IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant, *v.* Michael T. Nerad Senior Airman (E-4) United States Air Force, Appellee.	*AMICUS CURIAE* BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE Crim. App. No. 36994 USCA Dkt. No. 09-5006/AF

Michelle M. Lindo McCluer
4801 Massachusetts Avenue N.W.
Washington, DC 20016
(202) 274-4322
CAAF Bar Number 31105

Jonathan E. Tracy
4801 Massachusetts Avenue N.W.
Washington, DC 20016
(202) 274-4322
CAAF Bar Number 34423

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street N.W.
Washington, DC 20036
(202) 466-8960
CAAF Bar Number 13979

Stephen A. Saltzburg
720 20th Street N.W.
Washington, DC 20052
(202) 994-7089

Attorneys for Amicus Curiae

August 25, 2009

INDEX

Page

TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant, *v.* Michael T. Nerad Senior Airman (E-4) United States Air Force, Appellee.	*AMICUS CURIAE* BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE USCA Dkt. No. 09-5006/AF Crim. App. No. 36994

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

In accordance with Rule 26 of this Court's Rules of Practice and Procedure, the National Institute of Military Justice ("NIMJ") respectfully submits this brief as *amicus curiae*, addressing the certificate for review filed by the Judge Advocate General of the Air Force. For the reasons explained below, the Court should summarily affirm the decision of the Air Force Court of Criminal Appeals. By separate motion, NIMJ has requested leave to participate in oral argument.

Certified Issue

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN NULLIFYING APPELLEE'S FACTUALLY AND LEGALLY SUFFICIENT CONVICTION FOR POSSESSION OF CHILD PORNOGRAPHY.

Interest of the Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purposes are to advance the fair

administration of military justice in the Armed Forces of the United States and to foster improved public understanding of the military justice system. NIMJ participates actively in the military justice process through such means as the filing of *amicus* briefs, rulemaking comments, its website (www.nimj.org), and its publications program, including the unofficial *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (hereinafter "Rules Guide").

Jurisdiction, Statement of the Case, and Facts

The Court has jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867. Appellee has submitted statements of the case and of the facts which require no comment.

Argument

THE COURT HAS JURISDICTION TO REVIEW THE SPECIFIED ISSUE BUT, BECAUSE IT LACKS AUTHORITY TO ACT ON THAT ISSUE, IT SHOULD SUMMARILY AFFIRM THE AIR FORCE COURT'S DECISION.

This case presents the unusual situation of being within the Court's jurisdiction but beyond its power to act. While the Government describes this circumstance as "absurd," it is not for this Court to rewrite Article 67.

The Court's jurisdiction is exclusively statutory. *See United States v. Denedo*, 129 S. Ct. 2213, 2221 (2009). Article 67 divides jurisdiction into two powers: the power to review and the power to act. The Court possesses the power to review any case that falls within any of the three categories outlined in

Article 67(a). *See* Article 67(a), 10 U.S.C. § 867(a). Specific to this case, the Court shall review "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review." *See* Article 67(a)(2), 10 U.S.C. § 867(a)(2). Clearly, the Court has jurisdiction to review the issue raised in the certificate and is required to do so. This aspect of the Court's jurisdiction is nondiscretionary.

The power to review, however, is not the power to act. The power to act springs from three instances provided for in Article 67(c). First, the Court "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *See* Article 67(c), 10 U.S.C. § 867(c). Second, in a case which "the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him." *Id*. Third, "upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review." *Id.* Article 67(c)'s final sentence provides that this Court "shall take action only with respect to matters of law." *Id.* (emphasis added).

The last sentence of Article 67(c) qualifies each of the three instances, and must be read as words of limitation. Thus, in any case where this Court may act, it may do so only as to

matters of law. *See* Appellee's Brief at 10-13. Ordinarily, the types of cases that a court may review will overlap completely with the types of cases upon which a court may act. But the structure of Article 67 precludes a similar conclusion, as the diagram below demonstrates. The larger circle represents issues reviewable by the Court, and the inner circle represents issues upon which the Court may act.

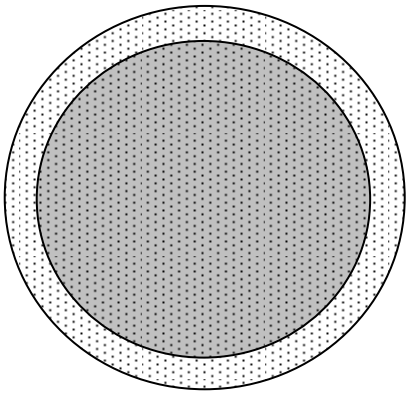

Figure 1:
ILLUSTRATION OF CAAF'S ARTICLE 67 JURISDICTION

Precedent demonstrates that this Court is aware that the powers to review and to act are not coextensive. Thus, the Court cautioned the Judge Advocates General against cloaking issues of fact by certifying them as questions of law in *United States v. Leak*, 61 M.J. 234, 242, n. 6 (C.A.A.F. 2005). The *Leak* opinion stated that, "[w]ere they to do so, this Court would be obliged to review all such cases, but consistent with Article 67, **could not act** with respect to cases it found presented questions of fact and not law." *Id.* at 242, n. 6 (emphasis added). Thus, in *Leak*, the Court was of the opinion that certain cases could be

subject to review, but not subject to proper action for non-fulfillment of the "matter of law" requirement in Article 67(c). *Id.* This logic was reaffirmed in *United States v. Kelly*, 14 M.J. 196 (C.M.A. 1982), where the Court held that "once the Judge Advocate General sends our Court a case for review under Article 67(b)(2), we *must* take action with respect to those issues properly raised by him--issues that are not moot, advisory, or otherwise defective..." *Kelly*, 14 M.J. at 200 (emphasis in original).

In the case at bar, the Air Force Court did not set aside the child pornography specification as incorrect in law. Therefore, based on the plain language of Article 67(c), this Court does not have the authority to act on the certified question.

Obviously, a disconnect between an appellate court's power to review and its power to act is undesirable. Indeed, Congress was on notice of this disconnect when it had the UCMJ under consideration in 1949. Major General Thomas H. Green, then Judge Advocate General of the Army, testifying before the Senate Armed Services Committee, foresaw the power the boards of review could wield in a situation such as the one presented in the case at bar. He highlighted how such an exercise of power would allow the boards to circumvent lawful decisions by convening authorities with respect to court-martial findings. MG Green recognized that he would have to accept the board's decision in

such cases:

> Under Articles 66 and 67 the determination of the board of review is final as to any matter other than a question of law. The latter is subject to appeal to the Civilian Court of Military Appeals either by the Judge Advocate General or the accused. This in effect authorizes the board to disapprove or mitigate legal sentences which have been approved by responsible senior commanders. It authorizes them to consider other than legal matters in determining what part of a finding or the sentences should be approved. For example, a board may consider that a given order which an accused is charged with having violated is unwise, and that therefore, on the basis of the entire record, a finding should be disapproved. **This makes possible an unwarranted invasion of the command prerogative and would authorize the board of review to substitute its judgment on military policy for that of the commander in the field.** This determination under the proposed bill would be absolutely final. **I could not appeal that case to the Court of Military Appeals because the board's determination would not be based on a question of law.**

Hearings before a Subcomm. of the Comm. on Armed Services, United States Senate, on S. 857 and H.R. 4080, Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice, 81st Cong., 1st Sess. 258 (1949) (emphasis added).

The parties to this case cite precedent supporting their arguments that the Air Force Court of Criminal Appeals does or does not possess the authority it purported to exercise. NIMJ takes no position on that issue. The question here, instead, is whether this Court may review and act upon that exercise of

authority. In light of the 1949 legislative history to which appellee points, the Court may review, but not act, on the underlying issue. Because it lacks power to act, it ought not reach the underlying issue, as that would be an advisory opinion.

Because of the special function performed by this Court, i.e., as an aspect of civilian control of the military, the Court should be loath to exclude from its reach cases that are within its substantive grant of jurisdiction. To offer an analogy: the service courts "cannot thwart Court of Appeals review by reducing the sentence below the statutory jurisdictional threshold." Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* 17 (12th ed. 2006) (*citing United States v. Johnson*, 45 M.J. 88, 90 (C.A.A.F. 1996); *United States v. Bordeaux*, 35 M.J. 291, 295 (C.M.A. 1992); *United States v. Bullington*, 13 M.J. 184 (C.M.A. 1982); *United States v. Reid*, 12 C.M.A. 497, 31 C.M.R. 83, 86-87 (C.M.A. 1961); and *Jones v. Ignatius*, 18 C.M.A. 7, 39 C.M.R. 7 (C.M.A 1968)). Allowing them to do so would run counter to the central premise of civilian oversight of the military justice system. The same is true of this case: the CCA could insulate its ruling from civilian review simply by casting it in a way that put it beyond the reach of Article 67. A Court of Criminal Appeals could thereby nullify a legally and factually sufficient guilty verdict without the possibility of a substantive appeal to this Court.

For these reasons, we consider that the Court has jurisdiction over the case as a result of the certification. That is not the end of the matter, for the question remains whether, having such jurisdiction, the Court should exercise it—and how. Whether or not setting aside a finding of guilty is within the service courts' power, the exercise of that authority was foreseen by Congress in 1949. Unless Congress amends Article 67, the Court may not act in this circumstance.

The Government, in effect, asks the Court to exceed its statutory authority by asserting that "[t]his Court stands as the 'supreme court of the military justice system' and 'is not powerless to accord relief' from any egregious error 'in any court-martial." Appellant's Brief at 5. For this proposition it relies on *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976). That reliance is misplaced. First, the plain language of Article 67 makes clear that Congress intended this to be a court of limited jurisdiction. Second, the Supreme Court later repudiated the type of broad assertion of jurisdiction made by the *McPhail* court. *See Clinton v. Goldsmith*, 526 U.S. 529 (1999). Second, the *McPhail* court understood there were limits to its "authority, even as the highest court in the military justice system." *McPhail*, 1 M.J. at 463. Third, Judge Cook, author of the *McPhail* opinion, later admitted he was "wrong in *McPhail* as to the scope of this Court's extraordinary relief jurisdiction." *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978)

(Cook, J., concurring). While Judge Cook believed that the Court should possess the jurisdiction posited in *McPhail*, it cannot stand "in the face of the clear purpose of Congress to have it otherwise." *Id.* at 222.

Article I courts are not the only ones limited in their scope of review. Article III courts may not issue advisory opinions. U.S. Const. art. III, § 2. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh den*. 439 U.S. 883 (1978); *St. Pierre v. United States*, 319 U.S. 41 (1943), *overruled on other grounds*; *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Although not prohibited from doing so, "[c]ourts established under Article I of the Constitution, such as this Court, generally adhere to the prohibition on advisory opinions as a prudential matter." *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003). This Court has long declined to issue advisory opinions in cases that were moot, for example, *see, e.g., United States v. Valead*, 32 M.J. 122, 123, 125 (C.M.A. 1991), or in which no party would gain a practical benefit. *See United States v. Fisher*, 22 C.M.R. 60, 64 (C.M.A. 1956). This same doctrine has been followed in cases certified to it by the Judge Advocates General, although the Court has been less than consistent in this area. *See, e.g., United States v. Bryant*, 12 M.J. 307 (C.M.A. 1981) (certificate for review dismissed because deciding issue would not have material effect on either party); *United States v. Maze*, 45 C.M.R. 34 (C.M.A. 1972) (certified

question answered to determine validity of conviction, despite no sentence relief opportunity); *United States v. Gilley*, 34 C.M.R. 6 (C.M.A. 1963) (certification issue regarding dismissed specification had no effect on sentence, so Court declined to act).

Here, any opinion issued in this case would be merely advisory because the Court lacks the authority to act on the certified issue. Given this Court's narrowly defined jurisdiction specifically delineated in Article 67, providing an opinion which it cannot enforce does not make sense. Therefore, the Court should summarily affirm the decision of the Court of Criminal Appeals and withhold any comment on the merits of the controversy. At most, in keeping with its past practice, see Rules Guide at 32-34 (collecting cases), it may wish to include a suggestion that Congress reexamine Article 67 to ensure that the Court's powers to review and to act are coextensive, or even some broader suggestion that would bring the direct appellate review of courts-martial into step with the direct review of convictions in the Article III courts.

Conclusion

For the foregoing reasons, the decision of the Court of Criminal Appeals should be summarily affirmed.

Respectfully submitted,

Michelle M. Lindo McCluer
4801 Massachusetts Avenue N.W.
Washington, DC 20016
(202) 274-4322
CAAF Bar Number 31105

Jonathan E. Tracy
4801 Massachusetts Avenue N.W.
Washington, DC 20016
(202) 274-4322
CAAF Bar Number 34423

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W.
Washington, DC 20036
(202) 466-8960
CAAF Bar Number 13979

Stephen A. Saltzburg
720 20th Street N.W.
Washington, DC 20052
(202) 994-7089

Attorneys for Amicus Curiae

August 25, 2009

CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were hand-delivered to the Court on August 25, 2009, and that a copy of the foregoing was deposited in the U.S. Mail, postage prepaid, for first-class delivery to each of the counsel: Mr. Dwight Sullivan, Senior Appellate Defense Counsel, Air Force Legal Operations Agency, 112 Luke Avenue, Suite 343, Bolling AFB, DC 20032-8000; and Major Jeremy S. Weber, Chief Appellate Government Counsel, Air Force Legal Operations Agency, United States Air Force, 112 Luke Avenue, Rm 206, Bolling AFB DC, 20032-5000.

Michelle M. Lindo McCluer
National Institute of Military Justice
4801 Massachusetts Avenue N.W.
Washington DC, 20016
(202) 274-4322