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GENERAL COUNSEL

The Honorable Lamar Smith
Chairman, Subcommittee on Courts,
the Internet and Intellectual Property
U.S. House of Representative
Washington, DC 20515-6216

Dear Mr. Chairman:

This responds to your letter to the Secretary of Defense, dated November 4, 2005, requesting the Department's views of H. R. 1364, a bill "to amend title 28, United States Code, to enable the Supreme Court to review decisions in which the Court of Appeals for the Armed Forces denied relief." Your letter requested an analysis of the relative merits of the legislation and asked for the Department's analysis of the number of appeals that would have been eligible for a petition of certiorari if the proposal had been enacted and in force for each of the last five fiscal years that ended September 30, 2005. I have been asked to provide you a response.

The Department of Defense does not keep aggregate statistics of the number of appeals requested, but the United States Court of Appeals of the Armed Forces (USCAAF) annually publishes in the Military Justice Reporter statistics regarding its appellate court activities. As requested, enclosed are USCAAF statistics for the past five fiscal years regarding petitions for grant of review filed and cases in which writ petitions and writ appeals were filed.

Over the past five fiscal years, the number of cases in which USCAAF denied review or dismissed a petition for review totaled 3,377, with another 368 cases in which USCAAF affirmed without granting relief. Additionally, a total of 143 extraordinary writ petitions or appeals of extraordinary writ petitions were denied or dismissed. If, as your letter states, the legislation makes clear that Supreme Court review would only cover the latter category of writ petitions or appeals of writ petitions denied or dismissed, the current annual impact would appear to be roughly 29 cases per year, on average. While this may appear to be a relatively low number of cases, focusing on the aggregate number of cases alone is misleading in that it does not adequately take into consideration the time and effort required for Supreme Court review of petitions for certiorari. Opening this additional avenue of Supreme Court appeal will require legal reviews and briefs from numerous counsel in the Military Departments' Government and Defense Appellate Divisions, the Department of Defense Office of General Counsel, as well as within the Office of the Solicitor General, and the Supreme Court.



These current statistics may also be misleading as an indicator of future appellate activity in the form of writ petitions/appeals if it is presumed that the number of writ petitions/appeals currently denied would remain relatively the same. In fact, this new potential avenue for Supreme Court review may "spawn" a host of USCAAF writ petitions/appeals (regardless of merit), if only to acquire the necessary "dismissal or denial" necessary for requesting Supreme Court review. Appellants, with nothing further to lose, might file multiple USCAAF writ petitions/appeals in the hope of eventually obtaining Supreme Court review. Additionally, many of these extraordinary writs are interlocutory in nature and brought during the trial of an active court-martial. Because adding an additional level of appeal during an active court-martial will necessitate an additional period of delay, the potential exists for introducing truly excessive delay into the resolution of cases tried by courts-martial. The potential impact on the military justice system, military appellate counsel and resources, the Department of Defense Office of General Counsel, the Office of the Solicitor General and the Supreme Court may prove far more extensive than currently envisioned. For extraordinary writs brought by petitioners who have an adjudged court-martial sentence, extending avenues for the appellate review of cases lengthens the time before the case may be considered "final" and the sentence fully executed; administrative discharges may be delayed and appellants on appellate leave will continue to enjoy the military benefits afforded service members in that status. The legislation does not provide clear safeguards precluding these possibilities.

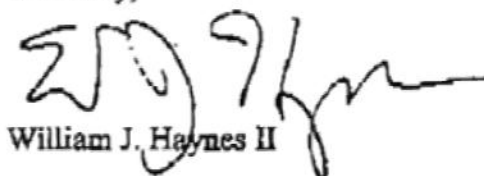
It is also important to note that no service member with a meritorious legal issue is denied USCAAF or Supreme Court review of that issue. USCAAF denies most extraordinary writ petitions because they do not raise issues that are truly extraordinary, but merely allege errors that can be addressed in the ordinary course of appellate review. Indeed, most such issues are later raised in the course of ordinary appellate review, and appellants do have an opportunity to petition the Supreme Court for review of assignments of error in which USCAAF denies relief. To the extent that the legislation purports to rectify an "inequity" in that the Government has the right to appeal USCAAF's extraordinary writ decisions while individual appellants do not, it should be noted that only 16 cases in the last five years have granted relief to an appellant or remanded a case, and in no such case has the Government obtained Supreme Court review of such a decision. There is no demonstrable inequity that needs to be rectified by enacting this legislation.

Congress has established a comprehensive appellate review process for the UCMJ judicial system and administration of military justice. Since 1983, the UCMJ has provided for the possibility of additional review by the Supreme Court upon petition for a writ of certiorari. Enclosed is a more detailed discussion of the legislative intent behind that limited right to review.

There is no apparent justification to modify the current review process, thereby increasing the burden upon the Supreme Court and counsel to address the myriad of matters that would be encountered with expanded *certiorari* jurisdiction. We oppose the proposed legislation.

The Office of Management Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

A handwritten signature in black ink, appearing to read 'WJ Haynes II', with a long horizontal flourish extending to the right.

William J. Haynes II

Enclosures:
As stated.