

IN THE
Supreme Court of the United States

B.M.,

Petitioner

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES*

**BRIEF FOR LCDR DOMINIC R. BAILEY IN
OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the CAAF may prudentially apply Article III limits on judicial power despite its obligation to review cases in accordance with a law enacted pursuant to Congress's power to make rules governing the military.

2. If Article III limits apply, whether a victim has standing to challenge court-martial rulings affecting her psychotherapist-patient privilege.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (CAAF) (Pet. App. 1-30) is reported at *In re B.M.*, 84 M.J. 314 (C.A.A.F. 2024).

The panel opinion of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) (Pet. App. 31-66) is reported at *In re B.M.*, 83 M.J. 704 (N-M. Ct. Crim. App. 2023).

The military judge's order abating the proceeding (Pet. App. 67-68) is unreported.

The military judge's sealed ex parte order (Supp. App. 1-3) is unreported.

JURISDICTION

The CAAF entered judgment on April 3, 2024. Petitioner argues that this Court has jurisdiction under 28 U.S.C. § 1259 because the CAAF reviewed questions certified by a Judge Advocate General, pursuant to 10 U.S.C. § 867(a)(2).

STATEMENT

Petitioner wrote a memoir in which she detailed her mental health issues related to prior trauma. Pet. App. 50-51. In the memoir, she described episodes where she lapsed into dissociated states, lost touch with reality, and experienced altered or inaccurate perceptions of events. Pet. App. 58. She also wrote of traumatic memories related to bathrooms (which is of particular importance as the charges in this case are based on her allegations of conduct that occurred in a bathroom). Pet. App. 58.

In light of Petitioner's public disclosures (in her memoir and subsequently on a podcast), Respondent Bailey moved to compel production of non-privileged information included in her mental health records.¹ Pet. App. 34. Respondent United States conceded the information was subject to production, and the military judge ordered the health facility to produce it. Pet. App. 35.

Subsequently, while reviewing in camera the records and ensuring the health facility complied with her order, the military judge realized that, contrary to her specific order, they also contained privileged

¹ Non-privileged mental health information includes a patient's diagnosis and treatment. See *United States v. Mellette*, 82 M.J. 374, 380 (C.A.A.F. 2022).

information. Pet. App. 36. She informed the parties and Petitioner of her discovery and her intent to redact the privileged information before providing the records to the parties. Pet. App. 36. Neither the parties nor Petitioner objected to this course of action. *See* Pet. App. 18.

The military judge executed her plan to make appropriate redactions. Pet. App 37. While doing so, she noticed certain privileged information the disclosure of which was necessary to Respondent Bailey's right to present a complete defense. Pet. App 37.

The military judge recognized that the psychotherapist-patient privilege, Military Rule of Evidence (M.R.E.) 513, prohibited her from disclosing such privileged information over Petitioner's objection.² So, the military judge informed Petitioner of her findings and conveyed that if the information were not disclosed, she would be required to abate the proceedings. Pet. App 38. Petitioner elected to maintain her privilege over the information. Pet. App. 38. The military judge then, adhering to M.R.E. 513 and the case law concerning it, abated the proceedings. Pet. App. 38.

After the abatement order was issued, Petitioner petitioned the NMCCA under Article 6b, Uniform Code of Military Justice (UCMJ),³ to issue a writ of

² *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) [hereinafter "M.C.M."], Mil. R. Evid. 513(a) (providing "a patient has a privilege . . . to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist").

³ 10 U.S.C § 806b.

mandamus overturning the military judge's ruling and disqualifying her from further participation in the case. Pet. App. 32. The NMCCA denied the petition and upheld the ruling, finding that "rarely are psychotherapist-patient records as material as they are in the present case." Pet. App. 60.

Petitioner filed a writ-appeal petition with the CAAF, which was denied for lack of jurisdiction. *B.M. v. United States*, ___M.J.___, 2023 CCA LEXIS 583 (C.A.A.F. 2023). The U.S. Navy Judge Advocate General (JAG) then, pursuant to Article 67(a)(2), UCMJ,⁴ certified two issues for the CAAF's review. Pet. App. 2. The first, whether the military judge had violated M.R.E. 513 in her rulings; the second, whether a constitutional exception to M.R.E. 513 exists.⁵

⁴ 10 U.S.C. § 867(a)(2)

⁵ The two certified issues provided:

I. M.R.E. 513 governs the procedures for production and in camera review of patient records that "pertain to" communications to a psychotherapist. The military judge applied R.C.M. 703 to order production and conduct an in camera review of [Petitioner's] diagnosis and treatment. Did the military judge err by applying the narrow scope of the M.R.E. 513(a) privilege defined in *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022), to bypass the procedural requirements of M.R.E. 513(e)?

II. The Army Court of Criminal Appeals held no constitutional exception to M.R.E. 513 exists. The Navy-Marine Corps Court of Criminal Appeals ruled the Constitution required production of mental health records. The resulting disparity in appellate precedent precludes uniform application of the law. Should *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017), be overturned?

Pet. App. 2 (alterations omitted).

On review, the CAAF answered both questions on justiciability grounds. *See generally* Pet. App. 7-16. The court analyzed Article 6b(a), UCMJ, and M.R.E. 513, each which grant certain rights to crime victims. Pet. App. 10-13. Considering the scope of these rights, the court held Petitioner lacked standing to challenge the military judge's abatement order. Pet. App. 13. Additionally, the court held the military judge's rulings had protected Petitioner's psychotherapist-patient privilege; thus, the relief sought was moot. Pet. App. 13.

ARGUMENT

Petitioner incorrectly frames the CAAF's decision. The court did *not* hold she lacked standing to challenge an alleged violation of her psychotherapist-patient privilege.⁶ Rather, the court held: (1) Petitioner lacked standing to challenge the military judge's abatement of the United States' prosecution; and (2) Petitioner maintained her privilege, rendering her requested relief moot. These sound and well supported holdings should not be disturbed.

I. THE CAAF HAS CONSISTENTLY AND APPROPRIATELY APPLIED THIS COURT'S JUSTICIABILITY PRINCIPLES, AND PETITIONER FAILS TO PROVIDE GOOD CAUSE TO UPROOT THIS LONGSTANDING APPLICATION.

⁶ In fact, the CAAF recently held that Mil. R. Evid. 513(e)(1), (2) provides a patient standing to challenge *any* production order of the patient's mental health records, even if the sought records are non-privileged. *In re H.V.Z.*, No. 23-0250, 2024 WL 3491143, at *8 (C.A.A.F. July 18, 2024).

Petitioner first attacks the CAAF’s application of Article III standing principles. *See* Pet. 15-20. She objects to these valid, appellate review limitations, claiming the court’s application of Article III standing conflicts with its statutory obligations. *See* Pet. 18-20. But her argument lacks merit because: (1) the CAAF is correct to review only justiciable issues; and (2) the CAAF’s application of Article III standing principles is consistent with that of other similarly-situated courts.

A. The CAAF Does Not Review Non-Justiciable Issues.

Although this Court has never addressed whether an Article I court is empowered to apply Article III justiciability principles, it has found the CAAF possesses “judicial power of the same kind wielded by civilian courts.” *Ortiz v. United States*, 585 U.S. 427, 439 (2018) (citation omitted); *see also Williams v. United States*, 289 U.S. 553, 565-67 (1933) (providing the judicial power of the United States is not limited to the judicial power defined under Article III and may be exercised by legislative courts). “Judicial power” is “the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.” *Muskraat v. United States*, 219 U.S. 346, 356 (1911). And such power is limited to “cases or controversies within the bounds of federal jurisdiction.” *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 689 (2015) (Roberts, C.J., dissenting) (citing *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219 (1995)).

For over a century, military courts have been “bound, like any court, by the fundamental principles of law.” *Ortiz*, 585 U.S. at 440 (quoting W. Winthrop,

Military Law and Precedents 54 (2d ed. 1920)). One of those principles is justiciability, the limitation of which the CAAF (and its predecessor, the Court of Military Appeals (CMA)) has long applied in its review of courts-martial.

In 1956, five years after its conception, the CMA reviewed an issue the JAG certified to that court (a procedural posture similar to that of this case). *United States v. Fisher*, 7 U.S.C.M.A. 270, 274 (C.M.A. 1956). Like the CAAF’s holding here, the *Fisher* court resolved the case on justiciability grounds—holding the certified issue was moot and review would only serve as an impermissible advisory opinion. *Id.*

Since then, the principles of justiciability and Article III “case or controversy” requirements have remained engrained in the court’s precedents. *See, e.g., United States v. Wall*, 79 M.J. 456, 459 (C.A.A.F. 2020) (declining to review an issue based on the ripeness doctrine); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (unequivocally providing that the limitations of cases or controversies apply to the court as a prudential matter); *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (applying the prohibition against advisory opinions); *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981) (declining to resolve a moot issue); *United States v. McIvor*, 21 C.M.A. 156, 158 (C.M.A. 1972) (same).

In accordance with these principles, the CAAF has appropriately limited its review to circumstances in which there is “an injury in fact, causation, and redressability.” *Wuterich*, 67 M.J. at 69 (citing *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008)).

**B. CAAF’s Application of Article III
Standing is Consistent with Other
Similarly-Situated Courts.**

Because the CAAF’s application of Article III standing principles does not conflict with other non-Article III courts, Petitioner fails to provide a “compelling reason[]” for review. *See* Sup. Ct. R. 12(a).

Other congressionally-created, Article I courts apply Article III standing requirements. *See, e.g., Curtin v. Comm’r*, 2023 U.S. Tax Ct. LEXIS 3824, *3-4 (T.C. 2023) (providing “limitations imposed on Article III courts presumptively apply to the Tax Court”); *Crow Creek Sioux Tribe v. US*, 900 F.3d 1350, 1354 (Fed. Cir. 2018) (providing “[t]he Court of Federal Claims, though an Article I court . . . applies the same standing requirements enforced by other federal courts created under Article III”); *Mokal v. Derwinski*, 1 Vet. App. 12, 13-15 (Vet. App. 1990) (providing that the Article I court “will adhere to the case or controversy jurisdictional restraints adopted by Article III courts”).

State courts have adopted the same principles. *See, e.g., Emps. Ins. Co. of Wasau v. First State Orthopedics, P.A.*, 312 A.3d 597, 607 (Del. 2024) (providing that Delaware “generally follow[s] Article III’s standing requirements”); *Tex. Propane Gas Ass’n v. City of Houston*, 622 S.W.3d 791, 799 (Tex. 2021) (providing “[t]he Texas standing requirements parallel the federal test for Article III standing”); *Ex parte Ala. Educ. TV Comm’n*, 151 So. 3d 283, 287 (Ala. 2013) (providing that even when a state statute provides a right of action to “any Alabama citizen,” a plaintiff must still satisfy the three requirements for standing set forth in *Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992)). *Cf. Biggs v. Cooper*, 236 Ariz. 415, 418 (Ariz. 2014) (providing that, *based on the state constitution*, Arizona courts are not constrained to Article III courts’ “case or controversy” requirement).

Without a division amongst similarly-situated courts,⁷ Petitioner fails to provide a compelling reason for this Court to review whether the CAAF has discretion to limit its own review to justiciable issues.

II. THE CAAF CORRECTLY HELD THE ISSUES ARE NON-JUSTICIABLE.

After arguing the CAAF should decide non-justiciable issues, Petitioner then argues that the issues *sub judice* are in fact justiciable. *See generally* Pet. 20-27. This argument mischaracterizes the CAAF’s opinion and relies on this Court’s distinguishable decisions. To the contrary, the CAAF soundly held the issues here are non-justiciable.

A. The CAAF Correctly Held Petitioner Lacks Standing to Challenge the Order Abating the United States’ Case.

An injury-in-fact requires an “invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (internal quotation marks omitted) (citing *Lujan*, 504 U.S. at 560). Injuries are rooted in rights, which, in turn, are rooted in law and tradition. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379

⁷ *See Ortiz*, 585 U.S. at 438 (providing that courts-martial “overlap[] significantly with the criminal jurisdiction of federal and state courts”).

(2024); A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983).

The law here provides Petitioner no right—no legally protected interest—to challenge the order abating the United States’ prosecution of Respondent Bailey. In reaching this conclusion, the CAAF reviewed the applicable statute and regulation, which are the source of her rights. *See* Pet. App. 9-13. The court first considered whether the abatement order violated her privilege under M.R.E. 513.⁸ Pet. App. 10. Finding the order did not vitiate, or require her to waive, her privilege, the court correctly concluded the order was not “a court-martial ruling that violates the rights of the victim afforded by M.R.E. 513.” Pet. App. 10.

The CAAF then analyzed Article 6b, UCMJ, which grants crime victims, among other things, a “right to proceedings free from unreasonable delay” and a “right to be treated with fairness and with respect for the dignity and privacy.” Pet. App. 11 (citing Article 6b(a)(7), (9), UCMJ). The court correctly found these rights also do not provide Petitioner standing to challenge the abatement order. Pet. App. 11.

In reaching this holding, the CAAF relied on this Court’s decision in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Pet. App. 11. There, this Court held the

⁸ M.C.M., Mil. R. Evid. 513(a) provides: “A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.”

petitioner lacked standing to sue a prosecutor who chose not to prosecute her child's child-support-delinquent father, explaining:

[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws.

Linda R.S., 410 U.S. at 615-16.

Similarly, here, Petitioner lacks a judicially cognizable interest in the United States' prosecution of Respondent Bailey. A party must have a "personal stake" in a dispute. *FDA*, 602 U.S. at 379 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). But Petitioner lacks a stake in this dispute. Based on the limited rights provided in M.R.E. 513 and Article 6b, UCMJ, she does not have (and cannot show) a direct nexus between her rights and the abatement order. The limited rights that Congress and the President have provided to crime victims vis-à-vis the prosecutions of service members do not encompass the right to challenge an abatement order. Thus, the CAAF correctly held Petitioner failed to show that the order resulted in an injury-in-fact. Pet App. 12.

Additionally, contrary to Petitioner's argument, Article 67(a)(2), UCMJ, does not create an injury-in-fact. *See* Pet. 14-16. A statute cannot construct such a

creation. *See TransUnion*, 594 U.S. at 426-27 (providing that while Congress can create a statutory cause of action, it cannot “enact an injury into existence”). The statutory provision provides the CAAF with subject-matter jurisdiction to review a certified issue. *See* Article 67(a)(2), UCMJ. That creation of jurisdiction, however, did not (and cannot) create an injury to accompany it.

Lastly, Petitioner errs in arguing that because Respondent United States has standing to challenge the abatement order, she, too, must also have standing. Pet. at 30. Standing principles do not give courts the power to order relief to any uninjured litigant. *See TransUnion*, 594 U.S. at 430 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). Rather, litigants “must demonstrate standing for each claim that they press and for each form of relief that they seek.” *Id.* (parenthetical omitted).

True, before the CAAF, Respondent United States supported the relief Petitioner sought: lifting the abatement order. Pet. App. 12. But it did not challenge the underlying justification for the abatement order, the military judge’s ruling that Respondent Bailey’s constitutional right to a fair trial entitled him to the disclosure of privileged information. As the CAAF found, Respondent United States could have challenged the ruling but chose not to. Pet. App. 12 (providing that “although [Respondent United States] now says that it supports the named victim’s arguments for lifting the abatement order, [Respondent United States] did not file an Article 62, UCMJ, appeal asking the NMCCA to lift the

abatement order”).⁹ Thus, Petitioner “cannot assume the role of [the prosecutor] and lacks standing.” Pet. App. 13.

In conclusion, congress provided Petitioner with rights—judicially cognizable interests—the impairment of which can create injuries. Finding neither Article 6b nor M.R.E. 513 provides her a right to challenge the abatement order, the CAAF correctly held she failed to show an injury and, consequently, lacked standing. Pet App. 12.

B. The CAAF Correctly Held Petitioner’s Relief Sought is Moot.

Contrary to Petitioner’s assertion, the CAAF did not hold that she lacked standing to challenge the alleged impairment to her privilege. *See* Pet. 21-24. Rather, the court held Petitioner’s grievance is moot. Pet. App. 13.

Standing and mootness are distinct justiciability concepts. The doctrine of standing generally requires a personal interest in a dispute at its outset, while the doctrine of mootness requires such an interest throughout the dispute. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021). “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 14 (2023) (Thomas, J., concurring) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Consistent with this Court’s precedents, the CAAF correctly held that any relief

⁹ Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A), provides the United States the right to appeal “an order or ruling of the military judge which terminates the proceeding with respect to a charge or specification.”

due to the alleged impairment of Petitioner's psychotherapist-patient privilege is moot. Pet. App. 13.

Before the CAAF, Petitioner sought an order to have her "mental health records be returned to a privileged and protected status." Pet. App. 8 (alteration omitted). The court found that relief already satisfied. Pet. App. 13. Her privileged records remain privileged, they remain sealed, and the military judge's in camera review did not "diminish[] [Petitioner's] right to assert her psychotherapist-patient privilege." Pet. App. 13-14 (citation omitted); *see also United States v. Zolin*, 491 U.S. 554, 572 (1989) (providing a privilege is not vitiated by virtue of in camera review). Thus, the CAAF held that the relief requested is moot, not that Petitioner failed to demonstrate an injury to her privilege as Petitioner argues.

Asserting that the CAAF decided the issue on standing rather than mootness, Petitioner cites numerous decisions concerning privileges, attempting to show an injury to her psychotherapist-patient privilege. *See* Pet. 21-22 (citations omitted). But the argument fails for two reasons. First, and again, the CAAF did not hold Petitioner lacked an injury to her privilege. Second, even if the cited decisions are applicable to the principle of mootness, the facts are clearly distinguishable.

The decisions involve a party to an action challenging an order compelling disclosure of privileged information.¹⁰ But here, Petitioner is a *non-*

¹⁰ For example, Petitioner cites to *Doe v. United States*, 749 F.3d 999 (11th Cir. 2014). Pet. 22. There, the plaintiffs were named

party who maintains her privilege *with no risk of compelled disclosure*. See Pet. App. 13-14. Contrary to Petitioner’s argument that the “disclosure of privileged information constitutes an injury in fact,” Pet. 21, the CAAF correctly found that there was no disclosure or even a future risk of disclosure—thus, the relief sought is moot. Pet. App. 13-14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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victims in the United States’ case against Jeffrey Epstein. *Doe*, 749 F.3d at 1000. They sued the United States under the Crime Victims’ Rights Act, 18 U.S.C. § 3771, and sought discovery of the non-prosecution agreement between Epstein and the United States’, which the district court ordered to be disclosed. *Id.* Epstein intervened, claiming the agreement was privileged. *Id.* He was granted limited intervention status to contest the disclosure of information over which he claimed privilege. *Id.* at 1002.

