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**Memorandum**

February 27, 2006

**SUBJECT: Supreme Court Review of Decisions of the U.S. Court of Appeals for the Armed Forces Under Writs of Certiorari**

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The proposed Equal Justice for Our Military Act, H.R.1364, would broaden the circumstances under which members of the Armed Services convicted by courts-martial are eligible to apply for a writ of certiorari to have their cases reviewed by the Supreme Court. This memo briefly summarizes the appellate procedures applicable to military courts-martial, including petitions for certiorari to the Supreme Court, and analyzes how this framework would be altered if H.R.1364 were to become law.

The Military Justice Act of 1983<sup>1</sup> established jurisdiction for the first time in the Supreme Court to hear cases from military tribunals in direct review under a writ of certiorari. Prior to that Act, neither the accused nor the government could ask the Court to review an adverse decision of the highest military court,<sup>2</sup> although the accused could seek Supreme Court review through a writ of habeas corpus.<sup>3</sup> The legislative history shows the change was motivated in part by a concern about the lack of the government's ability to appeal decisions of the civilian appellate court for the military services, then known as the Court of Military Appeals, even on matters of constitutional law, effectively making that court the final arbiter of such questions. Congress limited the availability of Supreme Court review to cases that had been heard by the Court of Military Appeals in order to maintain that court's role as the principle interpreter of military law and to avoid an undue increase in the Supreme Court's workload.<sup>4</sup>

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<sup>1</sup> Pub. L. 98-209, 97 Stat. 1393 (1983).

<sup>2</sup> The Court of Military Appeals, a civilian court, was created by the enactment of the Uniform Code of Military Justice in 1950 to review courts-martial from the various services. Pub. L. 81-506, 64 Stat. 108 (1950). Its name was changed to the Court of Appeals for the Armed Forces in 1994. Pub. L. 103-337, § 924, 108 Stat. 2663.

<sup>3</sup> ~~See S. REP. NO. 98-53, at 9 (1983).~~

<sup>4</sup> *Id.* at 33-34. **Congressional Research Service** Washington, D.C. 20540-7000  
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Eligibility for certiorari in courts-martial cases is largely determined by the sentence received (or possible with respect to the charged offense) and whether the U.S. Court of Appeals for the Armed Forces (CAAF) decides to hear the case. While the government is in most cases able to appeal an adverse decision (other than a finding of “not guilty” with respect to a charge or specification<sup>5</sup>) to the appellate courts, service members face more significant hurdles. In order to be eligible to petition the Supreme Court for a writ of certiorari, a service member must first have his or her case reviewed by the CAAF, which review is mandatory only where a Court of Criminal Appeals has affirmed the death sentence. In effect, the CAAF acts as a “gate-keeper” to control which military cases are eligible to be referred to the Supreme Court.

Courts-martial are conducted under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946, and the Manual for Courts-Martial. If a court-martial results in a conviction, the case is reviewed by the convening authority, who has discretion to mitigate the findings and sentence. If the convening authority approves a sentence of death, or, unless the defendant waives review, approves a bad-conduct discharge, a dishonorable discharge, dismissal of an officer, or confinement for one year or more, the Court of Criminal Appeals for the appropriate service<sup>6</sup> must review the case for legal error, factual sufficiency, and appropriateness of the sentence. All other cases are subject to review by judge advocates under regulations issued by each service. The Judge Advocates General may refer cases to the Courts of Criminal Appeals where their review determines a finding or sentence to be unsupported by law, or for any other reason. The Courts of Criminal Appeals also have jurisdiction to consider interlocutory appeals by the government of certain judicial rulings during court-martial proceedings in cases that could result in a punitive discharge (10 U.S.C. § 862), as well as petitions for extraordinary relief under the All Writs Act, (28 U.S.C. § 1651).<sup>7</sup>

The CAAF exercises appellate jurisdiction over the Courts of Criminal Appeals, with respect to issues of law. The CAAF is an Article I court composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate. Its jurisdiction is established in Article 67 of the UCMJ (10 U.S.C. § 867), which provides for jurisdiction in:

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<sup>5</sup> 10 U.S.C. § 622.

<sup>6</sup> There are four such courts – the Army Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, the Air Force Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals. These courts are established by the Judge Advocate General of the respective service. 10 U.S.C. § 866.

<sup>7</sup> For a discussion of extraordinary writs in military courts, see DAVID SCHLEUTER, *MILITARY CRIMINAL JUSTICE* § 17-19 (5<sup>th</sup> ed. 1999).

- (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
- (2) 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; and
- (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

Its review of cases involving the death sentence and those referred by the Judge Advocates General (JAG) is mandatory; its review of appeals upon the petition of the accused is discretionary. It also has jurisdiction to consider petitions for extraordinary relief under the All Writs Act.<sup>8</sup>

The Supreme Court of the United States has discretion under 28 U.S.C. § 1259 to review

- (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867 (a)(1) of title 10.
- (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867 (a)(2) of title 10.
- (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867 (a)(3) of title 10.
- (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

Thus, Supreme Court review by writ of certiorari is limited to cases where the CAAF has conducted a review, whether mandatory or discretionary under Article 67, *supra*, or has granted a petition for extraordinary relief. The Court does not have jurisdiction to review a denial of discretionary review by the CAAF, 10 U.S.C. § 867a, nor does it have jurisdiction to consider denials of petitions for extraordinary relief. Service members whose petitions for review or for extraordinary relief are denied by the CAAF may seek additional review only through collateral means, e.g., petitioning for habeas corpus to an Article III court, which could provide an alternate avenue for Supreme Court review.

To summarize, under the present system:

- Death penalty cases are always eligible for certiorari, because review is mandatory through the CAAF.
- Cases resulting in sentences ranging from one year to life, or a bad-conduct discharge, a dishonorable discharge, or the dismissal of an officer, must be reviewed by the appropriate Court of Criminal Appeals unless the defendant waives appeal, but review by the CAAF is discretionary unless the JAG certifies the case for its review. The Supreme Court can review such a case on certiorari only if the CAAF has reviewed it. The Supreme Court may not review a denial of review.

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<sup>8</sup> Common issues addressed by means of an extraordinary writ include jurisdictional issues, vacation proceedings, Article 32 investigations, speedy trial issues, enforcement of pretrial agreements, pre- or post-trial confinement, grants of immunity, and command influence. *Id.*

- Cases resulting in sentences less severe than those covered above may not be appealed by the defendant, but the JAG can refer such a case to the appropriate Court of Criminal Appeals, which would make the case eligible for further review under the same circumstances that apply to the non-death penalty cases described above. In other words, the JAG must certify a court-martial case involving a lesser sentence for it to be eligible for further appellate review. The Supreme Court can review such a case on certiorari only if the CAAF has reviewed it, which can happen only if the JAG orders further review or the CAAF grants discretionary review.
- Non-judicial punishment and administrative actions are not eligible for review by the military appellate courts, and consequently, are not eligible for certiorari by the Supreme Court.
- An acquittal may not be appealed on the facts, but the government can appeal an adverse court-martial ruling on a matter of law in any case where the charges are severe enough to make a punitive discharge possible.
- Interlocutory questions of law that arise during a trial involving, for example, whether evidence is admissible or whether the government must disclose it to the accused, may be appealed to the Court of Criminal Appeals by the government. The defendant may be able to bring an interlocutory challenge in the form of an extraordinary writ. Adverse decisions with respect to interlocutory questions may be certified by the JAG to the CAAF, or the defendant can appeal a denial of relief to the CAAF. The Supreme Court may review such a ruling on certiorari only where the CAAF has *granted* relief. Where relief is denied, the Supreme Court has no jurisdiction, although presumably the case will return to the court-martial level, where it may become eligible for review upon its final disposition according to the rules described above.
- Post-trial relief – other extraordinary writs, such as a writ for *coram nobis* (a petition to set aside a conviction based on newly discovered evidence raising fairness issues about the trial) may be reviewed by the Supreme Court on certiorari only if the CAAF *grants* relief.

The Equal Justice for Our Military Act, H.R.1364, would alter the Supreme Court jurisdiction over military cases to include cases in which the CAAF *denies* extraordinary relief, whether it is sought in an interlocutory appeal or as post-conviction relief. It would not otherwise alter the appellate framework, for example, to broaden the scope of mandatory or discretionary review by the appellate courts. It would not enable the Supreme Court to review denials by the CAAF to grant discretionary review to an accused service member. H.R. 1364 would affect jurisdiction under 28 U.S.C. § 1259 (4) over “other cases” (those not covered by sub-sections (1) - (3)), so that denials of relief can be heard by the Supreme Court on certiorari on the same basis as grants of relief.