

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Airman First Class (E-3))	REAL PARTY IN INTEREST'S
<div style="background-color: black; width: 100px; height: 1.2em; display: inline-block;"></div>)	RESPONSE TO PETITION FOR
<i>Petitioner</i>)	EXTRAORDINARY RELIEF IN THE
)	NATURE OF A WRIT OF MANDAMUS
v.)	
)	
Lieutenant Colonel (O-5))	
JOSHUA E. KASTENBERG, USAF)	
<i>Respondent</i>)	Misc. Dkt. No. 2013-05
)	
&)	
)	
Airman First Class (E-3))	
NICHOLAS E. DANIELS, USAF)	
<i>Real Party in Interest,</i>)	

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

Relief Sought

COMES NOW Airman First Class (A1C) Nicholas E. Daniels, USAF, Real Party in Interest, by and through his undersigned counsel, and requests this Honorable Court deny petitioner's request for extraordinary relief in the above captioned case.

DECISIONAL ISSUES PRESENTED

I.

**DOES THIS COURT HAVE JURISDICTION TO ISSUE
EXTRAORDINARY RELIEF AT THE REQUEST OF A NON-PARTY
SEEKING A REMEDY THAT COULD NOT BE PROVIDED ON A
DIRECT APPEAL?**

II.

**SHOULD THIS COURT GRANT A1C L.R.M.'S PETITION UNDER THE
ALL WRITS ACT WHERE JUDGE KASTENBERG HAS NOT USURPED
ANY AUTHORITY, THIS IS NOT AN EXTRAORDINARY SITUATION,**

AND A1C [REDACTED]. DOES NOT HAVE A CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SHE SEEKS?

III.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C [REDACTED] THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL, WHEN THERE IS NO SUCH RIGHT ESTABLISHED UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHT ACT NEITHER PROVIDES SUCH A RIGHT NOR APPLIES TO THE MILITARY, AND NO SUCH RIGHT HAS EVER BEEN RECOGNIZED IN MILITARY PRACTICE.

History of the Case and Statement of Facts

Arraignment in the case of *United States v. Daniels* was held on 29 January 2013. Prior to the arraignment, defense counsel submitted a motion under Military Rules of Evidence (MRE) 412 and 513 seeking to admit evidence involving A1C L.R.M. Appendix F of Petitioner's Petition. Prior to entering pleas, Judge Kastenberg took up motions. *Id.* At a motions hearing, Judge Kastenberg allowed Capt Dilworth, A1C L.R.M.'S special victims counsel (SVC) to argue why he believed he had standing. *Id.* Capt Dilworth 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. *Id.* Capt Dilworth later changed his position and asked to reserve the right to argue on A1C [REDACTED] behalf. *Id.* The military judge treated his motion to reserve the right to be heard later under MRE 412 as "a motion in fact," that is, as a motion to represent [REDACTED] at any MRE 412 hearings by making arguments on her behalf. *Id.*

Judge Kastenberg heard argument from the SVC, trial counsel, and senior defense counsel. *Id.* The military judge denied the SVC's request for standing. *Id.* The military judge ordered the case continued until 18 March 2013. On 1 February 2013, the SVC filed a motion to reconsider Judge Kastenberg's ruling. Appendix H of Petitioner's Petition. 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.” Appendix I of Petitioner’s Petition. Judge Kastenberg reconsidered the motion, but denied relief on 9 February 2013. Appendix K of Petitioner’s Petition.

On 14 February 2013, [REDACTED] filed a petition with this Honorable Court for a writ of mandamus. On 20 February 2013, this Honorable Court issued a show cause order to the government to show cause why the writ should not be issued. On 22 February 2013, the government filed a response. The government’s response took a different position than the government took at trial. On appeal, the government argued that the writ should be granted and Judge Kastenberg ordered to provide the petitioner the opportunity to be heard through counsel, “to include arguing points of law orally and in writing, in any evidentiary hearings under the foregoing rules.” Gov. Brief at 24.

JURISDICTION

This Court has no jurisdiction to grant the petitioner’s request for extraordinary relief. The petitioner cites only one source of authority as providing jurisdiction: the All Writs Act, 28 U.S.C. § 1651. Petition at 4. 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, the petitioner clearly errs by citing it as a basis for this Court’s jurisdiction. Tellingly, the petitioner cites no other source of authority for this Court’s jurisdiction. Nor does any such alternative basis for jurisdiction exist. 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 *Clinton v. 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.

Goldsmith, 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 Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999) ("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.").

Because this Court has no jurisdiction to grant the requested relief, the petition must be denied. But even if this Court were empowered to grant the requested relief, it should decline to do so.

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF MANDAMUS BECAUSE JUDGE KASTENBERG HAS NOT USURPED ANY AUTHORITY, THIS IS NOT AN EXTRAORDINARY SITUATION, AND A1C L.R.M. DOES NOT HAVE A CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF SHE SEEKS.

Standard of Review

”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)). “The petitioner must establish a clear and indisputable right to the requested relief.” *United States v. Denedo*, 66 M.J. 114, 126 (C.A.A.F. 2008) (citing *Cheney v. United States District Court*, 542 U.S. 367, 381 (2004)), *aff’d*, 556 U.S. 904 (2009).

A. There has been no clear abuse of discretion or usurpation of power.

This case does not satisfy the requirements for issuance of a writ of mandamus. “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 (internal citations omitted). Petitioner’s attempt to win recognition of a never-before-known right for a non-party to have counsel appear on her behalf before the court-martial of another servicemember, does not and cannot meet that standard.

Judge Kastenberg made a thorough analysis of the facts and the law and applied the law to the facts. After his careful analysis, he found a witness at a court-martial does not have

standing to be heard through counsel. There has never been a right to be heard through counsel for a witness at a court-martial. Additionally, Judge Kastenberg indicated that even if it was permissible to allow a witness's counsel to address the tribunal, he would exercise his discretion against allowing [REDACTED]'s counsel to do so in this case. *See* Appendix G of Petitioner's petition. Such an exercise of discretion is not reviewable by a petition for writ of mandamus.

Likewise, Judge Kastenberg's ruling was not a usurpation of power. As a military judge, he was expressly authorized to rule on the petitioner's request. *See* Art. 51(b), UCMJ, 10 U.S.C. § 851(b) (2006); R.C.M. 804(e). Thus, far from usurping authority, the military judge was exercising authority provided to him by Congress and the President.

Nor has Judge Kastenberg denied the petitioner any rights recognized by the Military Rules of Evidence (MRE). The rules do not provide [REDACTED] a right to be heard *through counsel*. Judge Kastenberg never denied [REDACTED] the right to be heard. In fact, Judge Kastenberg did the opposite, pointing out that [REDACTED] can be heard pursuant to MREs 412 and 513. *See* Appendix J of Petitioner's petition.

B. This is not characteristic of erroneous practice likely to recur.

Judge Kastenberg did not adopt any erroneous practice, much less one likely to recur. There is no statute, regulation, or case law granting a complaining witness the right to be heard through counsel at another servicemember's court-martial. It is not an erroneous practice to treat the complaining witness in this case in the same manner that the American military justice system has treated complaining witnesses since General Washington commanded the Continental Army. If that system is to be restructured, that is the task of Congress acting pursuant to its constitutional authority to make rules and regulations for the land and naval forces, or the President acting pursuant to his delegated rulemaking authority. *See* U.S. Const., art. I, § 8, cl. 14; Article 36, UCMJ, 10 U.S.C. §

836. It is not the function of an Article I Court to redraft the statutory and regulatory system adopted by Congress and the President; it would be even less appropriate to do so through the vehicle of a writ of mandamus.

C. This is not an extraordinary situation.

“[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 decision not to allow her to address the court-martial through counsel is not an “extraordinary situation.” In fact, it is the opposite. The course followed by Judge Kastenbergh has been the norm for the entire history of the American military justice system. The petitioner still has the same rights as every other complaining witness at a court-martial. As such, mandamus is unavailable. *See, e.g., Rhea v. Starr*, 26 M.J. 683, 684 (A.F.C.M.R. 1988) (noting that mandamus relief was not available to resolve “an area of the law not previously addressed by an appellate military court” because “for this very reason . . . the trial judge’s ruling . . . was not contrary to statute, *settled decisional law*, or valid regulation.”),

D. A1C L.R.M.’s right is not clear and indisputable.

An extraordinary writ is an extreme remedy and should be granted only in truly extraordinary circumstances. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384-85 (1953) (“Mandamus, prohibition and injunction against judges are drastic and extraordinary

remedies.”). It is for this reason that the party seeking the writ has the burden of showing it has a clear and indisputable right to its issuance. *Rhea* 26 M.J. at 685.

██████████ has failed to show a clear and indisputable right to relief. The lack of an indisputable right is indicated by even the trial counsel’s position disputing the purported right at trial. There is no military case law granting ██████████ the right to be heard through counsel at a court-martial. Instead, ██████████ relies on irrelevant third-party case law and the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, which does not apply to the military justice system.

The cases ██████████ 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 ██████████. 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 ██████████ 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. A1C ██████████. 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.

E. Under controlling Supreme Court case law, ██████████ 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. Congress has never conferred such a right on a complaining witness.

“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 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.

F. The Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA) does not apply to the military.

Judge Kastenberg did not err by denying [REDACTED]’s request to be heard through counsel. As conceded by the government’s answer, the CVRA does not apply in the military. *See* Gov. Brief at 8. “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 government of land and naval forces. *Walsh v. Hagee*, ___ F. Supp. 2d ___, Civil Action No. 11-2215, 2012 WL 5285133 (D.D.C. Oct. 26, 2012), does not support the proposition that the CVRA applies to courts-martial. Indeed, it indicates the opposite. In *Walsh*, the Court observed:

The CVRA 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. 2012 WL 5285133, at *8. Because this case does not arise in a district court and because Petitioner does not seek to invoke the CVRA in a district court, that statute is inapplicable.

Even if this case were being prosecuted in federal district court, the CVRA would not grant A1C L.R.M. the right to be heard through counsel during the findings stage of a contested criminal trial. The CVRA 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). Petitioner misinterprets § (d)(1) as implying a complaining witness is entitled to be heard through counsel since it talks about legal representative; however, Petitioner fails to acknowledge § (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....” 18 U.S.C. § 3771(e). [REDACTED] 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 U.S. district court proceeding. And even if she were, a motions hearing is not a stage at which the CVRA provides an alleged victim with the right to be heard. Accordingly, the CVRA does not and cannot establish a right to the relief that [REDACTED] seeks. Mandamus, therefore, is unavailable.

Conclusion

[REDACTED] has failed to provide any support for the proposition that this Court has jurisdiction to issue her requested writ of mandamus. She has also failed to provide any case law supporting the premise that the right to be heard through 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 deny petitioner’s petition for Extraordinary Relief in the Nature of a Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that copies of the foregoing was sent via email to the Court, petitioner's counsel, Judge Kastenberg, and served on the Appellate Government Division on 4 March 2013.

[REDACTED]

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