Post-Trial Procedure and Review of Courts-Martial (2023 Edition)

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I. Introduction

Although only six years have passed since the Military Justice Act of 2016 (MJA)[1] overhauled the Uniform Code of Military Justice (UCMJ),[2] Congress has not been idle. It made additional changes to the UCMJ in the National Defense Authorization Acts for Fiscal Years 2018,[3] 2021,[4] 2022,[5] and 2023.[6] This primer updates my January 2018 article,[7] explaining the current post-trial process and changes enacted by Congress that will become effective in the next few years.

II. Adjournment

After trial, in accordance with regulations prescribed by the President in the Rules for Courts-Martial (R.C.M.), the military judge first addresses any post-trial motions and matters that may affect the findings, the sentence, the Statement of Trial Results, the record of trial, or any post-trial action by the convening authority that are subject to resolution by the military judge before entry of judgment.[8] Thereafter the military judge enters the Statement of Trial results into the record, setting forth each plea and finding; the sentence, if any; and any other information required by the President.[9] The trial counsel is responsible for distributing the Statement to the accused's commander, the convening authority, the officer in charge of the confinement facility, if appropriate, and the accused or defense counsel.[10]

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[1] Pub. L. No. 114-328, div. E, §§ 5001–5542, 130 Stat. 2000, 2894–2968 (2016).

[2] 10 U.S.C. 801–946a (2018 Supp. III).

[3] Pub. L. No. 115-91, 131 Stat 1385 (2017).

[4] Pub. L. No. 116-283, 134 Stat 3388 (2021).

[5] Pub. L. No. 117-81, 135 Stat. 1701 (2021).

[6] Pub. L. No. 117-263, 136 Stat. 2395 (2022).

[7] James A. Young, *Post-trial Procedure and Review of Courts-Martial under the Military Justice Act of 2016*, ARMY LAW. (Jan 31, 2018), at 31.

[8] UCMJ, art. 60(b), 10 U.S.C. § 860(b) (2018 Supp. III).

[9] UCMJ, art. 60(a), 10 U.S.C. § 860(a) (2018 Supp, III); *see* R.C.M. 1101(a).

[10] R.C.M. 1101(d).

III. The Record of Trial

The court reporter prepares and certifies that the record of trial contains the required items. The military judge is not responsible for reviewing or certifying the record unless the court reporter is unable to do so because of disability, death, or absence.[11] The court reporter is required to provide a copy of the certified record to the accused and, upon request ,to any victim named in a specification who testified at trial, regardless of the findings of the court-martial.[12]

IV. Action of the Convening Authority

The convening authority's almost unfettered discretion to act on the findings and sentence of a court-martial has now been considerably limited. The convening authority may act on the findings only if the following four conditions are all met: the maximum authorized sentence to confinement is two years or less; the total of the adjudged sentences to confinement running consecutively does not exceed six months; a punitive discharge is not adjudged; and the accused was not convicted of any offense under Article 120(a) or (b), Article 120b, or any other offense specified by the Secretary of Defense.[13]

Generally, the convening authority's prerogative to reduce, commute, or suspend the sentence is restricted to cases in which the total period of confinement adjudged for all offenses running consecutively is six months or less but the accused is otherwise not sentenced to either death or a punitive discharge. Nevertheless, the convening authority does have broader powers in two circumstances:

(1) Upon recommendation of the military judge, the convening authority may suspend a sentence to confinement, in whole or in part, or a sentence to a punitive discharge. However, the convening authority may not suspend a mandatory minimum sentence or suspend a sentence to an extent greater than recommended by the military judge.[14]

(2) If an accused "provides substantial assistance in the investigation or prosecution of another person," whether that be before or after entry of judgment, the convening authority may, upon recommendation by the trial counsel, "reduce, commute, or suspend a sentence, in whole or in

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[11] UCMJ, art. 54(a), 10 U.S.C. § 854(a) (2018 Supp. III); R.C.M. 1112(c).

[12] UCMJ, art. 54(d), (e), 10 U.S.C. § 854(d) (2018 Supp. III); R.C.M. 1112(e).

[13] UCMJ, art. 60a(a), 10 U.S.C. § 860a(a) (2018 Supp. III). Article 120(a) is the offense of rape; Article 120(b) is sexual assault; and Article 120b concerns rape and sexual assault of a child.

[14] UCMJ, art. 60a(c), 10 U.S.C. § 860a(c) (2018 Supp. III).

part, including any mandatory minimum sentence."[15] This provision provides substantial incentive for an accused to cooperate with the Government in investigating and prosecuting others.

In determining whether to act on a case, the convening authority is required to consider written submissions of the accused and any victim of an offense."[16] She may not consider "any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial."[17] "If the convening authority reduces, commutes, or suspends the sentence," she "shall include a written explanation of the reasons for such action."[18] The convening authority must forward the action to the military judge, with copies to the accused and any victim.[19] If the convening authority acts favorably due to a trial counsel's recommendation that the accused provided substantial assistance after entry of judgment, the convening authority must forward the decision "to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to the Judge Advocate General for appropriate action."[20]

Despite the limited authority to reduce, commute, or suspend a sentence, the convening authority has retained the power, in her sole discretion, to defer a sentence to confinement, reduction, or forfeiture on application of the accused. The convening authority may rescind the deferral at any time and it terminates upon entry of judgment.[21] Without the consent of the accused, the convening authority may defer a sentence to confinement when the accused is required to first serve custody in a state or foreign country. The convening authority may rescind the deferral at any time, and it shall terminate upon entry of judgment.[22] The service Secretary may defer a sentence to confinement while a Government appeal of a Court of Criminal Appeals decision is pending before the Court of Appeals for the Armed Forces.[23]

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[15] UCMJ, art. 60a(d), 10 U.S.C. § 860a(d) (2018 Supp. III).

[16] UCMJ, art. 60a(e)(1), 10 U.S.C. § 860a(e)(1) (2018 Supp. III).

[17] UCMJ, art. 60a(e)(2), 10 U.S.C. § 860a(e)(2) (2018 Supp. III).

[18] UCMJ, art. 60a(f)(2), 10 U.S.C. § 860a(f)(2) (2018 Supp. III).

[19] UCMJ, art. 60a(f)(1), 10 U.S.C. § 860c(a)(f)(1) (2018 Supp. III).

[20] UCMJ, art. 60a(f)(3), 10 U.S.C. § 860a(f)(3) (2018 Supp. III).

[21] UCMJ, art. 57(b)(1), 10 U.S.C. § 857(b)(1) (2018 Supp. III); R.C.M. 1103(b).

[22] UCMJ, art. 57(b)(2), 10 U.S.C. § 857(b)(2) (2018 Supp. III); R.C.M. 1103 (c).

[23] UCMJ, art. 57(b)(5), 10 U.S.C. § 857(b)(5) (2018 Supp. III).

V. Entry of Judgment

After the convening authority takes action, the military judge enters the judgment of the court into the record of trial.[24] The judgment consists of the Statement of Trial Results and any modifications made due to the action of the convening authority or any post-trial ruling of the military judge that affects the plea, the findings, or the sentence.[25] It is only after the entry of judgment that an accused may waive or withdraw from appellate review.[26]

If, after entry of judgment, the convening authority acts to reduce, commute, or suspend a sentence due to the accused's substantial assistance, she must forward this action "to the chief trial judge for appropriate modification of the entry of judgment, which shall be transmitted to The Judge Advocate General (TJAG) for appropriate action."[27]

Although it is unclear from both the statute and the Rule for Courts-Martial upon whom the duty falls, a copy of the judgment shall be provided to the accused or to the defense counsel, who will then be responsible for providing a copy to the accused.[28] A copy shall, upon request, also be provided to any alleged victim or that person's counsel.[29] The statute requires that the judgment to be made available to the public under rules prescribed by the President. The President delegated this authority to prescribe the rules to the Secretary of Defense.[30]

VI. Government Appeals of the Sentence

The entry of judgment starts a 60-day clock, during which the Government may, with the approval of the Judge Advocate General, appeal a sentence to the Court of Criminal Appeals on the grounds that it violates the law or is "plainly unreasonable, as determined in accordance

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[24] UCMJ, art. 60c(a)(1), 10 U.S.C. § 860c(a)(1) (2018 Supp. III).

[25] *Id.*

[26] UCMJ, art. 61(a), (b), 10 U.S.C. § 861(a), (b) (2018 Supp. III). An accused may neither waive nor withdraw from appellate review in a death penalty case. UCMJ, art. 61(c), 10 U.S.C. § 861(c) (2018 Supp. III).

[27] UCMJ, art. 60c(f)(3) (2018 Supp. III).

[28] UCMJ, art. 60c(a)(2), 10 U.S.C. § 860c(a)(2) (2018 Supp. III); R.C.M. 1111(f).

[29] R.C.M. 1111(f)(3).

[30] UCMJ, art. 60c(a)(2)(B), 10 U.S.C. § 860c(a)(2)(B) (2018 Supp. III); R.C.M. 1111(f)5).

with standards and procedures prescribed by the President."[31] The President has prescribed such standards and procedures in R.C.M. 1117. "A sentence is plainly unreasonable if no reasonable sentencing authority would determine such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007."[32]

It is unclear whether either party can directly appeal the decision of the CCA on the Government's appeal of the sentence to the Court of Appeals for the Armed Forces. The statutes do not expressly provide for such review, and the CAAF's jurisdiction seems limited to "*cases* reviewed by a Court of Criminal Appeals."[33] The CAAF will likely determine that the CCA reviewed only the "sentence," not the "case." Nevertheless, it appears that, regardless of the outcome, by appealing the sentence to the CCA, the Government would establish the CAAF's jurisdiction over the accused's case, even when the sentence was otherwise sub-jurisdictional.[34]

The CAAF would then have authority Government appeals of the sentence may exact a cost on the Government in terms of delay and, at least for cases submitted to the CCA before 24 December 2023, granting an accused with a sub jurisdictional sentence an otherwise unavailable avenue for full review of the entire case by the CCA.[35]

The Government's authority to appeal the sentence appears predicated on the complete overhaul of the military sentencing regime. Currently, it is presumed the military judge will perform the sentencing function, except in death penalty cases. An accused convicted by court members, however, may choose to be sentenced by the members.[36] A military judge is required to announce a separate sentence to confinement and a fine, if any, for each offense of which the accused was convicted,[37] while court members announce a single sentence for all of the offenses.[38]

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[31] UCMJ, art. 56(d), 10 U.S.C. § 856(d), 10 U.S.C. § 856(d) (2018 Supp. III).

[32] R.C.M. 1117(e).

[33] UCMJ, art. 67(a)(2), (3), 10 U.S.C. § 867(a)(2), (3) (2008 Supp. III) (emphasis added).

[34] UCMJ, art. 66(b)(1)(C), 10 U.S.C. § 866(b)(1)(C) (2018 Supp. III); UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3) (2018 Supp. III).

[35] *See* UCMJ, art. 66(b)(1)(C), 10 U.S.C. § 866(b)(1)(C) (2018 Supp. III) and Pub. L. No. 117-263, § 544(b)(1), 136 Stat. 2395, ____ (2022).

[36] UCMJ, art. 53(b)(1)(B), 10 U.S.C. § 853(b)(1)(B) (2018 Supp. III).

[37] UCMJ, art. 56(c)(2), 10 U.S.C. § 856(c)(2) (2018 Supp. III).

[38] UCMJ, art. 56(c)(3), 10 U.S.C. § 856(c)(3) (2018 Supp. III).

Effective 28 December 2023, and applicable to cases in which all findings of guilty are for offenses that occurred on or after that date, the sentencing function will be performed solely by the military judge, using sentencing parameters and criteria set forth in presidential regulations.[39] Congress was specific in describing what it expected:

> (2) SENTENCING PARAMETERS.—Sentencing parameters established under paragraph (1) shall—
>
> (A) identify a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—
>
> (i) the severity of the offense;
>
> (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;
>
> (iii) any military-specific sentencing factors;
>
> (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and
>
> (v) any other relevant sentencing guideline.
>
> (B) include no fewer than 5 and no more than 12 offense categories;
>
> (C) assign such offense under this chapter to an offense category unless the offense is identified as unsuitable for sentencing parameters under paragraph (4)(F)(ii); and
>
> (D) delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit.
>
> (3) SENTENCING CRITERIA.—Sentencing criteria established under paragraph (1) shall identify offense-specific factors the military judge should consider and any collateral effects of available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.[40]

In 2021, Congress established a new Military Sentencing Parameters and Criteria Board to develop sentencing parameters and criteria to submit to the President for approval. The chief trial judges of the services are the voting members of the Board.[41] The chief judge of the Court of

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[39] Pub. L. 117–81, § 539E(c), (f), 135 Stat. 1701, 1706 (2021).

[40] Pub. L. 117–81, § 539E(e), 135 Stat. 1541, 1703–04 (2021).

[41] Pub. L. 117–81, § 539E(e)(4)(B), 135 Stat. 1541, 1704–05 (2021).

Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the DoD General Counsel "shall each designate one non-voting member."[42] The Board will consider sentencing data collected by the Military Justice Review Panel,[43] "consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system."[44] Although, the Board does not yet appear to have a presence on the internet, I understand the Board has been established and its staff has been drawn from staffs of the Board members.

The Military Justice Review Group (MJRG), which drafted the MJA, proposed that the Government not be permitted to appeal a sentence until sentencing parameters are established.[45] Sentencing parameters have not been published,[46] yet there appears nothing in the statute itself, to prevent the Government from currently appealing a sentence, and the President has prescribed procedures and standards for such an appeal.[47] Nevertheless, I can find no evidence that a sentence has yet been appealed.

VII. Review at the Courts of Criminal Appeals

The MJRG recommended substantial changes to the appellate review process. It proposed that, similar to federal civilian appellate courts, an accused should have an appeal as of right in non-capital cases, with automatic review limited to cases in which the members were authorized to impose a sentence of death.[48] Congress chose not to immediately adopt that proposal.

Instead, under the MJA, Congress set up three categories of appeal, applicable unless the accused waived or withdrew from appellate review:

A. The CCA "shall have jurisdiction" over a case in which the judgment entered includes a sentence of death, a punitive discharge, or

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[42] Pub. L. 117–81, § 539E(e)(4)(C), 135 Stat. 1541, 1705 (2021).

[43] Pub. L. 117–81, § 539E(e)(4)(F)(iii), 135 Stat. 1541, 1705 (2021).

[44] Pub. L. 117–81, § 539E(e)(4)(F)(vii), 135 Stat. 1541, 1705 (2021).

[45] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP: PART I; UCMJ RECOMMENDATIONS 514 (Mar. 25, 2015 [hereinafter MJRG REP.].

[46] Although not labeled as such, R.C.M. 1002(f) contain sentencing criteria.

[47] R.C.M. 1117.

[48] MJRG REP., *supra* note 45, at 609.

confinement for at least two years. [49] This subsection of the statute refers to this provision as "automatic review." Of course, a court having jurisdiction to review and being required to review a case are different. Regardless, from past statutory history and practice, we can infer that Congress meant to require the CCAs to review such cases.

B. Over cases in which the Judge Advocate General sent to the CCA for review of the sentence.[50] This appears to be confirmation of the authority of the Government, with the approval of the Judge Advocate General, to appeal a sentence.

C. Over an appeal *timely* filed by an accused as follows:

(1) the sentence to confinement exceeds six months and the case is not subject to automatic review;

(2) the Government previously filed an Article 62 appeal;

(3) the Judge Advocate General previously sent the case to the CCA to review a Government appeal of the sentence; and

(4) the court granted an accused's application for review of a case previously reviewed by the Judge Advocate General under Article 69, UCMJ.[51]

In the 2023 NDAA, Congress simplified the CCAs' jurisdiction over appeals by an accused. Effective for all cases submitted to a CCA on or after 23 December 2022, the four grounds for appeal above have been replaced with two broader grounds. The CCAs will have jurisdiction over all general and special courts-martial in which there was a finding of guilty and all summary courts-martial in which the accused first filed an application for review in the office of the Judge Advocate General and the CCA grants an application for review.[52]

Historically, if a case qualified for review, the CCA was required to review the whole case for error, whether issues were raised or not, as the CCA could

> affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witness, and determine

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[49] UCMJ, art. 66(b)(3), 10 U.S.C. § 866(b)(3) (2018 Supp. III).

[50] UCMJ, art. 66(b)(2), 10 U.S.C. § 866(b)(2) (2018 Supp. III).

[51] UCMJ, art. 66(b)(1), 10 U.S.C. § 866(b)(1) (2018 Supp. III).

[52] Pub. L. No. 117-263, § 544(b)(1), 136 Stat. 2395, ____ (2022).

> controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[53]

The Court of Appeals for the Armed Forces interpreted this passage as requiring "the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case."[54]

Currently, the

> Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.[55]

Under subparagraph (B), the CCA does not have to consider the factual sufficiency of the findings unless the accused so requests and "makes a specific showing of a deficiency in proof."[56] If the accused makes the showing, the "Court may weigh the evidence and determine controverted questions of fact," giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" and "to findings of fact entered into the record by the military judge."[57] "If as a result …, the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding."[58]

Effective 27 December 2023, the CCA will consider the following in reviewing sentences for cases in which all the findings of guilty are for offenses committed after that date:

> (A) whether the sentence violates the law;
>
> (B) whether the sentence is inappropriately severe-
>
> (i) if the sentence is for an offense for which the President has not established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022; or
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> (ii) in the case of an offense for which the President has established a sentencing parameter pursuant to section 539E(e) of

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[53] UCMJ, art. 66(c), 10 U.S.C. § 866(c) (2012).

[54] United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

[55] UCMJ, art. 66(d)(1)(A), 10 U.S.C. § 866(d)(1)(A) (2018 Supp. III).

[56] UCMJ, art. 66(d)(1)(B)(i), 10 U.S.C. § 866(d)(1)(B)(i) (2018 Supp. III).

[57] UCMJ, art. 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii) (2018 Supp. III).

[58] UCMJ, art. 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii) (2018 Supp. III).

> the National Defense Authorization Act for Fiscal Year 2022, if the sentence is above the upper range of such sentencing parameter;
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> (C) in the case of a sentence for an offense for which the President has established a sentencing parameter pursuant to section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, whether the sentence is a result of an incorrect application of the parameter;
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> (D) whether the sentence is plainly unreasonable; and
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> (E) in review of a sentence to death or to life in prison without eligibility for parole determined by the members in a capital case under section 853(c) of this title (article 53(c)), whether the sentence is otherwise appropriate, under rules prescribed by the President.[59]

VIII. Cases Not Eligible for Direct Review at CCA

Before the MJA, each general court-martial case in which there was a conviction that was not subject to review by the CCA—those in which the accused received a sentence that did not include death, a punitive discharge, or confinement for at least one year— and the accused did not waive or withdraw from appellate review, was reviewed in the office of the Judge Advocate General. If the findings or sentence was "unsupported in law or if reassessment of the sentence [was] appropriate, the Judge Advocate General [could] modify or set aside the findings or sentence or both."[60] For other cases not eligible for review by the CCA, the accused could apply to the Judge Advocate General for relief "on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence."[61]

Currently, general courts-martial no longer get special treatment. All courts-martial not reviewed by a CCA under Article 66, UCMJ, are subject to review by the Judge Advocate General upon application by the accused "on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence."[62] The CCA may review the Judge Advocate General's action in cases sent to the Court by order of the Judge Advocate General or upon

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[59] Pub. L. No. 117-81, § 539E(d)(2), 135 Stat. 1541, 1703 (2021).

[60] UCMJ, art. 69(a), 10 U.S.C. § 869(a) (2012).

[61] UCMJ, art. 69(b), 10 U.S.C. § 869(b) (2012).

[62] UCMJ, art. 69(a), 10 U.S.C. § 869(a) (2018 Supp. III).

application of the accused[63] that "demonstrates a substantial basis for concluding that the action on review [by the Judge Advocate General] constituted prejudicial error."[64] This appears to be a higher standard than the "good cause shown" standard an accused with a jurisdictional sentence would have to meet to get his case reviewed by the Court of Appeals for the Armed Forces (CAAF).[65] In any case reviewed by the CCA under Article 69, "the court may take action only with respect to matters of law."[66]

IX. The Court of Appeals for the Armed Forces

As the Supreme Court accepts so few military cases for review, the CAAF is the final venue for most cases. Before the 2016 MJA, the CAAF was required to review all cases in which the sentence as affirmed by the CCA extended to death, all cases referred to the CAAF by a Judge Advocate General, and all other cases reviewed by the CCA in which the Court granted, for good cause shown, an accused's petition.[67] Now, the Judge Advocate General must notify the other services' chief legal officer before referring a case to the Court.[68] This change was "intended to ensure that each Judge Advocate General has an opportunity to provide input on the decision to appeal cases that have the potential for impacting the law that affects all the services."[69]

Historically, the CAAF could "act only with respect to the findings and sentence as approved by the convening authority as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[70] This caused the CAAF to struggle with questions of its jurisdiction over interlocutory issues decided by the CCAs.[71] Congress resolved the issue by granting the

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[63] UCMJ, art. 69(d)(1), 10 U.S.C. § 869(d)(1) (2018 Supp. III).

[64] UCMJ, art. 69(d)(2)(A), 10 U.S.C. § 869(d)(2)(A) (2018 Supp. III).

[65] *See* UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3) (2018 Supp. III).

[66] UCMJ, art. 69(e), 10 U.S.C. § 869(e) (2018 Supp. III).

[67] UCMJ, art. 67(a), 10 U.S.C. § 867(a) (2012).

[68] UCMJ, art. 67(a), 10 U.S.C. § 867(a) (2018 Supp. III).

[69] MJRG REP., *supra*, note 45, at 625.

[70] UCMJ, art. 67(c), 10 U.S.C. § 867(c) (2012).

[71] *Compare* United States v. Lopez de Victoria, 66 M.J. 67, 70 (C.A.A.F. 2008) (the CAAF has jurisdiction to review the judgment of the CCA on a government appeal under Article 62 despite the silence of the statute) *with* Randolph v. H.V., 76 M.J. 27, 31 (C.A.A.F. 2017) (the CAAF lacked jurisdiction to review the CCA's granting a writ of mandamus to an alleged victim who was seeking to prevent military judge from examining her mental health records).

CAAF jurisdiction to consider "a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[72] Such decisions or judgments would appear to include Government appeals of the judge's sentence.

X. The Supreme Court

Every federal and state criminal case is eligible for Supreme Court review, as is "[e]very trial of an alien unprivileged enemy belligerent before military commissions at the request of the government or the accused.[73] Not so for servicemembers convicted at courts-martial.

Currently, the Supreme Court's jurisdiction over courts-martial cases is is restricted. "The Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review."[74] Since the CAAF is required to review all cases in which the CCA affirmed a death sentence and all cases the Judge Advocate General orders sent to it,[75] the Supreme Court would have jurisdiction. But in the vast majority of cases, the CAAF denies petitions for review and thus precludes the accused from having the case reviewed by the Supreme Court.

Servicemembers' access to the Supreme Court was limited due to "concern about the volume of cases from the military justice system that might be the subject of petitions for review."[76] Despite the MJRG recommendation that all three branches of government consult "regarding enhanced access by members of the armed forces to review by the Supreme Court,"[77] there is no evidence change is in sight. Not that any such change would likely modify the Supremes dismal record in granting review of military cases.

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[72] UCMJ, art. 67(c)(1)(B), 10 U.S.C. § 867(c)(1)(B) (2018 Supp. III).

[73] MJRG REP., *supra*, note 45, at 628.

[74] UCMJ, art. 67a(a), 10 U.S.C. § 867a(a) (2018 Supp. III).

[75] UCMJ, art. 67(a), 10 U.S.C. § 867(a) (2018 Supp. III).

[76] MJRG REP., *supra*, note 45, at 627 n.5 (citing H.R. REP. 98-549 at 16–17).

[77] *Id.* at 628.