

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	Misc. Dkt. No. 2013-05
Respondent	)	
	)	
&	)	
	)	
Airman First Class (E-3)	)	
NICHOLAS E. DANIELS,	)	
USAF,	)	ORDER
Real Party in Interest	)	
	)	
v.	)	
	)	
Airman First Class (E-3)	)	
L.R.M.,	)	
USAF,	)	
Petitioner	)	Panel No. 2

On 12 February 2013, a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus was filed with this Court by “Appellate Special Victims’ Counsel,” on behalf of LRM, the alleged victim in the pending court-martial of *United States v. Airman First Class Nicholas E. Daniels*, currently scheduled to re-convene on 18 March 2013 at Holloman Air Force Base, New Mexico. This petition asks this Court to order the trial judge in the case to provide an opportunity for the alleged victim to be heard through counsel at hearings conducted pursuant to Military Rules of Evidence (MRE) 412 and 513, and to receive any motions or accompanying papers reasonably related to her rights as may be implicated in any hearings under MRE 412 and 513. The petitioner also asked this Court to stay further proceedings in the trial until we rule on the petition.

Accordingly, it is by the Court on this 20th day of February, 2013,

**ORDERED:**

That, pursuant to Rule 20(e) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure, the Government shall, no later than 1630 hours on 4 March 2013, show cause why the writ of mandamus should not issue in the fashion requested by the petition.

In the event the Appellate Defense Division wishes to be heard on these issues, its brief is due by that same deadline.



FOR THE COURT

STEVEN LUCAS  
Clerk of the Court

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	Misc. Dkt. No. 2013-05
Respondent	)	
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Airman First Class (E-3)	)	
NICHOLAS E. DANIELS,	)	
USAF,	)	ORDER
Real Party in Interest	)	
	)	
v.	)	
	)	
Airman First Class (E-3)	)	
L.R.M.,	)	
USAF,	)	
Petitioner	)	Panel No. 2

It is by the Court on this 13th day of March, 2013,

**ORDERED:**

That all proceedings in the above styled case are hereby stayed pending decision of this Court, or until such time that said stay is lifted.



FOR THE COURT

A handwritten signature in blue ink, appearing to read "S. Lucas", written over a horizontal line.

STEVEN LUCAS  
Clerk of the Court

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>Airman First Class (E-3)</b>	)	
<b>LRM,</b>	)	
<b>USAF,</b>	)	
<b>Petitioner</b>	)	<b>Misc. Dkt. No. 2013-05</b>
	)	
<b>v.</b>	)	
	)	
<b>Lieutenant Colonel (O-5)</b>	)	
<b>JOSHUA E. KASTENBERG,</b>	)	<b>ORDER</b>
<b>USAF,</b>	)	
<b>Respondent</b>	)	
	)	
<b>Airman First Class (E-3)</b>	)	
<b>NICHOLAS E. DANIELS,</b>	)	
<b>USAF,</b>	)	
<b>Real Party in Interest</b>	)	<b>Panel No. 2</b>

*Procedural Background*

On 16 October 2012, Airman First Class (A1C) Nicholas Daniels was charged with raping and sexually assaulting A1C LRM, a female Airman, on 13 August 2012, in violation of Article 120, UCMJ, 10 U.S.C. § 920. After the charges were referred, Lieutenant Colonel (Lt Col) Joshua Kastenberg was detailed to the case as military judge on 28 December 2012. A month later, the appellant was arraigned at Holloman Air Force Base, New Mexico, and elected trial by enlisted and officer members.

On 22 January 2013, Captain (Capt) Seth Dilworth was appointed as special victims’ counsel (SVC) for A1C LRM.<sup>1</sup> The next day, he notified the military judge of his appointment via e-mail and asked the military judge to direct the trial counsel to provide him with “informational copies of all motions and responses to motions where

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<sup>1</sup> In January 2013, as part of a larger Air Force program to combat sexual assault, the Air Force JAG Corps implemented the special victims’ counsel (SVC) program as a way to increase the support provided to victims of sexual assault. Through this program, Air Force judge advocates are appointed to represent certain adult victims of sexual crimes allegedly committed by Air Force members. SVC R. PRAC. AND PROC. 1 (2013) [hereinafter SVC Rules]. The stated purposes of the SVC program is to provide advice (by developing victims’ understanding of the investigatory and military justice processes), provide advocacy (by protecting the rights afforded to victims in the military justice system) and empower victims (by removing barriers to their full participation in the military justice process). “Strengthening our support to victims in this way will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay nor infringing upon the rights of an accused.” SVC Rules at page 2.

A1C [LRM] has an interest, including any motions under [Mil. R. Evid.] 412.” The military judge ordered the SVC to enter a formal appearance with the court-martial and to “provide the statutory and/or regulatory basis for motioning [the] court-martial, as a third party.” His order also noted the trial and defense counsel would have an opportunity to object to the production of these materials to the SVC.

In his formal notice of appearance, Capt Dilworth, as SVC for A1C LRM, advised the military judge that his “formal involvement in [the court-martial] will be limited to asserting A1C [LRM]’s enumerated rights as a victim of crime under federal law and [Mil. R. Evid.] 412, 513 and 514.” He further stated his intention to observe the trial as her counsel and discuss the proceedings with her outside the courtroom. He asked the military judge to direct the parties to provide him with copies of motions filed under those Military Rules of Evidence.<sup>2</sup> In making this request, Capt Dilworth acknowledged A1C LRM is not a party to the case as defined by Mil. R. Evid. 103,<sup>3</sup> but contended she had standing in the proceeding regarding any issues involving her that arose under Mil. R. Evid. 412, 513 and 514.<sup>4</sup>

Contending these Military Rules of Evidence expressly give A1C LRM the “right to be heard,” Capt Dilworth argued she must be provided with informational copies of the defense’s recently-filed motions under Mil. R. Evid. 412 and 513, so she can understand the arguments being made regarding her privacy interests and thereby receive a “meaningful opportunity” to respond and be heard.<sup>5</sup> Although he argued that, as A1C LRM’s counsel, he is entitled to speak on her behalf during hearings under those

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<sup>2</sup> “When a military judge is detailed to a case, SVC will enter an appearance, notifying the judge of their representation of a witness in the case and requesting that the judge direct that the SVC be provided with informational copies of motions filed where the victim has an interest (e.g., [Mil. R. Evid.] 412, 513, and 514 motions).” SVC Rule 4.5.

<sup>3</sup> “The SVC program does not increase a victim’s standing in court-martial hearings . . . beyond the standing victims are currently afforded under existing laws and rules (e.g. evidentiary hearings under [Mil. R. Evid.] 412, 513, and 514).” SVC Rule 4. “Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under [Rule for Courts-Martial (R.C.M.)] 103 and do not have the same entitlements as litigation parties under the UCMJ.” SVC Rule 4.6.

<sup>4</sup> The accused must notify the alleged victim (or, when appropriate, the alleged victim’s guardian or representative) when the accused intends to offer evidence of the victim’s “sexual behavior” or “sexual predisposition” under Mil. R. Evid. 412, and the victim must be provided a reasonable opportunity to attend and be heard at a closed hearing to determine its admissibility. Mil. R. Evid. 412(a), (c). The in-camera hearing provision was designed to “serve as a check on questionable proffers [by the accused about such evidence] in order to protect victims.” *United States v. Sanchez*, 44 M.J. 174, 177, 180 (C.A.A.F. 1996). Similar notice and opportunity to be heard must be provided to the alleged victim if a party seeks the production of that victim’s confidential mental health records or communications with a victim advocate. Mil. R. Evid. 513(e) and 514(e).

<sup>5</sup> The trial counsel provided Captain Dilworth with a copy of the defense’s Mil. R. Evid. 412 motion regarding Airman First Class (A1C) LRM and the Government’s response, but did not provide him with the defense’s motion to admit evidence about A1C LRM pursuant to Mil. R. Evid. 513. The SVC was also given a copy of the memorandum signed by A1C LRM, on 6 December 2012, regarding her consultation with the trial counsel pursuant to the Crime Victims’ Rights Act, 18 U.S.C. § 3771, as well as the input the trial counsel had obtained from A1C LRM regarding Mil. R. Evid. 412, 513 and 514.

rules,<sup>6</sup> Capt Dilworth informed the military judge that he did not intend to make such a statement or argument on A1C LRM's behalf during any Mil. R. Evid. 412 or 513 hearing. He claimed that her interests were aligned with the Government's interests on those matters, but he did ask to sit in the gallery during those hearings.<sup>7</sup> Capt Dilworth stated he was not asking to receive "full judicial participation" as he claimed was authorized by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. Instead, he asked the military judge to "recognize the standing [A1C LRM] has through her counsel to request informational copies of ... any motions in which she has an interest including ... [Mil. R. Evid.] 412, 513 and 514," and "in the interest of judicial economy," to authorize him to make an argument for her at one of the motions hearing on those Military Rules of Evidence in the event he changed his mind and elected to do so.

The trial counsel had no objection to A1C LRM's SVC receiving the discovery materials previously provided to the defense and any motions filed pursuant to Mil. R. Evid. 412 513 and 514.<sup>8</sup> The Government also did not object to A1C LRM being heard, either personally or through the SVC, on factual matters during hearings on these Military Rules of Evidence, but they argued neither A1C LRM nor the SVC had a right to file motions or make legal arguments before the court on those matters.

Through his counsel, A1C Daniels did not object to A1C LRM receiving copies of motions filed under Mil. R. Evid. 412, 513 or 514 or her being present and/or heard during hearings under those rules. However, the defense opposed any third party, including the SVC, being present or heard during these hearings, because those third parties lacked standing. In addition to arguing a lack of authority for such an SVC role, the defense counsel argued that having to prepare and defend against arguments from potentially two government attorneys, an SVC and a prosecutor, unfairly added a burden on the defense and created an appearance problem, especially if the interests of the victim and prosecution are not aligned.

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<sup>6</sup> "While [Mil. R. Evid.] 412, 513 and 514 do not discuss an SVC's role in these evidentiary hearings, the [Military Rules of Evidence] do [afford] victims [a reasonable opportunity to attend and] to 'be heard.' For the purposes of these three [Military Rules of Evidence] and future [Military Rules of Evidence] or [R.C.M.]s giving victims the right to be heard in military justice proceedings, SVCs or civilian victims' counsel may be allowed to speak on their clients' behalf, as permitted by the presiding military judge." SVC Rules 4 and 4.6. "SVCs may represent victims in these [evidentiary hearings] and other UCMJ proceedings where victims are afforded standing, as permitted by the presiding military judge." SVC Rule 4.6. "SVCs may advocate a victim's interests to any actor in the military justice process . . . to the extent authorized by the [Manual for Courts-Martial (*Manual*)], military judges." SVC Rule 4.1.

<sup>7</sup> Recognizing that the interests of the Government—as represented through the actions of prosecutors at courts-martial—are frequently, but not always aligned with the interests of victims, the SVC program notes "An independent SVC [has] a duty to represent the interests of the victim—and only the victim. The objective is not for SVC to establish an adversarial relationship with [trial counsel] or the defense counsel, but to provide victims with the peace of mind of having independent representation by a licensed attorney—one eminently capable of communicating their interests throughout the military justice process." SVC Rules at page 2.

<sup>8</sup> "SVCs have a right to records which is no greater than their client's rights." SVC Rule 4.9.

At the conclusion of the 29 January 2013 session and through a second ruling following A1C LRM's request for reconsideration, the military judge issued detailed findings of fact and conclusions of law. The military judge observed:

Standing . . . denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard. An argument of law encompasses motioning the court to compel the [G]overnment to produce documents. . . . [T]he general principle of standing is far narrower than the right to be heard; it is the right to advance a legal argument.

The military judge then found A1C LRM had no standing (1) to move the court, through her SVC or otherwise, for copies of any documents related to Mil. R. Evid. 412 and 513; (2) to be heard "through counsel of her choosing" in any hearing before the court-martial; or (3) to seek any exclusionary remedy, through her counsel, during any portion of the trial. Finding the "right to be heard" in the Military Rules of Evidence does not denote the right to be heard through a personal legal representative, the military judge found A1C LRM was only authorized to be heard personally; through trial counsel in pretrial hearings under Mil. R. Evid. 412 and 513; and, in the event she became incompetent, through a guardian, representative or conservator. In the military judge's view, to hold otherwise would make A1C LRM a "de facto party" to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence. The military judge then held she received the required opportunity to assert her privacy rights when he authorized her to speak personally to him or through the trial counsel during the hearings.

In his ruling, the military judge "readily recognize[d the importance of] ensuring that the rights and dignity of victims of sexual assault, perpetrated by uniformed servicemembers and Departmental personal, are protected." The military judge continued, "Nonetheless, the achievement of these goals remains subject to the legal limits on third-party standing." Even if there was such third-party standing, and thus it was permissible to allow a witness's counsel to address the court-martial, the military judge stated he would exercise his discretion and not grant Capt Dillworth's request, as he believed such an event would undermine the appearance of an impartial judiciary charged with the duty of maintaining a fair trial.

On 14 February 2013, attorneys serving as appellate SVC on behalf of A1C LRM filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Petition for Stay of Proceedings. Lt Col Kastenber was named as the respondent in the petition, and A1C Daniels was named as the "real party in interest." In the petition, A1C LRM asked our Court to issue a writ of mandamus, directing the military judge "to provide an opportunity for A1C [LRM] to be heard through counsel at hearings conducted pursuant to [Mil. R. Evid.] 412 and 513, and to receive any motions or accompanying papers

reasonably related to her rights as those may be implicated in hearings under [Mil. R. Evid.] 412 and 513.” According to A1C LRM, the military judge’s actions have “curtailed her rights under [Mil. R. Evid. 412 and 513, the CVRA] and the United States Constitution.” Arguing that *United States v. Daniels* is a case that may later be subject to our appellate jurisdiction, A1C LRM contends the All Writs Act, 28 U.S.C. § 1651, therefore gives us jurisdiction to consider her petition as a named victim in that case.

The Government filed an answer to this Court’s Order to Show Cause on 22 February 2013, arguing we have jurisdiction under the All Writs Act to entertain A1C LRM’s petition. Taking a somewhat different position than it had at trial, the Government urges us to find in A1C LRM’s favor and order the military judge to permit A1C LRM to be heard through her SVC counsel, both orally and in writing.

A1C Daniels, as the real party in interest, filed a response on 4 March 2013. He argued we have no jurisdiction to consider A1C LRM’s request for extraordinary relief and that, even if we do, we should deny her request as the circumstances of this situation do not meet the high standards for issuing a writ of mandamus.

Additionally, we received amicus curiae briefs from: (1) the National Crime Victim Law Institute, in support of A1C LRM; (2) the Air Force Trial Defense Division, in support of A1C Daniels; (3) the Navy-Marine Corps and Coast Guard Appellate Defense divisions, opposing the petition; and (4) the Army Appellate Defense Division, opposing the petition.

On 11 March 2013, we heard oral argument from counsel for A1C LRM, A1C Daniels and the Government. On 13 March 2013, we ordered a stay in the court-martial proceedings pending our decision on the SVC issue.<sup>9</sup>

### *Jurisdiction*

Before reaching the substantive issue raised in this writ-petition, we must first determine whether the jurisdiction of our Court—created by Congress pursuant to Article I of the Constitution<sup>10</sup>—extends to the review of a sexual assault victim’s complaint about a military judge’s ruling at an ongoing court-martial proceeding. We find that it does not.

Through the UCMJ, Congress conferred upon the military courts jurisdiction to conduct criminal proceedings via courts-martial. As “courts established by Act of Congress,” the military courts of appeals are thereby authorized, by the All Writs Act to

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<sup>9</sup> That same day, A1C Daniels filed a petition for extraordinary relief in the nature of a writ of prohibition, asking the Court of Appeals for the Armed Forces (CAAF) to dissolve this stay. On 19 March 2013, CAAF denied that petition without prejudice.

<sup>10</sup> U.S. CONST. amend. I.

“issue all writs<sup>11</sup> necessary or appropriate in aid of [their respective] jurisdiction and agreeable to the usages and principles of law.” *Denedo v. United States*, 556 U.S. 904, 911 (2009) (citations and internal quotation marks omitted); Rule for Courts-Martial 1203(b), Discussion. *See also Noyd v. Bond*, 395 U.S. 683, 695, n. 7 (1969). This does not serve as “an independent grant of appellate jurisdiction” or enlarge our jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (citations omitted); *Denedo*, 556 U.S. at 912, 914 (“The authority to issue a writ under the All Writs Act is not a font of jurisdiction.”). The All Writs Act is a mechanism for us to exercise power we already have, and therefore we can only invoke the All Writs Act when doing so is in aid of our existing jurisdiction.

Our power to issue any form of relief under the All Writs Act “is contingent on [us having] subject-matter jurisdiction over the case or controversy.” *Denedo*, 556 U.S. at 911. “Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.” *Bowles v. Russell*, 551 U.S. 205, 212 (2007). “Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts. . . . *This rule applies with added force to Article I tribunals . . . which owe their existence to Congress’ authority to enact legislation pursuant to Art. I, § 8 of the Constitution.*” *Denedo* 556 U.S. at 912 (emphasis added) (citing *Goldsmith*, 526 U.S. at 533-34)).

As federal courts established under Article I of the Constitution, military appellate courts are courts of limited jurisdiction. *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008); *United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008) (noting that such jurisdiction is “conferred ultimately by the Constitution, and immediately by statute”). Congress conferred our appellate jurisdiction in Articles 62, 66, 69, and 73 UCMJ, 10 U.S.C. §§ 862, 866, 869, 873, and the All Writs Act explicitly recognizes our authority to grant extraordinary relief “in aid of” that statutory jurisdiction. Article 62, UCMJ, authorizes us to review certain kinds of interlocutory Government appeals. Article 66, UCMJ, provides the framework for our Court’s direct, record-based review of a specified subset of court-martial cases, namely those referred to us by The Judge Advocate General, which includes all cases in which the sentence, as

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<sup>11</sup> One such writ is the writ of mandamus, whose purpose is “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.” *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). The issuance of such a writ is “a drastic remedy that should be used only in truly extraordinary situations.” *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983). “Mandamus . . . does not ‘run the gauntlet of reversible errors.’ . . . Its office is not to ‘control the decision of the trial court,’ but rather merely to confine the lower court to the sphere of its discretionary power.” *Will v. United States*, 389 U.S. 90, 104 (1967) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382, 383 (1953)). “To justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even ‘gross error’; it must amount ‘to a judicial usurpation of power,’ or be ‘characteristic of an erroneous practice which is likely to recur.’” *Labella*, 15 M.J. at 229 (citations and internal quotation marks omitted). “To prevail . . . [a petitioner] must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.” *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012).

approved, includes death, a punitive discharge or confinement for at least one year. Article 66(b), UCMJ. When such a case is referred to us, we can act only with respect to the findings and sentence as approved by the convening authority. Article 66(c), UCMJ. Article 69, UCMJ gives military appellate courts jurisdiction to review cases in which The Judge Advocate General has taken certain actions. Article 73, UCMJ, permits this Court to review petitions for a new trial based upon newly discovered evidence or fraud on the court.

We find the All Writs Act does not give us the authority to issue a writ of mandamus regarding this particular, collateral, civil/administrative issue involving a non-party to the court-martial. The military judge's ruling obviously occurred during a pending court-martial, but that fact alone cannot bring the issue within our jurisdictional ambit. The military judge's ruling about the scope of the SVC's role or the alleged victim's access to motions does not directly involve a finding or sentence that was—or potentially could be—imposed in a court-martial proceeding, nor does it involve a Government interlocutory appeal under Article 62, UCMJ, or amount to a request for a new trial. *Goldsmith*, 526 U.S. at 535 (“Since the Air Force’s action . . . was an executive action, not a ‘findin[g]’ or ‘sentence,’ . . . that was (or could have been) imposed in a court-martial proceeding, the [action] appears straightforwardly to have been beyond the [Court of Appeals for the Armed Forces (CAAF)]’s jurisdiction to review and hence beyond the ‘aid’ of the All Writs Act in reviewing it.”). The fact that his ruling may affect the procedures used in a future hearing designed to determine the admissibility of evidence under the Military Rules of Evidence does not mean our jurisdiction extends to the adjudication of complaints from the alleged victim regarding those procedures. The Manual for Courts-Martial (*Manual*)<sup>12</sup> provisions regarding Mil. R. Evid. 412, 513 and 514 do not provide for any appellate or collateral review of the military judge’s decisions or how to conduct the hearings required by those rules, and we decline to create one through the All Writs Act under these circumstances.<sup>13</sup>

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<sup>12</sup> *Manual for Courts-Martial, United States (MCM)* (2012 ed.)

<sup>13</sup> Such caution is consistent with language within the *Manual*. “Each [R.C.M.] states binding requirements, except when the text of the rule expressly provides otherwise.” *MCM*, A21-2. It goes on to state:

In this *Manual*, if matter is included in a rule or paragraph, it is intended that the matter be binding, unless it is clearly expressed as precatory. . . . [I]f the drafters did not choose to ‘codify’ a principle or requirement derived from a judicial decision or other source of law, but considered it sufficiently significant that users should be aware of it in the *Manual*, such matter is addressed in the Discussion. The Discussion will be revised from time to time as warranted by changes in applicable law.

...  
[T]he user is reminded that the amendment of the *Manual* is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law.

*MCM*, A21-3 (emphasis added). See also SVC Rules at page 4 (“Non-compliance with the SVC Rules, in and of itself, gives rise to no rights or remedies to the victim or the accused, and the Rules will be interpreted in this context.”).

Furthermore, his ruling does not implicate constitutionally-based rights in a pending court-martial, which has led military appellate courts to exercise jurisdiction in petitions brought by non-parties prior to the entering of findings and sentence. *See ABC v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (noting the press has standing to complain if public access to an Article 32, UCMJ, hearing is denied because the media enjoys the same right to a public hearing as the accused); *San Antonio Express-News v. Morrow*, 44 M.J. 706, (A.F. Ct. Crim. App. 1996) (finding jurisdiction to consider writ—petition brought by media after an Article 32, UCMJ, investigation was closed by the investigating officer, as the press and the public have a recognizable interest in being informed of the workings of the court-martial process).

Lastly, we disagree with A1C LRM’s contention that the CVRA’s provision that states it applies to “any court proceeding involving an offense against a crime victim” includes military courts-martial and thus gives us the authority to issue a writ of mandamus granting her the requested relief. *See* 18 U.S.C. § 3771(b)(1). We find this statute does not enlarge our existing jurisdiction. *See United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998) (Military courts must “exercise great caution in overlaying a generally applicable [victim rights] statute . . . onto the military system.”); *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (Although they have many similarities, “the military and civilian justice systems are separate as a matter of law” and changes to the latter do not directly affect the former.).

We note Department of Defense Instruction (DoDI) 1030.01, *Victim and Witness Assistance*, ¶ 4.4 (23 April 2007, interim change), provides victims of crimes under the UCMJ with generally the same rights found in 18 U.S.C. § 3771(a)(1)-(8), but it does **not** include the CVRA’s language authorizing a crime victim to seek a writ of mandamus if the victim believes the trial judge has denied her any of those rights. *See id.* at ¶ 4.3 (“This directive is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim . . . the assistance outlined in this Directive.”). We find the decision of Congress, the President, and the Department to not apply the CVRA to the victims within the UCMJ system and to not adopt a mandamus provision during the years since the CVRA was enacted to be intentional. We also note that, even under the CVRA, A1C LRM would not be entitled to the relief she seeks from this court. *See* 18 U.S.C. § 3771(a)(2) and (4) (A crime victim has the right to receive reasonable notice and “to be reasonably heard at any *public proceeding* . . . involving the defendant’s release, plea, sentencing, or any parole proceeding.” (Emphasis added.)).

If we were to find jurisdiction in the scenario before us, we would, in effect, be granting a non-party to the court-martial judicially-recognized rights equal to those of party participants —albeit for a limited issue—in a fashion specifically granted nowhere in the UCMJ, the *Manual*, federal statutes, governing precedent, or even the SVC program guidance itself. That we decline to do. *Goldsmith*, 526 U.S. at 534 (A military

court “is not given authority, by the All Writs Act or any other source, to oversee all matters arguably related to military justice.”).

Nothing in the UCMJ vests the service courts with open-ended jurisdiction to entertain every challenge brought by interested entities regarding aspects of the court-martial proceedings. Because issuing this writ of mandamus would not be necessarily or appropriately in aid of our statutorily-limited jurisdiction, we conclude we do not have the authority to consider the Petitioner’s mandamus petition.

*Conclusion*

We, like the military judge, readily acknowledge the important objectives of the SVC program. However, against the backdrop of authority underscoring the specific jurisdictional boundaries of military courts under Article I of the Constitution, and specifically considering the nature of the relief sought by petitioner in the case before us, we conclude we do not have jurisdiction to consider the petitioner’s extraordinary writ.<sup>14</sup>

Therefore, it is by the Court on this 2nd day of April, 2013,

**ORDERED:**

That A1C LRM’s Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is **DENIED**; and our stay of the court-martial proceedings in *United States v. Daniels* is hereby **VACATED**.



FOR THE COURT

STEVEN LUCAS  
Clerk of the Court

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<sup>14</sup> Having found no jurisdiction to rule on the petition, we decline to address the remaining substantive determinations sought in the issues presented. We believe issues relating to the SVC program would benefit greatly from review by the services’ military justice officials, as well as the Joint Service Committee on Military Justice, to consider potential modifications to the *Manual* or instructions to trial judges regarding the implementation of the SVC program in the court-martial system.

**IN THE UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

Airman First Class (E-3)	)	
L.R.M,	)	
USAF,	)	
<i>Petitioner</i>	)	PETITIONERS' MOTION FOR
	)	RECONSIDERATION
v.	)	EN BANC
	)	
Lieutenant Colonel (O-5)	)	&
JOSHUA E. KASTENBERG,	)	
USAF,	)	
<i>Respondent</i>	)	PETITION FOR STAY OF
	)	PROCEEDINGS
Airman First Class (E-3)	)	
NICHOLAS E. DANIELS,	)	
USAF,	)	Misc Dkt. No. 2013-05
<i>Real Party In Interest</i>	)	

**TO THE HONORABLE, THE JUDGES OF  
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

Comes now the Petitioner, A1C L.R.M., pursuant to Rule 17 of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, and requests that this Honorable Court reconsider, en banc, its recent ruling, holding that it lacked jurisdiction to consider a petition requesting, *inter alia*, the proper enforcement of a Military Rule of Evidence.

Additionally, A1C L.R.M. requests that this Honorable Court immediately stay the proceedings in this case pursuant to Rule 23.7 until the completion of this Honorable Court's en banc reconsideration of this issue.



**DENIED**  
**18 APRIL 2013**

## ISSUE PRESENTED

**WHETHER THE PANEL ERRED IN FINDING IT HAD NO SUBJECT MATTER JURISDICTION TO CONSIDER AN AIR FORCE TRIAL JUDGE'S RULINGS REGARDING MILITARY RULE OF EVIDENCE 412 AND MILITARY RULE OF EVIDENCE 513.**

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

On 12 February 2013, A1C L.R.M. filed a petition for extraordinary relief in the form of a writ of mandamus. (Appendix 1). She sought relief from the military judge's erroneous determination regarding the procedures mandated in Mil. R. Evid. 412 and 513.

(Appendix 1).

On 20 February 2013, this Court issued an order to the Government to show cause why such a writ should not issue. (Appendix 2). On 22 February 2013, the Government filed an Answer. (Appendix 3). The Government Answer agreed that this Court had subject matter jurisdiction to resolve rulings regarding military rules of evidence. The Government Answer also agreed that a writ should issue to correct the trial judge's errors. *Id.*

On 4 March 2013, the Real Party in Interest Answer was filed. (Appendix 4). The Real Party in Interest argued that this Court lacked the jurisdiction to supervise the lower trial court's decision and in the alternative that the lower court's decisions regarding Military Rules of Evidence 412 and 513 were not in error. *Id.*

On 11 March 2013, oral arguments were heard on this case and a stay of the trial proceeding was subsequently ordered on 13 March 2013. (Appendix 5). On 2 April 2013, an order issued denying A1C L.R.M.'s request for a writ of mandamus and vacating the stay. The order held that this Court lacked jurisdiction to review the Air Force trial court's decisions regarding Mil. R. Evid. 412 and 513. (Appendix 6).

### **ARGUMENT**

This Court's subject matter jurisdiction must include the authority to supervise its lower court's legal and evidentiary decisions. There is nothing that is more firmly within this Court's subject matter jurisdiction than the review of evidentiary decisions of trial judges. In this case, the trial judge improperly interpreted and applied Mil. R. Evid. 412 and 513 in violation of existing law and the Constitution.

In addressing the procedural background of the case, the panel described the Special Victims' Counsel (SVC) program in great detail. However, the existence of the SVC program is not relevant to any legal question before this Court. The SVC program does not create jurisdiction, remove jurisdiction, provide standing, or remove standing. The rights of victims exist independent of the program; the rights existed before the SVC pilot program and will continue regardless of whether the program continues. Any consideration of the program either negative or positive in the analysis of this issue is simply not germane. Any victim or witness that desires to be heard through counsel under Mil. R. Evid. 412 and 513 who happens to procure civilian counsel would face the same legal predicament as A1C L.R.M.

**THE PANEL ERRED WHEN IT CONFUSED SUBJECT MATTER JURISDICTION WITH STANDING.**

Subject matter jurisdiction is determined by the subject of the matter to be addressed. It is not determined by the participant raising the issue—standing addresses an individual’s ability to seek relief in court. If the Honorable Court’s rationale for finding lack of jurisdiction is, as suggested by its dicta, that the court lacks jurisdiction to hear a writ brought by a non-party because of their status as a non-party, such a rationale must also fail.

In the final paragraphs of its order, the panel notes that to grant jurisdiction to hear A1C L.R.M.’s petition would be an invitation to “open-ended jurisdiction to entertain every challenge brought by interested parties regarding aspects of the court-martial.” (Appendix 6 at 9). Such a fear is misplaced as only participants with standing could seek review of these issues. Historically and practically, standing is a demanding legal test that can only be met by those closest and most directly tied to case.

As a result of conflating subject matter jurisdiction and standing, the panel failed to conduct the constitutionally necessary standing analysis. *See, United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008) (Applying the *Lujan* test in courts-martial, an individual has standing to assert rights in court if: 1) the litigant has suffered an “injury in fact”; 2) there is a causal connection between the injury and the conduct complained of; and 3) the injury is redressable by a favorable decision of the court).

Had the panel conducted the proper standing analysis, this Honorable Court would have determined that A1C L.R.M. had standing under Military Rules of Evidence 412 and 513 to be heard by the lower court, the denial constituted an injury, and the injury was redressable by this court’s action.

A1C L.R.M. was thus no differently situated than members of the press or individuals battling the propriety of subpoenas. *See, e.g., United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). A1C L.R.M.'s standing gave her the right to bring an issue to this Honorable Court's attention via extraordinary writ in a case that potentially could come to it through Article 66.

**THE PANEL ERRED WHEN IT DETERMINED THAT THE APPLICATION OF A MILITARY RULE OF EVIDENCE IS A COLLATERAL, CIVIL OR ADMINISTRATIVE ISSUE.**

The application of the Military Rules of Evidence in an Air Force court-martial is fundamentally within the purview of this Honorable Court's jurisdiction. The strict question before the panel was the application of the procedural rules in Mil. R. Evid. 412 and 513. The panel misconstrued the issue by characterizing the application of the rule as "collateral, civil/administrative" in nature. (Appendix 6 at 7). However, "termining an action an administrative matter is not a talisman" that "may remove a case from [y]our jurisdiction." *United States v. Ouimette*, 52 M.J. 691, 695 (CGCCA 2000).

In denying jurisdiction, the Court's reliance on *Clinton v. Goldsmith* is misplaced. 526 U.S. 529, 535 (1999). *Goldsmith* did not deal with a case, a court-martial, an Article 32, or even a rule of evidence. *Id.* *Goldsmith* involved an officer who was "dropped from the roles" in an administrative action subsequent to his court-martial. *See, Goldsmith*, 526 U.S. at 531. In finding the military court lacked jurisdiction, the Supreme Court instructed military appellate courts on the scope of their authority when dealing with actors outside of the court-martial system. *Id.* However, the Supreme Court did not speak to supervisory jurisdiction -- the jurisdiction of a superior court to confine an inferior court to act within the law. *Id.* The present case is an ongoing court-martial, and the issue before this Court is the application of procedural rules in an actual Air Force courtroom.

Further, *Goldsmith* has been limited to the facts of the decision. *See, e.g., United States v. Ouimette*, 52 M.J. 691, 695 (CGCCA 2000)(appellant’s complaints of conditions of confinement at the naval brig were reviewable by the appellate court); *see also, United States v. Reinert*, 2008 WL 8105416 pg. 8 (Army Ct. Crim. App.)(in a writ of prohibition brought by the Government to preclude a military judge from ordering the government to train and counsel drill sergeants to avoid a violation of Article 13 the court concluded that “the All Writs Act empowers us to issue a writ of prohibition in aid of our jurisdiction over a pending court-martial, even if the case does not fall strictly within the jurisdiction conferred by Articles 62, 66, 69, 73 UCMJ”).

The Court of Appeals for the Armed Forces has exercised its supervisory jurisdiction in assessing the application of procedural issues – even when the application of those rules was to benefit limited trial participants. Specifically, in *Carlson and Ryan-Jones v. Smith*, CAAF explicitly told trial courts how to handle rules of evidence when enforcing the rights of limited participants. 43 M.J. 401, 402 (C.A.A.F 1995)(summary disposition). *Carlson and Ryan-Jones v. Smith* involved the subpoena of EEO records. CAAF granted a writ of mandamus and ordered the military judge to examine the records *in camera*, in order to scrub them of matters related to Mil. R. Evid. 412 and other privileges. *Id.* The hearing was to be conducted in the manner prescribed under Mil. R. Evid. 412. *Id.* To protect the victim-petitioners’ interests in the release of the materials, the court noted that the victims will “be given an opportunity, *with the assistance of counsel* if they so desire, to present evidence, argument and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents.” *Id.* (emphasis added). Although the summary disposition lacks detail, in order to hear the writ, CAAF would have necessarily concluded that it

had jurisdiction over a writ brought by limited-participants seeking to vindicate their rights to privacy. CAAF would have also concluded that a writ was “in aid” of its jurisdiction, in order to prevent the court from otherwise disclosing materials that might have fallen under Mil. R. Evid. 412 and other privileges.

In *Carlson and Ryan-Jones v. Smith*, CAAF did precisely what we are requesting this Honorable Court do, namely, instruct a lower court on the proper procedures to allow a limited-participant the ability to protect her right to privacy by hearing from her counsel on matters relating to the release of her private sexual history and mental health matters.

**THIS PANEL ERRED WHEN IT LIMITED ITS SUPERVISORY JURISDICTION TO ISSUES DIRECTLY INVOLVING “A FINDING OR SENTENCE.”**

In avoiding jurisdiction, the panel concluded the military judge’s ruling did not directly involve a finding or sentence. However, there is nothing unprecedented or unusual for a military appellate court to inform a lower trial court about the proper construction of a military rule of evidence. The view that the military judge’s ruling “does not directly involve a finding or sentence that was or potentially could be imposed in a court proceeding,” confuses this court’s jurisdiction analysis. *See*, Appendix 6 at 7. It is generally impossible to tell whether any particular decision of a trial judge will impact the findings or sentence in a particular case. Accordingly, issue-based analysis has never been a jurisdictional test. According to the panel’s logic, decisions regarding delays, experts, counsel qualifications, bias of judges and members, investigative support, and evidentiary rulings, (just to name a few) would rarely if ever be reviewable.

This Honorable Court has traditionally viewed supervisory jurisdiction as the “authority over the actions of trial judges in cases that may **potentially** reach the appellate court.” *San Antonio Express-News v. Morrow*, 44 M.J. 706, 708 (A.F. Ct. Crim. App. 1996) citing, *Dettinger v. U.S.*, 7 M.J. 216, 220 (C.M.A. 1979). This is explicitly contrary to the issue-based analysis or outcome-based analysis the panel seemingly adopted. In determining the extent of its supervisory jurisdiction, this Court does not parse the individual decision being appealed to determine if it could, on its own, result in a “finding” or “sentence” because the court has jurisdiction not over individual decisions, but over cases. “As the highest Air Force Court, through [y]our reviews [you] exercise supervisory authority over the actions of Air Force trial judges , and where... an injustice has been done, [you] have the inherent power to correct it.” *San Antonio Express-News*, 44 M.J. at 708.

The panel’s order breaks with well-established precedent because the decision makes jurisdiction over a ruling contingent on its potential to directly involve a “finding” or “sentence.” This creates a precedent where the Court must parse every assignment of error in an appeal to see if the individual ruling below directly involved a finding or sentence in order to determine if the court had jurisdiction in the first instance to then decide the merits of those many individual rulings. Not only is this unworkable, the Court should not do so because the Court has subject matter jurisdiction over the entire case and all attendant issues. *See, Id.*

The military judge’s ruling in this case involved an interpretation of the Military Rule of Evidence and due process rights. To illustrate the logical inconsistency of the panel’s order, consider the result if the military judge had ruled the other way – that is, allowing A1C L.R.M. to be heard though counsel and such ruling was challenged by the accused. This Court would undoubtedly say

it had jurisdiction because the case was before it under UCMJ Article 66. If the issues in the case could somehow come before it through Article 66, then bringing the same issues before it now, when resolution is meaningful, would clearly be “in aid” of its “potential” jurisdiction.<sup>1</sup>

**THE PANEL’S DETERMINATION THAT SUBJECT MATTER JURISDICTION CAN BE EXPANDED TO CONSIDER ALL “CONSTITUTIONAL ISSUES” IS BOTH MISTAKEN AND WAS NOT APPLIED IN THIS CASE.**

In order to explain contradictory case law, the panel observed that it has jurisdiction to hear from a non-party petitioner when the petitioner has a complaint grounded in the United States Constitution whether or not statutory jurisdiction otherwise exists. (Appendix 6 at 6); *United States v. Denedo*, 556 U.S. 904, 912 (2009). This was a necessary attempt to explain this Court’s prior ruling on supervisory jurisdiction in *San Antonio Express-News* by creating novel special jurisdiction for petitions by limited party participants only if a constitutional issue is at stake. *See*, Appendix 6 at 8.

The panel’s analysis was both in error and misapplied to this case. On the issue of subject matter jurisdiction, the constitutionality of the issue is not a relevant factor. The existence of a constitutional issue does not create or expand subject matter jurisdiction unless the case could somehow reach the court through Article 66. For example, had the petitioner in *Goldsmith* been asserting a constitutional violation for dropping him from the rolls, the court would still have had no jurisdiction. 526 U.S. 536. The decision to drop him from the rolls would still have been outside the subject matter jurisdiction of a court-martial because there was no “potential” case.

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<sup>1</sup>For further support of this argument, scholars have noted that in extraordinary writ cases for purposes of jurisdiction, a case has the potential to fall within the scope of Article 66, although it has no adjudged sentence when it has the potential to fall within the court’s statutory jurisdiction upon completion of the trial; conversely, no writ will issue over summary courts-martial, nonjudicial punishment or letters of reprimand because they are not part of the “court-martial process that can result in a ‘findings’ or ‘sentence.’” Patrick B. Grant, *Extraordinary Relief: A Primer For Trial Practitioners*, ARMY LAWYER, Nov. 2008 at 31.

Second, even if there were some case or law that authorized this Court to expand its subject matter jurisdiction to hear all constitutional issues, the panel summarily ignored the constitutional issues in this case. That is, application of the panel's own rationale mandates that A1C L.R.M.'s issues be heard by this Court. A1C L.R.M. has submitted two constitutional issues for this Honorable Court to resolve: violation of her constitutional right to informational privacy and a violation of her constitutional due process rights for not being permitted the assistance of her counsel. *See, Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also, Chandler v. Fretag*, 348 U.S. 3, 9 (1954). The panel failed to address the constitutional violations in this case. Had they done so, using their own constitutional-issue based analysis, the panel would have determined that it had jurisdiction to hear the writ.

**THE HONORABLE COURT SHOULD DECIDE THIS CASE EN BANC IN ORDER TO RESOLVE A RULING THAT IS INCONSISTENT WITH ITS PREVIOUS VIEWS OF SUPERVISORY JURISDICTION.**

In its prior decisions involving extraordinary writ cases, this Honorable Court has analyzed its supervisory jurisdiction to hear petitions based not on the discrete issue presented but on the fact that the case itself could come before it pursuant to Article 66. The court has consistently applied the view that writs exist over cases, not specific issues: “[o]ur superior court holds that military appellate courts may exercise this authority **over cases** that may potentially reach the appellate court.” [Emphasis added]. *In re Al Halabi*, Misc. Dkt. 2003-07 (A.F. Ct. Crim. App.)(requesting the examination of a blanket order closing an Article 32 hearing to protect classified information), citing, *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979); *United States v. Richards*, 2012 WL 3136497(A.F. Ct. Crim. App.)(jurisdiction to hear a writ of habeas corpus questioning the lawfulness and procedures of pretrial confinement when even after 99 days of confinement no charges had yet been preferred); *United States v. Holsey*, 2012 WL 1556189 (A.F. Ct. Crim.

App.)(finding jurisdiction to hear a writ of mandamus requesting the appointment of several expert consultants prior to the conducting of an Article 32 hearing and referral of charges); *United States v. Cron*, Misc. Dkt. No 2011-06 (A.F. Ct. Crim. App.)(finding jurisdiction to hear a writ of mandamus, citing *Clinton v. Goldsmith* for authority to do so, when the accused requested appointment of a Portuguese translator to assist at an Article 32 hearing, though no charges had yet been referred to trial); *Murphy v. Smolen*, Misc. Dkt. No. 2007-03 (A.F. Ct. Crim. App.)(in a writ requesting the IO be ordered to recuse himself and order the convening authority to appoint a new Article 32 officer, the court noted “we have jurisdiction to hear this petition,” citing, *San Antonio Express-News v. Morrow* at 709).

It is readily apparent from this Honorable Court’s recent orders addressing extraordinary writs that this Honorable Court has never truncated its jurisdiction by claiming it exists only over particular issues rather than cases. This Court has never viewed the holding of *Clinton v. Goldsmith* as a bar to exercising its supervisory authority over cases that might one day come before it under Article 66. As this Honorable Court’s most recent view of its jurisdiction is so disparate from the interpretation that persisted over the last decade, this Honorable Court should decide the issues in the case, en banc, in order to preserve uniform application of the law and to resolve questions that are of great importance to AIC L.R.M., other victims, witnesses, and accuseds.

WHEREFORE, A1C L.R.M. respectfully requests this Honorable Court reconsider its opinion, en banc, and order a stay of the proceedings at trial until it can fully reconsider its ruling on jurisdiction and the underlying issues in the case.



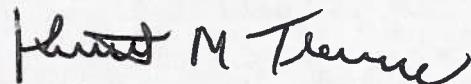
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**CERTIFICATION OF COMPLIANCE**

I certify that a copy of the foregoing was delivered to the Air Force of Court of Criminal Appeals, to the Appellate Government Division, to Appellate Defense Counsel and to Lieutenant Colonel Joshua Kastenber, on 10 April 2013.



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LRM, Airman First Class,  
U.S. Air Force, Appellant

v.

Joshua E. KASTENBERG, Lieutenant Colonel,  
U.S. Air Force, Military Judge, Appellee

and

Nicholas E. DANIELS,  
Airman First Class, U.S. Air Force, Real Party in Interest

No. 13-5006  
App. Misc. Dkt. No. 2013-05

United States Court of Appeals for the Armed Forces

Argued June 11, 2013

Decided July 18, 2013

BAKER, C.J., delivered the opinion of the Court, in which ERDMANN, J., and EFFRON, S.J., joined. STUCKY, J., filed a separate opinion, concurring in part and dissenting in part and in the result. RYAN, J., filed a dissenting opinion, in which STUCKY, J., joined as to Part A.

Counsel

For Appellant: Colonel Kenneth M. Theurer, (argued); Major Christopher J. Goewert, Major Matthew D. Talcott, and Major R. Davis Younts (on brief).

For Appellee: Major Ryan N. Hoback (argued).

For Real Party in Interest: Dwight H. Sullivan, Esq. (argued); Captain Christopher D. James and Captain Danko Princip (on brief).

Amici Curiae:

For the United States: Major Tyson D. Kindness (argued); Colonel Don M. Christensen and Gerald R. Bruce, Esq. (on brief).

For the Army Defense Appellate Division: Colonel Patricia A. Ham, Lieutenant Colonel Jonathan F. Potter, and Captain Matthew M. Jones.

For the Navy-Marine Corps Appellate Defense Division: Captain Paul C. LeBlanc, JAGC, USN, and Captain Jason R. Wareham, USMC.

For the National Crime Victim Law Institute: Margaret Garvin, Esq., Rebecca S. T. Khalil, Esq., and Sarah LeClair, Esq.

For the U.S. Marine Corps Defense Services Organization: Colonel John G. Baker, USMC.

For the Air Force Trial Defense Division: Colonel Donna Marie Verchio.

For Protect Our Defenders: Peter Coote, Esq.

Military Judge: Joshua E. Kastenberg

THIS OPINION IS SUBJECT TO REVISION BEFORE FINAL PUBLICATION.

Chief Judge BAKER delivered the opinion of the Court.

The Air Force Judge Advocate General (JAG) certified three issues for review by this Court:

- I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.
- II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.
- III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

#### BACKGROUND

On October 16, 2012, Airman First Class (A1C) Nicholas Daniels (Real Party in Interest) was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006). Lieutenant Colonel (Lt Col) Joshua E. Kastenberg (Appellee) was detailed to the case as military judge. The Real Party in Interest was arraigned at Holloman Air Force Base, New Mexico, and elected trial by enlisted and officer members.

Captain (Capt) Seth Dilworth was appointed as special victims' counsel for LRM. In his formal notice of appearance, Capt Dilworth stated that LRM had "standing involving any issues arising under [Military Rules of Evidence (M.R.E.)] 412, 513, and 514 in which she is the patient or witness as the subject of

the motion." Capt Dilworth noted that his formal involvement in the court-martial would "be limited to asserting A1C [LRM]'s enumerated rights as a victim of crime under federal law and [M.R.E.] 412, 513, and 514." He requested that the court direct counsel to provide LRM with copies of related motions. Trial counsel and trial defense counsel did not object to LRM receiving copies of the motions, but trial defense counsel opposed Capt Dilworth's presence or participation at the evidentiary hearings. Before the arraignment hearing, LRM received copies of defense motions to admit evidence under M.R.E. 412 and 513.

Initially during the arraignment hearing, Capt Dilworth indicated that he did not intend to argue at any future M.R.E. 412 or 513 motions hearings. Later during the same hearing, Capt Dilworth argued that there may be instances where LRM's interests in the motions hearings were not aligned with the Government, in which case Capt Dilworth asked the court to reserve LRM's right to present an argument. The military judge treated this request as a "motion in fact."

In a judicial ruling, the military judge limited LRM's right to be heard to factual matters, finding that standing "denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard." The military judge then found that LRM had no standing,

through counsel or otherwise, to motion the court for relief in the production of documents, and that Capt Dilworth could not argue evidentiary matters in LRM's interest. The military judge concluded that "the prospect of an accused having to face two attorneys representing two similar interests [is] sufficiently antithetical to courts-martial jurisprudence" and would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial."

LRM filed a motion to reconsider, asking for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, [Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)], and the United States Constitution." The military judge denied the motion for reconsideration in full.

LRM filed a petition for extraordinary relief in the nature of a writ of mandamus and petition for stay of proceedings, but the CCA concluded that it lacked jurisdiction to review LRM's petition for extraordinary relief. After the United States Air Force Criminal Court of Appeals (CCA) denied LRM's motion for reconsideration en banc, the Air Force JAG certified three issues for review by this Court.

JURISDICTION

Jurisdiction is a question of law that this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

As a preliminary matter, this Court has statutory jurisdiction to review the decision of the CCA under Article 67, UCMJ, 10 U.S.C. § 867 (2006). Article 67(a)(2), UCMJ, provides that this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

In United States v. Curtin, this Court considered the definition of a "case" as used in Article 67(a)(2), UCMJ. 44 M.J. 439 (C.A.A.F. 1996), cited with approval in United States v. Dowty, 48 M.J. 102, 107 (C.A.A.F. 1998). In Curtin, the military judge ruled that trial counsel's subpoenas duces tecum for the financial statements of the accused's wife and her father were administrative, and that the appropriate United States district court was the proper forum for challenging the subpoenas. Id. at 440. The Air Force JAG filed a certificate for review of a CCA decision denying the government's petition for extraordinary relief in the form of a writ of mandamus. Id. This Court held that it had jurisdiction, and determined that the "definition of 'case' as used within that statute includes a

'final action' by an intermediate appellate court on a petition for extraordinary relief." Id. (citing United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981)).

Similarly, in this case the CCA took a final action on a petition for extraordinary relief when it denied LRM's writ-appeal petition. Thus, as in Curtin, this Court has jurisdiction over the certificate submitted by the JAG pursuant to Article 67(a)(2), UCMJ, as we would in the case of a writ-appeal.

#### Subject-Matter Jurisdiction

The CCA erred by holding that it lacked jurisdiction to hear LRM's petition for a writ of mandamus. The All Writs Act, 28 U.S.C. § 1651 (2006), and Article 66, UCMJ, 10 U.S.C. § 866 (2006), establish the CCA's jurisdiction. The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Extraordinary writs serve "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953). "[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act." United States v. Denedo, 556 U.S. 904, 911 (2009).

The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999). Rather, the All Writs Act requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted). In the context of military justice, "in aid of" includes cases where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." Id. at 120. A writ petition may be "in aid of" a court's jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial. See, e.g., Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

To establish subject-matter jurisdiction, the harm alleged must have had "the potential to directly affect the findings and sentence." Ctr. for Constitutional Rights v. United States (CCR), 72 M.J. 126, 129 (C.A.A.F. 2013) (citing Hasan, 71 M.J. 416). There is no jurisdiction to "adjudicate what amounts to a civil action, maintained by persons who are strangers to the courts-martial, asking for relief . . . that has no bearing on any findings and sentence that may eventually be adjudged by the

court-martial." Id. The CCA's holding that the present case "does not directly involve a finding or sentence that was -- or potentially could be imposed -- in a court-martial proceeding," does not accurately reflect this analysis.

Under the appropriate analysis, LRM prevails. The petition invited the CCA to evaluate whether the military judge can limit the right to be heard under M.R.E. 412 and 513 by precluding LRM from presenting the basis for a claim of privilege or exclusion, with or without counsel, during an ongoing general court-martial. The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence -- which will form the very foundation of a finding and sentence. Furthermore, unlike "strangers to the courts-martial," CCR, 72 M.J. at 129, LRM is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2). Indeed, this Court has reversed court-martial convictions based on erroneous M.R.E. 412 evidentiary rulings. See, e.g., United States v. Ellerbrock, 70 M.J. 314, 321 (C.A.A.F. 2011) (reversing rape conviction after finding that evidence of the

victim's prior extramarital affair was improperly excluded under M.R.E. 412). LRM is not seeking any civil or administrative relief. Cf. Goldsmith, 526 U.S. at 533 (challenging an administrative separation proceeding, rather than a court-martial). Rather, she is seeking her right to be heard pursuant to the M.R.E. Thus, the harm alleged has "the potential to directly affect the findings and sentence," and the CCA erred by holding that it lacked jurisdiction. See CCR, 72 M.J. at 129.

#### Standing

LRM's position as a nonparty to the courts-martial, see Rule for Courts-Martial (R.C.M.) 103(16), does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege. See, e.g., CCR, 72 M.J. 126 (assuming that CCR had trial level standing to make request); United States v. Wuterich, 67 M.J. 63, 66-69 (C.A.A.F. 2008) (assuming standing for CBS in part under R.C.M. 703); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for victim's mental health provider); United States v. Johnson, 53 M.J. 459, 461 (C.A.A.F. 2000) (standing for nonparty challenge to a subpoena duces tecum or a subpoena ad testificandum during an Article 32, UCMJ, 10 U.S.C. § 832 (2006), pretrial investigation); ABC, Inc. v. Powell, 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); Carlson v. Smith, 43 M.J. 401 (C.A.A.F. 1995)

(summary disposition) (granting a writ of mandamus where the real party in interest did not join petitioners, but rather was added by this Court as a respondent).

Limited participant standing has also been recognized by the Supreme Court and other federal courts. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (standing created by First Amendment right); Church of Scientology v. United States, 506 U.S. 9, 11, 17 (1992) (standing created by attorney-client privilege). In particular, “[f]ederal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed.” United States v. Hubbard, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980); see, e.g., United States v. Antar, 38 F.3d 1348, 1350 (3d Cir. 1994); In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1561 (11th Cir. 1989); Doe v. United States, 666 F.2d 43, 45 (4th Cir. 1981); Anthony v. United States, 667 F.2d 870, 872-73 (10th Cir. 1981); In re Smith, 656 F.2d 1101, 1102-05, 1107 (5th Cir. 1981); United States v. Briggs, 514 F.2d 794, 796, 799 (5th Cir. 1975).

### Ripeness

Finally, this issue is ripe for review. The military judge’s ruling limits LRM’s right to be heard to factual

matters, preventing her from making legal arguments while invoking her legal privilege under M.R.E. 513.

Furthermore, while LRM's counsel initially indicated at the arraignment hearing that he did not intend to argue at a future motions hearing, noting that LRM had not received any documents, discovery, or court filings with respect to such hearings, counsel asked the military judge to reserve that right. The military judge treated this request as a "motion in fact." In the judicial ruling, the military judge specified whether counsel had standing to represent LRM during applicable hearings arising from the M.R.E. at trial as one of the issues before the court-martial, and ultimately denied the motion to grant standing. Accordingly, LRM interpreted the military judge's ruling as finding that she "does not have standing to be represented by counsel during applicable hearings arising from the military rules of evidence at trial." In the motion to reconsider, LRM asked for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution." The military judge denied the motion for reconsideration in full.

Thus, the issue of whether LRM has limited standing to be heard through counsel in hearings related to M.R.E. 412 and 513

comes to this Court in the form of a challenge by a limited participant to a concrete ruling by a military judge in an adversarial setting. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003) ("In the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting, we conclude that consideration of Issue I under the circumstances of the present case would be premature."). The parties have argued, and the military judge has addressed, the relevant legal issues. The issue is ripe for review by this Court.

#### SUBSTANTIVE ISSUES

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the R.C.M., are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35-36 (C.A.A.F. 2009); United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008).

The military judge erred by determining at the outset of the court-martial, during arraignment proceedings and before any M.R.E. 412 or 513 evidentiary hearings, that LRM would not have standing to be represented through counsel during applicable hearings arising from the M.R.E. The President has expressly stated the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings under M.R.E. 412 and 513. M.R.E. 412(c)(2) provides that, before

admitting evidence under the rule, the military judge must conduct a hearing where the "alleged victim must be afforded a reasonable opportunity to attend and be heard." See also M.R.E. 513(e)(2) ("The patient shall be afforded a reasonable opportunity to attend the hearing and be heard . . . .").

M.R.E. 513(a) also provides that a patient has the privilege to refuse to disclose confidential communications covered by the psychotherapist-patient privilege. A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of M.R.E. 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies.

Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness. Both M.R.E. 412 and 513 permit the parties to "call witnesses, including the alleged victim [or patient]." M.R.E. 412(c)(2); M.R.E. 513(e)(2).

However, in addition to providing that the victim or patient may be called to testify as a witness on factual matters, the rules also grant the victim or patient the opportunity to "be heard."

Id. Furthermore, every time that the M.R.E. and the R.C.M. use

the term "to be heard," it refers to occasions when the parties can provide argument through counsel to the military judge on a legal issue, rather than an occasion when a witness testifies. See, e.g., R.C.M. 806(d) Discussion; R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); M.R.E. 201(e).

This interpretation of a reasonable opportunity to be heard at a hearing is consistent with the case law of this Court and other federal courts. In Carlson, for example, this Court provided extraordinary relief to two sexual assault victims who had sought to prevent "unwarranted invasions of privacy" and to protect their rights under M.R.E. 412, Article 31, UCMJ, 10 U.S.C. § 831, and other privileges recognized by law. 43 M.J. 401. The Court ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." Id. (emphasis added). While Carlson is a summary disposition, this Court "has profited from guidance offered in prior summary dispositions." United States v. Diaz, 40 M.J. 335, 339-40 (C.M.A. 1994); see also Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (holding that "lower courts are bound by summary decisions by" the Supreme Court); United States v. Sanchez, 44 M.J. 174, 177 (C.A.A.F.

1996) (citing Carlson). Similarly, in United States v. Klemick, the Navy-Marine Corps CCA found that the military judge did not abuse his discretion in rulings on M.R.E. 513 matters. 65 M.J. 576, 581 (N-M. Ct. Crim. App. 2006). During the evidentiary hearing, the patient opposed trial counsel's motion "through counsel who entered an appearance in the court-martial on her behalf for this limited purpose," and the military judge considered the patient's brief and argument. Id. at 578.

Furthermore, while the military judge suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." In re Dean, 527 F.3d 391, 393 (5th Cir. 2008). The victims' "attorneys reiterated the victims' requests" and "supplemented their appearances at the hearing with substantial post-hearing submissions." Id.; see also Brandt v. Gooding, 636 F.3d 124, 136-37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard."). Similarly, in United States v. Saunders, at a pretrial Fed. R. Evid. 412(c)(1) hearing, "all counsel, including the alleged

victim's counsel, presented arguments." 736 F. Supp. 698, 700 (E.D. Va. 1990). In United States v. Stamper, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).

While M.R.E. 412(c)(2) or 513(e)(2) provides a "reasonable opportunity . . . [to] be heard," including potentially the opportunity to present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel, this right is not absolute. A military judge has discretion under R.C.M. 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. Furthermore, M.R.E. 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel, or any right to appeal an adverse evidentiary ruling. If counsel indicates at a M.R.E. 412 or 513 hearing that the victim or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed.

Based on the foregoing discussion, the military judge's ruling in the present case runs counter to the M.R.E., and is in

error for three reasons. First, by prohibiting LRM from making legal arguments, the military judge improperly limited LRM's right to be heard on the basis for the claim of privilege or admissibility. M.R.E. 513(a) creates a privilege to refuse to disclose confidential communications, which necessarily involves a legal judgment of whether the privilege applies, as well as the opportunity for argument so that a patient may argue for or against the privilege. Neither M.R.E. 412 nor 513 preclude the victim or patient from arguing the law.

Second, the military judge's ruling, made during the arraignment hearing process and prior to any M.R.E. 412 or 513 proceedings, is a blanket prohibition precluding LRM from being heard in M.R.E. 412 or 513 proceedings through counsel without first determining whether it would be unreasonable under the circumstances. Instead, the military judge based his ruling on his flawed conclusion that LRM was precluded from making legal argument. While LRM's right to be heard through counsel is not absolute, LRM has a right to have the military judge exercise his discretion on the manner in which her argument is presented based on a correct view of the law.

Third, the military judge cast the question as a matter of judicial impartiality. It is not a matter of judicial impartiality to allow a victim or a patient to be represented by counsel in the limited context of M.R.E. 412 or 513 before a

military judge, anymore than it is to allow a party to have a lawyer. The military judge's ruling was thus taken on an incorrect view of the law, and is in error.

REMEDY

As a threshold matter, the Government argues that, even though the Judge Advocate General has certified three issues to this Court, this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law. The relevant text of Article 67, UCMJ, states:

(a) The Court of Appeals for the Armed Forces shall review the record in --

. . . .

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review;

. . . .

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Emphasis added. The first clause of Article 67(c), UCMJ, does not confine the second clause in the way the Government proposes. In United States v. Leak, for example, this Court considered that:

One possible reading of the language in subsection (c) of the statute is that because the lower court did not affirm the finding with respect to Appellant's rape charge, or set it aside as incorrect in law, this Court is without authority to "act." Under this reading, this Court would be obliged to "review" the Judge Advocate General's certified question, but we would have no statutory authority to "act."

61 M.J. 234, 239 (C.A.A.F. 2005). The Court concluded that "Article 67 does not preclude review of questions of law certified by Judge Advocates General where the courts of criminal appeals have set aside a finding on the ground of factual insufficiency." Id. at 242. Similarly, in the present case, even though the CCA did not reach the substantive issues, this Court may still take action with respect to all of the certified issues, including whether this Court should issue a writ of mandamus.

Furthermore, prudential concerns, such as the impending court-martial start date, the parties' interest in the speedy resolution of these issues, and the JAG's certification of all three issues, counsel the Court to reach all the substantive issues and proceed to grant relief at this time, if appropriate. In addition, the military judge's ruling raises issues of law of

first impression which could apply in all M.R.E. 412 and M.R.E. 513 hearings. Absent any guidance from this Court and with no other meaningful way for these issues to reach appellate review, every military judge could interpret the scope and extent of a victim's rights differently, so that a victim or patient's rights vary from courtroom to courtroom. Under these circumstances, this Court should not decline to address substantive issues which are properly before it, and which present a novel legal question regarding the interpretation of the M.R.E. affecting an ongoing court-martial. As in Wuterich, "[i]n view of the pending court-martial proceedings, and because this case involves an issue of law that does not pertain to the unique factfinding powers of the Court of Criminal Appeals, we [should] review directly the decision of the military judge without remanding the case to the lower court." 67 M.J. at 70. "[N]either justice nor judicial economy would be served by delaying the [court-martial] pending remand to the Court of Criminal Appeals." Powell, 47 M.J. at 364.

However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge "to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers

reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513." The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.

#### CONCLUSION

Certified questions I and II are answered in the affirmative. Certified question III is answered in the negative. The current record is returned to the Judge Advocate General of the Air Force for remand to the military judge for action not inconsistent with this opinion.

STUCKY, Judge (concurring in part and dissenting in part and in the result):

While I agree with the majority that we have subject matter jurisdiction in this case, I nonetheless agree with the discussion of standing in Part A of Judge Ryan's dissent. I would therefore dismiss the petition for lack of standing and would not reach either the second or the third certified issues.

RYAN, Judge, with whom Stucky, J., joins as to Part A  
(dissenting):

A.

Whether it is more irregular that the Judge Advocate General of the Air Force (TJAG) "certified" these issues or that the Court chooses to answer them is a close call, particularly in light of the Supreme Court's recent decision in Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013) (holding that the respondents lacked standing "because they cannot demonstrate that the future injury they purportedly fear is certainly impending," and, therefore, cannot establish a sufficient injury-in-fact), and the plain language of Article 67(a)(2) and Article 69, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 867(a)(2), 869 (2006).

The putative victim in this pending court-martial, LRM, through her attorney, asked the military judge to order that she be provided copies of motions related to the admission of evidence under Military Rules of Evidence (M.R.E.) 412, 513, and 514, and that the court reserve to her attorney the right to argue on those motions, although, at that point, her attorney admitted that he "[did] not intend to do so." Trial and defense counsel did not object to LRM receiving informational copies of any motions filed

pursuant to those rules. While the military judge found that LRM lacked standing to motion the court for production of documents or be heard through counsel, the Government avers that trial counsel provided LRM, through her attorney, with (1) copies of defense motions to admit evidence pursuant to M.R.E. 412 and 513, (2) the Government's response to the defense motion to admit evidence under M.R.E. 412, and (3) other trial-related documents.<sup>1</sup>

Based on the foregoing, at this point in the proceedings, LRM -- having no intention to speak or legal arguments to raise -- has not suffered any actual harm. She alleges no "certainly impending" harm, Clapper, 133 S. Ct. at 1155, and does not allege any divergence between her interests and those of the Government, or that such a divergence in interests is likely, let alone certain, to occur at a later stage in the proceedings. The absence of any actual or imminent injury to LRM, a nonparty to the pending court-martial below, makes TJAG's unprecedented use of his certification power to certify interlocutory issues to this Court all the more perplexing.

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<sup>1</sup> In the Government's Response to Judicial Order -- Special Victims' Counsel, the Government avers that it did not provide LRM with a copy of its response to defense motion to admit evidence under M.R.E. 513.

While we are assuredly not an Article III court, we have, up until now, understood ourselves to be bound by the requirement that we act only when deciding a "case" or "controversy." See U.S. Const. art. III, §2; United States v. Johnson, 53 M.J. 459, 462 (C.A.A.F. 2000) (holding that the appellant lacked standing to object to an unlawful subpoena issued to secure the attendance of his wife as a witness at an Article 32, UCMJ, 10 U.S.C. § 832 (2006), hearing where the appellant "was neither deprived of a right nor hindered in presenting his case"); United States v. Jones, 52 M.J. 60, 63-64 (C.A.A.F. 1999) (holding that the appellant lacked standing to challenge the violation of a witness's Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2006), or Fifth Amendment rights and explaining that "[t]he requirement is designed to allow a moving party with a personal stake in the outcome to enforce his or her rights" (quotation marks and citations omitted)). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). And paramount to enforcing that jurisdictional threshold is

the requirement that, inter alia, a party have standing. See Raines v. Byrd, 521 U.S. 811, 818 (1997).

Integral to standing is a showing of injury-in-fact; "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Clapper, 133 S. Ct. at 1147 (citing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752 (2010)). This requirement ensures that federal courts resolve only actual disputes where people are being harmed in fact, leaving hypothetical issues of law to be resolved where they should be, by the coordinate executive and legislative branches of government. See Hollingsworth v. Perry, 133 S. Ct. 2652, \_\_ (2013), slip op. at 6 ("The doctrine of standing . . . 'serves to prevent the judicial process from being used to usurp the powers of the political branches.'" (quoting Clapper, 133 S. Ct. at 1146)); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea -- the idea of separation of powers.").

The issues before us are not justiciable because LRM has not been presently harmed and any future injury "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" Clapper, 133 S. Ct. at 1143. Per the representations of

both parties, LRM either has or will be permitted to have the documents she requested, and her attorney stated that he does not intend to speak on LRM's behalf, as LRM's interests are aligned with the Government's. Which begs the question: at this point, what, if any, injury would be redressed by a favorable decision from this Court? On these facts, I can see no injury to be remedied, rendering any decision from this Court purely advisory and outside the "judicial Power" of Article III federal courts. See U.S. Const. art. III, §2. On this ground alone the certification should be dismissed.

B.

Additional grounds exist for dismissal of this certification. By acting on the present certificate, the majority approves a road map for evading the ordinary limitations on our review of interlocutory issues. LRM, a nonparty to the litigation who has not suffered any actual injury or even a reasonable likelihood of future injury, had interlocutory issues involving hypothetical future harm to her rights certified by TJAG to this Court via Article 67(a)(2), UCMJ. This unprecedented use of Article 67(a)(2) was made despite the fact that to have its interlocutory issues considered, the Government would have to meet the stringent requirements of Article 62, UCMJ, 10 U.S.C. § 862

(2006), and an accused would have to satisfy both the jurisdictional requirements of Article 67, UCMJ, in order to invoke the power of the All Writs Act, 28 U.S.C. § 1651(a) (2006) (allowing this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction"), and the extraordinary burdens needed to meet the criteria for an extraordinary writ. See, e.g., Hasan v. Gross, 71 M.J. 416, 416-17 (C.A.A.F. 2012) ("Applying the heightened standard required for mandamus relief, [and] conclud[ing] that based on a combination of factors, a reasonable person, knowing all the relevant facts, would harbor doubts about the military judge's impartiality.").

Further exacerbating the impropriety of the situation is that the instant certification was made in the early stages of a criminal case; TJAG's actions having ground the accused's proceedings to a halt ostensibly to determine the contours of a right of a witness who has identified no injury-in-fact and no divergence between her interests and those of the Government. Considering that "[t]he exercise of prosecutorial discretion is a prerogative of the executive branch of government," United States v. O'Neill, 437 F.3d 654, 660 (7th Cir. 2006) (citing Wayte v. United States, 470 U.S. 598, 607 (1985)), and the ordinary state

of affairs in our adversarial system where the government, not TJAG, is the accused's adversary, TJAG's decision to certify the question whether this nonparty should be allowed to effectively intervene in this criminal proceeding is all the more remarkable.

Nor is the certification proper under any provision of the UCMJ. As relevant to this issue, Article 69(d), UCMJ, provides that a Court of Criminal Appeals (CCA) may review (1) "any court-martial case which (A) is subject to action by [TJAG] under this section, and (B) is sent to the [CCA] by order of [TJAG]; and, (2) any action taken by [TJAG] under this section in such case." Article 69(a)-(c), UCMJ, provides the circumstances in which TJAG may modify or set aside the findings and sentence in a court-martial case. Nowhere do these sections provide TJAG with authority to intermeddle on an interlocutory issue that is not case dispositive, let alone the authority to certify an interlocutory issue to this Court.

Yet despite the lack of statutory authority to intrude at this juncture of the case, TJAG "certified" the issues before this Court pursuant to Article 67(a)(2), UCMJ, which presents yet another problem. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in all cases reviewed by a [CCA] which [TJAG] orders sent to [this

Court] for review." In reviewing such "cases," this Court may "act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the [CCA]." Article 67(c), UCMJ; see also Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128-30 (C.A.A.F. 2013).

But there have been no findings or sentence entered here, and in requesting review of this particular interlocutory ruling, TJAG has not properly certified a "case" under Article 67(a)(2), UCMJ. In United States v. Redding, 11 M.J. 100, 102-04 (C.M.A. 1981), the Court clearly and fully considered whether TJAG had properly certified a "case" when he requested review of a trial judge's ruling "which rejected a command determination that a military lawyer requested by the accused . . . was unavailable" and where review of that ruling had been initiated directly in the Court of Military Review by a petition for extraordinary relief after the trial judge effectively dismissed the case for failure to make the requested military lawyer available.

The Court directly addressed whether the proceedings before it constituted a "case," and, therefore, were properly certifiable, and explicitly distinguished the military judge's ruling from "an intermediate or

interlocutory order" solely because "[the ruling] end[ed] court-martial proceedings on the charges; it is, therefore, not an intermediate or interlocutory order but a final decree." Id. at 104. The Court reasoned that because "the posture of the proceedings . . . was tantamount to a final disposition of the case," TJAG had properly certified a "case" within the meaning of Article 67(b)(2), UCMJ (now Article 67(a)(2), UCMJ). Id. (internal quotation marks and citation omitted).

Given the plain language of Articles 67 and 69, UCMJ, Redding at best expresses the outermost limits of TJAG's certification power, allowing him to certify an interlocutory issue only where it is "tantamount to a final disposition" of a case. Id. The majority, however, ignores both the plain statutory language and this precedent and instead, in cursory fashion, relies on United States v. Curtin, 44 M.J. 439 (C.A.A.F. 1996), a case which cited Redding to hold, without discussion, and contrary to both the plain language of Article 67, UCMJ, itself and the actual holding in Redding, that a "case" within Article 67(a)(2) "includes a 'final action' by an intermediate appellate court on a petition for extraordinary relief," quoting Redding, 11 M.J. at 104. See Curtin, 44 M.J. at 440; LRM v. Kastenberg, \_\_ M.J. \_\_, \_\_ (6-7) (C.A.A.F.

2013). Redding narrowly held that "proceedings of the kind in issue are certifiable" and distinguished between action by a military judge that amounts to a "final decree," which could be certified because "[s]uch action ends court-martial proceedings on the charges," from a ruling that is "interlocutory in nature," which could not be certified. Redding, 11 M.J. at 104 (internal quotation marks and citation omitted).<sup>2</sup>

Where, as here, an interlocutory ruling is not "tantamount to a final disposition of the case," id., the proper channels of review of the issue include (1) review in the ordinary course of appellate review by the CCA under Article 66, UCMJ, (2) an appeal by the Government subject

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<sup>2</sup> Moreover, in responding to the Government's argument that "this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law," LRM, \_\_ M.J. at \_\_ (19), the majority misapplies United States v. Leak, 61 M.J. 234 (C.A.A.F. 2005), in holding that, here, as in Leak, this Court may act on the substantive issues "even though the CCA did not reach [them]." LRM, \_\_ M.J. at \_\_ (20). Leak, however, more narrowly held that this Court could review "a lower court's determination of factual insufficiency for application of correct legal principles," Leak, 61 M.J. at 241, and the majority's passing extension of that holding to the present case is unwarranted. See United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010) ("[T]he power to review a case under Article 67(a)(2), UCMJ, includes the power to order remedial proceedings . . . to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a 'correct view of the law.'" (quoting Leak, 61 M.J. at 242)).

to the limitations of Article 62, UCMJ, or (3) a petition for extraordinary relief from the interlocutory ruling requested by a person with standing to challenge the ruling. See Article 66, UCMJ; Article 62, UCMJ; 28 U.S.C. § 1651(a).

It is entirely unclear why this Court would adopt a more expansive interpretation of "case" in this context, contrary to the plain language of the statute and unsupported by legislative history. The Supreme Court, in those limited instances where its jurisdiction is mandatory, see, e.g., 15 U.S.C. § 29 (particular class of civil antitrust cases), has been most exacting in requiring that the case is actually one it must decide. See Heckler v. Edwards, 465 U.S. 870, 876 (1984) (interpreting 28 U.S.C. § 1252 (repealed 1988), to provide mandatory jurisdiction in the Supreme Court only where "the holding of federal statutory unconstitutionality is in issue"); Palmore v. United States, 411 U.S. 389, 395-96 (1973) (holding that an appeal as of right would not lie to the Supreme Court under 28 U.S.C. § 1257 (amended 1988), in the context of a District of Columbia court's upholding a local statute against constitutional attack, and noting that "[j]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress

has expressed its wishes; and we are particularly prone to accord strict construction of statutes authorizing appeals to this Court") (internal quotation marks and citations omitted).

What the instant certification amounts to is an improper attempt by TJAG to shortcut proper procedure without statutory authority to do so at this juncture and force this Court to review an interlocutory ruling that (1) does not come before us in the form of a petition for extraordinary relief, (2) is neither case dispositive nor an adjudged finding or sentence, and (3) does not involve an injury-in-fact to anyone (other than perhaps the accused's right to a speedy trial). This is not an effort that should be rewarded. Article 67(a)(2), UCMJ, which requires us to decide certified issues in "cases," should be strictly construed to require just that, and all interlocutory routes to this Court should require parties with standing and issues that qualify for review under either Article 62, UCMJ, or the All Writs Act and Article 67, UCMJ. By presently certifying issues pursuant to Article 67(a)(2), UCMJ, TJAG circumvented (1) the specific requirements for a Government appeal under Article 62, UCMJ; (2) the heightened scrutiny required for an extraordinary writ by either LRM or the accused; and (3)

this Court's discretion over whether to grant review of this issue if, in the future, LRM suffers or is reasonably certain to suffer injury-in-fact and seeks a writ appeal.

TJAG may employ both congressional and executive routes to answer interlocutory questions definitively where his curiosity cannot await resolution of a particular case and where those claiming a right have no injury-in-fact such that they could seek a writ themselves. Permitting certification of interlocutory issues that are neither justiciable nor case dispositive in any sense distorts the limited role of both TJAG and this Court within the military justice system. For these additional reasons, I would dismiss the certification as improper, and I respectfully dissent.