UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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

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.[1] 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

[1] 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.[2] In making this request, Capt Dilworth acknowledged A1C LRM is not a party to the case as defined by Mil. R. Evid. 103,[3] but contended she had standing in the proceeding regarding any issues involving her that arose under Mil. R. Evid. 412, 513 and 514.[4]

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.[5] 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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[2] "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.

[3] ''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.

[4] 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).

[5] 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,[6] 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.[7] 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.[8] 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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[6] ''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.

[7] 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.

[8] ''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 services-members 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 Kastenberg 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. [9]

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[10]—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

[9] 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.

[10] U.S. CONST. amend. I.

"issue all writs[11] 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

[11] 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*)[12] 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. [13]

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[12] *Manual for Courts-Martial, United States* (*MCM*) (2012 ed.)

[13] 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.
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> . . . .
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> [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.[14]

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

[14] 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.