

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*Supreme Court Appellate Jurisdiction Over Military Court  
Cases*

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October 6, 2008

**Abstract.** This report surveys military courts' jurisdiction, the structure of appellate review for military cases, interactions between military and civilian courts, the Stevenson case, and the bills introduced in the 110th Congress.

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# CRS Report for Congress

## Supreme Court Appellate Jurisdiction Over Military Court Cases

October 6, 2008

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Prepared for Members and  
Committees of Congress

# Supreme Court Appellate Jurisdiction Over Military Court Cases

## Summary

Military courts, authorized by Article I of the U.S. Constitution, have jurisdiction over cases involving military servicemembers, including, in some cases, retired servicemembers. They have the power to convict for crimes defined in the Uniform Code of Military Justice (UCMJ), including both uniquely military offenses and crimes with equivalent definitions in civilian laws. For example, in a recent case, *United States v. Stevenson*, military courts prosecuted a retired serviceman for rape, a crime often tried in civilian courts.

The military court system includes military courts-martial; a Criminal Court of Appeals for each branch of the armed services; and the U.S. Court of Appeals for the Armed Forces (CAAF), which has discretionary appellate jurisdiction over all military cases. With the exception of potential final review by the U.S. Supreme Court, these Article I courts handle review of military cases in an appellate system that rarely interacts with Article III courts.

Criminal defendants in the Article III judicial system have an automatic right to appeal to federal courts of appeal and then a right to petition the Supreme Court for final review. In contrast, defendants in military cases typically may not appeal their cases to the U.S. Supreme Court unless the highest military court, the CAAF, had also granted discretionary review in the case. The Equal Justice for Our Military Act of 2007, H.R. 3174, which the House passed on September 27, 2008, and a companion bill in the Senate, S. 2052, would authorize appeals to the U.S. Supreme Court for all military cases, including cases that the CAAF declined to review.

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# Supreme Court Appellate Jurisdiction Over Military Court Cases

The U.S. military justice system exercises jurisdiction over criminal cases pursuant to Article I of the U.S. Constitution and the Uniform Code of Military Justice (UCMJ). Military courts' jurisdiction is limited to trying people connected to the armed forces for crimes defined by the UCMJ. Within these constraints, military courts' jurisdiction is relatively broad. For example, it extends to retired servicemembers such as the defendant in *United States v. Stevenson*,<sup>1</sup> a recent case in which military courts convicted a man on the Navy's temporary disability retired list. In *Stevenson*, the Navy prosecuted the defendant for rape, a crime routinely tried in non-military courts with civilian defendants.<sup>2</sup>

In general, the military justice system, including its system of appellate review, is separate and distinct from the civilian judicial system. Some constitutional safeguards and Supreme Court interpretations are inapplicable in military courts. Also, after following appellate review through the military court system, military defendants may appeal to the U.S. Supreme Court only in limited circumstances. Two bills introduced in the 110<sup>th</sup> Congress — H.R. 3174, which the House passed on September 27, 2008, and a companion bill in the Senate, S. 2052 — would broaden the Supreme Court's statutory jurisdiction by authorizing Supreme Court review of most military cases. This report surveys military courts' jurisdiction, the structure of appellate review for military cases, interactions between military and civilian courts, the *Stevenson* case, and the bills introduced in the 110<sup>th</sup> Congress.

## Military Courts' Jurisdiction

Most criminal cases in the United States are tried either in state courts or in civilian federal courts. The latter derive authority from Article III of the U.S. Constitution.<sup>3</sup> However, the armed forces may prosecute defendants with military

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<sup>1</sup> 66 M.J. 15 (C.A.A.F. 2008).

<sup>2</sup> *Id.* at 16. In *Stevenson*, the Naval Criminal Investigative Service investigated the defendant after determining that he "was a possible suspect in a ... rape of a military dependent." *Id.* Thus, military prosecutors tried the case in military courts. However, a civilian court would have had jurisdiction over the same conduct in a case involving a civilian defendant.

<sup>3</sup> Article III vests judicial power in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III. Article III courts include the U.S. Supreme Court, federal courts of appeals, federal district courts, and the U.S. Court of International Trade.

connections in military courts, which derive authority from Article I, sec. 8 of the U.S. Constitution.<sup>4</sup>

The Uniform Code of Military Justice (UCMJ), passed by Congress and implemented by the President through the Manual for Courts-Martial (MCM), governs military courts' jurisdiction and procedures.<sup>5</sup> Military courts exercise jurisdiction over officers and enlisted servicemembers on active duty.<sup>6</sup> The scope of their jurisdiction may extend to individuals other than active duty and enlisted servicemembers. Specifically, such jurisdiction extends to cases involving retired servicemembers who receive military pay or hospital care from an armed force; specified members of reserve units; enemy combatants; and other individuals with connections to military operations or benefits.<sup>7</sup> As noted below in the discussion of *United States v. Stevenson*, questions remain regarding the scope of military courts' power over retired servicemembers. However, it is clear that military courts' jurisdiction extends to military veterans only when a veteran maintains at least some current relationship with the military.<sup>8</sup>

If a defendant's connection with the armed forces is sufficient to establish jurisdiction, a military court may try that defendant for a broad range of activities, including conduct not related to official military duties, as long as the alleged conduct constitutes a crime under the UCMJ. The UCMJ includes some crimes that are unique to military service. For example, under the UCMJ, a defendant might be prosecuted for effecting unlawful enlistment, appointment, or separation; desertion; or absence without leave.<sup>9</sup> However, the armed forces may also prosecute defendants under the UCMJ for conduct over which civilian courts could also exert jurisdiction. For example, the UCMJ criminalizes murder, rape, robbery, and other common law crimes.<sup>10</sup>

## Appellate Structure for Military Cases

Article I military courts handle military cases throughout the chain of appellate review. Appeal to the U.S. Supreme Court is permitted at the end of the process only in specified circumstances.

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<sup>4</sup> Relevant provisions of Art. I, sec. 8 empower Congress to "raise and support armies"; "provide and maintain a navy"; and "make rules for the government and regulation of the land and naval forces." The section also grants Congress powers of "organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. Const. art. I, § 8.

<sup>5</sup> 10 U.S.C. § 801 *et. seq.*

<sup>6</sup> 10 U.S.C. § 802.

<sup>7</sup> 10 U.S.C. § 802(a).

<sup>8</sup> *Toth v. Quarles*, 350 U.S. 11, 14-15 (1955) ("It has never been intimated by this Court ... that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions.").

<sup>9</sup> 10 U.S.C. §§ 884, 885, 886.

<sup>10</sup> *Id.* at §§ 918, 920, 922.

The UCMJ creates various military courts and provides appellate procedures for them.<sup>11</sup> After an initial investigation and a court-martial, which is a trial-level proceeding, military cases undergo various stages of review within the military justice system. First, each court-martial proceeding has a “convening authority,” who is a commissioned officer (other than the defendant’s accuser) who convenes the investigation and court-martial proceeding and then approves or modifies the court-martial’s findings and sentences.<sup>12</sup> Convening authorities do not provide legal review; instead, they provide the equivalent of sentencing determinations by giving “full and fair consideration to matters submitted by the accused and determining appropriate action on the sentence.”<sup>13</sup> Under the UCMJ, convening authorities have “substantial discretion” to modify sentences and findings.<sup>14</sup>

After a convening authority approves or modifies a court-martial decision, a Court of Criminal Appeals offers the first opportunity for legal review in military cases. Each branch of the armed services has a Court of Criminal Appeals, comprised of panels of military judges<sup>15</sup> established by the Judge Advocate General for each branch.<sup>16</sup> The Courts of Criminal Appeals review cases in panels or, occasionally, *en banc*.<sup>17</sup> Review is not discretionary; each Judge Advocate General “shall refer” to the relevant Court of Criminal Appeals every case involving a conviction that imposes the death penalty or confinement for one year or more; a bad-conduct or dishonorable discharge; or, in certain cases, dismissal from the respective service.<sup>18</sup> Unlike convening authorities, Courts of Criminal Appeals provide legal review of military cases. They “may affirm only such findings of guilty, and the sentence ... as [they] fin[d] correct in law and fact and determin[e], on the basis of the entire record, should be approved.”<sup>19</sup>

After a Court of Criminal Appeals has reviewed a case, the United States Court of Appeals for the Armed Forces (CAAF) provides the final opportunity for appellate review within the military court system. The CAAF is an Article I court, housed

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<sup>11</sup> 10 U.S.C. § 801 *et. seq.* For an overview of courts-martial procedure, see CRS Report RS21850, *Military Courts-Martial: An Overview*, by Jennifer K. Elsea.

<sup>12</sup> 10 U.S.C. § 860; *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003).

<sup>13</sup> *Davis*, 58 M.J. at 102.

<sup>14</sup> 10 U.S.C. § 860(c).

<sup>15</sup> The UCMJ defines “military judge” as a “commissioned officer of the armed forces” whom the Judge Advocate General of the relevant branch has certified as qualified to serve in the branch in which the judge is a member. 10 U.S.C. § 826(b).

<sup>16</sup> 10 U.S.C. § 866(a). The four Courts of Criminal Appeals are the Army Court of Criminal Appeals, the Air Force Court of Criminal Appeals, the Navy-Marine Corps’ Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals.

<sup>17</sup> *Id.*

<sup>18</sup> 10 U.S.C. § 866(b). Dismissals of commissioned officers, cadets, and midshipmen are subject to automatic review by the Courts of Criminal Appeals. *Id.*

<sup>19</sup> 10 U.S.C. § 866(c).

within the Department of Defense.<sup>20</sup> However, unlike other military courts, the CAAF is comprised of civilian judges, whom the President appoints.<sup>21</sup>

In general, the CAAF has discretion to grant or deny petitions for appeals, analogous to the U.S. Supreme Court's discretion to grant or deny writs of certiorari.<sup>22</sup> However, the CAAF must accept appeals in two circumstances: 1) all cases in which the relevant Court of Criminal Appeals has affirmed a death sentence; and 2) all cases in which a Judge Advocate General has sent a case to the CAAF for review after a final Court of Criminal Appeals decision.<sup>23</sup>

The CAAF's appellate review is limited. The CAAF must act "only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."<sup>24</sup> In other words, appeals to the CAAF must involve issues originally heard by a court-martial and affirmed or denied by a convening authority and the relevant Court of Criminal Appeals. The CAAF cannot hear appeals based on the All Writs Act or other jurisdictional authority unless they aid direct review of court-martial decisions.

For example, in *Clinton v. Goldsmith*,<sup>25</sup> the Air Force had dropped from its rolls a servicemember who had served an earlier sentence for engaging in unprotected sex without telling his partners of his HIV-positive status. The servicemember had petitioned the Air Force Court of Criminal Appeals for injunctive relief under the All Writs Act, but that court denied relief, holding that it lacked jurisdiction. The CAAF then granted the injunctive relief.<sup>26</sup> The U.S. Supreme Court held that the CAAF had exceeded its jurisdiction in granting injunctive relief because the relief did not involve review of a court-martial decision.<sup>27</sup> In so holding, the Supreme Court rejected the CAAF's argument that jurisdiction was proper because the Air Force's dropping of the servicemember related to conduct at issue in an earlier court-martial proceeding; instead, the Court emphasized that "there is no source of continuing jurisdiction for the the CAAF over all actions administering sentences that the CAAF at one time had the power to review."<sup>28</sup>

With respect to appeals from the CAAF, the U.S. Supreme Court has jurisdiction to grant certiorari in four specific circumstances: 1) cases in which a death sentence has been affirmed by the relevant branch's Court of Criminal Appeals;

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<sup>20</sup> See 10 U.S.C. § 941.

<sup>21</sup> 10 U.S.C. § 942(b) ("Each judge of [The CAAF] shall be appointed from civilian life by the President, by and with the advice and consent of the Senate....").

<sup>22</sup> 10 U.S.C. § 867(a)(3).

<sup>23</sup> 10 U.S.C. § 867(a)(1),(2).

<sup>24</sup> 10 U.S.C. § 867(c).

<sup>25</sup> 526 U.S. 529 (1999).

<sup>26</sup> *Id.* at 532-33.

<sup>27</sup> *Id.* at 534-36.

<sup>28</sup> *Id.* at 536.



2) cases that a Judge Advocate General has certified to the CAAF; 3) cases in which the CAAF granted a petition for review, and 4) cases that do not fall in the other categories but in which the CAAF has granted relief.<sup>29</sup> The first two categories represent the two circumstances in which the CAAF must grant appeals. The second category represents cases in which the CAAF has exercised its discretion to grant an appeal. And the final category is a catch-all provision for other cases in which the CAAF might grant relief.

Because the Supreme Court's jurisdiction is limited to these four circumstances, its power to review military cases generally extends only to cases that the CAAF has also reviewed. For this reason, the CAAF's discretion over the acceptance or denial of appeals often functions as a gatekeeper for military appellants' access to Supreme Court review. If the CAAF denies an appeal, the U.S. Supreme Court will typically lack the authority to review the decision. In contrast, criminal appellants in Article III courts have an automatic right of appeal to federal courts of appeals and then a right to petition the Supreme Court for review.<sup>30</sup>

## Interactions Between Article I and Article III Courts

The U.S. armed forces have a long history of self-regulation. Except for limited interaction with the U.S. Supreme Court, Article I military courts operate separately from the Article III judicial system. As discussed above, military courts have distinct trial procedures and structures for appellate review. In addition, because military courts' jurisdictional authority arises under Article I rather than Article III, defendants in military cases do not have the benefit of certain Article III safeguards, such as lifetime appointments for judges.<sup>31</sup> In addition, although military defendants are entitled to due process rights under the Fifth Amendment to the Constitution, the Supreme Court has upheld a narrowed interpretation of such rights in the context of military courts.<sup>32</sup>

Furthermore, legal interpretations by Article III courts do not necessarily create binding precedent for Article I courts, and vice versa. The only Article III court holdings that bind military courts are those of the U.S. Supreme Court. However, military courts sometimes reject even Supreme Court precedents as inapplicable in the military context. For example, in *United States v. Marcum*,<sup>33</sup> the CAAF declined to follow an interpretation of the constitutional right to privacy that the Supreme Court had handed down a short while earlier. In *Marcum*, a court-martial had convicted a servicemember of various crimes, including non-forcible sodomy.<sup>34</sup> On appeal, the servicemember argued that with respect to the non-forcible sodomy

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<sup>29</sup> 28 U.S.C. § 1259 (2008).

<sup>30</sup> 28 U.S.C. § 1254(1).

<sup>31</sup> *Weiss v. United States*, 510 U.S. 163, 177-81 (1994) (holding that lack of fixed terms for military court judges does not violate Fifth Amendment due process guarantees).

<sup>32</sup> *Id.*

<sup>33</sup> 60 M.J. 198, 205 (C.A.A.F. 2004).

<sup>34</sup> *Id.* at 199.

charge, he was protected by a constitutional right to privacy in intimate relations under the Supreme Court case *Lawrence v. Texas*.<sup>35</sup> However, the CAAF declined to follow *Lawrence*.<sup>36</sup> The CAAF's rationale for diverging from Supreme Court precedent in *Marcum* was that constitutional protections "may apply differently to members of the armed forces than they do to civilians."<sup>37</sup> Thus, although "constitutional rights identified by the Supreme Court generally apply to members of the military," such rights do not apply when "by text or scope they are plainly inapplicable."<sup>38</sup>

Similarly, Article III courts are not bound by military courts' decisions. The Supreme Court may consider CAAF decisions or UCMJ provisions as potentially persuasive. For example, the Supreme Court ordered briefs to examine the impact of a military code provision after it handed down its decision in *Kennedy v. Louisiana*,<sup>39</sup> a case involving the question of a death penalty sentence for a child rapist.<sup>40</sup> In *Kennedy*, the Supreme Court held that the 8<sup>th</sup> Amendment prohibits punishment by death penalty for a defendant who rapes a child but did not cause or intend to cause a child's death.<sup>41</sup> In so holding, the Court emphasized the "national consensus" against the death penalty in such cases.<sup>42</sup> In its petition for rehearing, Louisiana argued that Congress's recent amendment of the UCMJ to include a death penalty punishment in military cases for the rape of a child undermined the Court's "national consensus" argument.<sup>43</sup> However, the Supreme Court decided not to reconsider its *Kennedy* decision, instead reaffirming its prior ruling with only minor modifications. In its opinion accompanying its denial of rehearing, the Supreme Court disagreed with Louisiana's interpretation of the death penalty language in the UCMJ amendment, but it also emphasized that "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context."<sup>44</sup>

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<sup>35</sup> 539 U.S. 558 (2003).

<sup>36</sup> *Marcum*, 60 M.J. at 205.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 206.

<sup>39</sup> 128 S.Ct. 2641 (2008).

<sup>40</sup> *Kennedy v. Louisiana*, Docket No. 07-343, Order September 8, 2008.

<sup>41</sup> *Kennedy*, 128 S.Ct. at 2645.

<sup>42</sup> *Id.* at 2657-58. For more information on the *Kennedy v. Louisiana* case, see CRS Report RS22844, *Capital Punishment: Constitutionality for Non-Homicide Crimes Such as Child Rape*, by Alison M. Smith.

<sup>43</sup> *Kennedy v. Louisiana*, Docket No. 07-343, Petition for Rehearing.

<sup>44</sup> *Kennedy v. Louisiana*, Denial of Petition for Rehearing, 554 U.S. \_\_\_ (2008) (October 1, 2008), slip opinion at 3.

## ***United States v. Stevenson***

A recent case, *United States v. Stevenson*,<sup>45</sup> highlights two issues relevant to jurisdiction in military cases. First, it raises questions regarding the scope of military courts' jurisdiction over retired servicemembers. Second, it raises a question regarding Supreme Court jurisdiction to review legal questions when the CAAF denied review. The first question was the basis for the *Stevenson* appellant's petition to the Supreme Court for certiorari.<sup>46</sup> The United States raised the second question in its brief opposing appellant's certiorari petition.<sup>47</sup>

Although the U.S. Supreme Court clearly has jurisdiction over cases in which the CAAF granted review,<sup>48</sup> it is unclear whether the Supreme Court's jurisdiction extends to specific issues that the CAAF declined to address. In *Stevenson*, Naval Criminal Investigative Service officials had investigated the appellant, a man on the Navy's temporary disability retired list, while he received treatment at a Veterans Affairs hospital. A military court-martial then tried and convicted the appellant for rape. On appeal, the CAAF remanded the case for fact finding regarding blood draws taken while appellee was a patient at the VA hospital.<sup>49</sup>

After the United States Navy-Marine Corps' Court of Criminal Appeals affirmed the court-martial's decision on remand, the CAAF granted a second review of the case.<sup>50</sup> However, exercising its discretion, the CAAF limited the issues on appeal to potential Fourth Amendment violations, declining to review the question of the military court's jurisdiction over a man on the temporary disability retired list.<sup>51</sup>

In his petition to the Supreme Court for certiorari, the appellant in *Stevenson* requested review of only the issue that the CAAF had declined to address — namely, the issue of military courts' jurisdiction over a case involving a person on the temporary disability retired list.<sup>52</sup> In response, the United States argued in its opposing brief that the Supreme Court's appellate review power does not extend to issues that the CAAF declined to review.<sup>53</sup> Thus, because the CAAF had declined to

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<sup>45</sup> 66 M.J. 15 (C.A.A.F. 2008).

<sup>46</sup> Brief of Petitioner-Appellant, *United States v. Stevenson*, No. 07-1397 (C.A.A.F. February 14, 2008).

<sup>47</sup> Brief for the United States in Opposition, *United States v. Stevenson*, No. 07-1397 (C.A.A.F. February 14, 2008).

<sup>48</sup> 28 U.S.C. § 1259(3).

<sup>49</sup> *Stevenson*, 66 M.J. at 16-17.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 16.

<sup>52</sup> Brief of Petitioner-Appellant at i.

<sup>53</sup> Brief for the United States in Opposition at 7-10.

review that portion of the Criminal Court of Appeals' decision, the United States argued that the Supreme Court lacked jurisdiction over the appeal.<sup>54</sup>

## Bills Introduced in the 110<sup>th</sup> Congress

Companion bills (H.R. 3174 and S. 2052) introduced in the 110<sup>th</sup> Congress would expand the U.S. Supreme Court's appellate jurisdiction over military cases.<sup>55</sup> The House passed its version, entitled the Equal Justice for Our Military Act of 2007, by voice vote on September 27, 2008. The bills would amend the UCMJ to authorize appeals to the Supreme Court in military cases, regardless of the CAAF's acceptance or denial of an appeal.

Bill sponsors have emphasized the need for the law to address the "long-standing disparity" between the broad ability to appeal the Supreme Court in civilian cases, on one hand, and the limited ability to appeal to the Supreme Court in military cases, on the other hand.<sup>56</sup> For example, when introducing H.R. 3174, Representative Davis stated that the legislation would "give our servicemembers equal access to the United States Supreme Court."<sup>57</sup> She also emphasized that under the current system, service men and women "sacrifice one of the fundamental legal rights that all civilian Americans enjoy" — namely, the right to appeal their cases to the U.S. Supreme Court.<sup>58</sup>

Courts have recognized compelling justifications for a military justice system that is distinct from Article III courts. For example, in *Marcum*, the CAAF emphasized the importance of ensuring discipline and obedience in the armed forces.<sup>59</sup> The *Marcum* court also stressed the military's interest in disciplining servicemembers differently according to their rank.<sup>60</sup> However, it is unclear whether such arguments justify a disparity in access to Supreme Court review, especially in the context of servicemembers no longer on active duty or crimes that exist under both military and civilian laws.

## Conclusion

Military cases follow a unique process of appellate review, moving from courts-martial through the following steps: 1) automatic appeals to Courts of Criminal Appeals for each armed forces branch; 2) potential discretionary review by the highest military court, the CAAF; and 3) review by the U.S. Supreme Court in

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<sup>54</sup> *Id.*

<sup>55</sup> Equal Justice for United States Military Personnel Act of 2007, S. 2052, 110<sup>th</sup> Cong. (2008); Equal Justice for Our Military Act of 2007, H.R. 3174, 110<sup>th</sup> Cong. (2008).

<sup>56</sup> See Cong. Rec. S11588 (daily ed. September 17, 2007) (statement of Senator Feinstein on behalf of herself, Senator Specter, and Senator Feingold).

<sup>57</sup> Cong. Rec. E1618 (daily ed. July 25, 2007) (statement of Hon. Susan A. Davis).

<sup>58</sup> *Id.*

<sup>59</sup> *Marcum*, 60 M.J. at 207-208.

<sup>60</sup> *Id.*

limited circumstances, usually only when the CAAF has also granted review. Legislation introduced in the 110<sup>th</sup> Congress would expand Supreme Court jurisdiction over military cases by authorizing Supreme Court review even if the CAAF had denied an appeal. If this measure became law, it would make moot the question highlighted by *United States v. Stevenson* regarding the Supreme Court's jurisdiction over specific issues that the CAAF had declined to review.