IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

COME NOW the undersigned appellate defense counsel, pursuant to Rule 28(c) of this Court's Rules of Practice and Procedure, and file a reply to the United States' Response to this Court's February 4, 2019 Order. For the reasons stated herein, this Court has jurisdiction to issue the writ of mandamus.

I.

History of the Case

On November 5, 2018, petitioner filed a writ for extraordinary relief requesting the disqualification of the current sitting members of the Army Court of Criminal Appeals who have not already disqualified themselves. On December 28, 2018,

this Court ordered the government to show cause why the requested relief should not be granted, and specifically asked the government to address this Court's jurisdiction. The government filed its answer on January 22, 2018. On January 29, 2019, petitioner filed a reply.

On February 4, 2019, this Court ordered the government to more fully address whether this Court has jurisdiction. Petitioner files a reply to this limited issue.

II.

Law and Argument

The government contends that this court need not decide jurisdiction. (Gov't Response, pg. 9). But "[j]urisdiction is the power to declare the law; when [it] ceases to exist, the only function remaining to the court is that of announcing that fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. 506, 514 (1869). Thus, a determination of jurisdiction is necessary, and there is jurisdiction in this case.

The All Writs Act, 28 U.S.C. §1651, empowers this Court to issue writs in aid of its subject-matter jurisdiction. *United States v. Denedo*, 556 U.S. 904, 911 (2009) (citations omitted). The exercise of the writ power under this Act "extends to the *potential* jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods*, 384 U.S. 597, 603 (1943) (emphasis added); *see also Chandler v. Judicial Council of Tenth Circuit,*

398 U.S. 74, 112 (1970) (Harlan, J., concurring) ("[A court] may issue [a] writ […] even where jurisdiction could be invoked on the merits only after proceedings in an intermediate court.") (citations omitted). Thus, where a court can entertain an appeal at some stage of a case, it has the authority to issue a writ of mandamus to reach it. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957).[*] In the

[*] Importantly, in *La Buy*, the petitioner contended that the appellate court did not have the power to issue a writ of mandamus except in those cases where the review would be frustrated after final judgment. *La Buy*, 352 at 254. The Court stated:

> The question of naked power has long been settled by this Court. As late as *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, the Court held that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Id*., at 25. The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651 (a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co*. v. *Holland*, 346 U.S. 379, 382-383 (1953). Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them. *Roche, supra*, at 25, and cases there cited. […] We pass on, then, to the only real question involved, *i. e*., whether the exercise of the power by the Court of Appeals was proper in the cases now before us.

La Buy, 352 at 255. Consequently, when the government suggests that this Court *could* find that there is no jurisdiction since the Army Court ruled on matters within its jurisdiction and a writ would otherwise thwart the policy against piecemeal appeals, (Gov't Response, pgs. 7-8), it conflates what is "in the aid of"

military context, a writ is "in aid of" a court's jurisdiction where the petitioner seeks "to modify an action that was taken within the subject-matter jurisdiction of the military justice system." *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (quoting *United States v. Denedo*, 66 M.J. 114, 120 (C.A.A.F. 2008), *aff'd* 556 U.S. 904 (2009)).

Here, this Court is statutorily required to review this capital case on appeal. Article 67(a)(1), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 867(a)(1). While this Court acts only with respect to the findings and the sentence of a court-martial, Article 67(c), UCMJ, the decision of the Army Court judges not to recuse themselves – an action taken within the subject-matter jurisdiction of the military justice system – lies squarely within the scope of this Court's statutory review. *See e.g.*, *United States v. Mitchell*, 39 M.J. 131, 132-33 (C.M.A. 1994). Consequently, this writ is "in aid of" this Court's jurisdiction.

The Supreme Court's ruling in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), does not compel a different conclusion. In *Goldsmith*, the Supreme Court held that this Court did not have the authority to enjoin the President and other military officials

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this Court's jurisdiction with whether the writ is proper (i.e., necessary and appropriate). Indeed, in *Roche v. Evaporated Milk Ass'n*, the case that the government relies upon, the Court stated, "[T]he question presented on this record is not whether the court below had power to grant the writ but whether in light of all the circumstances the case was an appropriate one for the exercise of that power." 319 U.S. 21, 25-26 (1943).

from dropping an officer from the rolls. *Goldsmith*, 526 U.S. at 535. Significantly, the crux of the holding there was that the President's "executive action" was "straightforwardly" beyond this Court's jurisdiction to review on appeal. *Id*. Since this Court could not review whether Goldsmith was properly dropped from the roles during appellate review as the action it did not affect the findings or the sentence of Goldsmith's court-martial, it was necessarily beyond the "aid" of the All Writs Act. *Id*. Unlike *Goldsmith*, judicial disqualification does affect the findings and the sentence, and this Court can hear this issue on its mandatory Article 67, UCMJ, review.

Moreover, unlike the respondent in *Goldsmith*, petitioner does not challenge the underlying executive action. That is to say, petitioner does not seek to enjoin the Deputy Judge Advocate General from rating the Army Court. Rather, petitioner seeks to disqualify the members of the Army Court because they lack the proper regulatory and statutory authority to review his capital appeal – an appeal that is supposed to serve as a vital check to ensure that his death sentence is not imposed capriciously. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

Outside the context of Supreme Court decisions, finding jurisdiction would be consistent with the decisions of this Court. Even the government notes that *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012), and *Walker v. United States*, 60 M.J. 354 (C.A.A.F. 2004), indicate that this Court *can* exercise jurisdiction. (Gov't

Response, pgs. 3-5); *see also United States v. Hamilton*, 41 M.J. 32, 39 (C.A.A.F. 1994) ("If the [appellate] judge refuses to disqualify himself, enforcement is by assignment of error on appeal, interlocutory appeal, or mandamus.") (citations omitted). The government subsequently attempts to distinguish these cases from this case because those decisions pre-date this Court's repudiation of "remedial jurisdiction" in *United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015). (Gov't Response, pgs. 3-5). But *Arness* does not control here. *Arness* concerned a court entertaining a writ where it lacked jurisdiction to hear the case on appeal. 74 M.J. at 443. Specifically, Arness' sentence did not trigger a mandatory review by the lower court, and the case was never referred to the lower court. *Id*. Such is not the case here, nor was it in the case in *Walker*. *Walker*, 60 M.J. at 354-55. Consequently, *Arness* does not inform on the question of jurisdiction in this case, nor did it overrule *Hasan v. Gross* or *Walker*.

Lastly, finding that this Court has jurisdiction would be consistent with federal decisions. In *In re Khalid Shaikh Mohammad,* for example, the United States Court of Appeals for the District of Columbia addressed whether it had mandamus jurisdiction where the petitioner requested disqualification of a military judge on the Court of Military Commission Review (CMCR). 866 F. 3d 473 (D.C. App. 2017). Importantly, there, the statutory review of CMCR decisions by the D.C. Circuit mirrored this Court's statutory review of Army Court decisions. *Id*. at 475;

see also 10 U.S.C. § 950g (a), (d). Finding that the ordinary rules of finality could not cure the taint of a biased appellate judge, the court concluded it had jurisdiction to entertain the writ, and ordered the recusal of the appellate judge. *Id*. at 477.

In sum, this Court has jurisdiction to issue this writ, and exercising jurisdiction over the issue of judicial bias is consistent with the practice in federal court. Therefore, this Court may, and should, grant the requested relief.

III.

Conclusion

WHEREFORE, petitioner prays for an order form this Court ordering the remaining judges of the Army Court to recuse themselves.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hasan*, Crim. App. Dkt. No. 20130781, USCA Dkt. No. 19-0054/AR was electronically filed with the Court, Respondent, and Government Appellate Division on February, 19 2019.

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