CAAF ROPING AT THE JURISDICTIONAL RODEO: *CLINTON V. GOLDSMITH*

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To preserve the constitutional balance, the federal judiciary must on occasion police itself. In *Clinton v. Goldsmith*,[3] the U.S. Supreme Court unanimously and without concurring opinion ruled that the Court of Appeals for the Armed Forces[4] (CAAF) had exceeded its jurisdiction.[5] The case turned on whether the CAAF could properly invoke the All Writs Act[6] to enjoin the President[7] and military officials from dropping Major James Goldsmith from the rolls of the Air Force. The CAAF majority had exercised that prerogative on the premise that Congress intended to vest in the appeals court "broad responsibility with respect to the administration of military justice."[8] Justice David Souter speaking for the Court, how-

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3. 119 S. Ct. 1538 (1999).

4. With the codification of the Uniform Code of Military Justice (UCMJ) in 1950, Congress created the Court of Military Appeals. Act of May 5, 1950, ch. 169, Art. 67(d) 130. Eighteen years later it renamed the Court the United States Court of Military Appeals. Act of June 15, 1968, Pub. L. 90-340, 82 Stat. 178. In 1994, Congress again changed the designation to the United States Court of Appeals for the Armed Forces. Act of October 5, 1994, Pub. L. 103-337, 108 Stat. 2663. The CAAF is a court whose five civilian judges are appointed for fifteen-year terms by the President with Senate approval.

5. *See* 10 U.S.C.S. § 867 (LEXIS 1999).

6. 28 U.S.C.S. § 1651(a) (LEXIS 1999). Congress enacted this law in 1948, and two decades later, the Supreme Court heard its first case involving the All Writs Act and military appeals courts. *See* Noyd v. Bond, 395 U.S. 683 (1969).

7. Under the UCMJ, Congress has delegated considerable authority to the President to prescribe procedures for courts-martial (Art. 36) and to prescribe maximum punishments (Art. 56). Civilian courts have validated the President's exercise of executive rule making in the promulgation of the *Manual for Courts-Martial (MCM).*

8. Goldsmith v. Clinton, 48 M.J. 84, 86-87 (1998). The UCMJ, Article 6, section (a), specifically gives the uniformed service judge advocates general responsibility for supervising military justice: "The Judge Advocate General or senior members of his staff shall

ever, found that neither the language of the law nor its legislative history permitted such an expansion of the CAAF's authority.

At the heart of this appellate litigation was a proposed separation from the military, a discretionary administrative action known as dropping-from-the-rolls.[9] Not every convicted military offender may be removed from the service rolls.[10] Only those who are absent without leave (AWOL) from their unit and those who have served in confinement at least six months of an initial sentence for more than that duration may be targeted.[11] Major James Goldsmith, convicted in 1994 for disobedience of a superior's order and for an HIV aggravated assault,[12] received a sentence that included confinement of six years, forfeiture of pay,[13] but did not include a punitive discharge. Goldsmith in fact never challenged the findings and sentence of the court-martial.[14] Instead, he first alleged a life-threatening deprivation of continuous medication while confined at Fort Leavenworth. The Air Force Court of Criminal Appeals (AFCCA) denied his petition for extraordinary relief on jurisdictional grounds.[15]

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8. (continued) make frequent inspection in the field in supervision of the administration of military justice." While this supervisory grant obviously does not include the authority to issue writs, neither, as the Supreme Court opinion points out, does the UCMJ grant to CAAF a broad and undifferentiated supervisory authority over military justice.

9. *See* 10 U.S.C.S. §§ 1161, 1167 (LEXIS 1999).

10. The administrative separation is not an available sentence to a court-martial. The UCMJ does not authorize a court-martial to sentence an officer to a punitive discharge–a bad conduct or dishonorable discharge–although the court-martial may sentence an officer to dismissal from the service. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(9)(A)-(C) (1998).

11. During a span of eighty years, Congress set and then modified on two occasions the authority of the President to drop from the rolls a member of the armed forces. At first the law applied only to Army officers AWOL for at least three months. *See* Act of July 15, 1870, § 17, 16 Stat. 319. Lawmakers then extended its application to officers convicted and confined by civil court. *See* Act of Jan. 19, 1911, ch. 22, 36 Stat. 894. Finally, Congress reworded the statute to include any officer in the armed forces absence without leave (AWOL) for three months or sentenced to confinement in federal or state penal or correctional institution (*see* Act of May 5, 1950, §10, 64 Stat. 146). *See also* Act of Aug. 10, 1956, § 1, 70A Stat 89.

12. Major Goldsmith disobeyed a safe-sex order from his superior officer and twice had unprotected sexual intercourse with partners without informing them that he carried HIV.

13. The court-martial convening authority approved the court-martial's sentence of forfeiture of $2500 pay per month for 72 months, as well as confinement for six years.

14. American courts-martial predate the Constitution. The nature and scope of their jurisdiction, their procedures, and their lawful punishments are outlined in the *MCM*.

15. The AFCCA by *per curiam* opinion found the medical issue moot because Goldsmith had been released from confinement.

Goldsmith then shifted appellate strategy. He argued before the CAAF that the recent proposed action by the Air Force to dismiss him from the rolls[16] violated both the *ex post facto*[17] and the double jeopardy[18] clauses of the U.S. Constitution, claims neither litigated at trial nor addressed in appellate review. Using the good cause exception found in its own Rules of Practice and Procedure,[19] the CAAF, by a 3-2 vote,[20] assumed jurisdiction,[21] exercised its claimed supervisory power under the All Writs Act, and granted the petition sought by Goldsmith.[22] Designating the need to protect the interest of the service member as the evident "good cause," the CAAF intervened, noting that the "[All Writs] Act contains no limitation on our power to consider a petition for extraordinary relief that has not been initially submitted in a Court of Criminal Appeals. . . ."[23]

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15. (continued) Goldsmith v. Clinton, 48 M.J. 84, 87-88 (1998).

16. The Air Force notified Goldsmith of the action to drop him from the rolls in 1996, and relied on a recent congressional expansion of presidential power under the National Defense Authorization Act for Fiscal Year 1996. 10 U.S.C.S. §§ 1161(b)(2), 1167 (LEXIS 1999). The rationale behind this provision is that an officer, sentenced to confinement for more than six months, will no longer be effective in the military service, upon release.

17. U.S. CONST., art. I, § 9, cl. 3. Goldsmith claimed that Congress had enacted the statute authorizing his removal *after* his court-martial conviction. The *ex post facto* clause applies to criminal, not civil, penalties. Calder v. Bull, 3 U.S. (3 Dallas) 386 (1798).

18. U.S. CONST., amend. 5. Goldsmith regarded the action to drop him from the rolls as a successive punishment based on the same conduct that had prompted his conviction.

19. Rule 4 (b)(1) states, "Absent a good cause, no such petition [for an extraordinary writ] shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals."

20. Senior Judge Everett along with Chief Judge Cox and Judge Sullivan formed the majority. Judges Gierke and Crawford dissented.

21. One court observer recently described the judicial action in *Goldsmith* as the CAAF's "liberal" assertion of "a supervisory role over the military justice system." Major Martin Sitler, *The Top Ten Jurisdictional Hits of the 1998 Term: New Developments*, ARMY LAW., Apr. 1999, at 12.

22. Military courts commonly employ four writs: mandamus, prohibition, habeas corpus, and error coram nobis. *See Armed Forces Appeals Court Rules*, Rule 4 (b).

23. Goldsmith v. Clinton, 48 M.J. 84, 88 (1998). This is not the first case in which the CAAF has voiced such a sentiment. Ten years ago, the court majority wrote, "[O]n no occasion has Congress indicated any dissatisfaction with the scope of our All Writs Act supervisory jurisdiction, as we explained it in *McPhail*." Unger v. Ziemniak, 27 M.J. 349, 353 (C.M.A. 1989). *See* McPhail v. United States, 1 M.J. 457 (CMA 1976). In *McPhail*, the CAAF ruled that its authority to issue an appropriate writ in aid of its jurisdiction was not limited to its appellate jurisdiction.

The government appealed,[24] and the interpretive task for the Supreme Court proved rather simple. The Court never reached the merits of the new claims advanced by Goldsmith but instead addressed the threshold issue of the CAAF's jurisdiction. Using the traditional "plain meaning of the words" approach as a means to determine statutory purpose[25] and supplemented by references to legislative and judicial histories, Justice Souter first examined the Act that authorized establishing the military appeals court.[26] He noted that Congress had established a separate judicial system for the armed forces in 1950, and placed the then-styled Court of Military Appeals at its apex as an Article I civilian appellate tribunal.[27] The statute confined its jurisdiction to the review of specified findings and sentences imposed by courts-martial and reviewed by the service courts of appeals.[28] The unambiguous language of the law[29] admitted to no other interpretation, and an examination of context yielded no more. Nothing in the legislative history of the bill, Souter concluded, remotely implied the intent

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24. Decisions of the CAAF are now subject to direct review by the U.S. Supreme Court through a writ of *certiorari*, as set forth in 28 U.S.C. § 1259. Like all *certiorari* petitions, the court enjoys the discretion to grant or deny. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. *See generally* Andrew S. Effron, *Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW. Jan. 1985, at 59 (providing background on Supreme Court review of the CAAF). Congress has restricted one dimension of appellate review: the Supreme Court may not review the CAAF's refusal to grant a petition for review. UCMJ art. 67(a) (1998).

25. *See, e.g.*, CARTER, REASON IN LAW (4th ed. 1994).

26. 10 U.S.C.S. § 941 (LEXIS 1999).

27. Among the enumerated Constitutional powers of the legislative branch is the authority to "constitute Tribunals inferior to the Supreme Court." U.S. CONST., art. I, § 8, cl. 9. Unlike their counterparts in Article III courts, Article I judges do not enjoy life tenure, protection against salary cutbacks, or the same degree of judicial independence and insulation from political pressures.

28. UCMJ art. 67(a) reads:

> The Court of Appeals for the Armed Forces shall review the record in–
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and,
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon the petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

29. Article 67(c) of the UCMJ reads in pertinent part that CAAF has the power to act "only with respect to findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *See* UCMJ art. 67.

for a plenary judicial power to oversee the administration of military justice, as the CAAF had asserted.[30]

The Supreme Court turned its attention to the All Writs Act in an effort to determine whether that statute had in fact enlarged the supervisory jurisdiction of the CAAF.[31] Souter observed that all courts established by Congress, including military courts, "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[32] Writs compel persons or courts to act or refrain from action to vindicate the interests of a petitioner. Courts issue writs when they determine that a previous action or inaction exceeded lawful discretion. Again, Souter invoked the plain meaning of the language of the statute. The CAAF, or any court for that matter, could summon forth an All Writs Act remedy only in aid of its lawful jurisdiction.[33] For the CAAF, the Supreme Court reasoned that jurisdiction meant the review of courts-martial findings or sentences.[34] Dropping Goldsmith from the Air Force rolls did not amount to either a finding or a sentence. Instead it was an independent executive action,[35] and, therefore, outside the review authority of the military appeals court.[36] Simply put, the CAAF exceeded its jurisdiction in issuing the writ.

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30. Souter rejected the argument that the CAAF had met the jurisdictional criterion by "protecting" the original sentence and disallowing an additional penalty. In explaining its reasoning, the CAAF had noted that the Congress had amended Title 10 and Article 58(b) of the UCMJ at the same time. Given the punitive nature of Article 58, the CAAF assumed that its action conformed to the intent of Congress. Goldsmith v. Clinton, 48 M.J. 84, 90 (1998).

31. One of the original purposes behind the establishment of a civilian appeals court for the military was to eliminate the collateral attacks upon court-martial judgments filed in Article III courts.

32. 28 U.S.C.S. § 1651 (a) (LEXIS 1999).

33. United States v. Morgan, 326 U.S.M.C.A. 502, 506 (1954). Indeed, the CAAF has not hesitated to issue extraordinary writs. *See, e.g.*, McPhail v. United States, 1 M.J. 457 (C.M.A. 1976); United States v. Bevilacqua, 18 U.S.C.M.A. 10 (1968); Gale v. United States, 17 U.S.C.M.A. 40 (1967).

34. The CAAF has long cited *Shaw v. United States*, 209 F.2d 311 (1954), an opinion of the U.S. Court of Appeals for the District of Columbia, to vindicate its claim to be a legitimate federal appellate tribunal, and not, as *Shaw* argued, merely an administrative agency whose rulings were inherently subject to federal appellate review.

35. Dissenters called the action "an administrative personnel decision" comparable to decisions "to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Goldsmith*, 48 M.J. at 92 (Gierke, J., dissenting).

36. Actually, three CAAF judges (the two dissenters and Chief Judge Cox) agreed that the action proposed by the Air Force was executive, not judicial, in nature. Cox, nevertheless, voted with the majority. In his concurring opinion, he conceded that the issuance

Military court observers will immediately note that this negation of the CAAF's authority by the Supreme Court has implications beyond the case in point. *Goldsmith* seems to resolve an issue that has preoccupied, and troubled, the CAAF judges, who have long sought to place the CAAF among Article III courts. In repeated attempts to seek Article III status, the CAAF has, several times since 1976, asserted its authority to issue writs in aid of its jurisdiction.[37] The issuance of writs, of course, is characteristic of any Article III court. In a recent volume, the CAAF's historian presciently wrote:

> [A]lthough it remains good law in theory, *McPhail* [asserting CAAF's writ authority] has apparently not led to actual relief for a plaintiff seeking to invoke its holding. Rather the Court has [in the past] tended to claim authority to intervene under the All Writs Act, and then declined to do so in the particular case. . . . At some point, implied but not implemented jurisprudential power becomes tenuous.[38]

Now, having finally asserted its purported writ authority in a case, the CAAF has been turned away with its writ power held less than "tenuous." What this ruling foretells for the Court's future efforts to gain Article III status remains to be seen, but it is a clear setback to those attempts.[39]

Even if the CAAF could have proffered a defensible claim to jurisdiction, reliance on the All Writs Act was premature. The All Writs Act grants only an equity authority to federal courts.[40] That is, the judiciary may use a writ as an equitable means to intercede only if all other adequate and available remedies at law, both administrative and judicial, have first been exhausted.[41] The statutory standard of "necessary" and "appropriate"

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36. (continued) of a Department of Defense Form 214, Certificate of Release or Discharge from Active Duty, a discharge certificate, given an officer dismissed by a court-martial is an administrative act. In his view, however, the *ex post facto* nature of recent congressional legislation outweighed that consideration.

37. *McPhail*, 1 M.J. at 457.

38. JONATHAN LURIE, 2 MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, at 241 n.44 (1998).

39. *See id.* at 137, 159, 185 (reciting the Court's forays into legislative thickets in search of Article III status).

40. Article III, sec. 2, vests the federal judiciary with authority over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST., art. 3, § 2.

41. *See* Carlisle v. United States, 517 U.S. 416 (1996); 19 MOORE'S FEDERAL PRACTICE § 201.40.

required to activate review by the CAAF could not be met in this case because several alternative avenues of relief remained open for the respondent. For example, if the Secretary of the Air Force actually dropped Goldsmith from the rolls, Goldsmith could then petition the Air Force Board of Corrections for Military Records (BCMR) for relief. A civilian entity, the BCMR may review discharges and dismissals of service members.[42] An action there, in turn, could prompt an array of judicial relief opportunities. Federal courts may review BCMR decisions[43] as final agency actions under the Administrative Procedure Act[44] and set them aside if they are "arbitrary, capricious, or not based on substantial evidence."[45] If the petitioner sought specific monetary relief, moreover, the federal courts could invoke the Tucker Act[46] or its progeny[47] as bases for review. Until and unless the Air Force took final action, Justice Souter argued that no court, civilian or military, could investigate the merits of Goldsmith's claims.

Decades ago, the U.S. Supreme Court recognized that the military justice system is separate and apart from the federal civilian judicial system.[48] That detachment, however, does not mean that the Court of Appeals for the Armed Forces is free to assume an unwarranted authority over all matters of military justice. As noted above, some observers assert that the CAAF in this case, and in others, is seeking status as an Article III court[49] through its assertion and accretion of judicial power.[50] Motivation aside, the authority for the CAAF to act is missing, a conclusion drawn from the time-honored process of constitutional prerogative and review.

With the exception of the original jurisdiction of the Supreme Court,[51] Congress by mere statute may set or alter the jurisdiction of all federal

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42. *See* 10 U.S.C.S. §§ 1553(a), 1552(a)(1) (LEXIS 1999) (detailing the jurisdiction of the BCMR).

43. The law limits these challenges to non-monetary claims.

44. 5 U.S.C.S. §§ 551, 704, 706 (LEXIS 1999).

45. Chappell v. Wallace, 462 U.S. 296, 303 (1983).

46. 28 U.S.C.S. § 1491 (LEXIS 1999).

47. *See* 28 U.S.C.S. § 1346(a)(2) (detailing the so-called "Little Tucker Act").

48. *See* Parker v. Levy, 417 U.S. 733 (1974); Burns v. Wilson, 346 U.S. 137 (1953) .

49. *See* Captain James P. Portorff, *The Court of Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?* ARMY LAW., May 1985, at 1.

50. *See* Colonel Craig S. Schwender, *Who's Afraid of Command Influence Or Can the Court of Military Appeals Be This Wrong?* ARMY LAW., Apr. 1992, at 19; Rear Admiral William Miller, then-Navy JAG, remarks to the ABA General Practice Section: Committee on Military Law, February 11, 1977, 5, *cited in* LURIE, *supra* note 38, at 245.

51. Article II, section 2 sets forth the jurisdiction of the Supreme Court as a court of the first instance. To change the original jurisdiction of the Court would require an amendment to the Constitution.

courts, including military tribunals. It is one of several institutional checks that our system of governance endorses. And for almost two centuries the U.S. Supreme Court has assumed its role as the guardian of constitutional values, including separation of powers and checks and balances. Since *Marbury v. Madison*,[52] the Court has enjoyed the implied and unchallenged power of judicial review, a power that it fully exercised in *Goldsmith*. Observers of the Court have come to expect its routine review of legislative acts and executive actions at federal and state levels. On rare occasions, the Court exercises its oversight over lower courts,[53] as it fully and unanimously did in *Goldsmith.*

The language and purpose of the authorizing statute in this case point to a more restrictive jurisdiction than the CAAF had claimed. Even the Court of Military Appeals, one of the CAAF's predecessors, acknowledged its own limits, by saying that it is not a "court of original jurisdiction with general, unlimited power in law and equity."[54] The ruling in *Goldsmith* represents one of those legitimate limits. Like all appellate courts, the CAAF functions, *inter alia*, as an editor to correct errors and as an architect to design judicial policy for the military and it will continue to do so. But *Clinton v. Goldsmith* restricts the tools it may use.

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52. 5 U.S. (1 Cranch) 137 (1803).
53. *See*, e.g. Cohens v. Virginia, 19 U.S. (6 Wheaton) 264 (1821).
54. *In re Taylor*, 12 U.S.C.M.A. 427, 430 (1961).