

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WILLIAM J. CLINTON, PRESIDENT OF THE UNITED
STATES, ET AL., Petitioners v. JAMES T. GOLDSMITH
Respondent.

CASE NO: 98-347 C.

PLACE: Washington, D.C.

DATE: Monday, March 22, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X

3 WILLIAM J. CLINTON, PRESIDENT :

4 OF THE UNITED STATES, ET AL., :

5 Petitioners :

6 v. : No. 98-347

7 JAMES T. GOLDSMITH :

8 Respondent. :

9 -----X

10 Washington, D.C.

11 Monday, March 22, 1999

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:04 a.m.

15 APPEARANCES:

16 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
17 Washington, D.C.; on behalf of the Petitioner.

18 JOHN M. ECONOMIDY, ESQ., San Antonio, Texas; on behalf of
19 the Respondent.

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 98-347, William J. Clinton v. James Goldsmith.
5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE PETITIONERS

8 MR. DREEBEN: Mr. Chief Justice, and may it
9 please the Court:

10 The Court of Appeals for the Armed Forces, in
11 this case, declared unconstitutional the President's power
12 to drop from the rolls of the military an officer who had
13 been convicted in a court-martial proceeding, sentenced to
14 more than 6 months of confinement, and who had served more
15 than 6 months of confinement.

16 Our submission is that this judgment should be
17 reversed for two reasons: First, the Court of Appeals for
18 the Armed Forces lacked jurisdiction to use power under
19 the All Writs Act to reach the action to drop him, Major
20 Goldsmith, from the rolls and to declare the statute under
21 which he was dropped unconstitutional. And, second, the
22 statutory power of the President to drop an officer from
23 the rolls is not a punitive criminal measure that
24 implicates the protections of the Double Jeopardy Clause
25 or of the Ex Post Facto Clause.

1 Now, the jurisdictional question involves a
2 consideration of what powers Congress gave to the Court of
3 Appeals for the Armed Forces in reviewing court-martial
4 judgments which consist of findings and sentences. The
5 Court of Appeals for the Armed Forces is given a
6 specifically defined jurisdiction to review the results in
7 court-martial cases when particular sentences have been
8 entered and the judgment below has been reviewed by the
9 Court of Criminal Appeals for the relevant service.

10 The Court of Appeals for the Armed Forces is not
11 given free-ranging jurisdiction over all matters that
12 might have something to do with military justice or that
13 might implicate matters affecting servicemembers who have
14 been sentenced under the Uniform Code for Military
15 Justice, the UCMJ. Rather, Congress has specially
16 allocated powers elsewhere within the military to consider
17 personnel actions that might be viewed as collateral
18 consequences --

19 QUESTION: Mr. Dreeben, exactly how could the
20 Respondent have proceeded to raise his issue of double
21 jeopardy, and -- and before what agency or agencies?

22 MR. DREEBEN: Justice O'Connor, Major Goldsmith
23 had three avenues essen -- essentially, in which he could
24 raise his claim. The first, which he availed himself of,
25 would be to raise it before the military itself, the

1 Secretary of the Air Force, in response to the notice that
2 he received that action was being considered to drop him
3 from the rolls. So he could present that claim to the
4 agency, which in this case he in fact did, along with a
5 myriad of other reasons, both equitable and statutory, why
6 he claimed he should not be dropped from the rolls.

7 If the Secretary of the Air Force does indeed
8 finalize an action to drop him from the rolls -- which has
9 not happened in this case -- he can present a claim to the
10 Board of Correction of Military Records, which is a
11 civilian body within the military service, and has the
12 power to correct military records or to relieve injustice.
13 And he can, before that body, make a claim that his
14 action -- to drop him from the rolls -- is
15 constitutionally barred or otherwise improper.

16 And most importantly here, he has recourse to
17 the Federal district courts to make a claim that the
18 action to drop him from the rolls would violate the
19 Constitution. There are two different avenues that he
20 could avail himself of. One would be an action under the
21 Administrative Procedure Act in a court that had proper
22 venue and jurisdiction to hear that claim, and he could
23 challenge the action -- dropping him from the rolls --
24 claiming that it violated his constitutional rights.

25 He could even, if he had a claim that he might

1 suffer some irreparable injury from the action, seek
2 injunctive relief that would bar the finalization of the
3 action, provided he could make the normal equitable
4 showings that go along with that.

5 QUESTION: Well, what if, in the case of an
6 ordinary criminal conviction within the armed services
7 that's been upheld by the Court of Appeals for the Armed
8 Forces, does a defendant in a situation like that have
9 resort to Federal courts under habeas corpus or something
10 else, or not at all?

11 MR. DREEBEN: Yes, Chief Justice Rehnquist.
12 After the conviction has been finally reviewed within the
13 military system, and the servicemember has exhausted other
14 avenues that are provided under the UCMJ to attempt to get
15 relief from the conviction, he can then bring a habeas
16 corpus action under the standard section governing habeas
17 corpus, Section 2241 of Title 28, and argue that his
18 conviction is affected by a fundamental defect that
19 requires that it be set aside.

20 In this case, of course, Major Goldsmith is not
21 challenging his underlying conviction. He is raising a
22 claim that the action to drop him from the rolls is, in
23 effect, another criminal punishment, because it was
24 enacted after the time that he committed his offenses,
25 violates the Ex Post Facto Clause, and because it is being

1 imposed, or might be imposed, after his conviction has
2 become final, violates the Double Jeopardy Clause.

3 QUESTION: Mr. Dreeben, what about the argument
4 that this relief was necessary to protect or effectuate
5 the result of the court-martial, which was specifically
6 that he not be dismissed from service? That was an option
7 that they had and that they didn't impose. So, why isn't
8 this a legitimate means of protecting the judgment that
9 there be no dismissal?

10 MR. DREEBEN: Justice Ginsburg, we don't dispute
11 that the Court of Appeals for the Armed Forces has, in
12 appropriate circumstances, the power to rely on the All
13 Writs Act. But the All Writs Act itself is not generally
14 available to do service when there are other provided
15 statutory means of accomplishing the end in question.
16 Here, the standard, typical means of raising any kind of a
17 double jeopardy defense is to set up that defense as
18 against the action that is brought against you. And so
19 long as there are adequate means of raising that claim,
20 there can be no warrant for using the All Writs Act to
21 circumvent the specifically provided means that Congress
22 has allowed for the raising of this claim.

23 The All Writs Act is an equitable power. If
24 there is an adequate remedy at law, there can be no resort
25 to equity.

1 QUESTION: And you -- you say the remedy is ask
2 the Secretary, then ask the Board of Corrections of
3 Military Records, and --

4 MR. DREEBEN: The BCMR, the Board of Correction
5 for Military Records, is an optional administrative
6 procedure. It's significant here because it signifies
7 that that is where Congress intended that servicemembers
8 go, within the military, to obtain relief from adverse
9 personnel actions.

10 QUESTION: Is that the one that's been spending
11 its time deciding whether Samuel Mudd was properly
12 convicted?

13 MR. DREEBEN: I'm not entirely sure, Chief
14 Justice Rehnquist. It does have broad-ranging authority
15 to consider claims that servicemembers might make, arising
16 from any aspect of their military record.

17 QUESTION: In this case, but -- but not the
18 Samuel Mudd case -- in this case, does the APA review come
19 from the Board of Corrections?

20 MR. DREEBEN: APA --

21 QUESTION: You indicated in your answer to
22 Justice O'Connor there is APA review.

23 MR. DREEBEN: That's right.

24 QUESTION: Do you exhaust your remedies before
25 the Board of Correction of Military Records and then go to

1 a court under the APA?

2 MR. DREEBEN: You do not have to, Justice
3 Kennedy. You can go to court under the APA and challenge
4 the final agency action that consists of dropping the
5 officer from the rolls. You can also go to the Board of
6 Correction of Military Records and challenge that action
7 under the APA, saying that the BCMR should have granted
8 relief.

9 QUESTION: My question is, if you did that with
10 the Board, do you then have any judicial review of what
11 the Board did?

12 MR. DREEBEN: Yes. Yes, you do.

13 QUESTION: Under the APA?

14 MR. DREEBEN: Yes. The Board's action itself is
15 a reviewable agency action.

16 There's another avenue of relief here --

17 QUESTION: And -- and are these rev -- are --
18 are its actions often reviewed in the courts?

19 MR. DREEBEN: Yes. BCMR actions are often
20 reviewed in the courts. They're most typically reviewed
21 under the guise of Tucker Act proceedings, because the
22 ultimate challenge here is that the servicemember should
23 not have been terminated from the military, which causes
24 him to lose military pay and other benefits. And those
25 claims can be framed, and typically are framed, as claims

1 for monetary relief. They're brought before the Court of
2 Federal Claims. They're appealed to the Federal circuit,
3 and thereby judicial review is obtained of any of the
4 statutory, regulatory, or constitutional objections that
5 the servicemember has.

6 Now, in this --

7 QUESTION: I'm surprised to hear you say that --
8 that in order to pursue these judicial remedies, you don't
9 have to go before the Board of Corrections. Is that -- is
10 that well-established? I would have thought that there's
11 an exhaustion requirement.

12 MR. DREEBEN: It is fairly well-established,
13 Justice Scalia, for two different reasons. One is that,
14 under the Tucker Act, the action that the individual is
15 challenging is being fired. And if he is dropped from the
16 rolls or otherwise discharged from the service, that's a
17 final action. It's going to be implemented. It is not
18 going to be stayed or delayed in any respect while he goes
19 to the Board of Corrections of Military Records.
20 Frequently, service --

21 QUESTION: But that -- but that's not an APA
22 action; that's a Tucker Act action.

23 MR. DREEBEN: That's correct.

24 QUESTION: You -- you said that there was an --
25 an action under the Administrative Procedure Act.

1 MR. DREEBEN: That's correct. And I think that
2 under this Court's decision in Darby v. Cisneros, unless
3 there is a specific statutory or regulatory requirement of
4 exhaustion, the servicemember need not, before bringing an
5 APA action, exhaust a -- the provided administrative
6 remedy, such as the BCMR. He can do it, but he can also
7 make a challenge to the actual decision to drop him from
8 the rolls.

9 If he is going to sustain such an action under
10 the APA, he has to be able to show that something more is
11 at stake than simply the money that he would have been
12 received if he had not been dropped from the rolls. But
13 the courts have generally recognized that, through one
14 avenue or another, the Federal courts are going to be able
15 to hear and adjudicate the very constitutional claim that
16 Major Goldsmith presented to the CAAF.

17 QUESTION: Is -- is it the case that the merits
18 in the jurisdictional question are tied together? That
19 is, if you see this action as a punishment, it would make
20 sense to say that the -- the criminal court has
21 jurisdiction, through the All Writs Act, to stop some
22 other part of the Army from -- let's say they explicitly
23 said, And we're going to punish you some more by making
24 you do extra duty, making you do this, making you do that,
25 dropping you from the rolls -- I guess they might have

1 jurisdiction there.

2 But if you don't see it as a punishment, you
3 rather see it is as a consequence or some kind of other
4 general action, then, of course, they wouldn't have
5 jurisdiction. But, I mean, looked at that way, you have
6 to decide the merits in order to decide if they have the
7 jurisdiction.

8 MR. DREEBEN: I don't think you do, Justice
9 Breyer. Because I think that the jurisdictional question
10 is fundamentally an allocation of power within the
11 military. The CAAF is given specific designated
12 jurisdiction to review court-martial findings and
13 sentences. The particular challenged action at issue
14 here -- dropping from the rolls -- is not a findings or
15 sentence that can be imposed in a court-martial
16 proceeding. The court-martial is in fact specifically
17 barred from dismissing or discharging an officer except as
18 in accordance with the UCMJ.

19 QUESTION: Well --

20 MR. DREEBEN: It does not have power to consider
21 DFR, dropping from the rolls, actions.

22 QUESTION: Well, even -- even if -- even if --
23 even if this were something other than you're saying it
24 is, certainly the way a double jeopardy is ordinarily
25 administered is not for the court where the first sentence

1 was imposed to start proceedings to enjoin another court.
2 You raise it in the second court, do you not?

3 MR. DREEBEN: That -- that's absolutely correct.

4 QUESTION: That's true. That's -- that's
5 exactly the question I'm -- I'm -- I don't know the answer
6 to.

7 MR. DREEBEN: So --

8 QUESTION: So, imagine, though, that the --
9 the -- the different part of the Army had said this --
10 they -- they write out the following. They say: We don't
11 think that that court-martial board did enough by way of
12 punishment. We want to punish this person further. And
13 so, by way of punishment, what we shall do -- and we
14 promise it's punishment -- is we shall throw him out of
15 the Army in order to really punish him. And they write as
16 many of the words "punishment" 50 times.

17 All right, now suppose all that had really
18 happened. Then would this court have jurisdiction?

19 MR. DREEBEN: No.

20 QUESTION: Because?

21 MR. DREEBEN: Because this Court's jurisdiction
22 is defined to review certain kinds of actions that are
23 taken under the UCMJ by the court-martial proceedings
24 itself. An officer who faces the kind of sanction that
25 you've described has another method of recourse,

1 specifically defined by statute. Within the military, he
2 can present his claim to the Secretary of the Air Force or
3 the relevant service Secretary. He can go to the BCMR.
4 And he can go to Federal district court.

5 And I think that it's important that in thinking
6 of the jurisdictional question that one keep in mind that
7 Congress set up the CAAF and the subordinate, intermediate
8 military tribunals for very important but specific and
9 limited purposes -- to review the court-martial sentences
10 that have been presented to them in accordance with the
11 jurisdictional statute. There is no free-ranging power
12 given to these bodies to review, essentially, personnel
13 actions that may occur as a collateral consequence of the
14 conviction or other consequences that may occur of the
15 conviction. And --

16 QUESTION: Do you agree that the -- that the
17 jurisdiction of the Court of Appeals for the Armed Forces
18 is being impaired when additional punishment is added?

19 MR. DREEBEN: No. No more than the jurisdiction
20 of a criminal sentencing court is impaired if the
21 government initiates a second action that could be
22 described of -- as violative of double jeopardy. The
23 original judgment stands. And, indeed, it still has --

24 QUESTION: I see. Right. I assume if they
25 tried to impose the second punishment instead of the

1 first, and -- and undo the first, then -- then there would
2 be an impairment?

3 MR. DREEBEN: Yes. And there would be a -- a
4 separate question raised if what the military did was take
5 the actual court-martial findings and sentence and
6 specifically revise it, and increase the punishment,
7 contrary to the specific provisions of the UCMJ, and
8 contrary to the affirmed judgment of the appellate court.
9 A traditional use of the All Writs Act power would be to
10 compel that the judgment that has been affirmed and
11 adjudicated in a particular manner be adhered to.

12 But this action in this case reached beyond the
13 judgment and beyond the terms of the authorized sentence,
14 and enjoins other parties, who were not part of the
15 court-martial proceeding, per se, and who are not acting
16 under the UCMJ, and who are not acting in pursuance of the
17 judgment of conviction, but, rather, are exercising
18 separate authority altogether to take an officer who has
19 been convicted in a court-martial and get him out of the
20 Air Force as a result of that.

21 QUESTION: Mr. Dreeben, is there any practical
22 difference in these three ways of removing an officer?
23 One is if the court-martial itself had imposed discharge.
24 One is an administrative separation. And the third is
25 what we're dealing with here; you refer to it by three

1 initials. They all get the person out, and that person
2 doesn't get any pay or allowances. Is there any practical
3 difference among the three?

4 MR. DREEBEN: There -- there are a number of
5 legal and practical differences, Justice Ginsburg. The
6 first and central one here is that the action of a
7 court-martial in dismissing an officer is considered to be
8 about the worst punishment that a court-martial can
9 impose, about the worst punishment that can be experienced
10 by an officer. It carries the stigma of having been taken
11 out of the military service as a punishment. And so it is
12 a punitive measure, and designed to be perceived as such.

13 The action of dropping from the rolls, in
14 contrast, grew up from the history of a law in the 18 --
15 enacted in 1870, that permitted the President to simply
16 recognize that if an officer were AWOL, absent without
17 leave, and not serving any services for the military, not
18 performing any work for the military, he could be simply
19 dropped from the rolls without characterization of how he
20 left the military.

21 A dismissal is roughly equivalent to a
22 dishonorable discharge. Dropping from the rolls is simply
23 a removal from the military without characterization of
24 the service experience at all.

25 The intermediate form of administrative remedy,

1 which is a proceeding under Section 1181, is more broadly
2 available for misconduct or dereliction of duty or conduct
3 that is inconsistent with the national security. And it
4 entails a full-blown due process hearing, at which the
5 servicemember can present to the armed forces reasons why
6 he should not be dropped -- why he should not be dismissed
7 from the -- the military or discharged from the military.
8 And it can carry adverse consequences, adverse
9 characterizations, for the servicemember who is
10 discharged.

11 So, it has both more due process, more potential
12 for adverse characterization, than dropping from the
13 rolls. Dropping from the rolls really targets a very
14 narrow category of servicemembers who have been convicted
15 of serious crimes or who are AWOL. And in those
16 situations, Congress has deemed it to be a sufficient
17 basis, alone, for removing that person as a serving member
18 of the military.

19 QUESTION: Does the court of military -- or does
20 the military court, the sentencing court, take dropping
21 from the rolls into consideration in the sentencing, and
22 say, this is a serious felony, we know you're going to be
23 dropped from the rolls, therefore we will reduce our
24 punishment somewhat to the following?

25 MR. DREEBEN: That would be impossible, because

1 the sentencing body at the court-martial level would not
2 know whether any administrative action would be taken
3 later, because --

4 QUESTION: Well -- well, it might know it
5 judicially. They say, in these cases, you're usually
6 dropped from the rolls, and we presume that you will be,
7 and therefore we will tailor our sentence accordingly.

8 MR. DREEBEN: As a -- as a practical matter, I
9 can't say that the court-martial body might not think
10 that. But it would have no more relevance to the legal
11 issues here than it would have if a sentencing court said
12 that I'm not going to impose a certain fine on you because
13 I anticipate that you're going to be fired by your
14 civilian employer once this criminal conviction is made
15 final.

16 The sentencing judgment that is imposed by the
17 court-martial, and ultimately affirmed or -- on review, is
18 simply that body's sentence. But it doesn't give the
19 courts that reviewed that sentence the power to enjoin
20 later authorities that may impose collateral consequences
21 as a result of the sentence.

22 QUESTION: Mr. Dreeben, you -- you said, I
23 think, a minute ago that if -- if the executive -- if the
24 military, in purporting to enforce the sentence, went
25 beyond its term -- say, there was to be loss of half pay

1 and the military said, well, we're going to -- we're going
2 to see that he loses three-quarters pay -- that in those
3 circumstances the All Writs Act could be used, in effect,
4 to bring the matter back to the Court of Appeals, in
5 effect, for enforcement of sentence; is that right?

6 MR. DREEBEN: No, Justice Souter. I may have
7 misspoken. But I meant to say only that if the military
8 authorities themselves attempt to alter the judgment, the
9 written document that reflects the judgment, and attempt
10 to impose greater punishment than has been affirmed by the
11 reviewing court, that court would have power to order its
12 own judgment corrected.

13 Post-sentence administration of any form is not
14 a matter that is given to the Court of Appeals for the
15 Armed Forces to have jurisdiction over. It --

16 QUESTION: How would -- how would a claim for --
17 for a -- a failure to follow the judgment after the review
18 be brought and enforced?

19 MR. DREEBEN: It depends what the claim is. If
20 the claim is that the servicemember is being held contrary
21 to the judgment, the servicemember can bring a habeas
22 corpus action. If the servicemember claims that he is
23 being given unconstitutional punishment in violation of
24 his Eighth Amendment rights, he could go to Federal
25 district court and bring either an APA action or, in

1 appropriate circumstances, maybe a Bivens action.

2 QUESTION: In my example, he would bring a
3 Tucker Act?

4 MR. DREEBEN: He would probably have to bring a
5 Tucker Act action, that's right.

6 And, again, this is not a question of -- of
7 unavailability of remedy. It is a question of allocation
8 of remedy over who -- who has power to determine how the
9 military acts once the court-martial sentence has been
10 finally reviewed.

11 The CAAF is a court that was set up to review
12 only issues of law arising out of court-martial
13 proceedings itself. That is what its statutory
14 restriction says it may do. And its judgments are then
15 reviewable here by the government or by the servicemember.
16 But the CAAF was not given authority to become an
17 all-powerful administrator of criminal judgments that it
18 has once affirmed. Those actions are reviewable under
19 other forms of proceedings entirely.

20 Justice Breyer, to come back to your question,
21 I -- I think that if the Court held clearly, as -- as it
22 should, that the dropping from the rolls procedure is a
23 civil and administrative remedy, that would reinforce the
24 conclusion that it could not possibly be a matter that
25 could ever come before the Court of Appeals for the Armed

1 Forces.

2 But even if the Court did not decide that
3 question, and addressed first the jurisdictional question,
4 the issue here is fundamentally who has authority to
5 decide whether the administrative action of dropping from
6 the rolls does implicate criminal punishment. In our
7 view, that responsibility falls to the military bodies
8 assigned for that responsibility and to the Federal
9 district courts.

10 QUESTION: Mr. Dreeben, there was -- the reason
11 given for going the CAAF route rather than the more
12 lengthy military district court or claims court was the
13 illness of Goldsmith. Is he still alive?

14 MR. DREEBEN: Yes, he is. He has been, as a
15 result of the order of the CAAF, not discharged from the
16 military. And because his sentence has expired, he has
17 returned to active duty.

18 The manner in which the case came to the CAAF is
19 significant because it reveals that the CAAF entertained
20 not only the action to drop Major Goldsmith from the
21 rolls, but it also entertained an action that he was not
22 being given appropriate medical treatment while in
23 military confinement. And the issue of what kind of
24 medical treatment a prisoner is being given has nothing to
25 do with the findings and sentence of the court-martial

1 that confined him to custody.

2 Normally, challenges to the way in which someone
3 is being held under a judgment are brought in a Federal
4 court or through administrative procedures -- proceedings
5 that are made available for that. It is not a continuing
6 source of jurisdiction for the CAAF over all actions
7 administering sentence simply because it once had power,
8 which in this case it never even exercised, to review the
9 sentence in question.

10 And a further indication of how far the CAAF has
11 gone from reviewing court-martial sentences is that it
12 issued an injunction not only against the Secretary of the
13 Air Force and subordinate officials not even to proceed
14 with the duty -- the dropping from the rolls procedure --
15 its injunction actually issued to the President of the
16 United States. And it is clearly something that is rather
17 extraordinary to suppose that an Article I court, which
18 has no specific jurisdiction at all to review this kind of
19 personnel action, could issue an injunction against the
20 President that would prevent him from removing from
21 military service an officer who has been convicted of
22 disobeying orders and committing assaults that were likely
23 to re -- lead to grievous or serious injury.

24 If the Court has no further questions, I would
25 save the rest of my time for rebuttal.

1 QUESTION: Thank you, Mr. Dreeben.
2 Mr. -- is it Economidy?
3 MR. ECONOMIDY: Economidy, just like America's
4 economy, except it's "omidy."

5 QUESTION: Say it again, will you.

6 MR. ECONOMIDY: Economidy.

7 QUESTION: Economidy.

8 MR. ECONOMIDY: I'm used to "Ec," though,
9 however.

10 QUESTION: Very well, we'll hear from you.

11 ORAL ARGUMENT OF JOHN M. ECONOMIDY

12 ON BEHALF OF THE RESPONDENT

13 MR. ECONOMIDY: Mr. Chief Justice, and may it
14 please the Court:

15 I'd like to correct two incorrect responses,
16 first, to Justice Kennedy and then to Justice Souter. You
17 had asked about an instruction in this particular case, if
18 this statute on dropped from the rolls had existed at the
19 time Respondent, Major Goldsmith, would have been entitled
20 to an instruction. The case is United States v. Powell,
21 30 C.M.R.

22 We have a provision in the Uniform Code of
23 Military Justice, which you may opt out by regulation.
24 The Air Force has. And it's an automatic reduction in
25 grade if you get confinement. In that particular case,

1 Congress had passed the law, but the individual did not
2 receive an instruction on the automatic effect of this
3 reduction in rank, which is sort of what the DFR is.
4 Within the military judges bench book, their book -- book
5 of instructions, you have in there an instruction that if
6 you give a particular sentence, then you're going to have
7 an automatic reduction.

8 So, if you asked, Justice Kennedy, would he be
9 entitled to an instruction, the answer would be yes, I --

10 QUESTION: Was it -- was it automatic? I
11 thought it had to be -- I -- I thought it's up to the
12 President.

13 MR. ECONOMIDY: You have to meet certain
14 criteria, Justice Scalia, to have that automatic reduction
15 in rank, unless you're referring to the DFR.

16 QUESTION: Well, yes, I was referring to the
17 DFR.

18 MR. ECONOMIDY: Okay.

19 QUESTION: What are you referring to?

20 MR. ECONOMIDY: I was referring to Article
21 58(a). Article 58(a) has an automatic reduction in rank,
22 down to E-1.

23 QUESTION: Is that what Justice Kennedy was
24 asking about?

25 QUESTION: No, I -- I --

1 MR. ECONOMIDY: He had asked about instructions.
2 And I am taking this by an analogy, that if you have a
3 certain result in a court, could they be entitled to an
4 instruction that would educate the members of the
5 court-martial? And the answer is yes. And the Powell
6 case would do that.

7 QUESTION: Well, does -- does that --

8 QUESTION: Is that being done now?

9 QUESTION: -- does the instruction address
10 itself to being dropped from the rolls?

11 MR. ECONOMIDY: It hasn't yet, because the
12 statute occurred. There has not been a DFR in the Air
13 Force involving this statute, to my knowledge, except for
14 Major Goldsmith's case, because we have a State
15 proceeding.

16 Justice Souter, you had asked, and the response
17 was, well, he could bring a Bivens action. That is
18 incorrect. We have the Ferius defense that an active duty
19 member cannot sue incident to military service. And that
20 has been extended over to civil rights. The case is
21 Chappell v. Wallace.

22 QUESTION: Yes. But I -- I take it you could
23 get relief if it were an issue of confinement by habeas
24 and if it were an issue of money under the Tucker Act. Is
25 that correct?

1 MR. ECONOMIDY: The place to in this particular
2 case would be the Court of Appeals. Because the Court of
3 Appeals, by their statute, Article 67, can act on findings
4 and on sentence. And when you look at the Court of
5 Appeals opinion in Goldsmith, particularly paragraph 1,
6 page --

7 QUESTION: What Court of Appeals are you talking
8 about?

9 MR. ECONOMIDY: The Court of Appeals for the
10 Armed Forces.

11 QUESTION: Okay.

12 MR. ECONOMIDY: CAAF.

13 QUESTION: Well, but what -- what about my
14 question? My question was, if there -- if there were
15 an -- an issue of confinement, he would have a habeas
16 remedy, and if there were an issue of -- of money, he
17 would have a Tucker Act remedy. Are those two statements
18 correct?

19 MR. ECONOMIDY: Those statements are correct.
20 But if you're in the military and you're imprisoned in
21 Turkey, or you're imprisoned in Japan, or Germany, you've
22 got one place to go, and that is the Court of Appeals for
23 the Armed Forces, because the Code applies worldwide,
24 under Article V. In this particular case --

25 QUESTION: Well, are -- are you saying that

1 someone imprisoned out of this country, in the custody of
2 an American custodian, cannot bring habeas corpus?

3 MR. ECONOMIDY: I would have habeas corpus in
4 the Court of Appeals for the Armed Forces.

5 QUESTION: Well, are you saying -- or perhaps
6 you're not expressing any opinion on -- whether someone
7 held in custody in the military, outside of this country
8 but by an American custodian, could -- could sue for
9 habeas corpus in the -- in a Federal district court?

10 MR. ECONOMIDY: I think this Court has given
11 opinions like the Gusic case versus Shoder, Schlesinger v.
12 Councilman, that says if you go into Federal courts, you
13 should have comity, and they should go to the Court of
14 Appeals for the Armed Forces or to the other military
15 appellate courts. That's why we went to the military
16 courts in this case. I --

17 QUESTION: I -- I don't have the same
18 recollection you do of those cases.

19 MR. ECONOMIDY: What they're saying there is
20 that if you have a court-martial-type case, you should go
21 to the military court, is how I read the cases.

22 QUESTION: Well, but one -- your argument, as I
23 understand it, for this being a court-martial-type case,
24 is that he can only get his remedy in the Court -- in
25 the -- in the Court of Appeals because habeas isn't

1 available.

2 MR. ECONOMIDY: I'm not saying habeas is not
3 available in the Federal courts. I'm saying we have a
4 specialty court, and that's where we should go first.

5 QUESTION: Well, but a specialty court that is,
6 by statute, given the authority to review sentences that
7 are brought before it. This is something quite different.

8 MR. ECONOMIDY: I would suggest to you,
9 Mr. Chief Justice, that what we have here is an increased
10 sentence; and therefore, under Article 67, the Court of
11 Appeals for the Armed Forces can act to protect and
12 effectuate that sentence.

13 QUESTION: There -- there is no precedent at all
14 in -- in civil law for saying that a court which imposes
15 the first sentence that's the basis of the -- should then
16 go about scurrying about and enjoin the second court. You
17 raise that question in the second court or the second
18 agency and proceed through review channels there. You
19 don't go back to the first court and get an injunction.
20 I've never heard of that.

21 MR. ECONOMIDY: Mr. Chief Justice, if we had the
22 situation where the individual was kept in confinement
23 past his confinement date, we can still go into the
24 military appellate courts. We have done that in the
25 McCray case. We had a very similar factual situation in

1 the U.S. v. Mahoney, in --

2 QUESTION: We know -- I know that they'll take
3 it. That's why this case is here. The question is --

4 QUESTION: That's why -- that's why this case is
5 here.

6 QUESTION: The question is whether they took it
7 properly.

8 MR. ECONOMIDY: I think that they did, Justice
9 Scalia, because they can act on the sentence, under
10 Article 67. And if they want to protect --

11 QUESTION: The sentence hasn't been changed.
12 The sentence stood. Another -- another forum has imposed
13 an additional sentence. Now, do they have authority to
14 prevent other forums from imposing additional sentences?

15 MR. ECONOMIDY: I believe --

16 QUESTION: Where -- where do you find that
17 within their jurisdictional statute?

18 MR. ECONOMIDY: I find it --

19 QUESTION: Just give me the text of it.

20 MR. ECONOMIDY: And the text of it is where they
21 can act upon the sentence. If the sentence is increased,
22 they have a --

23 QUESTION: Their sentence hasn't been touched.
24 Their sentence stood. If somebody tried to reduce their
25 sentence, and -- and let him out of the stockade, I

1 suppose they -- they -- they would have jurisdiction to
2 protect their own -- their own jurisdiction.

3 MR. ECONOMIDY: I believe they have the right to
4 protect the sentence from being increased by an
5 unconstitutional act --

6 QUESTION: That sentence isn't being increased.
7 An additional sentence is being imposed by another forum.

8 MR. ECONOMIDY: The forum here was a dropped
9 from the roll action. A dropped from the roll action, if
10 you go to Winthrop's treatise -- and he cites the Army
11 Regulation of 1890: When a person who is dropped from the
12 rolls leaves in a dishonorable status. You also had that
13 same situation, in the statutory definition today, of a
14 veteran, under Title 38, U.S. Code, Section 101(2).

15 QUESTION: Well, assuming that to be true, do
16 you -- you don't dispute that -- that your client could
17 have -- could have raised every issue that he is now
18 trying to raise by going to that Board for Correction
19 of -- whatever it is --

20 MR. ECONOMIDY: The Board for Correction of
21 Military Records --

22 QUESTION: Yeah.

23 MR. ECONOMIDY: -- would not help my client in
24 this particular case for the following two reasons.
25 First, the stat -- statute, which is 10 U.S.C., 1522, says

1 you can only go in on military justice matters in two
2 cases: number one, a correction of the court-martial
3 order; or, number two, the situation where there was
4 insufficient clemency granted by the convening authority
5 in the first place.

6 In this particular --

7 QUESTION: I'm not sure that I'm following your
8 answer.

9 MR. ECONOMIDY: All right.

10 QUESTION: But I take it your bottom-line answer
11 is no, he could not have gone to the Board for Correction
12 in this case?

13 MR. ECONOMIDY: You can always go, but he would
14 not be able to get relief. They would find the matter
15 non-cognizable.

16 QUESTION: What, because of the constitutional
17 claim that you're raising; is that it?

18 MR. ECONOMIDY: No. Because it involves a
19 military court-martial sentence.

20 QUESTION: Well, the -- I -- I don't think
21 we're -- we're following each other. I -- I am assuming
22 that the only thing that your client would seek review of
23 before this Board would have been the order to drop him
24 from the rolls. Are you saying that the Board does not
25 have jurisdiction to review that particular action of the

1 military?

2 MR. ECONOMIDY: I don't believe it is, because
3 they would view it as a military justice matter. And this
4 particular authorization act, 104-106, there was a
5 section, 551, which required the Section 551 study. And
6 one of the findings in that particular thing was that 37
7 percent of all Air Force cases that have been in
8 litigation in the past year could not receive relief in
9 the Board of Corrections for Military Records. The facts
10 on the Army was one-third of the cases that they could
11 not --

12 QUESTION: Well, let -- let me ask you this.
13 Let's assume that your client had been convicted not by a
14 court-martial but by a civilian criminal court, and then
15 had been dropped from the rolls. Would the Board for
16 Correction have jurisdiction to review a challenge to the
17 action of dropping him under those circumstances?

18 MR. ECONOMIDY: They could hear the case then
19 because it would not involve the statutory restrictions in
20 Section 1522.

21 QUESTION: Now, if we should decide that in fact
22 the Board for Correction would have jurisdiction here,
23 would that be the end of your case?

24 MR. ECONOMIDY: It means we would take an
25 alternative course of action. We may be going back in to

1 the Board of Corrections. He is due to retire on the 1st
2 of July, which would be my first concern.

3 QUESTION: What if Corrections said that it
4 doesn't have jurisdiction in these matters? Is there a
5 case of theirs that says, "We do not have jurisdiction"?
6 I mean, you tell me that they --

7 MR. ECONOMIDY: We really don't have cases in
8 the Board of Corrections, sir. If you're talking about
9 like a Federal appeals decision or something.

10 QUESTION: Well, you -- you say they have no
11 jurisdiction to make these corrections. Do you have
12 cases --

13 MR. ECONOMIDY: No, sir.

14 QUESTION: -- where someone has tried to get a
15 correction, and they say, "Gee, you know, I'm sorry, we'd
16 like to give it to you, but we have no jurisdiction"?

17 MR. ECONOMIDY: I have been in cases,
18 particularly Woodrick v. Divich, which is somewhat like
19 this. It was an All Writs case. We went into Federal
20 court. The government argued, "No, you have to go into
21 the Court of Appeals." We get into the Court of Appeals,
22 we get the argument, "No, you have to go into Federal
23 court." It's sort of a catch --

24 QUESTION: I'm not talking about the Federal
25 court. I'm talking about the Board of Corrections. I

1 mean, you -- you're -- you're saying that the Board of
2 Corrections has no jurisdiction over these matters.

3 MR. ECONOMIDY: I do not think that they do. It
4 involves the sentence --

5 QUESTION: Well, maybe you don't think so. Do
6 they think so?

7 MR. ECONOMIDY: I think their statutory charter
8 would preclude it, because --

9 QUESTION: Has the Board ever said so? Has the
10 Board ever responded to a request for review by saying,
11 "We do not have jurisdiction," on the grounds that you
12 have just been -- been stating to us?

13 MR. ECONOMIDY: I have had cases before the
14 Board of Corrections where they have stated that, yes,
15 sir.

16 QUESTION: Well, the Board has a fairly --

17 MR. ECONOMIDY: But not in this case.

18 QUESTION: The Board has a fairly generous idea
19 of its jurisdiction, if it can renew the court-martial of
20 Samuel Mudd, which took place in 1865.

21 MR. ECONOMIDY: I would suggest to you,
22 Mr. Chief Justice, what they're doing is going on the old
23 Board of Corrections statute.

24 QUESTION: What --

25 MR. ECONOMIDY: The statute was modified in

1 recent years to preclude that. Because they used to
2 review court-martial proceeding altogether. And then
3 Congress came in and modified the statute.

4 QUESTION: Is -- is there a citation you can
5 give us for that, the modification? The -- you say
6 Congress --

7 MR. ECONOMIDY: The -- I can't give you the
8 year; it would be section --

9 QUESTION: No, but I mean just -- just the --

10 MR. ECONOMIDY: 10 U.S.C., 1522 is the statute.

11 QUESTION: Thank you.

12 QUESTION: Is that -- is that in the materials?
13 You've been referring to it repeatedly, and I've been
14 looking for it. Is it -- is it -- is it in the appendix
15 to the cert petition, or is it anywhere that I can read
16 it?

17 MR. ECONOMIDY: No, it is not in the cert
18 petition or the appendix, no, sir.

19 QUESTION: This -- I mean, I think everyone --
20 or at least I would have the same question, but I'd focus
21 this way -- say Soldier Mudd or some other soldier is
22 walking along the street one day and he gets a letter.

23 QUESTION: Mudd wasn't even --

24 QUESTION: It says, "Dear Soldier, you are
25 dropped from the rolls."

1 Well, the soldier says, "This is certainly an
2 error." And is there some place he can go?

3 MR. ECONOMIDY: He could probably go to the
4 Board of Corrections for a drop from the roll action --

5 QUESTION: Now -- now -- now what Soldier Mudd
6 says, or the other soldier --

7 MR. ECONOMIDY: But he's AWOL at that point.

8 QUESTION: Well -- well, no, he's not. He's --
9 he's in his barracks when he gets the letter. He's not
10 AWOL or anything. He thinks an error has been made. Some
11 person by the same name is doing something bad, but not
12 him. I guess there's a place he could go, right?

13 MR. ECONOMIDY: There's a place he could go. It
14 would not be a good place to start.

15 QUESTION: Well, here he is in his barracks.
16 He's got the letter. It's a big mistake. Where does he
17 go?

18 MR. ECONOMIDY: I'd go to my commander first or
19 to whoever the source is.

20 QUESTION: Fine. The commander says, Fine, I'm
21 not a lawyer. I -- I see this letter; it's written by a
22 general. Where do I go? Where does he go?

23 MR. ECONOMIDY: I'd go to personnel, try to work
24 it through the personnel channels after that.

25 QUESTION: Fine. All that fails. Now, where

1 does he go?

2 MR. ECONOMIDY: You can say ultimately he could
3 possibly go to the Board for Corrections of Military
4 Records.

5 QUESTION: Fine. Now, it happens that his claim
6 of this gross error is that it's an added punishment for a
7 court-martial I previously had. Can't he take the same
8 route? Why not? What's the legal authority that says he
9 can't?

10 MR. ECONOMIDY: The Board of Corrections does
11 not have the power to find these statutes
12 unconstitutional. Your case of McCarthy v. Madigan says
13 you do not have to go through the administrative route to
14 exhaust your administrative remedies if they cannot
15 provide that particular remedy.

16 QUESTION: What -- what's the name of that case?

17 MR. ECONOMIDY: McCarthy v. Madigan.

18 QUESTION: Well, you have the cite for that?

19 QUESTION: Isn't that inconsistent with Southy?
20 I mean, the argument that you are making, that you made in
21 your brief, was that if the administrator can't give you
22 the constitutional judgment that you want, you can skip
23 over it and go directly to court. And this Court, in
24 Weinberger against Southy, said no, even though the
25 administrative agency doesn't have authority to hold the

1 law it administers unconstitutional, still, you can't skip
2 over that route. Because there are other questions to be
3 resolved, you have to go that route. And then you get to
4 a court that can deal with the constitutional question.

5 So, why is this any different?

6 MR. ECONOMIDY: My client at the time was dying.
7 I had to go somewhere pretty fast. And that was the
8 motivating factor. Your average trips to the Board of
9 Corrections run --

10 QUESTION: That's what you said in your brief.

11 MR. ECONOMIDY: Yes.

12 QUESTION: But you've been changing the argument
13 here. And you're saying the reason that you went -- one
14 of the reasons -- was that the Board of Corrections
15 didn't -- could not take such a case. In your brief, you
16 said you needed fast relief.

17 MR. ECONOMIDY: I don't think that they can
18 provide the remedy under the two statutory exceptions for
19 military justice matters that exist, which is they can
20 only act with regard to clemency or technical errors in
21 the court-martial order, like they misspell a name or they
22 misstate the sentence. I do not think that they can go
23 into this particular case. Because, as we have viewed
24 this case, it has always involved the sentence, which is
25 how the Court of Appeals acted under Article 67. And --

1 QUESTION: All right. Suppose I don't view it
2 that way. Suppose I view the later action as having
3 nothing to do with the court-martial order. Then surely
4 you could have gotten it corrected in the Board of
5 Corrections, right?

6 MR. ECONOMIDY: The Board of Corrections
7 probably would not correct this, because they will say
8 this is a commander's matter --

9 QUESTION: Well, I don't care about "probably."
10 I don't want to know what they'll do. You can always get
11 what they'll do --

12 MR. ECONOMIDY: I misunderstood.

13 QUESTION: -- reviewed in a Federal court, which
14 will tell them they're wrong. But would they have
15 jurisdiction to act upon it?

16 MR. ECONOMIDY: You can bring most anything
17 before the court. They might --

18 QUESTION: Well, of course, you can bring most
19 anything before any court --

20 MR. ECONOMIDY: Yes.

21 QUESTION: -- and they'll throw it out. But
22 would this Court have jurisdiction to take it?

23 MR. ECONOMIDY: The Board of Corrections?

24 QUESTION: The Board of Corrections --

25 MR. ECONOMIDY: It -- it --

1 QUESTION: -- assuming it had nothing --
2 MR. ECONOMIDY: -- it's not a court.
3 QUESTION: -- assuming I do not agree with
4 you --
5 MR. ECONOMIDY: Yes, sir.
6 QUESTION: -- that -- that this is related to
7 the court-martial sentence. Okay. I mean, that's your
8 premise.
9 MR. ECONOMIDY: Mmm-hmm. Yes.
10 QUESTION: Assuming I don't agree with that
11 premise, would the Board of Corrections have had
12 jurisdiction over the administrative action, severing your
13 client from the military?
14 MR. ECONOMIDY: If they agree with your position
15 that they -- that it is not a military justice action --
16 QUESTION: Right.
17 MR. ECONOMIDY: -- then they probably could,
18 yes, sir.
19 QUESTION: They would. Okay.
20 QUESTION: May I ask you a question running
21 through my mind? Supposing a serviceman gets convicted of
22 an offense and he gets sentenced to 6 months in the brig.
23 He serves his 6 months and he -- he gets out. And he goes
24 back on active duty. He goes on a ship, say. And his
25 commanding officer says, "I know what you did; 6 months

1 wasn't a fair punishment for that. I think you should
2 have had 9 months. I'm going to lock you up in the brig
3 for 90 days more." What is his remedy? Can he get an All
4 Writs Act proceeding before the CAAF?

5 MR. ECONOMIDY: I think that he can, because it
6 is an increase in the sentence that was judged. You
7 basically have the situation here, because the convening
8 authority in Goldsmith, General Griffith, is the same
9 person who brought the DFR action, after he'd been
10 promoted and moved to a different office.

11 QUESTION: Well, just in my hypothetical, you
12 say that -- that the All Writs Act would cover that case,
13 as well as yours?

14 MR. ECONOMIDY: If he meets the statutory
15 criteria for review --

16 QUESTION: Well, his sentence has already been
17 served. The other judgment is final. And no tampering
18 with that judgment. But the new commanding officer just
19 thinks the punishment was insufficient and he's decided to
20 give him an extra 90 days. He could go directly to the
21 CAAF, in your view?

22 MR. ECONOMIDY: If he satisfies the statutory
23 jurisdiction, the answer would be yes.

24 QUESTION: Well, how does he -- does he satisfy
25 the statutory jurisdiction requirement on my facts?

1 That's what I'm asking.

2 MR. ECONOMIDY: On your facts of just 6 months,
3 no punitive discharge, he would not be able to go to the
4 Court of Appeals for the Armed Forces. He could only go
5 to the judge advocate general, perhaps, or through an
6 Article 138.

7 QUESTION: But why couldn't he -- why couldn't
8 he go there on the same theory that you advocate here?
9 That's what I'm not -- I'm a little puzzled by.

10 MR. ECONOMIDY: Major Goldsmith was sentenced to
11 1 year of confinement. Therefore, there was direct
12 jurisdiction for the service court, under Article 66,
13 potential jurisdiction under Article 66.

14 QUESTION: Well, I'm assuming that in my case
15 the original sentence might have been 9 months instead
16 of 6.

17 MR. ECONOMIDY: It would -- it would have to be
18 at least 1 year to get service court review.

19 QUESTION: Well, make it a year and 18 months,
20 then, because I don't want to get --

21 MR. ECONOMIDY: All right. If it's a year, then
22 he would be able to go in -- either to the service court
23 or to CAAF, to seek habeas corpus.

24 QUESTION: Well, can -- can -- do they still
25 have company punishment, or captain's mast, where --

1 can -- can you get a review of -- of those kind of courts'
2 decisions in -- in the Court of Appeals, Armed Forces?

3 MR. ECONOMIDY: The -- your question was
4 twofold.

5 QUESTION: Yeah.

6 MR. ECONOMIDY: Do they still have captain's
7 mast? Yes, that's nonjudicial punishment under Article
8 XV, only in the Navy. The answer is CAAF does not have
9 jurisdiction. The service courts do not have jurisdiction
10 for review of Article XVs.

11 QUESTION: Well -- well, what if, under Justice
12 Stevens' hypothetical, the -- the commander just says,
13 You're going to be -- I don't -- I don't think you got a
14 tough enough sentence in your court-martial, so I'm going
15 to restrict you -- I'm going to restrict you to the ship
16 for 3 months or I'm going to restrict you to base 3
17 months, and I intend this as further punishment? Now, can
18 the CAAF step in, in that case, and say, Look, it's double
19 jeopardy?

20 MR. ECONOMIDY: I think they can act on their
21 sentence under Article 67. I think it would be double
22 jeopardy in the sense of an increased or multiple
23 punishment, and that they could step in, in that
24 hypothetical.

25 QUESTION: That -- that's the question exactly.

1 What gives them the authority to do that? Is it effect --
2 there is no judgment that they're effectuating. What --
3 what -- how -- what is the authority that the -- in that
4 case, that the CAAF can step in?

5 MR. ECONOMIDY: I would suggest to you --

6 QUESTION: Not the Court of Criminal Appeals,
7 it's the CAAF, right? Right. Yeah.

8 MR. ECONOMIDY: The CAAF would have to satisfy
9 Article 67, to protect and effectuate the sentence. When
10 the sentence is increased, I feel that they have a right
11 to protect the original sentence from being increased.

12 QUESTION: Well, it isn't their sentence, it's
13 the sentence of the court-martial.

14 MR. ECONOMIDY: It's the sentence of the
15 court-martial. It is the adjudged and the affirmed
16 sentence.

17 QUESTION: But their only jurisdiction is to
18 review the court-martial judgment. They have done that.
19 The further imposition has nothing to do with the
20 court-martial. So, I don't see how they would have
21 jurisdiction to review anything, and I don't see how they
22 would have jurisdiction under the All Writs Act in aid
23 of -- of -- of their -- of some independent jurisdiction.

24 MR. ECONOMIDY: If that is --

25 QUESTION: I'm -- I'm just missing the

1 connection.

2 MR. ECONOMIDY: Well, Justice Souter, if that is
3 the case, then a commander can go out and increase
4 punishment substantially. You had that in the case that
5 we cited, U.S. v. Maroney, which is exactly what happened.
6 It also happened the same way in United States/Mc --
7 McCray.

8 QUESTION: Well, you're -- you're setting up a
9 parade of horrors, but you're not responding to -- to my
10 attempt to analyze the terms in the All Writs Act in
11 relation to the jurisdictional statute here. And -- and
12 I -- I still am having trouble making the leap that you
13 want me to -- to make.

14 MR. ECONOMIDY: I believe that if the judgment
15 is changed, the adjudged and approved sentence, or the
16 above adjudged and affirmed judgments in a civil case --

17 QUESTION: Yeah, but we're playing with words.
18 In the hypothetical --

19 MR. ECONOMIDY: Well, if they -- if they
20 change --

21 QUESTION: -- no one is changing the judgment.
22 The -- the officer is saying: You didn't get enough and
23 I'm going to -- I'm going to engage in a little justice of
24 my own here. He's not changing anything. He's saying,
25 I'm going to do this.

1 MR. ECONOMIDY: I think that when you change the
2 court orders, then you have a right to protect it. This
3 Court did that in Will v. Calvert Insurance Company --
4 Calvert Fire Insurance.

5 QUESTION: My impression is Justice Souter's
6 point is there is no -- if the -- if there is a judgment
7 somewhere, it's not in the CAAF. The judgment is in
8 either the Court of Criminal Appeals or back in the
9 original court-martial. So, if you have some right to
10 protect something called a judgment, it isn't the CAAF
11 you'd go to, it would be to the court that has it.

12 MR. ECONOMIDY: The court-martial loses judgment
13 as soon as the action is taken. It lose -- it loses
14 jurisdiction at that particular point in --

15 QUESTION: Well, then -- then what about the
16 Court of Criminal Appeals?

17 MR. ECONOMIDY: You could go there as a first
18 step, if you satisfy their statutory criteria.

19 QUESTION: What would be the theory of going to
20 a court that doesn't have a judgment, that has no appeal?
21 In other words, what's the theory of going to the CAAF, as
22 opposed to, let's say, going to the Court of Claims or
23 going to the Ninth Circuit, or any other place?

24 MR. ECONOMIDY: We have viewed all along that
25 the DFR action equates to a dishonorable discharge, which

1 is the same as a dismissal. That is the same punishment
2 which he avoided in his court-martial and in -- in his
3 case. It also increased his -- his forfeitures. He had
4 partial forfeitures. The DFR action now takes it from
5 partial forfeitures to total forfeitures, not only of pay,
6 but also of allowances. That increases the sentence. We
7 believe that the CAAF has the right to protect the
8 original sentence.

9 QUESTION: May I change my hypothetical just a
10 little. Supposing you've got a Captain Queeg here. And
11 he's got two servicemen he wants to discipline. And one
12 of them has served a year's sentence for something or
13 other and it's over. As to him, he says, I'm going to
14 give you another 90 days because you didn't get enough
15 punishment.

16 The second person has never been disciplined for
17 anything, but he just doesn't like him. And he puts him
18 in the brig for 90 days because he didn't salute, or
19 something like that. And both of them are in the brig for
20 90 days. One of the could go to the Court of the Armed
21 Forces, the other could not?

22 MR. ECONOMIDY: That's correct, under your
23 hypothetical.

24 QUESTION: Yeah.

25 QUESTION: Is there any other situation where a

1 court of ultimate review in the hierarchy can act as the
2 court of first view? That's what makes this picture
3 really anomalous, because the CAAF is stepping in to
4 correct whatever it perceives as an error. But it's
5 taking a first view, when it's set up by the statute to be
6 a court of review. And it's not reviewing anything that
7 has been said lower down in the hierarchy. Is there any
8 counterpart to that notion that --

9 MR. ECONOMIDY: Not that I know of, Justice
10 Ginsburg.

11 QUESTION: And you say that Congress set up this
12 hierarchy, distinct from all others, so that the court of
13 last resort in that hierarchy can also take a first view.
14 Is there anything that suggests that Congress had that in
15 mind?

16 MR. ECONOMIDY: I think the -- you know, as we
17 have viewed this all along, they have a right to protect
18 the serviceman for unconstitutional acts within the
19 court-martial systems. They did that in Goldsmith, where
20 they saw the increase of sentence. They also did that in
21 Woodrick v. Divich, where they basically stopped the
22 court-martial.

23 QUESTION: But the D -- the DFR is not a
24 court-martial proceeding, is it?

25 MR. ECONOMIDY: It is not a court-martial

1 proceeding as such, but it's not necessarily a personnel
2 action. I would call it a military justice action.

3 QUESTION: Well, then, you're really saying that
4 the CAAF has rather broad authority just to see to it that
5 the Army doesn't get out of line when it's treating
6 individuals, or the Navy --

7 MR. ECONOMIDY: I think it can only act under
8 Article 67 with regard to findings and sentence of a
9 specific court-martial within its jurisdiction, which is
10 what they did in this particular case. They specifically
11 talked in their opinion, in Goldsmith, particularly
12 paragraph 1(b), about the sentence. They talk about
13 acting on the sentence four times in the opinion.

14 QUESTION: Well, but that doesn't make it so, as
15 anyone who's written an opinion before knows.

16 (Laughter.)

17 MR. ECONOMIDY: I guess not, sir.

18 We have believed all along that the drop from
19 the rolls action basically equates to a dishonorable
20 discharge under 38 U.S.C., 101(2), the definition of a
21 veteran. Also, the old 1891 reg that says a person who
22 has a DFR leaves in a dishonorable status. That's the
23 very sentence which we avoided in the court-martial, was
24 the dismissal, which is basically a dishonorable
25 discharge.

1 Thank you, Mr. Chief Justice.

2 QUESTION: Thank you, Mr. Economidy.

3 Mr. Dreeben, you have 5 minutes remaining.

4 MR. DREEBEN: If the Court has no further
5 questions, I would waive rebuttal.

6 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE PETITIONERS

8 QUESTION: Well, actually, I do. I mean,
9 what -- what do you say to his point, that -- as I take
10 it, he says that the -- that the CAAF has very broad
11 jurisdiction, that -- that if a commander decides to put
12 somebody in prison for 3 extra months or extra duty or any
13 of these things intended as a punishment, yes, you can go
14 to the CAAF, because that's the most practical route, it's
15 somehow related to the basic sentence, and that's all you
16 need?

17 So -- so, if you were to say there's authority
18 here that says to the contrary -- and this is all military
19 law, I -- I don't know what the military -- we have an
20 expert military court saying he's right. So -- so, what
21 authority do you have to say he's not right?

22 MR. DREEBEN: Justice Breyer, the question of --
23 of the meaning and interpretation of All Writs Act
24 jurisdiction is not a question of expertise in military
25 law. The fundamental issue here is, what does the All

1 Writs Act allow a sentencing court or, in this case, an
2 appellate court that might have, but did not, actually
3 review an underlying criminal judgment if somebody else
4 threatens actions that conceivably would implicate double
5 jeopardy rights.

6 QUESTION: Well, I suppose he'd say that the --
7 in the military, perhaps though not in the civil system,
8 what -- there -- there is some kind of a remedy, where a
9 commander takes a person and subjects him to punishment
10 growing out of a conviction, and that conviction specified
11 you shouldn't have that punishment. And maybe you have to
12 go back to the original court-martial and attack it first.
13 But if you do do that, there might be an appeal, so
14 they're preserving their appellate jurisdiction.

15 MR. DREEBEN: I think the answer comes from
16 Justice Stevens' hypothetical, which is that, if that kind
17 of unauthorized punishment is being meted out, whether it
18 be with a prior court-martial --

19 QUESTION: Meted out.

20 MR. DREEBEN: -- or without it, your remedy is
21 Federal habeas corpus.

22 QUESTION: Let me change the hypothetical to say
23 that, in doing this the extra 90 days, the -- the body
24 that does this says, to the extent necessary, this shall
25 constitute a modification of the criminal judgment entered

1 on such and such a date.

2 MR. DREEBEN: Well, I -- I think I conceded
3 earlier that if there were a formal modification of the
4 actual judgment that had been before a reviewing court,
5 traditional All Writ -- Writs Act authority would permit
6 it to rectify the --

7 QUESTION: What if it purported to be a
8 modification but there was no actual power to modify; the
9 wrong tribunal did it, but they thought they had the power
10 to modify the earlier judgment, but they didn't? They
11 said, instead of -- we're going to modify the judgment by
12 changing it in this respect. Then would they have
13 jurisdiction?

14 MR. DREEBEN: To correct the sentence, yes, but
15 not to adjudge the lawfulness of the administration of a
16 sentence. There --

17 QUESTION: Would they have jurisdiction to
18 correct the attempted modification of the judgment?

19 MR. DREEBEN: If I understand your hypothetical
20 correctly, they would have authority to say that you
21 cannot modify the judgment in the fashion that you thought
22 you had authority to do. I don't want to speak too
23 broadly on that, because there is actually authority of
24 the JAG to reduce a sentence even after it has been
25 affirmed.

1 And so, to a large extent, you really have to
2 understand that the CAAF's authority is limited to
3 ensuring fair rights under the UCMJ for the court-martial
4 sentences that are brought before it for review. And
5 thereafter, other bodies in the military and other bodies
6 in the Federal court system have responsibility for
7 adjudicating the constitutional and statutory claims that
8 servicemembers might render.

9 And I don't think that that's terribly different
10 from the civilian courts, but it should be reinforced by
11 an additional principle here. The purpose of military
12 justice is to reinforce discipline and order within the
13 military system. And there are a whole host of
14 jurisdictional and statutory bases within the military for
15 maintaining discipline, of which the CAAF and the UCMJ are
16 just one.

17 Congress divided up the world in the way that it
18 did and assigned responsibilities to various bodies within
19 the military and to the Federal courts outside the
20 military. And the -- the CAAF, in this case, has not
21 adhered to the firewalls that were put on its
22 jurisdiction, but has reached out to review actions by
23 other parties under the military that are really to be
24 reviewed elsewhere.

25 Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you,
2 Mr. Dreeben. The case is submitted.

3 (Whereupon, at 11:00 a.m., the case in the
4 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., Petitioners
v. JAMES T. GOLDSMITH Respondent.

CASE NO: 98-347

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: *Diana M. May*
(REPORTER)