by Bradley Richardson

A History of Extraordinary Relief in the U.S. Court of Appeals for the Armed Forces

The U.S. Court of Appeals for the Armed Forces (CAAF)[1] has struggled to define its jurisdiction to grant extraordinary relief. As recently as 2008, the court still lacked a consensus regarding the boundaries of its extraordinary relief authority. The result is an ebb and flow of authority throughout CAAF's history, with the court's jurisdiction ultimately being confined to review of findings and sentences under Article 67. This article will trace the history of extraordinary relief at CAAF, focusing on the cases that both extended and confined CAAF's authority. From those cases, a set of clearly defined rules and tests have arisen, but dissenting opinions still question the extent at which CAAF may grant extraordinary relief.

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The authority for federal courts to grant extraordinary relief was established in the Judiciary Act of 1789, § 14 (1 Stat. 81). The act later evolved into two statutes, the All Writs Act and the federal habeas corpus statute, which form the basis of federal extraordinary relief authority. The All Writs Act provides that "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aide of their respective jurisdictions and agreeable to the usages and principles of law."[2] On the other hand, the federal habeas corpus statute grants habeas power only to Article III courts and sets forth general guidelines and procedures which are applicable in those actions.[3] The distinction is important because, unlike Federal Circuit Courts of Appeal, CAAF has historically analyzed every writ for extraordinary relief, including habeas corpus, under the All Writs Act.[4] Only recently has the court adopted procedures from the Antiterrorism and Effective Death Penalty Act (AEDPA) for the evaluations of petitions for habeas corpus.[5]

Extraordinary relief in the then Court of Military Appeals (CMA) was first mentioned in 1954 in two opinions, but only in dicta and concurring opinions.[6] Subsequent to these two opinions, the court issued a series of decisions assuming it had authority to issue extraordinary relief but dismissing each petition either for lack of merit or jurisdiction over the original case.[7] Twelve years later, the court explicitly asserted its authority for the first time in *United States v. Frishcholz*.[8] In *Frishcholz*, the court addressed a petition for a writ of error coram nobis. The government argued that the All Writs Act did not grant authority for an Article I court to issue extraordinary relief. The court disagreed, determining that the All Writs Act applies to all courts established by Congress.[9] The court, while acknowledging its administrative location within the Department of Defense, "entertain[ed] no doubt ... that [it was] a court established by act of Congress within the meaning of the All Writs Act."[10] Nevertheless, the court dismissed the petition for failure to allege any new circumstances sufficient for a grant of relief.[11]

The court used its new found authority in subsequent cases without granting relief.[12] In other writ petitions found to be meritorious, the court granted relief on alternative grounds.[13] The authority, however, was without defined boundaries. The next 33 years would see the court expanding and limiting its own authority, creating uncertainty of its own extraordinary jurisdiction under the All Writs Act.

This period began with *United States v. Bevilacqua*.[14] In *Bevilacqua*, the court expanded its authority, holding that "[the] court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court martial."[15] The opinion had a potential effect of expanding the court's jurisdiction to grant extraordinary relief in areas outside of its original jurisdiction.[16] *Bevilacqua* was short lived. The U.S. Supreme Court subsequently addressed the CMA/CAAF's power to issue an emergency writ of habeas corpus in *Noyd v. Bond*.[17] In a footnote, the Supreme Court cited *Bevilacqua* as contradictory to its determination that CMA/CAAF had the "power" to issue an emergency writ, but only in cases that could be reviewed under its statutory jurisdiction.[18]

The court answered by clarifying its authority to grant extraordinary relief in *United States v. Snyder*.[19] Limiting *Bevilacqua*, the court confined its power to grant extraordinary relief to cases over which the court has, or could potentially gain, appellate jurisdiction. Following *Snyder*, the court released a string of summary dismissals and miscellaneous orders further clarifying and reinforcing its

Bradley Richardson, J.D., University of South Dakota School of Law, received his B.M. in 2002 from West Virginia University. *In summer 2012, the author interned in the chambers of Hon. Charles E. Erdmann of the U.S. Court of Appeals for the Armed Forces. He would like to acknowledge and thank Judge Erdmann; Theodore E. Dixon (Col., U.S. Army, Ret.), senior attorney advisor to Judge Erdmann; Katherine Bourdine; Allyson Breech; Tracy Sequenzia; and Michael Lumley for their assistance with this article.*

limitation.[20]

Although the court seemed to be narrowing its scope of authority, there was still a lack of uniformity defining the meaning of "in aid of jurisdiction."A divided court addressed the issue in *Collier v. United States*.[21] Through a "petition for appropriate relief," the court was asked to review the petitioner's post-trial confinement after one commander rescinded another commander's deferral of confinement. The issue was that the petitioner's appeal was pending before the Court of Military Review and CMA/CAAF would not have jurisdiction until after completion of that phase of review. The court granted relief and reinstated the deferment. In his dissent, Judge Darden argued that petitions for extraordinary relief during the system without providing relief.

The court continued the expansion of its authority in *McPhail v. United States*.[25] In *McPhail*, the court reviewed a petition for error coram nobis arising from a special court-martial where no bad conduct discharge was adjudged, which is outside of the court's jurisdiction under Article 67. It determined that *Synder* was too narrow and the "authority to issue an appropriate writ in 'aid' of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67." This allowed the court to grant relief to a servicemember from inferior courts acting contrary to the Constitution and prior decisions of higher appellate courts.[26]

McPhail became the policy for several years until United States

pendency of an appeal would only be appropriate when the action below "threat[ened] the loss of the Court's appellate powers over the subject matter." He further suggested that writs of mandamus and prohibition, not habeas corpus, "might well be appropriate as an aid of jurisdiction." However, the majority in *Collier* extended the court's authority, granting relief even when the case was not directly before the court.[22]

Opinions like *Collier* have led some commentators to suggest that the court uses extraordinary relief as a tool of persuasion for change within the military judicial system.[23] This is accomplished when the court asserts jurisdiction to review a petition for a writ, describe circumstances in which the writ could issue, but denies relief to the petitioner. The most overt usage of this policy is in *Courtney v. Williams*, where the court ordered the military to conduct probable cause hearings, overseen by a neutral and detached magistrate, for all pretrial confinement decisions made by command.[24] Here, the court forced a change in the military judicial

Supreme Court limited *McPhail* in *Clinton v. Goldsmith*, thus establishing CAAF's current jurisdictional boundaries of extraordinary relief. Goldsmith was an Air Force officer whom the President administratively dropped from the rolls after he was convicted of various offenses but not sentenced to a discharge. CAAF used its extraordinary relief power to enjoin the President, but the Supreme Court concluded that CAAF had exceeded its statutory authority. The Court concluded that CAAF's jurisdiction is confined by the All Writs Act to "it's existing statutory authority," and writs may be issued only when "necessary" and "appropriate" in light of a servicemember's alternative opportunities to seek relief. The All Writs Act "does not enlarge that jurisdiction." Further, the decision reestablished CAAF's authority to grant extraordinary relief only "in aid of" its jurisdiction, limiting review to courts-martial findings and sentences under Article 67, UCMJ.[27]

Following the *Goldsmith* decision, CAAF further addressed collateral review in *United States v. Loving* and *United States v.*

Denedo.[28] *Loving*, a case with an extensive appellate history, established the adoption of certain provisions of the Antiterrorism and Effective Death Penalty Act.[29] The procedural history of *Denedo* is more typical.[30] In that case, the court established the rules and tests for a writ of error coram nobis. Both cases gave the court the ability to hone its policy regarding collateral review, establishing clear rules and tests for extraordinary relief. The question of jurisdiction, however, resurfaced in *Denedo*, resulting in a split decision later settled by the U.S. Supreme Court.

In *Denedo*, the petitioner was a lawful permanent resident who entered a guilty plea in a special court-martial. During plea negotiations, Denedo expressly raised concerns about deportation but received assurances from his civilian counsel that the guilty plea would avoid any risk of deportation. He appealed his case to the Navy-Marine Corps Court of Criminal Appeals but did not pursue any further appellate review and served his confinement. Six years after his bad-conduct discharge was executed, deportation proceedings were initiated based on his court-martial conviction. He then filed a petition for extraordinary relief, requesting collateral review for ineffective assistance of counsel and an issuance of a writ of error coram nobis. Chief Judge Effron's majority opinion determined that the requested relief was "limited to the findings and sentence of the court-martial reviewed by the Court of Criminal Appeals." Therefore, CAAF had jurisdiction because the claim of ineffective assistance of counsel went "directly to the validity and integrity of the judgment rendered and affirmed. As such, the petition was 'in aid of' the existing jurisdiction of the Court of Criminal Appeals."[31]

Judge Stucky's dissent acknowledged the authority to consider coram nobis petitions, but argued that the case lacked merit and that jurisdiction does not extend to a "collateral consequence outside the purview of the armed forces and the system of military justice." Judge Ryan's dissent focused on the loss of the court's jurisdiction upon the finality of a sentence under Article 76 and the petitioner's severance from the military. She argued that upon finality, the court loses the ability to conduct collateral review. This is premised in part on the lack of statutory authority to conduct collateral review in Article 67. Moreover, Article 76 limits post-appellate review to petitions for a new trial under Article 73, Article 74, or presidential action. Finally, Judge Ryan argued that if the majority had not taken jurisdiction, Denedo's claims were immediately cognizable in an Article III court.[32]

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The Supreme Court affirmed.[33] Addressing the finality rule, the Court determined that the "long-recognized authority of a court to protect the integrity of its earlier judgments impels the conclusion that the finality rule is not so inflexible that it trumps each and every competing consideration."[34] It further rooted its opinion in the unique nature of the writ of coram nobis "as a belated extension of the original proceeding during which the error allegedly transpired."[35]

Following *Denedo* and *Loving*, CAAF may grant extraordinary relief where it currently exercises or could exercise direct appellate review.[36] But the dissenting opinions in *Denedo* demonstrate that future questions of CAAF's authority to grant extraordinary relief may again come into question, possibly requiring additional review by the U.S. Supreme Court.[37] The limited jurisdiction as an Article I court is one reason. The other is that "an extraordinary remedy ... should not be granted in an ordinary case."

Regardless, the consistent theme throughout CAAF's history of extraordinary relief is that a high jurisdictional threshold must be overcome before analysis of the merits. Once jurisdiction is established, CAAF's body of law provides clear avenues to determine whether to issue the writ.[38]

A Brief Summary of Current Rules and Tests for Extraordinary Relief

CAAF may issue an extraordinary writ for collaterally review when the writ is in aid of CAAF's jurisdiction pursuant to the All Writs Act,[39] which invests a court with power that is essentially equitable.[40] Therefore, the petitioner must exhaust all other remedies or pursue the normal appellate process prior to petitioning through a writ.[41] "The determination of whether another remedy is adequate requires a contextual analysis."[42] Presidential action is not an adequate remedy because it falls outside the scope of the judicial process.[43]

If exhaustion of other remedies is established, two separate determinations are required before granting an extraordinary writ: (1) the writ must be "in aid of" the court's jurisdiction and (2) the writ must be "necessary or appropriate."[44] The writ is "in aid of" the court's jurisdiction if the relief "modif[ies] an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court martial[.]"[45] The writ must directly affect a finding or sentence imposed (or potentially imposed) in a court-martial.[46] The accused bears the burden of "establish[ing] a clear and indisputable right to the requested relief."[47]

The writ should be brought within the military judicial system before petitioning a federal civilian court.[48] Generally, the appropriate forum to first petition for extraordinary relief is the service branch Court of Criminal Appeals.[49] If the writ is denied, then it may be appealed to CAAF under a writ-appeal.[50] However, a writ may be petitioned directly to CAAF by a showing of good cause for the original petition for extraordinary relief.[51]

Conclusion

This article only seeks to document the history of extraordinary relief at CAAF in an effort to aid practitioners who are petitioning the court for extraordinary relief. For a more detailed explanation of the rules and tests for each individual writ, please see the author's article "A Guide to Extraordinary Relief at CAAF" in the U.S. Air

Force JAG magazine, *The Reporter*, Vol. 40, No. 2. ⊙

Endnotes

[1]Formerly the U.S. Court of Military Appeals. Decisions prior to 1994 will be referenced as CMA/CAAF when necessary for clarity.

[2]28 U.S.C. § 1651(a) (2006).

[3]28 U.S.C. § 2241 (2006).

[4]Captain John J. Pavlick, *Extraordinary Writs in the Military Justice System: A Different Prospective*, 84 Mil. L. Rev. 7, 35-36 (1979).

[5]*Loving v. United States*, 64 M.J. 132, 134 (2006).

[6]*See United States v. Best*, 4 C.M.A. 581, 585, 16 C.M.R. 155, 159 (C.M.A. 1954); *United States v. Ferguson*, 5 C.M.A. 68, 87, 17 C.M.R. 68, 87 (C.M.A. 1954) (Quinn, J., concurring).

[7]*United States v. Buck*, 9 C.M.A. 290, 26 C.M.R. 79 (C.M.A. 1958); *United States v. Tavares*, 10 C.M.A. 282, 27 C.M.R. 356 (C.M.A. 1959); *In re Taylor*, 12 C.M.A. 282, 27 C.M.R. 356 (C.M.A. 1959) (dismissed because the case was an administrative decision outside the court's jurisdiction).

[8]16 C.M.A. 150, 152, 36 C.M.R. 306, 308 (C.M.A. 1966).

[9]*Id.* at 151, 36 C.M.R. at 308.

[10]*Id.*

[11]*Id.*

[12]*See, e.g., Gale v. United States*, 17 C.M.A. 40, 37 C.M.R. 304 (1967 C.M.A.); *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (C.M.A. 1967).

[13]*See, e.g., United States v. Garcia*, 18 C.M.A. 5,6, 39 C.M.R. 5,6, (C.M.A. 1968) (Petition for a writ of error coram nobis and a writ of habeas corpus treated as a petition for reconsideration); *Jones v. Ignatius*, 18 C.M.A. 7, 9, 39 C.M.R. 7, 9 (C.M.A. 1968) (petition for a writ of habeas corpus granted as a petition for appropriate relief.)

[14]18 C.M.A. 10, 39 C.M.R. 10 (C.M.A. 1969).

[15]*Id.* at 11-12, 39 C.M.R. at 11-12.

[16]*See* UCMJ art. 67 (2006).

[17]395 U.S. 683, n.7 (1969).

[18]*Id.*

[19]18 C.M.A. 480, 40 C.M.R. 192 (C.M.A. 1969).

[20]*See Hurt v. Cooksey*, 19 C.M.A. 584, 42 C.M.R. 186 (C.M.A. 1970) (dismissed for lack of jurisdiction to review administrative decisions); *Mueller v. Brown*, 18 C.M.A. 534, 40 C.M.R. 246 (C.M.A. 1969) (dismissed for lack of jurisdiction to review administrative decisions); *Whalen v. Stokes*, 19 C.M.A. 636, 42 C.M.R. 193 (C.M.A. 1970) (lack of ancillary jurisdiction in non-judicial punishment cases); *Thomas v. United States*, 19 C.M.A. 639 (C.M.A. 1970) (misc. order) (lack of ancillary jurisdiction in summary court-martial cases); *Hyatt v. United States*, 19 C.M.A. 635 (C.M.A. 1970) (misc. order, dismissed for lack of ancillary jurisdiction in special court-martial cases not involving a punitive discharge).

[21]19 C.M.A. 511, 42 C.M.R. 113 (C.M.A. 1970).

[22]*Id.* at 512-17, 42 C.M.R. at 114-18.

[23]*See* Pavlick, *supra* note 4, at 32-37.

[24]1 M.J. 267, 269 (C.M.A. 1976) (citing *Gerstein v. Pugh*, 420 U.S. 103, (1975)).

[25]1 M.J. 457, 458 (C.M.A. 1976).

[26]*Id.* at 458-62.

[27]526 U.S. 529, 531 (1999).

[28]*United States v. Loving*, 68 M.J. 1 (CAAF 2009); *United States v. Denedo*, 66 M.J. 114 (CAAF 2008).

[29]*Loving*, 64 M.J. at 145.

[30]*Denedo*, 66 M.J. 114; *Denedo v. United States*, 556 US 904 (2009).

[31]*Denedo*, 66 M.J. at 118-20.

[32]*Id.* at 130-37.

[33]*Denedo v. United States*, 556 U.S. 904 (2004).

[34]*Id.* at 915.

[35]*Id.* at 913.

[36]*Goldsmith*, 526 U.S. at 535.

[37]*See Denedo*, 66 M.J. at 130-41 (Stucky, J. & Ryan, J. dissenting).

[38]*Denedo*, 556 U.S. at 917.

[39]28 U.S.C. § 1651(a) (West, 2012).

[40]*Loving*, 62 M.J. at 246-47 (citing *Goldsmith*, 526 US at 537).

[41]*Denedo*, 66 M.J. at 119 (citing *Loving*, 62. M.J. at 247).

[42]*Denedo*, 66 M.J. at 121.

[43]*Loving*, 62 M.J. at 247.

[44]*Denedo*, 66 M.J. at 119.

[45]*Id.* at 120.

[46]*Goldsmith*, 526 U.S. at 535.

[47]*Id.* at 126.

[48]*See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 586-88 (2006); *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1986); *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975), *Noyd v. Bond*, 395 U.S. 683, 696-99 (1969) (holding that exhaustion of military judicial remedies is required before seeking relief in civilian courts); *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (holding the military judicial system is "separate and apart" from the Federal civilian system); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (C.M.A. 1950).

[49]*See Denedo*, 66 M.J. at 124 (2008) (citing *United States v. Murphy*, 50 M.J. 4, 5-6 (CAAF 1998)).

[50]CAAF R. 19(e) (2011); *See Denedo*, 66 M.J. at 117.

[51]CAAF R. 4(b)(1) (2011).