

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

**1 RESOLVED, That the American Bar Association urges Congress to amend
2 28 U.S. C. §1259(3) and (4) to permit discretionary review by the Supreme
3 Court of the United States of decisions rendered by the United States Court
4 of Appeals for the Armed Forces that deny petitions for review of courts-
5 martial convictions or deny extraordinary relief.**

REPORT

This proposed resolution urges Congress to enact legislation that would eliminate a troubling inequity in current law by permitting all court-martialed service members who face dismissal, discharge or confinement for a year or more to petition the Supreme Court of the United States for discretionary review through writ of certiorari. At present, only a small percentage of service members facing such charges may petition the Supreme Court, whereas the government routinely has the opportunity to petition the Supreme Court for review of adverse courts-martial rulings in any case where the charges are severe enough to make a punitive discharge possible.

The Current System of Appellate Review of Courts-Martial Convictions

The nation's modern military justice system is governed by the Uniform Code of Military Justice (UCMJ), originally enacted by Congress in 1950.¹ The UCMJ provides that criminal charges against members of the Armed Services will be tried before courts-martial and that convictions are subject to varying levels of military review, with those convictions punishable by death subject to mandatory civilian review by an Article I civilian court.

Courts-martial convictions resulting in a sentence of death, dismissal or discharge, or confinement for a year or more require review by each Service's highest appellate reviewing authority -- the Court of Criminal Appeals (CCA). The CCA also must hear cases that are referred by the Judge Advocate General and has discretionary jurisdiction to hear interlocutory appeals by the government during courts-martial proceedings in cases that could result in punitive discharge and petitions by the defendant for extraordinary relief under the All Writs Act.²

The Court of Appeals for the Armed Forces (CAAF) is an Article I federal court composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate.³ The Court's jurisdiction is worldwide, encompassing only questions of law arising from trials by court-martial in the United States Army, Navy, Air Force, Marine Corps, and Coast Guard. The CAAF is required to review all cases in which the sentence, as affirmed by

¹ Pub. L. No. 81-506, 64 Stat. 107 (1950).

² 28 U.S. C. §1651. 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.

³ Prior to 1994, the CAAF was called the Court of Military Appeals, which was created by Congress when it enacted the Uniform Code of Military Justice to provide meaningful civilian appellate review of courts martial convictions. Pub. L. 103-337, §924, 108 Stat. 2663 (1994).

the CCA, extends to death and all cases reviewed by the CCA in which any issue is “certified” to it by the Judge Advocate General.⁴ The CAAF also has discretionary jurisdiction to review, upon petition and good cause shown, only those convictions of service members that have been reviewed by the CCA.

In addition, like the CCA, the CAAF also exercises “extraordinary writs” jurisdiction under the All Writs Act.⁵ The accused may petition the Court to appeal a denial of relief by the CCA. Decisions resolving interlocutory questions in favor of the accused may be certified by the Judge Advocate General to the CAAF, in which case review becomes mandatory.

Certification by the Judge Advocate General almost always inures to the benefit of the government. “Historically, most certifications have been of issues on which the CCA found in favor of the accused and against the government. Thus, this certification process has been perceived as granting the government a virtual guaranteed right of appeal to the CAAF in any case it chooses, while the accused may only petition for discretionary review. Over the years, the CAAF has granted review in only about ten percent or fewer of the cases in which a petition for review has been filed.”⁶

Service Members Lack Equal Opportunity to Petition the U.S. Supreme Court

The U.S. Supreme Court has discretion to review certain classes of cases involving courts-martial convictions, as defined in 28 U.S.C. § 129:⁷

- (1) Cases reviewed by the Court of Appeals for the Armed Forces under § 867 (a) (1) of title 10.
- (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge

⁴ See 28 U.S.C. 867 (a).

⁵ *Supra*, note 2. Service members whose petitions for extraordinary relief have been denied may also seek to challenge certain court-martial convictions through collateral review in other federal courts, e.g., in the Court of Federal Claims for pay lost as a result of a court-martial at which a constitutional right was denied or in a federal court to seek habeas corpus review.

⁶ Kevin Barry, *A Face Lift (And Much More) For An Aging Beauty: The Cox Commission Recommendations To Rejuvenate The Uniform Code Of Military Justice*, 2002 L. Rev. M.S.U. – D.C.L. 57, 82 n.101(2002). See Legislative Research Incorporated, *The Military Justice System: 1983-84 Through 2004-05: Twenty Years of Key Statistical Findings* (March 30, 2006). This research paper, prepared for and at the behest of Norbett Basil MacLean III, affirms that the CAAF denies petitions for grant of review and petitions for relief far more often than it grants them. While there is significant variation from year to year, in 2004-05, petitions for review were denied in 78.3 percent (581) of the cases and granted in 19.54 percent (145) of the cases. Petitions for grants of extraordinary relief were denied in 70.45 percent (31) of the cases and granted in 4.55 percent (2) of the cases. Equally sobering, the statistical compilation reveals that during the same time-period, there were 7, 564 courts-martial convictions and only 799 petitions for grant of review granted by CAAF. It is not clear from the data presented in this report whether all the courts-martial convictions reported were reviewed by the CCA and therefore eligible for appeal to the CAAF.

⁷ This statutory provision providing limited opportunity to petition for a writ of certiorari for direct review of courts-martial by the Supreme Court in any case reviewed by the CAAF reflects an amendment to the Uniform Code of Military Justice that was enacted in 1983. Prior to 1983, there was no certiorari jurisdiction in courts-martial cases.

Advocate General under § 867 (a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under §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 ... 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.”⁸

This statutory framework creates a disparity in our laws governing procedural due process whereby the government has far greater opportunity to obtain Supreme Court review of adverse courts-martial decisions than is afforded convicted service members.

- Other than cases involving the death penalty, “[t]he accused has no right of appeal to CAAF, only the opportunity to petition for discretionary review. If CAAF does not grant a petition for review – and CAAF does not grant in approximately nine of ten of the cases in which a petition is filed – the accused is precluded from ever obtaining direct review by the Supreme Court.”⁹ In contrast, the government may appeal a court-martial acquittal to the Supreme Court on a matter of law in any case reviewed by the CAAF where the charges are severe enough to make a punitive discharge possible.
- The government can assure review by the CAAF of adverse decisions (i.e., those favorable to service members) with respect to interlocutory questions through certification by the Judge Advocate General. Defendant service members, on the other hand, only have the opportunity to petition for discretionary review by the CAAF of denials of extraordinary relief sought through interlocutory appeals or post-conviction extraordinary writs. If denied relief by the CAAF, the service member is statutorily denied the right to seek a writ of certiorari to the Supreme Court. In contrast, the government has the right of direct appeal to the Supreme Court whenever a service member is granted relief.

Congressional Concern

Congressional concern for this due process inequity is mounting. Representative Susan A. Davis (D-CA), a member of the House Armed Service Committee, introduced H.R.1364, The Equal Justice for Our Military Act, this Congress. Her press release on the bill states:

This is a simple matter of fairness.... It is ironic that we ask these men and women in uniform protect our democracy, of which a cornerstone is due process,

⁸ Jennifer K. Elsea, *Supreme Court Review of Decisions of the U.S. Court of Appeals for the Armed Forces Under Writs of Certiorari*, CRS Memorandum at 3, (February 27, 2006).

⁹ Barry, *supra* note 6, 95n.145

yet we deny some of them that process. The disparity with which defendants and the government are treated under the current law is an inequity that should be rectified.¹⁰

Her legislation would permit court-martialed service members whose cases involve “extraordinary circumstances” to appeal to the Supreme Court. H.R. 1364 would accomplish this by amending 28 U.S.C. §1259(4) to permit the Supreme Court to review, by writ of certiorari, cases where the CAAF has denied an extraordinary writ or writ appeal. Currently only the government has the right to appeal these cases. This modest step in correcting one aspect of the inequity faced by convicted service members has the support of two retired chief judges of the CAAF (Hon. Walter Cox and Hon. Eugene Sullivan) as well as the Military Officers Association of America. H.R. 1364 has been referred to the House Judiciary Committee, where hearings are tentatively planned for this summer.¹¹ Members of the Senate Judiciary Committee have expressed concern over the due process disparities and have indicated a desire to examine the possibility of offering a broader fix to the problem.

Broad Remedial Legislation in Needed

We agree with the latter approach and therefore are recommending adoption of policy that supports enactment of legislation that would amend 28 U.S. C. §1259 (3) and (4) to permit convicted service members to appeal to the Supreme Court in cases where their petitions for review by the CAAF have been denied, as well as in situations covered by H.R. 1364, i.e., cases where the CAAF has denied an extraordinary writ or writ-appeal. This broader remedial approach would provide service members with due process access to discretionary Supreme Court review similar to that which is permitted the government. Members of the military community have expressed support for this approach.¹²

While there may be some concern that more comprehensive corrective legislation will undermine the role of the CAAF or that it will unduly increase the workload of the Supreme Court, a legislative fix that only addresses the inequity created by the prohibition against seeking Supreme Court review in situations where relief by extraordinary writs has been denied by the CAAF would only rectify the due process inequity for a small segment of convicted service members. The problem with unequal access is far greater for the service members whose petitions for review have been denied by the CAAF. From 1999 to 2005, on average, 1.3 petitions for grant of relief were granted and 37 were denied. During the same time period, on

¹⁰ < <http://www.house.gov/susandavis/press/pr042805miljustice.html> >

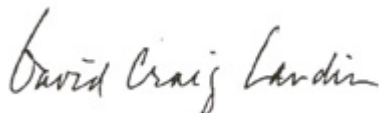
¹¹ H.R. 1364 is before the House Judiciary Committee because legislation dealing with matters affecting the jurisdiction of the Supreme Court is referred to the Committee on the Judiciary, not the Committee on the Armed Services.

¹² Legislative Research Incorporated, *The Military Justice System: 1983-84 Through 2004-05: Twenty Years of Key Statistical Findings at 6-7* (March 30, 2006). The preface to the LRI report, states, “The most recent UCMJ Code Committee Report noted that CAAF Senior Judge Robinson Everett encouraged consideration ‘to allow Supreme Court review of cases in which petitions for grant of review has been denied.’ See 2004-05 UCMJ Code Committee Report at p.2.”

average, CAAF denied 670 petitions for review and granted 129.¹³ In order to accomplish the purpose of rectifying the due process disparity caused by current law, remedial legislation should address the complete problem.

We are too often reminded that our military service members regularly place their lives on the line in defense of freedoms that we routinely enjoy. As they struggle to bring these freedoms to people in faraway lands, it is incumbent on us to assure that their own rights are not prejudiced by their response to the call of duty. For more than 60 years, the ABA has directly supported our men and women in uniform, whether mobilizing pro bono legal services at deployment centers, advocating on Capitol Hill or through the work of our Standing Committees on Legal Assistance for Military Personnel and on Armed Forces Law. Members of the legal profession have an obligation to take every step necessary to ensure that our soldiers and sailors are treated fairly under our legal system. This resolution, urging elimination of a long-standing disparity in the ability of court-martialed service members who face severe sentences to petition the Supreme Court for review, deserves your support.

Respectfully Submitted,

A handwritten signature in cursive script that reads "David Craig Landin".

David Craig Landin, Chair
Standing Committee on Federal Judicial Improvements
August 2006

¹³ Id at 9.

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Standing Committee on Federal Judicial Improvements

Submitted By: David Craig Landin, Chair

1. Summary of Recommendation(s).

The recommendation urges Congress to amend 28 U.S. C. §1259(3) and (4) to permit discretionary review by the Supreme Court of the United States of decisions rendered by the United States Court of Appeals for the Armed Forces that deny petitions for review of courts-martial convictions or deny extraordinary relief.

2. Approval by Submitting Entity.

FJIC approved the recommendation on May 2, 2006

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA has adopted several policies that are concerned with assuring that service members are not unduly prejudiced by reason of their call to duty. In 2/00, the ABA adopted a resolution to level the playing field for service members to qualify for capital gains exemption on the sale of their home when their service often requires them to involuntarily relocate and the law requires an unbroken period of residency for a house to otherwise qualify. In 2/93, the ABA adopted policy urging Congress to update and revise the Soldiers' and Sailors' Civil Relief Act by passage of the Service members Civil Relief Act, which is primarily concerned with ensuring that a service member's legal rights are not compromised while the person may be overseas (e.g., automatic stay in legal proceedings, and claiming such does not count as an appearance for the purposes of tolling timelines; protection for a service member's family from eviction from their home while the service member is on active duty;

The ABA also has policy concerning Access to Counsel in the military (08/96); amending the process for rulemaking in courts martial to comply with APA-like procedures (02/95; 02/97); changes to the rules for Courts Martial to provide convicted service members to review and submit matters for consideration at all stages of military administrative review and to provide an opportunity for convicted service members to review and submit petitions requiring certification to the U.S. Court of Military Appeals,

etc. (107A 02/93). There also are two policies titled “Supreme Court Review of Military Appeals Decisions that relate to other contexts, e.g., amending the Victims of Crime Act of 1984 to make sure victims of crimes perpetrated under the UCMJ are entitled to the same relief/benefits intended for victims under the Act (2/93); and amending, 10 USC 867 to provide that judges not reappointed to the CAAF be considered senior judges and able to be utilized on a temporary/continuing basis (8/89)

5. What urgency exists which requires action at this meeting of the House?

The war on terror has brought greater scrutiny to the manner in which the U.S. treats its military service members. There is renewed focus on assuring that our service members are not unduly prejudiced by reason of their call to duty. As a result, legislative action on this issue is imminent.

6. Status of Legislation. (If applicable.)

As reported in the accompanying report, H.R. 1364 (Davis, R-CA) has been introduced in the House and the House Judiciary committee is expected to hold hearings this summer. The Senate Judiciary Committee has expressed interest in examining this issue.

7. Cost to the Association. (Both direct and indirect costs.)

None

8. Disclosure of Interest. (If applicable.)

No member of FJIC is an active duty military service member and no member will benefit from enactment of this legislation.

9. Referrals.

Judicial Division
Coalition for Justice
Standing Committee on Judicial Independence
Potential cosponsors include:
Section of Family Law Military Committee
National Conference of Specialized Court Judges Military Courts Committee
General Practice, Solo and Small Firm Division Military Lawyers Committee
Government and Public Sector Lawyers Division Military Lawyers Conference

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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