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December 8, 2009

Honorable John Conyers, Jr., Chair
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Conyers:

I am writing on behalf of the ABA to reaffirm the Association's support for enactment of H.R. 569, legislation that will remove procedural barriers that unfairly limit the ability of court-martialed military service members who face grave sentences to petition the U.S. Supreme Court for discretionary review through writ of certiorari. As you prepare to mark up this legislation, we know that you and your committee members will keep in mind the following two important reasons to support enactment of this legislation.

H.R. 569 will restore due process and equal treatment under the law to our military service members.

Under current law, a service member is only permitted to petition the U.S. Supreme Court for review in cases that have first been reviewed by the U.S. Court of Appeals for the Armed Forces (CAAF). If CAAF does not grant review—and the court does not grant review in 80 percent or more of the cases in which a petition is filed—the accused is precluded from even applying for, much less ever obtaining, review by the Supreme Court. In contrast, the Judge Advocate General can assure that any issue that the government desires to raise will be heard by CAAF by certifying that issue for appellate review, and then seeking Supreme Court review of a decision of that court.

This is a blatantly unfair procedural system stacked against the service member.

While we recognize that the military system of justice is governed by rules and procedures that are purposely distinct from those of the Article III judicial system, there is no justification for a system that permits the government access to the Supreme Court on any issue certified by a Judge Advocate General while completely denying access in all non-capital cases to service members who cannot persuade CAAF to grant discretionary review.

Claims that enactment of the legislation will be very costly and burdensome are inaccurate.

The ABA strongly disagrees with the 2008 Congressional Budget Office (CBO) cost estimate that enactment of such a bill will cost \$1 million or more a year, despite its statement that the estimate is based on information provided in part by the American Bar Association. The estimate is erroneously predicated on an assumption that several hundred cases will be filed, when in fact past patterns predict that the number of petitions will be minimal.

For the small number of service members who will attempt to file a petition and who qualify for the assistance of the Defense Appellate Division, the resulting burden on military resources will be limited by three factors: some service members will not request the legal assistance of the Defense Appellate Division, as happened in eight of the 20 certiorari petitions filed by service members in 2007; the Defense Appellate Division is required by *Austin v. United States*, 513 U.S. 5 (1994), to deny assistance if it believes that the appeal is based on frivolous claims; and the government is not constitutionally required to provide defense counsel and could withdraw such services at any time.

Enactment of this legislation is not likely to produce a burdensome workload for the Supreme Court, either: the Court has shown that it can handle thousands of petitions filed by criminal defendants with relative ease; and the small number of petitions that would come from the military would hardly make a dent in the Court's workload.

We, of course, cannot say that there will be no costs associated with expanding service members' right to seek Supreme Court access. But we can say with confidence that the costs will be small, and that they are justified. As we prepare to send thousands more troops to Afghanistan, we are reminded that our military service members regularly place their lives on the line in defense of freedoms that we routinely take for granted. The very least they deserve is to be accorded the same due process rights in uniform to which they would be entitled out of uniform.

We urge you to support H.R. 569 and report it out of committee promptly.

Sincerely,



Thomas M. Susman

cc: Members of the Committee on the Judiciary