

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

Major (O-4),)	UNITED STATES' RESPONSE
NIDAL M. HASAN)	TO THIS COURT'S FEBRUARY
United States Army,)	4, 2019 ORDER
Petitioner,)	
)	
v.)	
)	
UNITED STATES ARMY)	Crim. App. No. 20130781
COURT OF CRIMINAL)	
APPEALS,)	USCA Dkt. No. 19-0054/AR
Respondent)	
)	
And)	
)	
UNITED STATES,)	
Real Party in Interest)	

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**TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

COMES NOW the undersigned appellate government counsel, pursuant to Rule 28(b)(1) of this Honorable Court’s Rules of Practice and Procedure, and responds to this Court’s February 4, 2019, order to address the jurisdiction of this Court to grant the petition for extraordinary relief in the nature of a writ of mandamus.

The All Writs Act authorizes this Court to issue writs “in aid of” its subject-matter jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). “As the text of the All Writs Act recognizes, a court’s power to issue any form of relief – extraordinary or otherwise – is contingent on that court’s subject-matter jurisdiction over the case or controversy.” *United States v. Denedo*, 556 U.S. 904, 911 (2009). The Act does not enlarge this Court’s existing statutory jurisdiction. *Goldsmith*, 526 U.S. at 534.

This Court’s jurisdiction is strictly defined by Congress in Article 67, Uniform Code of Military Justice, 10 U.S.C. § 867 (2012) [hereinafter UCMJ]. This Court conducts mandatory review of cases in which the “sentence, as affirmed by a Court of Criminal Appeals, extends to death” and cases certified by a Judge Advocate General, and can review cases “upon petition of the accused and on good cause shown.” Article 67(a), UCMJ. In any case this Court reviews, this Court has the authority to 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.” Article 67(c), UCMJ.

This case is currently before the Army Court for appellate review pursuant to Article 66, UCMJ. The Army Court has not yet acted on the findings and sentence of this case. Accordingly, this Court does not yet have direct appellate jurisdiction over this case. At issue is whether the issuance of the writ would be “in aid of” this Court’s jurisdiction. 28 U.S.C. §1651.

At first blush, a liberal interpretation of this Court’s authority under Article 67, UCMJ, in the context of the All Writs Act and this Court’s prior precedent in *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012), suggests that this Court may exercise jurisdiction under the Act because the writ is “in aid of” its potential jurisdiction. In *Gross*, this Court exercised jurisdiction under the Act to issue a writ of mandamus ordering the recusal of the military judge in Petitioner’s court-martial. *Gross*, 71 M.J. at 418-19. A colorable argument could be made that, if this Court can issue a writ of mandamus ordering the recusal of a military judge, so too could it issue a writ of mandamus ordering the recusal of military appellate judges.

However, upon further examination, there are key differences between this case and *Gross*. In *Gross*, this Court did not explicitly address the rationale for its jurisdiction under the All Writs Act. *Gross* was reviewed by this Court as a writ-

appeal during the pendency of a court-martial. *See Denedo*, 556 U.S. at 915 (noting that because a criminal court of appeals had jurisdiction over a writ, this Court had jurisdiction over an appeal of the writ). This Court may distinguish the instant writ by its procedural posture and the fact that the case is pending Article 66, UCMJ, review. This distinction may deprive the court of jurisdiction under the All Writs Act. Additionally, unlike in this case, the military judge in *Gross* clearly acted outside of his authority and took action to the immediate detriment of Petitioner. *Gross*, 71 M.J. at 418-419. Additionally, this Court issued its opinion in *Gross* before it repudiated the concept of “remedial jurisdiction” and supervisory authority over the military justice system in *United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015).¹

¹ In *Arness*, this Court “repudiate[d] the expansive approach taken in *McPhail* [*v. United States*, 1 M.J. 457 (C.M.A. 1976)], *Unger* [*v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989)], and *Dew* [*v. United States*, 48 M.J. 639 (Army Ct. Crim. App. April 23, 1998)]” with regard to the concept of “remedial jurisdiction” and reliance on the Court’s supervisory powers to issue writs. *Arness*, 74 M.J. at 443 (overruling *McPhail* and *Unger*). In doing so, this Court relied on the Supreme Court’s holding in *Goldsmith*. *Id.* at 443. In *Unger* and *McPhail*, the Court of Military Appeals (CMA) invoked its “supervisory authority” over the military justice system to find that it had jurisdiction to entertain petitions for extraordinary relief where the sentence was less than that required for review before the Courts of Criminal Appeal. *Unger*, 27 M.J. at 353-54; *McPhail*, 1 M.J. at 460-61. In *McPhail*, the CMA specifically noted, “The exercise of the supervisory authority is especially useful when the matter under review is ‘outside the jurisdiction of the court or officer to which or to whom the writ is addressed.’” *McPhail*, 1 M.J. at 323-24.

In *Walker v. United States*, 60 M.J. 354 (C.A.A.F. 2004), this Court issued an extraordinary writ in a case pending an Article 66, UCMJ, review to “ensure that Petitioner’s case is before a panel authorized to conduct the normal course of appellate review.” In *Walker*, the petitioner’s case was before “a court lacking a properly designated official who can perform the functions of the chief judge in making panel assignments” which this Court found to be “an extraordinary circumstance which directly and adversely affects the normal course of appellate review.” *Id.* at 359.

At first, as in *Gross*, *Walker* could support a conclusion that this Court has jurisdiction under the All Writs Act. If this Court could exercise jurisdiction under the Act in a matter concerning the composition of a panel of a criminal court of appeals, so too could it exercise jurisdiction to address the recusal of such a panel. However, while this case is under the same procedural posture as *Walker*, there are also key differences that could warrant this Court to come to a different conclusion concerning jurisdiction. In this case, the panel conducting the Article 66, UCMJ, review is properly constituted and the issue of recusal of the Army Court judges, which can be litigated through the ordinary course of appeal, does not “directly and adversely affect[] the normal course of appellate review.” *Id.* Additionally, as in *Gross*, *Walker* was decided years before this Court repudiated the concept of “remedial jurisdiction” and supervisory authority over the military justice system.

Petitioner relies on *Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013), and *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013), in addition to *Gross* to conclude that this Court has jurisdiction under the All Writs Act. However, the procedural posture of those cases is distinguishable from this case. Like *Gross*, this Court reviewed *Center for Constitutional Rights* as a writ-appeal and the case was not pending Article 66, UCMJ, review at the time of the writ. *Center for Constitutional Rights*, 72 M.J. at 127. Although this Court in *Center for Constitutional Rights* also reviewed whether it had jurisdiction over the writ, it found that it did not because it amounted to a “civil action, maintained by persons who are strangers to the court-martial[.]” *Center for Constitutional Rights*, 72 M.J. at 129. *Kastenberg* involved the certification of three issues certified by a Judge Advocate General for review by this Court, including whether a writ of mandamus should issue, after a criminal court of appeals declined to issue a writ of mandamus. *Kastenberg*, 72 M.J. at 367. In *Kastenberg*, this Court noted that it had “jurisdiction over the certificate submitted by the JAG pursuant to Article 67(a)(2), UCMJ, as we would in the case of a writ-appeal.” *Id.* at 367. Because this case involves an original petition for a writ of extraordinary relief filed with this Court during the pendency of a criminal court of appeals’ Article 66, UCMJ, review, this Court may conclude that *Center for Constitutional Rights* and

Kastenberg may not establish an affirmative basis for jurisdiction under the All Writs Act.

The Supreme Court has held that a writ of mandamus is “in aid of” jurisdiction if a lower court has “exceeded or refused to exercise its jurisdiction, [or] where appellate review will be defeated if a writ does not issue.” *Parr v. United States*, 351 U.S. 513, 520 (1956); *see also Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25-26 (1943) (noting that jurisdiction under the All Writs Act extends to cases “within its appellate jurisdiction although no appeal has been perfected” and that the “traditional use of the writ in aid of appellate jurisdiction ... has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”).

In this case, the Army Court has neither made a ruling that defeats the potential review of this court under Article 67(a), UCMJ, nor has it not exceeded or refused to exercise its jurisdiction. A narrow reading of “in aid of” this Court’s jurisdiction could lead this Court to conclude that since the Army Court has only made a recusal decision with no further action that would lead one to question the judges’ impartiality, they have not made a ruling that directly affects the findings and sentence in this case. “Here the most that could be claimed is that the [Army Court has] erred in ruling on matters within [its] jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional

policy against piecemeal appeals.” *Roche*, 319 U.S. at 30. Until the Army Court completes its Article 66, UCMJ, review and rules on any potential assignment of error pertaining to the legality of the Army Court’s recusal decision, this Court could find the writ is not “in aid of” this Court’s jurisdiction.

Furthermore, this Court could find that the ultimate issue in the instant petition is the legality of the rating scheme of the Army Court judges, and in so deciding the recusal issue merely based upon the rating scheme would impermissibly enlarge the court’s jurisdiction contrary to *Clinton v. Goldsmith*. In *Goldsmith*, the Supreme Court held that an administrative or executive action is not a “‘finding’ or ‘sentence’ that was (or could have been) imposed in a court-martial proceeding” and therefore cannot be “in aid of” this Court’s jurisdiction.

Goldsmith, 526 U.S. at 535. Additionally, in *Goldsmith*, the Supreme Court held that this Court has no supervisory authority over the military justice system, a holding that was later re-emphasized by this Court in *Arness*. *Id.* at 536 (“[T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice.”); *Arness*, 74 M.J. at 443.

This Court could find that the basis of the allegation that the Army Court judges erred in their recusal decision is based upon the structure of the rating scheme of the Army Court judges. Because the rating scheme is a matter that is both administrative and executive in nature, this Court could conclude that the

issue raised in the petition is outside of this Court's purview under *Goldsmith*. To decide the issue of recusal of the Army Court judges prior to the completion of their Article 66, UCMJ, review could constitute the exercise of "supervisory authority" the Supreme Court warned against in *Goldsmith*. Absent a ruling on an assignment of error pertaining to denial of Petitioner's motion for recusal, this Court could find that mandamus is not the vehicle for the relief Petitioner seeks.

This Court need not definitely decide whether it has jurisdiction in this case under the All Writs Act. Regardless of whether this court has jurisdiction under the All Writs Act, the petition must fail because, as the Government noted in its response to the petition, it is not necessary and appropriate to issue the writ in this case. Accordingly, this Court should deny the petition.

WHEREFORE, the Government respectfully requests that this Honorable Court deny the Petition for a Writ of Mandamus.



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February 11, 2019

Certificate of Filing and Service

I certify that the original was filed electronically with the Court at *efiling@armfor.uscourts.gov* and contemporaneously served electronically on appellate defense counsel, on this 11th day of February, 2019.



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