No. 19-184

In the Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

RICHARD D. COLLINS, *Respondent.*

UNITED STATES, *Petitioner*,

v.

HUMPHREY DANIELS III, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF HARMONY ALLEN AND TONJA SCHULZ AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED BY *AMICI CURIAE*

The Court of Appeals for the Armed Forces ("CAAF") held that the death sentence authorized by 10 U.S.C. § 920(a) (2000), Rape and Carnal Knowledge was unconstitutional. The CAAF and other military tribunals are constituted by Congress under Article I of the Constitution. These tribunals are not Article III courts.

The question presented by *amici curiae* is:

Whether an Article I tribunal can overrule Congress and the President by declaring laws unconstitutional.

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INTEREST OF *AMICI CURIAE*[1]

Respondent Richard D. Collins raped amicus curiae Harmony Allen.

Respondent Humphrey Daniels III raped amicus curiae Tonja Schulz.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions identified in the Petition, Pet. 2-3, this case involves:

Article I, Section 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, ...

Article I, Section 8, Clause 9 ("Inferior Tribunals Clause"):

> [Congress shall have the Power] To constitute Tribunals inferior to the supreme Court.

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[1] The parties were given timely notice of the filing of this brief and have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Protect Our Defenders paid approximately $1,200.00 for printing this brief. Protect Our Defenders is a nonprofit organization that honors, supports, and gives voice to survivors of military sexual assault. Protect Our Defenders is not a signatory to this brief. Otherwise, no person other than amici, their counsel or Protect Our Defenders made a monetary contribution to its preparation or submission.

Article I, Section 8, Clause 14:

> [Congress shall have the Power] To make Rules for the Government and Regulation of the land and naval Forces.

Article II, Section 1:

> The executive Power shall be vested in a President of the United States.

Article II, Section 2:

> The President shall be Commander in Chief of the Army and Navy of the United States.

Article III, Section 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

SUMMARY OF ARGUMENT

The Court of Appeals for the Armed Forces ("CAAF") overruled as unconstitutional the portion of 10 U.S.C. § 920, Rape and Carnal Knowledge (2000) ("Article 120") that authorizes the death penalty. The issue before the CAAF was the statute of limitations for rape and not the death sentence because no service member had been sentenced to death. CAAF decided a constitutional issue that did not need to be decided.

The CAAF is a tribunal constituted by Congress under Article I, Section 8, Clauses 9 and 14. It is also an Executive Branch entity. It is not an Article III court. Although its constitutional foundation as a

judicial body is firmly established, CAAF cannot rule that laws are unconstitutional. It is emphatically the province and duty of the judicial branch to say what the law is.

This Court should grant certiorari on the question presented by the amici curiae because its resolution affects the ability of Congress to regulate and govern the armed forces and the ability of the President to command. Military tribunals at all levels – CAAF, the service courts of criminal appeals and courts-martial – are invalidating congressional will and presidential efforts to maintain good order and discipline in the armed forces. Military tribunals have reversed laws and rules intended to prevent and punish military sexual assault. This cannot stand under our Constitution and is a threat to our national security.

Beyond the military justice system, this Court's decision on the amici curiae's question will make it clear that all Article I tribunals, whether addressing federal and veterans claims, taxes, bankruptcy or any other public rights issue, do not have authority to overrule laws passed by Congress.

STATEMENT

Amici curiae agree with the arguments and analysis of the Solicitor General in his petition for writ of certiorari. The 2006 change to 10 U.S.C. § 843, Statute of Limitations ("Article 43") simply clarified that the existing law (providing no statute of limitations for rape) would continue as Congress was simultaneously changing the language in Article 120 relating to the punishment for rape.

The Solicitor General's arguments are relevant only to the extent the law is ambiguous and in need of interpretation. There is no ambiguity in the law. At the time of the respondents' rapes, Article 120 made rape punishable by death and Article 43 provided no statute of limitations for offenses punishable by death. The respondents could be prosecuted for rape at any time without limitation.

A. CAAF Overruled Congress by Declaring Article 120 Unconstitutional.

United States v. Briggs, No. 19-108 (petition for writ of certiorari filed July 22, 2019) and this case, *Collins/Daniels*, are not before this Court based upon CAAF's interpretation of the statutes involved. The Solicitor General states in his petitions that in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), CAAF overruled only its prior precedents in *Willenbring v. Nuerater*, 48 M.J. 52 (C.A.A.F. 1998), and *United States v. Stebbins*, 61 M.J. 366 (C.A.A.F. 2005). The Solicitor General understates CAAF's *Mangahas* holding. In *Mangahas,* CAAF overruled congressional will by declaring unconstitutional the portion of Article 120 authorizing punishment by death. The CAAF erred not because it overruled its prior precedents, but because it overruled a validly enacted law.

CAAF relied upon *Mangahas* in *United States v. Briggs*, 78 M.J. 289 (C.A.A.F. 2019); *United States v. Collins*, 78 M.J. 415 (C.A.A.F. 2019); and *United States v. Daniels*, No. 19-0345/AF, 2019 CAAF LEXIS 541 (July 22, 2019). This Statement emphasizes that in *Mangahas* CAAF overruled Congress and the President.

CAAF curiously appears to have believed it was only interpreting Article 43 and thereby avoiding constitutional issues.[2] Despite CAAF's effort to avoid ruling upon a constitutional issue, it plainly held that a service member convicted of rape cannot be punished by death because the Constitution's Eighth Amendment prohibits cruel and unusual punishment. "[CAAF's] prior decisions . . . are overruled to the extent they hold that rape is punishable by death." *Mangahas*, 77 M.J. at 222. "[T]here is *no* set of circumstances under which the death penalty could constitutionally be imposed for the rape of an adult woman." *Id.* at 224 (emphasis in original). "We simply hold that where the death penalty could never be imposed for the offense charged, the offense is not punishable by death *for purposes of Article 43*." *Id.* at 225 (emphasis added).

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[2] In *Mangahas*, 77 M.J. at 221, CAAF explained that the court-martial judge dismissed the rape charge after finding that it violated Lt Col Mangahas's constitutional right to a speedy trial. The Air Force Court of Criminal Appeals vacated the dismissal. The CAAF reinstated the dismissal but made several statements indicating that it believed it was avoiding ruling on any constitutional issue and was basing its decision upon only Article 43. The CAAF noted that the court-martial judge "denied Appellant's motion to dismiss based on the nonconstitutional grounds of statute of limitations." *Id.* After briefing and argument on the constitutional right to a speedy trial, the CAAF recognized "[i]t is a long-established principle that federal courts will avoid a constitutional question if the issue presented in a case may be adjudicated on a nonconstitutional ground." *Id.* at 221-22. The CAAF ordered briefing on whether the rape of an adult woman, a violation of Article 120, was "a crime punishable by death *within the meaning of Article 43*." *Id.* at 222 (emphasis added).

In *Briggs*, the CAAF confirmed that *Mangahas* held that the death penalty provision in Article 120 was unconstitutional. *Briggs*, 78 M.J.at 292 ("In *Mangahas* [CAAF reconsidered its prior decisions] because there is, in fact, no set of circumstances under which anyone could constitutionally be punished by death for the rape of an adult woman.").

CAAF overruled Article 120's punishment by death for rape.

B. CAAF Ruled Upon A Constitutional Issue That Was Not Presented.

Although CAAF avoided ruling on the constitutional speedy trial issue, it nevertheless violated the constitutional avoidance canon when it ruled that Article 120's death punishment was unconstitutional. Neither Lt Col Mangahas nor any of the respondents was sentenced to death. There was no need to reach the constitutionality of Article 120's death sentence.

The constitutional avoidance canon required interpreting Article 43 so that no constitutional issue would be presented. Since an unlimited statute of limitations for rape does not present a constitutional question, Article 43 should have been interpreted to give constitutional respect to Article 120 and to find that rape is "punishable by death" *for purposes of Article 43.* It was illogical to rule upon the constitutionality of the death sentence for rape *for purposes* of a statute that does not raise a constitutional issue.

C. No Article III Court Has Ever Held Article 120's Death Sentence Unconstitutional.

CAAF may not have appreciated that it was overruling the constitutionality of Article 120. CAAF made its holding that the death penalty was unconstitutional without any analysis or precedent. CAAF stated that it was bound by this Court's precedent in *Coker v. Georgia*, 433 U.S. 584 (1977), but *Coker* did not hold that Article 120's punishment for rape was unconstitutional. Amici curiae agree with the Solicitor General's analysis of this point in *Briggs* Pet. 16-20.

Amici curiae believe the Solicitor General charitably describes CAAF as giving "short shrift" to the constitutional distinction between the civilian and military spheres on the issue of the death penalty for rape. *Briggs* Pet. 19. CAAF, in a footnote (*Mangahas*, 77 M.J. at 223 n.3), stated that such a distinction was "unfounded," and quoted a parenthetical statement made by this Court in *Kennedy v. Louisiana*, 554 U.S. 945, 946-47 (2008).[3]

CAAF misused the *Kennedy* Court's parenthetical statement, "a matter not presented here for our

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[3] The CAAF also said it was bound by CAAF's predecessor court's decision in *United States v. Hickson*, 22 M.J. 146, 154 n.10 (C.M.A. 1986). The predecessor Court of Military Appeals ("CMA") did not hold Article 120's death sentence was unconstitutional under *Coker*. No death sentence was involved in *Hickson*. The CMA was simply making the point that within the hierarchy of sex offenses, rape is the most serious. *Id.* The CMA included a footnote that discussed *Coker*. This dictum in a footnote was not a holding and is not binding on any court.

decision," to support its determination that there was no civilian/military distinction. CAAF ignored the context of the parenthetical. The applicable paragraph in *Kennedy* began with this Court's observation that the "authorization of the death penalty in the military sphere does not indicate that the death penalty is constitutional in the civilian context." *Id.* at 947. This Court then explicitly stated that when it surveyed state and federal law in *Coker* it did not mention the military penalty. *Id.* It further stated that other Eighth Amendment cases were considered only in the civilian context. *Id.* The Court then stated, "This case, too, involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision)."

This Court in *Kennedy* was exercising judicial restraint deciding only the civilian Eighth Amendment issue before it and refused to decide whether the military death sentence was constitutional. The Supreme Court did not overrule Article 120's death sentence.

This Court previously made clear that there is a constitutional distinction between the military and civilian spheres. "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized *two systems of justice*, . . . : *one for civilians and one for military personnel*." *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) (emphasis added).

In *Mangahas*, CAAF did not discuss or acknowledge the deference and respect that this Court has traditionally afforded Congress in military justice matters. *Weiss v. United States*, 510 U.S. 163, 176-78 (1994); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (judicial deference to Congress "is at its apogee" when reviewing congressional decision-making in military matters); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987); *Chappell*, 462 U.S. at 301; *Loving v. United States*, 517 U.S. 748, 768 (1996) ("we give Congress the highest deference in ordering military affairs").

Where this Supreme Court hesitated out of respect and deference, the CAAF rushed in without concern and overruled Congress.

REASONS FOR GRANTING THE PETITION

A. CAAF and Other Military Tribunals Cannot Exercise the Judicial Power to Declare Laws Unconstitutional.

Military tribunals are constituted by Congress under Article I. These tribunals are Executive Branch entities under the President. *Edmond v. United States*, 520 U.S. 651, 664 (1997). Military commanders convene courts-martial that are superintended by military judges (midlevel officers) who are assigned to military units and supervised by each service's Judge Advocate General. Each military service court of criminal appeals is supervised by the service's Judge Advocate General and the CAAF. *Id.* The CAAF is also an Executive Branch entity. *Id.* at 664 n.2.

Military tribunals are not ordained and established under Article III of the Constitution.

Although military tribunals are incapable of exercising "the judicial Power" vested in Article III courts, this Court recognizes the "judicial character" of military tribunals. *Ortiz v. United* States, 138 S. Ct. 2165, 2174 (2018). The judicial character of military tribunals gives them significant powers, including the powers to adjudicate core private rights to life, liberty, and property. *Id.* at 2186 (Thomas, J., concurring) (distinguishing between "a judicial power" and "the judicial Power").

This Court has not drawn the line between "a judicial power" and "the judicial Power," but certainly "a judicial power" cannot extend to invalidating an act passed by Congress and signed into law by the President. The Constitution assigns resolution of constitutional issues to the Judiciary. *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If a law conflicts with the Constitution, then Article III courts must determine which governs the case. "This is of the *very essence of judicial duty*." *Id.* at 178 (emphasis added).

Judging the constitutionality of an Act of Congress is the "gravest and most delicate duty" the Supreme Court[4]

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[4] Although this Court referred to this gravest and most delicate duty as a Supreme Court duty, federal appellate courts (*Rex v. Cia. Pervana de Vapores, S. A.*, 660 F.2d 61, 65 (3rd Cir. 1981); *cert. denied* 456 U.S. 926 (1982)) and district courts (*Ahjam v. Obama*, 37 F. Supp. 3d 273, 278 (D.D.C. 2014)) have held that they too have such duty. No Article I tribunal has this duty.

is called on to perform. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Congress is a branch of government that is equal to this Court, and its elected members take the same oath to uphold the Constitution as the members of this Court. *Id.* This Court accords more than the customary deference accorded the judgments of Congress where the case arises in the context of national defense and military affairs. *Rostker*, 453 U.S. at 486.

A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). The judicial Power cannot be shared with another branch of the government. *Stern v. Marshall*, 564 U.S. at 483. "There is no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

While the three branches are not hermetically sealed and (as discussed above) the judicial character of military tribunals give them significant powers to adjudicate rights to life, liberty, and property; it remains that Article III imposes limits that cannot be transgressed. *Stern*, 564 U.S. at 483. Article III could not preserve the system of checks and balances or the

integrity of judicial decision making if entities outside of Article III exercised judicial Power. *Id.* at 484. The Constitution assigns resolution of constitutional law to the Judiciary. *Id.*

Military law consists of the statutes governing the military establishment (including the Uniform Code of Military Justice), the regulations and rules issued thereunder, the constitutional powers of the President, and the inherent authority of military commanders. *See Manual for Courts-Martial, United States* (2019), pt. I I, ¶ 3, Nature and Purpose of Military Law.[5] While military tribunals have developed expertise in military law, they do not have expertise in constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), *overruled on other grounds by Solorio v. United States*, 483 U.S. 435 (1987) ("courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law"). The "experts" in constitutional law are the Article III courts. Judging the constitutionality of congressional acts is the prototypical exercise of judicial Power, and if this right is given to military tribunals then "Article III would be transformed from the guardian of individual liberty and separation of powers [this Court] has long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

CAAF judging the constitutionality of Article 120's death penalty infringes upon this Court's gravest and most delicate duty and violates the separation of

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[5] https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610

powers principle. The Constitution forbids CAAF or any other tribunal from exercising this great judicial Power.

To be clear, the amici curiae do not suggest that CAAF and other Article I tribunals must or should ignore the Constitution. When interpreting statutes and rules, tribunals should interpret any ambiguity or gap in accordance with the Constitution.[6] Where, as here, there is no ambiguity, CAAF and other tribunals must apply the laws or rules as written and are forbidden from overruling Congress.

Military personnel would not be left without a remedy for constitutional violations. Although military tribunals cannot provide relief, military personnel are still be able to seek redress in civilian courts for constitutional wrongs suffered in the course of military service. *Chappell*, 462 U.S. at 304-05. Military personnel must go to an Article III court that has the

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[6] The President, pursuant to authority granted to him by Congress under 10 U.S.C. § 836 ("Article 36"), prescribes rules. In certain rules, the President directed military tribunals to observe constitutional requirements. See Mil. R. Evid. 412 and Mil. R. Evid. 513 (2012) (the 2012 version of Mil. R. Evid. 513 is at https://jsc.defense.gov/Portals/99/Documents/MCM2012.pdf?ver=2015-03-17-114326-510). Each of these rules of evidence included a "constitutionally required" exception to the rule. As discussed further below, Congress has since directed the President to delete the "constitutionally required" exception to Mil. R. Evid. 513, and the President has done so. Military tribunals may apply constitutional principles as directed by the rules, but they cannot apply constitutional principles to invalidate laws, regulations or rules.

judicial Power to judge the constitutionality of laws and rules.

B. The Question Presented by Amici Curiae Warrants This Court's Review.

The Solicitor General's petitions in *Collins/Daniels* and *Briggs* explain that military sexual assault is one of the most destructive factors in our military, affecting not only the respondents in these cases but also numerous other military rapists who raped prior to 2006. Pet. 4-5, 17; *Briggs* Pet. 3-4, 22-26. Amici curiae fully agree with the Solicitor General that the importance of holding these rapists accountable is sufficient reason to grant the writ of certiorari. However, the question presented by amici curiae is significantly more important than the military statute of limitations question presented by the Solicitor General.

The question presented by the amici curiae is important to both the military and the Constitution. The CAAF's decision in *Mangahas* overruling Article 120 was not an isolated instance of CAAF or other military tribunals arrogating judicial Power in violation of the Constitution. Unfortunately, military tribunals are regularly overruling the laws of Congress and rules of the President. These unconstitutional decisions are impeding Congress's ability to fulfill its duty to govern and regulate the armed forces and the President's ability to command the armed forces. This threatens our national security and destroys the accountability of Congress and the President in military affairs. *Chappell*, 462 U.S. at 301-02; *Loving*, 517 U.S. at 757; *Free Enter. Fund v. Pub. Co.*

Accounting Oversight Bd., 561 U.S. 477, 501-02 (2010); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954-55 (2015) (Roberts, C. J., dissenting). " '[I]f there is a principle in our Constitution . . . more sacred than another,' James Madison said on the floor of the First Congress, 'it is that which separates the Legislative, Executive, and Judicial powers.' " *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J. dissenting) (quoting 1 Annals of Cong. 581 (1789)).

Although this Court previously reviewed cases where CAAF had overruled Congress, the question presented by the amici curiae was not recognized or ruled upon. Of the ten petitions for writ of certiorari granted by this Court pursuant to jurisdiction under 28 U.S.C. § 1259, the CAAF judged a statute or rule to be unconstitutional in two cases.[7] This Court reversed CAAF in both cases.

In *United States v. Scheffer*, 523 U.S. 303 (1998), the CAAF ruled that Mil. R. Evid. 707 (prohibiting admission of polygraph examinations) was

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[7] *Ortiz*, 138 S. Ct. at 2173 and cases cited therein at n.3. Seven of the ten petitions granted were filed by convicted service members where CAAF did not overrule any statute or rule. The United States was the petitioner in the remaining three grants. In *United States v. Denedo*, 556 U.S. 904 (2009), the CAAF did not overrule any statute, but merely determined that the service court of criminal appeals had jurisdiction to determine whether the service member was denied his 10 U.S.C. § 827 right to effective assistance of counsel. The Supreme Court agreed that the service court of criminal appeals had jurisdiction to consider the issue. The CAAF overruled a statute or rule constitutional grounds in the remaining two cases. These two cases are briefly discussed.

unconstitutional.[8] This Court did not address whether CAAF had authority to overrule statutes, but nevertheless reversed CAAF on the merits.

In *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the CAAF held that applying to the service member a law enacted after his conviction violated the Constitution's Ex Post Facto Clause. The law, 10 U.S.C. §§ 1161 and 1167 (1994 ed., Supp. III), was not part of the UCMJ. This Court reversed CAAF because it determined CAAF did not have jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). This Court has never upheld any CAAF decision that ruled a statute or rule was unconstitutional.

As discussed in the petitions, military sexual assault destroys the good order and discipline of our armed forces. Pet. 4-5; *Briggs* Pet. 3-4. Despite the best efforts by Congress and the President to fulfill their respective constitutional duties and end this scourge, military tribunals are unlawfully impeding congressional will. The following examples are not before the Court but are briefly presented because they demonstrate that military tribunals are comfortably but erroneously ruling laws and rules unconstitutional.

In *Mangahas*, 77 M.J. at 221, CAAF reached its decision to invalidate Article 120's death penalty only after the military judge, an Air Force lieutenant colonel, overruled Congress by declaring charges filed in accordance with the Uniform Code of Military

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[8] In 10 U.S.C. § 836, Congress authorized the President to prescribe rules for courts-martial. Mil. R. Evid. 707 was a rule lawfully prescribed and promulgated by the President.

Justice violated LTC Mangahas's constitutional right to a speedy trial.

In *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011), the CAAF, in dictum, stated that a court-martial's consideration of a victim's privacy in accordance with plain language of the military rape shield rule, Mil. R. Evid. 412, could be unconstitutional under circumstances not then before the CAAF. The CAAF stated that the military judge may not consider a victim's privacy. The entire purpose of a rape shield rule is to protect victim privacy. CAAF's ruling that considering a victim's privacy is unconstitutional stands alone and in sharp contrast to every federal court that has applied Fed. R. Evid. 412.[9] Since *Gaddis*, military courts have refused to follow the rule's balancing test that weighs the victim's privacy against the probative value of the evidence. In 2018, the President acquiesced to CAAF's *Gaddis* dictum by deleting the requirement that military judges consider a victim's privacy in the balancing test. Exec. Order

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[9] Federal courts determine whether evidence is "constitutionally required" by balancing the probative value of the evidence against the privacy interests of the victim. See *United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009); *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012); *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008); *Dolinger v. Hall*, 302 F.3d 5 (1st Cir. 2002); *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997); *United States v. Seibel*, 2011 U.S. Dist. LEXIS 88607 (D. S.D. August 9, 2011); *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000); *Grant v. Demskie*, 75 F. Supp. 2d 201 (S.D. N.Y.1999); *Petkovic v. Clipper*, 2016 U.S. Dist. LEXIS 94532 (N.D. Oh. 2016); *Buchanan v. Harry*, 2014 U.S. Dist. LEXIS 66665 (E.D. Mich. 2014).

No. 13,825, 83 Fed. Reg. 9,889, 10,097-98 (March 8, 2018).

The military's psychotherapist-patient privilege, Mil. R. Evid. 513, has long been abused by military judges because of a "constitutionally required" exception to the privilege. Although neither CAAF nor any service court of criminal appeals had ever ruled upon the privilege's "constitutionally required" exception, military judges routinely ordered production of privileged communications. *E.V. v. Robinson*, 200 F. Supp. 3d 108, 114 (D.D.C. 2016); *D.B. v. Lippert*, 2016 CCA Lexis 63, at *14-15 (A. Ct. Crim. App. Feb. 1, 2016). Because military judges routinely abused the privilege, Congress removed the "constitutionally required" exception. Carl Levin and Howard P. Buck National Defense Authorization Act for Fiscal Year 2015, 113 P.L. 291, 128 Stat. 3292, 2014 Enacted H.R. 3979, 113 Enacted H.R. 3979; *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M. Ct. Crim. App. 2017).

Military tribunals' responses to congressional will and the President's rules is frightening. In multiple services, midlevel military officers detailed as military judges have applied the deleted "constitutionally required" exception, boldly proclaiming that Congress cannot remove the exception. *J.M. v. Payton-O'Brien*, 76 M.J. at 784-85; *Lippert*, 2016 CCA Lexis 63, at *22. In *Lippert*, the Army appellate court noted that military judge Colonel Jeffery Lippert had been previously corrected twice for failing to follow the privilege rules. *Id.* at *12, *23.

In *Payton-O'Brien*, the Navy Appellate court reversed Captain Bethany Payton-O'Brien's order to

produce the victim's mental health records, but further instructed that military judges are constitutionally required to dismiss the charges unless the victim agrees to disclose her privileged records. *Payton-O'Brien*, 76 M.J. at 289-92. There is simply no precedent or logic for this ruling. This is a cruel price to ask victims of sexual assault to pay for justice.

More recently, the Navy-Marine Corps Court of Criminal Appeals reversed a military retiree's conviction for attempted sexual assault of a child. *United States v. Begani*, No. 201800082, 2019 CCA LEXIS 316 (N-M. Ct. Crim. App. July 31, 2019). The Navy appellate court overruled Congress by declaring 10 U.S.C. § 802 ("Article 2") unconstitutional. This is an unprecedented intrusion into congressional judgment. The three-judge panel, consisting of retirement-eligible officers who would personally benefit by their ruling that military retirees are immune from court-martial jurisdiction, held that Article 2's different treatment of different retiree classifications violated the Constitution's Equal Protection Clause.

The usurpation of the judicial Power by military tribunals is an extraordinary threat to the Constitution. The Congress cannot regulate and govern the armed forces and the President cannot command when Article I tribunals impede their will and judgment in military affairs. Military sexual assault is a cancer that must be stopped. It is Congress's and the President's constitutional duty to address sexual assault, limited only by this Court's duty to ensure the laws and rules comply with the

Constitution. Military tribunals can only interpret and apply laws and rules. They are without power to overrule.

Beyond the military justice system, this Court's decision on the question presented by amici curiae will make it clear that all Article I tribunals, whether addressing federal and veterans claims, taxes, bankruptcy or any other public rights issue, do not have authority to overrule laws passed by Congress.

CONCLUSION

The petition for a writ a certiorari should be granted on the question presented by amici curiae.

Respectfully submitted,

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