THE CASE FOR MODIFICATIONS TO THE DISCOVERY AND DEPOSITION RULES FOR THE ALLEGED VICTIM AND ACCUSED

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Where dangers do exist, and abuses are threatened, not denial of discovery but appropriate safeguards to prevent such dangers and abuses, should be our effort.[1]

[T]he quest for better justice is a ceaseless quest and the single constant of our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice.[2]

I. Introduction

A. Quintessential Sexual Assault Cases

As known by many practitioners of Military Justice, from a civilian defense attorney, to a veteran Major prosecutor, to even a Second Lieutenant three months on the job, sexual assault cases receive increased scrutiny from superiors, Congress, and the press.[3] Practitioners also know that sexual assault allegations in the military usually share a few common characteristics: they tend to be alcohol related, friend related, or regret related. Rarely do practitioners see an overtly violent sexual assault such as a "stranger jumping out of the bushes." The following two hypothetical examples contain elements and facts similar to those that the practitioner sees in a vast majority of his or her cases.

1. The Accused's Position

In February 2015, Lance Corporal Anderson, a member of the United States Marine Corps, was accused of raping and sexually assaulting Lance Corporal Vance, a fellow Marine, after a night of mutual drinking and carousing at an on-base bar in Okinawa, Japan.

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[1] William J Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279, 294 (1963) [hereinafter Brennan, *The Criminal Prosecution*].

[2] William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L. REV. 1 (1990) (citation omitted) [hereinafter Brennan, *A Progress Report*].

[3] For the purposes of this paper, "sexual assault" will be used as a catch-all for all crime arising under Articles 120 and 120b of the UCMJ. This is the way they are spoken of in Congress. While each crime is different, distinct and contains different elements to prove, Congress has not made these distinctions, and for the purposes of this article these distinctions will not be made either, as the argument is not reliant on or restricted by these distinctions. For clarification, these crimes include: Rape, Sexual Assault, Wrongful Sexual Contact, and Abusive Sexual Contact.

Before joining the Marine Corps, Lance Corporal Vance was sexually assaulted when she was thirteen-years old. At that time, to cope with that traumatic effect, she saw a psychiatrist. Before the alleged sexual assault, Lance Corporal Vance had a reputation in the barracks for promiscuity. After the alleged sexual assault, Lance Corporal Vance consulted with the Sexual Assault Counselor provided by her unit. On suggestion, Lance Corporal Vance went to see a uniformed Navy psychologist. Lance Corporal Vance began meeting with the Navy psychologist weekly for the first three months following the alleged assault. During Lance Corporal Vance's meetings with the Navy psychologist she expressed that she initially consented to sexual activity with Lance Corporal Anderson in the form of kissing and cuddling. She further explained that, as the activity progressed to manual and oral sexual stimulation she became increasingly distressed because it reminded her of her previous sexual assault. She described that she began to 'zone-out,' but did not actively refuse Lance Corporal Anderson's continued sexual advances. She finally told the psychologist that she does not wholly remember what happened, but that she thought she 'froze,' and gave no outward manifestations of 'no,' but did not want to have sexual intercourse.

At the Article 32, Uniform Code of Military Justice (UCMJ)[4] hearing, Lance Corporal Vance did not testify. Instead, the trial counsel submitted to the preliminary hearing officer a two-page statement Lance Corporal Vance had previously given to Naval Criminal Investigative Service that was made twelve hours after the alleged assault.

At trial, the military judge denied defense motions to compel discovery of Lance Corporal Vance's psychiatric records from her Navy psychologist, because of a lack of

[4] UCMJ art 32 (2012).

showing relevance and to depose the victim because Lance Corporal Vance did not testify at the Article 32.

2. The Victim's Position

As a child, Senior Airman Young was abused. Since joining the United States Air Force she has had romantic relationships with both female and male Airmen (one of these was a consensually 'abusive' relationship). In March 2015, Senior Airman Young alleged that a fellow airman sexually assaulted her. After reporting the sexual assault, the trial counsel consults Senior Airman Young through her Special Victims' Counsel (SVC)[5] regarding whether she wants the prosecution to go forward. She does not know what charges there will be to 'go forward' on, as the Government has not given her or her Counsel any documents, related to the case including the charge sheet, but she expresses she wants it to go forward. She is genuinely frightened about the trial process and has undiagnosed PTSD resulting from her prior childhood abuse. When asked if she wants to participate in the Article 32 hearing, she is told she is not required to. Based on advice from her SVC, and not wanting to be put through further stress, she opts to not participate. The hearing turns into a 'paper shuffle' as the government only submits written statements to the Investigating Officer for his consideration. The defense puts on no witnesses at the hearing.

In pretrial hearings, the defense raised motions for discovery of the victim's psychological records, as well as to discuss MRE 412 issues related to the style and manner in which Senior Airman Young's prior sexual actions occurred (the physical 'abusive' nature, which caused bruises), in her previous sexual relationships. The government counsel

[5] While each branch of the armed services now provides, if wanted, counsel to Victims of sexual violence, each has a different name for those Judge Advocates;, for example, the Marine Corps uses "Victims' Legal Counsel." For simplicity, throughout this article that position will always be referred to as "Special Victims' Counsel" or "SVC," unless it is found in a direct quote to service specific publications.

wants to pursue a theory that Senior Airman Young was a 'broken' individual, had a lot of "emotional baggage," and was easily manipulated into being taken advantage of. Accordingly, the government counsel did not oppose the defense motions.

Pursuant to her right to be heard,[6] the judge allowed Senior Airman Young to either take the stand or submit a written statement (which can be from her SVC). She did not want any of her past consensual sexual encounters discussed, nor did she want the abuse she suffered as a child to be raised. Her SVC submitted a memorandum to the court expressing this, inadvertently addressing the childhood trauma as he did not know this was not at issue (leading to a request for discovery of information surrounding the abuse). The SVC's memorandum included no case analysis and provided little legal basis because he had not been given any discovery or evidence related to the case (not even who the defense intends to question to elicit this evidence or any written motion related to the procedings). As the government did not oppose the motion, the military judge weighed the victim's preference and determined the evidence admissible, but ruled that measures would be taken at trial to limit testimony, and limit who may be in the gallery during the testimony.

B. What Has Been Missing

In each of these hypothetical situations one can foresee problems for both the accused and the victim in protecting his and her rights.[7] This would have been true five years ago before the first changes to Article 120, UCMJ,[8] and is true today. In the first hypothetical

[6] *See* Crime Victims Right Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-62 (2004) (codified as amended at 18 U.S.C. § 3771 (2006)); and National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat 672 (2013) [hereinafter NDAA for FY 14].

[7] For ease of readability and consistency, the alleged victim will be gendered as a female, throughout this paper, as the vast majority of alleged military sexual assault victims are females. Likewise, the accused will be gendered as a male, as the vast majority of military sexual assault accused are males.

[8] UCMJ art. 120 (2012).

situation, the accused is not receiving the relevant evidence necessary for his potential defense; information that could lead to his acquittal. In both hypothetical situations, the alleged victim is not receiving the protection of her privacy that she is owed under the law, because she is unable to understand where the infringement on her rights is coming from.

These two hypothetical situations illustrate failures the current Rules for Courts-Martial (RCM) have regarding discovery and depositions in providing justice to the accused and the victim in a case. . Because of recent changes, the current RCMs are an arduous system that provides no relief to the victim to obtain discovery and limits the accused from securing potentially relevant information from the government.[9] Congress, in its zeal to end sexual assaults has overlooked providing necessary tools derived in the RCMs to the attorneys they have provided for the victims. This results in an inequality of justice for both victim and accused.

To achieve equity of justice, this paper suggests modifications that take Congress' intent for broadened victim's rights in sexual assault cases and provides the tools to accomplish this in the Military Justice arena. These suggestions will benefit both the accused and the alleged victim in a court-martial. The modifications relating to the alleged victim are simply to give the victim discovery of evidence and motions related to the victims' privacy rights as identified under MREs 412 and 513 and any congressionally identify right. The suggested changes relating to the accused are to provide earlier and more expansive discovery of material related to the Court-martial, and a broader deposition right when the alleged victim does not testify at the Article 32 hearing.

C. The Problems and Proposed Solutions

[9] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2012) [hereinafter MCM].

Sexual assaults occurring in the United States Armed Forces have garnered increasing amounts of attention. Evidence of this can be found in the news media,[10] videos,[11] and non-profit organizations.[12] Not coincidentally, Congress, primarily spearheaded by Senators Gillibrand (D-NY)[13] and McCaskill (D-MO),[14] has taken increased interest in this problem,

[10] *See* Sara Corbett, Editorial, *The Women's War*, N.Y. TIMES (Mar. 18, 2007) http://www.nytimes.com/2007/03/18/magazine/18cover.html?pagewanted=all&_r=0; Editorial, *Sexual Violence and the Military*, N.Y. TIMES, (Mar. 8, 2012) http://www.nytimes.com/2012/03/09/opinion/sexual-violence-and-the-military.html; Editorial, *Sexual Assaults in Military Bring Shame, Not Action*, USA TODAY, Mar. 27, 2005, http://usatoday30.usatoday.com/news/opinion/editorials/2005-03-27-our-view_x.htm; Nathaniel Penn, *Son, Men Don't Get Raped*, GQ (Nov. 20, 2014), http://www.gq.com/long-form/male-military-rape; Helen Benedict, *The Nation: The Plight of Women Soldiers*, NPR (May 6, 2009), http://www.npr.org/tem plates/story/story.php?storyId=103844570. In fact, the United States Military has been marred by multiple sex scandals during the past thirty years. In 1989-90, the Navy and Marine Corps were at focus for a scandal by the name of Tailhook, in which, male Naval pilots were accused of groping and harassing female military members and civilians. Michael Winerip, *Revisiting the Military's Tailhook Scandal*, N.Y. TIMES (Sept. 4, 2014, 9:23 AM), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html?_r=0. Then in 1996, the Aberdeen Proving Grounds scandal broke, involving the sexual assault of new recruits by drill instructors in the United States Army. It ultimately encompassed other training centers within the Army. MAJOR GENERAL ROBERT D. SHADLEY, U.S. ARMY (RETIRED), THE GAME: UNRAVELING A MILITARY SEX SCANDAL (2013). In 2003, allegations of sexual misconduct by instructors occurred at the Air Force Academy. Office of the inspector general of the Department of Defense, Evaluation of Sexual Assault, Reprisal, and Related Leadership Challenges at the United States Air Force Academy Report Summary (2004), *available at* http://www.defense.gov/news/Dec2004/d20041207igsummary.pdf. In 2011, Lackland Air Force Base became the focus when male instructors were alleged to have assaulted at least 31 female trainees. Chris Lawrence, *31 Victims Identified in Widening Air Force Sex Scandal*, CNN (Sept. 4, 2014 9:01 AM), http://www.cnn.com/2012/06/28/justice/texas-air-force-scandal/. In 2013, an accusation of sexual assault against the head of the Air Force's sexual assault prevention program was made. Alison Harding, *Air Force Lieutenant Colonel Acquitted of Groping Woman in Parking Lot*, CNN (Sept. 4, 2014, 9:33 AM), http://www.cnn.com/2013/11/13/us/virginia-air-force-officer-acquitted/. This is not a comprehensive list of scandals.

[11] *See* THE INVISIBLE WAR (Chain Camera Pictures 2012).

[12] *See, e.g.*, *RAINN Helps Victims of Sexual Assault in the Military Through Groundbreaking Service for Department of Defense*, RAPE, ABUSE & INCEST NATIONAL NETWORK, https://rainn.org/news-room/SAFEHelpline (last visited Mar. 22, 2015);; MILITARY RAPE CRISIS CENTERcrisis center, http://militaryrapecrisiscenter.org/ (last visited Mar. 22, 2015)./. VICTIM RIGHTS LAW CENTER http://www.victimrights.org/ (last visited Mar. 22, 2015) (founded in 2000, not specifically for military, but during a time of this increased focus on the sexual assault crime).

[13] *See Senator Kristen Gillibrand: A Voice for the People of New York*, KIRSTEN GILLIBRAND UNITED STATES SENATOR FOR NEW YORK, http://www.gillibrand.senate.gov/about/biography (last visited Mar. 22, 2014).

[14] *See Senator Claire McCaskill: An Independent Voice for Missouri*, CLAIRE MCMASKILL UNITED STATES SENATOR FOR MISSOURI, http://www.mccaskill.senate.gov/about-claire (last visited Ma. 22, 2015).

as evidenced by the amount of topic specific legislation it has generated over the past ten to fifteen years .[15]

Between 1990 and 2004, Congress did not pass any bills of significance implicating victims' rights in the military. In 2004, Congress required the Department of Defense (DoD) to create the Sexual Assault Prevention and Response Office.[16] In 2012, Congress required the DoD to provide special victim capabilities for the prosecutions of sexual assaults.[17] In 2013, Congress changed the practice of courts-martial, particularly those involving allegations of sexual assault, by enacting a bill of rights for victims (outlining the rights victims receive through the court-martial process); it also provided counsel for victims of sexual assault.[18] In 2014, Congress passed more sweeping legislation that provided actual standing for victims to be heard through counsel on certain MREs, modified MRE 513 in relation to the disclosure of psychotherapist communications, modified MRE 404(a) related to Good Military Character evidence admissibility, adjusted the standard to obtain a deposition, required consultation with the victim on prosecution venue, and provided an avenue of writ of mandamus to the SVC to enforce the victim's rights pursuant to certain MREs.[19]

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[15] *See* Sydney Brownstone, *New York's Senator Gillibrand Prepares to Introduce Military Sexual Assault Bill Next Week*, THE VILLAGE VOICE BLOGS (May 8, 2013), http://blogs.villagevoice.com/runninscared/2013/05/gillibrand_msa_bill.php; *Senator Gillibrand Presses Military Leaders on Sexual Assault*, YOUTUBE (Mar. 13, 2013), http://www.youtube.com/watch?v=ztVXGWxiFNY.

[16] U.S. DEP'T OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (6 Oct. 2005).

[17] National Defense Authorization Act for Fiscal Year 2013, 112 Pub. L. No, 239, § 573, 126 Stat. 1632 (2012) [hereinafter NDAA for FY 13].

[18] NDAA for FY 14, *supra* note 6, at §1716.

[19] Carl Levin &and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §532 (2014) [hereinafter NDAA for FY 15].

Adaptation has seen issues involving the SVC function in court and finding an appropriate balance with accused's rights.[20] It has spawned a myriad of academic disagreements in the Judge Advocate community about the role of the SVC and other changes to the Manual for Courts-Martial.[21] Ultimately, these issues come down to a balance of power between the three potentially competing interests in a court-martial: the Government, the accused, and the alleged victim.[22] But one thing that seems to be in agreement is that Congress's actions have not created a fully matured practice of sexual assault cases. This paper suggests that Congress has (1) omitted the tools necessary for a victim to protect her rights and (2) overlooking reductions in the rights of that accused.[23]

In trying to resolve the disconnection between Congress' remedies and actual practice related to victim's right, initial judicial rulings have determined the extent of the SVC's presence in the court-martial.[24] Unfortunately, Congress has not provided nor have the

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[20] *See* LRM v. Kastenberg, 72 M.J. 364 364 (C.A.A.F. 2013).

[21] *See* Sam Adams, *Thinking About SVC and Victim Discovery Rights*, CAAFLOG, (Jan. 23, 2014) http://www.caaflog.com/2014/01/23/thinking-about-svc-and-victim-discovery-rights/; Zachary D. Spilman, *Deposing the Alleged Victim, Now and in the Future*, CAAFLOG (Aug. 18, 2014) http://www.caaflog.com/2014/08/18/deposing-the-alleged-victim-now-and-in-the-future/; *See* Major Christopher J. Goewert & Captain Seth W. Dilworth, *The Scope of a Victim's Right to Be Heard Through Counsel*, THE REPORTER Vol 40, No3, 27 (2013). But, this internal debate of victim rights and accused rights is not something novel to the legal community. "[T]he quest for better justice is a ceaseless quest, and the single constant of our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice. Law's evolution is never done, and for every improvement made there is another reform that is overdue." Brennan, *A Progress Report*, *supra* note 2, at 2 (citation omitted).

[22] UCMJ Article 46 (2012).

[23] *See* NDAA for FY 13, *supra* note 17, and NDAA for FY 14, *supra* note 6. Many individual and isolated rules and rights were created or changed in these two acts.

[24] *See* Kastenberg, 72 M.J. at 365; *see*. *See generally*, Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, BYU L. REV. 255, 261-2 (2005) [hereinafter Beloof, *The Third Wave*].

> [V]ictims' interests are often at odds with those of the two traditional parties to criminal proceedings, the state and the defendant. This Article does not offer a detailed defense of the need for victims' rights; it assumes that they are relevant and useful, but it argues that further action is required to fully vindicate the victims' rights that state codes and constitutions

courts identified the functional tools for a SVC to carry out his mission.[25] This article suggests additions and changes to the RCMs that provide victims and their counsel the ability to appropriately protect their statutory rights.[26]

Another area of consternation is the degradation of rights and privileges of the accused[27] in relation to the re-establishment of victim rights. For a long time rights of the accused have conversely been both marginalized and championed as an essential part of a free nation.[28] Ultimately, the goal of the criminal process is to accurately determine the truth of what happened and hold only the guilty accountable. To achieve this, "[t]he truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise."[29]

In light of these recent changes it is important to remember the criminal process through "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser."[30] Accordingly, discovery rights have been a fluid part of the law:

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already describe. It is against this backdrop that this section outlines the history of the victims' rights movement.

Id. The case here is similar to that that which Beloof describes. It is presumed that certain rights exist; in relevant part: those related to the victim's MRE 412, 513, and 514 interests. This article will focus on the implementation of those rights, or giving them "teeth."

[25] Goewert & Dilworth, *supra* note 21. The two authors of this article were two of the counsel representing the alleged victim in the subject case at trial and in appeal. In the article, they raise the issue of discovery rights for the victim. It provides no legal analysis or supporting evidence, but bases its argument more on policy than precedence. *Id.*

[26] NDAA for FY 14, *supra* note 6, at § 806b.

[27] *See* Adams, *supra* note 21 (comments section); Spilman, *supra* note 21 (comments section).

[28] *See generally*, Brennan, *The Criminal Prosecution*, *supra* note 1, at 294.

[29] Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964).

[30] Wardius v. Oregon, 412 U.S. 470, 474 (1973).

> The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams*, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[31]

Ultimately, in a court-martial, discovery rights must allow, more so than it already does, for the truth to come out.[32]

D. Structure.

To establish a theoretical foundation for proposed changes to the RCMs, the article is structured as follows: First, Section II provides a peripheral discussion of the history of discovery rights for the victim in criminal proceedings to act as a backdrop for the current discovery environment in the military. It then addresses the victim's current right to discovery in criminal proceedings and particularly in military proceedings. It will then address the current state of the law, with all implications from congressional hearings and bills, and will then show why added discovery rules are necessary and address any counterargument to victim's discovery. The section will next address counter-arguments and close by providing the options for potential amounts of discovery offered to the victim.

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[31] *Id*. (citing Williams v. Florida, 399 US 78, 82 (1970) (footnote omitted)).

[32] *See* Brennan, *The Criminal Prosecution*, *supra* note 1, at 294 ("Where dangers do exist, and abuses are threatened, not denial of discovery but appropriate safeguards to prevent such dangers and abuses, should be our effort. We found out that the civil discovery procedures could be abused, and fashioned safeguards against them."); *see also* FED R. CIV. P. 26. (creating a much broader rule of discovery). This assures both the victim and the accused greater access to the truth, and allows them to better protect themselves.

Section III will first give a brief history of discovery rights for the accused, it will then state the current status of the law related to the accused's right to discovery in military criminal proceedings. Finally, it will show why added discovery and deposition rules are needed and address any counter to this. Section IV will isolate the specific changes and additions to RCMs 701 and 702 that are needed to accomplish goals of Congress and justice related to both the victim and the accused. Section V will summarize the arguments and suggestions for change.

II. The Case for Discovery Rights for the Victim of a Crime

Over the past three plus years, Congress has passed a myriad of legislation in relation to sexual assaults in the military.[33] Each provision of rights, and every rule change, has been done with the goal of eradicating sexual assaults in the military.[34] These provisions and rule changes passed in each year's NDAA have omitted important tools, leaving an incomplete criminal justice patchwork. Congress has not made a cohesive plan, and has instead created a series of reactionary responses to the overarching problem. Each year new reports indicate

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[33] NDAA for FY 13, *supra* note 17; NDAA for FY 14, *supra* note 6; and NDAA for FY 15; *supra* note 19.

[34] 113 CONG REC. E890 (Jun. 14, 2013) (statement of Rep Schakowsky).

> I am proud to support provisions in the National Defense Authorization Act (NDAA) that make progress toward combating military sexual assault. . . . However, I believe we need to go further. . . . I strongly believe we need to take action now to fundamentally change the way sexual assault is handled in the military by passing legislation to prevent and punish sexual assault and rape.

Id. 113 Cong Rec. H3658 (Jun. 17, 2013) (statement of Rep Wilson).

> It is our obligation to crack down on these heinous crimes by strengthening the *military justice system* so that we can better protect those who protect us. I am very grateful that last week Members from both sides of the aisle joined together in a bipartisan fashion to address this problem by passing the National Defense Authorization Act for Fiscal Year 2014. . . . Thankfully, we were successful in including 20 additional provisions that will address prevention, investigation, *prosecution*, and punishment of the crime of sexual assault.

Id. (emphasis added).

that sexual assaults are still occurring in the military;[35] Congress, in lock step, changes or amends the relevant law. Senator Collins (R-ME) acknowledges and attempts to justify this reactionary tendency:

> One of the criticism I have heard is that we should wait a few more months for the results of still more studies or perhaps even wait a few more years to see if recently enacted provisions have made a difference. I strongly disagree. How many more victims are required to suffer before we take additional action? How many more lives must be ruined before we act? Rather than waiting for the results of yet more studies, we must debate proposals to increase the confidence of survivors and increase prevention efforts now until we have proved that the military has, indeed, fostered a culture of zero tolerance.[36]

Congress's zeal to immediately stop sexual assault through *ad hoc* legislation is commendable, but ultimately unrealistic and inefficient. A more reasoned, systematic, plan will close important gaps in the current legislation. In its exuberance, Congress has omitted an important set of tools necessary for the SVC program to work.

To fully provide the SVCs the tools to reach the goal of protecting the victim, there must be an adjustment to the controlling discovery rules found in the RCMs.[37] Victims need to be granted the right to tailored discovery. It allows the SVC to appropriately and ethically participate in the court-martial while keeping with congressional intent and justice.

A. History of Victims' Rights

[35] *See* Research & Reports, UNITED STATES DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE (last visited Mar. 22, 2015) http://sapr.mil/index.php/research. Yearly surveys of sexual assaults in the military can be found here.

[36] 113 CONG. REC. S8145 (daily ed. Nov. 13, 2013) (statement of Senator Collins).

[37] *See* MCM, *supra* note 9, R.C.M. 101.

In the colonial era and early days of the United States, citizen prosecuted citizen; victim prosecuted those he accused of committing a crime against him.[38] Derived from our English roots,[39] the government rarely, if ever, prosecuted the accused on behalf of the victim.[40] Rather, it was the individual himself or independent "officials who charged fees for their [prosecutorial] services."[41] In a private prosecution, it was incumbent upon the private prosecutor to arrest the accused, [42] then acquire and produce the evidence against the accused at trial.[43]

At the time, citizen prosecutions were in fact "preferred because it avoided the tyranny of government prosecutors and the expense of providing for public prosecution."[44] Further, and more importantly, revenge by and restitution to the victim were "goal[s] of the system."[45] Ultimately then, it was the aggrieved citizen who decided whether he wanted to pursue prosecution, and not the state.[46] While the practice of "private prosecution survived in the

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[38] Douglas E. Beloof, *Weighing Crime Victims' Interest in Judicially Crafter Criminal Procedure*, 56 CATH. U.L. REV. 1135, 1138 (Summer 2007).

[39] DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE, 7 (1999).

[40] *See* Beloof, *supra* note 38.

[41] BELOOF, *supra* note 39, at 7.

[42] PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES, 5 (2001).

[43] BELOOF, *supra* note 39, at 7 ("The burden of investigation also rested with the victim. . . . [T]he victim carried the burden of prosecution.").

[44] Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 484-88 (2005).

[45] BELOOF, *supra* note 39, at 8 ("For many criminal offenses, the victim was awarded multiple damages. Where the offender was indigent, the victim was usually authorized to sell the defendant into service for a period corresponding to the amount of multiple damages.").

[46] William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 468 (1967).

United States well into the 1800s," it began to cede to public prosecutions.[47] State and federal government always had the authority to prosecute criminal actions; in fact, the discretion to do so was held by the government and not the victimized citizen. But during the 1800s a sea change resulted in it becoming an increasingly common practice.[48]

This sea change may have been "motivated by Enlightenment notions that criminal prosecutions should serve societal interests of deterrence and retribution rather than individual victim interests in private redress."[49] It may also have been the product of urban growth and technology proving a functional inability for a private individual to arrest, collect evidence, and prosecute an individual accused.[50] Over time "[p]ublic prosecutors gradually took over from private prosecutors"[51] thereby decreasing the number of private prosecutions, and marginalizing the interested party status of victims.[52] This overhaul was so drastic that in "felony trials, citizens' historic participation rights were eliminated."[53] "Government-operated police" and prosecutors replaced the individual's hiring of private police and prosecutors.[54] As a consequence, "[i]mprisonment and fines replaced capital and corporal punishments as the primary criminal sanctions. Restitutive [sic] damages to the victim were

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[47] Beloof & Cassell, *supra* note 44, at 484-88.

[48] Beloof, *supra* note 38, at 1138-39, *see also* Beloof & Cassell, *supra* note 43.

[49] TOBOLOWSKY, *supra* note 42, at 5 (citing Juan Cardenas, *The Crime Victim in Prosecutorial Process*, 9 HARV. L. REV. & PUB. POL'Y 357, 366-368 (1986)); *see also* BELOOF, *supra* note 39, at 8-9 (suggesting that Enlightenment principles were at play here as well.) Specifically, he references Cesare Beccaria who espoused that society existed because of social contract where by public interests in law enforcement and prosecution were to protect the social contract between all people.

[50] BELOOF, *supra* note 39, at 8.

[51] Beloof, *supra* note 38, at 1139.

[52] *Id*. at 1146.

[53] *Id*. at 1139.

[54] TOBOLOWSKY, *supra* note 42, at 5.

no longer actively pursued through the criminal justice process."[55] This left only misdemeanors for citizens to prosecute "subject to the public prosecutors' authority to *nolle prosequi . . . .*"[56]

With these changes the victim went from the primary interested party against the accused to being "merely a witness in the government's prosecution," leaving the victim's interest "relegated to the civil justice system for the recovery of restitution."[57] By the mid-twentieth century, "the [Supreme] Court effectively held that citizens do not have rights in state criminal processes."[58] What the Supreme Court meant was that victimized citizens no longer had an ability to prosecute a felony charge or force the state to do so. In effect, the Supreme Court definitively announced that any private prosecution was dead certainly by 1981.[59] In reality, it had been dead for much longer; even in 1973 the Supreme Court proclaimed that an

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[55] *Id*. at 5-6.

[56] Beloof, *supra* note 38, at 1140.

[57] TOBOLOWSKY, *supra* note 42, at 6.

[58] Beloof, *supra* note 38, at 1140.

> Instead of compelling the public prosecutor to charge, citizens brought charges independently of the public prosecutor. For example, in Maryland the case of *Brack v. Wells* [46 A.2d 319, 321 (Md. 1944)], decided three decades before *Linda R.S.*, the state's high court ruled that mandamus could not be used to compel a public prosecutor to charge: . . . Further the *Brack* court stated that mandamus would not lie when there was another remedy available. That other remedy was for the citizen to independently approach the grand jury.

Id. S*ee also* Linda R.S. v. Richard D, 410 U.S. 614, 619 (1973).

[59] Beloof, *supra* note 37, at 1141. *See* United States v. Timmerman, 454 US 83, 87 (1981) (per curiam) ("the Court stated that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." . . . The prosecutorial power lays exclusively with the "public prosecutor" as has the "discretion to direct, or not direct, state resources to prosecution." (Citing *Linda R.S. v. Richard D,. 410 U.S. 614,* 619 (1973).).

individual did not have a "judicially cognizable interest in the prosecution or non-prosecution of another."[60]

1. A Change: States lead the way.

State governments, through the 1980s, 1990s, and 2000s, have been granting victims' rights in criminal trials to the point that today nearly all states give victims process rights in one form or another.[61] Victims have not received these rights in federal and military trials until recently. While the federal government did not grant these rights, "states have met felt needs by engaging in experiments providing more, rather than less, protection than found in the Federal Constitution for civil liberties of victims."[62] Victims' rights or interest have not returned to what they were at the country's origins: "[w]hile modern victims' rights laws have not heralded a return to private felony prosecution at the trial stage, they do provide for participation independent of the public prosecutor in a variety of procedural contexts."[63]

In 1934, Justice Benjamin Cardozo noted, anachronistically perhaps, that "justice, though due to the accused, is due to the *accuser* also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[64] Six decades later in 1991, the Supreme Court acknowledged that "victims' interests" were then coming to the forefront of public consciousness in regards to criminal justice.[65] Specifically, the Court

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[60] Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

[61] *See generally*, *infra* note 67.

[62] Beloof, *supra* note 38, at 1148.

[63] *Id*.

[64] Snyder v. Mass, 291 U.S. 97, 122 (1934); *see also* Doe v. U.S., 66 F.2d 42, 46 (4th Cir. 1981) (emphasis added) ("An awareness of victims' rights begins with understanding that victims, as well as the state, are harmed by crime.").

[65] Payne v. Tennessee, 501 U.S. 808, 833 (1991).

identified victims have an interest in sentencing because to not consider the sentencing impact on the victim "conflicts with a public sense of justice keen enough that it has found voice in a nationwide victims' rights movement."[66] Accordingly, victims' rights have not been totally forgotten since our origins. In fact, the victim has still been held with reverence by some of the past century's noted legal scholars.

By the late 1990s, the nationwide movement manifested in "almost every state [having] passed some form of victims' rights legislations, and over thirty states [having] passed amendments to their state constitutions granting rights to victims."[67] In fact, thirty-one states passed constitutional amendments providing victims' rights, before Congress enacted the Crime Victims Rights Act (CVRA) in 2004.[68] But, these statutory and constitutional victims' rights are often broad, including the rights to "fairness, respect, dignity, privacy, freedom from abuse, due process, and reasonable protection."[69]

2. Federal Actions.

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[66] *Id*. at 834.

[67] Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 441 (2011). Examples of language coming from state constitutions are: ILL. CONST. art. I, § 8.1 (a)(I) ("[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); OKLA. CONST. an. II, § 34 ("To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process, any victim or family member of a victim of a crime has the right to know . . . ."); S.C. CONST. an. I, § 24(A) ("To preserve and protect victims' rights to justice and due process . . . , victims of crime have the right to . . . be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process."); TEX. CONST. an. I, § 30(a) ("A crime victim has the following rights . . . the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process.").

[68] Beloof, *supra* note 38, at 1149.

[69] Beloof, *The Third Wave*, *supra* note 24, at 262.

Victims' participation must fit in and around the traditional government interest. At trial, the victim and accused each enjoy certain rights and privileges that are inalienable and that may be infringed upon only in light of a more important right of another party. "For example, the victim's right to be heard at sentencing is completely independent of the defendant's constitutional and the state's statutory rights to be heard,"[70] thus cannot be taken away. The victim's privacy rights identified under MREs 412 and 513 are further examples of such rights. Ultimately, there is little question that these rights and privileges exist, the argument is how to protect them while retaining justice for the accused.

Meanwhile, the federal government began attempting to give victims' rights the Victims of Crime Act of 1984,[71] and then the House tried to expand this through the Victims' Rights and Restitution Act of 1990 but ultimately failed.[72] Finally, in 2004, Congress passed the Crime Victims' Rights Act (CVRA).[73] The earlier acts were of little practical effect, but the CVRA took an enormous step toward re-establishing victims as participants in criminal trials.[74] The CVRA gave victims of crime:

> 1. The right to be reasonably protected from the accused.
> 2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> 3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that

[70] Beloof, *supra* note 38, at 1148 n. 87; *see* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement for Sen Kyl) ("It is not necessary for the victim to obtain the permission of either party [to address the court]."); and, Kenna v. US Dist Court, 435 F.3d 1011, 1017 (9th Cir 2006)).

[71] 42 U.S.C. § 10606 (1984).

[72] H.R. 5368, 101st CONG. (1990).

[73] 18 U.S.C. § 3771 (2004).

[74] *See* United States v. Moussaoui, 483 F.3d 220, 234 (4th Cir. 2007) ("Congress enacted the CVRA in order "to protect victims and guarantee them some involvement in the criminal justice process.").

> testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> 4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> 5. The reasonable right to confer with the attorney for the Government in the case.
> 6. The right to full and timely restitution as provided in law.
> 7. The right to proceedings free from unreasonable delay.
> 8. The right to be treated with fairness and with respect for the victim's dignity and privacy.[75]

These however did not directly apply to the military courts; leaving the victims of crime in the military courts without these statutory rights to protect them.

3. Crime Victims in the Military

As sexual assaults received greater attention from the press, Congress began taking a closer look at the military justice system regarding these crimes and the victims of these crimes. In 2012, Congress passed the National Defense Act for Fiscal Year 2013 (NDAA for FY 2013).[76] In that, Congress required a standing-up of special units dedicated to "investigating and prosecuting allegations of child abuse, serious domestic violence, or sexual offenses; and, providing support for the victims of such offenses."[77] The NDAA for FY 2013 required additional and further training for Commanders.[78] The following year, in the National Defense Act for Fiscal Year 2014 (NDAA for FY 2014), Congress passed a victims' 'bill of rights,' that granted military victims:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any of the following:

[75] 18 U.S.C. § 3771 (2004).

[76] NDAA for FY 13, *supra* note 17.

[77] *Id*. at §573.

[78] *Id*. at §574.

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.
(B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.
(C) A court-martial relating to the offense.
(D) A public proceeding of the service clemency and parole board relating to the offense.
(E) The release or escape of the accused, unless such notice may endanger the safety of any person.
(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.
(4) The right to be reasonably heard at any of the following:
(A) A public hearing concerning the continuation of confinement prior to trial of the accused.
(B) A sentencing hearing relating to the offense.
(C) A public proceeding of the service clemency and parole board relating to the offense.
(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
(6) The right to receive restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.[79]

This is almost identical language of the 2004 CVRA. These rights are a bit more particularized to the military process, but still highlight rights related to notice, input, and privacy.

In addition to the military's 'bill or rights' via the NDAA for FY 2014, Congress required defense counsel to go through government counsel to interview the alleged victim, eliminated the statute of limitations for sexual assault cases; created the SVC program, changed Article 32 from an 'investigation' to a 'preliminary hearing,' required that all

[79] NDAA for FY 14, *supra* note 6, at §806b.

penetration offenses of sexual assault be tried at General Courts-martial, placed limitations on clemency, and set mandatory minimums for sentencing.[80]

In December 2014, as part of the National Defense Authorization Act for Fiscal Year 2015 (NDAA for FY 2015), Congress: modified MRE 513; limited good military character evidence; adjusted the victim's right to be heard through counsel; revised the standard of proof needed when ordering a deposition; required consultation with victim on venue of prosecution (military vs. civilian); and, provided a path for appeals via a writ of mandamus.[81]

B. The Case for Victim Discovery Rights

1. Back to the Hypothetical

In the second hypothetical posed at the beginning of this paper, Senior Airman Young did understand what was happening to her and what would be asked of her.[82] Her SVC explained the process but could not give her in-depth or particular advice as to what she should expect, because he only had her as his source of information. As such, she felt powerless as the court-martial process set out. She believed that did not want her previous sexual relationships nor the abuse she suffered as a child brought out in court, because she did not know how it could be relevant. Nonetheless, she had no real recourse to keep this information out as both the government counsel and counsel for the accused wanted the information in. Here SVC meanwhile, did not know all the circumstances surrounding her past consensual sexual encounters and could not articulate why they were not relevant. This

[80] *See* NDAA for FY 14, *supra* note 6.

[81] *See* NDAA for FY 15, *supra* note 19, at §532.

[82] *See Supra*, Part I.A.2

scenario plays out under the current rules. The same rules that Congress passed with the intent of eliminating this exact situation.

Once Congress joined in recognizing victims' rights in the criminal court-martial process, they did so with near unanimity.[83]

> A review of electoral passage rates of constitutional amendments guaranteeing state victims' rights reveals that it is not unusual for them to pass by 70-90%. Similarly, the initial Senate version of the CVRA passed with a 96-1 vote in favor. The bill became H.R. 5197 passing with a 394-14 vote in the House and unanimous consent in the Senate.[84]

But, enthusiasm alone does not solve the problem of sexual assaults. Problematic omissions in the legislation temper Congress's enthusiasm to take up the "public sense" of increased victim's rights.[85]

To identify the omissions left by Congress that need to be filled, it is helpful to look at the legislative record surrounding victims' rights. This will best represent what the congressional drafters intended the legislation to accomplish. Discussion in both the House and Senate regarding the 2004 CVRA, military Crime Victims bills, and the most recent three NDAAs are all pertinent for uncovering Congress's ultimate intent on how to "[combat] the epidemic of sexual assault and sexual misconduct . . ."[86] in the military.

Congress believes that more prosecutions of sexual assault will diminish the number of sexual assault committed by holding the guilty accountable and as a deterrent effect. To achieve more prosecutions, Congress believes more reporting of sexual assaults needs to be

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[83] *See* Beloof, *supra* note 38, at 1152-53.

[84] *Id*. *See also* 113 CONG. REC. S1377 (daily ed. Mar. 10, 2014) (statement of Senator Ayotte) ("The Senate voted 97-0—unanimously—to support the Victims Protection Act.").

[85] *Payne*, 510 U.S. at 834 (Scalia concurrence).

[86] 113 CONG. REC. H3219 (daily ed. Jun. 6, 2013) (statement of Rep Coffman).

initiated by the victim. To foster reporting Congress believes that victims need to feel their rights are 'protected' and they will not be re-victimized. To achieve a feeling of protection, Congress believes the victim needs to be empowered. To empower the victim, Congress has provided the SVC to represent the victim. However, this is where Congress has stopped. They have not given the tools for the victim to achieve this goal, despite what Congress has intended for the SVC to accomplish.

2. Protect and Report.

In 2013, Representative Susan Brooks (R- IN) summarized that "[i]f we want to end the epidemic of sexual assault in our military, we must ensure that these victims come forward to report their assaults without fearing that they will be victimized again by the institution, the military they've chosen to serve."[87] Representative Sheila Jackson-Lee (D-TX) expresses the intent in a simplified manner: "It is important that we create the proper avenues for victims of sexual assault to avoid re-victimization through the legal process."[88] Congress believes that if victims believe they are 're-victimized' by the criminal justice system, they lose confidence that the system will support them, and, consequentially, will not report the assault.[89]

One common complaint of re-victimization is that, at trial, the accused is allowed to run rough shod over the victims' rights. This is perceived as a lack of protection at trial is a

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[87] 113 CONG. REC. H4059 (daily ed. Jun. 26, 2013) (statement of Rep. Brooks).

[88] 113 CONG. REC. H4061 (daily ed. Jun. 26, 2013) (statement of Rep. Jackson Lee).

[89] *See* 113 CONG. REC. H4058 (daily ed. Jun. 26, 2013) (statement of Rep. Walorski) (noting that "[m]any individuals don't come forward because they don't have confidence in the military justice system . . . . We have to find a way to empower the victims and restore their faith in the *military justice system*. That is what this bill does.") (emphasis added). While both Representatives Walorski and Brooks were addressing a provision requiring the Investigator General to conduct an investigation on any report of retaliation due to claim of sexual assault, the general point is that lack of faith in the criminal justice system is seen as a major hurdle to meeting the "reporting" goal.

major prohibitive factor for reporting the crime. "As we've heard, the reason given for the lack of reporting is because so many fear retaliation and the fact that it would negatively impact their career. Sixty-two percent—62 percent— give that as their reason."[90]

Senator Susan Collins (R-ME) summarizes this best: "Senator Gillibrand's amendment takes aim squarely at the problem of victims failing to report sexual assault."[91] Congress repeatedly acknowledged that victims fear being re-victimized. They fear not being protected from having potentially embarrassing details of their sexual history or psychological records needlessly becoming public. These fears ultimately negatively affect reporting.

3. Empowerment.

Congress associates failing to report as an indicator that victims do not feel protected in the court-martial process. Senator Collins identifies that "[m]ore than anything, survivors need to have the confidence that the legal system in which they report a crime will produce a just and fair result." [92] Congress intends for victims to believe their rights are protected, and empowering the victim will accomplish this. To achieve empowerment the victim must have rights upon which to base that power:

> It should be clear to all who have been following the debates . . . there is no difference of opinion that we must address the crisis. That means . . . how we work to protect the rights of victims . . . [is] achieved in an open and

[90] 113 CONG. REC. H4060 (daily ed. Jun 26, 2013) (statement of Rep. Blackburn). These comments relate to the Investigator General investigating retaliation crimes, but it demonstrates that fear of what other's (peers, leaders, commanders) think of the victim is important to the victim.

[91] 113 CONG. REC. S8145 (daily ed. Nov. 13, 2013) (statement of Sen. Collins).) (Senator Gildibrand is often seen as the main proponent behind all reform to the victims' rights found in the NDAA 13, 14, and 15. This bill covers much more than the IG provisions, but also the modifications to MRE 412 and 513..).

[92] 113 CONG. REC. S8145 (daily ed. Nov. 13, 2013) (statement of Sen. Collins).

> transparent fashion so that victims know there is a system that works for them and so that our constituents know . . . .[93]

This is not just one or two Senators who support this, but the entire Senate, "[t]here may be differing opinions on how best to achieve the overall goals of reducing sexual assault in the military, but I believe all my colleagues can agree on one common goal: protecting the victims from further abuse."[94] But ultimately,

> [b]efore we [Congress] can truly understand the scope of sexual assault in the military and how to best confront it, we have to find a way to encourage more victims to come forward. We have to find a way to empower the victim and restore their faith in the military justice system.[95]

Empowerment, it seems, is the desired remedy for sexual assaults; more so, perhaps, than the outcomes of prosecution:

> As a former prosecutor . . . I learned over time that the outcomes are incredibly important. But just as important is how people feel about how they are treated in the system. . . Just as important as how many months someone got in prison was whether or not the crime was explained to them, whether or not the process was explained to the victims, and whether or not the outcome was explained. We actually had people come back and say: I know this case had to be dropped; or I know you couldn't bring charges in this case, but I felt that you treated me with respect and I understood that my case would still remain so that if another case came forward my record would be there, my report would be there. If the facts were better or if there was more evidence, you could go forward with it.[96]

Congress then, intended for the victims to feel like they are 'a part' of the criminal justice process, and not just an outside observer. Further, Congress has deemed that the victim

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[93] 113 CONG. REC. S8148 (daily ed. Nov. 13, 2013) (statement of Sen. Murkowski).

[94] 113 CONG. REC. S8145 (daily ed. Nov. 13, 2013) (statement of Sen Catwell).

[95] 113 CONG REC. H4057 (daily ed. Jun. 26 2013) (statement of Rep. Walorski).

[96] 113 CONG. REC. S8149 (daily ed. Nov. 13, 2013) (statement Sen. Klobuchar).

needs to feel they have the power to protect themselves from re-victimization and protect themselves from other violations of their rights.

In 2004, Senator Kyl expressed that the CVRA "is so important because crime victims *share an interest* with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from criminal proceedings, whether these are pretrial, trial, or post-trial proceedings."[97] Victims' fear their "character [being dragged] through the mud,"[98] because the victim:

> needs to do the unthinkable, and that is to lay herself or himself bare to the public about what has happened. The way you do that is through the reforms . . . that we have incorporated in this bill, and that is that every single victim gets their own lawyer.[99]

Providing victims a SVC empowers the victim to assert and actively defender her rights. These two ideas are intertwined and circular. Empowerment comes from the victim feeling she has had her rights protected through the court-martial process and protection further empowers her to not be re-victimized by the process.

4. The Special Victims' Counsel

Congress established two primary ways to empower the victim. First, Congress adjusted deposition rules and tightened access to MRE 412 and 513 materials, making it harder for an accused to use these tools. Second, Congress gave victims the right to have a SVC to represent them and their rights.

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[97] 104 CONG. REC. S10,910 (daily ed. Oct 9, 2004) (statement of Sen Kyl)(emphasis added).

[98] Molly O'Toole, *Hagel Orders Military Sexual Assault Case Review As Controversy Comes to Congress*, HUFFINGTON POST (Mar. 13, 2013, 5:14 PM), http://www.huffingtonpost.com/2013/03/12/hagel-military-sexual-assault_n_2864225.html. .

[99] 113 CONG. REC. S8151 (daily ed. Nov. 13, 2013) (statement of Senator McCaskill). Although Senator McCaskill may have a mis-understanding of military law as she suggests that as a response to retaliation, "the victim has her own lawyer who can help press those charges if that occurs." *Id.* The problem is that only the accused's commander can decide to refer (or "press") charges against an individual service member.

The SVC is necessary because a prosecutor can not always accomplish the mission of protecting the victim.[100] For example, a government prosecutor has the ability to attempt to enforce a victim's right (e.g. argue against the presentation of MRE 412 evidence), but he would not have the authority to waive that right.[101] This distinction is important because the prosecution is not counsel to the victim. Senator Levin, chairman of the Armed Services Committee, specifically mentioned the need for this separation as the new law would "require every service member who reports a sexual assault to get a special victims' advocate who works for them, *not for the command* or for the court".[102] This special victim's advocate is the genesis of the SVC.

In 2013, the U.S. Air Force experimented with the SVC program before Congress mandated the program. After just one year in existence, Senator Murray believed the SVC program was a success by citing: "[n]inety-two percent of victims are extremely satisfied with the advice and support their SVC lent them through the military judicial process, 98

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[100] Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degenhardt*, 19 FED SENT'G REP. 1, 5 (2006) ("But where there is conflict, it would be unethical for these government attorneys to put the individual victims' interests above the interests of the people. Absent their own due process of notice and the ability to speak, victims can be left out in the cold.").

[101] Beloof, *The Third Wave*, *supra* note 24, at 272.

> Victims' rights are protected against waiver by the state even when the state has authority to enforce the rights. Most victims cannot readily afford counsel, do not have a right to appointed counsel, or may not be able to be present at every proceeding. As a result, some jurisdictions allow prosecutors to enforce victims' rights. But even when the state may enforce victims' rights, the state has no authority to waive victims' rights.

Id.

[102] 113 CONG. REC. S1373 (daily ed. Mar. 10, 2013) (statement of Sen Levin) (emphasis added).

> The bill also strengthens victims' input into prosecution decisions. . . an attorney who works not for the commander of the court but for the victim. The bill before us requires that these victims' counsels advise victims on the advantages and disadvantages of seeing their case prosecuted in a military court or in a civilian court. . The bill also requires that when victims express a preference for one of the other, that preference be given great weight.

Id. at 1373-4.

percent would recommend other victims requires these advocates, and 93 percent believed these advocates effectively fought on their behalf."[103] These results, derived from the Air Force's limited SVC experiment, enforced Congress' requirement to implement the SVC program DoD-wide.

5. Function of the SVC

Congress implicitly indicates the SVC's function by using of the word "advocate" interchangeably with Special Victim's Counsel.[104] "Advocate" is distinct from mere "counsel." An advocate is "a person who assists, defends, pleads, or prosecutors another,"[105] while "counsel" is "one or more lawyers who represent a client."[106] Being an advocate implies a more active role, requiring the attorney to affirmatively reach out and protect the victims' rights much like a defense counsel does. While there is an assumption that the SVC will "provide real advice and assistance when survivors need such assistance the most,"[107] and in fact the SVC program was codified in midst of the military's legal assistance program, this is due to the fact that the representation spans beyond the bounds of any potential court-martial.[108] Once retained, the SVC's obligations begin before a court-martial, continue regardless of a court-martial, and continue until after a court-martial, to ensure the victim's

[103] 113 CONG. REC. S8151 (daily ed. Nov. 13, 2013) (statement of Sen. Murray).

[104] 113 Cong. Rec. S1373 (daily ed. Mar. 10, 2014) (statement of Sen. Levin) ("[T]hat require every servciemember [sic] who reports a sexual assault to get a special victims' advocate who works for them, not for the command or the court . . . .").

[105] BLACK'S LAW DICTIONARY 60 (8th ed. 2004); MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (Advisor: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.")

[106] BLACK'S LAW DICTIONARY 374 (8th ed. 2004).

[107] 113 CONG. REC. S8146 (daily ed. Nov 13, 2013) (statement of Sen Collins).

[108] 10 U.S.C. § 1044e.

rights are being upheld.[109] Senator Ayotte's comments clarify that the SVC's advice and assistance is "to represent them [the victim] and *their interest* . . . someone looking out for them."[110] This form of representation is the manifestation that allows for protection of the victim's rights.

6. Privacy

A victim is re-victimized when she feels she unjustly loses privacy, because she either does not know why her privacy is being violated, or does not believe her privacy must be exposed through the court-martial process. Congress, concerned with the privacy of the victim, mandated that the victim has: "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter."[111] The interest in privacy is not a new idea to Congress having been brought up over a decade ago by Rep McIntosh Slaughter: "I have introduced the Prevention of and Response to Sexual Assault and Domestic Violence in the Military Act. . . . My bill will also enhance the rights of victims to safety and justice. It will better protect a victims' privacy . . ."[112] Four years ago another act was proposed to Congress to protect privacy not just in the immediate time frame but also in the long term:

> The Support for Survivors Act is straightforward. Quite simply, it requires the Department of Defense to ensure lifelong storage of all documents connected with reports of sexual assault and sexual harassment in the military, while also

[109] *Id*.

[110] 113 CONG. REC. S8147 (daily ed. Nov. 13, 2013) (statement of Sen Ayotte). *Cf.* U.S. MARINE CORPS, ORDER P5800.16A Ch7, LEGAL ADMINISTRATION MANUAL Chap 2, 2001.1 (10 Feb. 2014) [hereinafter MCO P5800.16A Ch 7]. Similarly, the DSO's mission includes some legal assistance like duties advice (e.g. NJP counseling, not taken as clients and not providing what the counselee should do, but advising him of his rights, the system, and possible outcomes.

[111] NDAA for FY 14, *supra* note 6, at §1701.

[112] 104 CONG REC. E2066-67 (daily ed. Nov. 28, 2004) (statement of Rep McIntosh Slaughter).

> maintaining full privacy for those involved. . . . Importantly, the bill ensures protection of the privacy of the records.[113]

Congress never defined what the 'right of privacy' meant in the capacity to the victim. As such we need to look elsewhere to find the definition and importance of the right. Privacy is "[t]he condition or state of being free from public attention to intrusion or interferences with one's acts or discussions."[114] Supreme Court case law provides that privacy rights are derived from substantive due process guaranteed under the Fourteenth Amendment.[115] The Court made clear that:

> These matters, involving the most intimate and personal choices of a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, or meaning, or the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[116]

The Court reaffirmed that privacy rights have a constitutional basis: "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships . . . ."[117] The victim's right to privacy is likewise tied up in this. Her private sexual or psychopathic needs, actions, or tendencies need to be guarded.[118] The SVC has been charged with this task.

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[113] 112 CONG REC. S8059 (daily ed. Nov. 30, 2011) (statement of Sen Klobucher).

[114] BLACK'S LAW DICTIONARY 1233 (8th ed. 2004).

[115] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (Harlen's concurrence); *see also*, Roe v. Wade, 410 US 113 (1973).

[116] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[117] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[118] This article is not suggesting that the victim's privacy rights are absolute, as there are circumstances where they must cede to the accused's Constitutional rights.

7. Basic Theories Against Discovery

There are various reasons why the victim should receive discovery; such as it may result in quicker resolutions to courts-martial, it may provide more just outcomes, and justice at large is better served when there is free and open discovery. Moreover, discovery rights are necessary for the SVC to complete his mission of protecting victim interests and providing competent ethical service to his client. Without granting discovery to the SVC, his powers are illusory and the victim will not enjoy protection of her rights. The counterarguments include the following dimensions:

a. Illusory Rights

To help protect the victim of a sexual assault, Congress wanted to empower her. To empower the victim, Congress gave her a SVC. Congress intended for the SVC to advise victims and represent victims in cases where the victim's rights may be violated or are at issue. This is to help assure that the victim is not re-victimized. To accomplish this intent, the SVC must have the appropriate tools available to him; otherwise, the victim's rights and protections are "illusory."[119]

Congress determined that the victim will be better protected and empowered if she has an active role in the court-martial process when her rights are at question. The SVC has been charged to fulfill that active role on behalf of the victim, as he is a subject matter expert.[120] To effectively and efficiently play that active role, the SVC needs access to the appropriate

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[119] *See* Beloof, *The Third Wave, supra* note 24. "[Victims'] rights were illusory because the victims were unable to enforce them, as they lacked standing to enforce them, remedy for their violation, or review by a higher tribunal." *Id.* at 257. "The Third wave of victims' standing, remedy, and review will transform these illusory rights into real rights." *Id.* at 258. "Victims' rights are illusory unless there is a nondiscretionary review mechanism." *Id.* at 259.

[120] NDAA for FY 15, *supra* note 19, at §532.

tools. Congress did not intend for the SVC to be powerless however it did not equip the SVC to be fully operational. To operate fully, the SVC needs the discovery of evidence relevant to his client's rights so that he can advocate on her behalf.

b. Fulfilling the Ethical Obligation.

> Under the ethical rules, a lawyer's duty to a client includes a duty to perform some investigation. Most jurisdictions have rules of professional conduct that require counsel to be "competent" and define competence to include a requirement that counsel inquire into and analyze the facts of the case as well as the legal principles involved.[121]

As the SVC is a licensed lawyer, with training in victims' rights,[122] he owes certain ethical standards of competence to his client. This, however, does not mean the victim receives the same Sixth Amendment standard of effective assistance of counsel as an accused does at trial.[123] Nevertheless, a SVC must provide services in accordance with the ethical standards laid forth by his service secretary and his state bar's ethical standards (which generally conform with the Criminal Justice standards of the American Bar Association.)[124]

In the Army, the ethical requirements are not dependant on the role of the attorney. When advocating all Army lawyers have the responsibility to "zealously [assert] the client's

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[121] Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 589 (2006). While this article is geared to expanded rights of an accused in criminal court, the legal principle holds true regardless of party in the criminal trial, or regardless of the attorney's job.

[122] MCO P5800.16A Ch 7, *supra* note 110, at ch. 6.

[123] U.S. CONST. amend. VI. *See* McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).

[124] *See generally* MODEL RULES OF PROF'L CONDUCT (2007) (R 1.1 "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.") (R. 2.1 "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.") (R. 3.1 "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . . "); STANDARDS FOR CRIMINAL JUSTICE § 11-1 (2d ed. 1980).

position under the law and the ethical rules of the adversary system."[125] It is further expressed that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and justice will be served."[126] Additionally, the Army places significance on the discovery in relation to trial attorneys: "A lawyer shall not . . . make frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[127] As ethical rules are based on providing discovery to another attorney, the Army demonstrates that discovery is critical for an attorney to appropriately function and represent his client. Ultimately, then the Army implicitly requires its SVC to represent his client just a defense counsel would.

In the Marine Corps, however, obligations and requirements are set out separately, dependant on the individual attorney's billet. The requirements of the SVC, are laid out in the Legal Administration Manual chapter six.[128] Per chapter six, the SVC derives its power via 10 USC §1044 and 10 USC §1565b,[129] and his obligation is:

> A Marine VLC must exhibit unfettered loyalty and professional independence in representing his or her client, and is ultimately responsible for acting the client's best interest. A Marine VLC's primary duty is to provide zealous, ethical, and effective representation to Marines and other eligible clients. This duty is limited only by law, regulation, and the Rules of Professional Conduct (JAGINST 5803.1_ series).[130]

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[125] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6b (1 Jun. 1992).

[126] *Id*. at 6g.

[127] *Id*. at App. B, Rule 3.4 (d).

[128] MCO P5800.16A Ch 7, *supra* note 110, at ch.6 .

[129] *Id*. at 6001.1.

[130] *Id*. at 6001.3. "VLC" stands for "Victims' Legal Counsel." It is the Marine Corps equivalent of the SVC.

To place the meaning of these obligations and roles in context, it is helpful to compare them to the parallel section of the defense counsel. The defense counsel derives her power via the Sixth Amendment and JAGINST 5800.7.[131]

> A Marine defense counsel must exhibit unfettered loyalty and professional independence in representing the client, and is ultimately responsible for acting in the client's best interest. A Marine defense counsel's primary duty is to provide zealous, ethical, and effective representation to Marines and other Service members; this duty is limited only by law, regulation, and the Rules of Professional Conduct (JAGINST 5803.1_ series).[132]

These two sections are nearly identical. They are consistent in terms of both general duties and the manner with which the attorney is to perform his representation.

Similarly, both the Army and Marine Corps require their SVCs to provide ethical, effective representation. Despite the obligations of the SVC and defense counsel being virtually identical, the defense receives discovery in order to meet these obligations while the SVC does not.[133] As the broad obligations or representation is similar, so should the benefits to support the obligations be the same.

To deny discovery to the SVC would be a manifest subversion of his ethical duties to his client, the victim.[134] As part of a SVC's job he must, if needed, make legal and factual arguments to the court to advance his clients position. If he makes arguments and assertions without full knowledge of the facts he is ineffective in his persuasion and representation. The outcome of his argument and representation is irrelevant to this equation, just that he

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[131] *Id*. at Chap 2, 2001.1.

[132] *Id*. at Chap 2, 2001.6.

[133] The accused has his life and liberty in the balance at trial. Meanwhile, the victim has retribution. These are not directly comparable, however, the attorney's obligations to her client is a sacred and doesn't vary based on type of client.

[134] Prosser, *supra* note 121, at 589.

obtained what he needed to comprehensively argue on behalf of his client. Ultimately, Discovery is important for the SVC because, without it his arguments are based on conjecture and potentially privileged information garnered from his client. To prevent unethical or incompetent representation, the most productive and efficient method to accomplish this is for Congress to enact changes to RCM 701, allowing the victim discovery in these criminal cases.[135]

C. The Challenges Ahead

1. Mixed Findings of Case Law

Prior to 2012, Congress had only addressed victim's rights, in any meaningful way, through the CVRA; and that did not even apply to the victims on the military courts. As such, federal case law related to victim rights is minimal, but does exist. There are numerous victim related cases arising in the states and federal courts. Most, however, address whether the victim received an adequate opportunity to voice her opinion in sentencing matters. Meanwhile, military cases have focused on the role of the SVC in the court-martial proceedings.

While no court, in any jurisdiction, has directly addressed the issue of granting discovery to the victim, some courts have done so generally, and are instructive on how and why this right should exist. No military court has addressed whether the victim has any right to discovery generally, much less specifically related to the victim's rights related to MREs 412 and 513. In search of persuasive case law, the federal courts have only peripherally

[135] *See infra* section IV. However, if these proposed discovery rules are not adopted, military judges can and should nonetheless require them of counsel practicing before them. They have the inherent authority to manage the case: ". . . this court, under its inherent authority to manage this case, could impose discovery obligations on each party . . . it will permit Plaintiffs the opportunity to conduct limited discovery in the form of document requests and requests for admissions from the U.S. Attorney's Office." Doe v. United States, 817 F.Supp.2d 1337 (S.D.FL 2011).

addressed victim's discovery rights pursuant to the CVRA. However, examining some of those decisions will provide guidance, showing a mixed acceptance of victims' discovery rights in practice. Ultimately, these cases will hold favorably to how and why production of discovery related to MREs 412 and 513 should be implemented into RCM 701.

a. Federal Case Law

The victim's right to discovery is implicit in the case of *Doe v. United States*, an Eleventh Circuit decision from 2014.[136] In this case, the defendant and the prosecutor came to a pretrial agreement whereby the defendant would enter mixed pleas.[137] The victim, however, was never given the opportunity to consult with the prosecutor before the agreement was made.[138] Upon learning of the agreement, the victim appealed to enforce her rights under the CVRA.[139] As part of the appeal, the victim wanted discovery of any discussions between the defense and the prosecutor produced.[140]

The district court holding had an underlying assumption that the victim had a right to discovery of the correspondence between the prosecution and defendant to carry-out her right. To reinforce this right, the *Doe* court cited *Kenna v. U.S. Dist Court*, "the [CVRA] was enacted to make victims *full* participants in the criminal justice system".[141] The *Doe* court was careful to limit this however:

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[136] Doe v. United States, 749 F.3d 999 (11th Cir 2014).

[137] Doe v. United States, 817 F.Supp.2d 1337 (S.D. Fl 2011).

[138] *Id*. at 1339.

[139] *Id*. at 1339-40.

[140] *Id*. at 1343.

[141] *Id*. at 1340 (emphasis added) (citing Kenna v. United States Dist Court, 435 F.3d 1011, 1016 (9th Cir 2006); *see also* S.Rep.No. 108-191, at 38 (2003) ("Victims should always be given the power to determine the form of

> As the court explained in *Rubin*, "there is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy or object to or appeal pretrial or *in limine* orders . . . . In short, the CVRA, for the most part, gives victims a voice, not a veto." . . .Thus to the extent that the victims' pre-charge CVRA rights impinge upon prosecutorial discretion, under the plain language of the statue those rights must yield.[142]

The district court was occupied with the issue of a victim making prosecutorial decisions, it was not concerned with the victim's right to discovery. Prosecution decisions are not dependant on whether the victim receives discovery; but the discovery does allow the victim an informed voice.

The circuit court got closer to formally discussing and granting discovery. They specifically addressed "whether a privilege bars crime victims from discovering plea negotiations."[143] They found, "the intervenors [sic] argue that the district court erred when it ordered the disclosure of the plea negotiations because three privileges protect the correspondence . . . We disagree. No privilege prevents the disclosure of the plea negotiations."[144] As such, they assumed a right to discovery of this information. The circuit court's concern was with the balancing of rights between the victim and accused. Consequentially, the victim's rights prevailed over assertions of privileged communication.

Further, the *Doe* court did not recognize any clear right to "object to or appeal pretrial or in limine orders."[145] It was this, in part, upon which they made their ultimate holding. In

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the statement. . . . The Committee does not intend that the right to be heard be limited to 'written' statements, because the victim may wish to communicate in other appropriate ways.").

[142] *Id*. at 1342 (citing United States v. Rubin, 558 F.Supp.2d 411, 418 (E.D.N.Y. 2008).

[143] *Doe*, 749 F.3d at 1001.

[144] *Id*. at 1008-9.

[145] *Doe*, 817 F.Supp.2d at 1343.

contrast today, the SVC does have these actual rights. It is for these purposes precisely why the SVC exists: to object or appeal on behalf of the victim and her rights. This update in law changes the analysis, and sways in favor of granting discovery to the victim. As the victim now has certain of these important rights (and abilities) in the trial (court-martial), the *Doe* court may have had a different outcome—one that favors granting discovery.

United States v. Ingrassia is a case dealing with the issue of whether the victims were given proper notice of the disposition of the case. The magistrate handling pre-trial portions of the case recommended that the sentencing report be served on all victims via standard mail.[146] The government did not object to this; but it did not mail the reports; instead, the government made the reports available on the internet with "Public Access to Court Electronic Records" (PACER).[147] Using PACER was a service practice the government had utilized with other records for victims in the same case.[148]

The victims appealed, citing that appropriate notice was via standard mail not electronic records. They alleged the service discrepancy violated their rights under the CVRA. The district court held:

> That service of the objections on the identified victims of the crime by first class mail is unnecessary and not required under the CVRA or the Federal Magistrates Act. The Report, the government's objections, and the Memorandum of Decision and Order are all available to the public on the Public Access to Court Electronic Records . . . .[149]

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[146] United States v. Ingrassia, 392 F.Supp.2d 493 (E.D.N.Y. 2005).

[147] *Id*. at 498.

[148] *Id*. at 498.

[149] *Id*. at 497.

The learning point from the district court's holding is that service by mail was not necessary solely because the victims already had the information available to them, albeit in another form. Importantly, the decision does not suggest that the victim did not have a right to the reports. Further, there is no claim that the victims should not have this information upon which to make their decisions or to provide input on sentencing. In fact, the court states that "the CVRA plainly puts an interested victim in a position to get [such information] by establishing an enforceable right to confer with the prosecutor."[150] To put an interested victim in a position to get such information means the victim needs evidence. If not explicitly, this court implicitly acknowledged the victim's right to at least receive some discovery.

However, in *United States v. Sacane*, the U.S. District Court of Connecticut held that the victim did not have a right to a pre-sentencing report.[151] Here, Sacane pled guilty to a charge related to financial fraud. Durus Funds, the victim, appealed the sentence "claim[ing] that without a court order compelling more detailed disclosures, the court will not have an accurate picture of the assets available for purposes of setting a payment schedule."[152] The court held that the victim's "reliance on the CVRA, which allows a crime victim to enforce certain rights enumerated in §3771(a), is misplaced. . . it does not grant crime victims a right to discover financial information from a defendant."[153] In achieving this decision, the court held:

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[150] *Id*. at 497.

[151] United States v. Sacane, Crim No. 3:05cr325(AHN), 2007 U.S. Dist. LEXIS 22178, at *3 (D. Conn. Mar 28, 2007).

[152] *Id*. at *3.

[153] *Id*. at *7 (continuing, the court went on to say that "Courts have consistently held that a crime victim does not have the right under the CVRA to obtain information contained in a presentence report . . . .").

> If the CVRA does not provide crime victims with a right to disclosure of the presentence report, then *a fortiori* it would not provide crime victims with a right to obtain such disclosures directly from a defendant . . . the CVRA does not provide a mechanism for crime victims to obtain information from a defendant; rather, it was enacted to give crime victims an efficient means by which to provide information to the court and, as necessary, get information from the government for that purpose: The Senate Debate supports the view that the framers of the CVRA intended that the right to be heard would be a mechanism for victims to provide information. To the extent victims might wish to obtain information on which to base their input, the contemplated mechanism for doing so was conferral with the prosecutor rather than the implicit creation of an affirmative disclosure right.[154]

Essentially, the court noted a lack of statutory language directing the victim to specifically receive this information. Under the CVRA, the court viewed the victim as a provider of information not a 'user' of information. Similarly, in *In re Dem*, the court found "it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion." [155] As such, federal courts do not seem generally apt to read in a right of discovery of sentencing materials for victims.

By limiting a victim to a 'provider of information,' the courts have minimized her role to that of a ordinary witness. Thus, courts like the *In Re Dem*, *Ingrassia*, and *Secane* read the CVRA as only providing expanded rights to the victim solely as a witness, and not as a participant. These cases, however, are distinct from the military court-martial setting because (1) these courts were only addressing privileges like input on sentencing, and (2) Congress has firmly identified that the military victim is a participant in the trial, not just a witness. The military crime victim has greater interest in receiving discovery because

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[154] *Id*. at *5-6 (internal citation omitted).

[155] *In Re* Dem, 527 F.3d 391, 395 (5th Cir. 2008).

Congress has identified her greater role in trial to protect such rights as her right of privacy (as found via MREs 412 and 513).

b. Other Jurisdictions

In a brief look at two state jurisdictions, issue of interplay between the CVRA and discovery is somewhat cured. Colorado law dictates that the victim has a "right to receive [the] initial incident report . . . limited by law enforcement depending on status of case."[156] The victim also has the right to view all or part of the pre-sentencing report.[157] While not evidentiary, the victim also has the right to be informed of any motion that would "substantially delay prosecution."[158] She further has the right to be heard on this issue.

In *State ex rel Hilbig v. McDonald*, a Texas state court, it was held that even a right granted via the state constitution (right to consult with the prosecutor) is not enough to compel the government to serve discovery on the victim.[159] It was argued that in addition to the right of consultation, the victim had a right to "fairness."[160] Even taking these two rights together, the court did not grant the victim any right of discovery.[161] A case involving issues of MRE 412 and 513-like rules may have a different outcome, as the right is based in the federal Constitution. This ultimately demonstrates that some state courts are not likely to find a discovery right when one has not specifically articulated by the legislature.

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[156] COLO. REV. STAT. § 24-4.1-302.5 (2014). Though, Colorado is still dealing with issues that are not MREs 412 and 513 equivalents.

[157] *Id*. (having "[t]he right, at the discretion of the district attorney, to view all or a portion of the presentence report of the probation department . . . .").

[158] *Id*. at § 24-4.1-303.

[159] State *ex rel* Hilbig v. McDonald, 839 S.W.2d 854, 855-56 (Tex. App. 1992).

[160] *Id*.

[161] *Id*.

Almost all states have taken legislative or constitutional action to provide the victim's rights.[162] There is a split among states in allowing victims at least some form of discovery, as the examples above demonstrates. But none have taken the step of providing SVCs to represent victims of crimes as the military has. Accordingly, state jurisdictions are not able to give precise guidance related to discovery to the SVC in relation to the victim's privacy rights.

2. Military cases

While appellate military courts have not dealt with discovery for the victim, they have dealt, in a limited fashion, with SVC related issues. The military first dealt with the SVC issue in 2013, in *LRM v. Kastenberg*, a case arising out of the Air Force.[163] This case addressed the SVC before Congress required implementation of the SVC or provided victims a clear path for appeals.

a. LRM v. Kastenberg.

In *LRM v. Kastenberg*, the SVC filed a notice of appearance to the court asserting his representation of LRM, the alleged victim, and asserting her's rights associated with MREs 412, 513, and 514.[164] In part, the SVC requested production of any motion for admission of evidence under one of these three MREs.[165] After receiving a copy of a motion for admission of MRE 412 evidence, the SVC requested to "present an argument" on the motion

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[162] *See supra* note 67.

[163] *Kastenberg*, 72 M.J. at 364.

[164] *Id*. at 3-4.

[165] *Id*. at 4.

to the trial judge in response.[166] The trial judge found that the victim "had no standing, through counsel or otherwise, to motion the court for relief in the production of documents."[167] By holding that LRM did not have standing, the trial judge explained that LRM was limited to the "right to be heard to factual matters" and that "standing denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard."[168] Upon denial of motion to reconsider, LRM's counsel filed a writ of mandamus to the Air Force Court of Criminal Appeals, who denied standing. The Judge Advocate General of the Air Force then certified the issue for review by the Court of Appeals for the Armed Forces (CAAF).[169]

CAAF held, in part, that "a reasonable opportunity to be heard at a hearing includes the right to present facts *and legal argument*, and that a victim or patient who is represented by counsel be heard through counsel."[170] This was based on a theory that:

> [b]oth MRE 412 and 513 permit parties to call witnesses, including the alleged victim . . . However, in addition to providing that the victim or patient may be called to testify as a witness on factual matters, the rules also grant the victim or patient the opportunity to be heard. Furthermore, every time that the MRE and the RCM use the term "to be heard," it refers to occasions when the parties can provide argument through counsel to the military judge on a legal issue, rather than an occasion when a witness testifies.[171]

Accordingly, CAAF held that the right to be heard means more than just the victim testifying factually; it means the victim has the right to have her SVC present a legal argument on her

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[166] *Id*. at 4.

[167] *Id*. at 4-5 (citation omitted).

[168] *Id*. at 4 (citation omitted).

[169] *Id*. at 5.

[170] *Id*. at 14 (emphasis added)

[171] *Id*. at 14.

behalf. The next step, that the court does not take, is addressing what is necessary to present argument. As argued here, the most appropriate way to provide for argument is to provide discovery. Ultimately, however, the court left any discovery issues unaddressed.

b. Sommer v. Bridges.

The Army Court of Criminal Appeals (ACCA) heard a mandamus appeal by the alleged victim to: (1) the military trial judge's denial of a trial-delay request by the SVC, and (2) some discovery violations.[172] The trial judge denied the SVC's requested delay, in part because he determined the SVC did not have proper standing or a ripe participation right in the trial: "Even if you had such authority, you have no good cause for continuance. As you say, there are no known [Military Rules for Evidence] 412 or 513 issues to be litigated at trial."[173] Ultimately, the ACCA agreed with the trial military judge.[174]

While the ACCA's holding did not concern discovery issues, the discussion in *dicta* is instructive as to discovery issues. The victim argued, in part, that her rights were violated because she did not receive appropriate discovery related to trial dates and other associated administrative material.[175] In response, ACCA, looked to a "Memorandum from the Office of The Judge Advocate General for the Army, for Judge Advocate Legal Service Personnel" concerning "Disclosure of Information to Crime Victims."[176] Specifically, ACCA noted that

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[172] Sommer v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. 2014).

[173] *Id*. at 3.

[174] *Id*. at 7.

[175] *Id*. at 2-3.

[176] *Id*. at 6, n.2, (citing Memorandum from the Office of The Judge Advocate General, for Judge Advocate Legal Service Personnel, Subject: Disclosure of Information to Crime Victims- POLICY MEMORANDUM 14-09, para. 4.b(3)(1 Oct. 2014)(Disclosure Mem.). It reads in applicable part: "[a]ny docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial . . . ." *Id.*

the internal policy for docketing provided that "notice need not be provide[d] until receipt or filing by the government, not beforehand."[177] Additionally, ACCA noted that the Disclosure Memo's "policy 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 a victim the notice outlines in the policy."[178] Ultimately, ACCA was not going to create a right to discovery or cause of action that was not elsewhere created. Nor would it create rules contrary to the Army's internal policies.[179] Instead ACCA defended that they "must zealously defend the military trial judge's authority to manage the proceedings over which he presides."[180]

3. Summary of Cases.

The few military cases that have involved victim's issues, have focused on the victim's standing in the case through the SVC. What has not been fully addressed or decided are the discovery rights of the victim. In both of the above military cases, the victim received at least some underlying amount of discovery, but it seems this was out of generosity not obligation. In *LRM*, discovery appeared to have been an issue at trial, but was not addressed by CAAF. The court did suggest, however, that when a victim has an interest in the proceeding she is entitled to both factual and legal argument. In *Sommer*, ACCA did briefly address discovery it but held that the right does not exist in that specific fact scenario. Ultimately then, the military courts have not discounted the right to discovery outright, but:

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[177] *Id*. at 6, n.2.

[178] *Id*. at 6 n.2.

[179] *Id.* at 6.

[180] *Id*. at 6 (citing United States v. Browers, 20 M.J. 356, 361 (C.M.A. 1985) (Cox, J. concurring)). Leaving the issue to trial judge discretion, is, presumably, another avenue for granting discovery to victims. The problem is that it would be *ad hoc* and largely judge dependant, thus providing great variance of enforcement across the military.

(1) require an actual interest that has been infringed, and (2) would prefer to have an existing rule laid out for them, rather than create their own piecemeal fix to discovery rights.

4. Red Cell Arguments

The addition of both victim's rights and the implementation of an SVC program to the military criminal process have been received with skepticism and resistance from practitioners in the court room to commentators in discussion forums. The following are arguments, found in these areas, against providing victims' the right to discovery.

a. A Zero Sum Relationship With the Accused

One argument against victim rights in general, and victim discovery in particular, is that by granting the victim more rights, the accused's rights will be diminished. On the other side of the spectrum, proponents of victims' rights often advocate that victims' discovery rights should be identical to accused's discovery rights. This too is problematic, because each party, while sharing the interest of justice, has independent and different interests in the court-martial.

> If advocates really do want to create more balance and equity between the treatment of victims and defendants at sentencing, the disconnect between the two practices should not be overlooked. The failure to acknowledge this disconnect, as well as the failure to appeal for some form of readjustment, makes victims' advocates calls for balance and equality in the criminal justice system ring somewhat hollow.[181]

But, it is difficult to find the right balance to this perceived imbalance due to an understanding that the state has the primary and sole interest in prosecuting criminals.[182]

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[181] Giannini, *supra* note 67, at 436 (2011).

[182] *Id*. at 437-38. Giannini suggests that:

> The imbalance that exists between victims and defendants is rooted within the public prosecution model, which generally structures how our country addresses crime. . . . But as a

This, however, is logical fallacy; discovery is not a zero-sum game. Multiple parties are able to see and hold different identical copies of the same evidence/discovery. The answer is "finding a true balance between the allocution right of victims and defendants."[183] Further, "[i]n an attempt to render impartial justice, injustice may result when a victim's interests in the proceedings against her offender are ignored, sidelined, or treated as secondary by the prosecution, the defense, and the court."[184] Nevertheless, courts are apprehensive to take an ad hoc approach to balance the rights of the victim and rights of the accused.

Some adversaries to victims' rights pit each party against the other creating a contentious struggle for rights between the victim and the accused,[185] or the victim and government verse the accused (two versus one); but they do not recognize that the victim is not always aligned with the government, or whose issue is not relevant to the accused. As discussed previously,

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> violation which tears at the fabric of our peace and community and hence creates a harm that is greater than simply the harm to the victim involved . . . . The public prosecution model emphasizes that certain wrongs so violate the norms of appropriate behavior in civil society that the power of the state should be brought to bear against individuals violating those norms. By conceiving of crime as acts that harm not only individual victims, but also all members of our body of ordered government, the state assumes the duties prosecution and punishment, thereby relieving victims of the personal responsibility of holding perpetrators liable for their criminal acts. However, the public prosecution model focuses on the relationship between the state and the offender, rather than the victim and the offender, and has therefore regulated victims to the role of witnesses or of evidence. Institutional consideration of victims' individual harms has become secondary to the state's primary goals of deterring and punishing criminal activity.

Id. (citations omitted). This article is based on the premise that Congress sees the court-martial having two purposes: (1) primarily it is a validation of public interests (and good order and discipline); and (2) 'victim validation' (which is growing in importance).

[183] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[184] Giannini, *supra* note 67, at, 471 (2011).

[185] *See* Michael M O'Hear, *Victims and Criminal Justice: What's next?*, 19 FED. SENT'G REP. 83, 83 (2006) ("The victims' rights movement has proven remarkably successful in the political arena. The success is due, in part, to popular stereotypes of "good" victims and "bad" defendants, as well as to a legislative reform program that emphasizes giving victims procedural rights analogous to those of defendants.").

this view that the state as the sole interest is changing.[186] As such, the victim receiving discovery does not diminish the accused's right in any capacity (it may just make the defense counsel work harder).

b. Tainted Testimony

Another argument against providing discovery to the victim is that doing so would taint her testimony at trial. More specifically, giving the victim discovery of statements and evidence from the case will help her craft or falsify her "story" for the court so that it comports with all the other evidence the prosecutor will provide to the trier of fact.[187] In essence accusing the victim of perjury. But this is lacking for multiple reasons.

First, Congress has already mandated that the victim is allowed a copy of the record for the Article 32 hearing.[188] Similarly, the victim or SVC is able to sit through the Article 32 hearing and listen to the facts as they are presented. This alone offers a fairly early opportunity to the victim to obtain some discovery. This opportunity, however, covers information that is public and, more importantly, it is unlikely to contain discovery pertinent to her privacy rights.

Second, the victim is already permitted to sit through trial, limited by the trial judge's discretion.[189] As MRE 615 permits:

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[186] *See* 104 CONG. REC. S460, s4269 (daily ed. Apr. 22, 2004) (statement of Sen Fainstein).

[187] Advocate, Comment to *Thinking About SVC and Victim Discovery Rights*, CAAFLOG (Jan. 23, 2014, 4:39 PM), http://www.caaflog.com/2014/01/23/thinking-about-svc-and-victim-discovery-rights/ (" [D]isclosing information is fraught with peril. I also think the more information any witness has about a case, the more likely it is their testimony will be influenced.").

[188] NDAA for FY 14, *supra* note 6, at § 702 (providing that the Article 32 report could be delayed as there is no time requirement for its service).

[189] *See* MCM, *supra* note 9, Mil. R. Evid. 615 and NDAA for FY 14, *supra* note 6, at § 806b.

> At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of . . . (4) a person authorized by statute to be present at courts-martial, or (5) any victim of any offense from trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presenting proceedings.[190]

Accordingly, the victim already has legal access to hear some evidence. What end is there in delaying the time that she discovers the evidence, especially when, the victim could be testifying after all other evidence is presented by the prosecutor? To root out the truth, a defense counsel's cross-examination can rigorously confront the victim, point out any and all inconsistencies, and confront them with the fact that they were able to look at the evidence beforehand to prepare for testimony.

Third, the argument is based on the assumption that every victim is dishonest from the outset of her allegation and will use the discovered evidence to convert her testimony in court to that of all other evidence. It further implies that the prosecutor or SVC will fail in his ethic duty of candor to the tribunal.[191] The implication necessary assumes that the SVC will know if the victim's in-court testimony contrasts previously made privileged statements to him; and the SVC will fail to take some action (including: trying to privately persuade his client to tell

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> The right not to be excluded from any public hearing or proceeding described in paragraph (2) [inter alia. Article 32, court-martial] unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

Id.

[190] MCM, *supra* note 9, Mil. R. Evid. 615.

[191] MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

> A lawyer shall not knowingly: . . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Id.

the truth, removing himself from her representation, or informing the tribunal) to remedy the situation in violation of his ethical standards.[192] Accordingly, the argument that victim will change her testimony based off of obtaining discovery necessarily includes an accusation that the SVC will violate his ethical obligations.[193]

The same assumption would be and has been made against a defense counsel in the similar argument that the accused would commit (if the accused testified at trial) or suborn perjury should he receive discovery.[194] However, there are no statistics, reports, or evidence to support this supposition: for either the victim or the accused.[195] The criminal justice system is built on the bedrock that assumes every attorney an honest participant. If this assumption is not made, then no part of the criminal justice system can be trusted and the entire construct falls apart. If this is, in fact, a ubiquitous or prevailing problem, then the

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[192] Informing the tribunal is one remedy, but may not be the only or best one- out of duty to the client (i.e. removing one's self from representation). The prosecutor would not have the same attorney-client duties the SVC would.

[193] Issues of whether the victim is a party to the court is not resolved, and not in the scope of this article. However, for this argument the author presumes that a defense counsel and prosecutor will have the obligation of candor to the tribunal throughout the court-martial. It further assumes that the SVC assumes the obligation of candor upon his notice of appearance to the court; once he takes action toward the court he owes integrity to the process. Thus, in most cases, the SVC will have this obligation incumbent upon them.

[194] *See* Brennan, *The Criminal Prosecution*, *supra* note 1, at 287; Brennan, *A Progress Report*, *supra* note 2, at, 2.

[195] Brennan, *The Criminal Prosecution*, *supra* note 1, at 287.

> [H]ow can we be so positive criminal discovery will produce perjured defenses when we have firmly shut the door to such discovery? That alleged experience is simply non-existent." He elaborated further: "There have been many assertions that livery discovery invites perjury and fabrication, but virtually no tangible proof or documentation of these assertions. What meager statistical evidence there is suggests that perjury is a very slight danger indeed. . . . Indeed, it seems quite as likely that better knowledge on both sides concerning the material evidence, and an awareness of the defendant's part how much of the case is recorded on paper, would serve to deter rather than encourage perjury and fabrication.

Id. at 287 n.39.

criminal justice system is fundamentally flawed and discovery to the SVC will have no effect.

c. Summary

Counterarguments to granting victims the right of discovery are based on fear that it will harm the accused and his rights at trial. These fears, however, are not fully realized. Any residual implication on the accused rights comes about only when his rights abut another's rights or interests. This balance of rights is already, by and large, addressed in the evidentiary rules for admitting MRE 412 and 513 evidence. Discovery to the victim is not what potentially limits or is connected to the accused's rights. It is what allows the SVC to competently advise and represent the victim.

This is not to say that Congress has not limited the accused's position, and this will be addressed in Section III, but discovery itself does not harm or degrade the accused's rights.

D. Options of Discovery for the Victim

The extent or amount of the discovery that the victim should receive needs to be addressed, as there are various options. This section briefly examines various amounts of potential discovery, total or only on request to the military judge, and one middle ground amount.

1. No Discovery.

Under this theory, victims receive no discovery without an affirmative request for, and judicial ruling in favor of, granting it. There currently are no rights in the RCMs that grant a victim the right to discovery.[196] Furthermore, there is no affirmative duty on a prosecutor to

[196] *See* United States v. Sacane, Crim No. 3:05cr325(AHN), 2007 U.S. Dist. LEXIS 22178, at *7 (D. Conn. Mar 28, 2007) (noting that "nothing in that statute suggest that the court has the discretion to order Sacane to turn over such financial information to the Durus Funds").

give discovery to the victim. This leaves the victim with no discovery outside of her own knowledge. If the victim believes she needs access to pertinent evidence, she will be left petitioning the court for this information. This leaves an *ad hoc* situation with a burden on the victim to show how and why she has a right to obtain the evidence.

Further, this process requires the victim to know about the evidence before they have the evidence, in order to request it. With the new standards of the Article 32 preliminary hearing, it is very unlikely the victim will see any evidence presented that may relate to one of her privacy rights or evidence incriminating her in a possible crime. This is because the accused will most likely not have the opportunity to question her and tip his hand on possible other evidence related to her privacy rights. Nor will the accused put that type of evidence into the record, at the Article 32. Accordingly, the victim is left in the dark about any outside evidence concerning her privacy rights, until motions on the issue are being argued. If it is not until motions that the victim is requesting specific discovery, it will likely lead to a delay in trial, which has the potential to harm the accused. It will also set her at a disadvantage to protect her rights. This is not a tenable option.

2. Full Discovery

Under this theory, victims receive discovery equal to what the accused receives (or potentially as much as what the prosecutor receives). This includes all statements, all investigative notes, and all medical reports related to the accused, all alleged victims, and all witnesses.

One substantive basis for this is that "[i]t will eventually be made part of the record of trial which must be provided to the victim and it is sensible to release it when it is of use to a

victim's counsel."[197] The argument goes that as the victim has the right to a copy of the record of trial, so will ultimately learn all the evidence anyway.[198]

However, full discovery is not necessary or practical for the SVC to be competent. Under current criminal justice philosophy, with society having the primary interest in prosecutions, the victim's interest goes only so far as her rights go. Her interest is not in the verdict, the sentence, the privacy rights of another alleged victim, in the RCM 404b rights of the accused, or in the Article 31b rights of the accused. The interest is limited to those rights associated with her privacy.[199] Protecting personal identifying information and privacy of witnesses and the accused, among other interests, is one reason to not give total discovery. Depending on the timing of discovery, another reason may be that it could interfere with other investigations. For these reasons of relevancy and counter-interests, full discovery is not an optimal option.

3. Relevant and Partial Discovery

Under this theory, a victim receives evidence associated only with her interests and rights and only when they are implicated. This can be accomplished by updating RCM 701 to require certain discovery served on the victim of a case. The areas that should be carved-out involve: Charge Sheets, the victim's own statements,[200] any material that is related to MREs

[197] Goewert & Dilworth, *supra* note 21, at 31. But even this argument lacks because the record of trial will not contain evidence that was never put in front of the court during pretrial matters or during trial.

[198] 10 U.S.C. § 854(e).

[199] Largely this is where MREs 412 and 513 are concerned.

[200] Major Michael Zimmerman, *An Ounce of Improper Preparation Isn't Worth the Cure: The Impact of Military Rule of Evidence 612 on Detecting Witness Coaching*, ARMY LAW., May 2014, at 21, 30 (suggesting that "the statement of the eyewitness, with counsel's notes and highlights . . . squarely falls within the ambit of MRE 612 and a judge will likely order disclosure").

412 and 513 issues;[201] correspondence between the accused and the government; and Article 32 reports— before referral of charges.[202] All of these would be curtailed, or limited,[203] pursuant to privilege,[204] being classified,[205] or need based on a negative impact that discovery would have on an on-going investigation.[206]

Some SVCs argue that in addition to the victim receiving filings to the court that relate to her MRE 412, 513, and 514 rights, she should receive the Article 32 report:

> In providing only that information that will be provided to the court, the government may inadvertently hamper SVCs in their role. The better practice would be to provide the victims' counsel with a copy of the Article 32 report. Such a document normally contains information that will be provided to a court in hearings under MRE 412 and 513 and will allow the SVC to fully understand the case, competently brief the issues and bring matters to the court's attention that might have been overlooked by the parties.[207]

This argument, made two years ago, is already a bit dated in view of what Article 32 now provides. As the defense will have little ability to derive new information from the hearing, they are less likely to probe issues that would implicate the victim's privacy rights. While this rationale is a bit moot, the victim, pursuant the NDAA for FY 2014, still receives a copy

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[201] Chris, Comment to *Thinking About SVC and Victim Discovery Rights*, CAAFLOG (Jan. 24, 2014, 4:36 PM), http://www.caaflog.com/2014/01/23/thinking-about-svc-and-victim-discovery-rights/ ("[I]f the victim does not have the 412/513 evidence raised in a motion they cannot intelligently argue the victim's position. They cannot hope to invoke and protect their rights under Article 6(b) if they are left in the dark.") (citing U.S. v. Heaton, 458 F.Supp.2d 1271(D.Utah, 2006)).

[202] NDAA for FY 14, *supra* note 6, at § 1702 (requiring that the 32 be recorded and a copy made available to the victim). The definition of "made available" for the purposes of this rule was not provided.

[203] MCM, *supra* note 9, at R.C.M. 701(f) and (g).

[204] MCM, *supra* note 9, MIL. R. EVID 501-4.

[205] MCM, *supra* note 9, MIL. R. EVID 505.

[206] MCM, *supra* note 9, MIL. R. EVID 506, 7.

[207] Goewert & Dilworth, *supra* note 21, at 31.

of the Article 32 report, thus allowing the SVC a marginally better chance to advise the victim in all aspects of her case—including her prosecutorial preferences.

Relevant or tailored discovery sidesteps the problem of waiting for motions to obtain discovery by the SVC. It also does not have the issues with providing all information to the victim. This option provides the victim only that discovery that impacts her rights and interest. Other evidence is not relevant to her and thus unnecessary to provide.

III. Discovery Rights for the Accused

> *[W]hen parties lack access to favorable evidence, the fairness and reliability of the adjudication is called into question. Liberal discovery is considered essential to enable the parties to present their best cases as well as to enable them to make informed settlement decisions.*[208]

The accused's rights have long been secondary to the government's interests, and are perpetually under scrutiny in the United States.[209] However, just because the accused has long struggled to obtain rights in the criminal process is not a reason to continue to diminish his rights, even if you believe the accused is already adequately protected.[210]

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[208] Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 643 (2013).

[209] *See* Brennan, *The Criminal Prosecution*, *supra* note 1, at 280 (referencing that "Soviet prosecutors at the War Crimes Trials at Nuremberg protested against adoption of the prevailing American procedures on the ground that they're "not fair to defendants") (citation omitted).

[210] *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Noted legal scholar Learned Hand even held strong against the idea of expanded accused's discovery.

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and to make his defense fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. . . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Id.

Meanwhile, the accused in a military court martial, who traditionally has enjoyed greater protections than his accused brethren in the federal or state jurisdictions in the United States, has taken some setbacks to his rights and privileges.[211] Specifically, the accused in sexual assault cases has had his right to use "Good Military Character" as a defense in trial, or with the convening authority, removed.[212] He has also seen the elimination the convening authority's ability to grant any meaningful post trial clemency.[213] Moreover, his opportunity to question the alleged victim during the Article 32 hearing has practically been removed.[214] And finally, he has seen a heighten burden placed on his ability to discovery MRE 513 evidence.[215]

Additionally, greater resources are expended to aid prosecutors in Article 120 litigation. Each military service now has special experienced prosecutors, who are dedicated to handling major crimes and sexual assault allegations.[216] To aid these special sexual assault prosecutors, they are given dedicated investigators *in addition to* the existing U.S. Army Criminal Investigation Command, Air Force Office of Special Investigations, or the Naval Criminal Investigative Service.[217] Meanwhile, the accused has not gained any similar benefit of experienced counsel or investigator. Instead, he continues to play the role of underdog to the government. The military prosecutor now has more tools at its disposal for prosecution

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[211] For example: right to provided counsel in all cases, good military character as a defense (in limited cases now), presence at the Article 32 pre-trial hearing, etc..

[212] NDAA for FY 14, *supra* note 6, at § 1708.

[213] *Id*. at § 1702.

[214] *Id*. at § 1702.

[215] NDAA for FY 15, *supra* note 19, at § 537.

[216] *See* U.S. Marine Corps Military Justice Report for Fiscal Year 2012 (2013).

[217] *Id*.

than ever before, the victim has greater influence on whether the court-martial proceeds,[218] and the accused has fewer (if any) opportunities to question the alleged victim. Ultimately, this leaves the accused at a net loss in rights and privileges.

One way to remedy this net loss is to adjust the rights of discovery. Primarily, there needs to be earlier and broader discovery from the government to the accused under RCM 701. Additionally, RCM 702 needs to be expanded allowing greater use of depositions of sexual assault victims (with greater MRE 412 and 513 protections). A lack of broad discovery keeps potentially important information from the accused and not disclosing this material "undermines confidence in the outcome of the trial" because the evidence might have led to an acquittal."[219]

A. History of Struggle

1. Since Day One of the Republic

The accused in the criminal trial has long struggled to obtain discovery of the evidence that would be used by the prosecutor in preparation for trial much less the evidence against him.[220] In a typical opinion of the times, the New Jersey Supreme Court held, in 1953, that the accused was not allowed a copy or inspection his confession or other case related documents.[221] As recently as the 1970s Congress "[r]efuse[d] to approve amendments . . . that would have provided for discovery of names of witnesses to be called, on the ground that

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[218] *See supra* Part II.

[219] United States v. Bagley, 473 US 667, 678(1985). This logic also applies to the victim.

[220] *See* Brennan, *The Criminal Prosecution*, *supra* note 1, at 280.

[221] State v. Tune, 13 N.J. 203, 227 (1953) ("The part of the order permitting the defendant to inspect his confession is reversed and the part of the order denying inspection of other papers in the county prosecutor's possession is affirmed.").

to allow this is not in the interest of effective administration of criminal justice."[222] Further, on multiple occasions, the Supreme Court found that the accused had no Constitutional right to discovery.[223]

While the amount and quality of accused's right to discovery have consistently been addressed by the federal courts, it rarely results in his favor. Yet, one early case to favorably address discovery rights of the accused was *United States v. Burr*.[224] The *Burr* court admonished a lower court decision that determined the accused had no right to discovery: "it would justly tarnish the reputation of the court which had given its sanction to its [the discovery] being withheld."[225] Justice Brennan regretfully noted many decades later that "the value of [the *Burr*] precedent was virtually unappreciated in our country for almost a century and a half."[226]

The first Supreme Court case that changed the tide regarding discovery was *Brady v. Maryland*.[227] The holding in *Brady* required a positive obligation of the prosecutor to disclose exculpatory, mitigating, and extenuating evidence to the defense, without a

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[222] CHARLES A. WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE 62 (4th ed. 2009) (citation omitted) (referencing Federal Rules of Criminal Procedure 16 which provides discovery rights in federal trails).

[223] *See* Weatherford v. Bursley, 429 U.S. 545, 559 (1977); Gray v. Netherlands, 518 U.S. 152 (1966).

[224] United States v. Burr, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

[225] *Id*. at 37.

[226] Brennan, *The Criminal Prosecution*, *supra* note 1, at 285.

[227] Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the defense asked for discovery prior to trial. The prosecutor turned over some, but not all of the evidence, omitting an admission by Boblit that he fired the gun that killed the victim. The Court held that not disclosing favorable evidence to the accused was in violation of the accused's Fourteenth Amendment's Due Process protection; regardless of the intent of the prosecutor. *Id.*

preliminary request by the defense.[228] The Court believed justice, above a conviction or an acquittal, should be sought:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: The United States wins its point whenever justice is done its citizens in courts.[229]

However, shortly after the *Brady* decision, the Court struggled to find what it believed was the appropriate balance of rights. In one holding, the Court limited discovery, declaring that "there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . ."[230] Despite this noted minimization, the Court also assured that discovery to the accused was necessary:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[231]

The Court seems to have been trying to create a distinct line, but with no effive way to define it. It is doing this not to find a right "amount" of discovery but to find the right balance of power: "although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the

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[228] *Id*.

[229] *Id*. at 87 (citation omitted).

[230] *Weatherford*, 429 U.S. at 559.

[231] *Williams v. Florida*, 399 U.S. at 82 (footnote omitted).

accused and his accuser."[232] Here, the Court is referring to the Government as the 'accuser.' The Court seems to not want to harm the accused by too little information; but also seems to fear that the Government is disadvantaged by requiring it to turn over everything it has obtained. The source of the fear of turning over too much has, over time, proven non-existent.

2. Discovery is Worse Than Other Places

Despite the advancements in discovery for the accused, the amount of and timing in production of discovery may still be behind what it should be, or what other jurisdictions provide. In England, by at least 1990, discovery practice was much more robust and inclusive than it is today in the United States' military.[233] Specifically, "in more serious cases, [the prosecutor must] disclose any material in her files that has some bearing on the offense charged or on the surrounding circumstances, whether or not she intends to use this evidence at trial."[234] This is what a fair trial necessitates; a situation where the accused has access to see all evidence against him, which assures justice.

B. The Current Military Struggle

1. Back to the Hypothetical

In the first hypothetical posed at the beginning of this paper, Lance Corporal Anderson was accused of a crime that the alleged victim may not even be able to give evidence that he committed.[235] During the sexual encounter, Lance Corporal Vance never said not or gave an

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[232] *Wardius*, at 474.

[233] *See* Brennan, *A Progress Report, supra* note 2, at 15-16; J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 328-33 (S. Mitchell & P. Richardson 42d ed. 1985).

[234] Brennan, *A Progress Report, supra* note 2, at 15-16.

[235] *See Supra*, Part I.A.1

indication that she did not want to participate; in fact she was actively participating. The only evidence available to Lance Corporal Anderson is Lance Corporal Vance's written statement that she did want to have sexual intercourse with Lance Corporal Anderson, but he had sex with her anyways. Lance Corporal Anderson has no knowledge of the exculpatory and/or mitigating evidence that Lance Corporal Vance admits she participated in the sexual encounter and did not indicate she wanted it to stop. There is no way Lance Corporal Anderson could know this evidence exists, because his counsel has had no opportunity to discovery it. Accordingly, Lance Corporal Anderson will have to go to court and may be convicted. This scenario plays out under the current rules. These rules allow for an accused to potentially be convicted for a crime there is little to no evidence for.

2. What Discovery the Military Accused Should Receive

Under *Brady* and subsequent case law, the prosecutor has a positive obligation to disclose exculpatory, mitigating, and extenuating evidence to the defense, without a preliminary request by the defense.[236] RCM 701 requires a bit more from the government:

> Any paper which accompanied the charges when they referred to the court-martial . . . [and] any books, papers, documents . . . . which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused . . ..[237]

The key requirement is for discovery of evidence that is material to preparation of the defense. The Supreme Court has defined material as "favorable evidence [that] could reasonably be taken to put the whole case in such a different light as to undermine confidence

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[236] *Brady*, 373 U.S. 83.

[237] MCM, *supra* note 9, R.C.M 701.

in the verdict."[238] One problem with this definition is that it is a *post hoc* determination, and one that is more restrictive than a relevance determination, which ultimately hinders the accused's ability to receive discovery. Functionally, what this means is that the appellate court will look to see if the evidence not turned over to the accused was material, i.e. would it have resulted in a not-guilty verdict, if not, then any error would be harmless and the accused receives no benefit.[239] It is only afterwards do we determine the weight of the evidence in light of all else.

The accused does not receive any benefit of exculpatory evidence at pre-trial hearings either. The Supreme Court said trial courts do not have the "supervisory power" to create rules requiring a "prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury."[240] While Congress could make such a rule, the court held that the constitution does not require it.[241] As such, in the new Article 32 preliminary hearing where the prosecutor is limited in the scope of his presentation, he has little if any incentive to put forward exculpatory information. Once again then, the accused has no opportunity to

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[238] Kyles v. Whitely, 514 U.S. 419, 435 (1995).

[239] *See* Green, *supra* note 208, at 645-6 (addressing *Brady v. Maryland*, 373 U.S. 83 (1963)).

> [B]ut the materiality element is the most significant limitation on the disclosure duty. . . . The Supreme Court has said that evidence is not material unless it might have tipped the balance btw a conviction and an acquittal . . . evidence "undermines confidence in the outcome of the trial. . . . One could take the view that, like a "harmless error" standard, materiality is only a standard of post-conviction review—that is to say, that prosecutors must disclose all favorable evidence in connection with a trial but that afterwards a conviction will not be overturned unless, in hindsight, the withheld evidence was material. Some lower courts read *Brady* line of cases this way. But most lower courts interpret the Supreme Court decisions to permit prosecutors to withhold favorable evidence unless it is material. This is how the Department of Justice reads the high court-s opinions as well.

Id. (citations omitted).

[240] United States v. Williams, 504 U.S. 36, 45 (1992).

[241] *Id*.

discover potentially mitigating or exculpatory evidence. Nor does he enjoy the possibility of preliminary hearing officer getting the full picture of evidence to which he can make a an accurate recommendation to the convening authority (who is the ultimate gatekeeper to trial).

3. Military Accused: Losing the Article 32

One traditional and valuable tool to the accused facing General Court-Martial was the ability to obtain evidence at an Article 32 pre-trial investigation. As noted in the discussion section of RCM 405(a): "[t]he investigation also serves as a means of discovery."[242] This allowed the accused to receive copies of whatever the government provided the investigating officer. It also allowed the counsel for the accused to ask questions of witness character or follow relevant tangents that may not directly tie to an element of a charged offense. However, Congress recently undercut this opportunity in an attempt to protect the alleged victim.[243]

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[242] MCM, *supra* note 9, R.C.M. 405(a) discussion.

> The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers."

Id. As noted, this is an "investigation" by which discovery is a part and purpose of it. It even allows that the investigation is not limited to what the government presents, thus implying that the accused may explore other relevant areas so long as related "to the issues raised by the charges and necessary to determine the proper disposition of the case." This permits the defense to explore areas of inconsistencies, possible impeachment, affirmative defenses, and evidence of fabrication.

[243] NDAA for FY 14, *supra* note 6, at § 1702 and NDAA for FY 15, *supra* note 19, at §531. The impetus, in part, for all these charges was an Article 32 investigation that took place at the U.S. Naval Academy in 2013. *See* Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 20, 2013, http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?_r=0.

When Congress passed the NDAA for FY 2014, it fundamentally changed the purpose of Article 32 from an "investigation" to a "preliminary hearing."[244] The changes extend further specifying that the Article 32 hearing is specifically not a discovery tool.[245] Moreover, it mandated that the "preliminary hearing shall be limited to . . . determining whether there is probable cause" an offense was committed and the accused did it, whether there is "jurisdiction over the offense and the accused . . . considering the form of the charges," and recommending a "disposition that should be made of the case."[246] Heightened note should be given to the language that the preliminary hearing "shall be limited" to those four purposes.[247] Congress reinforced this change where the accused's "right" is to "cross-examine witnesses who testify at the preliminary hearing . . . relevant to the *limited* purposes of the hearing, as provided [the four purposes]."[248] This removes any doubt: no discovery or investigative purpose plays a role in the new Article 32 hearing. This means that all questions and evidence presented must directly tie to one of the preferred charges, with little to no room to deviate from that.[249] Functionally, questions can only go to establishing probable cause that a crime was committed and that the accused committed it.[250] The

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[244] NDAA for FY 14, *supra* note 6, at §1702.

[245] ALNAV Message, 086/14. No longer to be an investigation, 221805Z Dec 14, SECNAV, subject: New Article 32, UCMJ, Preliminary Hearing Procedures [ALNAV Message 086/14]. The new Art 32 is a probable cause hearing to have the "Preliminary Hearing Officer" (PHO) only looking to the charges preferred and not investigating further leads that may arise during the hearing.

[246] NDAA for FY 14, *supra* note 6, at §1702.

[247] *Id*.

[248] *Id*. (emphasis added).

[249] MARADMIN Message, 681/14, 241725Z Dec 14, SJA to CMC, subject: Procedural Changes to and Training Requirements for Article 32, Uniform Code of Military Justice, Preliminary Hearings [hereinafter MARADMIN Message 681/14] and ALNAV Message 086/14, *supra* note 245, para. 3.

[250] MARADMIN Message 681/14, *supra* note 249, para. 2, and ALNAV Message 086/14, *supra* note 245, para. 3.

changes were done with the victim's interest of privacy in mind, but they resulted in the removal of an important benefit to the accused.

Not only has discovery been removed from the Article 32, but the alleged victim is no longer "required to testify at the preliminary hearing."[251] However, to fill this void and aid the prosecutor in meeting his burden of persuasion Congress, through the NDAA for FY 2014, provided that "[a] victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing."[252] What this meant in practice was that if the victim elected not to testify, a sworn statement by the victim be introduced as a replacement her testimony. As such, the accused was not able to have a meaningful opportunity to cross-exam or probe the veracity of the information provided for either the accused's benefit or the preliminary hearing officer's benefit.[253]

The NDAA for FY 2015 goes further to limit the accused's ability to obtain any discovery at the Article 32. While the RCM 405 "reasonably available" analysis survived the NDAA for FY 2014 changes, it did not survive the NDAA for FY 2015. Under the new law, to which each service has established temporary rules until the new RCMs are published,[254]

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[251] NDAA for FY 14, *supra* note 6 at §1702 §§ 832 (d)(3).

[252] *Id*. at §1702 §§ 832 (d)(2).

[253] *See generally* Prosser, *supra* note 121, at 575-6. Discussing pre-trial hearings and discovery, but not military discovery rules directly, Prosser is almost prophetic about what is occurring to the accused's rights:

> the trend has been to limit the scope of the hearing to a determination of whether there is probable cause to believe that the defendant has committed a felony offense . . . . The scope of the examination of witnesses generally is limited. In some jurisdictions, counsel cannot raise issues of credibility of witnesses.

Id. This is exactly what is occurring in the Military. "In some jurisdictions, hearsay testimony may be introduces at preliminary hearings, this further reducing defense discovery of information from witnesses." *Id.*

[254] *See* ALNAV Message 086/14, supra note 245, and U.S. DEP'T, DIR. 2015-09, IMPLEMENTATION OF SECTION 1702 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014—ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE PRELIMINARY HEARING (24 Feb. 2015) [hereinafter ARMY DIR. 2015-09].

the same in-depth analysis is no longer necessary; and more importantly, there is no potential limit to what type of document can be inserted in place of the live testimony.[255] The test begins by merely "determine[ing] whether the witness is relevant, not cumulative, and necessary based on limited scope of the charges at the preliminary hearing."[256] The convening authority and preliminary hearing officer are the decision makers for availability and "means of testimony if costs are incurred for civilian witnesses."[257] If the witness (including the alleged victim) is determined not available, the replacement for her testimony no longer needs to be sworn.[258] In fact, another individual (i.e. CID, NCIS, OSI, agent, or a "first responder," roommate, etc.) could recount what the alleged victim, or witness, said.[259] Even a quickly written unsworn statement would be adequate.[260] Also, the preliminary hearing officer no longer has the ability to subpoena documents or witnesses to the hearing.[261] This limits both the accused and government counsel.

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[255] MCM, *supra* note 9, R.C.M. 405(g).

[256] Naval Justice School, The Article 32 Preliminary Hearing Part II: Conducting the Hearing, at slide 9 (Jan. 2015) (unpublished PowerPoint presentation) (on file with author).

[257] *Id*.

[258] ARMY DIR. 2015-09 *supra* note 254, para. 10.c.(2) ("a preliminary hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence or reproductions thereof, offered by either side, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.").

[259] *Id*.

[260] It could be taken a step further, to be a written statement by that investigator of what the alleged victim told them. Of course this may go to the weight of the evidence in the "probable cause determination" but it does not go to the truth or ability of the accused to test the providence/veracity/truth of the accusations.

[261] ALNAV Message 086/14, *supra* note 245, para.3.

Both the Department of Army and Department of Navy, however, have replaced this loss of questioning ability with earlier discovery.[262] Now within five days following an Article 32 appointment order, the prosecutor is required to disclose the:

> (1) charge sheet, (2) Article 32 appointing order, (3) documents accompanying the charge sheet on which the preferral decision was based, (4) documents provided to the convening authority when deciding to direct the preliminary hearing, (5) documents the counsel for the government, intends to present at the preliminary hearing, and (6) access to tangible objects for the Government intends to present at the preliminary hearing.[263]

This differs only slightly, in the accused's favor, from the obligations of the prosecutor under RCM 701. Under RCM 701, the prosecutor owes the accused papers accompanying charges, convening orders, and statements, "as soon as practicable after service of charges" and other documents, tangible objects, and reports "upon request of the defense."[264]

Another area that the service departments' rules seem to benefit the accused is that the discovery obligation is no longer bound by a "relevancy," "exculpable," or "materiality" limitation.[265] Although this may be an inadvertent ramification of the Directive and ALNAV it is the unambiguous reading of the regulation. The Directive requires: "[d]ocuments accompanying the charge sheet on which the preferral decision was based . . . [and] [d]ocuments provided to the convening authority when deciding to direct the preliminary

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[262] *Id*., ARMY DIR. 2015-09, *supra* note 254, para. 6.a. The language is nearly identical between the services. Generally, this is common practice and done without a specific rule requiring it.

[263] ARMY DIR. 2015-09, *supra* note 254, para. 6.a. *See also* ALNAV Message 086/14, *supra* note 245, para. 2, and Naval Justice School, The Article 32 Preliminary Hearing Part I: Preparing for the Hearing, at slide 10 (Jan. 2015) (unpublished PowerPoint presentation) (on file with author). The Naval Justice School PowerPoint was a teaching guild used by the Navy and Marine Corps for implementing the changes.

[264] MCM, *supra* note 9, R.C.M. 701(1) and (2).

[265] MCM, *supra* note 9, R.C.M. 701.

hearing . . . ."[266] This requirement is very broadly written to include anything used in creating the charges, i.e. any and all documents and evidence to support the charges preferred.[267] It does not distinguish if a certain piece of evidence or discovery is ultimately not "relevant" or "material" to the final charges, just that it was something under consideration by the government counsel when the charging and preferral decisions were made. Since all this evidence will be turned over, the trial counsel is no longer required to sort his file between 'discoverable' and 'non-discoverable' portions. Instead, he must turn over what he read or considered in the drafting and charging process.

4. An Impossible MRE 513?

In the NDAA for FY 2015, Congress has required that under MRE 513:

> [A] party seeking production or admission of records or communications protected by the [psychotherapist] privilege . . . to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; . . . . [and] to show that the information sought is not merely cumulative of other information available.[268]

These limitations are problematic because they required the "party seeking production" (in most cases the accused) to have prior knowledge of what is, in effect, privileged communication. This raises a significant concern for multiple reasons. "In civil litigation, a requirement that a party designate the documents he or she is seeking is workable, since interrogatories and other discovery devices permit the party to ascertain what materials exist. These other devices are not available to the criminal defendant."[269] Here the military

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[266] ARMY DIR. 2015-09, *supra* note 254, para. 6.a. and ALNAV Message 086/14, *supra* note 245, para. 2.

[267] *See* ARMY DIR. 2015-09, *supra* note 254, para. 6.a. and ALNAV Message 086/14, *supra* note 245, para. 2.

[268] NDAA for FY 15, *supra* note 19, at § 537.

[269] WRIGHT AND HENNING, *supra* note 222, at 70.

accused has no other tool,[270] to potentially obtain the base information on whether there is relevant material to be discovered from the MRE 513 material. This leaves the accused without a meaningful opportunity to obtain relevant and material evidence.[271]

C. Providing Justice to the Accused

1. What Should Be Done

Rules akin to those for civil litigation in the United States are more appropriate given the significance and ramifications resulting from a criminal trial. "As many others have noted, the limited scope of discovery in federal criminal cases cannot easily be reconciled with the liberality of discovery in modern civil litigation."[272] This may be especially true in light of the returned importance of the alleged victim as a participant in the trial.[273] Civil trials have the benefit that:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be

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[270] Such as a deposition, an independent investigator, or the Article 32 as a discovery tool.

[271] *See generally* Green, *supra* note 208, at 644 ("The defense cannot depose witnesses to gather relevant information on its own. The defense lacks the investigative tools and, in most cases, the funds to try to replicate the government's investigation.").

[272] *Id*. 643.

[273] In the civil trial it is plaintiff verse defendant, which is akin to accuser verse accused. Under this new system that Congress is creating, while the ultimate decisions are still being made by the United States (via the prosecutor and/or Convening Authority), the victim has the right to be consulted on and provide input on many of these decisions. Practically speaking then, given the victim's power and the general push to accomplishing the victim's goals, the victim is the decision maker in the process. Most often the prosecutor and/or Convening Authority will acquiesce to the victim's preference in decisions of disposition. As such, with such practical power, the military court-martial is much more akin to the civil trial where it is party verse party. In the military the government and victim are so intertwined that it is like a civil trial with a government counsel for the plaintiff.

> admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.[274]

The civil rules allow for vast discovery that is easily expanded to assure all parties have a full picture of the case before them. "The underlying rationale for the broad discovery provided for in these rules for civil cases is that knowledge of all the relevant facts is essential to proper litigation and surprise is undesirable."[275]

As Congress is leading the way regarding victim rights, it could also do so with accused rights by making changes to the military court rules that are closer to civil court rules. [276] A criminal accused has his life, liberty, and financial livelihood at stake at trial. This is much greater risk than the financial cost the respondent in civil litigation has at stake. Because more is at stake and in pursuit of democracy and the republic, the criminal accused should receive discovery equal to or greater than the civil respondent.[277] It is under this premise to achieve justice that the accused should have his rights to discovery and deposition expanded.

2. Depositions

In the NDAA for FY 2015, Congress changed depositions under RCM 702 by requiring:

> an authority authorized to order a deposition . . . may order a deposition at the request of any party, but only if the party demonstrates that due to exceptional circumstances, it is in the interest of justice that the testimony of the

[274] FED. R. CIV. P. 26(b)(1).

[275] Prosser, *supra* note 121, at 581.

[276] *See generally* U.S. v. Gupta, 868 F. Supp 2d 491, 495 (SDNY 2012) (noting the differences between civil and criminal discovery obligations); Richard M. Strassberg & Yvonne M. Cristovici, *Criminal Discovery: Reform to Level the Playing Field?*, 1 N.Y. L.J. I (2012), *available at* http://NYLJ.com.

[277] The counter argument to this is that in criminal trials, the Government has interests that the petitioner does not. Foremost, that there is an interest in not providing investigative means and methods, which future criminals would learn to subvert.

> prospective witness be taken and preserved for use at a preliminary hearing . . . or court-martial.[278]

This change leaves the issue of discovery practices rather ambiguous.[279] The changes to RCM 702 are focus on clarifying who and when an authorized authority can order a deposition. Congress has continued to leave undefined what an "exceptional circumstance" is for use at either the Article 32 hearing and at trial.[280]

Meanwhile, federal courts have held "[t]he purpose of Rule 15(a) [depositions] is to preserve testimony for trial, not to provide a method of pre-trial discovery."[281] While the idea of depositions is similar, the language of RCM 702 is more inclusive than Rule 15(a), of permissible reasons to allow a deposition. The discussion section for RCM 702 suggests one such option:

> A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 (see RCM 405(g)) or at the time of trial (see RCM 703(b)). . . . *a deposition may* be used by any party for the purpose of contradiction or impeaching the testimony of the deponent as a witness. See MRE 613.[282]

This language does not limit the ultimate purpose of the deposition, but merely suggests purposes and uses for a deposition.[283]

How the "exceptional circumstances" plays in is unclear. Certainly, one exceptional circumstance is the upholding of someone's constitutional rights—including the accused's

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[278] NDAA for FY 15, *supra* note 19, at § 532.

[279] *Id.*

[280] *Id.*

[281] United States v. Kelley, 36 F.3d 1118, 1124 (D.C. Cir. 1994) (citation omitted).

[282] MCM, *supra* note 9, R.C.M. 702(a) (emphasis added).

[283] NDAA for FY 15, *supra* note 19, at § 532.

due process rights. Justice Brennan saw the need for greater use of depositions in criminal cases: "The general prohibition on taking depositions for discovery purposes is surely due for reconsideration. Depositions have proved an important discovery tool in civil cases, and when a defendant's freedom, rather than civil liability is at stake, we should enhance rather than limit the discovery that is available."[284]

Recently, Judge Baker, chief Judge of the Court of Appeals for the Armed Forces, noted that a deposition could be an effective way of allowing the accused an opportunity to question the alleged victim if she does not participate in the Article 32 hearing.[285] His brief concurrence on a summary disposition contains has more depth than one may give it at first blush.

This case reviewed a trial judge's determination to allow a disposition of an alleged sexual assault victim.[286] Prior to the accused's motion to the trial judge for a deposition, the alleged victim started but did not complete her Article 32 testimony, had begun an interview with defense counsel but stopped it before the defense attorneys were finished.[287] In both cases, defense questioning had not made it to the details of the alleged assault.[288] The trial judge determined that "exceptional circumstances" required a deposition.[289] Those circumstances were that "in the interest of justice that the testimony of [the witness] be taken

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[284] Brennan, *A Progress Report*, *supra* note 2, at 12.

[285] United States v. McDowell, Misc. Dkt. No. 14-5005 (C.A.A.F. 2014) (real party in interest Senior Airman Christoper A. Demario) *available at* http://www.caaflog.com/2014/08/12/caaf-affirms-the-afccas-denial-of-a-government-petition-for-a-writ-to-stop-the-deposition-of-an-alleged-victim-of-sexual-assault/.

[286] *Id*.

[287] *Id*.

[288] *Id*.

[289] *Id*.

and preserved."[290] The government filed an immediate appeal, but neither AFCCA nor CAAF gave relief to the government.[291]

Baker's concurrence notes that even though the alleged victim was available for trial and was interviewed in part, it was still appropriate to grant a deposition.[292] He focuses on the importance of the limitations that the trial judge placed on the deposition:

> The military judge's order permits BB's [the alleged victim's] attorney to attend the deposition, including those portions relating to matters covered by Military Rule of Evidence (M.R.E.) 412, thus allowing BB to exercise any privileges, including her privilege under M.R.E 513 to refuse to disclose confidential communications between her and her psychotherapist. See R.C.M. 405(i). In addition, the military judge's order provides additional protection by requiring the defense to provide notice and by authorizing the deposition officer to take reasonable and necessary measures if issues under M.R.E. 412 arise.[293]

His point is that the deposition can simultaneously be made to promote justice and protect the participants. He identifies that the alleged victim can and should have her rights protected throughout the process, so the accused nor government violates those rights.[294] In isolating RCM 702(f)(3) in which "the deposition officer is charged with protecting witnesses from annoyance, embarrassment, or oppression" and RCM 702(g)(1)(B) in which the deposition should have the same decorum as trial[295] he identifies further protection for the alleged victim.

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[290] *Id*.

[291] *Id*.

[292] *Id*.

[293] *Id*.

[294] *Id*.

[295] *Id*.

While Judge Baker sees the trial judge's ruling as appropriate, he does not necessarily see this as the solution in the future, providing this caveat: "how Article 6(b) and the new Article 32 interplay with an accused's rights is not addressed in this case and must be resolved in future contexts."[296]

Nonetheless, Chief Judge Baker's concurrence identifies a major issue now facing sexual assault counts-martial at large: the accused struggling to obtain necessary discovery. He foresees scenarios similar to this case likely to play-out in courtrooms across the military. He hedges that future laws (the NDAA for FY 2015) may change the playing field, but in fact, the new Article 32 will not adjust situation too much. If anything, it will increase the likelihood of exceptional circumstances like this occurring again. Circumstances that allow for a deposition (with the appropriately tailored protections afforded the alleged victim).

3. Red Cell

One argument against early and robust discovery of evidence is that the accused could threaten witnesses into not testifying at trial.[297] This is not a new argument, Chief Justice Arthur T. Vanderbuilt, of the New Jersey Supreme Court, even noted this in 1953:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense.[298]

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[296] *Id*.

[297] *See* Green, *supra* note 208, at 669-670 ("[D]isclosing identities, statement, or background will discourage witness from assisting law enforcement officials in current or future cases.").

[298] *Tune*, 13 N.J. at 210.

> [T]he criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they

However, Justice Brenner responded ten years later that "the true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present."[299] Moreover:

> To date, no one has shown that in those United States jurisdictions there is a greater incidence of witness tampering. Nor has anyone shown that instances of witness tampering, to the extent they occur in jurisdictions with more liberal discovery, are attributable to the marginal increases in disclosure of information that would not be produced in federal criminal cases."[300]

Providing this information is not detrimental to the health and welfare of witnesses, especially in the military where there is presumably greater physical protection to witnesses. The convening authority, or commander, has the authority- and often exercises it- to prevent an accused from contacting certain witnesses of a court-martial. Moreover, the increased discipline of the armed services makes it more difficult to accomplish the task of coercing perjured testimony.

> know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime.

Id.

[299] Brennan, *The Criminal Prosecution*, *supra* note 1, at 291 (arguing further "Besides, isn't there a suggestion in the argument, and a rather slanderous one, that the criminal defense bar cannot be trusted? After all, isn't it the defense attorney and not the accused himself who will have access to the state's materials?"). This same presumption can be applied to victims' counsel, as discussed supra. In neither case is it warranted or appropriate.

[300] Green, *supra* note 208, at 671 (citing Avis E. Buchanan, *Fairer Trials and Better Justice in D.C.*, WASH. POST, Oct. 28, 2011, at A1).

> In studies by some of the states and cites with open-file discovery (Florida, San Diego, Philadelphia, Detroit[,] and Newark, no causal link between the practice and witness intimidation has been found. Notably, none of the jurisdictions with more open discovery practices has switched back to a more restrictive practice. Instead, these jurisdictions rely on allowing prosecutors to seek judicial intervention or protective orders on those rare occasions where discovery disclosures might jeopardize a witness's safety.

Id. at n.142.

D. Summary

Congress's focus on protecting the victim in the court-martial has come at a cost to the accused and his rights. In almost all circumstances this does not have to be the case. In situations where this has been deemed necessary by Congress, like removing the discovery or investigative aspect to an Article 32 hearing, actions need to be taken to put the accused back to where he should be regarding his rights in the process. To do otherwise is an affront on the American criminal justice's notions of fairness and equality under the law.

IV. Proposed Changes to Rules for Courts-Martial 701 and 702

To bridge the gaps left by Congress regarding victim rights and to not compromise the accused's rights which have been inadvertently limited by the expansion of victim rights, this article proposes modifications to RCM 701 and 702.[301] RCM 102 mandates that "[t]he rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."[302] With this in mind, the rules need to conform to the laws that Congress has changed (particularly regarding victims and MRE 412 and 513).

1. RCM 702 Changes.

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[301] *See* MCM, *supra* note 9, R.C.M. analysis, at A21-1.

> These goals were intended to ensure that the Manual for Courts-Martial continues to fulfill its fundamental purpose as a comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and nonlawyers in the operation and application of such law. It was recognized that no single source could resolve all issues or answer all questions in the criminal process. However, it was determined that the Manual for Courts-Martial should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, without the necessity to consult other sources, as much as reasonably possible.

Id.

[302] MCM, *supra* note 9, R.C.M. 102(b).

Depositions have proved an important discovery tool in civil cases, and when a defendant's freedom, rather than mere civil liability, is at stake, we should enhance rather than limit the discovery that is available. When an alleged victim decides not to participate in an Article 32 preliminary hearing, and is found unavailable, her written statements nor hearsay statements by other witnesses provide an adequate substitution for the accused's need of discovery. And now that a meaningful opportunity to cross-exam witnesses including the alleged sexual assault victim has been all but removed from the Article 32 hearing, the role of the deposition is critical to the court-martial process.

The renewed significance of an RCM 702 deposition will require some alterations to the rule. These alterations will allow for an opportunity by the accused of a sexual assault to obtain discovery that he may justly need, while still limiting him from a fishing expedition that would re-victimize the alleged victim. The bounds of the deposition must accordingly be clearly drawn, but left broad enough to assure fairness and justice in the criminal justice system.

Accordingly, RCM 702 should allow greater deposition rights when the alleged victim in a case is determined unavailable at an Article 32 preliminary hearing and does not testify. The deposition can be limited in nature by the military judge, just as it can implicitly be done now. For example, the military judge can prohibit questions into MREs 412 and 513 issues. The rule should allow a military judge to be the deposition officer in any deposition of an alleged victim in an Art 120 case (or any case that may impact an MRE 412 and 513 protection).[303] As such RCM 702 should include the following provision:

[303] As a secondary option, the rule should require a senior, trial experienced judge advocate be the deposition officer in an Art 120 case.

> In General Court-martial cases with an alleged victim. A deposition may be granted by a military judge after referral of charges, if the witness to be deposed was not available at a hearing under Article 32 or will not be available for trial. Once granted, the military judge will serve as the deposition officer and will have the authority to rule on objections, particularly those related to MREs 412, 513, and 514. Unless performed at the request of the government due to witness unavailability at trial, this will not satisfy the accused's right of confrontation.

This specifically mandates that the military judge will conduct the deposition. This serves the two goals. First, is it allows the accused to discover potential exculpatory or otherwise relevant evidence, in a manner that provides testimony in case of impeachment later at trial. Second, it protects the alleged victim from abusive and degrading questions that would re-victimize the victim. Further, this provision requires that the alleged victim must be found unavailable; accordingly, if the accused waives the Article 32 hearing and there is no finding of unavailability, the deposition would not be granted. Finally, this is not a substitute for trial, as this is meant primarily for discovery purposes.

2. RCM 701 Changes

Many of the suggested changes are minor changes that assimilate the RCM with those recent changes through NDAA for FY 2014 and NDAA for FY 2015. This particularly applies to nomenclature changes. For example, "trial counsel" becomes "government counsel" and "defense counsel" becomes "counsel for the accused." The other changes are major ones. These changes increase the amount of discovery to the accused and set an earlier time limit for initial discovery. For the victim, they create discovery rights.

a. Accused Changes

The first change is to RCM 701(a)(1). This change requires that "papers accompanying charges; convening orders, [and] statement" be served at the same time as the service of charges. The provision will read as follows:

> (1) Papers accompanying charges; convening orders; statements. Upon service of charges under RCM 602, the government counsel shall provide the counsel for the accused with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:[304]
> (A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;
> (B) The convening order and any amending orders; and
> (C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

This compels the government to serve discovery sooner than the current requirement of "as soon as practicable." This change helps provide the accused the maximum time allowable to look over the evidence before he goes to trial. In many cases this is not an issue in practice; however, it keeps the government from languishing in its duties. It is an initial attempt to balance the accused's discovery rights, in light of those lost by the Article 32 changes.

The second change that generally benefits the accused is to RCM 701(a)(2). Here the language of "upon request of the defense" is removed, and the "martial" standard is changed to a "relevant" standard. This provision should read as follows:

> (2) Documents, tangible objects, reports. After service of charges, the Government shall permit the defense to inspect:
> (A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are relevant to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused . . . .

What this accomplishes is that it requires the government to turn over or make available to the defense materials that should be available to the accused out of fairness and justice. The existing hurdle is onerous and is ripe for exploitation. As is, the defense needs to ask for

[304] These allow for an earlier discovery to the accused, thus trying to make up for the lack of discovery available at the new Article 32 preliminary hearing.

information it may not know exist. This creates extra administrative work that only slows the court-martial process and provides an opportunity for gamesmanship.

An important change suggested by this article, is that it takes away the "material" construct that is only ever a post hoc determination and does not truly evaluate the importance of the material. This helps remove a subjective decision by government counsel on what is material to the accused's trial preparation, a trial preparation they are largely unaware of. By setting a relevance standard, it allows for greater amounts of discovery to go the accused, thereby assuring he is provided a full ability to put forward a defense. Further, this standard allows a trial or appellate court to make a more efficient and objective determination on a violation of the rule.

b. Victim Changes.

The first major change regarding discovery rights for the victim is the creation of a new RCM 701(c).[305] This provision, subject to the those same limiting sections that apply to the accused found in (f) and (g)(2), provides the following discovery:

> (1) Papers accompanying charges, documents, tangible objects, reports, statements. Upon preferral of charges, the government counsel shall provide the victim with copies of, or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect:

This section roughly parrots that of the accused; however, it is much more limited and condensed. It provides a general scope of the type of evidence that should be turned over to the alleged victim so long as it comports with sub-paragraphs (A), (B), and (C). Sub-paragraph (A) limits paragraph (1) to only those items that relate to that particular victim's right under MREs 412, 513, and 514:

[305] This slot has already been taken, but the other sections would be moved back next in order. For balance and ease of reading the victim section should be placed near the accused section.

> (A) Any paper which accompanied the charges when they were preferred, statements, papers, documents, photographs, tangible objects, buildings, places or copies of portions there of which are within the possession, custody, or control of military authorities, and that are relevant to that victim's rights or protections as provided under MRE 412, 513, and 514, or were obtained from or belong to that victim; results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel

This subsection provides the tools necessary for a victim and her SVC to adequately protect the victim's privacy rights related to MREs 412 and 513. This, however, creates a burden on the government to identify potential relevant issues in the evidence and turn over any information related to that. It also limits the victim to only information related to her rights and what she has an interest in.

In following with the requirements of NDAA for FY 2014, sub-paragraph (B) requires:

> (B) Any statements made by the victim relating to an offense charged in the case which is in the possession of the trial counsel;

This offers the victim and her SVC the opportunity to see her statements for purposes such as preparing to give case disposition input. This rule substantiates in practice the rule Congress has required. It can be utilized regardless of privacy rights involved as it can aid in informing a victim for prosecution preference input.

Sub-paragraph (C) is a subsection that is consistance with the requirements laid out in the NDAA for FY 2014, related to possible criminal misconduct by the alleged victim:

> (C) Any statement that may implicate the victim in any criminal activity;

This subsection protects the criminal rights of an alleged victim as it is discovery related to any potential or alleged misconduct on the part of the alleged victim. Specifically, it gives the alleged victim certain accused-like protections. In addition, it provides necessary

information that may help to form a victim's input on disposition. It further alleviates their feeling of being coerced to making incriminating statements without a grant of immunity.

The last remaining provisions related to victims' discovery rights involve implementing rights from the NDAA for FY 2014 or NDAA for FY 2015 and a requirement that parties serve the victim any motion made or responded to related to MRE 412, 513, or 514.

> (2) The government counsel shall provide the victim with copies of, or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect, a copy of the Report of preliminary hearing from the preliminary hearing officer pursuant to an Article 32, MCM, hearing,
> (3) The government counsel and the counsel for the accused shall provide the victim with copies of any motion made or responded to pursuant to MRE 412, 513, or 514, with all accompanying or referenced documents,
> (4) The government counsel shall provide the victim with copies of, or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect any offer by the accused or government to ender a pretrial agreement pursuant to RCM 705;
> (5) Upon any final action by the convening authority, the government counsel shall provide a copy of or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect:
> (A) The final action taken by the convening authority;
> (B) A copy of the record of trial.

Paragraphs (2), (4), and (5) all establish requirements set out by the NDAA for FY 2014 that pertain to a court-martial.[306] Paragraph (3) associates with the paragraph (1)(a) relating to MRE 412, 513, and 514. This provision, however, obligates both the accused and the government to serve any applicable motion not only on each other, but also upon the victim. While individual court rules typically cover this, this firmly established the victim's position regarding these issues—in keeping with congressional intent.

c. Government averment.

[306] *See* NDAA for FY 14, *supra* note 6.

One final protection, for both the accused and alleged victim, should require government counsel to assure that due diligence has been taken in complying with the discovery rules. This is not be viewed as general distrust of prosecutors but a method for keeping the government forthright in its disclosure of evidence to the accused and victim. The extent of the averring should include items related to questioning mental health issues of the alleged victim and witnesses, and MRE 412 and 513 issues.[307] To specifically address this issue, the government counsel should affirm that all discovery owed to the accused and the victim has been served upon them or made available to the appropriate other party. The government counsel should also affirm that all steps were taken to obtain discovery and find evidence related to the case including potential exculpatory information, and including searches of mental health records of the individuals involved. Specifically:

> (a) (5) Government Counsel Statement of discovery. At arraignment of charges or upon a motion for docketing, the government counsel will affirm that all discovery owed to the accused and the alleged victim has been served upon or made available to the appropriate other party. The government counsel will also affirm that all steps were taken to discovery and find evidence related to the case including potential exculpatory information, and including searches of mental health records of the individuals involved.

For the purpose of assuring the most expedient and fair process to the accused and alleged victim, the statement should be at arraignment of charges or upon a motion for docketing.

3. Back to the Hypothetical Situations

Under these proposed modifications to the RCMs, the hypothetical situations described in the beginning of this paper play out differently.[308] Perhaps they would result in a different

[307] *See generally* United States v. Trigueros, 69 MJ 604, 608 (A. Ct. Crim. App. 2010) ("where there is no dispute over the relevance of the requested material, due diligence requires trial counsel to ask each victim whether she has attended any mental health counseling sessions, investigate the existence of any medical records, and obtain them, employing a subpoena or other compulsory process where necessary.")

[308] *See supra* Part I.A.1-2.

ultimate outcome, but if not, they would at least provide full justice to the accused and alleged victim in the case.

In the first hypothetical Lance Corporal Anderson's counsel would have had an opportunity to question the alleged victim at a tailored deposition. In doing so, he would have been able to find out that Lance Corporal Vance saw a Navy psychologist. While the exact nature of what was discussed may not have been immediately ascertainable, enough of a foundation could have been established for the defense to motion the court for an in camera review of notes from these meetings. This information could have resulted in an acquittal or a withdrawal of charges.

In the second hypothetical Senior Airman Young, would have had access to information from that outset, that may have lead her to submit input that she did not want the trial to go forward, as she value her privacy over the conviction of the accused. Further, with discovery about how and what the accused wanted to present about Senior Airman Young's sexual history, her SVC could have articulated to the court how it was not relevant and why it should be inadmissible, something the government counsel was not willing to do. Even if the military judge had admitted this evidence, Senior Airman Young's SVC could still have explained to her what to expect and advised her that unless asked she did not have to offer information about her childhood. With discovery rights, Senior Airman Young's SVC could have been better prepared to effectively protect her interests and rights.

V. Conclusion

Over the past three years Congress has set out in a semi-reactionary manner to resolve the 'issue of sexual assaults in the military.' To accomplish this, Congress decided that the victim needed to be re-empowered. While early in our country's history the victim was the

primary actor in holding the accused accountable for his criminal actions, this waned in favor of governmental interests and efficiency. However, a trend to re-establish the victim in trial as a participant (or something more than mere witness) has been occurring in almost all U.S. jurisdictions over the past three decades. This trend converged into the military justice system in the past five years.

Congress has taken the lead in implementing this trend in the military, acting with such vigor that the military now provides more victim rights and privileges than in any other jurisdiction in the United States. It has done this through an intertwined two part strategy. The two parts are: (1) increase the number of prosecutions of sexual assaults and (2) provide alleged victims of these crimes with the support necessary to carry-on. The first part focuses more in the realm of military justice and where this paper turns its attention, and the second part is focused in the welfare of the victim, but plays a critical part of first goal as well.

Essentially, to combat sexual assaults, Congress' logic is: (1) Prosecutions will both deter future assaults and hold those accountable who have committed a sexual assault. (2) In order to prosecute these crimes, the crimes need to be reported, however, surveys show that victims are apprehensive to report sexual assaults against them. (3) If reporting is increased, prosecutions will increase. (4) A victim is more likely to report if she feels she will not be re-victimized by the process, i.e. have her rights upheld. (5) Empowering the victim throughout the process will make her feel that she will not be re-victimized. And (6), providing the victim her own attorney who will represent her interests will empower the victim.

To accomplish this purpose, Congress passed a number of laws, *inter alia*, giving the victim a 'bill of rights,' giving the victim an SVC, giving the victim standing to related to

their MRE 412 and 513 cases, a right to appeal decisions based off of this, and a right to not participate in Article 32 hearings. Passing these laws was done in a scattered manner across three years; as a result, Congress omitted necessary provisions related to the SVC.

In order to allow the SVC to accomplish the mission he was created to accomplish—empowering the victim—he needs the tools to accomplish this. He, however, was not given these tools. In order for the SVC to adequately represent his client, the alleged victim, in making arguments in court, he needs evidence to make the arguments. Without the evidentiary tool he offers no real value in protecting or advocating for his client as argument requires law and facts. If the SVC only has law and limited facts (which potentially are privileged as they come from his client) he will be unable to make necessary arguments. Accordingly, the victim and her SVC need discovery rights that are tailored to her needs. These needs relate in large part to her privacy interests in the court-martial. It is important that the discovery right be tailored because there is still a balance of rights at the court-martial.

The balance of rights should not be a zero-sum game between the accused, victim, and government. It is a balance assuring that each party and participate is adequately protected. Under the past three years of legislation, the accused at court-martial has seen his rights and privileges eroded. This was not an intentional action part of Congress' intent in protecting the victim.[309] It has been, however, a consequence of some of Congress' actions. The most

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[309] Brennan, *The Criminal Prosecution*, *supra* note 1, at 287.

> And might not expanded discovery benefit the prosecution as well as the accused? If sharpening of the issues, exposure of untenable arguments and more efficient marshaling of the evidence result from discovery, doesn't the prosecution profit? For if voluntary disclosure to defense counsel often results in guilty pleas because defense counsel becomes convinced of the hopelessness of the client's cause, should not a rule authorizing criminal discovery in every case result in even more dispositions without trial?

egregious diminishment of the accused's rights relates to the loss of discovery from the Article 32. What was once an important way to discover new information and to get a chance to question the alleged victim under oath (and under the protection of the investigating officer), is now a paper-shuffle that strictly forbids discovery.

Through its actions, Congress has inadvertently harmed the accused and among other things[310] his discovery rights at the court-martial. What Congress has overlooked is assuring the military accused continues to enjoy the deserved rights he has become accustomed to. Accordingly, the accused needs earlier and broader discovery of evidence. Further, deposition rights need to be liberalized to be used for discovery purposes, especially of the alleged victim when she refuses other opportunities to be questioned.

Id.

[310] For example: removing clemency, enacting mandatory minimum sentencing, and removing "Good Military Character" defense. How a service member performs at work is not necessarily relevant on if he sexual assaults someone off work, but it could potentially remove a major argument from the accused, if a Military Judge reads the rule too conservatively. Studies show that individuals with PTSD (which ails some military accused) are more likely to commit misconduct as a result of their trauma. If not rising to the level of a defense, it would certainly be a mitigating factor in sentencing. *See* Evan R. Seamone, *Attorneys As First Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 156-57 (2009).

> The Link between PTSD and criminal activity is also well documented. Commonly, veterans with the disorder knowingly participate in dangerous behavior in attempts to recreate the rush of combat. This could include anything from driving at extremely fast speeds, to provoking road rage, and starting fist-fights. . . . Ultimately, criminal activity can result from (1) Overreaction to danger cues; (2) Behavioral re-experiencing while a dissociative state; (3) Stimulation-seeking behavior to overcome numbness and emotional nonreactivity; and (4) Engaging in dangerous behavior to alleviate survivor guilty.

Id. at 156-57.

Another area where the accused has rights more limited than most other jurisdictions relates to conviction ratios, as the military only requires two-thirds to convict an accused. 10 U.S.C. § 852. All states but Louisiana and Oregon require a unanimous finding by its jury to convict someone of a crime (and in many cases this is a panel of 12 individuals). The Supreme Court has looked at the Constitutionality a few times *inter alia*. Bellow v. Georgia, 435 US 223 (1978) and Williams v. Florida, 399 US 78 (197). The Court has routinely held that the Constitution does not prevent only 2/3 of the jury needed to convict.

The military criminal justice system should be leading the way for the rest of the jurisdictions in the United States. This is a jurisdiction where changes can be implemented in an expeditious, efficient, and consistent manner across the entire jurisdiction. This is why the implementation of victims' rights has not failed. Similarly, the military criminal justice system must lead the way in protecting of the accused. The two concepts are not mutually exclusive, they can co-exist.

The openness of discovery and the rights of the accused and victim should be lofty goals to which the practitioner and Congress strive to protect. However, the current system needs the feasible operational tools to accomplish these objectives. The key is a development of RCMs that provide robust and relevant discovery to all parties and participants. That way, the military justice system will fulfill its ultimate goal of justice in theory and practice. This paper humbly proposes those changes to the RCMs that will enhance the fair and efficient practice of military justice in the United States.

Appendix A. Test of the Proposed Modifications

1. Textual example of the proposed modifications. A word in *italics* is new to the rules. A word with a ~~line through it~~ is deleted in the proposed modifications.

Rule 701. Discovery.

(a) Disclosure by the ~~*trial*~~ *government counsel to the defense.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) Papers accompanying charges; convening orders; statements. ~~As soon as practicable after~~ *Upon* service of charges under RCM 602, the ~~trial~~ *government* counsel shall provide the ~~defense~~ *counsel for the accused* with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) Documents, tangible objects, reports. After service of charges, ~~upon request of the defense,~~ the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are ~~material~~ *relevant* to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused .

. . .

(5) *Government Counsel Statement of discovery. At arraignment of charges or upon a motion for docketing, the government counsel will affirm that all discovery owed to the accused and the alleged victim has been served upon or made available to the appropriate other party. The government counsel will also affirm that all steps were taken to discovery and find evidence related to the case including potential exculpatory information, and including searches of mental health records of the individuals involved.*

. . .

(c) Disclosure by the government counsel to the victim. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the victim—

(*1) Papers accompanying charges, documents, tangible objects, reports, statements. Upon preferral of charges, or upon learning of any issue, the government counsel shall provide the victim with copies of, or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect:*

(A) Any paper which accompanied the charges when they were preferred, statements, papers, documents, photographs, tangible objects, buildings, places or copies of portions there of which are within the possession, custody, or control of military authorities, and that are relevant to that victim's rights or protections as provided under MRE 412, 513, and 514, or were obtained from or belong to that victim; results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military

authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel;

(B) Any statements made by the victim relating to an offense charged in the case which is in the possession of the trial counsel; or

(C) Any statement that may implicate the victim in any criminal activity;

(2) The government counsel shall provide the victim with copies of, or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect, a copy of the Report of preliminary hearing from the preliminary hearing officer pursuant to an Article 32, MCM, hearing,

(3) The government counsel and the counsel for the accused shall provide the victim with copies of any motion made or responded to pursuant to MRE 412, 513, or 514, with all accompanying or referenced documents,

(4) The government counsel shall provide the victim with copies of, or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect any offer by the accused or government to ender a pretrial agreement pursuant to RCM 705;

(5) Upon any final action by the convening authority, the government counsel shall provide a copy of or if extraordinary circumstances make it impractical to provide copies, permit the victim to inspect:

(A) The final action taken by the convening authority;

(B) A copy of the record of trial.

. . .

Rule 702. Depositions.

(a) In general. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

…

(c) In General Court-martial cases with an alleged victim. A deposition may be granted by a military judge after referral of charges, if the witness to be deposed was not available at a hearing under Article 32 or will not be available for trial. Once granted, the military judge will serve as the deposition officer and will have the authority to rule on objections, particularly those related to MREs 412, 513, and 514. Unless performed at the request of the government due to witness unavailability at trial, this will not satisfy the accused's right of confrontation.

Appendix B. United State v. McDowell, Demario Real Party in Interest Summary Disposition Opinion

No. 14-5005/AF. United States, Appellant v. Todd E. MCDOWELL, Appellee, Christopher A. DEMARIO, Real Party In Interest. CCA 2013-28. On consideration of the issues certified by the Judge Advocate General of the Air Force, 73 M.J. 287 (C.A.A.F. 2014), the briefs of the parties and of the *amici curiae*, the motions of Protect Our Defenders and the alleged victim for leave to file *amicus curiae* briefs and make oral argument in support of Appellant, and the motions of the Real Party in Interest and Appellant to supplement the record, we conclude that the United States Air Force Court of Criminal Appeals did not err in denying Appellant's petition for extraordinary relief. Accordingly, it is ordered that the motions of Protect Our Defenders and the alleged victim to file *amicus curiae* briefs are hereby granted, that the motions of the Real Party in Interest and Appellant to supplement the record are hereby granted, that the motions of Protect Our Defenders and the alleged victim to make oral argument are hereby denied as moot, that the certified issues are answered in the negative, and the decision of the Court of Criminal Appeals is hereby affirmed.

* BAKER, Chief Judge (concurring):

I agree with the reasoning of the Court of Criminal Appeals as to why the military judge did not abuse his discretion in this case as well as its reasons for not granting a writ of mandamus. A writ of mandamus is limited to "the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power.'" Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). Neither is present in this case. However, given the importance of the issues raised to military justice, including to the alleged victim, to the Government, and to

the accused, I believe it important to state on the record my concurrence with the military judge and the lower court. I also do so to highlight the sui generis nature of this case.

Background

As summarized in the lower court's order, a single charge and specification were preferred against the accused alleging the rape of BB, a 16-year-old female acquaintance. On the day prior to the Article 32, UCMJ,[1] investigation, defense counsel interviewed the alleged victim for three hours. At the hearing, defense counsel informed the investigating officer that they had not been able to complete their interview of the alleged victim the previous day. To accommodate the defense the investigating officer allowed more expansive questioning of the alleged victim "that would normally have been covered during a pretrial interview." After more than two hours on the stand answering the defense questions, it appeared to the investigating officer that the alleged victim was becoming upset with the nature of the questions. At this point the investigating officer informed the alleged victim that she was not obligated to continue her appearance at the hearing and that she was free to leave, and she departed. At the point the witness's testimony terminated, defense counsel had just begun questioning her relating to the events on the day of the alleged act. Up to that point, counsel had been questioning her on her interactions with the accused leading up to the day of the alleged rape.

Later, at a pretrial Article 39(a), UCMJ,[2] session, the defense moved to depose the alleged victim asserting they had had insufficient opportunity to interview her or to cross-examine her at the Article 32 investigation. The military judge concluded, "due to the exceptional circumstances of this case, it is in the interest of justice that the testimony of [the witness] be taken and preserved." He then granted the motion to depose the witness and

ordered the convening authority to reopen the Article 32 investigation to allow the investigating officer to consider the deposition once it was taken. The Government filed a Petition for Extraordinary Relief with the Court of Criminal Appeals seeking a writ of mandamus against the military judge. Relief, however, was denied.

A writ of mandamus is a writ this court may issue under the authority of the All Writs Act, 28 U.S.C. § 1651(a) (2006). However, "[t]o 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.'" Murray v. Haldeman, 16 M.J. 74, 76 (C.M.A. 1983) (internal citations omitted).

Discussion

At the time of the military judge's ruling, Article 49(a), UCMJ,[3] provided the accused a statutory right to "take oral or written depositions unless the military judge . . . forbids it for good cause." Moreover, as a general matter, an accused has a due process right to interview witnesses in order to prepare a defense. Consistent with these principles, "A request for a deposition may be denied only for good cause." Rule for Courts-Martial (R.C.M.) 702(c)(3)(A). "The fact that a witness is or will be available for trial is good cause for denial in the absence of unusual circumstances . . . ." R.C.M. 702(a)(3)(A) Discussion. However, if there are unusual circumstances, such as the "unavailability of an essential witness at an Article 32 hearing," there is no good cause to deny the deposition. Id.

Three factors make this case both sui generis and place it beyond easy characterization. First, the witness BB was available for trial. She was also interviewed prior to trial and cross-examined during the Article 32 investigation. However, at the same time, and as noted

by the military judge and the Court of Criminal Appeals, BB's pretrial interview was terminated before the defense had concluded its questioning, and her cross-examination testimony at the Article 32 investigation was curtailed before the incident in question was addressed.

Second, in the context presented, the military judge placed limits on the deposition. The military judge's order permits BB's attorney to attend the deposition, including those portions relating to matters covered by Military Rule of Evidence (M.R.E.) 412, thus allowing BB to exercise any privileges, including her privilege under M.R.E 513 to refuse to disclose confidential communications between her and her psychotherapist. See R.C.M. 405(i). In addition, the military judge's order provides additional protection by requiring the defense to provide notice and by authorizing the deposition officer to take reasonable and necessary measures if issues under M.R.E. 412 arise.

These safeguards were in addition to the existing rules and tools already available to the military judge to regulate the proper conduct of depositions. For instance, under R.C.M. 702(f)(3), the deposition officer is charged with protecting witnesses from "annoyance, embarrassment, or oppression." Also, under R.C.M. 702(g)(1)(B), "The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself." Thus, it would appear that the military judge, who was in the best position to observe the witness and was most able to assess the circumstances surrounding the issue of the witness's expected testimony in this case, exercised discretion that was within the ambit of his authority.

Third, while Article 32 has been amended, the impact of this provision on military practice is not at issue in this case. As the Court of Criminal Appeals noted: "Defense

counsel may or may not have greater occasion to request depositions of alleged victims after this legislation takes effect, but such requests will be based on different factual predicates than the situation in this case." Under Article 6b, UCMJ,[4] victims have the right not to be excluded from, and the right to be heard at any hearing convened pursuant to Article 32. Although this provision of the UCMJ took effect after the Article 32 investigation in this case, it is an example of a continuing trend toward affording alleged crime victims protections throughout the criminal justice process, particularly in sexual assault cases. As the lower court pointed out, further changes are on the horizon. The coming changes to Article 32 itself will expressly state that no victim will be required to testify at an Article 32 hearing.[5] Moreover, the fact of the matter is that in this case the alleged victim was a civilian who could not have been compelled to appear, or continue her appearance, at the Article 32 hearing in the first place. See R.C.M. 405(g)(2)(B) Discussion. Thus, how Article 6(b) and the new Article 32 interplay with an accused's rights is not addressed in this case and must be resolved in future contexts.

As a result, I concur with the Court's resolution of the relevant motions in the case and the Court's disposition of the certified issues.

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[1] Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832 (2006).

[2] 10 U.S.C. § 839(a) (2006).

[3] 10 U.S.C. § 849 (2006).

[4] 10 U.S.C. § 806b (2013).

[5] 113-66, FY 2014 National Defense Authorization Act, § 1702(a).