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## Building a System of Military Justice Through the All Writs Act

This note considers the use of extraordinary writs<sup>1</sup> by the Court of Military Appeals<sup>2</sup> during its 1975-76 term. Past use of this power and the limitations thereon are also discussed in an effort to place its current use in perspective. During that term COMA issued two major decisions which dealt with extraordinary relief: *Courtney v. Williams*<sup>3</sup> and *McPhail v. United States*.<sup>4</sup> *Courtney* involves, principally, the way in which extraordinary relief can be used.<sup>5</sup> *McPhail* deals with the determination of when it may be used.

### MCPhAIL: ESTABLISHMENT OF GENERAL SUPERVISORY JURISDICTION

In *McPhail*, Judge Cook, an infrequent supporter of extraordinary writs,<sup>6</sup> refused to allow COMA's lack of potential appellate jurisdiction, as defined by the Uniform Code of Military Justice (UCMJ),<sup>7</sup> to deny the court the power to reverse a conviction when it felt that the initial court-martial was without jurisdiction over the offense charged.<sup>8</sup> This seems to be precisely the type of case for which the use of extraordinary relief is intended.

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<sup>1</sup>Through the All Writs Act Congress made available to its judicial bodies broad ranging powers. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (1970). While congressional intent in regard to this statute is unclear, it may have been designed to grant to all courts created by congressional authority similar powers to interpret their jurisdiction as was claimed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for those courts whose authority is derived from article III of the Constitution. The House Report dealing with this Act states: "The revised section (1651, All Writs Act) extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." HOUSE COMM. ON THE JUDICIARY, REVISION OF TITLE 28, UNITED STATES CODE, H.R. REP. 3214, 80th Cong., 1st Sess. A145 (1947). Thus, the flexibility to achieve overall justice which the interpretation of jurisdiction made in *Marbury* may have brought to article III courts is made available to all courts through the All Writs Act.

<sup>2</sup>Hereinafter COMA.

<sup>3</sup>24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>4</sup>24 C.M.A. 304, 52 C.M.R. 15 (1976).

<sup>5</sup>*Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976). See notes 40-74, *infra*, & text accompanying.

<sup>6</sup>See *Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976); *Porter v. Richardson*, 23 C.M.A. 704 (1975); *Milanes-Canamero v. Richardson*, 23 C.M.A. 710 (1975); *Phillippy v. McLucas*, 23 C.M.A. 709 (1975); *Kelly v. United States*, 23 C.M.A. 567, 50 C.M.R. 786 (1975); *Thomas v. United States*, 23 C.M.A. 570, 50 C.M.R. 789 (1975).

<sup>7</sup>Articles 66 and 67 of the UCMJ, 10 U.S.C. §§ 866-67 (1970), define the appellate jurisdiction of the Court of Military Appeals. Appellate jurisdiction is made contingent on the potential sentence which the accused may receive. The offense charged in *McPhail* did not carry a sufficient sentence to allow it to reach COMA by way of appellate review. *McPhail v. United States*, 24 C.M.A. 304, 52 C.M.R. 15 (1976).

<sup>8</sup>*McPhail v. United States*, 24 C.M.A. 304, 52 C.M.R. 15, 21 (1976).

COMA clearly has authority to interpret court-martial jurisdiction<sup>9</sup> and could have been denied authority to act in the *McPhail* case only by the mechanical jurisdictional limitations of the UCMJ. COMA's ultimate interpretation, in *McPhail*, of the jurisdictional limits of the UCMJ involved the resolution of a difficult issue on which the court had wavered for over a decade.

### *The Jurisdictional Limits in the UCMJ*

Since its first reference to extraordinary relief in 1954,<sup>10</sup> COMA has struggled with the development of standards for its use. The most significant issue to date has focused on the UCMJ and the proper interpretation of statutory jurisdiction provided therein.<sup>11</sup>

In 1966 COMA declared that it held the power to grant extraordinary relief under the All Writs Act<sup>12</sup> saying: "Part of our responsibility includes the protection and preservation of the Constitutional rights of persons in the armed forces."<sup>13</sup> One year later this "responsibility" broadened to a "general supervisory power over the administration of military justice."<sup>14</sup> In 1968 COMA squarely addressed the issue of statutory jurisdictional limitations upon its use of extraordinary writs and declared that "Article 67 does not describe the full panoply of power possessed by this Court."<sup>15</sup> Despite its strong words, COMA denied the extraordinary relief requested in all of these cases.

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<sup>9</sup>*Fleiner v. Koch*, 19 C.M.A. 630 (1969), *applying* *O'Callahan v. Parker*, 395 U.S. 258 (1969).

<sup>10</sup>In *United States v. Ferguson*, 5 C.M.A. 68, 17 C.M.R. 68 (1954), the concurring opinion by Judge Brosman stated the belief that COMA came within the "broad sweep" of the All Writs Act. *Id.* at 86. In both *United States v. Buck*, 9 C.M.A. 290, 26 C.M.R. 70 (1958), and *United States v. Tavares*, 10 C.M.A. 282, 27 C.M.R. 356 (1959), the court assumed it held the power to issue extraordinary writs for the sake of argument without deciding the issue. Finally in *In re Taylor*, 12 C.M.A. 427, 31 C.M.R. 13 (1961), the court said only: "Undoubtedly, it [COMA] also has incidental powers, the limits of which, however, we have not attempted to define." *Id.* at 430, 31 C.M.R. at 16. It then makes reference to the All Writs Act and to *Buck*. In addition to references to the All Writs Act there are also many specific references to the need to guarantee constitutional safeguards in the military justice system. *See, e.g., United States v. Jacoby*, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960), where the court states that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."

<sup>11</sup>*See* note 7 *supra*. These limiting provisions should be interpreted, however, in light of the broad purpose of the creation of COMA to promote uniformity in the judicial process and to discover and correct defects in the system and its administration. *See* SENATE COMM. ON ARMED SERVICES, ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE, S. REP. NO. 486, 81st Cong., 2d Sess. (1950).

<sup>12</sup>*See* note 1 *supra*.

<sup>13</sup>*United States v. Frischholtz*, 16 C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966).

<sup>14</sup>*Gale v. United States*, 17 C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967).

<sup>15</sup>*United States v. Bevilacqua*, 18 C.M.A. 10, 11, 39 C.M.R. 10, 11 (1968). This case involved a conviction for possession and use of marijuana under Article 134 leading to a sentence of reduction in grade and partial forfeiture of pay, a sentence not within COMA's statutory jurisdiction.

The Supreme Court, however, in the 1969 case of *Noyd v. Bond*,<sup>16</sup> took note of COMA's dicta in those earlier cases and warmly embraced COMA's original declaration of authority to issue extraordinary writs. The Supreme Court did indicate, however, that any extension of that authority beyond statutory bounds<sup>17</sup> would be questionable. Shortly after this hint from the Supreme Court and a mere nine months following its "full panoply" declaration in regard to Article 67,<sup>18</sup> COMA said of that declaration:

What we there stated concerning our duty and responsibility to correct deprivations of constitutional rights within the military system must be taken to refer to cases in which we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved.<sup>19</sup>

This complete reversal of COMA's position is explainable only by the persuasive power of the Supreme Court.<sup>20</sup>

The Supreme Court's persuasive power was again wielded in 1972 when the Court exercised its own privilege to reverse fields by suggesting that only COMA can determine the breadth of its jurisdiction.<sup>21</sup> In *McPhail* COMA was able to return to its original declaration<sup>22</sup> by seizing upon the Supreme Court's suggestion and declaring that the jurisdictional limitations of the

<sup>16</sup>395 U.S. 683 (1969).

<sup>17</sup>[W]e do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).

*Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969).

<sup>18</sup>See note 15 *supra* & text accompanying.

<sup>19</sup>*United States v. Snyder*, 18 C.M.A. 480, 483, 40 C.M.R. 192, 195 (1969). This case involved a conviction for adultery under Article 134 leading to a sentence of reduction in grade, a sentence not within COMA's statutory jurisdiction.

<sup>20</sup>Professor Wacker suggests that *Snyder* should not be read as a retreat from *Bevilacqua* since on its face *Snyder* did not present a situation where issuance of the writ was appropriate. Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals*, 10 HARV. C.R.-C.L. CIV. RIGHTS-L. REV. 33 (1975). However, the opposite view is more plausible. Since the writ could easily have been denied on those grounds, the fact the court acted to dismiss the petition on the mechanical grounds of jurisdiction reemphasized its desire to limit *Bevilacqua*.

<sup>21</sup>*Parisi v. Davidson*, 405 U.S. 34 (1971). The Court stated:

That court [COMA] has been given no "jurisdiction" to consider a serviceman's claim for discharge from the military as a conscientious objector.

Whether this conceptual difficulty might somehow be surmounted is a question for the Court of Military Appeals itself to ultimately decide. See *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).

*Id.* at 44. This was not a complete reversal in that the Court reiterated its belief that the statutory provisions do limit COMA's extraordinary writ jurisdiction.

<sup>22</sup>See note 15 *supra* & text accompanying.

UCMJ are no limit on the authority of COMA to issue an otherwise appropriate writ.<sup>23</sup> The government had argued in *McPhail* that since the case could not reach COMA under Article 67, the court had no jurisdiction. COMA concluded, however, that its supervisory jurisdiction over the military justice system was not limited solely to those cases within Article 67 and that it could issue the writ in aid of this supervisory jurisdiction.<sup>24</sup>

*Other Limitations on the Use of Extraordinary Relief: Extraordinary  
Circumstances and Exhaustion of Remedies*

In addition to the jurisdictional limitation, now avoided by the *McPhail* decision, COMA has employed two other concepts in limiting the use of the All Writs Act: extraordinary circumstances and exhaustion of remedies. Both of these limitations were adopted from COMA's civilian court counterparts.

The requirement that the petitioner, in the civilian context, show extraordinary circumstances implements a desire to avoid the adverse effects of orders aimed at lower court judges unless the circumstances outweigh such concerns. This limiting concern for lower court authority seems to hold less importance in the military justice system, where extraordinary writs are directed chiefly to commanders rather than judges. However, the fact that it is command authority itself which is being questioned makes the issue very significant to the overall military establishment. In the early cases in which COMA either acknowledged or assumed the power to issue extraordinary writs, denial of the actual writ was based upon a lack of extraordinary circumstances.<sup>25</sup> Unfortunately the concept is not well defined. Cases involving various types of writs can be found which indicate a willingness by the court to grant relief based upon inadequate remedy<sup>26</sup> while others, citing exhaustion of remedies, never reach the issue of extraordinary circumstances.<sup>27</sup> The concept of extraordinary circumstances is often stated but rarely defined.

Unlike the concept of extraordinary circumstances, the concept of

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<sup>23</sup>"Reexamining the history and judicial applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in 'aid' of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67." *McPhail v. United States*, 24 C.M.A. 304, 390-91, 52 C.M.R. 15, 20-21 (1976).

<sup>24</sup>The court specifically said that to the extent *Snyder* viewed the court's jurisdiction under the All Writs Act as limited to cases within Article 67, *Snyder* was "too narrowly focused." *McPhail v. United States*, 24 C.M.A. 304, 310, 52 C.M.R. 15, 21 (1976).

<sup>25</sup>See cases cited note 10 *supra*.

<sup>26</sup>See *Zamora v. Woodson*, 19 C.M.A. 403, 42 C.M.R. 5 (1970) (clear lack of jurisdiction); *Lowe v. Laird*, 18 C.M.A. 131, 39 C.M.R. 131 (1969) (pretrial confinement); *Jones v. Ignatius*, 18 C.M.A. 7, 39 C.M.R. 7 (1968) (preservation of COMA's jurisdiction); *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967) (post-trial conviction).

<sup>27</sup>See *Catlow v. Cooksey*, 21 C.M.A. 106, 44 C.M.R. 160 (1972); *Font v. Seaman*, 20 C.M.A. 387, 43 C.M.R. 227 (1971); *Walker v. Commanding Officer*, 19 C.M.A. 247, 41 C.M.R. 247 (1970); *Dale v. Hay*, 19 C.M.A. 254, 41 C.M.R. 254 (1970); *Taylor v. Resor*, 19 C.M.A. 405, 42 C.M.R. 7 (1970); *Hallinan v. Lamont*, 18 C.M.A. 652 (1968).

exhaustion of remedies<sup>28</sup> has developed around a specific provision in the UCMJ, Article 138.<sup>29</sup> This article, through its broad language, is designed to provide service personnel with an appeal to the next higher commander for any wrong committed against them by their immediate commanding officer. As is often true with such broad provisions, Article 138 seems ill-suited to deal with the specific and often immediate needs which prompt a petition for an extraordinary writ.<sup>30</sup> The use of this doctrine has placed an additional burden upon petitioners as well in that the court requires them to show an abuse of discretion by the higher commander to whom they have appealed under Article 138 before it will overturn that decision.<sup>31</sup> This requirement has been applied with a heavy deference for the commander's decision.<sup>32</sup>

In at least one area it seems that the requirement of appeal to the next higher commander may be declining in importance. In 1973 the court ignored this requirement and reached the issue of improper confinement despite the lack of any indication that an appeal under Article 138 had been taken.<sup>33</sup> The majority again failed to deal with this particular exhaustion of remedies limitation in the confinement cases decided during the 1975-76

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<sup>28</sup>The foundation of the exhaustion of remedies doctrine lies in a desire to allow administrative agencies an opportunity to apply their specialized knowledge to cases within their fields, thus avoiding unnecessary litigation and allowing a court the benefit of the agencies' knowledge. *McKart v. United States*, 395 U.S. 185 (1969). This principle seems less applicable to the use of extraordinary relief in most military courts, although a further concern underlying this principle is the avoidance of the usage of writs as a substitute for the appellate process. *Banker's Life and Casualty Co. v. Holland*, 346 U.S. 379 (1953).

<sup>29</sup>Article 138 provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the secretary concerned a true statement of that complaint, with proceedings had thereon.

10 U.S.C. § 938 (1970). Cases citing this limitation are cited at note 27 *supra*.

<sup>30</sup>An Army publication recently expressed this point in regard to pretrial restraint: "Relief by way of the Article 138 process is of dubious merit because, lacking a specific time limitation, it does not provide the necessary immediate relief from the unlawful confinement. Inordinate delay in processing the complaint could moot the issue." *Unlawful Pretrial Confinement*, 7, #3 *The Advocate*, Newsletter for Military Defense Counsel 2, 6 (1975).

<sup>31</sup>"The type of restraint, if any, to be imposed upon an accused prior to trial presents a question for resolution by the commanding officer, in the exercise of his sound discretion. His decision will not be reversed in the absence of a showing of an abuse of discretion." *Horner v. Resor*, 19 C.M.A. 285, 286, 41 C.M.R. 285, 286 (1970). *See also*, *Smith v. Coburn*, 19 C.M.A. 291, 41 C.M.R. 291 (1970); *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967).

<sup>32</sup>*Cf.* *United States v. Nixon*, 21 C.M.A. 480, 485, 45 C.M.R. 254, 259 (1972) (dissenting opinion). Judge Duncan, in his dissent, suggested that a more thorough review of the need for restraint should have been made in light of *United States v. Jennings*, 19 C.M.A. 88, 41 C.M.R. 88 (1969) wherein the court dealt at length with the issue of whether confinement was necessary.

<sup>33</sup>*Newsome v. McKenzie*, 22 C.M.A. 92, 46 C.M.R. 92 (1973).

term.<sup>34</sup> Judge Cook's dissent in *Porter v. Richardson*<sup>35</sup> emphasized the majority's omission and attempted to justify the commander appeal process of Article 138.<sup>36</sup> The somewhat mechanical points emphasized by Judge Cook stand in stark contrast to the majority's failure even to mention the topic. It appears the majority is implying that these mechanical points do not merit consideration or repudiation. Rather than arguing them away, the majority went directly to consideration of the substantive issues involved with confinement. Since the majority was so obvious in skirting these mechanical bottlenecks, which have been prevalent in past cases,<sup>37</sup> it appears that mechanical limitations are being lifted in favor of dealing directly with the substantive issues of each writ.<sup>38</sup> A discussion of extraordinary writs, however, is incomplete without reference to the particular form of relief

<sup>34</sup>See cases cited note 6 *supra*.

<sup>35</sup>23 C.M.A. 704 (1975).

<sup>36</sup>Judge Cook cites *United States v. Hartsook*, 15 C.M.A. 291, 35 C.M.R. 263 (1965), which deals only with probable cause for searches, and *Levy v. Resor*, 17 C.M.A. 135, 37 C.M.R. 399 (1967) which mechanically applied the Article 138 requirement. See note 27 *supra*. Cf. cases cited note 26 *supra*. He further attempts to equate the referral of charges by the commander to a court martial with an indictment by a grand jury in the civilian judicial system, thereby justifying restraint. Support for this contention is found in *United States v. Nix*, 15 C.M.A. 578, 36 C.M.R. 76 (1965), which suggested that Article 34, 10 U.S.C. § 834 (1970), is analogous to the federal procedure of preliminary examination; but that article gives no indication that it was intended to carry the burden of placing the full safeguards of a grand jury into the hands of one individual. The support cited in *Nix* and repeated by Judge Cook in his dissent is *United States v. Roberts*, 7 C.M.A. 322, 22 C.M.R. 112 (1956), which quoted an article by Judge Latimer, *A Comparative Analysis of Federal and Military Criminal Procedure*, 29 TEMP. L.Q. 1 (1955). In his article, Judge Latimer had stated that "something roughly analogous to the federal procedure of preliminary examination and grand jury indictment is obtained in the military through the use of a formal pretrial investigation and convening authority consideration." *Id.* at 5 (emphasis added). Apparently, between 1955 and 1965, the rough edges vanished and the analogy became perfected. Finally Judge Cook cites the Manual for Courts-Martial ¶ 21c, *United States*, 1969 (rev.) [hereinafter cited as MCM], which denies any power to the military judge to alter pretrial restraint except in his presence. This deference to the Manual arises from *Petty v. Moriarity*, 20 C.M.A. 438, 43 C.M.R. 278 (1971), which relies upon *United States v. Smith*, 13 C.M.A. 105, 32 C.M.R. 105 (1962). The latter case states:

Some of the cases in this Court, in referring to paragraph 140a [of the Manual], state the same "is binding on this Court." This is possibly unfortunate language insofar as it may carry a connotation that this Court is in anywise bound by Presidential directives or regulations any more than is any other court. Manifestly, any such implication must be rejected.

*Id.* at 119, 32 C.M.R. at 119. The court in *Smith* continues to say that the provision "has the force of law and is entitled to consideration by this Court, as by all others, in that light." *Id.* The court there appeared to consider the "force of law" to be somewhat different from a "binding provision"; but whatever the proper connotation it is clear that COMA is prepared to overrule the Manual when necessary. See *United States v. Varnadore*, 9 C.M.A. 471, 26 C.M.R. 251 (1958); *United States v. Cothorn*, 8 C.M.A. 158, 23 C.M.R. 382 (1957); *United States v. Wappler*, 2 C.M.A. 393, 9 C.M.R. 23 (1953).

<sup>37</sup>This appears to be true for the jurisdiction of military judges, as well, for the court praised Judge Wood in *Bouler v. Wood*, 23 C.M.A. 589, 50 C.M.R. 854 (1975), in regard to his willingness to accept the responsibility to consider the pretrial confinement issue and his power to deal with it.

<sup>38</sup>This should not, however, be taken as a suggestion that extraordinary writs will issue with any great regularity. As have been observed:

granted, since the substantive issues and available mechanical provisions vary with the relief requested. This note therefore turns to the specific use of extraordinary relief as applied in the 1975-76 term to pretrial confinement.<sup>39</sup>

#### COURTNEY: EXERCISE OF GENERAL SUPERVISORY JURISDICTION

*Courtney v. Williams*<sup>40</sup> and other cases during the 1975-76 term<sup>41</sup> dealt with the use of extraordinary relief in the context of pretrial confinement. Courtney petitioned COMA for extraordinary relief in order to challenge the legality of his confinement. After inviting and receiving briefs and oral argument on the issues by appellate divisions in the various services as amicus curiae,<sup>42</sup> the court held that in the absence of a military necessity which would dictate to the contrary the fourth amendment required that an independent body make the determination of probable cause.<sup>43</sup> The court specifically noted that the UCMJ fails to provide for such a hearing,<sup>44</sup> implying that the court has a duty to fill such gaps in the Code as may

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[I]t is only the exercise of forbearance that has limited the role of the court from more frequent interference in interlocutory questions. The court has set forth broad general outlines as to when extraordinary relief will be granted, and by denials of specific petitions has for practical purposes established other considerations which often are raised to the level of prerequisites before the relief will be granted. The net result is a great restriction on the number of petitions granted, and this in spite of the court's asserted power to give the requested relief.

Q. Richardson, Survey and Effect of Recent Extraordinary Writ Decisions (March 1975) (unpublished thesis presented to The Judge Advocate General's School, United States Army).

<sup>39</sup>This is not a random selection in that the 1975-76 term dealt principally with petitions for release from pretrial restraint.

<sup>40</sup>24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>41</sup>See note 5 *supra*.

<sup>42</sup>*Courtney v. Williams*, 24 C.M.A. 87, 88, 51 C.M.R. 260, 261 (1976). The court's language referring to the amicus proceedings strongly suggests an approach more characteristic of administrative agency rulemaking than judicial adjudication. *Id.* The accuracy of this impression is supported by the fact that the court's decision requiring an independent determination as to probable cause and the need for restraint, see note 54 *infra* & text accompanying, came not only more than two months after petitioner's release from pretrial confinement, but after he was tried, convicted, and sentenced. *Id.* at 90, 51 C.M.R. at 263.

<sup>43</sup>The Supreme Court did not deal directly with an Article 13 type requirement, see note 41 *supra* & accompanying text, which considers the type of restraint permissible, because of the availability of bail in civilian courts. Absent this right to bail in the military, COMA read *Gerstein* as dealing broadly with both probable cause and the need for restraint.

<sup>44</sup>24 C.M.A. at 89, 51 C.M.R. at 262. The UCMJ authorizes the restraint of enlisted personnel on the authority of any commissioned officer, and of any service member on the authority of the commanding officer. 10 U.S.C. § 809 (1970). The Manual for Courts-Martial has elaborated on these provisions of the UCMJ by placing the authority to release one who has been confined solely in the commanding officer. MCM ¶ 22, 1969 (rev.).

The authority to order confinement is restricted by Article 9d of the UCMJ which requires probable cause of guilt before confinement may be imposed. 10 U.S.C. § 809 (1970). In addition, Article 13 places a limit on the nature of restraint permissible before trial: "[N]or shall the arrest or confinement imposed upon [the accused] be any more rigorous than the circumstances require to insure his presence [at trial]. . . ." 10 U.S.C. § 813 (1970).

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court dealt with parallel substantive concerns in the civilian justice system and held that due process requires the



abridge constitutional rights.<sup>45</sup> Such constitutional significance may in the future be interpreted as a prerequisite of extraordinary relief of the *Courtney* genre. This should not be taken to mean, however, that extraordinary relief will be forthcoming only when constitutional rights are involved. Other cases this term demonstrate that COMA continues to grant relief in less compelling circumstances.

In *Kelly v. United States*<sup>46</sup> and *Thomas v. United States*,<sup>47</sup> COMA considered the propriety of petitioners' confinement in the United States Disciplinary Barracks while awaiting a possible rehearing after a reversal of their convictions.<sup>48</sup> Having rejected the technical objection urged by the government that there was no showing of service of process upon it,<sup>49</sup> and having found that a referral of charges for a rehearing had not mooted the issue, the court said nothing about reviewing the need for confinement; rather it ordered petitioners released from the Disciplinary Barracks,<sup>50</sup> citing Article 13.<sup>51</sup> This indicates that the majority thought that confinement in the Disciplinary Barracks prior to trial is a *prima facie* violation of Article 13.

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approval of a detached magistrate if pretrial confinement is to be continued after initial detention. 420 U.S. at 114. A full hearing with all constitutional safeguards was not required but rather an assurance that someone other than the initiator of confinement would review the finding of probable cause for arrest and detention. 420 U.S. at 123. The analogous safeguards in the military justice system were recently considered by the Eighth Circuit and found faulty in three ways: the decision to continue confinement is made by the "prosecutor"; no hearing is allowed; and the burden is upon the accused to show a lack of need for continued restraint. *DeChamplain v. Lovelace*, 510 F.2d 419 (8th Cir. 1975), *vacated as moot*, 421 U.S. 996 (1975). In view of Article 13, the court ordered a hearing to be held in regard to continued confinement. It must be remembered that Article 10 of the UCMJ, 10 U.S.C. § 810 (1970), guarantees that when a person is placed in pretrial confinement, "immediate steps shall be taken . . . to try him or dismiss the charges against him." COMA has held that when pretrial confinement exceeds ninety days, a rebuttable presumption of an Article 10 violation exists, and the charges may be dismissed. *United States v. Marshall*, 22 C.M.A. 431, 47 C.M.R. 409 (1973) (expanding the *Burton* standard to delineate situations when the presumption may be rebutted); *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971). See MCM ¶ 68i, 1969 (rev.).

<sup>45</sup>The court's decision continues its acknowledged duty to correct what it considers to be any deficiency in existing Code provisions. See *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960).

<sup>46</sup>23 C.M.A. 567, 50 C.M.R. 786 (1975).

<sup>47</sup>23 C.M.A. 570, 50 C.M.R. 789 (1975).

<sup>48</sup>The only major distinction between these cases is the reversing forum: *Kelly* was reversed by the Army Court of Military Review while COMA itself reversed the decision in *Thomas*. The distinction is important, however, for in *Kelly* COMA ordered the ACMR to review the petition: "[W]e are returning this petition to the United States Army Court of Military Review in order for that Court to exercise its extraordinary writ authority." 23 C.M.A. at 568, 50 C.M.R. at 787. In *Thomas* COMA placed the duty to act upon itself, thereby suggesting that *Kelly* is intended to affirm the power of the CMR's to issue extraordinary writs and their duty to take that responsibility when their actions have led to its necessity. This may then serve as an avenue to be exhausted in future COMA decisions though it is significant that the court did not use it here as a complete bar to action on its part.

<sup>49</sup>"We decline to hold this *in propria persona* petitioner absolutely responsible for knowing all of our rules." *Kelly v. United States*, 23 C.M.A. 567, 568, 50 C.M.R. 786, 787 (1975).

<sup>50</sup>*Id.* at 568, 50 C.M.R. at 787.

<sup>51</sup>See 10 U.S.C. § 813 (1970).

The dissent insisted that the court assume that individuals awaiting final determination of their convictions through appeal are to be treated differently from those whose convictions are final.<sup>52</sup> It is this argument which indicates the true difference of opinion within the court. The dissent equated the reversal of a conviction and authorization of a rehearing to the continuation of the reviewing process of one convicted at a court-martial. The majority found that such a reversal qualifies the accused as one *awaiting* court-martial so that the concerns of pretrial restraint again become relevant.

Although the court here acted through an extraordinary writ to serve notice to those in the military justice system that the rights of an accused whose status changes must be continuously safeguarded during the judicial process,<sup>53</sup> nevertheless it should be observed that the holding comprises no pronouncement of a legislative nature. Rather, the court in *Kelly* and *Thomas* utilizes the petitioners' request for extraordinary relief to employ its supervisory jurisdiction in making an adjudicative determination: the court deemed petitioners to have been in pretrial confinement and found such confinement improper on the facts of those cases.

In *Courtney* the court went further and employed its supervisory jurisdiction, again through a request for extraordinary relief, to establish, prospectively, procedural requisites for proper pretrial confinement.

*Courtney*, in implementing its independent hearing requirement, sets out two criteria to be considered in determining if confinement is appropriate: probable cause and the need for restraint. The latter is involved chiefly with the consideration of the effect of confinement upon one's ability to prepare for trial.<sup>54</sup> This was the principal substantive concern in the court's opinion and with it there can be little dispute; however the court exercised its extraordinary writ jurisdiction without suggesting either standards for applying this doctrine or means for its application. An attempt to consider the application of *Courtney*, therefore, may reveal some insight into the problems which arise through such use of extraordinary relief.

#### *The Application of Courtney*

*Courtney* requires a review of pretrial restraint by a neutral and detached magistrate in regard to probable cause and the need for restraint. These broad principles, however, are inadequate to deal with difficult substantive issues. The court is not to be criticized for a failure to enunciate all aspects of the standard for review since that will necessarily be dependent upon development in future cases.<sup>55</sup> The real failure of the court lies in its failure

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<sup>52</sup>*Kelly v. United States*, 23 C.M.A. 567, 569, 50 C.M.R. 786, 788 (1975).

<sup>53</sup>It is puzzling that the majority did not order a review of petitioner's confinement; but perhaps it felt that the decisions in *Porter* and *Phillippy* would suffice to inform the convening authority that such review was necessary.

<sup>54</sup>*Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>55</sup>COMA issued a show cause order to an Army magistrate on March 25, 1976 in *Iturralde-*

to overrule the "abuse of discretion" standard that COMA has applied in the Article 138 commander appeal context.<sup>56</sup> This may leave the burden upon the petitioner to show that the type of restraint imposed is unnecessary. A footnote in *Courtney* cites a federal court case which places the burden on the government to show the need for restraint<sup>57</sup> and thus implies the removal of the burden from petitioner. *McPhail*, however, suggests that this standard is still good law<sup>58</sup> so that reliance upon the commander's initial decision appears likely.

Another question raised but unanswered in *Courtney* is which body is to have the responsibility of reviewing pretrial confinement. COMA appears to desire to regularize this review so as to remove it from the extraordinary writ area by providing an alternative forum which may itself become a remedy to be exhausted. In the cases preceding *Courtney* during the 1975-76 term,<sup>59</sup> the court ordered the military judge to whom a charge had been referred to convene an Article 39a hearing to review this issue. That article allows the military judge to rule on any matter within his authority as defined by the UCMJ,<sup>60</sup> but there is no provision within the UCMJ granting authority to the judge to rule on the confinement issue. Further, the Manual for Courts-Martial specifically limits such authority to alteration of an accused's restraint only when in the presence of the court-martial.<sup>61</sup> The court may have intended to supplement the judge's authority under the Manual through this extraordinary writ decision.<sup>62</sup> But if the court here did intend to

*Aponte v. Kasson*, Miscellaneous Docket No. 76-21. This case may help set the standards lacking in *Courtney*.

<sup>56</sup>See note 31 *supra* & text accompanying.

<sup>57</sup>*Courtney v. Williams*, 24 C.M.A. 87, 90 n.13, 51 C.M.R. 260, 263 n.13 (1976), citing *DeChamplain v. Lovelace*, 510 F.2d 419 (8th Cir. 1975), *vacated as moot*, 421 U.S. 996 (1975).

<sup>58</sup>"This is not to say, however, that our extraordinary jurisdiction can be invoked for all of the errors that can be reviewed by way of ordinary appeal under Article 67. See . . . *Horner v. Resor*. . . ." *McPhail v. United States*, 24 C.M.A. 304, 310, 52 C.M.R. 15, 21 (1976). See note 31 *supra*.

<sup>59</sup>*Porter v. Richardson*, 23 C.M.A. 704 (1975); *Milanes-Canamero v. Richardson*, 23 C.M.A. 710 (1975); *Phillippy v. McLucas*, 23 C.M.A. 709 (1975).

<sup>60</sup>Article 39a provides in part:

At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35) [which provides time for preparation by the accused], call the court into session without the presence of the members for the purpose of —

2. hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter [the UCMJ], whether or not the matter is appropriate for later consideration or decision by the members of the court. . . .

10 U.S.C. § 839a (1970).

<sup>61</sup>MCM ¶ 21(2)c, 1969 (rev.).

<sup>62</sup>The court stands upon firm precedent in this action since many past cases have suggested this power for the judge. For example, in *Hallinan v. Lamont*, 18 C.M.A. 652 (1968), the court required the petitioner to seek redress under Article 138 but also suggested that if such relief was denied, the accused could renew his request before a military judge.

grant such authority to the military judge, it has apparently not determined that he can act prior to a referral of charges.<sup>63</sup>

Perhaps realizing the deleterious effect which the limitations of Article 39 have on the ability of a military judge to deal with the problem of reviewing pretrial confinement, the court mentioned in a footnote that Article 32c provides for proceedings prior to the referral of charges.<sup>64</sup> Article 32 provides a forum roughly analogous to a preliminary hearing in civilian courts, but it is presided over by a commissioned officer rather than a judge.<sup>65</sup> The lack of standards for review discussed above, especially in regard to deference to the commander's discretion,<sup>66</sup> may have a greater impact upon the layman than upon a military judge. This commissioned officer is within the authority of the commander whose decision on restraint is to be reviewed, so that the likelihood of deference to the commander's decision<sup>67</sup> may be even greater. If an Article 32 investigating officer is to make the decision required by *Courtney*, it is even more important that clear standards be delineated for his use. Further, the Article 32 investigation is not required to be held within any particular time following an accused's restraint, but rather upon the discretion of the commander, so that lack of a mechanism to assure a timely review of pretrial restraint by an independent body remains.

It is significant, however, that COMA did not merely refer to Article 32 in general, but specifically to section c thereof, which suggests the possibility of an investigation outside Article 32 prior to the referral of charges.<sup>68</sup> The reference to this article may be intended to provide support for the possibility

<sup>63</sup>Judge Cook's dissent in *Phillippy v. McLucas*, 23 C.M.A. 709 (1975) opposed the authority of a judge to act before a referral of charges and the majority's decision merely ordered the convening authority to make such referral immediately if he intended to do so and allow the judge to review the need for restraint. In *Bouler v. Wood*, 23 C.M.A. 589, 50 C.M.R. 854 (1975), the court said of Judge Wood's consideration of, but forbearance on, the issue of pretrial restraint: "His concern and foresight recognizing the necessity for judicial process while at the same time the possible limits to the exercise of his powers can only serve as a model for other judges." *Id.* at 590, 50 C.M.R. at 855.

<sup>64</sup>*Courtney v. Williams*, 24 C.M.A. 87, 90 n.13, 51 C.M.R. 260, 263 n.13 (1976).

<sup>65</sup>10 U.S.C. § 832 (1970).

<sup>66</sup>See notes 61-64 *supra* & text accompanying.

<sup>67</sup>*McPhail* itself involved a case of deference to the commander in that the judge had conducted the court-martial only because the convening authority had disagreed with the judge's initial ruling and ordered the judge to proceed. In the absence of a statement from COMA to the contrary the judge believed he must acquiesce to the convening authority's decision. *McPhail v. United States*, 24 C.M.A. 304, 306, 52 C.M.R. 15, 17 (1976).

<sup>68</sup>Article 32c provides:

If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

10 U.S.C. § 832(c) (1970).

of investigations beyond those required by the UCMJ, so as to allow the type of investigation of pretrial restraint the court has required. Section c's support for this possibility is weak, however, in that it specifically refers to "investigation of the subject matter of an offense."<sup>69</sup> If this citation was meant to encourage review outside of the UCMJ, the court leaves unsettled the question of who should conduct this review, although in another footnote it applauds the Army's effort to establish a magistrate system.<sup>70</sup> Given that the Air Force has proposed that the convening authority review pretrial restraint,<sup>71</sup> in clear contradiction to *Courtney*, it seems the court's failure to name a forum may undermine its efforts to provide a remedy for those placed in pretrial restraint.

In his concurrence in *Courtney*, Judge Ferguson expanded upon Judge Fletcher's opinion for the court by adding words with which Judge Fletcher perhaps could agree only in principle. He expressed the view that the role of the military judge is closely analogous to that of a federal judge, though he refused to admit that pretrial confinement is an issue which only a judge can resolve.<sup>72</sup> This concurrence suggests a possible avenue for future issues of an extraordinary character in that it begins the development of the military judge as a truly potent force.<sup>73</sup>

To summarize the basic points in regard to pretrial confinement, COMA has determined that the right to review of one's pretrial confinement by an independent body must be assured to those in the military, without regard to the ultimate form of appeal available by statute. Both pretrial restraint, whether one is charged with murder or with possession of marijuana, and the fourth amendment rights of all accused of an offense, must be preserved. Many questions remain open, however, since COMA has not said who will determine the need for continued restraint, what specific standards will be applied, or who will bear the burden of proof in regard to the reversal of the

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<sup>69</sup>*Id.*

<sup>70</sup>*Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>71</sup>Air Force Manual 111-1, ¶ 3-25, Military Justice [proposed ¶ 3-25 on file with the INDIANA LAW JOURNAL].

<sup>72</sup>Judge Ferguson's view is supported by the Senate Report on the 1968 amendment to the UCMJ. See SENATE COMM. ON ARMED SERVICES, MILITARY JUSTICE ACT OF 1968, S. REP. 1601, 90th Cong., 2d Sess. (1968). The general purposes of the provisions concerning the military judge were "[T]o redesignate the law officer of a court-martial as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges. . . ." *Id.* at 3. The report goes on to say:

The effect of the amendment, generally, is to conform military criminal procedure with the rules of criminal procedure applicable in the U.S. district courts and otherwise to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge.

*Id.* at 9-10. This broad wording would appear to sanction the determination of the need for restraint even before the referral of charges.

<sup>73</sup>See Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F.L. REV. 1 (Summer 1975).

initial decision of the commander. It seems that the only certain method of assuring impartial review is the delegation of the power to appoint the reviewing magistrate to one who is totally outside of the line of command, such as the Judge Advocate General for each service. Even better would be a regional system of magistrates appointed by the Judge Advocate General for the defense establishment to serve all branches of the service via tele-communications. But no matter who receives the task it must be made clear to those who conduct the actual review that all authority rests in them without deference to the decision of the commander. Appointment of individuals with legal training may better fulfill this need. Development of specific standards will grow from the review of these "magisterial" decisions, and extraordinary writ jurisdiction cannot be withdrawn from this area until such standards have become clear.

#### THE FUTURE

Two important results arise from the court's decisions during the 1975-76 term. The mechanical limitations so often and so arbitrarily used in the past seem to be giving ground to more substantive concerns. Perhaps as the court broadens the powers of military judges, it will retreat from this approach and cite exhaustion of remedies and deference to the military judge. This view is strengthened by the fact that *Courtney* is all dicta, since the petition was denied,<sup>74</sup> and by the fact that COMA had little choice but to act in the area of pretrial restraint given recent federal court decisions.<sup>75</sup>

On the other hand, COMA in both *Courtney* and *McPhail*, used broad language and citation to past cases which recognized a supervisory role for COMA in the military justice system to support its actions.<sup>76</sup> Further the court made references this term to the Code of Professional Responsibility<sup>77</sup> and the ABA Standards Relating to the Administration of Criminal Justice.<sup>78</sup> These references, along with COMA's recent proposal of broad rules of procedure for all military courts,<sup>79</sup> suggest COMA desires to increase its influence upon the entire system and build a uniform system of military justice.<sup>80</sup> The federal courts clearly appear ready to place this task in the hands of the military courts.<sup>81</sup>

<sup>74</sup>24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>75</sup>See note 44 *supra* & text accompanying.

<sup>76</sup>*Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976); *McPhail v. United States*, 24 C.M.A. 304, 52 C.M.R. 15 (1976).

<sup>77</sup>*Kidd v. United States*, 24 C.M.A. 25, 51 C.M.R. 75 (1975).

<sup>78</sup>*Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>79</sup>COMA is presently proposing sweeping changes in its Rules of Practice and Procedure [on file with the INDIANA LAW JOURNAL]. Proposed Rules 11 and 12 would grant to COMA broad powers in regard to the qualification and disciplinary review of attorneys practicing before any courts in the military justice system.

<sup>80</sup>Non-judicial punishments provided by Article 15 of the UCMJ, 10 U.S.C. § 815 (1970), as well as administrative discharges may require further scrutiny by COMA as the due process and personal property rights implications become clearer.

<sup>81</sup>The UCMJ establishes an independent system of jurisprudence for the military and Article 76 of the UCMJ provides that where appellate review has proceeded through all of the

The other aspect of the court's decision in *Courtney*<sup>82</sup> is its legislative nature. The problems discussed above in regard to the application of this case<sup>83</sup> may suggest the difficulty of using this form of jurisdiction to resolve difficult issues of military justice. Given the willingness of the federal courts to give a free rein to the military courts,<sup>84</sup> there appears to be little to stop COMA other than the Congress. Congress speaks, however, through the UCMJ which COMA itself interprets.

COMA may have faced these issues squarely in an effort to develop a system of military justice, or it may not. If the court has decided to expand its influence, it will need the assistance of advocates within the system to help formulate this expansion. At present few standards exist for a determination of the use of extraordinary relief; but enough has been done by COMA to declare open season for those who are willing to take the first shot at the substantive issues which must be resolved.

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steps available the results "are final and conclusive." 10 U.S.C. § 876 (1970). The Supreme Court, rather than finding this provision a bar to the Court's potential review, interpreted it to denote the exhaustion of military review and therefore determinative of the steps required prior to seeking relief in the federal courts. *Gusik v. Schilder*, 340 U.S. 128 (1950). Three years later in *Burns v. Wilson*, 346 U.S. 137 (1953), the Supreme Court addressed this issue once again and asserted that it had full power to review, by habeas corpus, the rulings of a military court. At the same time, however, the Court recognized that the standard for review of military adjudications must reflect the military's unique needs by stating that "when a military decision has dealt fully and fairly with an allegation . . . it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." 346 U.S. at 142. This idea was carried one step further in 1968 when the court suggested that the review must rely upon issues of constitutional significance. *United States v. Augenblick*, 393 U.S. 348 (1968). This line of precedent indicates that the federal courts intend to leave to the military courts the independence the UCMJ established and the task of assuring the justice it was designed to promote. *Cf. Henry v. Middendorf*, 96 S. Ct. 1281, 1291-92 (1976).

<sup>82</sup>24 C.M.A. 87, 51 C.M.R. 260 (1976).

<sup>83</sup>See notes 55-73 *supra* & text accompanying.

<sup>84</sup>See note 81 *supra*.