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Ronald W. Meister

Re: *Notice of Proposed Changes to Rules of Practice and Procedure*

Gentlemen:

Thank you for the opportunity to comment on the proposed changes to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces. The National Institute of Military Justice ("NIMJ") respectfully submits the following comments for the Court's consideration.

Although we recognize that the Court has long been part of the Defense Department for administrative purposes, it sends the wrong signal to require that rulemaking comments go through the Department's docket management apparatus and mailroom. The Court's independence is critical to its success, and anything that detracts, even subliminally, from that independence should be avoided.

On the merits, both the requirement for a *Grosteffon* Appendix and the modified page limits make sense and we support them. The proposed change to Rule 21(b)(5)(G) is another matter. Built into it is the notion that the Supreme Court can (or should) only grant certiorari with respect to issues as to which the Court of Appeals has granted review. That, in our view, is not the law (and to the extent it is merely a "should" rather than a "can," is unwise). The original proposal for Supreme Court review of decisions of this Court permitted certiorari only with respect to issues as to which this Court had granted review. As enacted, however, the legislation refers to "cases," rather than "issues." The language is clear and one need go no further, but if one harbored any doubts, the evolution from the original proposal to the enacted measure removes it.

The Solicitor General has repeatedly argued to the contrary. The Supreme Court has received several briefs noting the issue and the leading treatise, *Supreme Court Practice*, refers to it as unresolved. The Supreme Court

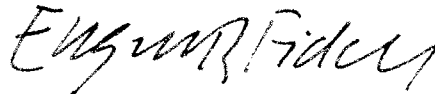
itself has never indicated its view, and no inference can be drawn from its unexplained denials of certiorari where petitioners sought certiorari on ungranted issues in granted cases. We do know, however, from last year's decision in *United States v. Denedo*, that not one Justice believes the Court's grant of certiorari jurisdiction with respect to cases decided by this Court should be read parsimoniously. The Court should therefore take no step that even by implication embraces the Solicitor General's incorrect "parsimonious" reading of the grant of certiorari jurisdiction.

The proposed change is not only inconsistent with the plain language of the statute, but it also would virtually require prudent counsel to seek certiorari from any decision of this Court remanding a case to assure that there is an opportunity for any issue raised before this Court to be considered by the Supreme Court. The proposed change would impose a risk in any case that is remanded that the Court could deny review of a case following a remand and, thereby, block Supreme Court review on an issue that was before the Court prior to remand. There is a place for Supreme Court review of interlocutory appeals in courts-martial, as *Solorio v. United States* demonstrates, but it is most unwise to alter this Court's rules in a way that imposes on counsel a professional obligation to file, thereby in turn adding, perhaps needlessly, to the Supreme Court's work. It is bad enough that Congress has, thus far, given this Court a gatekeeper function; there is no reason to make matters worse by requiring litigants to overcome that hurdle twice.

For all these reasons we recommend that the Court not adopt the proposed change in Rule 21(b)(5)(G).

In view of the interest of the military and civilian bar in the issues addressed in this letter, we are posting it on the NIMJ website and forwarding a copy to Dwight H. Sullivan for posting on the CAAFlog blog. We hope these steps will generate additional comments that will prove helpful to the Court.

Very truly yours,



Eugene R. Fidell
President

cc: William A. DeCicco, Esq.
Dwight H. Sullivan, Esq.