No. 07-1397

IN THE

Supreme Court of the United States

WALTER S. STEVENSON, *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 OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The National Institute of Military Justice ("NIMJ") is a District of Columbia not-for-profit corporation founded in 1991 to advance the fair administration of justice in the armed forces and to foster improved public understanding of the military justice system. NIMJ, which is affiliated with the Washington College of Law, American University, regularly appears as an amicus curiae in cases raising important issues of military law and policy. NIMJ's directors and advisors include law deans and professors and private practitioners, most of whom have served as military lawyers, up to and including flag and general officer rank.

The National Veterans Legal Services Program ("NVLSP") is an independent, nonpartisan, nonprofit advocacy, educational, and policy organization founded in 1980. It is dedicated to ensuring that veterans and their families receive the VA benefits

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

and assistance they need and deserve. NVLSP is a veterans service organization recognized by the VA and regularly represents veterans before VA regional offices, the Board of Veterans Appeals, and the Court of Appeals for Veterans Cases, and appears as an amicus curiae in other forums on important issues of veterans law.

SUMMARY OF ARGUMENT

Military justice is an exceptional jurisdiction which, because it does not provide the full panoply of rights conferred by the Constitution, should be no broader than necessary to achieve good order and discipline in the armed forces. It offends the Constitution to court-martial a retiree who is on the Permanent Disability Retired List ("PDRL").

ARGUMENT

In personam jurisdiction is the threshold, and in a democratic society, the *central* issue in the administration of justice through military courts. NIMJ and NVLSP believe the decision of the Court of Appeals reflects a misreading of the Uniform Code of Military Justice ("UCMJ") and runs counter to this Court's jurisprudence over the last half-century. It is also contrary to prevailing international human rights norms.

Beginning with *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court has made clear that court-martial jurisdiction comes at the expense of important constitutional rights (such as trial by jury) and must therefore be confined to the least possible scope necessary to the end proposed. *Id.* at 22. The result is a series of decisions holding unconstitutional various provisions of the UCMJ

that purport to extend court-martial jurisdictions to persons who are not, and in some instances never have been, on active duty. *Reid v. Covert*, 354 U.S. 1 (1954); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

This case involves the UCMJ provision that brings within the sweep of the court-martial system retired regulars who are entitled to pay. UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4). Whether or not that rarely-used provision is constitutional in the case of personnel who are retired by reason of longevity, it cannot plausibly be defended in the case of those who, like petitioner, are retired for physical disability and placed on the PDRL.

The petition ably marshals the arguments against court-martial jurisdiction. We believe they are unanswerable given the exacting test the Court has correctly applied in the past when considering the constitutionality of congressional efforts to subject various categories of individuals other than active duty military personnel to court-martial jurisdiction.

1. The petition is properly filed despite the fact that the Court of Appeals did not grant review of the Question Presented. That court's jurisdiction over this case was discretionary. UCMJ art. 67(a)(3), 10 U.S.C. § 867(a)(3). Although it granted petitioner's petition for grant of review, it did so only with respect to two other issues. Pet. App. 2a-3a. The Solicitor General has in the past taken the position that review by petition for a writ of certiorari is available only with respect to issues as to which the Court of Appeals has granted review. That position is plainly wrong. When Congress expanded the cer-

tiorari jurisdiction to include cases arising under the UCMJ, it did so with respect to "cases" in which the then Court of Military Appeals had granted review, abandoning the approach taken earlier in the legislative process of permitting review only of "issues" as to which that court had granted review. *See generally* 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). This is an "unresolved question."[2] Even if, contrary to our submission, the Court denies the petition in light of the considerations set forth in Rule 10, we respectfully suggest that it is important for the Court's order to make clear that a petition for a writ of certiorari will lie as to any issue in a case in which the Court of Appeals has granted review, regardless of whether that court's grant includes the issue with respect to which certiorari is sought. It is disturbing enough that Congress has given the service-members who defend our Nation narrower access to this Court than the untrammeled access enjoyed by other petitioners for certiorari;[3] there is no reason to make that discrepancy worse by construing the grant of certiorari jurisdiction in court-martial cases more narrowly than the statutory text or legislative history warrant.

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[2] EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 128 n.103 (9th ed. 2007).

[3] *Id.* at 130; *compare* 28 U.S.C. § 1254 *with* 28 U.S.C. § 1259; *see also* UCMJ art. 67a(a), 10 U.S.C. § 867a(a).

2. Petitioner is correct in suggesting (at 18) that the Court should not delay consideration of the important jurisdictional issue as to which he seeks certiorari. A similar question arose in *Solorio v. United States*, 483 U.S. 435 (1987), which concerned subject-matter, rather than personal jurisdiction, but the interest in resolution is the same. The Court granted review there even though the case was pending on interlocutory appeal. Given the number of PDRL retirees whose amenability to trial by court-martial would turn on a decision in this case, an authoritative determination by this Court would serve the public interest.

3. Permitting court-martial jurisdiction over PDRL retirees runs counter to the line of authority under which such retirees are outside the sweep of *Feres v. United States,* 340 U.S. 135 (1950). *McGowan v. Scoggins*, 890 F.2d 128, 137-39 (9th Cir. 1989); *Crumpler v. United States*, 495 F. Supp. 266 (S.D.N.Y. 1980). The reason, of course, is that they are as a practical matter civilians. They have no military duties and their involuntary recall to active duty is so deeply improbable as to be nonexistent. *See* Pet. at 12-13 & nn.11-12.[4] Allowing them to sue the government creates none of the tension and distraction that has been cited in connection with intra-military litigation. *See also Chappell v. Wallace*, 462

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[4] While retirees have on occasion been recalled to active duty, *see* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-20.00, at 2-28 (3d ed. 2006), we are unaware of any involuntary recall of a disabled retiree. Voluntary recalls are not probative with respect to the constitutionality of subjecting to military justice persons who have not agreed to be recalled.

U.S. 296 (1983). It exalts form over substance to view those who are on the PDRL as part of the military for the purpose of criminal jurisdiction.

4. The application of military justice to retired personnel is also contrary to prevailing international human rights norms. For example, in *Case of Palamara-Iribarne v. Chile*, Judgment of Nov. 22, 2005, Ser. C, No. 135, http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.doc,[5] the Inter-American Court of Human Rights, held that a retired officer who was employed by the Chilean Navy in a civilian capacity was not subject to trial by court-martial. The court found a violation of, among other things, Article 8(1) of the American Convention on Human Rights, O.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, commenting:

> 139. The Court has pointed out that the application of military justice must be strictly reserved to active-duty military members, based on a previous case wherein it noted that "when [the] proceedings [against the victim] were started and heard, [he was] a retired military member, and therefore, could not be trie[d] by the military courts." [*Cf. Case of Cesti-Hurtado v. Peru*, Judgment of Sept. 29, 1999, Ser. C, No. 56 (¶ 151).] Chile, as a democratic State, must respect the restrictive and

[5] We are grateful to Agustina Del Campo, Impact Litigation Project Coordinator, Washington College of Law, for this reference.

> exceptional scope of military courts, and exclude the trial of civilians from the jurisdiction thereof.
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> 141. The Court considers that Chile has not adopted the necessary measures for Mr. Palamara-Iribarne to be tried by ordinary courts, since as a civilian her did not have the military status required to be deemed the perpetrator of a military criminal offense. The Court notes that, in Chile, establishing that a person has military status is a complex task which requires the interpretation of various provisions and regulations, which allowed the judicial authorities who applied them to make a broad interpretation of the concept of "military" in order to subject Mr. Palamara-Iribarne to the military Courts.
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> 142. Such broad jurisdiction of military courts in Chile, which allows them to hear cases which should be heard by civilian courts, is not in line with Article 8(1) of the American Convention.

The court ordered Chile to "align its domestic legal system to the international standards regarding criminal military jurisdiction within a reasonable period of time, so that in case it considers the existence of a military criminal jurisdiction to be necessary, this must be restricted only to crimes committed by military personnel in active service." P. 101 (¶ 14). Consistent with this analysis, the draft UN Principles Governing the Administration of Justice Through Military Tribunals, E/CN.4/2006/58 (Jan.

13, 2006), observe that "[m]ilitary courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature at tried by civilian courts." *Id.* at 10 (Principle No. 5); *see also id.* at 11 (¶ 21) (jurisprudence of European Court of Human Rights, Inter-American Court, Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights is unanimous with respect to military courts' lack of jurisdiction to try civilians). While there may be circumstances in which a non-military person such as a dependent or a civilian accompanying the forces in the field might well prefer trial by court-martial over a foreign alternative forum, *see* Michael R. Gibson, *International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity*, 4 J. INT'L L. & INT'L REL. 1, 24-26 (2008), it is difficult to extend that approach to disabled retirees for whom the alternative is trial in a civilian American court of law. This Court's longstanding skepticism with respect to the trial of civilians by court-martial is consistent with international norms and warrants a narrow interpretation of UCMJ art. 2(a)(4).

CONCLUSION

For the foregoing reasons and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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