13 May 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

L.R.M.
Airman First Class (E-3), USAF
Appellant,

v.

JOSHUA E. KASTENBERG
Lieutenant Colonel (O-5), USAF
Appellee.

and

NICHOLAS E. DANIELS
Airman First Class (E-3), USAF
Real party in Interest.

Crim. App. No. 2013-05
USCA Dkt. No. 13-5006/AF

REAL PARTY IN INTEREST'S ANSWER TO CERTIFIED QUESTION

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and	)	
	)	
Airman First Class **Nicholas E. Daniels,** USAF Real Party In Interest	)	

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

DECISIONAL ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY HELD IT LACKED JURISDICTION TO HEAR A1C L.R.M.'S PETITION FOR A WRIT OF MANDAMUS.

II.

WHETHER A WRIT OF MANDAMUS IS INAPPROPRIATE WHERE THERE IS NO CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SOUGHT AND WHERE ANY REQUEST FOR RELIEF IS NOT YET RIPE.

III.

WHETHER THE MILITARY JUDGE CORRECTLY HELD THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL WAS NOT A RIGHT GUARANTEED BY THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT OR THE UNITED STATES CONSTITUTION.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed A1C L.R.M.'s petition pursuant to the All Writs Act and

determined it does not have jurisdiction to issue A1C L.R.M.'s writ. Under Article 67(a)(2) Uniform Code of Military Justice (UCMJ), this Court has jurisdiction to determine whether it has jurisdiction. However, for the reasons discussed below, this Court does not have jurisdiction to issue the requested relief.

Summary of Proceedings

Arraignment in the case of *United States v. Daniels* was held on 29 January 2013. (J.A. at 96).

The military judge denied the Special Victim Counsel's (SVC) request to potentially be heard at an M.R.E. 412 and 513 hearing, on behalf of A1C L.R.M. and for informational copies of all M.R.E. 412 and 513 motions. (J.A. at 172). On 1 February 2013, the SVC filed a motion to reconsider Judge Kastenberg's ruling. (J.A. at 195). The trial counsel filed a response to the motion to reconsider stating, "[T]he Government objects to Special Victim Counsel presenting legal or factual argument or moving the court for the admission or suppression of evidence." (J.A. at 205). Judge Kastenberg reconsidered the motion, but denied relief on 9 February 2013. (J.A. at 215).

On 14 February 2013, A1C L.R.M. filed a petition with AFCCA for a writ of mandamus. (J.A. at 4). On 20 February 2013, AFCCA issued an order to the government to show cause why the writ should not be issued. On 22 February 2013, the government filed a response, taking a different position than it took at

trial. (J.A. at 5). On 11 March 2013 oral argument was held at AFCCA, during which AFCCA heard argument from the SVC's "appellate counsel," and government and defense appellate counsel. On 13 March 2013, AFCCA stayed the proceedings in the case of *United States vs. Daniels. Id.* On 13 March 2013, A1C Daniels' counsel filed a petition for extraordinary relief, in the nature of a writ of prohibition requesting this Court deny AFCCA's stay. *Id.* This Court denied that petition on 19 March 2013. *Id.* On 2 April 2013, AFCCA issued an order denying A1C L.R.M.'s petition, based on lack of jurisdiction. (J.A. at 1). On 10 April 2013, A1C L.R.M. petitioned AFCCA for reconsideration *en banc.* AFCCA denied A1C L.R.M.'s petition and dissolved the stay on 18 April 2013. (J.A. at 11).

On 29 April 2013, the Judge Advocate General of the Air Force filed a certificate of review with this Court.

Statement of Facts

On 16 October 2012, Airman First Class (A1C) Daniels was charged with one charge and two specifications of violating Article 120, UCMJ. (J.A. at 13). The alleged victim of those offenses was A1C L.R.M.

On 29 January 2013, during a motions hearing, A1C L.R.M.'s counsel asked Judge Kastenberg to recognize A1C L.R.M.'s right to standing for informational copies of motions related to A1C L.R.M. and to reserve the right to make an argument for A1C

L.R.M. at an M.R.E. 412 hearing. (J.A. at 149). The SVC admitted his client's interests aligned with the government and he did not intend to make a statement for her or argue on her behalf. (J.A. at 103). The SVC later changed his position and asked to reserve the right to argue on A1C L.R.M.'s behalf. (J.A. at 149). In addition, he asked for permission to be present in the gallery during any closed hearing. *Id.* Judge Kastenberg granted counsel permission to be present, absent an objection from defense counsel persuading him otherwise. (J.A. at 151).

A1C L.R.M.'s counsel, during a motions hearing, said A1C L.R.M. has the right to be heard during an M.R.E. 412 hearing. (J.A. at 106). Specifically, her counsel said "her right to be heard can be placed in proper context if she receives informational copies." *Id.* Additionally, A1C L.R.M.'s counsel acknowledged that her request to receive the motions could be addressed through a Freedom of Information Act request. (J.A. at 107).

In addition, A1C L.R.M.'s counsel said during the motions hearing that only part of the Crime Victims' Rights Act (C.V.R.A.), 18 U.S.C. § 3771, applies to courts-martial. (J.A. at 111). He admitted that the reason the C.V.R.A. does not apply to military courts in full is because they are not district courts. (J.A. at 112). A1C L.R.M.'s counsel said

there are some similarities between the C.V.R.A. and a court-martial, specifically the complaining witness's ability to observe the entire trial, but only if the military judge granted that request. *Id.* A1C L.R.M.'s counsel indicated A1C L.R.M. did not want to observe the whole trial, but rather just the verdict and sentence, should the trial go that far. *Id.* After Judge Kastenberg observed that was the same thing any witness could do, A1C L.R.M.'s counsel said A1C L.R.M. may request to be present during the entire court-martial. (J.A. at 112-13). Judge Kastenberg subsequently denied A1C L.R.M.'s counsel the right to potentially be heard at an M.R.E. 412 or 513 hearing, on behalf of A1C L.R.M. (J.A. at 172).

When A1C L.R.M's counsel submitted his motion for reconsideration, he reversed his position and argued that the right to be heard meant through counsel. (J.A. at 200). In addition, he asserted that all the rights of crime victims in the C.V.R.A. applied in the military. (J.A. at 198). However, he maintained that "after reconsidering the briefs that were filed under M.R.E. 412, if given the opportunity to present argument, including legal arguments, to the court in an M.R.E. 412 hearing. A1C [L.R.M.] *may* make arguments that are different from the Government's brief as currently submitted." (J.A. at 196) (emphasis added). Judge Kastenberg denied A1C L.R.M.'s counsel's motion for reconsideration. (J.A. at 218).

Summary of Argument

AFCCA correctly held it did not have jurisdiction to grant the relief Appellant requests under the Uniform Code of Military Justice or the All Writs Act. (J.A. at 6-7).

Even if this Court were to hold that jurisdiction to issue a writ does exist, Appellant has failed to meet the stringent requirements to grant a writ of mandamus. Nor is any request for extraordinary relief even ripe, since A1C L.R.M.'s counsel has never indicated an actual intent to address the court-martial during a motions hearing.

Finally, even if it were appropriate to reach the merits of Appellant's claims, Judge Kastenberg correctly held that no legal authority provides Appellant with a right to address the court-martial through counsel and he did not abuse his discretion by declining to allow Appellant's counsel to do so.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS CORRECTLY HELD IT LACKED JURISDICTION TO HEAR A1C L.R.M.'S PETITION FOR A WRIT OF MANDAMUS.

Standard of Review

Jurisdiction is reviewed *de novo*. *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012), *reconsideration denied,* 71 M.J. 389 (C.A.A.F. 2012), *cert. denied*, __ U.S. __, No. 12-805 (May 13, 2013).

Law and Analysis

A. Appellant's reliance on the All Writs Act is misplaced.

This Court, like AFCCA, has no jurisdiction to grant the Appellant's request for extraordinary relief. The Appellant seeks to rely on the All Writs Act, 28 U.S.C. § 1651, to establish this Court's jurisdiction. Appellant's brief at 9 (noting that "Airman LRM sought review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that she lacked standing to assert her right to be heard through counsel during evidentiary hearings."). But as the Supreme Court has repeatedly held, the All Writs Act is not a jurisdiction-granting statute. *See*, *e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Thus, it cannot provide a basis for this Court's jurisdiction.

As the Supreme Court observed in *United States v. Denedo*, 556 U.S. 904, 911 (2009), "a court's power to issue any form of relief" under the All Writs Act "is contingent on that court's subject-matter jurisdiction over the case or controversy." This Court does not have and will never have jurisdiction over any case or controversy involving A1C L.R.M., a non-party in the court-martial below. In *Goldsmith*, the Supreme Court observed:

> Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly

> to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it. Thus, this Court has no jurisdiction to issue the requested writ of mandamus.

526 U.S. at 535 (footnote omitted).

Here, the military judge's refusal to allow A1C L.R.M.'s counsel to participate in another servicemember's court-martial was not a finding or sentence that was (or could have been) imposed in a court-martial proceeding. Accordingly, this Court is without jurisdiction to grant the requested relief.

The conclusion that this Court has no jurisdiction is especially appropriate given this Court's status as an Article I tribunal. "[E]stablished principles of statutory construction mandate . . . a narrow interpretation of" an Article I court's jurisdiction-granting statute. *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (quoting *Delaware Div. of Health & Social Services v. Dep't of Health & Human Services*, 665 F. Supp. 1104, 1117-18 (D. Del. 1987)). An Article I court "is a court of limited jurisdiction, because its jurisdiction is statutorily granted and it is to be strictly construed." *Id*. (quoting *Delaware Div. of Health & Social Services*, 665 F. Supp. at 1118); *see also Goldsmith*, 526 U.S. at 535 ("the CAAF's independent statutory jurisdiction is narrowly circumscribed"); *Denedo*, 556 U.S. at 912 ("[I]t is for Congress to determine the subject-matter jurisdiction of federal courts. . . . This rule

applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Art. I, § 8 of the Constitution.").

B. Appellant incorrectly relies on *Center for Constitutional Rights et al. v. United States and Colonel Denise Lind, Military Judge* (*CCR*), 72 M.J. 126 (C.A.A.F. 2013), to create jurisdiction when that case actually demonstrates the absence of jurisdiction.

Recently, this Court in *CCR* held it did not have jurisdiction to grant a writ of mandamus and prohibition requested by a non-party. That decision both confirms the legal correctness of AFCCA's ruling and refutes many of the arguments advanced in A1C L.R.M.'s writ appeal.

A1C Daniels, like the accused in the court-martial case that was the subject of *CCR*, never sought to invoke this Court's jurisdiction. On the contrary, he has consistently stated that this Court and AFCCA lack jurisdiction to decide A1C L.R.M.'s petition.

Likewise, the other party to the underlying court-martial, the United States, has not invoked this Court's jurisdiction; nor could the United States, for two reasons. First, seeking relief from Judge Kastenberg's order below would be beyond the bounds of Article 62, through which Congress prescribed the government's ability to challenge a trial-level ruling. Any hypothetical petition for a writ of mandamus filed by the

government would, therefore, not be in aid of this Court's statutory jurisdiction which, for purposes of government appeals, is restricted by the boundaries of Article 62. Second, the government could not succeed on a hypothetical petition for extraordinary relief because at the trial level, it opposed the relief that A1C L.R.M. sought through her mandamus petition. (J.A. at 212). The doctrine of invited error would, therefore, preclude relief for the government. *See*, *e.g.*, *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001).

CCR refutes Appellant's argument that AFCCA's order "confused subject matter jurisdiction with standing." Appellant's brief at 17 (bold deleted). This Court based its ruling in *CCR* on a lack of jurisdiction to grant the relief requested by a non-party. *CCR* also refutes Appellant's argument that *Clinton v. Goldsmith* is not relevant to a non-party's petition for extraordinary relief arising from a court-martial. Appellant's brief at 11-12. In *CCR*, this Court emphasized *Goldsmith*'s limitations on its jurisdiction. 72 M.J. 126 (C.A.A.F. 2013), slip op. at 6-7. AFCCA's order is consistent with the jurisdictional limits as defined by this Court's interpretation of *Goldsmith* in *CCR*.

In addition, *CCR* refutes Appellant's argument that AFCCA somehow erred by tying its extraordinary writ jurisdiction to its Article 66 jurisdiction. Appellant's brief at 10-11. *CCR*

confirms that a military appellate court must assess whether it has jurisdiction to grant extraordinary relief by examining the limitations of its jurisdiction-granting statute. *See CCR*, 72 M.J. 126 (C.A.A.F. 2013), slip op. at 9, ("Ultimately, then, any potential jurisdiction we may have in this case must turn on the extent of our own statutory jurisdiction, which is to be found in Article 67, UCMJ, as interpreted by the Supreme Court.").

Appellant's argument for jurisdiction based on *Carlson and Ryan-Jones v. Smith,* 3 M.J. 401, 402 (C.A.A.F 1995) (summary disposition), fails as well. Appellant's brief at 15. As this Court aptly pointed out in *CCR*, pre-*Goldsmith* case law concerning this Court's extraordinary relief jurisdiction is of limited value. *Goldsmith* "clarified [this Court's] understanding of the limits of [this Court's] authority under the All Writs Act." *CCR,* 72 M.J. 126 (C.A.A.F. 2013), slip op. at 9. Additionally, as in the *Powell* decision discussed in *CCR*, in *Smith*, this Court merely "assumed jurisdiction . . . without considering the question." *Id*. (discussing *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997)). Moreover, *Smith* was decided by summary disposition. As this Court observed in *United States v. Diaz*, the precedential value of summary dispositions can be limited by their "abbreviated" "recitation of the facts and analysis." 40 M.J. 335, 339 (C.M.A. 1994). This Court continued, "If, in subsequent litigation in which a summary

disposition is urged as helpful, a party believes that fuller rumination following hard-hitting advocacy would lead to a different conclusion, then that party is free to urge such a belief in the context of arguing what weight should be accorded the summary disposition." *Id*. at 340. This is such a case. In light of both this Court's jurisdiction-granting statute and case law – including *Goldsmith* and *CCR* – concerning the limits of this Court's jurisdiction to grant extraordinary relief, *Smith* cannot control this case's outcome.

Finally, and most importantly, this Court lacks jurisdiction to grant Appellant's request under its jurisdiction-granting statute. "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." Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2006). Appellant's assertion that being denied a right will somehow affect a finding and sentence and therefore create jurisdiction is a fallacy. Appellant's brief at 9. As Appellant concedes, she is not a party to the court-martial. Appellant's brief at 13.

A1C L.R.M. will never have a right to seek review. In the case of *United v. Daniels*, A1C L.R.M. will never be sentenced. Therefore, her case will not be available for review by an

appellate court. Likewise, she will never be in position to seek relief from Judge Kastenberg's ruling under Article 66 or 67, UCMJ.

Because this Court has no jurisdiction to grant the requested relief, the petition must be denied.

WHEREFORE, A1C Daniels respectfully requests this Honorable Court find it lacks jurisdiction to grant Appellant's request and affirm AFCCA's order.

II.

A WRIT OF MANDAMUS IS INAPPROPRIATE WHERE THERE IS NO CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SOUGHT AND WHERE ANY REQUEST FOR RELIEF IS NOT YET RIPE.

Standard of Review

"To prevail on [a] writ of mandamus, Appellant 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) (citing *Cheney v. United States Dist. Court for D.C.,* 542 U.S. 367, 380–81 (2004)).

Law and Analysis

A. Appellant does not have a clear and indisputable right to the relief requested.

Appellant has no indisputable right to the relief she seeks. In fact, at trial, even the government disputed

Appellant's right to the relief she seeks. When stating their position, trial counsel said in reference to A1C L.R.M., "[she] does not have a right to file motions or make motions for the court pursuant to 412, 513, or 514. Those MREs limit her activity in court to being heard, but nothing further." (J.A. at 134). Government did clarify that it believes A1C L.R.M. potentially has a right to be heard through counsel. *Id.* However, Government counsel further clarified that meant "so long as it does not encompass an opportunity to present legal argument on admissibility of evidence...or presenting legal or factual argument or moving the court for the admission or suppression of evidence" (J.A. at 212). Mandamus is an inappropriate vehicle to attempt to establish a new, disputed legal right.

No legal authority grants A1C L.R.M. the right to be heard through counsel at a court-martial. Instead, A1C L.R.M. relies on irrelevant third-party case law, the C.V.R.A. (which does not apply to the military justice system), and a misapplication of the Military Rules of Evidence.

The cases Appellant cites are distinguishable from the case on hand. For example, while *Powell v. Alabama*, 287 U.S. 45 (1932), is a seminal case for ensuring a *party* to a case has the right to counsel, as A1C L.R.M. pointed out:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear *a party* by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 69 (emphasis added).

But Appellant is not a *party*. *Powell* therefore recognizes no rights that she possesses. The petitioners in *Powell* were three criminal defendants who had been sentenced to death. *Id*. at 50. A1C Daniels faces the possibility of confinement for life without eligibility for parole. But Appellant faces no risk to her life, liberty, or property. Hence, unlike the petitioners in *Powell*, she has no due process right or Sixth Amendment right to be represented by counsel. Appellant has failed to prove a clear and indisputable right to counsel and therefore failed to show why she has a clear and indisputable right to the requested writ.

B. Issuing a writ is not appropriate under these circumstances.

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983); *see also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384-85 (1953) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies.").

"[N]ot every case is suitable for consideration upon a petition for extraordinary relief—whether by the *accused* or by *the Government*." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (emphasis added). "[M]ere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ…it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972).

The military judge's denial of Appellant's request was not an "extraordinary situation." In fact, it is the opposite. The course followed by Judge Kastenberg has been the norm for the entire history of the American military justice system. The Appellant still has the same rights as every other complaining witness at a court-martial. As such, mandamus is unavailable. Instead, what Appellant seeks to do is exactly what this Court said it cannot in *Dettinger v. United States*: control a military judge. 7 M.J. 216, 224 (C.M.A. 1979).

In *Dettinger*, this Court reversed the Air Force Court of Military Review (A.F.C.M.R.) after the A.F.C.M.R. granted a writ after a military judge dismissed the Government's case for violating its own rules. This Court concluded that the military judge in *Dettinger* did not violate a statute or decisional law.

Judge Kastenberg's ruling, like that of the military judge in *Dettinger*, did not violate a statue or decisional law and therefore Appellant does not have grounds for extraordinary relief. *Id.*

Finally, this issue is not ripe. A1C L.R.M.'s counsel, during the motions hearings, said he *may* ask to be heard at a subsequent motion hearing. (J.A. at 149). Even in the motion to reconsider,[1] A1C L.R.M.'s counsel still failed to state whether he would attempt to argue on behalf of A1C L.R.M. at a 412 or 513 hearing, but implied he would not. (J.A. at 196). As such, this issue is not ripe and issuing a writ would be, at best, premature.

Finally, litigation over the requested relief has already harmed A1C Daniels' clearly established right to a speedy trial. The Air Force Court of Criminal Appeals stayed the proceedings in A1C Daniels' case, resulting in a lengthy delay in his case. The Air Force Court did so despite ultimately concluding that it lacked jurisdiction to grant extraordinary relief. Therefore, A1C Daniels' actual speedy trial right has been compromised by Appellant's attempt to establish a previously unknown right for a witness to address the court-martial through counsel. The

[1] A1C Daniels disputes A1C L.R.M's authority to bring a motion, since she is not a party to the litigation. *See generally,* R.C.M. 905 (h) and (i) (the opposition party must have a chance to respond to a motion and written motions must be served on the other party).

prejudice to A1C Daniels' rights resulting from the protracted litigation over Appellant's claims further demonstrates the inappropriateness of extraordinary relief.

WHEREFORE, A1C Daniels respectfully requests this Honorable Court find Appellant has not met the strict requirements to issue the requested writ.

III.

THE MILITARY JUDGE CORRECTLY HELD THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL WAS NOT A RIGHT GUARANTEED BY THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT OR THE UNITED STATES CONSTITUTION.

Standard of Review

Mandamus relief is available only if the petitioner shows he or she "has a clear and indisputable right to the relief sought." *In re Braxton*, 258 F.3d 240, 261 (4th Cir. 2011) (quoting *United States ex rel. Rahman v. Oncology Assocs., P.C.,* 198 F.3d 502, 511 (4th Cir. 1999)).

Law and Argument

A. Under controlling Supreme Court case law, A1C L.R.M. has no due process right to address the court-martial through counsel.

Complaining witnesses at courts-martial have never had the due process right to be heard through counsel. If complaining witnesses are to be granted that right, it must be Congress or the President who does so. "Congress has primary responsibility for the delicate task of balancing the rights of servicemen

against the needs of the military." *Solorio v. United States,* 483 U.S. 435, 447 (1987). Before recognizing any purported due process right of a complaining witness to be heard through counsel at another servicemember's court-martial, this Court must apply the test set out in *Weiss v. United States*, 510 U.S. 163 (1994).

Weiss requires an extremely deferential review of any due process challenge to military justice procedures. In rejecting a due process challenge to the lack of fixed terms of office for military judges, the *Weiss* Court observed that courts-martial "have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all." *Id.* at 179. Similarly, courts-martial have been conducted for over 200 years without counsel for complaining witnesses being permitted to argue about what evidence is admissible or whether evidence is subject to discovery by the defense. Neither Congress nor the President has ever provided any such right to a complaining witness. As *Weiss* demonstrates, the courts may not use the Due Process Clause to impose such a requirement where the branch of government constitutionally tasked with regulating the land and naval forces has not done so. *See* U.S. Const. art. I, § 1, cl. 14.

Recently, this Court in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013), had the opportunity to once again set out the test for due process challenges to aspects of the military justice system. In doing so, this Court stressed the test set out in *Weiss* and denied a right that had not been previously recognized. Yet, in her writ appeal, A1C L.R.M. argues for a due process right to address the court-martial through counsel without even discussing *Weiss*, much less demonstrating how she can prevail under the standard that *Weiss* established for due process challenges to military justice procedures.

B. The C.V.R.A. does not apply to the military and even if it did, it would not grant the relief Appellant seeks.

AFCCA correctly held the C.V.R.A. does not apply to the military. (J.A. at 8). Citing *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000), AFCCA noted that "civilian and military justice are separate as a matter of law." *Id.* at 124. According to the C.V.R.A., "the rights described in subsection (a) shall be asserted in the *district court* in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the *district court* in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). District court is defined as "each district court of the United States created by chapter 5 of title 28, the District Court of

the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam." 18 U.S.C. § 3006A(j).

Courts-martial are not included as district courts. Courts-martial are created by convening authorities acting under the authority granted to them by Congress in the exercise of its Article 1, § 8, clause 14 authority to prescribe rules for the government of land and naval forces. *Walsh v. Hagee*, __ F. Supp. 2d __, 2012 WL 5285133 (D.C. Cir. Oct. 26, 2012), *aff'd,* No. 12-5367, 2013 WL 1729762 (D.C. Cir. Apr. 10, 2013), does not support the proposition that the C.V.R.A. applies to courts-martial. Indeed, it indicates the opposite. In *Walsh*, the Court observed:

> The C.V.R.A. provides crime victims with several rights including "[t]he right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). Such protection must be sought in the district court where a defendant is being criminally prosecuted, or in the district court in the district where the crime occurred. 18 U.S.C. § 3771(d)(3).

Id. at *8. Because this case does not arise in a district court and because Appellant does not seek to invoke the C.V.R.A. in a district court, that statute is inapplicable.

Even if this case were being prosecuted in federal district court, the C.V.R.A. would not grant A1C L.R.M. the right to be heard through counsel during the findings stage of a contested criminal trial. The C.V.R.A. gives complaining witnesses the right to "be reasonably heard at any public proceeding in the

district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771 (a)(4). Appellant misinterprets § (d)(1) as implying a complaining witness is entitled to be heard though counsel since it talks about legal representatives; however, Appellant fails to consider § (e), which says:

> [i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter.

C.V.R.A., 18 U.S.C. § 3771(e).

A1C L.R.M is over 18 years of age, competent, and alive; therefore, she would not be entitled to have a representative speak on her behalf even in a district court proceeding. And even if she were, a motions hearing is not a stage at which the C.V.R.A. provides an alleged victim with the right to be heard. Accordingly, the C.V.R.A. does not and cannot establish a right to the relief that A1C L.R.M. seeks. Mandamus, therefore, is unavailable.

Likewise, the C.V.R.A is a statute of general applicability and not applicable to courts-martial. As this Court stated in *United States v. Spann*, "we have emphasized the necessity of 'exercis[ing] great caution in overlaying a generally applicable statute specifically onto the military system.'" 51 M.J. 89, 92

(C.A.A.F. 1999) (citing *United States v. Dowty,* 48 M.J. 102, 106, 111 (C.A.A.F. 1998)). Just as this Court did in *Spann*, it should determine a generally applicable statue, such as the C.V.R.A., does not apply in courts-martial.

C. The Military Rules of Evidence do not give the relief Appellant seeks.

At an M.R.E. 412 and 513 hearing, "the *parties* may call witnesses, including the alleged victim...." M.R.E. 412 (emphasis added). Everyone, including Appellant, agrees that A1C L.R.M. is not a party to the court-martial. Appellant's brief at 13. In addition, M.R.E. 412 (c)(2) says "the alleged victim must be afforded a reasonable opportunity to attend and be heard."

M.R.E.s 412 and 513 do not authorize the relief Appellant seeks. Instead, these rules state that A1C L.R.M. has the opportunity to be heard. Judge Kastenberg in his order on reconsideration emphasized that, consistent with those rules' requirements, he would give A1C L.R.M. the right to be heard at an M.R.E. 412 or 513 hearing. (J.A. at 216).

Appellant confounds the opportunity to be heard as established by the *Manual for Courts-Martial* (*M.C.M*) with an opportunity to be heard through counsel. Appellant argues that the M.C.M. gives A1C L.R.M. the opportunity to be heard, but cites to portions of the M.C.M. stating that a *party* can be

heard through counsel. Appellant's brief at 31. The President issues the M.C.M.[2] and was very deliberate in his word choice. If the President chooses to change M.R.E. 412 and/or 513 to provide the relief Appellant seeks, he is free to do so. However, to date, he has not.

As this Court said in *Spann*, "if Government counsel ... believe that such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to interpretative uncertainties, but through amendments to the Manual for Courts–Martial or, if necessary, though legislative changes." 51 M.J at 93. If the President or Congress decide to change the M.C.M. or the UCMJ to accommodate Appellant's argument, then that is their right. However, under existing law, Appellant does not have a legal right to the relief she seeks.

WHEREFORE, A1C Daniels respectfully requests this Honorable Court find no merit in Appellant's argument that the Constitution, the C.V.R.A or the Military Rules of Evidence give the relief she seeks.

Conclusion

Appellant has failed to demonstrate that this Court has jurisdiction to issue her requested writ of mandamus. She has also failed to demonstrate that the right to be heard through

[2] *See* Article 36, UCMJ, 10 U.S.C. § 836.

counsel is afforded to a court-martial witness. Congress is free to change the UCMJ and the President is free to change the *Manual for Courts-Martial* if either wants to establish a previously unknown right for complaining witnesses to address the court-martial through counsel. But to date, neither has done so. Judge Kastenberg did not err by denying a right that does not exist.

WHEREFORE, A1C Daniels respectfully requests that this Honorable Court affirm AFCCA's order.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to Appellant and Appellee, on 13 May 2013.

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APPENDIX A