The More Things Change, the More They Stay the Same: Has the Scope of Military Appellate Courts' Jurisdiction Really Changed since *Clinton v. Goldsmith*?

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I. Introduction

It's official . . . well, as good as official. Last year was proclaimed to be "The Year of Jurisdiction."[1] In honor of that proclamation, it is only fitting to address the latest cases defining the scope of appellate jurisdiction. In 2008, the Court of Appeals for the Armed Forces (CAAF) and the courts of criminal appeals took a rather broad view of their jurisdiction.[2] But while the cases are new, the trend is old. It is the same trend that the Supreme Court intended to reverse in 1999 in its landmark decision, *Clinton v. Goldsmith*.[3]

In 1998, the CAAF reviewed *Goldsmith v. Clinton*, which involved the administrative consequences of a court-martial sentence.[4] The CAAF found that Congress intended the court to have broad jurisdiction in military justice matters.[5] In a 3–2 decision, the CAAF asserted jurisdiction and granted Major (Maj) Goldsmith his requested relief.[6] In 1999, the Supreme Court reviewed the case in *Clinton v. Goldsmith* and found that the CAAF's view of its jurisdiction was far too expansive.[7] Furthermore, the Supreme Court stated that the jurisdiction of military appellate courts is "narrowly circumscribed."[8] That is, statutorily created Article I courts have only that authority given to them by statute.[9] This year, when faced with jurisdictional dilemmas[10] involving the scope of their jurisdiction under the All Writs Act[11] and the scope of their jurisdiction in cases involving government appeals, the courts failed to take the narrow road.

Congress passed the All Writs Act in 1948, granting appellate courts jurisdiction over cases that are "in aid" of their jurisdiction.[12] "The All Writs Act is not an independent grant of appellate jurisdiction"[13] but is a source of residual authority.[14] Stated differently, appellate courts can only invoke the All Writs Act when doing so is in aid of their *actual* jurisdiction.[15] In *Noyd v. Bond*, the Supreme Court specifically found that the All Writs Act applies in military cases.[16]

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[1] Posting of Dwight Sullivan to CAAFlog, https://www.blogger.com/comment.g?blogID=34853720&postID=1877241590194968336 (June 21, 2008, 21:12) [hereinafter Sullivan Post].

[2] *Id*. ("[T]the outcome construed the relevant court's jurisdiction broadly. This may be just coincidence, it may reflect a jurisprudential philosophy, or it may be the product of a simple human trait to want to retain the option of playing.").

[3] 526 U.S. 529 (1999).

[4] 48 M.J. 84, 90–91 (1998). Contrary to his pleas, Major (Maj) Goldsmith was found guilty, among other things, of several specifications of assault. *Id.* at 85. Though Goldsmith was sentenced to lengthy confinement, he was not sentenced to a punitive discharge. *Id.* Pursuant to newly enacted legislation, President Clinton dropped Maj Goldsmith from the Air Force rolls. *Id.*at 86 (citing 10 U.S.C. 1161(b)(2). On appeal, Maj Goldsmith claimed the President's action of dropping him from the rolls violated the Double Jeopardy and Ex Post Facto prohibitions. *Id*. at 89–90.

[5] *Id.* at 87.

[6] *Id.* at 90–91. Judge Effron did not participate in this decision.

[7] 526 U.S. at 536.

[8] *See id*. at 535 ("We have already seen that the CAAF's independent statutory jurisdiction is narrowly circumscribed. To be more specific, the CAAF is accorded jurisdiction by statute . . . ."); *see also id*. at 534 ("Despite these limitations [found in Article 67, UCMJ] the CAAF asserted jurisdiction and purported to justify reliance on the All Writs Act . . . .").

[9] *Id.* at 535. Unlike federal courts which derive their powers from Article III of the Constitution, military courts, both trial and appellate, are established by Congress pursuant to its "power to govern and regulate the Armed Forces" under Article I of the Constitution. *See* Clinton v. Goldsmith, 526 U.S. 529, 534 (1999). Hence, military appellate courts are often referred to as Article I courts, and federal appellate courts are often referred to as Article III courts. See *Article: The Thirty-Fifth Hodson Lecture,* 193 MIL. L. REV. 178, 193–95 (2007) (describing the application of "Article III Precedent in an Article I Court.").

[10] This is a term of art coined by the author to describe those cases where jurisdiction is not specifically granted by statute.

[11] 28 U.S.C. § 1651(a) (2006).

[12] 28 U.S.C. 1651(a) ("[A]ll courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdiction . . . .").

[13] *Goldsmith*, 526 U.S. at 535 (quoting 16 C. WRIGHT, A. MILLER & E COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932, at 470 (2d ed. 1996).

[14] United States v. Reinert, No. 20071195 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished) (quoting Loving v. United States, 62 M.J. 235, 247 (C.A.A.F. 2005)).

[15] *Goldsmith*, 526 U.S. at 534–35. Actual jurisdiction is that jurisdiction granted to the appellate court by statute under Articles 62, 66, 67, 69, or 73, UCMJ.

In 1983, Congress enacted the Military Justice Act of 1983 which amended Article 62, UCMJ to afford the Government the right to appeal a military judge's ruling that "terminated proceedings with respect to a charge or specification or that excluded evidence that was substantial proof of a material fact."[17] On its face, Article 62 only grants jurisdiction to the courts of criminal appeals to consider a government appeal.[18] The UCMJ does not specifically grant the CAAF jurisdiction to review the decisions of the service appellate courts on government appeals. However, the CAAF has reviewed the court of criminal appeals' decisions in government appeals since the amended Article 62's enactment over twenty-five years ago.[19] This year—The Year of Jurisdiction—the government challenged the CAAF's authority to review government appeals.

Section two of this article discusses *Goldsmith*—the case that the Supreme Court intended to change the scope of appellate jurisdiction. Section three examines five 2008 appellate jurisdictional dilemmas—testaments that the courts' assertion of jurisdiction has seemingly remained unchanged since *Goldsmith*. Section four previews the future and discusses whether clarification of the scope of appellate jurisdiction is on the horizon.

II. *Clinton v. Goldsmith*[20]

Appellate courts have long struggled over the scope of their jurisdiction. *Goldsmith* was one such struggle. *Goldsmith* has both specific application as well as general application—specific in that it scolded the CAAF for exceeding its jurisdiction under the All Writs Act—general in that it reminds all Article I courts that their jurisdiction is narrow and mandates that the CAAF and the courts of criminal appeals act solely within the confines of their statutorily-given authority.[21]

Having been convicted of willful disobedience and assault, Maj Goldsmith requested extraordinary relief under the All Writs Act to stop the President from dropping him from the Air Force rolls.[22] Infected with HIV, Maj Goldsmith had been ordered by his superior officers to tell his sexual partners of his infection and to take precautions to prevent the spread of his infection.[23] He disobeyed the order twice.[24] In 1994, he was tried and convicted of willful disobedience and assault.[25] The panel sentenced Maj Goldsmith to six years confinement and partial forfeitures, but the panel did not sentence him to a dismissal.[26] The Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and the sentence, and Maj Goldsmith did not petition the CAAF for further review of his case.[27] In 1995, the convening authority took final action on Maj Goldsmith's case.[28]

Approximately a year later, as part of the National Defense Authorization Act for Fiscal Year 1996, Congress empowered the President to drop any officer from the rolls whose sentence had become final, and who had been sentenced to more than six months confinement, and had served at least six months of the confinement.[29] In 1996, Maj Goldsmith received notice that he was being dropped from the Air Force rolls.[30]

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[16] *Goldsmith*, 526 U.S. at 534 (citing Noyd v. Bond, 395 U.S. 683 (1969)).

[17] United States v. Lopez de Victoria, 66 M.J. 67, 68 (C.A.A.F. 2008).

[18] UCMJ art. 62(b) (2008) ("In ruling on an appeal under this section, the Court of Criminal Appeals may act only . . . .").

[19] *See Lopez de Victoria*, 66 M.J. at 71.

[20] 526 U.S 529 (1999).

[21] *See id.*at 533–35.

[22] *Id*. at 531.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 531–32.

[27] *Id*. at 532.

[28] *Id.*

[29] *Id*. (citing NDAA 1996, *supra* note 19, § 1141(a)).

[30] *Id*.

In December 1996, Maj Goldsmith petitioned the AFCCA for extraordinary relief—but not regarding being dropped from the rolls. Major Goldsmith alleged that the confinement facility, the Fort Leavenworth Disciplinary Barracks, had been denying him his HIV medication and that his life was endangered.[31] The AFCCA denied his petition.[32] Major Goldsmith then filed an extraordinary writ to the CAAF, appealing the AFCCA's decision and making the additional argument that being dropped from the rolls violated the double jeopardy and ex post facto prohibitions.[33]

The Government initially argued that Maj Goldsmith's petition for extraordinary relief was outside of the CAAF's jurisdiction because he never petitioned the CAAF for discretionary review under Article 67, UCMJ.[34] The CAAF found that the Government's interpretation of the All Writs Act was too narrow and that "Congress intended for this Court to have *broad* responsibility with respect to the administration of military justice."[35] The Government also argued that Maj Goldsmith's being dropped from the rolls was an "administrative" matter and not punishment.[36] The CAAF found that the practical effect of Maj Goldsmith being dropped from the rolls was akin to punishment and violated the spirit of the ex post facto and double jeopardy prohibitions.[37] The CAAF enjoined the President from dropping Maj Goldsmith from the rolls.[38]

In 1999, the Supreme Court reviewed the CAAF's decision. Its analysis was simple and straightforward. The CAAF is created by Congress. Congress has limited the CAAF's jurisdiction to reviewing only the "findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[39] Hence, the CAAF's jurisdiction is "narrowly circumscribed."[40] Dropping Maj Goldsmith from the rolls constituted neither a finding nor a sentence since there was no change in the findings and sentence of his court-martial.[41] The Supreme Court unanimously found that the CAAF took action over a purely administrative matter, and hence, its action enjoining the President was clearly outside the CAAF's jurisdiction.[42]

While the Supreme Court's analysis was straightforward and direct, their intent to rein the appellate courts back into the confines placed upon them by Congress was even more direct. Major Goldsmith urged the Supreme Court to adopt the CAAF's broad view of its jurisdiction. The Supreme Court emphatically responded "This we cannot do."[43] Again and again, the Supreme Court reminded the CAAF of the confines of its jurisdiction stating, "We have already seen that the CAAF's independent statutory jurisdiction is narrowly circumscribed. To be more specific, the CAAF is accorded jurisdiction by statute . . . ."[44]

> [T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, ... Simply stated, there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review.[45]

As previously stated, the Supreme Court intended its holding in *Goldsmith* to have both specific application as well as general application. It is against this backdrop that we take a look at five 2008 The Year of Jurisdiction cases.

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[31] Goldsmith v. Clinton, 48 M.J. 84, 86 (1998).

[32] *Id.* at 86.

[33] *Id.* at 89–90. By the time that time of his appeal to the CAAF, Goldsmith's claim regarding his medical treatment had been mooted by his release from confinement. *Id*. at 88.

[34] *Id*. at 86.

[35] *Id.* at 86–87 (emphasis added).

[36] *Id*. at 90.

[37] *Id.*

[38] *Id*.

[39] Clinton v. Goldsmith, 526 U.S. 529, 534 (1999).

[40] *Id*. (alteration in original) (quoting 10 U.S.C. § 867(c)).

[41] *Id*. at 535–36.

[42] *Id*. at 535 ("[T]he elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the 'aid' of the All Writs Act in reviewing it.").

[43] *Id*. at 534.

[44] *Id.* at 535.

[45] *Id.* at 536.

III. The Year of Jurisdiction: Five New Developments with an Old, Familiar Theme

Goldsmith has been described as having had "a chilling effect . . . in which the Court of Appeals has had chalk on its jurisdictional spikes."[46] But did it?

United States v. Denedo[47]

The 3–2 decision in *Denedo* is probably the most debatable CAAF decision of the year.[48] The issue in *Denedo* was whether the Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction to grant extraordinary relief under the All Writs Act in a case that had been final for over seven years.[49] Despite the Supreme Court's holding in *Goldsmith* that there is "no continuing source of jurisdiction," the NMCCA and the CAAF asserted jurisdiction.[50]

In 1998, Mess Management Specialist Second Class, (MS2) Denedo was found guilty, in accordance with his pleas, of conspiracy and larceny.[51] The military judge sentenced him to three months confinement, reduction to E-1, and a punitive discharge.[52] The convening authority approved the sentence as adjudged.[53] The NMCCA affirmed the findings and sentence in MS2 Denedo's case.[54] Like Maj Goldsmith, MS2 Denedo did not petition the CAAF for further review. The Navy discharged MS2 Denedo in May 2000.[55] In 2006, the Government initiated deportation proceedings against Denedo based on his special-court martial conviction.[56]

Approximately ten years after his conviction, Denedo filed an extraordinary writ with the NMCCA alleging ineffective assistance of counsel.[57] Denedo, a lawful permanent resident from Nigeria, claimed that his defense counsel assured him during plea negotiations that "if he agreed to plead guilty at a special court-martial he would avoid any risk of deportation."[58] He claimed that his main concern was separation from his family.[59]

The Government filed a motion to dismiss the writ based on lack of jurisdiction.[60] The NMCCA denied the Government's motion but also considered and denied the Denedo's writ for extraordinary relief.[61] Denedo then filed a writ for extraordinary relief with the CAAF.[62] The Government again asserted that the NMCCA erred in considering Denedo's petition in the first place.[63]

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[46] Eugene R. Fidell, *Zen and Jurisprudence of the United States Court of Appeals for the Armed Forces*, 46 MIL. L. & L. OF WAR REV. 393, 396 (2007) (based on Remarks presented at the Washington College of Law, American University: Current Issues in Military Law: A Program for Teachers (Nov. 17–18, 2006)).

[47] 66 M.J. 114 (C.A.A.F. 2008).

[48] Sullivan Post, *supra* note 1 (describing *Denedo* as the CAAF's most famous and controversial jurisdictional case of the year).

[49] *See Denedo*, 66 M.J. at 119.

[50] *Id.* at 120.

[51] *Id.* at 118.

[52] *Id.*

[53] *Id.*

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id.*

[60] *Id*. at 118–19.

[61] *Id.*

[62] *Id.* at 119.

[63] *Id.*

The CAAF began its analysis by considering whether the writ was "in aid of" the NMCCA's existing jurisdiction. The CAAF found that the writ is "in aid of" the existing jurisdiction of the NMCCA despite finality under Article 76.[64] The CAAF hung its jurisdictional hat on *Schlesinger v. Councilman*.[65] In *Schlesinger*, the Supreme Court stated that "Article 76 provides a prudential constraint on collateral review, not a jurisdictional limitation. . . . Article 76 'does not expressly effect any change in the subject-matter jurisdiction of *Article III* courts.'"[66] Despite the holding in *Goldsmith* that Article I courts do not have the same powers as Article III courts,[67] the majority cursorily reasoned that it could apply the same rationale found in *Schlesinger*, a case involving an Article III court, to Denedo, a case involving an Article I court.[68] The CAAF found that Article 76 UCMJ was not an impediment to the NMCCA's subject matter jurisdiction[69] and that the NMCCA has jurisdiction under Article 66 to review Denedo's sentence because it included a punitive discharge and because Denedo's ineffective assistance of counsel claim attacked the validity of the findings and sentence in his court-martial.[70] The CAAF concluded that the writ was "in aid of" the NMCCA's jurisdiction.[71] Though the CAAF found that the NMCCA had jurisdiction under the All Writs Act to issue a writ, it returned the case to the NMCCA to give the Government the opportunity to get affidavits from Denedo's defense counsel concerning his claim before deciding whether the NMCCA erred in not issuing the writ.[72] Judges Stucky and Ryan disagreed.

Though Judge Stucky agreed with much of Judge Ryan's dissent[73] in which she argues that the CAAF does not have jurisdiction in Denedo's case (discussed below), he felt that Denedo's case fell on the merits stating that deportation proceedings are a collateral consequence of a court-martial conviction and is completely outside the military justice system.[74] Judge Ryan argued that the CAAF did not have jurisdiction in Denedo's case because Denedo had severed all relationship with the military and that the UCMJ did not provide for the court's jurisdiction over former servicemembers.[75] She disagreed with the majority's rationale in interpreting Article 76 in light of the Supreme Court's holding in *Schlesinger*.[76] Instead, she plainly read Article 76 to provide that the finding and sentence in Denedo's case are final and conclusive subject to very limited exceptions and faulted the majority for failing to "recognize that there is a difference between what is 'prudential' for an Article III court, and what is a statutory directive for an Article I, legislatively created court."[77] Judge Ryan reminded the majority of the Supreme Court's holding in *Goldsmith* by stating,

> When the Supreme Court overturned this Court's *Goldsmith* opinion, it made it clear that this Court occupied only a small plot of the judicial landscape, and that that plot was circumscribed by statute.

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[64] *Id.* at 120–21. Article 76, UCMJ provides

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required . . . and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation . . . are final and conclusive.

Id.

[65] 420 U.S. 738 (1975).

[66] *Denedo*, 66 M.J. at 120 (quoting *Schlesinger*, 420 U.S. at 749).

[67] *See generally* Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999).

[68] *See Denedo*, 66 M.J. at 121–23. The only explanation that the majority gave concerning why it could apply the same rationale in *Schlesinger* to its analysis in *Denedo* was that the Supreme Court seemingly approved of the CAAF's action in reviewing *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A. 1966), a post-Article 76 case, by citing to it in *Schlesinger*. *Id*. at 123. According to Judge Ryan in her dissent, "The majority conclusorily asserts that it has jurisdiction . . . ." *Id*. at 134.

[69] *Id*. at 121. The court furthered reasoned that Article76 simply means that the decision has res judicata effect and will stand unless the decision is challenged. *Id.* For example, the hearing officer in Denedo's deportation proceedings would have to recognize Denedo's court-martial conviction as final. *Id*. at 127.

[70] *Id*. at 120.

[71] *Id*.

[72] *Id.* at 130.

[73] *Id*. (Stucky, J., dissenting).

[74] *Id*. at 131 (Stucky, J., dissenting).

[75] *Id.* at 135 (Ryan, J., dissenting) ("Denedo is a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction. He has no current relationship with the military . . . .").

[76] *Id*. at 138 (Ryan, J., dissenting).

[77] *Id.* (Ryan, J., dissenting). The limitations under Article 76, UCMJ include only a petition for a new trial or action by the service Secretary or the President.

> Inexplicably, this Court appears determined not to heed the Supreme Court's unequivocal directive that it stay squarely within the express limits of statutory jurisdiction.[78]

As Judge Ryan's dissent highlights, the CAAF's perception of the expansiveness of its jurisdiction has seemingly remained unchanged in spite of *Goldsmith*.[79]

The similarities between *Goldsmith* and *Denedo* are striking. First, the procedural postures of the cases are similar. Both *Goldsmith* and *Denedo* involved cases that were final. Major Goldsmith's case had been final for approximately three years while MS2 Denedo's case had been final for over seven years. [80]

Second, the CAAF's rationale for asserting jurisdiction is similar in both cases. In *Goldsmith*, the CAAF found that it had "continuing jurisdiction" based on the false notion that it had broad supervisory powers over any matter pertaining to military justice.[81] In *Denedo*, the CAAF essentially made the same argument, that the NMCCA had "continuing jurisdiction," by asserting that finality under Article 76 is only a "prudential constraint" and not an impediment to the NMCCA's jurisdiction.[82]

Third, the dissents in *Goldsmith* and *Denedo* are similar. In 1998 when the CAAF reviewed *Goldsmith*, Judge Gierke wrote a dissenting opinion in which Judge Crawford joined, stating that Maj Goldsmith being dropped from the rolls "pertains to a collateral administrative consequence . . . that may or may not occur."[83] Judge Stucky made the same argument in *Denedo*.[84] Judge Gierke concluded his dissenting opinion in *Goldsmith* by stating that the CAAF had no jurisdiction to interfere in the Air Force's dropping Goldsmith from the rolls.[85] Naturally, Judge Ryan advanced a similar dissent in *Denedo*.

Fourth, both *Goldsmith* and *Denedo* leave the same questions unanswered: "What is the scope of the CAAF's jurisdiction?" and "When does it end?" In *Goldsmith*, the Supreme Court emphatically stated that the CAAF has no source of "continuing jurisdiction"[86] but it did not address when exactly the CAAF's jurisdiction ends. Since in *Denedo* the CAAF found that finality under Article 76 does not affect the NMCCA's jurisdiction,[87] *Denedo* also leaves the question "When does Article I jurisdiction end?" Or better yet, if finality under Article 76 is not the end of the Article I jurisdiction, at what point does Article III jurisdiction begin?

What is for certain is that the impact of *Denedo* is farther reaching than it appears at first blush. There is nothing precluding a former servicemember whose case is final under Article 76 from petitioning a court of criminal appeals for extraordinary relief.[88] What is clear from the Supreme Court's holding in *Goldsmith* is that Congress did not intend for Article I courts to have the same broad powers as Article III courts.[89] Inexplicably, the CAAF ignored the holding in *Goldsmith* and affirmed the NMCCA's authority to hear the writ.[90] The court's holding in *Denedo* is in keeping with its pre-*Goldsmith* expansive view of its jurisdiction.

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[78] *Id.* at 140 (Ryan, J., dissenting) (citing Clinton v. Goldsmith, 526 U.S. 529, 533–35 (1999).

[79] *Id*. at 139 (Ryan, J., dissenting) ("But the majority's justification is troubling not so much because it is misplaced, but because it is highly reminiscent of the position of this Court prior to the Supreme Court's decision in *Clinton v. Goldsmith*.").

[80] S*ee Goldsmith*, 526 U.S. at 531; *Denedo*, 66 M.J. at 118.

[81] *See Goldsmith*, 526 U.S. at 536.

[82] *See Denedo*, 66 M.J. at 121.

[83] Goldsmith v. Clinton, 48 M.J. 84, 91 (1998) (Gierke & Crawford, JJ., dissenting).

[84] *See Denedo*, 66 M.J. at 131 (Stucky, J., dissenting).

[85] *Goldsmith*, 48 M.J. at 92 (Gierke & Crawford, JJ., dissenting).

[86] *Goldsmith*, 526 U.S. at 536.

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

[88] Posting of Cloudesley Shovell to CAAFlog, https://www.blogger.com/comment.g?blogID=34853720&postID=1877241590194968336 (June 23, 2008, 14:00 EDT) (*Denedo* "opens the doors of the CCAs to all manner of extremely stale claims, because now CCAs have continuing jurisdiction over all cases meeting the Art. 66(b) threshold, no matter how old, no matter how thoroughly reviewed, and no matter how final. All you need is an appellant who is still alive.").

[89] *See Denedo*, 66 M.J. at 138; Honorable Robinson O. Everett, *The Twenty-Ninth Kenneth J. Hodson Lecture on Criminal Law*, 170 MIL. L. REV. 178, 195 (2001); John W. Winkle III & Gary D. Solis, *CAAF Roping at the Jurisdictional Rodeo:* Clinton v. Goldsmith, 162 MIL. L. REV. 219, 224 (1999).

[90] *Denedo*, 66 M.J. at 130.

United States v. Lopez de Victoria[91]

Lopez de Victoria presented the CAAF with another jurisdictional dilemma during this year's term. The issue in *Lopez de Victoria* was whether the CAAF had the authority to review the decisions of the courts of criminal appeals' in government appeals.[92]

A panel convicted Sergeant (SGT) Lopez de Victoria of indecent acts with a child and making false official statement.[93] He was sentenced to a dishonorable discharge, reduction to E-1, total forfeitures, and confinement for four years.[94] During a post-trial 39(a) session, the military judge found that the statute of limitations barred SGT Lopez de Victoria's convictions for indecent acts with a child.[95] The judge set aside the findings for indecent acts and ordered a sentence rehearing.[96] Pursuant to Article 62, UCMJ, the Government appealed the military judge's ruling.[97] The Army Court of Criminal Appeals (ACCA) granted the Government's appeal and reversed.[98] Sergeant Lopez de Victoria petitioned the CAAF for review of the ACCA's decision.[99]

The CAAF specified the additional issue, "Whether this Court [the CAAF] has statutory authority to exercise jurisdiction over decisions of the courts of criminal appeals rendered pursuant to Article 62, UCMJ."[100] The Government argued that the CAAF did not have jurisdiction to review the ACCA's decision since Article 67(c) provides that the CAAF "may act only with respect to the 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."[101] Since the ACCA had not acted on the findings and sentence in this case, the Government argued that the CAAF was without jurisdiction.[102]

In a 3–2 decision, the majority paid homage to *Goldsmith* and recognized that the CAAF is a court of limited jurisdiction,[103] but further stated,

> However, this principle [of limited jurisdiction] does not mean that our jurisdiction is to be determined by teasing out a particular provision of a statute and reading it apart from the whole. . . . "We believe it axiomatic that Article 67 must be interpreted in light of the overall jurisdictional concept intended by Congress, and not through the selective narrow reading of individual sentences within the article."[104]

The CAAF then noted that Article 67(a)(3) provides that it has jurisdiction over "'all cases reviewed by a Court of Criminal Appeals' in which the accused's petition establishes good cause."[105] In analyzing whether it had jurisdiction to review government appeals, the CAAF took three considerations into account.

First, the CAAF considered Congress's intent in enacting the UCMJ and the Military Justice Act of 1983 (statutes providing for appellate review): to promote uniformity in the Code's application between the services.[106] The majority reasoned that if "all cases" did not include government appeals, then the very purpose of the statutes would be defeated.[107]

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[91] 66 M.J. 67 (C.A.A.F. 2008).

[92] *Id.* at 68.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 69 (quoting UCMJ 67(c) (2008)).

[102] *See id.*

[103] *Id.*

[104] *Id.* (quoting United States v. Leak, 61 M.J. 234, 239 (C.A.A.F. 2005)).

[105] *Id.* at 71 (quoting UCMJ art. 67(a)(3)).

[106] *Id.* at 70.

Second, the CAAF considered the "judicial backdrop" under which Congress amended Article 62.[108] Prior to being able to submit an appeal under Article 62, the Government had only the extraordinary writ process to appeal a military judge's interlocutory ruling.[109] The majority found that Congress intended "to replace the cumbersome extraordinary writ procedure" in allowing government appeals under Article 62.[110] At the time that Congress amended Article 62, the CAAF took a "broad reading of jurisdiction over 'cases'" and considered petitions for extraordinary writs certified by the Government or submitted by an accused.[111] Hence, the majority reasoned that Congress did not intend to limit the CAAF's review of government appeals under the amended Article 62 since it had previously reviewed government appeals submitted as requests for extraordinary relief.[112]

Lastly, the majority considered stare decisis—the fact that the CAAF had been reviewing the decisions of the courts of criminal appeals' in government appeal cases since the amended Article 62 had been enacted.[113] They noted that the Supreme Court had never discouraged the CAAF from asserting jurisdiction in its review of Article 62 cases.[114] Hence, the CAAF found that it had the statutory authority to exercise jurisdiction over the courts of criminal appeals' decisions in Article 62 cases.[115]

Once again, Judge Ryan dissented, this time joined by Judge Erdmann. Again, she began her analysis with *Goldsmith*'s proscription that the CAAF's "independent statutory jurisdiction is narrowly circumscribed."[116] In keeping with her dissent in *Denedo*, Judge Ryan took a "plain-read approach" and found that Article 62 on its face states that only the courts of criminal appeals can consider government appeals,[117] while Article 67 plainly reads that the CAAF only has jurisdiction to review "the 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."[118] Because Article 62 appeals are always interlocutory, there are never any findings and sentences approved by the convening authority when appealed to the courts of criminal appeals.[119] Moreover, she also reminded the majority that:

> [W]e must be mindful that the Supreme Court has consistently held that "[where] Congress includes particular language in one section of a statute but omits it in another section . . . it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion."[120]

Consequently, Judge Ryan argued that nothing in the plain language of Articles 62 or 67 or any other statute grants the CAAF the statutory authority to review an Article 62 appeal and that the majority erred in considering SGT Lopez de Victoria's appeal.[121]

As with *Denedo*, *Lopez de Victoria* raises more questions than it answers. Based on the majority's uniformity rationale in *Lopez de Victoria*, what precludes the CAAF from asserting jurisdiction in every case not specifically addressed by statute based on the rationale that they are promoting uniformity among the service courts? Should the CAAF and the courts of

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[107] *Id.*

[108] *Id.*

[109] *Id.* at 68.

[110] *Id.* at 70.

[111] *Id*.

[112] *See id.*

[113] *Id*.

[114] *Id*. at 70–71. The majority cited to *Solorio v. United States*, 483 U.S. 435 (1987), the case in which the Supreme Court overturned the service-connection doctrine delineated in *O'Callahan v. Parker*, 395 U.S. 258 (1969). *Id.* The majority noted that the Supreme Court never stated that the CAAF had erred in considering *Solorio*, a government appeal. *Id.*

[115] *Id*. at 71. The CAAF ultimately reversed the ACCA's decision. *Id*. at 74.

[116] *Id.* at 75 (Ryan & Erdmann, JJ., dissenting).

[117] *Id.* at 76 (Ryan & Erdmann, JJ., dissenting).

[118] *Id.* at 75 (Ryan & Erdmann, JJ., dissenting) (quoting UCMJ art. 67(c) (2008)).

[119] *Id.* (Ryan & Erdmann, JJ., dissenting).

[120] *Id.* at 75 (Ryan & Erdmann, JJ., dissenting) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

[121] *Id.* at 74 (Ryan & Erdmann, JJ., dissenting).

criminal appeals weigh stare decisis more heavily than the rules of statutory construction? Most importantly, should the CAAF and the courts of criminal appeals continue to rely on pre-*Goldsmith* cases in analyzing the scope of this jurisdiction?[122]

United States v. Dossey[123]

The CAAF was not alone in taking a broad view of its jurisdiction this year. The NMCCA and the ACCA also took an expansive view. When faced with a jurisdictional dilemma in *United States v. Dossey*, the NMCCA first took the narrow road. Then upon reconsideration, the NMCCA took the broad road after all. The issue in *Dossey* was whether the court had jurisdiction under Article 62 to review a military judge's declaration of a mistrial.[124]

Hull Maintenance Technician Third Class (HT3) Dossey was charged with using government computers to access child pornography.[125] The military judge granted a defense motion, in part, to exclude evidence obtained from a search of a government computer.[126] The Government later introduced evidence to the panel that violated the military judge's ruling.[127] The military judge declared a mistrial to the affected charge and specification without asking for counsels' comments regarding the need for a mistrial.[128]

Pursuant to Article 62, the Government appealed the military judge's ruling declaring a mistrial.[129] At first, the NMCCA denied the government appeal finding that it did not have jurisdiction under Article 62.[130] The NMCCA reasoned that the military judge's declaration of a mistrial was not a ruling that "terminates the proceedings."[131] The Government requested reconsideration en banc and also filed an extraordinary writ of mandamus. The court denied both the en banc reconsideration and the extraordinary writ but granted the Government's request for panel reconsideration.[132]

The NMCCA reconsidered the issue of whether a mistrial is a ruling that actually "terminates the proceedings," an issue of first impression.[133] It noted that the practical effect of a mistrial is the withdrawal of the particular charge and specification. However, the convening authority could re-refer the charge and specification.[134] Therefore, a mistrial may, but does not always, terminate all the proceedings on a charge.[135]

The NMCCA then took a look at the UCMJ's treatment of "proceedings" in other Articles and found that when "proceedings" is used in other places it is primarily used to describe a "happening before a particular court-martial."[136] In light of the UCMJ's treatment of the word "proceedings," the court concluded that "terminates the proceeding" means "to terminate the proceedings *before the particular court-martial* to which a charge has been referred."[137] Superimposing that

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[122] *Id*. at 71 (citing United States v. Solorio, 21 M.J. 251 (C.M.A. 1986); United States v. Tucker, 20 M. J. 52 (C.M.A. 1985)).

[123] 66 M.J. 619 (N-M. Ct. Crim. App. 2008).

[124] *Dossey*, 66 M.J. at 621.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* Under Article 62, the Government may appeal a military judge's adverse ruling if it is (1) "An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification," (2) "An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding," or (3) involves the disclosure or nondisclosure of classified evidence. UCMJ art. 62(a) (2008).

[132] *Id.*

[133] *Id.* at 623.

[134] *Id*. at 622. There are two limited instances when the government is precluded from re-referring the affected charge and specification once a mistrial has been declared: jeopardy has attached and the declaration was (1) "[a]n abuse of discretion and without the consent of the defense" or (2) "[t]he direct result of intentional prosecutorial misconduct designed to necessitate a mistrial." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 915 (2008).

[135] *Dossey*, 66 M.J. at 622.

[136] *Id.* at 623–24.

[137] *Id.* at 624.

definition into Article 62, the court found that a mistrial does, in fact, terminate the proceedings and asserted jurisdiction.[138] Furthermore, the NMCCA found that their reading the phrase "terminates the proceedings" provided "a *broader* range of orders appealable than the alternate reading, and effectuates the Congressional intent that the Government should enjoy a *broad* right to appeal."[139] The NMCCA concluded that the military judge erred in declaring a mistrial and reinstated the charge and specification.[140]

Senior Judge Vollenweider dissented from the NMCCA's opinion.[141] Judge Vollenweider argued that the NMCCA did not have jurisdiction since a mistrial only terminates the trial but not the final prosecution.[142] Furthermore, Judge Vollenweider found the majority's argument that "Congress intended Article 62 to be interpreted and applied in the same manner as the federal Criminal Appeals Act . . ." to be unpersuasive since Congress did not use the same wording in Article 62 as it did in Article 62's federal counterpart.[143]

After the NMCCA's ruling, HT3 Dossey petitioned the CAAF for a grant of review but his petition was dismissed because the Government opted to administratively separate him in lieu of court-martial.[144] Accordingly, the question remains open whether the NMCCA solved this jurisdictional dilemma correctly.

United States v. Wuterich[145]

Wuterich was less controversial (finally a 3–0 decision)[146] than the other jurisdictional issues that have been presented, but again, it illustrates the trend of appellate courts taking an expansive view of their jurisdiction. The jurisdictional issue posed in *Wuterich* was whether the NMCCA had jurisdiction under Article 62 to review a military judge's ruling quashing a government subpoena?[147]

Staff Sergeant (SSgt) Wuterich was one of the Marines charged in the Haditha killings.[148] After dereliction of duty and voluntary manslaughter charges were preferred against SSgt Wuterich, he gave an interview to a *CBS* correspondent.[149] In that interview, he described the bombing of his convoy and the circumstances of the killings.[150] The Government requested all video and audiotapes taken during the interview. *CBS* turned over only the material that it broadcasted.[151] Citing a "news-gathering" privilege under the First Amendment, *CBS* refused to turn over any material that had not been publically broadcasted and *CBS* moved to quash the subpoena.[152] The military judge viewed the publically broadcasted material and found it to be relevant and material.[153] Despite this finding, the military judge granted the motion to quash the Government subpoena stating that the material was cumulative of other information that the Government had available.[154] The military

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[138] *Id*.

[139] *Id.* (emphasis added).

[140] *Id*. at 625.

[141] *Id.* at 626 (Vollenweider, J., dissenting).

[142] *Id.* at 628 (Vollenweider, J., dissenting).

[143] *Id*. (Vollenweider, J., dissenting).

[144] CAAFlog: *Dossey Explained*, http://caaflog.blogspot.com/search?updated-max=2008-10-13T21%3A14%3A00-04%3A00&max-results=50 (Sept. 23, 2008, 17:39).

[145] 66 M.J. 685 (N-M. Ct. Crim. App. 2008).

[146] Unlike the NMCCA, the CAAF found *Wuterich* to be just as debatable and controversial as *Lopez de Victoria* and *Denedo*. *See infra* note 168.

[147] *Wuterich*, 66 M.J. at 687.

[148] *Id.* at 686.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id*. at 686–87.

[154] *Id.* at 687.

judge never viewed the material that had not been broadcasted.[155] The Government appealed the military judge's ruling pursuant to Article 62.[156]

The NMCCA reasoned that that a court of criminal appeals has jurisdiction under Article 62 over a government appeal from an order or ruling which excludes evidence "that is substantial proof of a fact material in the proceeding"[157] and that Congress intended that Article 62 be applied in the same manner as its federal counterpart is applied in federal criminal courts of appeals.[158] Federal courts use an "effects test" which asks whether the order quashing "effectively 'suppresses or excludes evidence' . . . in a criminal proceeding"?[159] If so, then the federal court has jurisdiction over the government appeal.[160] In keeping with the practice of federal courts, the NMCCA ruled that it had jurisdiction in this case and granted the Government's appeal but remanded the case for further fact-finding.[161] *CB*S and SSgt Wuterich appealed the NMCCA's decision to the CAAF. Unlike the NMCCA, the CAAF found *Wuterich* to be just as debatable and controversial as *Lopez de Victoria* and *Denedo*. On 17 November 2008, the CAAF, 3–2, agreed with the NMCCA's application of the "effects test" and found that military judge's decision quashing the subpoena had the direct effect of "excluding evidence."[162] Hence, the CAAF found that the NMCCA had jurisdiction to consider the government appeal.[163]

United States v. Reinert[164]

When faced with a jurisdictional dilemma involving both its jurisdiction under the All Writs Act and its jurisdiction under Article 62, UCMJ the ACCA was admittedly perplexed. Like the CAAF and its NMCCA sister court, the ACCA, with trepidation, took the broad road. The issue in *Reinert* was whether the court had jurisdiction under the All Writs Act to issue a writ that does not fall within the specific statutory language in Article 62 or 66?[165]

A military judge[166] sitting as a special court-marital convicted Private (PVT) Gipson, pursuant to his pleas, of conspiracy to commit housebreaking and larceny, absence without leave, disobeying a superior commissioned officer, disobeying a superior noncommissioned officer, larceny, housebreaking, and communicating a threat.[167] During PVT Gipson's court-martial, the military judge found that PVT Gipson had been subjected to illegal pretrial punishment in violation of Article 13, UCMJ.[168] The Government conceded that PVT Gipson should be granted twenty days of confinement credit.[169] The military judge accepted the Government's concession, but he also ordered the Government to ensure that the offending noncommissioned officer's were counseled and that installation-wide training regarding Article 13 be conducted.[170] Should the Government fail to comply with his order, the military judge stated that he would award PVT Gipson five additional days of confinement credit.[171] The military judge sentenced PVT Gipson to a bad-conduct discharge, confinement for seven

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[155] *Id.*

[156] *Id.*

[157] *Id*. (quoting Article 62 (a)(1)(B) (2008)).

[158] *Id.*

[159] *Id*. (quoting United States v. Wilson, 420 U.S. 332, 337 (1975)).

[160] *Id.*

[161] *Id.* at 688.

[162] United States v. Wuterich, 67 M.J. 63, 75–77 (C.A.A.F. 2008). Judge Ryan, joined by Judge Erdmann, dissented from the opinion finding that the majority's holding conflicted with the court's decision in *United States v. Browers*. *Id.* at 58–59 (Ryan & Erdmann, JJ., dissenting) (quoting *Browers*, 20 M.J. 356, 360 (C.M.A. 1985) (defining "excludes evidence" as "a ruling made at or before trial that certain testimony, documentary evidence, or real evidence is inadmissible")).

[163] *Id*.

[164] No. 20071195 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished).

[165] *Id*. at 8.

[166] Colonel Patrick Reinert was the military judge sitting as a special court-martial and is the respondent in this matter. *Id.*

[167] *Id.* at 2.

[168] *Id.* at 3–4.

[169] *Id.* at 4.

[170] *Id.*

[171] *Id.* at 4–5.

months, and forfeiture of $867 pay per month for seven months.[172] He also granted PVT Gipson twenty days confinement credit for illegal pretrial punishment.[173]

The Government failed to conduct installation-wide training, and PVT Gipson filed a motion for appropriate relief.[174] The Government admitted that installation-wide training had not been conducted. Based on that information, the military judge supplemented his ruling and awarded PVT Gipson five additional days of confinement credit.[175]

The Government argued that the military judge exceeded his authority, and after the military judge refused to reconsider his ruling, the Government requested that the ACCA provide extraordinary relief to prohibit the military judge from awarding PVT Gipson the five additional days of confinement credit.[176] Based on the advice of his staff judge advocate to refrain from taking action until the matter was settled, the convening authority did not take action on PVT Gipson's case.[177] In return, PVT Gipson filed an extraordinary writ of mandamus requesting the ACCA to order the convening authority to act on his case.[178]

The ACCA reasoned that this case did not fall under Article 66, UCMJ because the findings and the sentence had not been approved by the convening authority.[179] Nor did this case fall under Article 62. The military judge's ruling did not terminate any charges or specifications, nor did it exclude important evidence, nor did it involve the disclosure or nondisclosure of classified evidence. Hence, it did not have jurisdiction under Article 62.[180]

The ACCA then examined its jurisdiction under the All Writs Act.[181] Like the other courts, the ACCA began with the Supreme Court's proscription in *Goldsmith* that the jurisdiction of Article I courts is narrowly defined and that the All Writs Act does not enlarge the court's jurisdiction.[182] The ACCA stated that "[i]f *Goldsmith* was the only case interpreting the All Writs Act, we would conclude there is no jurisdiction because neither Article 62 nor 66, UCMJ, provide for this court's review of the government appeals under the All Writs Act."[183] The ACCA further questioned its authority to issue relief under the All Writs Act based on the CAAF's recent decision in *Lopez de Victoria* where the CAAF stated that Article 62 was intended to replace the Government's right to submit an interlocutory appeal under the All Writs Act.[184]

Nevertheless, the ACCA reasoned that the CAAF has asserted jurisdiction in cases that did not fall under Article 67, and that they were "bound to follow precedent established by [the] superior court."[185] The ACCA, with "significant concerns," found that it had jurisdiction.[186] The ACCA further concluded that the military judge's order was an "extraordinary matter"[187] since there was no other way to address the order and that the military judge exceeded his authority because there is nothing in the *Manual for Courts-Martial* to suggest that he had the authority "to advance the interests of justice beyond the existing proceeding."[188]

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[172] *Id.* at 2.

[173] *Id.*

[174] *Id.* at 5.

[175] *Id*.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 6.

[179] *See id.* at 7.

[180] *Id.* at 7–8.

[181] *Id.* at 8.

[182] *Id.* at 7–9.

[183] *Id.* at 9.

[184] *Id.* at 10.

[185] *Id*. at 11; *see, e.g.*, United States v. Suzuki, 14 M.J. 491, 492–93 (C.M.A. 1983); United States v. Caprio, 12 M.J. 30, 30–33 (C.M.A. 1981); United States v. Redding, 11 M.J. 100, 104–06 (C.M.A. 1981); Dettinger v. United States, 7 M.J. 216, 218 (C.M.A. 1979).

[186] *Id.*

[187] *Id*. at 14.

[188] *Id.* at 15.

Although the lengthy opinion was unpublished, the ACCA deserves some kudos for saying what we've all been thinking—What exactly is the scope of appellate jurisdiction in light of *Goldsmith*?

IV. The Future

A survey of the cases decided by the CAAF and the courts of criminal appeals during "The Year of Jurisdiction" have yielded results that are arguably inconsistent with the Supreme Court's intent in *Goldsmith*. Almost all of the cases acknowledged *Goldsmith*'s holding that their jurisdiction is narrowly circumscribed, but in the end, both the CAAF and the courts of criminal appeals effectively broadened their jurisdiction. What is interesting about the CAAF's rationale in asserting jurisdiction in these cases is that its analytic framework is contrary to both the Supreme Court's decision in *Goldsmith* and the CAAF's own decision early this year in the case *United States v. Custis*.[189]

The issue in *Custis* was whether the military judge erred in applying a common law exception (i.e., "the joint crime participant" exception) to the marital privilege codified in Military Rule of Evidence (MRE) 504.[190] The facts are not as interesting as the CAAF's holding. The CAAF recognized that, while every federal court that has considered the issue has recognized the joint crime participant exception, the exception is not included in MRE 504.[191] The CAAF further reasoned that "the authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government."[192] Hence, the military judge and the AFCCA erred in applying the exception.[193] Such an approach is inconsistent with the CAAF's approach in its jurisdictional cases where in the absence of a specific grant of authority, the CAAF nonetheless asserted authority.

The courts of criminal appeals seem simply perplexed on the jurisdictional issue. The ACCA flatly stated, "We have significant concerns . . ." about the scope of its jurisdiction.[194] While the NMCCA was not as vocal about their uncertainty, their vacillations tell the story. First, the NMCCA said it did not have jurisdiction in *Dossey*, and then it found that it did.[195]

After the current court term, the Supreme Court's holding in *Goldsmith* has increased the uncertainty and dissension about the scope of appellate jurisdiction. Quite simply, both the CAAF and the courts of criminal appeals need more clarity.

But, as the title of this article suggests, the more things change, the more they stay the same. The need for clarification of the scope of appellate jurisdiction within the military courts of appeal is not new. Senior Judge Robinson Everett, the author of the CAAF's opinion in *Goldsmith*, noted the uncertainty that the Supreme Court's holding in *Goldsmith* would create concerning the scope of the CAAF's authority and suggested that Congress should clarify the CAAF's powers.[196] In 2001, the Cox Commission Report[197] also recognized the need for clarification.[198] To date, there has been no clarification by either the Supreme Court or Congress.

However, Congress has recently shown interest in matters pertaining to military jurisdiction. Specifically, in the case *United States v. Stevenson*.[199] In his appeal to the CAAF, Hospital Corpsman Third Class (HM3) Stevenson made two

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[189] 65 M.J. 366 (C.A.A.F. 2007).

[190] *Id*. at 367.

[191] *Id.* at 369.

[192] *Id.*

[193] *Id.*

[194] United States v. Reinert, No. 20071195 at 11 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished).

[195] United States v. Dossey, 66 M.J. 619, 621 (N-M. Ct. Crim. App. 2008).

[196] Everett, *supra* note 94, at 195. Judge Everett also believed that the CAAF should broaden its powers so that it could grant extraordinary relief in any court-martial or Article 32 investigation. *Id*.

[197] REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter COX REPORT], *available at* http://www.nimj.org/documents/Cox_Comm_Report.pdf. The Honorable Walter T. Cox III led a commission to conduct a survey regarding the fairness of the military justice system. *Id.* This report contains the commission's findings and recommendations. *Id.*

[198] Honorable H.F. "Sparky" Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 193 (2007) (citing the COX REPORT, *supra* note 202).

[199] 66 M.J. 15 (2008). In 1997, investigators suspected Hospital CorpsmanThird Class (HM3) Stevenson of raping a military dependent in 1992. *Id.* at 16. By the time that he became a suspect, HM3 Stevenson, who suffered from diabetes, had been assigned to the temporary disability retired list. The investigators learned that HM3 Stevenson routinely had his blood drawn at a Veteran's Affairs hospital as part of his diabetes treatment and asked the

arguments. First, HM3 Stevenson challenged the military court's jurisdiction, claiming that the courts did not have jurisdiction over him since he was assigned to the temporary disability retired list.[200] Second, HM3 Stevenson argued that his Fourth Amendment rights had been violated.[201] On 14 February 2008, the CAAF set aside the NMCCA's decision based on HM3 Stevenson's Fourth Amendment argument and remanded the case.[202] The CAAF declined to review HM3 Stevenson's lack of jurisdiction argument.[203] Hospital Corpsman Third Class Stevenson subsequently petitioned the Supreme Court, arguing that the military courts lacked jurisdiction.[204] In turn, the Government argued that the Supreme Court lacked jurisdiction because the CAAF declined to review HM3 Stevenson's jurisdictional argument.[205]

In the meantime, on 27 September 2008, the House passed the Equal Justice for Our Military Act of 2007 which would grant the Supreme Court jurisdiction to consider military cases like HM3 Stevenson's regardless of the CAAF's disposition of the appeal.[206] The companion bill to the Equal Justice for Our Military Act of 2007 is pending in the Senate.[207] Unfortunately for HM3 Stevenson, the Supreme Court denied certiorari on 6 October 2008.[208] Four days after the Supreme Court denied HM3 Stevenson's petition, the Congressional Research Service compiled a report on the Supreme Court's jurisdiction in military court cases and referenced *Stevenson* in particular stating that "[i]f this measure became law, it would make moot the question highlighted by *United States v. Stevenson* regarding the Supreme Court's jurisdiction over specific issues that the CAAF had declined to review."[209]

The question remains, considering Judge Everett's recommendation that Congress clarify the scope of appellate jurisdiction coupled with the fact that Congress has been responsive to other military jurisdictional issues, what does Congress's inaction tell us? Is Congress laboring under a misconception that the scope of military appellate jurisdiction is clear? Perhaps. The same Congressional Research report that discussed *Stevenson*, found that "it is clear that military courts' jurisdiction extends to military veterans only when a veteran maintains at least some current relationship with the military."[210] That's not what the CAAF and the NMCCA held in *Denedo*.

Clarification from the Supreme Court, if not from Congress, may be on next year's horizon. The acting solicitor general filed a petition for certiorari in the *Denedo* case, presenting the question "Whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. 801 et seq."[211] According to the acting solicitor general, *Denedo* is just one of the latest cases where the CAAF has expanded "its role beyond its congressionally prescribed jurisdiction to 'review . . . specified sentences imposed by courts-martial.'"[212]

In closing, Judge Cox when asked about *Goldsmith* back in 2000 summed it up best:

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medical personnel to draw an additional vial of blood so that they could determine his DNA. *Id*. The medical personnel drew the extra vial of blood without informing HM3 Stevenson. *Id.* at 17. Subsequently, HM3 Stevenson was found guilty of rape. *Id*. at 16. On appeal, HM3 Stevenson alleged that the court did not have jurisdiction to try him, a temporary disabled retiree. *Id.* at 17; ANNA C. HENNING, CONG. RESEARCH SERV. REPORT SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES, RL 34697, at CRS-7 (2008). Hospital CorpsmanThird Class Stevenson also alleged that the Government violated his Fourth Amendment rights by not obtaining a warrant for the withdrawal of the extra vial of his blood. *Stevenson*, 66 M.J. at 17; HENNING, *supra*.

[200] *Stevenson*, 66 M.J. at 17..

[201] *Id.*

[202] *Id.* at 20.

[203] HENNING, *supra* note 201, at CRS- 7.

[204] *Id*.

[205] *Id*. at CRS-8-9.

[206] *Id.* at CRS-8.

[207] *See id.* at CRS-8-9.

[208] Stevenson v. United States, 129 S. Ct. 69 (2008).

[209] HENNING, *supra* note 184, at CRS-9.

[210] *Id.* at CRS-2 (citing Toth v. Quarles, 350 U.S. 11, 14–15 (1955) ("It has never been intimated by this Court . . . that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institution.")).

[211] Brief on behalf of Petitioner, United States v. Denedo, 66 M.J. 114 (2008).

[212] *Id.* (quoting Clinton v. Goldsmith, 526 U.S. 529, 534 (1999)).

> [W]e've had a lot of interesting talks around the court about [*Goldsmith*]. Some scholars and others think *Goldsmith* was probably an aberration because the services were so concerned about us reaching into the administrative business of the secretaries of the departments. Others think it was a good left hook to the chin on the court as far as limitations of jurisdiction. We'll just have to wait until the next case and see what the court does.[213]

Was *Goldsmith* an aberration or was it really meant to be a "left hook to the chin?" Maybe we'll find out next term.[214] If so, perhaps next year will be proclaimed as "The Year of Clarification."

[213] Walter Hudson, *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 68 (2000).

[214] The Supreme Court has granted certiorari in *Denedo* and will hear oral argument on 25 March 2009. Supreme Court Argument Calendar, http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMarch2009.pdf (last visited Mar. 24, 2009).