

# The Top Ten Jurisdiction Hits of the 1998 Term: New Developments in Jurisdiction

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## Introduction

*"Without music, life is a journey through a desert"*

-Pat Conroy

I was sitting at my computer deep in thought, yet unable to put words on the screen. I had thoroughly digested this year's jurisdiction cases and could not discover a common thread that tied them all together. I seriously wanted to find a trend that I could promote to make this year's jurisdiction article flow seamlessly from beginning to end and still be intellectually stimulating. Then it dawned on me. As the disc jockey on the radio station I was listening to announced the week's number one pop-rock single, I realized that this year's jurisdiction cases were like the top ten hits—each case unique, yet varying in degree of prominence. So, I present the top ten jurisdiction "hits" of the 1998 term.<sup>1</sup> But first, a brief review of jurisdiction is in order.

Traditionally, this article only focused on courts-martial jurisdiction. This year, however, it addresses cases pertaining to both courts-martial jurisdiction and appellate jurisdiction. The cases relating to court-martial jurisdiction center primarily on the composition of the court-martial and on personal jurisdiction. The cases involving appellate jurisdiction deal with extraordinary writ authority. The article first addresses courts-martial jurisdiction, then briefly discusses extraordinary writ jurisdiction.

Rule for Courts-Martial (R.C.M.) 201(b) sets forth the five elements of court-martial jurisdiction. They are: (1) jurisdiction over the offense, (2) jurisdiction over the accused, (3) a properly composed court, (4) a properly convened court, and (5) properly referred charges.<sup>2</sup> The most litigious issues of courts-martial jurisdiction relate to either jurisdiction over the offense (subject matter jurisdiction) or jurisdiction over the accused (personal jurisdiction).<sup>3</sup> Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense.<sup>4</sup> If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a service member at the time the offense is committed, subject matter jurisdiction is complete.<sup>5</sup> To satisfy personal jurisdiction, the accused must be a service member at the time of trial.<sup>6</sup>

Appellate jurisdiction focuses on the military appellate court's authority to hear and resolve a legal issue. In 1948, Congress enacted the All Writs Act,<sup>7</sup> which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. In 1969, the Supreme Court held that the All Writs Act applied to the military appellate courts.<sup>8</sup> Consistent with other federal courts, the military appellate courts view writ relief as a drastic remedy that should only be invoked in truly extraordinary situations.<sup>9</sup> In addition to the actual jurisdiction granted military appellate courts under the UCMJ,<sup>10</sup> those courts have relied on the All Writs Act as a source of potential, ancillary, or supervisory jurisdiction.<sup>11</sup> The issue often becomes, as was the situa-

1. The 1998 term began 1 October 1997 and ended 30 September 1998.
2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (1998) [hereinafter MCM].
3. See generally EVA H. HANKS, ELEMENTS OF LAW 18 (1994).
4. MCM, *supra* note 2, R.C.M. 203; *Solorio v. United States*, 483 U.S. 435 (1987) (holding that subject matter jurisdiction is contingent upon the status of the accused (as a member of the armed service at the time of the offense charged) and not whether there was a service connection).
5. *Solorio*, 483 U.S. at 451.
6. MCM, *supra* note 2, R.C.M. 202 analysis, app. 21, at A21-9. Generally, court-martial jurisdiction over a person begins at enlistment and ends at discharge. To satisfy personal jurisdiction, the offense and the court-martial must occur between these two defining periods. Jurisdiction is lost if the accused is discharged after the offense, but before the court-martial.
7. 28 U.S.C.A. § 1651(a) (West 1999).
8. *Noyd v. Bond*, 395 U.S. 683 (1969). The military justice system commonly uses four writs: mandamus, prohibition, error coram nobis, and habeas corpus. A writ of mandamus is an order from a court of competent jurisdiction that requires the performance of a specified act by an inferior court or authority. BLACK'S LAW DICTIONARY 866 (5th ed. 1979). The writ of prohibition is used to prevent the commission of a specified act or issuance of a particular order. *Id.* at 1091. The writ of error, *coram nobis*, is used to bring an issue before the court that previously decided the same issue. It allows the court to review error of fact or a retroactive change in the law that which affects the validity of the prior proceeding. *Id.* at 487. The writ of *habeas corpus* is used to challenge either the legal basis for or the manner of confinement. *Id.* at 638. Rules 27 and 28 of the United States Court of Appeals for the Armed Forces Rules of Practice and Procedure set forth the requirements for the contents of a petition for extraordinary relief. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES RULES OF PRACTICE AND PROCEDURES (27 Feb. 1996).

tion this year, under what circumstances can military appellate courts exercise relief under the All Writs Act.

With this overview as a backdrop, it is time to introduce the top ten jurisdiction cases from the 1998 term.

### Hit #10: United States v. Cook<sup>12</sup>

The bottom of the chart contains cases that play a familiar tune from years past—the jurisdictional significance of a properly composed court.<sup>13</sup> Leading off the cases in this area is *United States v. Cook*.<sup>14</sup> *Cook* emphasizes the importance of having members properly detailed to the court. The jurisdictional issue before the Court of Appeals for the Armed Forces (CAAF) was whether Private First Class (PFC) Cook’s court-martial “lacked jurisdiction because interlopers served as members of the court-martial panel.”<sup>15</sup> Ultimately, the CAAF held that any error that occurred in excusing members was not a jurisdictional defect. Rather, it was an administrative error that was tested for prejudice.<sup>16</sup>

At trial, before the court-martial members were empanelled, the convening authority’s staff judge advocate (SJA) excused five of the nine panel members from the primary court-martial convening order. The SJA then substituted the excused mem-

bers with five members from an alternate list.<sup>17</sup> Without objecting to this procedure, the defense voir dired the panel, and exercised both a challenge for cause and a preemptory challenge.<sup>18</sup>

On appeal, PFC Cook argued that the excusal and substitution of members violated R.C.M. 505(c)(1)(B)(ii).<sup>19</sup> This rule states that “no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority’s delegate in any one court-martial.”<sup>20</sup> Since the SJA excused and substituted five of the nine members, he exceeded his authority under R.C.M. 505.<sup>21</sup> Under the rule, the SJA was only permitted to excuse and substitute three of the five court-martial members. On appeal, PFC Cook argued that the two extra substituted members were “interlopers.”<sup>22</sup> According to PFC Cook, since the panel contained “interlopers,” the court-martial was not properly detailed and, therefore, lacked jurisdiction.<sup>23</sup>

In overruling this argument, the CAAF declared that the one-third rule under R.C.M. 505(c) “does not involve a matter of such fundamental fairness that jurisdiction of the court-martial would be lost without an express waiver on the record.”<sup>24</sup> Since PFC Cook did not object to the process at trial, the court viewed any violation of Rule 505(c) as administrative in nature, and tested it for prejudice.<sup>25</sup> The court also dismissed the

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9. Daniel J. Wacker, *The “Unreviewable” Court-Martial Conviction: Supervisory Relief Under the All Writs Act From the United States Court of Military Appeals*, 32 HARV. C.R.-C.L. L. REV. 33 (1975).

10. See UCMJ arts. 66, 67, 69 (West 1999).

11. See *McPhail v. United States*, 1 M.J. 457, 462 (C.M.A. 1976); *Dew v. United States*, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998).

12. 48 M.J. 434 (1998).

13. See Major Martin H. Sitler, *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, ARMY LAW., May 1998, at 2 (discussing 1997 jurisdiction cases).

14. 48 M.J. 434 (1998).

15. *Id.* at 435.

16. *Id.* at 438.

17. *Id.* at 436.

18. *Id.*

19. *Id.*

20. MCM, *supra* note 2, R.C.M. 505(c)(1)(B)(ii).

21. *Id.*

22. *Cook*, 48 M.J. at 437. The term “interloper” refers to a member “who sat on a court-martial but who had not been appointed by the convening authority to do so.” *Id.*

23. *Id.* at 436.

24. *Id.*

25. *Id.*

defense’s “interloper” argument. The CAAF found that all members who were appointed to the court-martial, even the members who were substituted from the alternate list, were properly detailed by the convening authority and were not “interlopers.”<sup>26</sup>

In holding that there was no jurisdictional error, the CAAF makes it clear that the jurisdictional challenge to members lies with the detailing of the members and the number of members that make up the panel.<sup>27</sup> In *Cook*, the convening authority properly detailed the members that were empaneled panel and the general court-martial panel consisted of the proper quorum of members—at least five members.<sup>28</sup> As such, there was no jurisdictional error.

*Cook* provides clear guidance for practitioners in the area of jurisdictional challenges to court-martial member composition. Counsel can raise two jurisdictional issues: (1) the court-martial does not consist of the requisite number of panel members, and (2) the members sitting on the panel are not properly detailed. Other errors that may arise, such as improperly excusing members, raise administrative, not jurisdictional, errors. The court will test these administrative errors for prejudice.

*United States v. Upshaw*<sup>30</sup> has a similar tune to that of *Cook*—the proper composition of a court-martial consisting of members. Air Force Staff Sergeant (E-5) Upshaw, requested to be tried by a court-martial composed of officer and enlisted members.<sup>31</sup> In fulfilling this request, the convening authority’s SJA instructed his staff to compile a list of available enlisted personnel of the rank of E-7 and above.<sup>32</sup> The SJA gave this rank-limiting guidance under the mistaken belief that the accused was an E-6.<sup>33</sup> From this list, the convening authority detailed the enlisted members to the court-martial. The defense argued that this impermissible exclusion of E-6s deprived the court-martial of jurisdiction.<sup>34</sup>

In addressing this issue, the CAAF emphasized that “[w]hile it is permissible to look first at the senior grades for qualified court members, the lower eligible grades may not be systematically excluded.”<sup>35</sup> The court also stated that it is improper for a convening authority to stack a court-martial panel by “inclusion or exclusion.”<sup>36</sup> Looking at the facts of *Upshaw*, however, the CAAF determined that the exclusion of E-6s did not result from improper stacking, but rather from an administrative mistake.<sup>37</sup> Finding that the error was non-judicial, the court tested for prejudice. Ultimately, the court found no prejudice and affirmed the conviction.<sup>38</sup>

In *Upshaw*, the CAAF makes two jurisdictional pronouncements: (1) “[c]ourt stacking does not deprive the court-martial

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26. *Id.* at 437. The convening authority used the criteria set forth under Article 25(d), UCMJ when selecting court-martial members to both the primary and alternate lists. *Id.* at 436 (citing UCMJ art. 25(d) (West 1999)).

27. *Id.* at 437. See UCMJ arts. 16, 25 (West 1999).

28. UCMJ art. 16(1)(A). This provision states: “The three kinds of courts-martial in each of the armed forces are—(1) general courts-martial, consisting of—(A) a military judge and not less than five members . . . .” *Id.*

29. 49 M.J. 111 (1998).

30. *Id.*

31. *Id.* at 112.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 113 (citing *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975); *United States v. Greene*, 43 C.M.R. 72 (C.M.A. 1970); *United States v. Crawford*, 35 C.M.R. 3, 12 (C.M.A. 1964)).

36. *Id.* (citing *United States v. Hilow*, 32 M.J. 439, 440 (C.M.A. 1991)).

37. *Id.*

38. *Id.* In a dissenting opinion, Judge Effron placed great weight on the fact that the defense raised the issue of improper exclusion during trial and the military judge denied any relief. He emphasized that the accused correctly raised the error, yet it was ignored. He opines that the CAAF must “scrutinize carefully any deviations from the protections designed to provide an accused servicemember with a properly constituted panel. . . . When a service member has done all he or she can do by putting the issue in the spotlight and asking for a timely correction, and the government declines to correct the error, we should not countenance such disrespect for the protections of the rights of members of the armed forces.” *Id.* at 116 (Efron, J., dissenting).

of jurisdiction,<sup>39</sup> and (2) administrative errors in detailing court-martial members are non-judicial.<sup>40</sup>

### Hit # 8: United States v. Seward<sup>41</sup>

Another court-composition melody that played this year was *United States v. Seward*.<sup>42</sup> Unlike *Cook* and *Upshaw*, the court-martial composition issue in *Seward* focused on the military judge rather than court-martial members. In particular, the accused argued that his court-martial lacked jurisdiction because he did not make an election to be tried by military judge alone, either orally or in writing, before the court was assembled.<sup>43</sup> The CAAF, however, held otherwise.<sup>44</sup>

The accused in *Seward* was charged with two specifications of larceny and tried by a general court-martial before officer and enlisted members.<sup>45</sup> The accused pleaded guilty to the lesser-included offenses of wrongful appropriation, and the government attempted to prove the greater offenses of larceny. By the end of the government's case, the military judge had seen enough error to grant the defense's request for a mistrial.<sup>46</sup> The government then re-referred the case to another general court-martial. In the interim, however, the government entered into a pretrial agreement with the accused in which he agreed to plead guilty to the lesser offenses of wrongful appropriation and elected to be tried by military judge alone. In exchange, the

government agreed not to pursue the greater offenses of larceny.<sup>47</sup>

The same military judge that sat for the first court-martial presided over the second.<sup>48</sup> Unfortunately, the military judge considered the second trial a continuation of the first trial and did not ask the accused to make an election to be tried by military judge alone before assembly.<sup>49</sup> This is an important procedural step that is codified under Article 16, UCMJ.<sup>50</sup> It was not until the sentencing proceedings were completed that the accused finally submitted a request to be tried by military judge alone. On appeal, the accused challenged the legality of the process.

The first jurisdictional pronouncement made by the CAAF in *Seward* was that the granting of the mistrial had the same effect as the convening authority withdrawing the charges—it terminated jurisdiction of the first court-martial.<sup>51</sup> “A new referral was necessary to establish jurisdiction again and to convene a separate court-martial from the first.”<sup>52</sup> The CAAF viewed the accused's second court-martial as separate and distinct. Accordingly, the second court-martial had to satisfy all jurisdictional prerequisites.<sup>53</sup> As such, the court found that “the military judge erred by not seeking [the accused's] request for trial by military judge alone on the record before assembly.”<sup>54</sup> The court, however, did not find this error to be jurisdictional.<sup>55</sup>

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39. *Id.* at 113.

40. *Id.*

41. 49 M.J. 369 (1999).

42. *Id.*

43. UCMJ art. 16 (West 1998). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special courts-martial. In pertinent part, Article 16(1)(B) provides that “only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.” *Id.* art. 16(1)(B).

44. *Seward*, 49 M.J. at 373.

45. *Id.* at 370.

46. *Id.* at 371.

47. *Id.* at 373. There were no sentence limitations as part of the pretrial agreement. *Id.*

48. *Id.* at 371.

49. *Id.* at 370. The military judge also incorporated by reference into the second trial the accused's pleas to the wrongful appropriation made at the first trial. *Id.*

50. UCMJ art. 16(1)(B) (West 1999). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special courts-martial. In pertinent part, Article 16(1)(B) provides: “only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.” *Id.*

51. *Seward*, 49 M.J. at 372.

52. *Id.* at 373.

53. *Id.* See MCM, *supra* note 2, R.C.M. 201(b).

The court seemed to rely on a substantial compliance rationale to justify its holding. The CAAF stated that the “[accused’s] desire to be tried by military judge alone was apparent from both the terms of the pretrial agreement and the entry of [the accused’s] written request for a judge-alone trial, albeit after completion of the sentencing proceedings.”<sup>56</sup> The CAAF reached a similar conclusion last year in *United States v. Turner*.<sup>57</sup> Interestingly, however, the court in *Seward* did not cite *Turner* to support its holding. Regardless, the music in *Seward* is clear—failing to follow the plain language of Article 16 does not create a jurisdictional error so long as the facts show there is substantial compliance with the statute.

#### **Hit # 7: United States v. Keels<sup>58</sup>**

With hit number seven, the chart unveils a different tune; a melody of personal jurisdiction. In *United States v. Keels*, the CAAF considered the question of when personal jurisdiction terminates. The specific issue was whether a convening authority’s order to execute a punitive discharge served as a valid discharge that terminated personal jurisdiction.<sup>59</sup> The CAAF held that the order to execute the punitive discharge did not terminate court-martial jurisdiction.<sup>60</sup>

In 1994, Airman Basic Keels was convicted of drunken driving and involuntary manslaughter.<sup>61</sup> His sentence included fifteen months of confinement and a bad-conduct discharge.<sup>62</sup> He served the confinement, then remained in the service in an appellate leave status pending final appellate review of his case.

His conviction was eventually approved, and a supplemental court-martial order was completed. The order directed Keels’ punitive discharge to be executed.<sup>63</sup> One week later, Keels was accused of sodomizing and sexually assaulting his stepdaughter. At no time did Keels receive a valid discharge certificate<sup>64</sup> or undergo a final accounting of pay—two vital requirements that define a discharge from the service.<sup>65</sup>

On appeal, Keels challenged the jurisdiction of his second court-martial. He argued that the publication of the court-martial order executing the punitive discharge terminated personal jurisdiction over him. In denying Keels’ challenge, the CAAF stated that the appellate review under Article 71(c), which is required before a punitive discharge can be executed, merely initiates “the administrative process of preparing the appropriate separation and pay documentation.”<sup>66</sup> The court clearly holds that delivery of a valid discharge certificate, undergoing a clearing process, and receiving a final accounting of pay defines a discharge, the mechanism that terminates personal jurisdiction over a servicemember.<sup>67</sup> This is a melody that has been played before, and will most certainly be played again.

#### **Hit # 6: United States v. Underwood<sup>68</sup>**

This next hit comes to us from the Air Force Court of Criminal Appeals and addresses the jurisdictional significance (or lack thereof) of an improper referral. In *United States v. Underwood*,<sup>69</sup> the Air Force Court considered at the effect of improper

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54. *Seward*, 49 M.J. at 373.

55. *Id.* The court went on to find that the error did not unduly prejudice the accused, and affirmed the conviction. *Id.*

56. *Id.* at 373.

57. 47 M.J. 348 (1997) (holding that an accused’s request for trial by military judge alone can be inferred from the record). See Sitler, *supra* note 13, at 3 (discussing *Turner* and other similar cases).

58. 48 M.J. 431 (1998).

59. *Id.*

60. *Id.* at 432.

61. *Id.*

62. *Id.*

63. *Id.* Once the allegations that the accused sexually abused his stepdaughter surfaced, the government issued another court-martial order. This revoked the previous order directing the execution of the accused’s punitive discharge. *Id.*

64. *Id.* The court defines a valid discharge certificate as a Department of Defense Form 214.

65. See 10 U.S.C.A. § 1168(a) (West 1999).

66. *Keels*, 48 M.J. at 432.

67. *Id.* (citing *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)).

68. 47 M.J. 805 (A.F. Ct. Crim. App. 1997).

command influence during the referral process on courts-martial jurisdiction.

In April 1996, the government referred rape charges against the accused.<sup>70</sup> Due to the victim's unavailability, the government requested a continuance, which the military judge denied. In response, the "convening authority withdrew all charges and, *de facto*, dismissed them" in June 1996.<sup>71</sup> Several months later, the convening authority referred the same charges to another general court-martial.<sup>72</sup> At trial, the defense moved to dismiss the charges for lack of jurisdiction, arguing that the withdrawal and re-referral to another court-martial was improper.<sup>73</sup> The judge denied the motion.

On appeal, the accused again raised the issue that the court-martial lacked jurisdiction.<sup>74</sup> The Air Force Court disagreed by declaring that "issues of an improper referral for trial are not jurisdictional in nature."<sup>75</sup> Even though the defense improperly titled its argument, the court recognized that challenges to the referral process touch upon "one of the more sensitive areas of the military justice process."<sup>76</sup> Applying a *de novo* standard of review, the Air Force Court held that there was not an improper withdrawal or re-referral.<sup>77</sup> Focusing on R.C.M. 604(a) and (b), which address withdrawal and re-referral of charges, the court determined that the convening authority's intent was proper, and the government did not unfairly delay the trial.<sup>78</sup> As such, the court affirmed the case.<sup>79</sup>

When viewed singularly, the jurisdictional significance of *Underwood* seems minimal. When compared to the other

court-martial composition cases decided this year, however, *Underwood* adds support to the trend that errors with procedural rules (for example, the member selection process and the referral process) are non-jurisdictional errors. As such, the appellate courts will scrutinize these errors for prejudice.

#### Hit # 5: ABC, Inc. v. Powell<sup>80</sup>

The next several selections on the chart focus on the military appellate courts' procedure and exercise of authority under the All Writs Act.<sup>81</sup> As mentioned in the introduction, there is no question that military appellate courts can grant relief under the All Writs Act. The issue that is often raised, involves the extent of the court's writ authority. Before discussing this issue, a review of a case that focuses on extraordinary writ filing procedures is in order.

In *ABC, Inc. v. Powell*,<sup>82</sup> the CAAF established a clear procedure that practitioners should follow when filing a writ with a military appellate court. Specifically, the court announced that absent a showing of good cause, a practitioner should first file a writ with the respective service courts of criminal appeals.<sup>83</sup> If the service court denies the requested relief, the accused can then file a writ with the CAAF.

The substantive issue raised in *Powell* was whether the convening authority erred in closing the Article 32 investigation to the public.<sup>84</sup> The issue came before the CAAF as a writ, which the defense filed directly with the court, bypassing the service

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69. *Id.*

70. *Id.* at 807. The charges referred against the accused were "charges of rape, forcible sodomy, indecent assault, and providing alcohol to a minor." *Id.* There was later added another charge of rape involving a second victim. *Id.*

71. *Id.* at 808.

72. *Id.* The re-referral occurred in August 1996.

73. *Id.* at 806.

74. *Id.*

75. *Id.* at 807.

76. *Id.*

77. *Id.* at 811.

78. See MCM, *supra* note 2, R.C.M. 604(a), (b) discussion (providing examples of proper and improper reasons for a convening authority to withdraw and re-refer charges).

79. *Underwood*, 47 M.J. at 811.

80. 47 M.J. 363 (1997).

81. 28 U.S.C.A. § 1651(a) (West 1999).

82. 47 M.J. 363 (1997).

83. *Id.* at 365.

Court of Criminal Appeals.<sup>85</sup> In the end, the CAAF granted the requested relief and ordered that the Article 32 investigation be open to the public and the press.<sup>86</sup> In the process, however, the court made clear its intention that petitioners must first seek relief from the service courts.

Although not substantively significant to the issue of appellate jurisdiction, *ABC, Inc.*, provides procedural precedent that practitioners should heed.

#### **Hit # 4: United States v. Dowty<sup>87</sup>**

Although not a case centered on an extraordinary writ issue, the CAAF in *United States v. Dowty* displays its proclivity toward expansive authority under the All Writs Act. The issue before the court was the application of the Right to Financial Privacy Act (RFPA)<sup>88</sup> to the military. Similar to the All Writs Act, the RFPA is a federal statute that the military has embraced. The purpose of the RFPA is to regulate the government's ability to seize a person's bank records.<sup>89</sup> The issue in *Dowty* arose when the government attempted to acquire the accused's bank records and, in response, the accused filed a petition in federal court protesting release of the records.<sup>90</sup> The government eventually prevailed in the collateral attack, but the process delayed the court-martial past the five-year statute of limitations. At trial, the defense moved to dismiss the charges against Dowty, arguing that the statute of limitations expired.<sup>91</sup> In response, the government argued that the RFPA's tolling provision applied, and the time used to address the accused's collateral challenge in federal court should not count against the statute of limitations.<sup>92</sup> The military judge disagreed with the government and dismissed the charges.

In a government appeal, the prosecution argued that the RFPA and its tolling provision applied to the military. In hold-

ing that the RFPA does apply to the military, the CAAF looked to the military's exercise of another federal statute—the All Writs Act. In making the comparison, the CAAF stated that it fully embraced the jurisdiction afforded under the federal writ statute. It emphasized that the All Writs Act “has been exercised in a wide variety of circumstances, including instances where [the CAAF] would not have had direct review of the proceedings.”<sup>93</sup> Although not a momentous appellate jurisdictional pronouncement, the message remains consistent—military appellate courts recognize supervisory jurisdiction under the All Writs Act to address issues arising in all facets of the military justice system. The next two cases provide recent examples of the exercise of this authority.

#### **Hit # 3: Dew v. United States<sup>94</sup>**

In *Dew v. United States*, the Army Court of Criminal Appeals (ACCA) granted relief under the All Writs Act. In so doing, it revealed its view of the Act's supervisory role over the military justice system.

Before addressing the specifics of *Dew*, a brief discussion of supervisory writ jurisdiction is warranted. The Supreme Court, along with the military appellate courts, unequivocally declared that the All Writs Act is not a separate source of appellate jurisdiction.<sup>95</sup> Rather, it provides a means by which a federal appellate court can address issues that will aid in the exercise of its actual jurisdiction. Without question, an appellate court may exercise extraordinary writ authority in aid of its actual or potential jurisdiction.<sup>96</sup> Another type of authority an appellate court may assert in aid of its jurisdiction under the All Writs Act is supervisory authority. The outer limits of supervisory jurisdiction are undefined and are viewed differently among the military appellate courts. In *Dew*, the ACCA presented its view of the scope of supervisory jurisdiction.

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84. *Id.* at 364.

85. *Id.*

86. *Id.* at 366. “Absent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32 investigative hearing.” *Id.* at 365.

87. 48 M.J. 102 (1998).

88. *Id.* at 107.

89. *Id.*

90. *Id.* at 104.

91. *Id.* at 105.

92. *Id.*

93. *Id.* at 106.

94. 48 M.J. 639 (Army Ct. Crim. App. 1998).

95. Wacker, *supra* note 9, at 52.

The accused in *Dew* was convicted of making and uttering worthless checks by dishonorably failing to maintain funds.<sup>97</sup> Because she was sentenced only to a rank reduction, she did not qualify for an automatic review by the ACCA.<sup>98</sup> As required, however, the Office of The Judge Advocate General (OTJAG) reviewed her case. Upon review, the OTJAG upheld the conviction and sentence.<sup>99</sup> Staff Sergeant Dew then requested that her case be forwarded to the Army Court of Criminal Appeals for review.<sup>100</sup> The OTJAG denied her request. In response, the accused filed a writ for extraordinary relief with the ACCA.

The first issue addressed by the ACCA was whether it had jurisdiction to hear the writ. The court declared that it had “All-Writs-Act supervisory jurisdiction to consider, on the merits, a writ challenging the action taken [by OTJAG].”<sup>101</sup> In supporting its position, the ACCA looked to its role in the military justice process. The court professed that “[a]s the highest judicial tribunal in the Army’s court-martial system, [it is] expected to fulfill an appropriate supervisory function over the administration of military justice.”<sup>102</sup> Accordingly, the ACCA felt comfortable exercising jurisdiction over a challenge to action taken under Article 69.

What *Dew* does not answer, however, is what are the outer limits of the court’s supervisory jurisdiction under the All Writs Act. The ACCA specifically stated that “[it] need not define the outer limits of [its] supervisory jurisdiction in order to dispose of the petition before [it].”<sup>103</sup> This statement by the court invites

practitioners to not only challenge Article 69 actions, but to also seek extraordinary relief for novel issues that allow the court to exercise its supervisory role over the military justice process. As illustrated in the next case, the CAAF sings this same tune.

## Hit #2: Goldsmith v. Clinton<sup>104</sup>

When considering the jurisdictional melody of extraordinary writs, the most noteworthy case decided during the 1998 term is *Goldsmith v. Clinton*.<sup>105</sup> In *Goldsmith*, the CAAF expands its supervisory review authority under the All Writs Act by stopping the Air Force from administratively separating an officer from the military.<sup>106</sup>

Major Goldsmith, the accused, was convicted of an HIV aggravated assault.<sup>107</sup> Although he was sentenced to a lengthy period of confinement, he was not given a punitive discharge.<sup>108</sup> While in confinement, the accused filed a writ before the Air Force Court of Criminal Appeals. The accused complained that the confinement facility was improperly administering and maintaining his HIV medication.<sup>109</sup> By the time the writ came before the Air Force Court, the accused had been released from confinement and the HIV issue was moot. Therefore, the writ was denied.<sup>110</sup>

Regardless, the accused filed a writ appeal to the CAAF. He did not argue that the denial of the initial writ was improper;

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96. UCMJ art. 66(b) (1999) (defining actual jurisdiction). Potential jurisdiction includes cases that could reach the actual jurisdiction of the appellate court depending upon the action taken by others who exercise authority in the military justice system. A case where the CAAF exercised writ authority in aid of its potential jurisdiction is *ABC, Inc. v. Powell*. See *ABC, Inc. v. Powell*, 47 M.J. 363 (1997). In *ABC, Inc.*, the case was at the Article 32 investigation stage when the writ was filed. Therefore, there was the *potential* that the CAAF could have reviewed the case CAAF if it was referred to a general court-martial and resulted in a conviction.

97. *Dew*, 48 M.J. at 642.

98. *Id.* at 644.

99. *Id.* at 643.

100. *Id.* The accused’s legal challenge was that her plea was improvident because her bad checks were written to pay for a gambling debt. The OTJAG reviewed the accused court-martial pursuant to Article 69(a), and upheld the conviction. Under Article 69(a), the OTJAG shall review a general court-martial that resulted in a conviction that is not otherwise reviewed by the Court of Criminal Appeals. See UCMJ art. 69(a). The accused then requested that the OTJAG recommend further appellate review under Article 69(d). The OTJAG denied this request. Article 69(d) permits the OTJAG to send a court-martial to the military appellate courts in situations where the case does not qualify for automatic review by the courts. See *id.* art. 69(d).

101. *Dew*, 48 M.J. at 647.

102. *Id.* at 645 (citing *Noyd v. Bond*, 395 U.S. 683 (1969); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976)).

103. *Id.* at 647.

104. 48 M.J. 84 (1998).

105. *Id.*

106. *Id.* at 89. The type of administrative separation Major Goldsmith was facing was a dropping from the roles. See 10 U.S.C.A. §§ 1161, 1167 (West 1999).

107. *Goldsmith*, 48 M.J. at 85.

108. *Id.*

109. *Id.* at 86.

instead, the accused raised a new issue before the court.<sup>111</sup> He claimed that the government was unlawfully dropping him from the rolls of the Air Force.<sup>112</sup> Since the accused was not adjudged a punitive discharge in his court-martial, the government sought to discharge the accused by dropping him from the rolls of the Air Force. The government took this action pursuant to a federal statute. The law in effect at the time of the accused's conviction, however, did not permit the government to drop an officer from the rolls based solely on a court-martial conviction. According to the defense, the government's action was additional punishment that violated the *ex post facto* clause of the Constitution.<sup>113</sup> Before addressing this issue, however, the CAAF had to determine if it possessed the jurisdiction to grant the relief. Specifically, the CAAF considered whether it could grant relief over an issue that it did not address, nor could address, under its statutory appellate authority.

The government insisted that "dropping [the accused] from the rolls [was] only an 'administrative' matter and [did] not concern punishment."<sup>114</sup> According to the government, since the challenge did not amount to a military justice matter, the CAAF lacked supervisory authority under the All Writs Act to grant relief. In rejecting the government's argument, the majority declared that the government's action (dropping the accused from the rolls) amounted to additional punishment.<sup>115</sup> Since the action equated to punishment, the issue was a military justice matter. As such, CAAF reasoned that it could exercise its inherent supervisory power under the All Writs Act to grant relief, if necessary.<sup>116</sup> Under the facts of *Goldsmith*, the CAAF believed it was necessary to grant relief, and ordered the Air Force not to drop Goldsmith from the rolls.<sup>117</sup>

The interesting aspect of *Goldsmith* is the display of differing opinions the judges of the court have about the scope of the court's supervisory authority under the All Writs Act. In a concurring opinion, Chief Judge Cox cautions that the court's exercise of jurisdiction in *Goldsmith* is limited to the facts of the case.<sup>118</sup> He does not purport to adopt a precedent that allows the CAAF to exercise writ jurisdiction over all administrative actions that touch the military justice system. Judge Sullivan, however, applauds the court's action, and emphasizes that the CAAF "should use [its] broad jurisdiction under the Uniform Code of Military Justice to correct injustices like this and [should] not wait for another court to perhaps act."<sup>119</sup> Judges Gierke and Crawford strongly disagree. In a dissenting opinion authored by Judge Gierke, both judges proclaim that dropping the accused from the rolls "pertains to a collateral administrative consequence . . . that may or may not occur," and that the CAAF "has no jurisdiction over administrative personnel actions."<sup>120</sup> On 4 November 1998, the Supreme Court agreed to review *Goldsmith*, and address the issue of the scope of the CAAF's supervisory authority under the All Writs Act—a song soon to be composed.<sup>121</sup>

#### Hit #1: *Willenbring v. Neurauter*<sup>122</sup>

The number one hit this term involves the music of court-martial jurisdiction. Topping the jurisdiction chart this year is *Willenbring v. Neurauter*.<sup>123</sup> In this case, the CAAF put to rest the interpretation of a long debated issue: can the military assert courts-martial jurisdiction over a reservist who committed misconduct while a member of the regular component?

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110. *Id.*

111. By allowing the petitioner to first raise the issue before the CAAF, the court made clear that its previous holding in *ABC, Inc.* (declaring that a writ for extraordinary relief must first be brought before the Court of Criminal Appeals absent good cause) was not an ironclad rule. *Id.* at 88.

112. *Id.* at 86.

113. *Id.* at 89.

114. *Id.* at 90.

115. *Id.*

116. *Id.* at 87.

117. *Id.* at 90. The CAAF held that the government's action in dropping the accused from the rolls of the Air Force violated the *Ex Post Facto* clause of the Constitution. *Id.*

118. *Id.*

119. *Id.* at 91.

120. *Id.*

121. *Goldsmith v. Clinton*, 119 S. Ct. 402 (1998).

122. 48 M.J. 152 (1998).

123. *Id.*

Through means of an extraordinary writ, the court answers the question in the affirmative.<sup>124</sup>

On 31 March 1992, after serving over ten years in the Army, the accused was discharged from the regular component, and on 1 April 1992 he enlisted with the U.S. Army Reserve.<sup>125</sup> In 1997, while the accused was a member of the reserve component, charges were preferred against him for rape. The charges related to misconduct the accused allegedly committed in 1987 and 1988 while he was a member of the regular component.<sup>126</sup> Pursuant to Article 2(d), UCMJ, the government involuntarily recalled the accused to active duty.<sup>127</sup> Once the government referred the case to a general court-martial, the accused challenged the jurisdiction of the court, arguing that the court-martial lacked jurisdiction because he had been discharged from the regular component before joining the reserve component. The accused alleged that the intervening discharge precluded the military from prosecuting him for any misconduct he may have committed while a member of the regular component.<sup>128</sup>

In support of his position, the accused relied on Articles 3(a) and 2(d), UCMJ. The version of Article 3(a) that applied to the case did not permit the military to assert court-martial jurisdiction over an offense committed prior to an intervening discharge when the offense was punishable by confinement for less than five years and could be prosecuted in a civilian criminal court.<sup>129</sup> Under this statute, the accused argued that he was discharged, and the crime that the military sought to prosecute him for was rape—an offense that could easily be prosecuted in the civilian criminal justice system. As such, under Article 3(a), the military could not assert court-martial jurisdiction.<sup>130</sup>

Alternatively, the defense opined that even if the government could satisfy Article 3(a), Article 2(d) did not provide the statutory authority to involuntarily recall the accused to active duty to face a court-martial.<sup>131</sup> Article 2(d) permits the military to involuntarily recall a reservist to active duty for purposes of a court-martial when he allegedly committed misconduct while on active duty.<sup>132</sup> The defense argued that the term “active duty” only pertains to periods of active duty served while a member of the reserve component.<sup>133</sup> Since the accused’s offenses occurred while he was an active duty member of the regular component, Article 2(d) did not apply. Therefore, the government had no means to place the accused in the proper status to court-martial him.

In a well-written and reasoned opinion by Judge Effron, the CAAF synthesized the two statutory provisions at issue and declared that they should be “read in harmony.”<sup>134</sup> First, the court determined that the accused’s intervening discharge did not necessarily divest the military of court-martial jurisdiction over the accused.<sup>135</sup> In analyzing the then-existing Article 3(a), the CAAF addressed three scenarios. According to the CAAF:

If there was a complete termination of military status with no subsequent military service, then the former service member would not be subject to court-martial jurisdiction for prior-service offenses as a matter of constitutional law . . . . If, however, there was a complete termination of military status followed by reentry into reserve service, then the reservist would be subject to court-mar-

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124. *Id.* at 175.

125. *Id.* at 154. The accused was fulfilling a six year enlistment when he requested an early discharge. As part of his request, the accused agreed to serve the remaining portion of his enlistment in the reserves. The accused remained in the reserves until his court-martial.

126. *Id.* at 155.

127. UCMJ art. 2(d)(2) (West 1999). This provision states that “[a] member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was (A) on active duty . . . .” *Id.*

128. *Willenbring*, 48 M.J. at 157. The accused argued that the “court-martial may not exercise jurisdiction over a former service member whose relationship with the armed forces has been severed completely as a result of a valid discharge . . . .” *Id.* (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)).

129. *Id.* at 158. “When Congress enacted the present version of Article 3(a), the statute was given prospective effect, applying only to offenses occurring on or after October 23, 1992.” *Id.*

130. *Id.* at 157.

131. *Id.* at 171.

132. UCMJ art. 2(d)(2) (West 1999).

133. *Willenbring*, 48 M.J. at 171.

134. *Id.* at 175.

135. *Id.*

tial jurisdiction for prior service offenses, subject to the major offense and nontriability conditions of Article 3(a). Finally, if there was a change in status between regular and reserve service, or within various forms of reserve service, unaccompanied by a complete termination of military status, then the reservist would be subject to court-martial jurisdiction for all prior-service offenses to the same extent as a regular whose military status had changed in form without a complete termination of military status.<sup>136</sup>

The CAAF declared that the latter scenario applied, and urged the military judge to solicit facts that would definitively answer the question of whether the accused's military status was completely terminated.<sup>137</sup> Second, the CAAF declared that Article 2(d) is not limited to misconduct committed while serving on active duty as a member of the reserve component. Rather, the term "active duty" refers to both regular component and reserve component active duty service.<sup>138</sup>

In addition to answering the issues before the court, the CAAF also foreshadowed its interpretation of the current version of Article 3(a) when faced with a similar situation. Throughout its opinion, the court confirmed several times that "under current law, if a person is subject to military jurisdiction at the time of trial and was subject to military jurisdiction at the time of the offense, that person may be tried for offenses occurring during a prior period of military service . . . regardless of the intervening discharge."<sup>139</sup> The court makes it clear that the statute of limitations of the criminal misconduct alleged is the determinative factor that may preclude prosecution in the military, not an intervening break in service.<sup>140</sup>

The *Willenbring* case solidifies the CAAF's interpretation of Articles 3(a) and 2(d). The case clearly opens the door for the military to prosecute reservists who commit misconduct while

members of the regular component. Although stated in dicta, the court firmly believes that under the current Article 3(a) any intervening discharge or break in service is irrelevant. The relevant jurisdictional inquiry is—was the accused in the proper status at the time of the crime and at the time of trial? What happens in between is immaterial. The defense can nevertheless take issue. There still remains a viable constitutional challenge to Article 3(a)—can the military assert court-martial jurisdiction over a person who became a civilian, yet for whatever reason, decided to re-join the military?<sup>141</sup> The Supreme Court will most likely have to answer this challenge.

## Conclusion

Although there is no overall trend, there are several messages that can be gleaned from this year's cases. First, challenging court-martial jurisdiction is always ripe when the government fails to follow the rules, especially when it comes to court-martial composition or referral. The success of the challenge may not hinge on the strict application of the rule, but rather the particular facts in the case that indicate a substantial compliance with the rule. Second, the military appellate courts are liberal in asserting a supervisory role over the military justice system under the All Writs Act. This trend may change, however, depending on the Supreme Court's decision in *Goldsmith v. Clinton*. Finally, although it is contained in dicta, the message in *Willenbring* is clear—under Article 3(a), UCMJ, a break in service does not automatically divest the military of court-martial jurisdiction.

The cases mentioned in this article represent the most significant or controversial jurisdiction cases of the 1998 term. Each one played a unique tune that influenced the law of military jurisdiction.

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136. *Id.* at 170.

137. *Id.* at 175.

138. *Id.* *But see* *Murphy v. Dalton*, 81 F.3d 343 (3d. Cir. 1996) (holding that the term "active duty" in Article 2(d) only pertains to (active duty service performed while a member of the reserve component).

139. *Id.* at 158.

140. *Id.* at 176.

141. *See* *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1966) (declaring that it is unconstitutional to assert court-martial jurisdiction over a former service member who has become a civilian); *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949) (holding that discharged servicemembers are not subject to court-martial jurisdiction for prior service offenses).