No. 21-920

IN THE

Supreme Court of the United States

KALAB D. WILLMAN, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF

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REPLY BRIEF

In its brief in opposition, the government largely parrots the strained reading of Article 66 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, adopted by the Court of Appeals for the Armed Forces (CAAF) below. Under that approach, when a servicemember challenges a court-martial sentence on appeal, the Court of Criminal Appeals (CCA) may consider new evidence attached to its record to decide if the sentence is cruel or unusual, but *not* to decide if the sentence is otherwise unlawful or inappropriate. This bizarre reading is not required by the text of Article 66. And because it would undermine the expansive role that Congress intended CCAs to play in reviewing military sentences, it should be rejected.

Like no other appellate court in the United States, the CCAs have both the ability and the responsibility to review not just the *legality* of sentences imposed by courts-martial, but their *appropriateness*, as well. *See United States* v. *Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957) ("[T]he criterion for the exercise of the [CCAs'] power over the sentence is not legality alone, but legality limited by appropriateness.").

This unique grant of authority was no accident. When Congress created the CCAs' predecessors in 1950, sentence-appropriateness review on appeal was seen as an essential protection for servicemembers—to promote fairness and consistency in how transitory military trial judges spread across the globe imposed criminal sentences. *United States* v. *Boone*, 49 M.J. 187, 191–92 (C.A.A.F. 1998). Thus, in reviewing court-martial sentences, Congress purposefully gave the CCAs "*carte blanche* to do justice." *United States* v. *Claxton*, 32 M.J. 159, 162 (C.M.A. 1991).

With that mandate in mind, the CAAF has held that CCAs *may* consider new matters in reviewing whether a servicemember's punishment is cruel or unusual in violation of either the Eighth Amendment or Article 55 of the UCMJ, 10 U.S.C. § 855. *E.g.*, *United States* v. *Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001). Consistent with the scope of Article 66, it should follow that, where the *same* new material supports a claim that a sentence was lawful but inappropriate, the CCAs' "*carte blanche* to do justice" includes the power to consider it in that context, too.

Here, the CAAF held otherwise. By a 3-2 vote, it limited the CCAs' sentence-appropriateness review to the record as it was presented to the convening authority—even when, as here, the record before the CCAs includes new evidence that the CCAs *may* consider in reviewing cruel or unusual punishment claims. In other words, the CAAF effectively held that CCAs must often consider two *different* records when reviewing the *same* sentence—and are limited to the narrower of the two (the record before the convening authority) when reviewing sentence appropriateness.

That decision turns the CCAs' "*carte blanche* to do justice" into a straitjacket. Among other things, it prevents CCAs from considering uncontroverted evidence that post-trial sentencing conditions are unreasonable even when that evidence is *already* part of the record before the CCAs—solely on the ground that it wasn't part of the trial record. It thus forecloses challenges to the appropriateness of a sentence based upon such new evidence in *any* forum, since collateral review of such claims will generally be unavailable. *See, e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950).

The government doesn't dispute any of this. It doesn't argue that Petitioners *forfeited* their sentence-appropriateness claims by not raising them earlier. Nor does it claim that Petitioners would *lose* on the record before the CCAs. Rather, its core claim is that certiorari should be denied because the CAAF was correct; Petitioners are just out of luck. Opp. 15–21.

As the dissenting opinion below explained, this illogical and unfair result is not required by the text of Article 66. That provision authorizes the CCAs to consider "the entire record" when reviewing the appropriateness of a court-martial sentence. 10 U.S.C. § 866(c) (2012). It is clear from Article 66's text and context that "the entire record" includes all materials properly before the CCAs—whether because they were part of the record below *or* because they properly became part of the record on appeal. *See* Pet. App. 20a (Sparks, J., dissenting). If anything, Congress's use of the word "*entire*" underscores the capaciousness of the review it intended the CCAs to undertake.

Moreover, it would make no sense for the statute's reference to "the entire record" to mean one thing (the record before the CCA) when reviewing whether a sentence is cruel or unusual, and something else (the record before the convening authority) when reviewing whether it is appropriate. Perhaps the government's true objection is to the CAAF's precedents allowing CCAs to consider new evidence in the cruel or unusual punishment context—but it has not cross-petitioned for review of those decisions here.

Instead, possibly recognizing the weakness of its statutory interpretation argument, the government closes its brief in opposition by suggesting that any error on CAAF's part will have a limited impact—

because of recent amendments to Article 66 that won't go into effect until 19 months from now. As relevant here, those amendments replace Article 66's reference to "the entire record" with a reference to "any portion of the record in the case that is designated as pertinent by any party" or "any information required by rule or order of the [CCA]." National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(d)(2), 135 Stat. 1541, 1703–04 (2021).

As its text makes clear, this amendment raises the same issue about which "record" the CCAs are allowed to review in considering the appropriateness of a court-martial sentence. In that respect, the government—tellingly—does not actually claim that Petitioners' appeals would come out *differently* under future Article 66. Nor does it disavow relying upon the CAAF's decision here to construe that new language when it becomes operative. Instead, all it offers is the unsubstantiated assertion that "any decision of this Court interpreting" the current text of Article 66 "would have limited prospective importance." Opp. 22. Suffice it to say, that conclusion is hardly self-evident.

But even if the 2021 amendment *would* resolve the issue raised in these cases from December 2023 onwards, that provides little aid to Petitioners—or to any other similarly situated servicemembers between now and the end of next year. This Court's most recent grant of certiorari to the CAAF, which culminated in a unanimous reversal, involved an even smaller (and closed) set of cases. *See United States* v. *Briggs*, 141 S. Ct. 467 (2021). The government offers no explanation for why that tiny and finite set of court-martial appeals warranted this Court's intervention, but this far larger—and ever-expanding—set does not.

I. ARTICLE 66'S REFERENCE TO "THE ENTIRE RECORD" MEANS THE RECORD IN THE CCA

As the CAAF has repeatedly recognized, the CCAs possess "a unique authority that is the product of the evolution of military justice in the United States." *Boone*, 49 M.J. at 191. In drafting the UCMJ, Congress "perceived a need to provide for an intermediate appellate tribunal that would have the high responsibility of ensuring uniformity and evenhandedness, values that could not be assured if final decision making were left at the local command level." *Id.* at 191–92. That's why, alone among *all* criminal appellate courts in the United States, CCAs were given the authority to review whether court-martial sentences are not just legal, but appropriate.

Neither the CAAF nor the government have pointed to any evidence that, in authorizing such review, Congress intended the CCAs to be limited to the record before the convening authority—as opposed to the record before the CCAs. Nor does the text of Article 66 support such a reading. That language provides that CCAs

> may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

10 U.S.C. § 866(c) (2012).[1]

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1. The version of Article 66(c) applicable to Petitioners' cases has since been recodified as amended in Article 66(d)(1), 10 U.S.C. § 866(d)(1). Pet. 4 n.2. The amendment is not material.

Like the CAAF, the government makes much of Article 66's two uses of the word "only," stressing that this text limits the scope of the CCAs' review and thereby "forecloses the review that petitioners seek." Opp. 16. In its view, by limiting the CCAs to acting "only with respect to the findings and sentence as approved by the convening authority," Article 66 limits the CCAs to *considering* only factual and legal arguments submitted *to* the court-martial or the convening authority.

This argument badly misreads Article 66. The first sentence of Article 66(c) simply establishes convening authority approval as a precondition for CCA review. It is the *second* sentence of Article 66(c) that sets forth what a CCA may consider in its plenary review. And that sentence, properly understood, is a "transparency and due process requirement rather than . . . a limitation on the powers of the CCA to supplement the record." *United States* v. *Jessie*, 79 M.J. 437, 446 (C.A.A.F. 2020) (Ohlson, J., dissenting). As its plain text indicates, Article 66 is focused on limiting the circumstances in which CCAs can *affirm* the findings and sentence as approved by the convening authority, not the circumstances in which they can *reject* them.

In light of this broad language, the CAAF has held, among other things, that CCAs may consider legal arguments that were not preserved before the court-martial or the convening authority—and are not required to apply conventional principles of waiver or forfeiture even when the CAAF itself would be. *See, e.g.*, *Claxton*, 32 M.J. at 162; *United States* v. *Britton*, 26 M.J. 24, 26–27 (C.M.A. 1988).

Of even greater relevance here, when CCAs are confronted with new legal arguments that turn upon

facts that were not in the record before the court-martial or convening authority (such as ineffective-assistance-of-counsel claims), the CAAF has also recognized the ability of CCAs "to obtain evidence by affidavit, testimony, stipulation, or a factfinding hearing, as it deems appropriate." *Boone*, 49 M.J. at 193. Neither the CAAF nor the government has argued that Article 66 forbids such record expansion.

Against that backdrop, it is hardly surprising that the CAAF has also recognized that evidence that was not presented to the court-martial or convening authority can nevertheless be considered by the CCAs when it is relevant to whether the sentence imposes cruel or unusual punishment. To that end, in *Erby*, the CAAF remanded a sentencing challenge to the Air Force CCA to "conduct whatever factfinding is required" to resolve the dispute. 54 M.J. at 479; *see United States* v. *Pena*, 64 M.J. 259, 266–67 (C.A.A.F. 2007) (considering a declaration appellant submitted to the CCA).

Like the CAAF in this case, the government portrays *Erby* and *Pena* as recognizing an "atextual exception" to Article 66's limitation on CCA review to "the entire record." Opp. 20. Also like the CAAF, the government claims that there is no justification for expanding such a judge-made carve-out beyond the context of sentencing challenges grounded in the Eighth Amendment or Article 55. *Id.*; *see also Jessie*, 79 M.J. at 444–45.

But the far better reading of *Erby* and *Pena*, and one that is consistent with the text and design of Article 66, is that "the entire record" for purposes of CCA review simply means the record *before the CCAs*. After all, although Article 66 gives the CCAs broad

discretion, that discretion is invariably asymmetrical in favor of *appellants*. Findings and sentences cannot be affirmed (or enhanced) by the CCAs based upon matters not submitted to the convening authority, but they can be rejected or reduced based upon the same.

So construed, "the entire record" that CCAs may consider *includes* new evidence properly made part of the record *in* the CCAs. This was the central point of *Erby*—which ordered the Air Force CCA to expand the record before resolving a sentencing challenge. *See* 54 M.J. at 479. If *Erby* truly was an "atextual" decision, there would have been no need for a remand; the CAAF could have simply expanded the record itself.

Likewise, the CAAF's decision in *Pena* turned on a declaration that the appellant had submitted to the Air Force CCA—and had thereby made part of the record before *that* court. *See United States* v. *Pena*, 61 M.J. 776, 780 (A.F. Ct. Crim. App. 2005). Just like in the ineffective-assistance-of-counsel cases, nothing in *Erby* or *Pena* suggested that the CAAF viewed such new evidence as *outside* "the entire record" under Article 66. Especially because Article 66 is entirely about review *by* the CCAs, the natural and consistent way to reconcile these cases is that "the entire record" is a reference to the record as it exists in the CCAs—*including* new evidence CCAs are allowed to consider.

If "the entire record" encompasses new evidence properly added to the record before the CCAs, then the CAAF was wrong to reject Petitioners' claims. Whether or not court-martial appellants have a right to introduce new evidence in CCAs in support of sentence-appropriateness claims, once that evidence is *already* part of the record before the CCAs, they necessarily have a right to have it considered.

II. RECENT REFORMS HAVE ONLY INCREASED THE NEED FOR THIS COURT'S INTERVENTION

The government closes its brief in opposition by deflecting attention from its textual argument, suggesting instead that the Question Presented has a limited scope because the relevant language of Article 66 is set to change in December 2023. As noted above, this argument assumes that the new language won't raise the same question—and that, even if it does, this Court should ignore a serious defect in the CCAs' authority affecting a significant (and growing) body of criminal appeals. *See ante* at 4.

But whereas the amendment to Article 66 is set to go into effect 19 months from now, other reforms are *already* exacerbating the problems caused by the CAAF's decision below. When Petitioners were tried, several months typically elapsed between sentencing and the deadline for submitting new material to the convening authority. *See, e.g.*, Pet. App. 23a, 35a (114 days for Petitioner Willman). Under the Military Justice Act of 2016, that window has been compressed from months to just 10 days—even if the trial record has not yet been authenticated. 10 U.S.C. § 860a(e)(1); R.C.M. 1106(d)(1). Thus, it is far *more* likely today that a viable challenge to the appropriateness of a sentence will arise after the convening authority has approved it than was true prior to that reform.

Congress has also heavily circumscribed the convening authority's power to grant sentencing relief in general. Whereas convening authorities previously had broad discretion to set aside a sentence in whole or in part, *see* 10 U.S.C. § 860(c) (2012), the same convening authorities may no longer set aside, in whole or in part, any "sentence of confinement" that

runs more than six months, or any "sentence of dismissal, dishonorable discharge, or bad-conduct discharge." *Id.* § 860a(b) (2018). Because of these constraints, there is little reason for appellants facing such sentences to even *attempt* to supplement the record within the truncated period that they now have for doing so.

What these reforms underscore is that, even if the Question Presented will have "limited prospective importance" as of December 2023, it has growing importance *until* then. After all, among other things, the CAAF's decision in this case precludes CCAs from considering any claims by servicemembers that the conditions of their post-trial confinement are inappropriate or even unlawful—unless they are so odious as to constitute cruel or unusual punishment.

Nor is collateral review a viable alternative. Servicemembers may not bring damages claims arising out of their imprisonment, whether under the Constitution or the Federal Tort Claims Act. *See United States* v. *Stanley*, 483 U.S. 669 (1987). And where the claim is that the post-trial conditions of confinement are inappropriate but not necessarily *unlawful*, injunctive or declaratory relief would likewise be unavailable. The government does not argue otherwise; it merely cites to the CAAF's own vague speculation that collateral relief *might* potentially be available in *some* cases. Opp. 20 (citing *Jessie*, 79 M.J. at 445). It would be one thing if Congress intended such an unjust result. But the broad authority it gave to the CCAs under Article 66—their "*carte blanche* to do justice"—is decisively to the contrary.

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Ultimately, the Petition asks this Court to reaffirm the unique role that Congress intended the CCAs to play within the military justice system. The CAAF's decision below would heavily circumscribe the CCAs' raison d'être in ways that the text of the UCMJ does not require and that Congress never intended. And as Judge Sparks has suggested, the damage caused by the CAAF's misbegotten ruling may extend well beyond sentence-appropriateness claims like those Petitioners advance here. *Jessie*, 79 M.J. at 449 (Sparks, J., dissenting).

Congress gave this Court the power to review decisions by the CAAF largely so that this Court—and not an Article I tribunal—would have the last word on important, structural questions affecting the entire military justice system. The government does not dispute that the CAAF's decision below creates a serious tension with respect to when the CCAs may consider new material not presented to a convening authority. It has nothing at all to say about how the decision below undermines Congress's unambiguous purpose in giving CCAs such unique and broad authority to review court-martial sentences. And, if this Court agrees that the Question Presented is worth resolving one way or the other, the brief in opposition does not identify a single obstacle that would prevent the Court from doing so here.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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