IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re	)	**Misc. Dkt. No. 2007-03**
	)	
	)	
Colonel (O-6)	)	
MICHAEL D. MURPHY,	)	**ORDER**
USAF	)	
	)	
Petitioner	)	**Panel No. 1**
	)	
v.	)	
	)	
	)	
Major General (0-8)	)	
ROBERT SMOLEN,	)	
Convening Authority	)	
USAF	)	
	)	
	)	
Colonel (O-6)	)	
BRUCE AMBROSE,	)	
Investigating Officer	)	
USAF	)	
Respondents	)	

On 10 July 2007, this Court received a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. The petitioner requests the Court order the following forms of relief in the above cited proceeding:

> (1) The Court order the appointed Article 32, UCMJ, 10 U.S.C. § 832, investigating officer, Colonel (Col) Bruce Ambrose, to recuse himself from serving as the investigating officer in petitioner's hearing, and order the appointment of a non-Air Force designated Judge Advocate to perform the duties of an investigating officer pursuant to Article 32, UCMJ for the hearing scheduled for 23 July 2007;
>
> (2) The Court, following its action in the present petition, recuse itself from all future litigation in the petitioner's proceedings;

Petitioner also requested the Court order a stay of proceedings, pending the Court's decision in the instant petition. Finally, petitioner made a motion to submit documents in support of his petition.

Accordingly, it is by the Court, this 13th day of July 2007;

ORDERED:

The motion to submit documents is granted.

The petitioner's request for relief in the nature of a Writ of Mandamus is denied based upon the reasoning below.

This Court is empowered to issue extraordinary writs. The power is "generally predicated upon the All Writs Act, 28 U.S.C. § 1651(a)." *Dettinger v. United States,* 7 M.J. 216, 218 (C.M.A. 1979). We have jurisdiction to hear this petition. *San Antonio Express-News v. Morrow,* 44 M.J. 706, 709 (AFCCA 1996). While this power is great, it is not unlimited. The Supreme Court has said:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

Kerr v. United States Dist. Court for Northern Dist of Cal., 426 U.S. 394, 402 (1976) (internal citations omitted). The Supreme Court further elaborated on the remedy in *Cheney v. United States District Court for the District of Columbia,* 542 U.S. 367, 380 (2004):

> This is a "drastic and extraordinary" remedy "reserved for really extraordinary cases." *Ex Parte Fahey,* 332 U.S. 258, 259-260 (1947). The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine (the court against which mandamus is sought) to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" *Will v. United States,* 389 U.S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial 'usurpation of power,'" *ibid.*, or a clear abuse of discretion," *Bankers Life & Casualty Co. v.*

Holland, 346 U.S. 379, 383 (1952), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S. at 95. \

As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. Of Cal.,* 426 U.S. 394, 403 (1976). First, "the party seeking issuance of the writ (must) have no other adequate means to attain the relief he desires." *ibid.*—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey, supra,* at 260. Second, the petitioner must satisfy "the burden of showing this (his) right to issuance of the writ is "clear and indisputable." *Kerr, supra,* at 403. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra,* at 403."

In the instant petition, there has not been a showing by the petitioner that the action of the convening authority appointing Col Ambrose as the investigating officer has amounted to a "usurpation of power." Indeed, Rule for Courts-Martial 405 (d)(1) specifically authorized the convening authority to appoint Col Ambrose—"an officer in the grade of major or lieutenant colonel or higher or one with legal training"—to serve as the investigating officer in this case. Further, the potential decision of Col Ambrose (based on the facts presented to this Court by petitioner) to not recuse himself as the investigating officer in petitioner's case will not amount to a "usurpation of power" or be of a magnitude to require this Court to intervene. The potential decision of Col Ambrose does not exceed his grant of power under the authority vested in him as an investigating officer under Article 32, UCMJ.

Nor is petitioner without "other adequate means to attain the relief he desires." Petitioner may present his claims and challenges at various stages of the proceedings, to include, but not limited to, the Article 32, UCMJ investigation, before a military trial judge (if his case is referred to court-martial), or before this Court during the normal course of appeal (if appropriate).

The claims of the petitioner regarding (1) the impartiality of Col Ambrose; or (2) the impartiality of any other Air Force Judge Advocate designated to serve as the investigating officer in petitioners case; and (3) the impartiality of this Court are issues to be decided in the course of the petitioner's proceedings which have not yet been fully addressed in the military justice process. The petitioner has failed to show that extraordinary relief is necessary.

Based on the foregoing, this Court will not intervene in the scheduling of the investigation under Article 32, UCMJ. The request for a stay is denied.

Judge JACOBSON did not participate.

FOR THE COURT

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator