No. 24-7069

In the Supreme Court of the United States

THOMAS M. ADAMS, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*[*]

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. Among its, officers, directors, and Fellows are law professors, private practitioners, and other experts in the field, none of whom are on active duty, but many of whom have served as judge advocates. NIMJ has repeatedly appeared as an *amicus* before this Court, CAAF, and other federal courts in military justice matters.

SUMMARY OF ARGUMENT

The government typically submits a letter waiving response to certiorari petitions seeking review of CAAF decisions. That is often appropriate. Because of the importance of equal access to this Court, NIMJ believes that the interest of justice will be served if the Court has the benefit of full party presentations on the issues. To ensure that that happens, the Court should invite the government to file a brief in opposition that addresses them.

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[*] This brief is submitted more than 10 days before the deadline prescribed in the Rules of the Court. Counsel for NIMJ has authored this brief in whole. No person or entity other than the *amicus* has made a monetary contribution to its preparation or submission.

ARGUMENT

1. The petition raises an important issue regarding the power of the United States Court of Appeals for the Armed Forces (CAAF) to block access to this Court by refusing to grant review under Article 67, UCMJ. Although Congress abrogated that power when it amended Article 67a, UCMJ, and 28 U.S.C. § 1259, that amendment only applies to cases in which a petition was filed with CAAF on or after December 22, 2024. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533(b), 137 Stat. 136, 261 (2023). This case and others like it are not affected by that change.

2. The Question Presented lends itself to analysis through the following 3-part lens:

> Is review under section 1259 restricted to the issue(s) as to which CAAF granted review, or does it extend to all issues in the case?
>
> If CAAF has previously granted review of a case and remanded for further proceedings, may it foreclose review on writ of certiorari by denying review when the case returns to it?
>
> Is "good cause" a workable standard, and if not, may this Court grant certiorari in a case in which CAAF has denied review in whole or as to an issue the petitioner wishes to raise?

These matters (among others) are examined in Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. F. 1,

May 31, 2021, *available at* https://www.yalelawjournal.org/pdf/FidellFissellCaveFinal_oryo61do.pdf.

3. Section 1259 does not limit this Court's jurisdiction to the particular "issue(s)" as to which CAAF has granted review.

The Solicitor General, having previously suggested that the matter was unclear, Brief in Opposition 5 n.3, *Jacobs v. United States*, 498 U.S. 1088 (1991); Brief in Opposition 3 n.2, *Williams v. United States*, 506 U.S. 941 (1992), in time came to insist that review by petition for a writ of certiorari for court-martial cases was available only with respect to issues on which CAAF granted review. Brief in Opposition 7-8, *Stevenson v. United States*, 555 U.S. 816 (2008); Brief in Opposition 5-6, *McKeel v. United States*, 549 U.S. 1019 (2006).

That view was mistaken. CAAF can specify in the order granting review fewer than all of the issues raised by an appellant. This is clear from the third sentence of Article 67(c). The same sentence provides that it has a duty to act only with respect to those issues. However, under the initial clause of Article 67(a), the entire record in the case must be reviewed, and under Article 67(a)(3), it is the "case[]" that is reviewed. CAAF orders that identify particular issues are properly understood as marking the metes and bounds of what it *must* act on (not the larger universe of what it *may* act on), and, as a practical matter, merely as limiting the briefing to particular issues – a routine power that *any* appellate court enjoys, including this one. To view an order granting

review in any other light would pit the issue-oriented third sentence of Article 67(c) against the case-oriented terms of Article 67(a).

The statutory text is both clear and directly buttressed by the legislative history. When Congress expanded the certiorari jurisdiction in 1983 to include cases arising under the UCMJ, it did so with respect to "cases" in which CAAF – then known as the United States Court of Military Appeals – had granted review. This is in contrast to the approach taken earlier in the legislative process of permitting certiorari review only of "issues" as to which that court had granted review. James P. Pottorff, *The Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?,* 149 ARMY LAW. 1, 14, May 1985; *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 150-51 & nn.12-15 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

Congress ultimately rejected the "issues" approach that had been in the Defense Department's original legislative proposal, Pottorff, *supra*, at 14 & n.97 (H.R. 6298), opting instead (in accordance with the Department's witness's advice, *id*. at 14 & n.98) for the broader term "cases." Whether, as Capt. Pottorff suggested (at 14 & n.100), the choice was driven by concern that the "issues" approach might raise a question in light of Article III's case or controversy requirement, or by something else, that Congress abandoned that restrictive approach could

not be clearer.

4. Whether, in older cases, certiorari could be granted with respect to an issue CAAF did not list when granting review was thought to be an "unresolved question." EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 128 n.103 (9th ed. 2007). It no longer is. In *Abdirahman v. United States*, 585 U.S. 1046 (2018) (mem.), with the Solicitor General's concurrence, this Court acted on an issue that had not been the subject of a CAAF order granting review. The certiorari petition there, filed on behalf of 165 petitioners, raised the Appointments Clause challenge that this Court resolved in *Ortiz v. United States*, 585 U.S. 427 (2018). After issuing its *Ortiz* decision, this Court denied the *Abdirahman* certiorari petition. 585 U.S. 1030 (2018) (mem.). One of the *Abdirahman* petitioners, Briggs, then petitioned for rehearing, asking that certiorari be granted in his case, followed by remand to CAAF for further consideration in light of CAAF's construction of the UCMJ statute of limitations in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), an issue on which it had not previously granted review in his case. Petition for Rehearing, *Abdirahman v. United States*, No. 17-243 (U.S. July 9, 2018). Interestingly, the Solicitor General had previously indicated he did not oppose Briggs's remand request. Supplemental Brief for the United States, *Abdirahman v. United States*, No. 17-243 (U.S. Mar. 29, 2018). This Court granted rehearing, granted certiorari as to Briggs, vacated the CAAF judgment, and remanded for further

consideration in light of *Mangahas*. *Abdirahman*, 585 U.S. 1046, *supra*, thus exercising jurisdiction over an issue that was not part of CAAF's decision in the case, and necessarily rejecting, albeit *sub silentio*, the Solicitor General's cramped interpretation of section 1259(3). *Briggs* later returned to this Court for plenary review on a government petition. *United States v. Briggs*, 592 U.S. 69 (2020). *See generally* EUGENE R. FIDELL, BRENNER M. FISSELL, MARCUS N. FULTON & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 19.03[19], at 202-03 (LexisNexis 23d ed. 2024).

5. Neither Section 1259 nor the UCMJ textually suggest that a case in which CAAF granted review and remanded (and which under prior law was eligible for review here on writ of certiorari) can become ineligible for such review when it returns to CAAF following remand. A decision on remand remains part of the same "case," and there is no basis in public policy for treating it as having lost its eligibility for review on certiorari simply because CAAF had remanded.

6. Where, as here, CAAF is silent as to why it refused to find "good cause" in a case that is not facially frivolous, that refusal should not bar the access to this Court that is enjoyed by any other class of litigant.

CONCLUSION

The Court should invite the views of the Solicitor General.

Respectfully submitted.

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