No. 98-347
[***NOTE: where possible links have been made to the article or court opinion***]

In the Supreme Court of the United States

OCTOBER TERM, 1997

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WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioner,

v.

JAMES T. GOLDSMITH, *Respondent*.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

_____

MOTION OF NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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SEPTEMBER 1998

MOTION OF
NATIONAL INSTITUTE OF MILITARY JUSTICE
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.2, the National Institute of Military Justice (``NIMJ'') respectfully moves for leave to file the attached brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.

1. NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ takes an active interest in the entire field of military justice, and fosters improved public understanding by such means as publication of the monthly *Military Justice Gazette* and the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces*, and the sponsorship of seminars and training programs. NIMJ has commented on and proposed changes to military procedural rules, testified before Congress, and appeared as an *amicus curiae* in the United States Court of Appeals for the Armed Forces. NIMJ's advisory board includes law professors, private practitioners and other experts in the field, none of whom are currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer rank. NIMJ is entirely independent of the government and relies exclusively on voluntary contributions for its programs.

2. NIMJ seeks leave to file this brief because the decision below, if allowed to stand, will continue the uncertainty that has long plagued the military justice system as to the scope of the authority of the Court of Appeals for the Armed Forces under the All Writs Act. Especially given the influence of the Court of Appeals' approach to the All Writs Act on the four service Courts of Criminal Appeals, continuing uncertainty on this issue ill serves the public interest.

3. Counsel for petitioner has consented to the filing of this brief; counsel for respondent has withheld consent. Copies of their responses to our requests for consent have been lodged with the Clerk.

For the foregoing reasons, NIMJ respectfully moves for leave to file the attached brief.

Respectfully submitted.

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BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Institute of Military Justice (``NIMJ'') respectfully submits this brief *amicus curiae* with regard to the first question stated in the petition.[(1)] We submit this brief because, although dropping an officer from the rolls is not a frequent occurrence, the scope of the All Writs Act authority of the United States Court of Appeals for the Armed Forces is an important and recurring issue, and that court's critical institutional role is compromised when it asserts jurisdiction in excess of its statutory authority.

The Court of Appeals stands at the apex of the military justice system. What it *does* counts for much in setting the tone throughout the system. What it *says* also counts for much. ``Through its decisions, the Court [of Appeals] has a significant impact on the state of discipline in the armed forces, military readiness, and the rights of servicemembers. The Court plays an indispensable role in promoting public confidence in the military justice system." S. Rep. No. 81, 101st Cong., 1st Sess. 171 (1989). It is self-defeating if, in pursuit of that objective, it compromises its own role by claiming authority Congress has not conferred on it, and invites others who properly look to it for leadership to do the same.[(2)]

Because of the breadth of its potential appellate jurisdiction, the Court of Appeals enjoys sweeping authority under the All Writs Act. That authority rests on a firmer footing than the decision below suggests, but it does not extend to deciding whether the Constitution forbids dropping respondent from the rolls under the legislation Congress passed in 1996.

Statement

1. Goldsmith, an Air Force officer, was convicted at a general court-martial and sentenced to a period of confinement and forfeiture of pay. His case was subject to review by the Air Force Court of Criminal Appeals as a matter of right and then to discretionary review by the Court of Appeals for the Armed Forces. The Air Force Court affirmed the findings and sentence. Goldsmith elected not to seek discretionary review by the Court of Appeals.[(3)]

2. After the time for seeking discretionary review had expired, Goldsmith sought extraordinary relief from the Air Force Court based on the fact that medication he needed as a result of his medical condition was being withheld by authorities at the United States Disciplinary Barracks. That court denied the writ. Thereafter, he filed a ``writ appeal petition'' seeking review of the Air Force Court's denial. *See* C.A.A.F.R. 4(b)(2), 18(a)(4). While that petition was pending, he added a further claim--not presented to the Air Force Court[(4)]--seeking to bar the Air Force from dropping him from the rolls in accordance with legislation Congress passed in 1996, after his offenses. That legislation was part of a larger measure, another provision of which, concerning automatic forfeiture of pay, was held unconstitutional as an *ex post facto* law in *United States v. Gorski*, 47 M.J. 370 (1997). By the time the Court of Appeals decided his case, Goldsmith had been released from confinement, but the Air Force continued to propose dropping him from the rolls as provided in the new statute.

3. In an opinion by Senior Judge Everett, the Court of Appeals held that the medication issue had become moot, Pet. App. 8a, 15a, but noted that the court would have jurisdiction under the All Writs Act to address issues of unlawful confinement and cruel or unusual punishment. Pet. App. 6a-7a. As for the dropping-from-the-rolls issue, the court concluded that it had jurisdiction under the All Writs Act, Pet. App. 4a-6a, that the legislation could not constitutionally be applied to Goldsmith, Pet. App. 11a-14a, and that the Air Force was barred from dropping him from the rolls. Pet. App. 14a-15a. Chief Judge Cox and Judge Sullivan wrote separate concurring opinions. Pet. App. 15a, 17a. Judges Gierke and Crawford dissented, maintaining that dropping from the rolls would be a collateral administrative consequence of Goldsmith's confinement, over which the Court of Appeals had no jurisdiction. Pet. App. 17a.

4. Goldsmith's constitutional claim can be addressed in a variety of forums. In addition to those noted in the petition (at 12), he could sue in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, for pay and allowances lost as a result of being dropped from the rolls.

Reasons for Granting the Writ

The linchpin of the Court of Appeals' exercise of jurisdiction is its view that

if this Court is empowered to grant extraordinary relief in a case that it cannot possibly review directly, it is also empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis

for direct review in this Court after review in the intermediate court. Moreover, in our view, Goldsmith's failure to petition this Court for discretionary review pursuant to Article 67 did not waive or otherwise affect our extraordinary-writ jurisdiction in connection with this case. Pet. App. 6a.

This view disregards the requirement that an extraordinary writ be ``in aid of'' the issuing court's basic grant of jurisdiction. 28 U.S.C. § 1651(a). This error is more fundamental than whether dropping from the rolls is administrative or punitive.

The UCMJ defines the categories of cases that are subject to review by the Court of Appeals. UCMJ Arts. 66- 67, 10 U.S.C. §§ 866-67. The court's application of the All Writs Act to cases outside those categories has been inconsistent. After some initial uncertainty, *see* Michael E. Brown, Note, *Building a System of Military Justice Through the All Writs Act*, 52 IND. L.J. 189, 190-91 & n.17 (1976) (quoting *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969)); *United States v. Snyder*, 18 C.M.A. 480, 40 C.M.R. 192 (1969), it claimed in *McPhail v. United States*, 1 M.J. 457 (1976), to have writ authority in a subjurisdictional special court-martial. The author of *McPhail* later repudiated it, *Stewart v. Stevens*, 5 M.J. 220, 221 (1978) (Cook, J., concurring), but the doctrinal course had been set.

Since then, the Court of Appeals has claimed All Writs Act authority in such settings as a Navy special court-martial that could not have triggered review by the military appellate courts because the accused was a commissioned officer, *Unger v. Ziemniak*, 27 M.J. 349 (1989); a Navy general court-martial that could not have reached it because the intermediate court had in effect entered an unappealable acquittal, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (1988); Air Force general courts-martial that were not subject to appellate court review because the accused had been acquitted at trial, *Gray v. Mahoney*, 39 M.J. 299 (1994); and a nonjudicial punishment that falls outside the military appellate courts' normal purview. *Fletcher v. Covington*, 42 M.J. 215 (1995); *see* note 8 *infra*.

With the exception of *Carlucci*, where the court blocked an Inspector General investigation of intermediate military appellate judges,[(5)] it has claimed jurisdiction but declined to issue any writ beyond a stay.[(6)] As a result, its jurisdictional claims have, until now, escaped review on certiorari. It is on this line of cases (and the notion of pendent jurisdiction) that the Court of Appeals rested its claim to authority in Goldsmith's case. *See* Pet. App. 5a-6a & n.3, 9a.[(7)]

While dropping from the rolls is scarcely an everyday occurrence, the mischief threatened by the Court of Appeals' claim to All Writs Act authority that exceeds its broad potential appellate jurisdiction is substantial. It blurs the line between the statutory supervisory responsibility of the Judge Advocates General, *see* UCMJ Arts. 6, 69, 10 U.S.C. §§ 806, 869, and other military authorities, on the one hand, and the role of the Court of Appeals, on the other. By doing so, it creates a possible no-man's land where real abuses may lurk undetected or, worse yet, become the object of a corrosive tug-of-war between court and military. By perpetuating past claims to a sweeping jurisdiction whose parameters are necessarily uncharted, the decision below fosters uncertainty and compromises the ability of all concerned in the court-martial process--commanders and their legal advisers, prosecutors, defense counsel and accuseds--to exercise their rights

intelligently and perform their functions in a lawful manner. Ironically, because the Court of Appeals' claimed jurisdiction is subject to the prudential standards applicable to extraordinary relief, it may also prove to be illusory for GIs who might seek to invoke it.

Significantly, to the extent that the four service Courts of Criminal Appeals take their lead from the Court of Appeals in considering the limits of their own All Writs Act authority over cases not subject to normal review, the danger that those courts will adopt a similar approach cannot be dismissed. Indeed, even before the decision below was handed down, there was reason to be concerned on this score. For example, in *Dew v. United States*, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998) (en banc), *writ app. petition filed*, No. 98-817 (C.A.A.F. May 15, 1998), the Army Court asserted that ``[o]ur authority to issue extraordinary writs `in aid of jurisdiction' under the All Writs Act is not limited to our actual or potential appellate jurisdiction defined in Articles 62, 66, and 69'' of the UCMJ, 10 U.S.C. §§ 862, 866, 869.

The second prong of the Court of Appeals' jurisdictional claim, *see* p. 5 *supra*, is also troublesome. It is difficult to view an extraordinary writ as being ``in aid of'' the issuing court's jurisdiction where the party seeking the writ elected not to invoke that jurisdiction in the first place and there is no suggestion of chicanery or a miscarriage of justice in the appellate process.[(8)] Of course, a different question would be presented if, for example, the waiver were claimed to have been the result of ineffective assist-ance of counsel, overreaching, or some other factor that compromised the appellate process. Nothing in the decision below suggests that this is such a case.

The principle of civilian appellate review of courts-martial is at the core of the UCMJ. It is a model that has been embraced by other common law democracies with which we share cherished legal and political traditions. Not for nothing has Congress insisted that the judges of the Court of Appeals be drawn from civilian life, UCMJ Art. 142(b)(1), 10 U.S.C. § 942(b)(1), and included them in the Code Committee that Congress intended to function as its eyes and ears on the military justice system. UCMJ Art. 146, 10 U.S.C. § 946. A strong Court of Appeals for the Armed Forces is central to both civilian control of the military and public confidence in the fair administration of military justice. Experience over the years teaches that the power to grant extraordinary relief is indeed integral to the Court of Appeals' role. At the same time, however, *excessive* claims, framed in the language of the All Writs Act, may squander the court's hard-earned institutional capital and thus defeat the larger congressional purpose.

These considerations favor a grant of certiorari. If, in the end, the decision below is reversed, the congressional goal of effective civilian appellate oversight of military justice will still be served because the Court of Appeals will still enjoy broad All Writs Act power not only as to cases that reach it as a result of its core Article 67 grant of jurisdiction but also as to those cases that remain subject to its *potential* appellate jurisdiction. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).[(9)]

While Congress has not conducted extended hearings on military justice in many years, the entire subject has received unusual public attention in recent years as a result of a spate of high-profile courts-martial. For this reason, one might expect that Congress would revisit the military appellate architecture and make whatever alterations seem warranted in light of this Court's disposition of this case.[(10)] Perhaps the ``particular needs of the military justice system . . . may be enough'' to warrant a departure from

conventional All Writs Act analysis. Edward H. Cooper, *Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts*, 98 F.R.D. 593, 604 (1983), noted in *Carlucci, supra*, 26 M.J. at 331 n.5. That, however, is for Congress to decide.

This case concerns what Congress has done, not what it might do. Whether the Court of Appeals and the service Courts of Criminal Appeals have supervisory power over their subordinate courts ``is a highly controversial topic of great significance." 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 25-20.00, at 36 & n.65.1 (Cum. Supp. 1995). ``The legitimacy and parameters of [the Court of Appeals'] supervisory jurisdiction remain[] uncertain." JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 275 (1998). Review is necessary to resolve that uncer-tainty.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1998

1. No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief.

2. ``. . . I urge you to always keep in mind our system's constitutional roots, its accountability to the American people, its role in ensuring morale and discipline, and its relationship to the eternal truth--that the young men and women upon whom we depend for success in any endeavor must have faith in the value of doing things the right way. Military Justice must reinforce that faith." John S. Cooke, *The Twenty-Sixth Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 29 (1998).

3. Under the UCMJ, all that is required for discretionary review by the Court of Appeals is ``good cause." UCMJ Art. 67(a)(3), 10 U.S.C. § 867(a)(3). The factors that bear on whether *this* Court will grant certiorari, S. Ct. R. 10, are echoed in the Court of Appeals' rules, *see* C.A.A.F.R. 21(b)(4), but as a practical matter all that is required is an issue of some substance, rather than one of any special importance or generic effect.

4. Absent good cause, the Court of Appeals' rules require resort to the Courts of Criminal Appeals before extraordinary relief is sought from it. C.A.A.F.R. 4(b)(1).

5. The court predicated its All Writs Act authority on, among other things, the notion that if the judges who sought relief were to disobey an order to cooperate in the investigation, they themselves would have been subject to court-martial. *Id*. at 333.

6. In *Gray*, the Court of Appeals' All Writs Act authority was not disputed. 39 M.J. at 303. The cases are surveyed in DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 17-19, at 824-25 & nn.5-13 (4th ed. 1996).

7. The Court of Appeals cited no authority for the proposition that Goldsmith could invoke its All Writs Act power even though he had waived discretionary review. It also did not explain how allowing such a litigant to do so was ``in aid of" its jurisdiction. Pet. App. 6a.

8. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943), observed that a court's All Writs Act authority ``extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." On its face this could be read to cover cases where, as here, the time to perfect an appeal has passed, rather than not yet elapsed. The next sentence of Chief Justice Stone's opinion refers, however, to the possibility that appellate jurisdiction could be defeated, thus making it clear that he had in mind appeals that could still be perfected, and not those for which the deadline had expired.

9. Under § 1302 of National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1576 (1989), the Judge Advocates General can refer *any* court-martial--even a summary court-martial--to the Courts of Criminal Appeals, from which review could in turn be sought in the Court of Appeals. For this reason, while the

Court of Appeals lacked the All Writs Act power it claimed in *Unger*, it would have that authority if a similar case were to arise today. Nonjudicial punishments remain outside the court's direct authority, but can be ruled on when they figure in courts-martial that are otherwise within its jurisdiction. *E.g., United States v. Edwards*, 46 M.J. 41 (1997).

10. Congress also has before it a study of judicial review of military personnel administrative actions. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 551, 110 Stat. 318 (1996).