

such review under section 866 of this title (article 66). Such a waiver shall be—

- (1) signed by the accused and by defense counsel; and
- (2) attached to the record of trial.

(b) **WITHDRAWAL OF APPEAL.**—In a general or special court-martial, the accused may withdraw an appeal at any time.

(c) **DEATH PENALTY CASE EXCEPTION.**—Notwithstanding subsections (a) and (b), an accused may not waive the right to appeal or withdraw an appeal with respect to a judgment that includes a sentence of death.

(d) **WAIVER OR WITHDRAWAL AS BAR.**—A waiver or withdrawal under this section bars review under section 866 of this title (article 66).

*See 2016 Amendment note below.*

#### HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
861 .....	50:648.	May 5, 1950, ch. 169, § 1 (Art. 61), 64 Stat. 127.

The word “each” is substituted for the word “every”.

#### AMENDMENTS

2016—Pub. L. 114-328 amended section generally. Prior to amendment, section related to waiver or withdrawal of appeal.

1983—Pub. L. 98-209 amended section generally, substituting “Waiver or withdrawal of appeal” for “Same—General court-martial records” as section catchline, and, in text, substituting provisions relating to waiver or withdrawal of appeal for provisions relating to initial action by the convening authority on general court-martial records.

#### EFFECTIVE DATE OF 2016 AMENDMENT

Amendment by Pub. L. 114-328 effective on the date designated by the President, not later than the first day of the first calendar month beginning two years after Dec. 23, 2016, with implementing regulations prescribed by the President not later than one year after Dec. 23, 2016, and with provisions relating to applicability to various situations, see section 5542 of Pub. L. 114-328, set out as a note under section 801 of this title.

#### EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98-209 effective first day of eighth calendar month beginning after Dec. 6, 1983, but not to apply to any case in which the findings and sentence were adjudged by a court-martial before that date, and the proceedings in any such case to be held in the same manner and with the same effect as if such amendments had not been enacted, see section 12(a)(1), (4) of Pub. L. 98-209, set out as a note under section 801 of this title.

### § 862. Art. 62. Appeal by the United States

(a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):

(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(C) An order or ruling which directs the disclosure of classified information.

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Criminal Appeals and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

(Aug. 10, 1956, ch. 1041, 70A Stat. 58; Pub. L. 98-209, § 5(c)(1), Dec. 6, 1983, 97 Stat. 1398; Pub. L. 103-337, div. A, title IX, § 924(c)(2), Oct. 5, 1994, 108 Stat. 2831; Pub. L. 104-106, div. A, title XI, § 1141(a), Feb. 10, 1996, 110 Stat. 466; Pub. L. 114-328, div. E, title LIX, § 5326, Dec. 23, 2016, 130 Stat. 2928; Pub. L. 115-91, div. A, title V, § 531(h), Dec. 12, 2017, 131 Stat. 1385.)

#### AMENDMENT OF SECTION

*Pub. L. 115-91, div. A, title V, § 531(h), (p), Dec. 12, 2017, 131 Stat. 1385, 1388, provided that, effective immediately after the amendment made by section 5326 of Pub. L. 114-328, set out below, takes effect as provided for in section 5542 of that Act, subsection (b) of this section is amended by striking “, notwithstanding section 866(c) of this title (article 66(c))”. See 2017 Amendment note below.*

*Pub. L. 114-328, div. E, title LIX, § 5326, title LXIII, § 5542, Dec. 23, 2016, 130 Stat. 2928, 2967, made amendments to this section effective on the date designated by the President, not later than the first day of the first calendar month beginning two years after Dec. 23, 2016, with implementing regulations prescribed by the President not later than one year after Dec. 23,*

2016, and with provisions relating to applicability to various situations. After such effective date, this section will read:

§ 862. Art. 62. Appeal by the United States

(a)(1) In a trial by general or special court-martial, or in a pretrial proceeding under section 830a of this title (article 30a), the United States may appeal the following:

(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(C) An order or ruling which directs the disclosure of classified information.

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

(G) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.

(2)(A) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(B) An appeal of an order or ruling may not be taken when prohibited by section 844 of this title (article 44).

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Criminal Appeals and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

(d) The United States may appeal a ruling or order of a military magistrate in the same manner as had the ruling or order been made by a military judge, except that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

(e) The provisions of this section shall be liberally construed to effect its purposes.

See 2016 Amendment notes below.

HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
862(a) .....	50:649(a).	May 5, 1950, ch. 169, §1
862(b) .....	50:649(b).	(Art. 62), 64 Stat. 127.

AMENDMENTS

2017—Subsec. (b). Pub. L. 115-91 struck out “, notwithstanding section 866(c) of this title (article 66(c))” after “matters of law”.

2016—Subsec. (a)(1). Pub. L. 114-328, §5326(1)(A), in introductory provisions, substituted “general or special court-martial, or in a pretrial proceeding under section 830a of this title (article 30a), the United States may appeal the following:” for “court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):”.

Subsec. (a)(1)(G). Pub. L. 114-328, §5326(1)(B), added subpar. (G).

Subsec. (a)(2). Pub. L. 114-328, §5326(2), designated existing provisions as subpar. (A) and added subpar. (B).

Subsecs. (d), (e). Pub. L. 114-328, §5326(3), added subsecs. (d) and (e).

1996—Subsec. (a)(1). Pub. L. 104-106 amended par. (1) generally. Prior to amendment, par. (1) read as follows: “In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.”

1994—Subsec. (b). Pub. L. 103-337 substituted “Court of Criminal Appeals” for “Court of Military Review” in two places.

1983—Pub. L. 98-209 amended section generally, substituting “Appeal by the United States” for “Reconsideration and revision” as section catchline, and, in text, substituting provisions relating to appeals by the United States for provisions relating to the convening authority returning the record to the court for reconsideration and appropriate action.

EFFECTIVE DATE OF 2017 AMENDMENT

Amendment by Pub. L. 115-91 effective immediately after the amendments made by div. E (§§ 5001-5542) of Pub. L. 114-328 take effect as provided for in section 5542 of that Act (10 U.S.C. 801 note), see section 531(p) of Pub. L. 115-91, set out as a note under section 801 of this title.

EFFECTIVE DATE OF 2016 AMENDMENT

Amendment by Pub. L. 114-328 effective on the date designated by the President, not later than the first day of the first calendar month beginning two years after Dec. 23, 2016, with implementing regulations prescribed by the President not later than one year after Dec. 23, 2016, and with provisions relating to applicability to various situations, see section 5542 of Pub. L. 114-328, set out as a note under section 801 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98-209 effective first day of eighth calendar month beginning after Dec. 6, 1983, but not to apply to any case in which the findings and sentence were adjudged by a court-martial before that date, and the proceedings in any such case to be held

in the same manner and with the same effect as if such amendments had not been enacted, see section 12(a)(1), (4) of Pub. L. 98-209, set out as a note under section 801 of this title.

### § 863. Art. 63. Rehearings

Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

(Aug. 10, 1956, ch. 1041, 70A Stat. 58; Pub. L. 98-209, §5(d), Dec. 6, 1983, 97 Stat. 1398; Pub. L. 102-484, div. A, title X, §1065, Oct. 23, 1992, 106 Stat. 2506; Pub. L. 114-328, div. E, title LIX, §5327, Dec. 23, 2016, 130 Stat. 2929; Pub. L. 115-91, div. A, title V, §531(i), Dec. 12, 2017, 131 Stat. 1385.)

#### AMENDMENT OF SECTION

*Pub. L. 115-91, div. A, title V, §531(i), (p), Dec. 12, 2017, 131 Stat. 1385, 1388, provided that, effective immediately after the amendment made by section 5327 of Pub. L. 114-328, set out below, takes effect as provided for in section 5542 of that Act, subsection (b) of this section is amended by inserting before the period at the end the following: “, subject to such limitations as the President may prescribe by regulation”. See 2017 Amendment note below.*

*Pub. L. 114-328, div. E, title LIX, §5327, title LXIII, §5542, Dec. 23, 2016, 130 Stat. 2929, 2967, made amendments to this section effective on the date designated by the President, not later than the first day of the first calendar month beginning two years after Dec. 23, 2016, with implementing regulations prescribed by the President not later than one year after Dec. 23, 2016, and with provisions relating to applicability to various situations. After such effective date, this section will read:*

### § 863. Art. 63. Rehearings

(a) Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be adjudged, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless

the sentence prescribed for the offense is mandatory.

(b) If the sentence adjudged by the first court-martial was in accordance with a plea agreement under section 853a of this title (article 53a) and the accused at the rehearing does not comply with the agreement, or if a plea of guilty was entered for an offense at the first court-martial and a plea of not guilty was entered at the rehearing, the sentence as to those charges or specifications may include any punishment not in excess of that which could have been adjudged at the first court-martial.

(c) If, after appeal by the Government under section 856(d) of this title (article 56(d)), the sentence adjudged is set aside and a rehearing on sentence is ordered by the Court of Criminal Appeals or Court of Appeals for the Armed Forces, the court-martial may impose any sentence that is in accordance with the order or ruling setting aside the adjudged sentence, subject to such limitations as the President may prescribe by regulation.

*See 2016 Amendment note below.*

#### HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
863(a) .....	50:650(a).	May 5, 1950, ch. 169, §1
863(b) .....	50:650(b).	(Art. 63), 64 Stat. 127.

In subsection (a), the words “In such a” are substituted for the words “in which”.

In subsection (b), the word “Each” is substituted for the word “Every”. The word “may” is substituted for the word “shall” in the second sentence.

#### AMENDMENTS

2017—Subsec. (b). Pub. L. 115-91 inserted “, subject to such limitations as the President may prescribe by regulation” before period at end.

2016—Pub. L. 114-328 designated existing provisions as subsec. (a), substituted “may be adjudged” for “may be approved” in second sentence, struck out at end “If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.”, and added subsecs. (b) and (c).

1992—Pub. L. 102-484 substituted “approved” for “imposed” in second sentence and inserted “approved” before last reference to “sentence” in third sentence.

1983—Pub. L. 98-209 struck out subsec. (a) which provided that if the convening authority disapproved the findings and sentence of a court-martial he could, except where there was lack of sufficient evidence in the record to support the findings, order a rehearing, stating the reasons for disapproval, and that if he disapproved the findings without reordering a rehearing, he had to dismiss the charges, and redesignated former subsec. (b) as entire section, and, as so redesignated, inserted “under this chapter” after “Each rehearing”, and inserted provision that if the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.