.

On January 15, 2009, H.R. 569, The Equal Justice for our Military Act of 2009, was introduced in the 111<sup>th</sup> Congress by Rep. Susan Davis and currently has 19 co-sponsors.<sup>52</sup> The Senate introduced a companion bill, the Equal Justice for United States Military Personnel Act of 2009, S. 357, on January 30, 2009. On June 11, 2009, the House Committee on the Judiciary’s Subcommittee on Courts and Competition Policy held a hearing on H.R. 569. H.R. 569 was reported out of the Subcommittee on Courts and Competition Policy on July 30, 2009, as amended by a Manager’s amendment in the nature of a substitute.

### **C. Section-by-Section Analysis**

---

<sup>50</sup> Legislative Hearing on H.R. 569, The Equal Justice for Our Military Act of 2009, Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111<sup>th</sup> Cong. 6 (2009) (statement of H. Thomas Wells, Jr., President, American Bar Association).

<sup>51</sup> Letter from Jeffrey P. Minear, Counselor of the Chief Justice of the United States Supreme Court to Representative Henry Johnson, Chairman, and Howard Coble, Ranking Member, Subcomm. on Courts and Competition Policy (June 18, 2009).

<sup>52</sup> Co-sponsors of H.R. 569 include Rep. Ackerman, Rep. Berman, Rep. Bordallo, Rep. Brady, Rep. Frank, Rep. Grijalva, Rep. Hinchey, Rep. Holt, Rep. Loeb sack, Rep. Massa, Rep. McDermott, Rep. Ortiz, Rep. Schakowsky, Rep. Scott, Rep. Sestak, Rep. Skelton, Rep. Tauscher, Rep. Wexler, and Rep. Woolsey.

*Sec. 1. Short Title.* This section sets forth the short title of the bill as the “The Equal Justice for our Military Act of 2009.”

*Sec. 2. Certiorari to the United States Court of Appeals for the Armed Forces.* Section 2 amends paragraphs (3) and (4) of 28 U.S.C. §1259 to give service members the right to appeal to the Supreme Court any case that the CAAF granted or denied review in, as well as any decision by the CAAF concerning any petition for extraordinary relief or an interlocutory appeal. Section 2 also authorizes a technical and conforming amendment to be made to 10 U.S.C. § 867(a), which presently prohibits Supreme Court review, by a writ of certiorari, any action of the CAAF in refusing to grant a petition for review

#### **D. Manager’s Amendment**

On July 30, 2009, the Subcommittee on Courts and Competition Policy held a markup for H.R. 569 and adopted a Manager’s amendment by voice vote. The manager’s amendment makes a technical change to section 2 of the bill, and adds a new section 3 which provides an effective date. Specifically:

1. Section 2 is amended to add a provision amending section 2101(g) of title 28 of the United States Code to clarify the statutory authority of the Supreme Court to write rules governing deadlines for certiorari petitions following a decision by the CAAF.

**Explanation:** Under 28 U.S.C. 2101(g), the Supreme Court is authorized to establish by rule how much time a petitioner has to submit an application for a writ of certiorari following a decision by the CAAF. However, it is not clear whether a decision by the CAAF to not review a case is a decision for purposes of 28 U.S.C. 2101(g). To eliminate any ambiguity, this amendment will explicitly permit the Supreme Court to establish rules regarding the time in which a petitioner has to submit a writ for certiorari following the CAAF’s denial of review.

2. A new section 3 is added to provide that the amendments made by the Act shall take effect after 180 days from the date of enactment of the Act and that the changes made by this act shall apply to any petition granted or denied by the CAAF after that effective date. An exception to that effective date is made such that the authority of the Supreme Court to make rules regarding the deadline for petitioning for certiorari will take effect on the date of enactment of the Act.

**Explanation:** H.R. 569 does not currently provide an effective date and in its current form would go into effect on the date of enactment. This is problematic since the Supreme Court will need time to establish rules governing the timeliness of applications for a writ of certiorari. Delaying the date the bill goes into effect by six months will give the Supreme Court time to amend its rules concerning timeliness of applications. It also specifies that CAAF decisions made on or after the effective date will be eligible for appeal to the Supreme Court.