IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40322
Technical Sergeant (E-6), DOUGLAS M. FOLTS, USAF, *Appellant.*	)	USCA Dkt. No. 25-0043/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial and
Appellant Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

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23 April 2025

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UNITED STATES, *Appellee* v. Technical Sergeant (E-6) DOUGLAS M. FOLTS, USAF, *Appellant*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES Crim. App. No. ACM 40322 USCA Dkt. No. 25-0043/AF

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS LACKED JURISDICTION TO REVIEW APPELLANT'S CASE.

INTRODUCTION

The military, crime victims, and all of society have a significant interest in the finality of courts-martial convictions. Military courts should not hastily interpret UCMJ amendments to reopen statutorily-final courts-martial convictions for new direct appellate review, especially when Congress did not specifically dictate such a result in their legislation. Here, the Air Force Court of Criminal Appeals (AFCCA) erred by asserting jurisdiction and reopening Appellant's statutorily-final case, and this Court should vacate that decision.

Appellant was convicted and sentenced at a general court-martial ending on 27 February 2022. (JA at 21-22.) At the time of his conviction, based on the relative lenience of his sentence, Appellant was not entitled to direct appellate review by AFCCA. Article 66(d); UCMJ, 10 U.S.C. § 866(b) (2020). Thus, according to Article 57(c)(1)(A); UCMJ, § 10 U.S.C. 857(c)(1)(A) (2018), UCMJ, direct appellate review of Appellant's court-martial conviction became complete on 6 July 2022, when a judge advocate completed an Article 65(d), UCMJ; 10 U.S.C. § 865(d) (2018) review of his case. (JA at 22, 25.) This was a "final judgment as to the legality of the proceedings." Article 57(c)(2).

More than five months later, in the National Defense Authorization Act for Fiscal Year 2023[1] (FY23 NDAA), Congress changed the rules governing direct appellate review of servicemembers' courts-martial. Congress amended Article 66, UCMJ to afford direct appellate review by a Court of Criminal Appeals (CCA) to all servicemembers who were convicted at a general or special court-martial, regardless of the sentence received. Id. at Section 544(b). But Congress did not specify the cases to which its statutory amendments would affirmatively apply, giving rise to the controversy in this case: whether the expanded right to direct appellate review by a CCA applies to courts-martial like Appellant's where direct

[1] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law No. 117-263, 136 Stat. 2395, 23 December 2022.

appellate review was already statutorily final under Article 57(c) before the FY23 NDAA was passed.

"[J]urisdiction of courts is neither granted nor assumed by implication." United States v. Loving, 62 M.J. 235, 244 n.60 (C.A.A.F. 2005) (internal citation omitted). Yet, in United States v. Vanzant,[2] 84 M.J. 671 (A.F. Ct. Crim. App. 2024), rather than take a narrow view of its jurisdiction "in strict compliance with authorizing statutes," Ctr. for Const. Rts. v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013), AFCCA found that it had jurisdiction to review cases like Appellant's through inferences and implication. AFCCA highlighted that when the FY23 NDAA was passed, Appellant could have still petitioned the Judge Advocate General for review under Article 69, UCMJ (2019) and that under other provisions of that rule, Appellant's case could have made it to the CCA for review. Id. at 676-78. AFCCA concluded that because Appellant's case still had some potential pathway to CCA review, Congress intended the expanded Article 66 appellate rights from the FY23 NDAA to extend to Appellant. Id.

AFCCA's analysis in Vanzant suffers from several flaws. First, the court failed to apply the well-recognized presumption against retroactivity. That

[2] The Coast Guard Court of Criminal Appeals (CGCCA) and Navy-Marines Corps Court of Criminal Appeals (NMCCA) reached similar conclusions in United States v. Mieres, 84 M.J. 682 (C.G. Ct. Crim. App. 2023) and United States v. Hirst, 84 M.J. 615, 616 (N-M. Ct. Crim. App. 2024), respectively.

presumption holds that if a statutory amendment would attach "new legal consequences to events completed before its enactment" the amendment does not apply retroactively absent "clear congressional intent." Landgraf v. USI Film Prods., 511 U.S. 244, 270-80 (1994). Second, the court failed to follow Article 57, UCMJ's direction that a court-martial is final after Article 65(d) review; instead, the court made its own extra-textual determination that Article 69 review is the relevant marker of finality. Third, the court did not appreciate the differences between direct appellate review and Article 69 review, which is a type of collateral review. The court failed to recognize that collateral review provides fewer rights than direct appellate review and that its availability does not undermine the finality of a court-martial conviction. Finally, AFCCA used the canon of *expressio unius est exclusio alterius*[3] – reasoning previously rejected by the Supreme Court in Landgraf – to incorrectly find that Congress had signaled its intention to apply the FY23 Article 66 amendments to cases like Appellant's. Vanzant, 84 M.J. at 676. AFCCA's flawed analysis led it to erroneously conclude that because servicemembers like Appellant still had access to a form of *collateral* review, the FY23 Article 66 amendments could (and indeed intended to) reopen their already-final cases for new direct appellate review.

[3]"The inclusion of one thing is the exclusion of others." *See* United States v. Mooney, 77 M.J. 252, 257 (C.A.A.F. 2018).

In answering the granted issue, this Court should begin by recognizing that application of the FY23 Article 66 amendments would represent a significant expansion of Appellant's appellate rights. While before the amendments, Appellant only had access to a limited post-finality collateral review, the amendments, if applied to him, would suddenly grant him full Article 66 direct appellate review by a CCA, including factual sufficiency review. The prospect of such an expansion of appellate rights in a statutorily-final case is the type of "retroactive effect" from a statutory amendment that requires Congress to speak clearly to make the amendment retroactive to past events. Applying the presumption against retroactivity here, Congress did not specify that the FY23 Article 66 amendments would apply retroactively to courts-martial that were already final under Article 57(c), UCMJ. Without such explicit congressional direction, military courts may not apply the FY23 Article 66 amendments to Appellant's case. Thus, AFCCA erred in asserting jurisdiction over Appellant's case, and this Court should vacate its decision below.

STATEMENT OF STATUTORY JURISDICTION

AFCCA held that it had statutory authority to review this case under Article 66(b)(1)(A), UCMJ (2022). Because AFCCA reviewed the case, this Court has jurisdiction to review AFCCA's decision under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2020).

RELEVANT AUTHORITIES

Article 57, UCMJ; 10 U.S.C. § 857 (2018) (unchanged by FY23 NDAA):

(c) APPELLATE REVIEW.—

(1) COMPLETION OF APPELLATE REVIEW.—Appellate review is complete under this section when— (A) a review under section 865 of this title (article 65) is completed;

(2) COMPLETION AS FINAL JUDGMENT OF LEGALITY OF PROCEEDINGS.—The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.

Article 65(c)(1), (d), and (e), UCMJ; 10 U.S.C. § 865(c)(1), (d), and (e) (2018) (unchanged by FY23 NDAA):

(c) NOTICE OF RIGHT TO APPEAL.—

(1) IN GENERAL.—The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused.

(d) REVIEW BY JUDGE ADVOCATE GENERAL. — . . .

(1) BY WHOM. — A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

(A) IN GENERAL.—A review under subparagraph (B) shall be completed in each general and special court-martial that is not

eligible for direct appeal under paragraph (1) or (3) of section 866(b) of this title (article 66(b)).

(e) REMEDY. —

(1) IN GENERAL. —If after a review of a record under subsection (d), the attorney conducting the review believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, who may set aside the findings or sentence, in whole or in part.

Article 66(b), UCMJ; 10 U.S.C. § 866(b) (2020 and 2022):

Before FY23 NDAA	**After FY23 NDAA**
(b) REVIEW. (1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction over a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c) [10 U.S.C. § 860c], as follows: (A) On appeal by the accused in a case in which the sentence extends to confinement for more than six months and the case is not subject to automatic review under paragraph (3).	(b) REVIEW. (1) APPEALS BY ACCUSED—A Court of Criminal Appeals shall have jurisdiction over— (A) a timely appeal **from the judgment of a court-martial, entered into the record under section 860c(a)** of this title (article 60c(a)) [10 U.S.C. § 860c(a)], **that includes a finding of guilty**;

Article 69, UCMJ (2019); 10 U.S.C. § 869 (2018) (*See* Appendix).

Article 69, UCMJ (2022); 10 U.S.C. § 869 (2022) (*See* Appendix).

Article 76, UCMJ; 10 U.S.C. § 876 (2018):

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharged carried into execution under sentences by courts-martial following
>
> approval, review, or affirmation as required by this chapter, are final and conclusive. . . .

Rule for Courts-Martial (R.C.M.) 1201(a) and (h) (2024) (*See* Appendix).

R.C.M. 1201(h)(4)(B) Discussion (2019)

> Review of a case by the Judge Advocate General under this subsection is not part of appellate review within the meaning of Article 76 or R.C.M. 1209.

R.C.M. 1209(b) (2019, 2024)

> "Effect of finality," The judgment of a court-martial and orders publishing the proceedings of a court-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the United States, subject only to action upon petition for a new trial under Article 73, to action under Article 69, to action by the Secretary concerned as provided in Article 74, and the authority of the President.

James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law No. 117-263, § 544(d) (Dec. 23, 2022):

> The amendments made by this section shall not apply to – (1) any matter that was submitted before the date of enactment of this Act to a Court of Criminal Appeals established under section 866 of title 10, United States Code (article 66 of the Uniform Code of Military Justice); or (2) any matter that was submitted before the date of enactment

> of this Act to a Judge Advocate General under section 869 of such title.

STATEMENT OF THE CASE

Contrary to his plea, Appellant was convicted at a general court-martial of one specification in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2018) for committing a lewd act upon a child: specifically, communicating indecent language to his 14-year-old stepdaughter, OM. (JA at 9, 22.) Appellant was acquitted of two other specifications in violation of Article 120b. (JA at 21-22.) On 27 February 2022, a military judge sentenced Appellant to confinement for 16 days and forfeiture of $3,000 pay per month for six months. (Id.)

The convening authority took no action on the findings and approved the sentence as adjudged. (Id.) The military judge entered judgment on 9 March 2022. (Id.)

On 6 July 2022, an attorney "designated under regulations prescribed by" the Secretary of the Air Force completed the Article 65(d), UCMJ review. (JA at 9, 22.) That attorney concluded that (1) Appellant's court-martial had jurisdiction over Appellant and the offense, (2) the charge and specification stated an offense, (3) the sentence was legal, and (4) the findings and sentence were correct in law and fact. (Id.)

Congress passed the FY23 NDAA on 23 December 2022. On 22 February 2023, Appellant filed with the CCA a Notice of Direct Appeal Pursuant to Article

66(b)(1)(A). (JA at 26-27.) In that notice, Appellant acknowledged that he had not "received any notification regarding this right to appeal under the amended Article 66(b)(1)(A)," but asserted that the amended statute should apply to him. (Id.)

Appellant raised several assigned errors in his brief at AFCCA. (JA at 2.) The United States asserted in its Answer to Assignments of Error brief that AFCCA had no jurisdiction to review the case because it was already final under Article 57(c)(1) but acknowledged the court's contrary published decision in United States v. Vanzant. (JA at 30.) AFCCA issued an opinion affirming the findings and sentence under Article 66(d) without addressing whether it had jurisdiction to review Appellant's case. (JA at 1-15.)

SUMMARY OF ARGUMENT

By the time Congress passed the FY23 NDAA, according to statute, direct appellate review had been completed in Appellant's case, and there was already "a final judgment as to the legality of the proceedings." *See* Article 57(c)(1)-(2), UCMJ. Applying the presumption against retroactivity and Landgraf, 511 U.S. 244, the FY23 NDAA amendments expanding Article 66, UCMJ review do not apply to Appellant's already-final court-martial. As a result, AFCCA erred by reopening direct appellate review of Appellant's court-martial under Article 66.

AFCCA erred by going outside the text of the UCMJ to find that Appellant's conviction was not "final" in the sense of having exhausted all pathways to the CCA, since he still had the option to seek Article 69 review. Vanzant, 84 M.J. at 678. Such analysis conflicts with how the Supreme Court and other federal courts treat finality – which is tied to the end of direct appellate review. *See, e.g.* Beard v. Banks, 542 U.S. 406, 412 (2004); Lopez v. Wilson, 426 F.3d 339, 351 (6th Cir. 2005) (en banc). Article 69 review is a type of collateral review that is not part of direct appellate review within the meanings of Article 57 or Article 76, and its potential availability did not disturb the finality of Appellant's conviction. *See* R.C.M. 1201(h)(4)(B) Discussion (2019).

Applying the FY23 Article 66 amendments to Appellant would dramatically expand his substantive rights, entitling him to new direct appellate review by a CCA, where he was only entitled to collateral review before. Thus, AFCCA's reopening of direct appellate review in a statutorily-final case is the type of "retroactive effect" that, under Landgraf, must be authorized by "clear congressional intent." 511 U.S. at 280. But Congress did not speak clearly as to the FY23 NDAA's retroactivity. So AFCCA resorted to a negative inference, *expressio unius est exclusio alterius*, to find congressional intent. Vanzant, 84 M.J. at 676. Because Section 544(d) of the FY23 NDAA identified two scenarios where the amendments would *not* apply retroactively, AFCCA concluded that

Congress meant for the amendments to apply retroactively to circumstances that were not expressly excluded in Section 544(d). Id. Yet in Landgraf itself, the Supreme Court rejected the notion that a negative inference could show the type of *clear* congressional intent required to overcome the presumption against retroactivity. 511 U.S. at 257-61. Since there is no evidence of "clear congressional intent" to apply the FY23 Article 66 amendments to already-final cases like Appellant's, AFCCA erred in asserting jurisdiction over Appellant's case.

Besides a straightforward Landgraf anti-retroactivity analysis, there are other reasons this Court should decline to apply the FY23 Article 66 amendments to Appellant. Interpreting the FY23 NDAA to resurrect already-final courts-martial raises constitutional, separation of powers concerns. The Supreme Court has held that Congress cannot pass legislation to reopen final judgments without violating the separation of powers doctrine. Plaut v. Spendthrift Farm, 514 U.S. 211 (1995). To avoid this constitutional conundrum, this Court should decline to read language into the FY23 NDAA that reopens direct appellate review for courts-martial that have already reached finality under Article 57 and Article 76.

Besides raising constitutional concerns, interpreting the FY23 NDAA Article 66 amendments to apply retroactively conflicts with the plain language of the rest of the UCMJ. Even after the FY23 NDAA amendments, Article 65(d)(2),

and R.C.M. 1201(a) (2024) contemplate that there will still exist a category of cases that are "ineligible for direct review" under Article 66 and that will still receive only Article 65 review. If, after 23 December 2022, all non-waived courts-martial are now entitled to Article 66 review, this would render Article 65(d)(2) superfluous. The only way to explain Article 65(d)(2)'s continued existence in the Code is to conclude that Congress intended the FY23 Article 66 amendments to only apply to cases with entries of judgment (EOJs) dated on or after 23 December 2022. Congress's decision to keep Article 65 intact after the FY23 NDAA amendments to Article 66 reflects clear congressional intent that some special and general courts-martial – including Appellant's with an EOJ dated before 23 December 2022 – remain ineligible for Article 66 review.

Lastly, AFCCA expressed concern that, under the government's reading, servicemembers' Article 69 rights were curtailed after the FY23 NDAA amendments. Vanzant, 84 M.J. at 677. According to AFCCA, that supposed loss of Article 69 rights supports that Congress wanted those servicemembers to have full Article 66 review. Id. But even if AFCCA were correct, *c.f.* United States v. Alfred, Order, No. 25-0085/AR, 2025 CAAF LEXIS 288 (C.A.A.F. 16 April 2025) (applying Article 69 (2019) to a case with an EOJ dated before 23 December 2022), an inference about what Congress would have wanted is not the sort of

statement of "clear congressional intent" required to make a statute apply retroactively.

At bottom, AFCCA's assertion of jurisdiction was incompatible with the presumption against retroactivity, Landgraf, and the mandate for military courts to narrowly construe their own jurisdiction. It also required reading not one, but two provisions of the UCMJ – specifically Article 57(c)(1)(A) and Article 65(d)(2) – to be inoperative or insignificant. Further, reopening Appellant's statutorily-final conviction raises constitutional concerns; and in any event, by maintaining Article 65(d)(2), Congress already signaled its intent that the amendments only apply to EOJs dated on or after 23 December 2022. Since, for any of the above reasons, Appellant was ineligible for Article 66 review, this Court should uphold victims' and society's interest in finality by vacating the decision of the CCA.

LAW AND ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS LACKED JURISDICTION TO REVIEW APPELLANT'S CASE, AND THIS COURT SHOULD VACATE ITS DECISION.

Standard of Review

This Court reviews questions related to jurisdiction *de novo*. *See* United States v. Brubaker-Escobar, 81 M.J. 471, 474 (C.A.A.F. 2021).

Law

The UCMJ Before and After the 2023 NDAA Amendments

Article 66(b) – Review by the Court of Criminal Appeals

Before and after the FY23 NDAA amendments, **Article 66(b)(3)** has provided for automatic CCA review of cases with a sentence of death, dismissal, dishonorable or bad conduct discharge, or more than 2 years of confinement.

Effective 23 December 2022, Congress amended **Article 66(b)(1)** to allow any servicemember with a finding of guilty at a general or special court-martial to appeal his case to a CCA. *See* FY23 NDAA, Section 544(b). Before this amendment, a servicemember could only appeal to the CCA if he received a sentence to confinement for more than six months. Article 66(b)(1)(A) (2020).

Article 69 – Review by the Judge Advocate General

Congress significantly altered Article 69 in the FY23 NDAA. *See* Section 544(c). Before the FY23 NDAA, under **Article 69(a)**, an accused with a sub-jurisdictional sentence from a general or special court-martial who had received Article 65 review could apply to the Judge Advocate General for review under certain circumstances. **Article 69(c)(1)(A)** and **(2)** described the scope of the actions the Judge Advocate General could take for special and general courts-martial, which included setting aside, in whole or in part, the findings and sentence based on newly discovered evidence, fraud on the court, lack of jurisdiction, or

error prejudicial to the accused's substantial rights. Per **Article 69(b)**, the accused had to submit his application for Article 69 review within a year of completion of Article 65 review, extendable to three years for good cause shown. Under this prior version of Article 69, a case reviewed by TJAG under the statute could then make it to a Court of Criminal Appeals in two ways: under **Article 69(d)(1)(A)**, if TJAG sent it there, or, under **Article 69(d)(1)(B)**, if the accused submitted an application for review that was granted by the CCA. When such a case arrived at the CCA, based on **Article 69(e)**, the Court could only act with respect to matters of law. And the Court's authority was also limited by **Article 69(d)(1)** to "review of the action taken by the Judge Advocate General under [**Article 69(c)**]."

Under the **new Article 69(a)**, if an accused with a general or special court-martial conviction applies for review under the statute, TJAG's only option for action is that he or she "may . . . order such court-martial be reviewed under" Article 66. The **new Article 69(c)(2)** explains that "in a case reviewed under" Article 65(b), which appears to mean cases that were eligible for direct review, but appeal was waived or was withdrawn, TJAG may only review "the issue of whether the waiver or withdrawal of an appeal was invalid under the law." If it was invalid, TJAG must send the case to the CCA. Id.

Analysis

To begin, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (internal quotation marks and citations omitted). This Court and the courts of criminal appeals are Article I "courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). As the party invoking the lower court's jurisdiction, Appellant has the burden to establish jurisdiction. United States v. LaBella, 75 M.J. 52, 53 (C.A.A.F. 2015).

Jurisdiction here turns on whether the FY23 Article 66 amendments apply to Appellant's court-martial. Since the NDAA contains no express effective date or language signifying retroactive application, the modifications to Article 66, took effect on the date of the NDAA's enactment, which was 23 December 2022. *See* Johnson v. United States, 529 U.S. 694, 702 (2000). The dispositive question for this Court is whether these amendments to Article 66 apply to convictions like Appellant's that were already statutorily "final" on 23 December 2022. This Court should conclude that they do not.

a. American jurisprudence has a well-recognized presumption against statutory retroactivity.

"There is a strong presumption against statutory retroactivity, which is deeply rooted in our jurisprudence and embodies a legal doctrine older than

our Republic." United States v. Jenkins, 50 F.4th 1185, 1191 (D.C. Cir. 2022) (citing Landgraf, 511 U.S. at 265) (quotations omitted). Going back to 1908, the Supreme Court observed that the presumption against retroactivity was so strong that a statute should never be construed to act retroactively if it is susceptible to any other construction. United States Fid. & Guar. Co. v. United States, 209 U.S. 306, 314 (1908). According to the Court, a statute "ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied." Id. More recently, federal courts have reiterated that "in general, courts will apply a statute retroactively only if that result is so clearly compelled as to leave no room for reasonable doubt." Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 174 (4th Cir. 2010) (internal citation omitted). As the Fourth Circuit explained, "[c]ase law is thus very clear that we should look for clear signs of intentional and unavoidable retroactive application if a statute is indeed to have that effect." McKiver v. Murphy-Brown, LLC, 980 F.3d 937, 955 (4th Cir. 2020).

There is no exception to the presumption against retroactivity for statutes that make criminal law more favorable to defendants. For example, as the DC Circuit has recognized, "[s]ince 1871, federal law [specifically, 1 U.S.C. §109] has codified the presumption against retroactivity for statutes making criminal law *more* favorable to defendants." Jenkins, 50 F.4th at 1191. (emphasis in original).

While 1 U.S.C. §109 does not apply to Appellant's situation, the underlying sentiment against statutory retroactivity does. So even though the FY23 Article 66 amendments might make criminal law "more favorable" to servicemembers like Appellant, the presumption against retroactivity still applies.

b. Under the Supreme Court's Landgraf decision, a statute with retroactive effect cannot be applied to events completed before its enactment absent clear congressional intent.

Landgraf is the Supreme Court's seminal case acknowledging the general presumption against statutory retroactivity. 511 U.S. at 265-66. "Landgraf analysis applies to both civil and criminal statutes." Weingarten v. United States, 865 F.3d 48, 55 n.6 (2d Cir. 2017). Under Landgraf, when Congress has not "expressly prescribed" a statute's reach, a court determines whether a statute would have "retroactive effect." Id. at 280.[4] To do that, a court "must ask whether the new provision attaches new legal consequences to events completed before its enactment." Id. at 269-70. The Supreme Court also describes a statute as having "retroactive effect" if it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. at 280. If a court finds that a statute

[4] Courts need not even resort to the presumption against retroactivity if the statute otherwise makes clear that it does not apply retroactively, because "[w]here the congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838 (1990).

"operate[s] retroactively . . . it does not govern absent clear congressional intent favoring such a result." Id. In other words, if Congress wants a statute to have retroactive effect and apply to past events, it must clearly say so.

Requiring Congress to have spoken clearly before retroactively applying a jurisdiction-creating amendment accords with another military-specific principle: that military courts "being creatures of Congress created under the Article I power to regulate the armed forces, must exercise their jurisdiction in strict compliance with authorizing statutes." Ctr. for Const. Rts. v. United States, 72 M.J. at 128. As this Court has recognized, "jurisdiction of courts is neither granted nor assumed by implication." Loving, 62 M.J. at 244, n.60 (quoting Norman J. Singer, 2A Sutherland Statutory Construction § 67.3 (6th ed. 2000)). If Congress has not explicitly authorized a CCA to exercise jurisdiction over a particular set of cases, the CCA should be reluctant to assume it has it. Here, AFCCA should have taken a narrow view of its jurisdiction in deciding whether it had authority to review Appellant's case.

c. Based on Landgraf, the FY23 Article 66 amendments cannot apply to Appellant's statutorily-final court-martial, and so AFCCA lacked jurisdiction to review his case.

In Vanzant, AFCCA cursorily bypassed Landgraf and the presumption against retroactivity without any true analysis by suggesting that the FY23 NDAA had no retroactive effect. 84 M.J. at 678. The court disputed that Appellant's case was final or complete after Article 65(d) review, because Appellant "had not exhausted his right to seek CCA review" through Article 69, and the Court viewed the FY23 NDAA as "expanding an existing path to appellate review, rather than reopening a completed case." Id. AFCCA seemingly presumed that if Appellant's case was not really final, then the FY23 NDAA amendments did not "attach[] new legal consequences to events completed before [their] enactment" or "impose new duties with respect to transactions already completed." *See* Landgraf, 511 at 269-70, 280. Yet AFCCA's analysis was wrongheaded because it disregarded what Congress itself has said about court-martial finality. The court was not free to ignore Congress's explicit direction in Article 57(c)(1)(A), UCMJ that appellate review of a case is final after Article 65(d) review. AFCCA also failed to recognize the significance of expanding Appellant's rights – action that would attach a new legal consequence (new direct appellate review) to an event already completed (direct appellate review of Appellant's court-martial). This Court should correct those errors.

1. The appropriate marker for finality under both Article 57(c) and Article 76, UCMJ is Article 65(d) review – not Article 69 review.

A. Per the plain statutory language, Appellant's case was final under Article 57(c) after Article 65(d) review.

Having finished Article 65(d) review on 6 July 2022, appellate review of Appellant's court-martial conviction was already statutorily final under Article 57(c) when the FY23 NDAA amendments took effect later that year. The plain language of the statute should be uncontroversial. Article 57(c)(1)(A) establishes that "appellate review" is complete when Article 65(d) review has been completed. And, under Article 57(c)(2), the completion of appellate review constitutes "a final judgment as to the legality of the proceedings."

Contrary to AFCCA's view, the fact that Appellant still could have applied for Article 69 review as of 23 December 2022 does not affect the finality of his conviction. "Finality of a legal judgment is determined by statute," Plaut, 514 U.S. at 227, and, here, the statute – Article 57 – does nothing to tie finality to Article 69 review. This Court should also consider that under Article 57(c), Congress sets the expiration of time to file a petition at CAAF and the expiration of time to file a petition for writ of certiorari at the Supreme Court as other markers of finality. If Congress had wanted the expiration of time to file for Article 69 review by TJAG to be the marker of finality for subjurisdictional sentences, it easily could have said so. The fact that Congress did not reinforces that Article 69 review is not part of

direct appellate review. In sum, since appellate review was over after completion of Article 65(d) review, under the UCMJ, there was a final judgment as to the legality of Appellant's conviction at that point– whether or not Article 69 review might have still been an option.

B. Appellant's case was also final under Article 76 after completion of Article 65(d) review.

This Court has made clear that there is sometimes a distinction between "a final judgment as to the legality of the proceedings"[5] and finality under "Article 76." Loving, 62 M.J. at 240-42. "A final judgment as to the legality of the proceedings . . . establishes the point of completion of the direct legal review." Id. at 240. Finality under Article 76 "is the terminal point for proceedings within the court-martial and military justice system." Id. This Court recognized that because death sentences with a "final judgment as to the legality of the proceedings" still required approval by the President under Article 71(a) before execution, a capital case could be "final" under Article 71(c), but not yet "final" under Article 76. Id. at 242. Yet, for a noncapital, subjurisdictional case like Appellant's, the analysis is different, and the point for a "final judgment as to the legality of the proceeding" and finality under Article 76 ends up being the same. That end point is Article 65(d) review, not Article 69 review, in both instances.

[5] At the time of the Loving decision and until 2019, this concept was covered in Article 71(c), UCMJ, rather than Article 57. *See* 10 U.S.C. § 871(c) (2000).

Article 76 states that "appellate review . . . provided by" the UCMJ is "final and conclusive." "Appellate review" is defined within the UCMJ – specifically in Article 57 – and does *not* include Article 69 review. But Article 76 also states that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed *as required* by this chapter . . . are final and conclusive." (emphasis added). In Loving, this Court used this language to conclude that capital cases were not final under Article 76 until the President approved the death sentence, since such an approval was "required by this chapter," specifically by Article 71(a), before the sentence could be executed. 62 M.J. at 243.

In contrast to presidential approval of a death sentence, Article 69 (2019) review was not a review "required by" the UCMJ. The language of Article 69 was discretionary, and the Judge Advocate General was not required to review a case under that article, even upon application of an accused. Article 69 review presumably never happened at all in many cases because the servicemember did not submit an application. And even if the Judge Advocate General decided to review a case, he or she had complete discretion: he or she "*may* modify or set aside, in whole or in part, the findings and sentence." Article 69(a) (emphasis added). In the end, per the plain statutory language of the UCMJ, finality under Article 76 did not wait for the potential exercise of purely discretionary Article 69 review. Since Article 65(d) review denoted the end of appellate review and was

the last review "required" under the UCMJ for subjurisdictional cases like Appellant's,[6] it is the correct marker for finality under Article 76.

The Manual for Courts-Martial, United States (MCM) (2019 ed.) states outright what is implicit in Articles 57 and 76: Article 69 review "is not part of appellate review within the meaning of Article 76 or R.C.M. 1209." R.C.M. 1201(h)(4)(B) Discussion (2019). *See also* 53 Am Jur 2d Military and Civil Defense § 30.8 ("The procedure by which a case may be considered by the Judge Advocate General [under Article 69] is not part of the appellate review considered final within the meaning of Article 76 of the Uniform Code of Military Justice."); Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice,* 24 January 2024, para. 24.18 ("For cases that do not require corrective action [under Article 65(e)(1)], [special courts-martial] and [general courts-martial] reviewed under Article 65, UCMJ, are final under Article 76, UCMJ, upon completion of the judge advocate's review."); DAFI 51-201, 14 April 2022, para. 24.17 (same).

[6] Since subjurisdictional sentences do not include death or dismissal, no additional act of approval after completion of appellate review is necessary before the sentence can be executed. Article 57(a). In fact, Article 57(a) guarantees that subjurisdictional sentences will be executed before the end of appellate review. Appellant's sentence to confinement was effective the day it was adjudged, and his forfeitures took effect 14 days after they were adjudged. Article 57(a)(1)-(2).

Article 69, UCMJ has undergone many revisions over the years, at times authorizing multiple types of review – some of which might be characterized as direct appellate review. For example, the 1969 version of the statute required review of general courts-martial with subjurisdictional sentences by the office of the judge advocate general. Article 69, UCMJ (1969). But the statute simultaneously stated that "[n]otwithstanding [Article 76]" TJAG had authority to review "the findings or sentence, or both, in a court-martial case which has been *finally reviewed*, but has not been reviewed by a Court of Military Review." Id. (emphasis added). During such review TJAG could vacate or modify the findings or sentence "on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused." Id.

In fact, since 1969, Article 69, as interpreted in the Manual for Courts-Martial, has consistently provided for some form of TJAG review of courts-martial "after final review." And the Manual repeatedly maintained that this post-finality TJAG review "is not part of appellate review within the meaning of Article 76 or R.C.M. 1209" or stated words to that effect. *See* MCM, ch. XXI, para. 110A (1969); R.C.M. 1201 (b)(3)(A) and Discussion (1984); R.C.M. 1201(b)(3)(A) and Discussion (2016); R.C.M. 1201(h)(4)(B) and Discussion (2019).

The Second Circuit has thus aptly characterized Article 69 review by the Judge Advocate General as "a collateral proceeding akin to coram nobis" that is "an ancillary review procedure" and "not part of a direct appeal procedure." Curci v. United States, 577 F.2d 815, 818 (2d Cir. 1978). And another commentator explained that "as implemented by the Manual for Courts-Martial, relief under [Article 69] is clearly not to be regarded as part of the appellate review process. It is a post-review remedy more in the nature of extraordinary relief, a discretionary power of relief in the hands of the Judge Advocate General." Homer E. Moyer, *Justice and the Military* §2-766 at 620 (1972).

Although these sources referred to previous versions of Article 69, there is no evidence that any later amendments to Article 69 have made it part of direct appellate review or a "required" review under Article 76. After all, Article 57(c) now describes Article 65 review as the completion of appellate review and, the applicable versions of the Rules For Courts-Martial still describe Article 69 review as "Application for relief to the Judge Advocate General *after final review.*" R.C.M. 1201(h) (2019, 2024) (emphasis added). In the end, for cases like Appellant's, the only marker of finality under Article 57(c) or Article 76 is the completion of Article 65(d) review.

C. Direct appellate review and collateral review are distinct, and Article 69 review is the latter.

AFCCA erred first, by not recognizing the differences between direct appellate review and collateral review; and second, by failing to identify TJAG's Article 69 review as a form of collateral review. The Supreme Court has explained, "'collateral review' means a form of review that is not part of the direct appeal process." Wall v. Kholi, 562 U.S. 545, 552 (2011). Habeas corpus and coram nobis are examples of collateral review. Id. "Direct review immediately follows trial, generally is constrained by tight, non-waivable time limits, and concludes with finality of judgment." Lopez, 426 F.3d at 351 (citation omitted). Or, as the Ninth Circuit has observed, "once finality attaches, the conclusion of direct review occurs." Branham v. Montana, 996 F.3d 959, 965 (9th Cir. 2021). Collateral review "necessarily follows direct review," and its time limits "are generally looser and waivable for good cause." Lopez, 426 F.3d at 351 (citation omitted).

Following this framework, Article 69 (2019) review fit the definition of collateral review. After direct review was over – concluding with the finality of judgment under Article 57(c)(2) after Article 65(d) review – a servicemember could apply for collateral review through Article 69. The Article 69 time limits were "waivable for good cause": TJAG "may, for good cause shown, extend the period for submission of an application" for up to three years after Article 65

review. Article 69(b) (2019). Such a prolonged timeline weighs in favor of Article 69 review being collateral in nature.[7] It seems unlikely that Congress would want to allow delay of the finality of direct appellate review for such an extended period.

Finally, even assuming that Article 69 review falls during the period between "final judgment as to the legality of the proceedings" and "finality" under Article 76, it is still collateral in nature. This Court has described its jurisdiction over cases during this period before Article 76 finality as "collateral review jurisdiction," Loving, 62 M.J. at 236 – another indicator that direct appellate review is over by that point. Again, all signs point to Article 69 review being collateral.

[7] TJAG's authority to extend the Article 69 submission deadline for up to three years for good cause raises more questions about applicability of the FY23 amendments to servicemembers who have not "exhausted" their Article 69 rights, as AFCCA termed it. Vanzant, 84 M.J. at 677. What if a servicemember's year to petition for Article 69 review has expired, but three years to seek an extension from TJAG for good cause shown have not? Are such servicemembers eligible for new direct appellate review under Article 66 since they also have not exhausted their Article 69 rights? Are we to assume that Congress specifically intended its amendments to reach them too? What if TJAG would have denied their tardy submissions for lack of good cause shown? Before asserting jurisdiction, would AFCCA have to determine whether such servicemembers could show good cause for not submitting their Article 69 application within one year? These questions show why AFCCA's threshold for asserting jurisdiction is arbitrary and unworkable.

D. The limited nature of Article 69 review supports that it is a collateral review.

Further reinforcing that Article 69 (2019) cannot be viewed as part of direct appellate review is the type of review that would have been available to servicemembers like Appellant whose cases arrived at the CCA via Article 69, under the pre-FY23 NDAA version of the rule. Such cases would not have received a full Article 66 review with factual sufficiency and sentence appropriateness review. Instead, the CCA could only act on such cases with respect to matters of law. *Compare* Article 66(d)(1) (2020) *with* Article 69(e) (2019). And Article 69(d)(1) (2019) further cabined the CCA's authority by authorizing the court only to review the specific "action taken by the Judge Advocate General under" Article 69(c). Indeed, the CCA could only grant a servicemember's application for review if there was a "substantial basis for concluding" that TJAG's action under Article 69(c) "constituted prejudicial error." Article 69(d)(2)(A) (2019). This language shows that the CCA could not review any matter from the record it wanted – it was limited only to issues raised to TJAG and acted on by TJAG. As a result, a CCA's collateral Article 69(d)-(e) (2019)

review was in no way the equivalent to direct Article 66 review.[8] This aligns with review stemming from Article 69 being a collateral, rather than direct review.

As this Court highlighted in Denedo v. United States, although final judgments may be reviewed in certain circumstances, such as in coram nobis petitions, they are reviewed under "highly constrained standards." 66 M.J. 114, 121 (C.A.A.F 2008). The more limited and stringent standards applied during CCA review under Article 69 after final review accord with that principle. The First Circuit has observed that a statute "furthers the principle of finality" when it "limit[s] the grounds on which courts collaterally reviewing final judgments may disturb them." Evans v. Thompson, 518 F.3d 1, 11 (1st Cir. 2008). So too here. By making it comparatively onerous for TJAG or the CCA to overturn a conviction or sentence under Article 69, Congress reinforced the finality of a court-martial already reviewed under Article 65(d).

[8] *See also* David A. Schlueter & Lisa Schenck, Military Criminal Justice: Practice and Procedure § 18-1(D) n.39. (Matthew Bender & Co. 2024) ("Article 66(b)(1)(D), U.C.M.J. Review under an Article 69 situation is very different from a direct appeal or an automatic review. Appellate review of a decision by the Judge Advocate General under Article 69 involves: first, an accused's application for review by the Judge Advocate General under Article 69; second, action by the Judge Advocate General on that application; third, an accused's application to the Court of Criminal Appeals for review of the Judge Advocate General's decision; and fourth, the decision by the Court of Criminal Appeals to grant review.)

2. The possibility of future collateral review does not render a conviction like Appellant's "non-final" for purposes of a retroactivity analysis.

Just because Appellant could have still applied for Article 69 collateral review when the FY23 NDAA went into effect did not make his court-martial non-final. The concept of finality is typically tied to completion of *direct* appellate review, regardless of the possibility of additional collateral review. *See* Banks, 542 U.S. at 412 (discussing the retroactive application of judicial decisions to "final" cases).

In keeping with that concept, the Court of Federal Claims has explained that the statutory framework that provides for finality in the court-martial process "is not affected by the subsequent filing of a writ of error coram nobis." MacLean v. United States, 67 Fed. Cl. 14, 21 (2005). Likewise, the availability of a collateral review through Article 69 review does not affect the finality of courts-martial convictions. Such reasoning matches other federal courts' understanding of finality. As explained by the Third Circuit, "[a] petition for a writ of habeas corpus is a collateral attack on a conviction, which does not negate finality. Finality would be negated . . . only if [a] conviction was overturned as a result of the habeas petition." Reyes v. AG of the United States, 514 F. App'x 129, 132 (3d Cir. 2013) (unpub. op.) (citations omitted). The Third Circuit has also noted an understanding among circuits that the pendency of collateral motions "does not

vitiate finality, unless and until [] convictions are overturned as a result of th[ose] collateral motions." Rojas Paredes v. AG of the United States, 528 F.3d 196, 198-99 (3d Cir. 2008). Following this logic, the possibility or pendency of Article 69 review does not negate the finality of a court-martial conviction, unless and until TJAG or a CCA acts to disturb the findings or sentence.

3. Applying the FY23 Article 66 amendments to Appellant would have a "retroactive effect."

A. Reopening a final judgment for new direct appellate review is a "retroactive effect" that implicates Landgraf.

The above leads to one conclusion – direct appellate review of Appellant's court-martial was final well before the passage of the FY23 NDAA amendments. And even if Article 69 could be considered an additional marker of finality, that does not change the fact that, at the very least, the FY23 NDAA amendments would disrupt finality as defined in Article 57(c). Where a "final judgment as to the legality of the proceedings" once existed, it would exist no more. Appellant would go from having access only to the possibility of collateral review to having another chance for full direct appellate review. That is a retroactive effect. Thus, any statutory amendment that sought to disturb the Article 57(c) concept of finality by reopening direct appellate review would implicate Landgraf, irrespective of Article 69

Reopening final judgments would certainly be an instance of "impos[ing] new duties with respect to transactions already completed," that, under Landgraf, should not be undertaken without a statement of clear congressional intent. 511 U.S. at 280. Other federal and state courts have consistently refused to apply statutory or regulatory changes to cases that have already reached finality for such reasons. *See, e.g.*, Hernandez-Rodriguez v. Pasquarell, 118 F.3d 1034; 1042-44 (5th Cir. 1997) (refusing to apply newly instituted regulations to an already final decision of the Board of Immigration Appeals, an Executive Branch entity, especially since the regulations did not purport to apply retroactively); Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) (declining to apply a new statute retroactively to judgments that had become final and unappealable before the statute's effective date); People v. Padilla, 50 Cal. App. 5th 244, 251 (2020) ("A retroactive ameliorative statute applies in a given case if it becomes effective prior to the date the judgment of conviction becomes final … ."") (internal citations omitted). *See also* United States v. Homcy, 18 U.S.C.M.A. 515, 516 (C.M.A. 1969) (the CMA has repeatedly "held that whenever court-martial proceedings are completed prior to the effective date of the Uniform Code . . . this Court has no jurisdiction to review them.") As a result, this Court has scant precedent – if any at all – to support applying the FY23 Article 66

amendments retroactively to statutorily-final cases, particularly without evidence of clear congressional intent for that result.

B. Applying the FY23 Article 66 amendments to Appellant would substantially expand his appellate rights, constituting a "retroactive effect."

AFCCA failed to recognize how substantially the FY23 Article 66 amendments would expand the rights of servicemembers like Appellant. And this error apparently caused the court to improperly gloss over the presumption against retroactivity. To observe the difference, this Court need only to look at United States v. Hirst, No. 202300208, 2024 CCA LEXIS 372 (N-M Ct. Crim. App. 2 Sep 24). Before the FY23 NDAA, having received a subjurisdictional sentence Gunnery Sergeant (GySgt) Hirst was entitled only to Article 65(d) direct appellate review by a judge advocate – which he received before the FY23 NDAA amendments were passed. Hirst, 84 M.J. at 616. Although GySgt Hirst could later apply for Article 69 review, TJAG's review would have been limited to only a few categories, such as fraud on the court and error materially prejudicial to a substantial right. Article 69(c)(1) (2019). Then after Article 69 review, assuming GySgt Hirst's case made it to the CCA, the CCA could not review factual issues – it was limited only to acting on matters of law. Article 69(e) (2019).

But after the FY23 NDAA, NMCCA applied the newly amended Article 66 to GySgt Hirst's case and overturned his conviction for factual insufficiency. 2024

CCA LEXIS at *1-2. In sum, GySgt Hirst went from having no possibility for factual sufficiency review on 22 December 2022 to, in NMCCA's view, having a right to full factual sufficiency review on 23 December 2022. His conviction was overturned for reasons it could not have been overturned before 23 December 2022. Application of the FY23 Article 66 amendments thus represented a significant expansion of appellate rights for GySgt Hirst. The amendments attached "new legal consequences" to a court-martial already completed before their enactment.

Viewed through this lens, AFCCA's implication that the FY23 Article 66 amendments have no retroactive effect dissipates. The amendments expand, rather than simply maintain, the CCA access and review available to servicemembers with previously subjurisdictional sentences. Such an amendment that speaks "to the substantive rights" of servicemembers is "as much subject to [the Supreme Court's] presumption against retroactivity as any other [statute]." Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 951 (1997) (applying the presumption against retroactivity to a statutory amendment that "create[d] jurisdiction where none previously existed"). Since AFCCA characterized the FY23 amendments as "expanding an existing path to appellate review," Vanzant, 84 M.J. at 678, the court erred by not applying the presumption against retroactivity.

C. The FY23 Article 66 amendments would also have "retroactive effect" because, if applied to already-final cases, they would upset settled expectations.

In Landgraf, the Supreme Court justified its requirement for Congress to speak clearly on retroactivity by observing that such a rule "helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." 511 U.S. at 268. Indeed, retroactive application of the FY23 Article 66 amendments would cause disruption within the military justice system. Appellant's case involved a named victim, his 14-year-old stepdaughter, OM. She provided a victim impact statement at his court-martial describing how Appellant's crime made her scared every night to go to sleep and gave her nightmares about him coming after her and hurting her.[9] (JA at 99-100.) If the FY23 Article 66 amendments are applied to statutorily-final cases, victims like OM must be told that their offenders' courts-martial were not final after all, and that, in fact, their offenders will be entitled to a new and full direct appellate review by a CCA. Given the potential disruption to crime victims' settled expectations, it is appropriate for this Court to ensure that Congress spoke clearly as to retroactivity. If Congress did not speak clearly, this Court cannot be confident

[9] Some similarly situated Air Force cases recently or currently pending at AFCCA also involve named victims. E.g. United States v. Cooley, ACM 40376 and United States v. Boren, 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. 19 March 2025).

that Congress ever weighed the benefits to the accused against the disruption to crime victims that retroactive application of these amendments would cause. Without that certainty, this Court should decline to apply the FY23 Article 66 amendments retroactively.

4. Congress did not clearly speak to overcome the presumption against retroactivity – AFCCA erroneously used reasoning rejected by Landgraf to conclude otherwise.

Since applying the FY23 Article 66 amendments to already-final cases would have a retroactive effect, Congress must have expressed clear intent to do so. It did not. Regarding applicability, Congress stayed silent, other than to list in Section 544(d) two scenarios where the amendments would not apply: (1) to any matter already submitted to a CCA and (2) to any matter already submitted to a Judge Advocate General under Article 69. Applying the negative inference doctrine of *expressio unius est exclusio alterius*, AFCCA used these Section 544(d) exceptions to infer that Congress intended the FY23 Article 66 amendments to apply to cases like Appellant's. Vanzant, 84 M.J. at 676. But the Supreme Court and other federal courts have rejected the use of this type of negative inference to find clear congressional intent to apply a statute retroactively. *See* Landgraf, 511 U.S. at. 257-61; Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 167 (3d Cir. 1998); Scott v. Boos, 215 F.3d 940, 948 (9th Cir. 2000).

In Landgraf, the Supreme Court refused to apply the canon of "*expressio unius est exclusio alterius*" to an amendatory Act with similarities in structure to the FY23 NDAA. 511 U.S. at 259. The Civil Rights Act at issue in Landgraf stated that, except as otherwise specifically provided, the Act's amendments would take effect upon enactment. Id. at 257. Two other sections of the Act specified that the Act's amendments would not apply to certain categories of cases: (1) cases in which a disparate impact complaint had already been filed and an initial decision had been rendered before certain dates; and (2) cases in which the conduct of American citizens working abroad occurred before the date of enactment of the Act. Id. at 258. The Supreme Court declined to conclude that "because Congress provided specifically for prospectivity in two places," the Court should infer that Congress intended the rest of the statute to apply retroactively. Id. at 259. It found that Congress could have had other reasons for highlighting the two scenarios where the Act would apply prospectively. Id. at 260-61. The Court also expressed doubt that Congress would choose "a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases."[10] Id. at 262. *See also* id. at 290 (Scalia, J. concurring in judgments)

[10] As the Third and Ninth Circuits similarly observed in Mathews and Scott, respectively, given the strong presumption against retroactivity, "it would be strange indeed if Congress had used a silent negative inference to indicate that the [] amendments should be applied retrospectively." Mathews, 161 F.3d at 168-69; Scott, 215 F.3d at 948.

("refinement and subtlety are no substitute for clear statement"). In the end, the Supreme Court did not read either caveat "as doing anything more than definitively rejecting retroactivity with respect to the specific matters covered by its plain language." Id. at 261 n.12. *See also* Dist. 65 Ret. Tr. for Members of the Bureau of Wholesale Sales Representatives v. Prudential Sec., 925 F. Supp. 1551, 1569 (N.D. Ga. 1996) (explaining that, "[i]n Landgraf, the Supreme Court declined to extend the '*expressio unius est exclusio alterius*' doctrine to retroactivity").

The same logic should apply here. Just because Congress denoted certain circumstances where the FY23 NDAA amendments do not apply retroactively to pending cases does not support the negative inference that Congress therefore intended the amendments to apply retroactively to all circumstances not specified.[11] If Congress had wanted to apply the Article 66 amendments retroactively, it could have easily said so. Landgraf was decades-old when the FY23 NDAA was passed, so Congress was well-aware of what it needed to do to make a statutory amendment retroactive.

[11] Holding that the FY23 Article 66 amendments do not apply to "final" cases does not make the Section 554(d) exceptions surplusage. As in Landgraf, Congress could have had other reasons to highlight these exceptions. Since courts have sometimes applied statutory changes to "pending" cases, *see* Landgraf, 511 U.S. at 264, Congress may have found it necessary to specify that the FY23 NDAA amendments do not apply to cases already pending some sort of review. Because no similar general rule applies to cases like Appellant's where an appeal is already "final" and not "pending," Congress likewise may have found it unnecessary or redundant to state that the Article 66 amendments did not apply to those cases.

The Coast Guard Court got this analysis exactly backwards in Mieres, 84 M.J. at 686, saying that if Congress had intended the FY23 Article 66 amendments to apply "only to judgments entered on or after its enactment dates . . . we can expect that it would have simply said so." This analysis disregards both the presumption *against* statutory retroactivity and the Supreme Court's rejection of the *expressio unius est exclusio alterius* canon in determining clear congressional intent in retroactivity analyses. And in any event, CGCCA did not explain why we would expect that Congress intended the Article 66 amendments to apply not just to judgments that "occurred prior to its enactment," but also to judgments that had already become statutorily final. This Court should therefore follow the Supreme Court's lead and view Section 544(d) as doing nothing more than "definitively rejecting retroactivity with respect to the specific matters covered by its plain language." Landgraf, 511 U.S. at 261 n.12.

In sum, the FY23 NDAA shows no "clear congressional intent" to apply the amendments to Article 66, UCMJ to statutorily-final courts-martial. Under Supreme Court precedent, it cannot apply to cases like Appellant's.

d. Constitutional concerns give this Court another reason not to read the FY23 Article 66 amendments to reopen Appellant's statutorily-final court-martial conviction.

That direct appellate review of Appellant's conviction had reached finality also raises constitutional concerns about whether Congress, through the FY23 Article 66 amendments, could retroactively reopen the case and subject it to new direct appellate review. In Plaut, the Supreme Court held that Congress could not, through new legislation, retroactively command the federal courts to reopen final judgments without violating the constitutional doctrine of separation of powers. 514 U.S. at 219. The Court observed that the Founders recognized "a sharp necessity to separate legislative from the judicial power." Id. at 221. As the Court characterized it, "[w]hen retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" Id. at 225 (citing The Federalist No. 81, p. 545 (J. Cooke ed. 1961)). For Congress to "annul a final judgment" would be "an assumption of Judicial power," which is forbidden. Id. at 224 (internal citations omitted). *See also* Hayburn's case, 2 U.S. 409, 2 Dall. 409, 411 (1792) (opinion of Iredell, J., and Sitgreaves, D. J.) ("No decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested").

True, Plaut dealt with the final judgments of Article III courts, and the military justice system is located within the Executive Branch of the federal government. *See* United States v. Brown, 84 M.J. 124, 135 (C.A.A.F. 2024) (Hardy, J. concurring in part and dissenting in part) ("all the actors in the military justice system are members of the executive branch"). But separation of powers concerns remain. The Supreme Court recently reiterated that the "military justice system's essential character" is "judicial," and that "courts-martial have long been understood to exercise judicial power of the same kind wielded by civilian courts." United States v. Ortiz, 138 S.Ct. 2165, 2174-75 (2018) (internal citations omitted). As Justice Thomas explained in his Ortiz concurrence, because the Constitution gives the political branches expansive power over the military, the Constitution allows the military to have an entity within the Executive Branch that exercises judicial power. Id. at 2186; 2188-89 (Thomas, J. concurring). Congress's annulment of the final judicial decision of an Executive Branch entity (in this case, the completion of an Article 65(d) review) would also be an unconstitutional assumption of judicial power condemned in Plaut. And even putting aside the Executive Branch's authority to exercise judicial power through the military justice system, Congress reopening judgments declared final by the Executive Branch still represents one branch of government interfering with the functioning of another. *See* Benjamin v. Jacobson, 172 F.3d 144, 159 (2d Cir. 1999) ("The Constitutional

principle of separation of powers protects each of the three Branches of the federal government from encroachment by either of the other Branches.")[12]

In sum, following the logic of Plaut, once the Executive Branch has issued a final judgment as to the legality of a court-martial proceeding through completion of Article 65 review, the Legislative Branch (Congress) cannot reopen that judgment without violating the separation of powers doctrine. Interpreting the FY23 NDAA to reopen final judgments of courts-martial – especially where nothing in the plain language of the NDAA purports to do so – raises serious constitutional concerns under Plaut.[13] Following the canon of constitutional avoidance, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such

[12] The fact that Congress, through the UCMJ, created the military justice system and Article I courts that exercise judicial power does not change the analysis. In Plaut, the Supreme Court recognized that Congress had constitutional authority to create inferior Article III courts. 514 U.S. at 221. Nonetheless, Plaut's holding appears to prohibit Congress from overturning the final judgment of *any* Article III court. Id. at 225-26.

[13] In Vanzant, AFCCA asked why Article 69 (2019) "did not already offend constitutional separation of powers" by allowing modification of a final judgment. 84 M.J. at 679. But this question again disregards the difference between direct appellate review and collateral review. The prior version of Article 69 did not reopen a "final" conviction for new direct appellate review in a manner similar to how Congress reinstated lawsuits that had become final in Plaut. Article 69 (2019) only allowed for a more limited collateral review after finality. And the discretion to initiate that collateral review was vested in the Judge Advocate General, an Executive Branch actor, rather than the legislature.

questions are avoided, [the Court's] duty is to adopt the latter." Jones v. United States, 526 U.S. 227, 239 (1999) (internal citation omitted). In this case, this Court can avoid the constitutional quandary altogether by simply refusing to read retroactivity language into the FY23 NDAA that is not there. *Cf.* QUALCOMM Inc. v. FCC, 181 F.3d 1370, 1380, n.8 (D.C. Cir. 1999) (given historical practice and constitutional concerns, "the court will not read a statute retroactively to alter a final judgment absent an express statement of intent").

e. The plain language of the post-23 December 2022 UCMJ does not support application of the FY23 Article 66 amendments to cases like Appellant's.

This Court need not rely only on constitutional avoidance principals to resolve the jurisdictional question in this case. Congress has already telegraphed through Article 65 that it did not intend the FY23 Article 66 amendments to resurrect Appellant's already-final court-martial – or to apply to any other case with an entry of judgment dated before 23 December 2022.

Congress elected to make no changes to Article 65 in the FY23 NDAA. Article 65(d)(2)(A) still states that a review by a judge advocate general "shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of [Article 66(b)]." Thus, Congress obviously contemplated that there would still be some category of cases existing after 23 December 2022 that would not be "eligible for direct appeal" and would receive

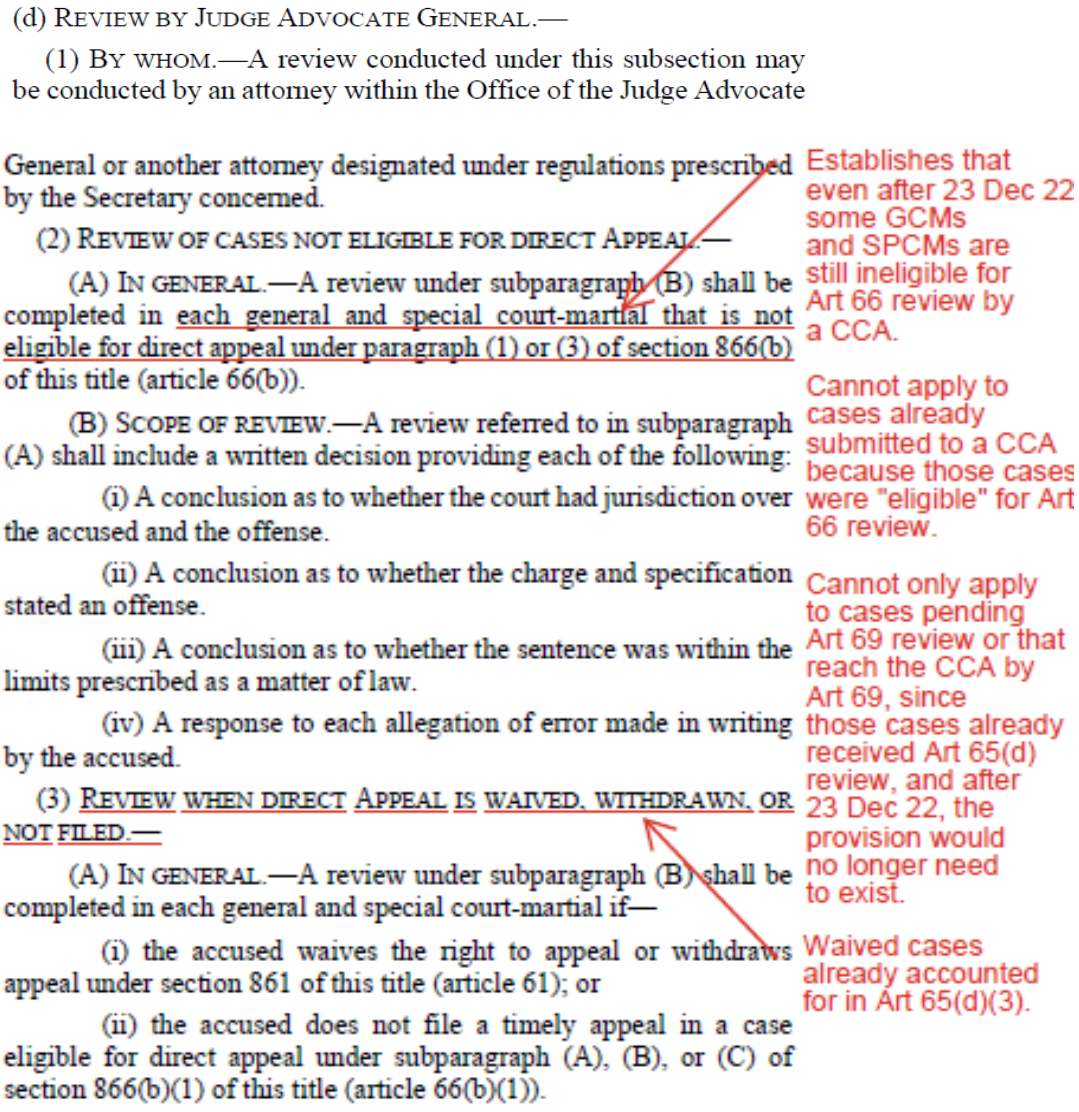
only an Article 65 review by a judge advocate. If this were not Congress's intent, there would be no reason for Congress to maintain Article 65(d)(2)(A) in its preexisting form. Although AFCCA essentially read Article 65(d)(2)(A) out of the UCMJ in finding it had jurisdiction over Appellant's case, this Court should reject that reasoning.

To disregard Article 65(d)(2)(A) "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." United States v. Nordic Vill. Inc., 503 U.S. 30, 36 (1992). The unchanged Article 65(d)(2)(A) thus refutes any notion that Congress intended the changes to Article 66 to apply retroactively. If the new Article 66 applied retroactively to all general and special courts-martial, irrespective of when they occurred, then there would no longer be any such cases "not eligible for direct appeal." Instead, Article 65(d)(2)(A) reveals that Congress must have intended the FY23 Article 66 amendments only to apply to entries of judgment dated after the NDAA's effective date.[14] In such a scenario, after 23 December 2022, there

[14] Congress's tying of application of the Article 66 amendments to the date of entry of judgment, which according to R.C.M. 1111(a)(2) (2019) "initiates the appellate process," makes sense on every level. Not only does it comport with the plain language of Articles 65 and 66, but it reflects the general rule in other jurisdictions that a "statute creating a right of appeal where one did not exist before does not apply to judgments entered before its enactment." 4 C.J.S. Appeal and Error § 3 (2023); *see also*, e.g., State v. Boldon, 954 N.W.2d 62, 68 (Iowa 2021); Murphy v. Murphy, 295 Ga. 376, 378, 761 S.E.2d 53 (Ga. 2014); In re Farmers & Traders Bank of Wrightstown, 244 Wis. 576, 12 N.W.2d 925 (Wis. 1944).

would still be some cases "not eligible for direct appeal" that needed Article 65(d) review.

Examining Article 65(d)(2) and (3) together proves instructive, and an excerpt from Article 65(d) from the Manual for Courts-Martial (2019 and 2024 eds.) is included below to assist the Court.



Article 65(d)(2)(A)'s language "each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of [Article 66(b)]" cannot be understood to refer to any other category of cases other than those with EOJs dated *before* 23 December 2022.

- It does not apply to servicemembers who already submitted matters under Article 66, UCMJ before 23 December 2022, because those appellants were, by definition, eligible for direct appeal under Article 66(b)(1) or (3).

- It does not apply to servicemembers who waived, withdrew, or failed to timely file a direct appeal because those appellants are already addressed in Article 65(d)(3), and such an interpretation would render Article 65(d)(2) superfluous.

- While it might apply to cases in which a servicemember already applied for review under Article 69 or reached the CCA through Article 69 before 23 December 2022 or whose timeframe for seeking Article 69 review had already expired, it cannot apply *only* to those cases, for the reasons described in the next paragraph.

Article 65(d)(2)(A) and (B) require that cases "not eligible for direct review" under Article 66 receive an Article 65 review. By definition, as of 23 December 2022, a general or special court-martial then being reviewed under Article 69 (or whose time for seeking review under Article 69 had expired or who had reached the CCA through Article 69) had already received Article 65(d) review. *See, e.g.,* Article 69(b) (2019) (to be eligible for Article 69 review, a servicemember must apply within a year of Article 65 review). If Article 65(d)(2)(A) only applies to such cases already submitted for Article 69 review,

and every other non-waived case is now "eligible for direct review," then there would be no reason for Article 65(d)(2)(A) to direct new Article 65 reviews. Yet Article 65(d)(2) still directs that Article 65 review will occur in some non-waived cases.

In its interpretation of the UCMJ after the FY23 Article 66 amendments, this Court must account for the continuing existence of Article 65(d)(2)(A) and (B) and should interpret them in a way that does not render them surplusage. To do so, this Court should conclude that Congress contemplated that after 23 December 2022, there would still be a category of cases ineligible for Article 66 direct review that needed future Article 65 review. Cases with entries of judgment rendered before 23 December 2022 fit that bill,[15] and therefore this Court should conclude that Congress intended the FY23 NDAA amendments to Article 66 to apply only to cases with entries of judgment after 23 December 2022. Appellant, who has an entry of judgment dated 9 March 2022 is ineligible for Article 66 review.

[15] For example, a general court-martial with a subjurisdictional sentence and an entry of judgment dated 21 December 2022 would be ineligible for Article 66 review and would have still needed to receive Article 65 review on the 23 December 2022 effective date of the FY 2023 NDAA. Congress's maintenance of Article 65(d)(A)-(B) in its current form accounts for such a scenario.

The President's implementation of Article 65 in R.C.M. 1201(a) in the new 2024 MCM reinforces this conclusion. R.C.M. 1201(a)(1) (2024) still directs Article 65 review for general and special courts-martial "not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3)." Again, there would have been no need for the President to maintain this language in the 2024 Manual if there were not some cases remaining after the FY23 NDAA amendments that were still ineligible for CCA review and needed Article 65 review.

Since the plain language of the UCMJ reveals that the Article 66 amendments do not apply retroactively to provide Article 66 review to all special and general court-martial convictions, this Court need not even apply the general presumption against retroactivity described in Landgraf, 511 U.S. at 280. In determining retroactivity, "[w]here the congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp., 494 U.S. at 838. *See also* Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 161 (3d Cir. 1998) ("we must use normal statutory construction rules to determine if Congress manifested an intent to only apply a statute to future cases. . . if we find an intent to not apply a statute retrospectively, our inquiry is done"). Congressional election to maintain Article 65(d)(2)(A) in existing form evidences "clear congressional intent" that some general and special courts-martial – those like Appellant's with entries of

judgment before 23 December 2022 – remain ineligible for Article 66 review. Congressional intent governs, and AFCCA had no jurisdiction to review Appellant's case.

AFCCA essentially conceded that its finding of jurisdiction rendered Article 65(d)(2)(A) "empty" or "redundant." Vanzant, 84 M.J. 680. Yet the court disregarded the canon against interpreting statutes in a way that makes any provision "inoperative or superfluous, void or insignificant." Corley v. United States, 556 U.S. 303, 314 (2009) (internal citation omitted). In contrast, this Court can give effect to Article 65(d)(2)(A) by simply declining to apply the FY23 Article 66 amendments retroactively to cases like Appellant's.

f. AFCCA erred by using an inference about what Congress would have wanted – rather than a clear statement of intent – to assume jurisdiction over Appellant's case.

As another justification for finding Article 66 jurisdiction over cases like Appellant's, AFCCA expressed an unfounded concern that Appellant's Article 69 rights had been abridged by the FY23 NDAA. Vanzant, 84 M.J. at 676-77. Without AFCCA exercising Article 66 jurisdiction, the court feared that "servicemembers similarly situated to Appellant would have had their rights to seek TJAG and potentially CCA review under the 'old' system curtailed without being afforded the right to a direct appeal under the 'new' system." Id. at 677.

The court thus partly premised its finding of jurisdiction on its belief that Congress would not have wanted such an outcome. Id.

To start, merely speculating that Congress would not have wanted servicemembers in Appellant's position to be denied Article 69 review is not enough to find "clear congressional intent" to apply the FY23 Article 66 amendments retroactively. Courts cannot assume jurisdiction using such an inference. *See* Loving, 62 M.J. at 244, n.60. But secondly, a recent order by this Court suggests that the 2019 version of Article 69 still applies to cases like Appellant's with EOJs dated before 23 December 2022. In United States v. Alfred, Order, No. 25-0085/AR, 2025 CAAF LEXIS 288 (C.A.A.F. 16 April 2025) this Court appeared to apply the 2019 version of Article 69, UCMJ to an appellant who had an EOJ dated before 23 December 2022.[16] This Court applied the "old" Article 69 even though the appellant received Article 65(d) review and applied to TJAG for Article 69 review *after* the 23 December 2022 effective date of the FY23

[16] *See* Brief on Behalf of Appellee, dated 14 March 2024, United States v. Alfred, Dkt. No. 20220126 (A. Ct. Crim. App.) at 3 (stating that the military judge entered judgment on 20 May 2022). Available at https://www.jagcnet.army.mil/ACCALibrary/cases/e911c577-d5a4-46e6-87d4-53b0b70aec7d. (Last visited 23 April 2024).

NDAA amendments to Articles 66 and 69.[17] Since Appellant also has an EOJ dated before 23 December 2022, according to this Court's order in Alfred, the 2019 version of Article 69 applied to him even after 23 December 2022. His Article 69 rights were not curtailed.

In any event, even if Appellant had lost some rights under Article 69, that would not be enough to show that Congress clearly intended to extend Article 66 review to servicemembers like Appellant with statutorily-final convictions. AFCCA erred in using this inference to find it had jurisdiction over Appellant.

g. Principles of finality support finding no Article 66 jurisdiction in Appellant's case.

As a final consideration, rejecting AFCCA's claim of Article 66 jurisdiction over cases like Appellant's not only comports with prevailing Supreme Court precedent; it also recognizes the importance of finality in the military justice system. "Society at large has the same interest" in finality as the government. Buck v. Davis, 580 U.S. 100, 135 (2017) (Thomas, J. dissenting). "Finality . . . promotes the law's deterrent effect; it provides peace of mind to a wrongdoer's victims; it promotes public confidence in the justice system; it conserves limited

[17] *See* Order, dated 10 October 2024, United States v. Alfred, Dkt. No. 20220126, (A. Ct. Crim. App. 10 October 2024) (stating that Article 65(d) review was completed on 24 March 2023, and the applicant subsequently applied to TJAG for Article 69 review) (Available at https://www.jagcnet.army.mil/ACCALibrary/cases/e911c577-d5a4-46e6-87d4-53b0b70aec7d. (Last visited 23 April 2024).

public resources; and it ensures the clarity of legal rights and statuses." Id. at 135-36. As the Supreme Court has acknowledged, "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out . . . To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, and interest shared by the [government] and the victims of crime alike." Calderon v. Thompson, 523 U.S. 538, 556 (1998) (internal citations and quotations omitted). This Court will promote both OM's and society's vital interests in finality by holding that the CCAs cannot reopen direct appellate review of the statutorily-final convictions of Appellant and other similarly situated servicemembers.

CONCLUSION

In the end, the FY23 NDAA Article 66 amendments would substantially expand Appellant's rights. Given this "retroactive effect," this Court cannot apply the amendments to Appellant's case under Landgraf because Congress evinced no "clear congressional intent" for such a result. And finding Article 66 jurisdiction over Appellant's case without a clear statement of congressional intent would contravene the principle that military courts must exercise their jurisdiction in strict compliance with authorizing statutes.

Constitutional separation of powers concerns also counsel against this Court reading the amendments retroactively to reopen Appellant's already-final court-

martial conviction for a new direct appellate review. But this Court need not even reach that constitutional question, because the plain language of the post-23 December 2022 UCMJ – Article 65(d)(2) in particular – already reveals that Congress intended the amendments to apply only to cases with entries of judgment dated on or after 23 December 2022. Under any reasoning, the FY23 NDAA amendments to Article 66, UCMJ do not govern Appellant's court-martial. Applying the prior version of Article 66, the CCA had no jurisdiction to review Appellant's direct appeal.

The United States requests that this Court vacate the decision of the Court of Criminal Appeals.

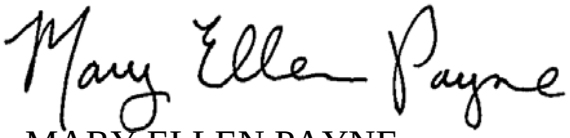
MARY ELLEN PAYNE, USAF
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian appellate defense counsel, and to the Air Force Appellate Defense Division on 23 April 2025.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Mary.payne.5@us.af.mil
Court Bar No. 34088

CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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/s/
MARY ELLEN PAYNE
Attorney for USAF, Government Trial and Appellate Operations Division

Date: 23 April 2025

Appendix

Article 69, UCMJ; 10 U.S.C. § 869 (2018)

(a) IN GENERAL.—Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

(b) TIMING.—To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than one year after the date of completion of review under section 864 or 865 of this title (article 64 or 65), as the case may be. The Judge Advocate General may, for good cause shown, extend the period for submission of an application, but may not consider an application submitted more than three years after such completion date.

(c) SCOPE.—

(1)(A) In a case reviewed under section 864 or section 865(b) of this title (article 64 or 65(b)), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds 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.

(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (Article 44).

(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

(2) In a case reviewed under section 865(b) of this title (article 65(b)), review under this section is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law. If the Judge Advocate General determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

(d) COURT OF CRIMINAL APPEALS.—

(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)—

(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if—

(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

(B) the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at

an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

(3) The submission of an application for review under this subsection does not constitute a proceeding before the Court of Criminal Appeals for purposes of section 870(c)(1) of this title (article 70(c)(1)).

(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.

Article 69, UCMJ; 10 U.S.C. § 869 (2020)

(a) IN GENERAL.—Upon application by the accused or receipt of the record pursuant to section 864(c)(3) of this title (article 64(c)(3)) and subject to subsections (b), (c), and (d), the Judge Advocate General may—

(1) with respect to a summary court-martial, modify or set aside, in whole or in part, the findings and sentence; or

(2) with respect to a general or special court-martial, order such court-martial to be reviewed under section 866 of this title (article 66).

(b) TIMING.—

(1) To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than—

(A) for a summary court-martial, one year after the date of completion of review under section 864 of this title (article 64); or

(B) for a general or special court-martial, one year after the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article

865(c)), unless the accused submitted a waiver or withdrawal of appellate review under section 861 of this title (article 61) before being provided notice of appellate rights, in which case the application must be submitted to the Judge Advocate General not later than one year after the entry of judgment under section 860c of this title (article 60c).

(2) The Judge Advocate General may, for good cause shown, extend the period for submission of an application, except that—

(A) in the case of an application for review of a summary court martial, the Judge Advocate may not consider an application submitted more than three years after the completion date referred to in paragraph (1)(A); and

(B) in case of an application for review of a general or special court-martial, the Judge Advocate may not consider an application submitted more than three years after the end of the applicable period under paragraph (1)(B).

(c) SCOPE.—

(1)(A) In a case reviewed under section 864 of this title (article 64), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds 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.

(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(D)(i) Subject to clause (ii), if the Judge Advocate General sets aside findings and orders a rehearing and the convening authority

determines that a rehearing would be impracticable, the convening authority shall dismiss the charges.

(ii) If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

(2) In a case reviewed under section 865(b) of this title (article 65(b)), review under this section is limited to the issue of whether the waiver or withdrawal of an appeal was invalid under the law. If the Judge Advocate General determines that the waiver or withdrawal of an appeal was invalid, the Judge Advocate General shall send the case to the Court of Criminal Appeals.

(d) COURT OF CRIMINAL APPEALS.—
(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)(1) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

(2) The Court of Criminal Appeals may grant an application under paragraph (1) only if—

(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

(B) the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

(3) The submission of an application for review under this subsection does not constitute a proceeding before the Court of Criminal Appeals for purposes of section 870(c)(1) of this title (article 70(c)(1)).

(e) ACTION ONLY ON MATTERS OF LAW.—Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.

RULE 1201. Review by the Judge Advocate General (2024)

(a) *Review of certain general and special courts-martial.* Except as provided in subsection (b), an attorney designated by the Judge Advocate General shall review:

(1) Each general and special court-martial case that is not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3); and

Discussion

See R.C.M. 1203(b) and (c).

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(2) Each general or special court-martial eligible for appellate review by a Court of Criminal Appeals in which the Court of Criminal Appeals does not review the case because:

(A) In a case under Article 66(b)(3), other than one in which the sentence includes death, the accused withdraws direct appeal or waives the right to appellate review.

Discussion

See R.C.M. 1203(b).

(B) In a case under Article 66(b)(1), the accused does not file a timely appeal, or files a timely appeal and then withdraws it.

Discussion

See R.C.M. 1307 for judge advocate review of summary courts-martial.

(h) *Application for relief to the Judge Advocate General after final review*.[1]

(1) *In general*. Notwithstanding R.C.M. 1209, the Judge Advocate General may, upon application of the accused or a person with authority to act for the accused or receipt of the record pursuant to R.C.M. 1307(g):

(A) With respect to a summary court-martial previously reviewed under R.C.M. 1307, modify or set aside, in whole or in part, the findings and sentence; or

(B) With respect to a general or special courtmartial previously reviewed under paragraph (a)(1) or (2), order such a court-martial to be reviewed under R.C.M. 1203 by the Court of Criminal Appeals.

(2) *Timing*. To qualify for consideration under this subsection, an accused must submit an application not later than one year after—

(A) In the case of a summary court-martial, the date of completion of review under R.C.M. 1307; or

(B) In the case of a general or special court-martial, the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under R.C.M. 1116(b)(2).

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[1] In United States v. Alfred, Order, No. 25-0085/AR, 2025 CAAF LEXIS 288 (C.A.A.F. 16 April 2025), this Court noted that 2024 Manual for Courts-Martial did not contain the correct text of R.C.M. 1201(h). The Court recognized that the correct text of the Rule is included in the 2023 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 14103, Annex 1 § 1(xx), 88 Fed. Reg. 50569 (Aug. 2, 2023).

(3) *Extension*. The Judge Advocate General may, for good cause shown, extend the period for submission of an application under paragraph (h)(2) for a time period not to exceed three additional years. The Judge Advocate General may not consider an application submitted more than three years after the applicable expiration date specified in paragraph (h)(2).