2016

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THE ALLEGED VICTIM'S RIGHT TO MANDAMUS IN MILITARY COURTS-MARTIAL

Leila Mullican*

I. INTRODUCTION

At trial and on interlocutory appeal, an accused is constitutionally entitled to the presumption of innocence unless and until he or she is eventually proven guilty beyond a reasonable doubt. Aspects of Congress’ new, wide-sweeping changes to military justice legislation encroach upon, and sometimes violate, the constitutional protections historically afforded to criminal defendants at courts-martial. However, the United States Constitution requires courts to strictly construe statutes that provide third parties standing to file for writs of mandamus. (citation) By granting standing to alleged victims only for procedural violations of a victim’s rights, military courts of criminal appeals will provide an appropriate stop-gap against the increasingly crushing weight of sexual assault charges upon an accused.

Although the federal Crime Victim’s Rights Act (CVRA)1 was first passed in 2004, Congress only began establishing those rights for alleged victims,2 namely victims of rape and sexual assault, in the military criminal justice system in 2014.3 Proponents of “providing due-process-like rights of participation” to alleged victims seek to prevent “secondary harm, which comes from governmental processes and governmental actors within those processes.”4 In the movement to change victims’ rights and roles in military justice, all services established victims’ legal counsel programs, which provide legal advice and advocacy for eligible victims of sexual assault.5

Congress’ last wide-sweeping reforms to victims’ rights in the courts-martial process were in the Fiscal Year 2016 and 2015 National Defense Authorization Acts (NDAA).6 The 2015 NDAA amended Article 6b, Uniform Code of

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2 The words “alleged victim” and “victim” in this Article mean the named victim in a case that has yet to be fully adjudicated. The word “alleged” is meant to highlight the presumed innocence of the accused. The word “petitioner” in this Article describes an alleged victim who petitions for a writ of mandamus.


Military Justice (UCMJ),[7] to give alleged victims,⁸ as nonparties to courts-martial, standing to petition military Courts of Criminal Appeals (CCA) for writs of mandamus.⁹ Mandamus is “[a] command by order or writ” from a superior court that is “directed to some inferior court . . . requiring the performance of a particular duty therein specified.”¹⁰ Under the 2015 Article 6b(e), petitioners could only request writs of mandamus if they believed their rights afforded by Military Rules of Evidence 412¹¹ or 513¹² were violated by a military’s judge’s ruling. The 2015 Article 6b(e) read as follows:

(e) Enforcement By Court of Criminal Appeals.—

(1) If the victim of an offense under this chapter believes that a court-martial ruling violates the victim’s rights afforded by a Military Rule of Evidence specified in paragraph (2), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the court-martial to comply with the Military Rule of Evidence.

(2) Paragraph (1) applies with respect to the protections afforded by the following:

(A) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(B) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim’s sexual background.

In the 2016 NDAA, Article 6b(e)¹³ was expanded to extend to the protections afforded by Article 6b(a), the rights of a victim of an offense, and additional Military Rules of Evidence:

(e) Enforcement By Court of Criminal Appeals.—

(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under Section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) If the victim of an offense under this chapter is subject to an order
to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, and, to the extent practicable, shall have priority over all other proceedings before the court.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim’s sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

Article 6b is now similar to the CVRA, which allows the victim to petition for a writ of mandamus if any of his or her rights enumerated under the CVRA are violated.14

However, Article 6b(e) has created several questions of interpretation for judges and practitioners. Particularly, it is not clear whether a CCA has jurisdiction over all claims concerning Mil. R. Evid. 412, 513, 514,15 and 615. It is also unclear whether victims can petition for writs on substantive issues regarding a military judge’s ruling or only for violations of their procedural rights. Finally, the text of Article 6b(e) does not state whether the alleged victim is entitled to a writ of mandamus for any issues outside of those enumerated in the article if the CCA finds the alleged victim is a holder of a separate right or privilege.

This Article interprets the meaning and effect of Article 6b by analyzing the text of the article and case precedents concerning the CVRA. Part II reviews a CCA’s jurisdiction to hear victims’ writs under the All Writs Act and Article 6b. Part III analyzes the question of victims’ standing to petition for writs of mandamus and ultimately argues that Article 6b provides the alleged victim with only limited standing to request a writ. Part IV discusses the standard of review for a writ of mandamus and when writs of mandamus are appropriately issued to an alleged victim-petitioner. Part V addresses false complaints of sexual assault and how they can impact petitions requesting mandamus and defense responses to those petitions. Practitioners should understand these issues to best analyze petitions for and oppositions to mandamus under Article 6b.

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14 18 U.S.C. § 3771(a), (d)(3).
15 See Exec. Order No. 13,696, 80 Fed. Reg. 35,820 (June 22, 2015) (amending Mil. R. Evid. 514 to include a privilege between a victim and Department of Defense Safe Helpline staff and provided the victim with procedural rights similar to those under Mil. R. Evid. 513).
II. JURISDICTION & THE ALL WRITS ACT

Whether a court has jurisdiction is a question of law that is reviewed de novo. 16 CCAs may review a trial military judge’s ruling under three circumstances: (1) review in the ordinary course of appellate review under Article 66, UCMJ; (2) interlocutory appeal by the government under Article 62, UCMJ; 17 and (3) petition of extraordinary relief by “a person with standing to challenge the ruling.” 18

The court-martial and CCAs’ “constitutional origin is based on the congressional authority to govern the armed forces set out in Article I, § 8, clause 14.” 19 “[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 20 “[M]ilitary courts [of appeals], like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act.” 21 The All Writs Act neither serves as “an independent grant of jurisdiction, nor does it expand a [CCA]’s existing statutory jurisdiction.” 22 “Rather, the All Writs Act requires two determinations: (1) whether the requested writ is ‘in aid of’ the [CCA]’s existing jurisdiction; and (2) whether the requested writ is ‘necessary or appropriate.’” 23

“The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” 24 In the context of military justice, “in aid of” includes cases where a petitioner seeks “to modify an action that was taken within the subject matter jurisdiction of the military justice system.” 25 “To establish subject-matter jurisdiction, the harm alleged [by the petitioner] must have had the potential to directly affect the findings and sentence” of the court-martial. 26 “A writ petition may be ‘in aid of’ a [CCA]’s jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial.” 27

It is clear that CCAs have jurisdiction under the All Writs Act to hear victims’ petitions for writs of mandamus concerning Mil. R. Evid. 412, 513, 514, and 615 rulings and rulings

17 18 U.S.C. § 862, Art. 62 (2015) (The government can challenge an order or ruling of the military judge that: (A) “terminates the proceedings with respect to a charge or specification;” (B) “excludes evidence that is substantial proof of a fact material in the proceeding;” (C) “directs the disclosure of classified information;” or (D) “imposes sanctions for nondisclosure of classified information.” The government may also file an interlocutory appeal when the military judge refuses to: (E) “issue a protective order sought by the United States to prevent the disclosure of classified information;” or (F) enforce a protective order for classified information “that has previously been issued by appropriate authority.”).
21 Kastenberg, 72 M.J. at 367 (quoting Denedo, 556 U.S. at 911).
22 Id. (citing Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999)).
23 Id. (quoting Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008), aff’d, 556 U.S. 904 (2009)).
25 Kastenberg, 72 M.J. at 367 (quoting Denedo, 66 M.J. at 120).
26 Id. (citations omitted).
27 Id.; see also Roche, 319 U.S. at 25 (stating appellate court authority to issue writs of mandamus “is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to cases within its appellate jurisdiction although no appeal has been perfected.”).
regarding a victims’ rights under Article 6b(a) and (c) and Article 32 (preliminary hearings). An alleged victim’s request that a CCA reverse the military judge’s ruling on those matters is an effort “to modify an action that was taken within the subject matter jurisdiction of the military justice system.”28 The Court of Appeals for the Armed Forces (CAAF) and CCAs regularly review military judges’ rulings under those rules of evidence and those articles.29 Furthermore, a military judge’s ruling on those matters, such as the admissibility of evidence of a previous sexual relationship between the accused and the alleged victim (Mil. R. Evid. 412), or psychological evidence that the alleged victim has a personality disorder (Mil. R. Evid. 513), “has a direct bearing on . . . the evidence considered by the court-martial on the issues of guilt or innocence -- which will form the very foundation of a finding and sentence.”30 As such, the harm from an improper ruling on such evidence would have “the potential to directly affect the findings and sentence” of a court-martial.31

However, the Army Court of Criminal Appeals recently found that they did not need to consider whether a matter was in aid of their jurisdiction under the All Writs Act if the petition is filed for one of the enumerated reasons under Article 6b(e).32

III. STANDING

After an appellate court reviews whether it has jurisdiction, the next question concerns whether the petitioner has standing. “As ‘an essential and unchanging part of the case-or-controversy requirement of Article III,’ constitutional standing ‘is a threshold issue in every case before a federal court, determining the power of the court to entertain the suit.’”33 Military courts, Article I courts, generally apply standing requirements “as a prudential matter.”34 Thus, an alleged victim’s failure to satisfy standing requirements would preclude a court’s consideration of his or her petition for mandamus relief.

To have standing, a petitioner must establish an injury in fact, causation, and redressability.35 An injury in fact is “a concrete and particularized invasion of a legally protected

28 Kastenberg, 72 M.J. at 368.
30 Kastenberg, 72 M.J. at 368.
31 Id. (quoting Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129 (C.A.A.F. 2013)).
34 United States v. Waterich, 67 M.J. 63, 69 (C.A.A.F. 2008) (citing United States v. Chisholm, 59 M.J. 151, 152 (C.A.A.F. 2003)) (“This Court, which was established under Article I of the Constitution, has applied the principles from the ‘cases and controversies’ limitation as a prudential matter.”); see, e.g., United States v. Loving, 41 M.J. 213, 244 (C.A.A.F. 1994) (assuming arguendo that appellant would have had standing to object to search of another’s home); see also Kastenberg, 72 M.J. at 368-69 (addressing whether petitioner-victim had standing by using federal precedent); United States v. Disney, 62 M.J. 46, 48-49 (C.A.A.F. 2005) (finding the appellant had standing to assert claim).
35 Waterich, 67 M.J. at 69.
interest.”\(^\text{30}\) Causation is a “traceable connection between the alleged injury in fact and the alleged conduct of the [respondent].”\(^\text{37}\) Redressability is shown when “it is likely . . . that the [petitioner’s] injury will be remedied by the relief [petitioner] seeks in bringing suit.”\(^\text{38}\)

In the United States’ current system of public prosecutions, “federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed.”\(^\text{39}\) For example, some courts have found that third parties have standing to assert a recognized privilege, such as the attorney-client privilege, or a claim that they have been wronged by the actions of the defendant.\(^\text{40}\) In United States v. Nixon, the Supreme Court decided a case where the President asserted his Presidential privilege as a third party against a subpoena duces tecum filed by the Special Prosecutor in a criminal case.\(^\text{41}\) The Fifth Circuit has found a third party has standing to request redaction of a criminal record that has impugned his reputation.\(^\text{42}\) Other courts have held that the press has standing to intervene in criminal cases to challenge the abridgment of free speech.\(^\text{43}\)

However, those cases deviate from the norm in criminal proceedings: “a citizen [generally] lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”\(^\text{44}\) Courts that deny standing to alleged victims in criminal trials often do so because there was no injury in fact:

The direct, distinct and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced. It is the defendant and he alone that suffers the direct consequences of a criminal conviction and sentence. Collateral individuals to the proceeding . . . have not suffered an Article III direct injury sufficient to invoke a federal court’s jurisdiction to rule on their claim.\(^\text{45}\)

Military courts should be wary of extending standing in contravention of a clear mandate by Congress. In a criminal trial, the accused risks losing the very foundation of what the United States Constitution was created to protect: freedom and liberty.

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\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Kastenberg, 72 M.J. at 369 (citing United States v. Hubbard, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980)).

\(^{40}\) Anthony v. United States, 667 F.2d 870, 878 (10th Cir. 1981) (holding that a third-party psychologist, who was the victim of illegal wiretapping, had standing to object to appellant-wiretapper’s request for discovery and had standing to bring motion to suppress the contents of the unlawfully recorded tapes).


\(^{42}\) In re Smith, 656 F.2d 1101, 1107 (5th Cir. 1981) (holding the liberty and property concepts of the Fifth Amendment protect an individual from being publicly and officially accused of having committed a serious crime, particularly where the accusations gain wide notoriety) (citing United States v. Briggs, 514 F.2d 794, 799 (5th Cir. 1975)).

\(^{43}\) Press-Enterprise Co. v. Superior Ct., 478 U.S. 1, 15 (1986) (holding there is a First Amendment right of access to criminal proceedings); In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1561 (11th Cir. 1989) (citing In re Application of Dow Jones & Co., 842 F.2d 603, 607 (2d Cir. 1988) (“The rights of potential recipients of speech, like the news agencies, to challenge the abridgment of that speech has already been decided.”)).


\(^{45}\) United States v. Grundhoefer, 916 F.2d 788, 791 (2d Cir. 1990).
“The Bill of Rights was written to protect the individual from the overreaching and intrusive power of the government when it seeks to deprive the individual of life, liberty or property. Preventing the encroachment of government into a person’s rights, not actually requiring state action to protect these rights, is the philosophical underpinning of our democracy.”

Upholding the accused’s constitutional rights also comports with the first purpose of military law “to promote justice.” Finally, a non-party’s limited right to appeal a military judge’s ruling is consistent with an accused’s constitutional rights to due process and a speedy trial.

Extraordinary writs slow down trials while the parties await an appellate decision. Thus, the military justice system, and even more so the judiciary, should stand as a bulwark against the encroachment of the accused’s constitutional rights.

Although “[t]here is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege,” Congress specifically granted standing to alleged victims under Article 6b for alleged violations of their procedural rights under Article 6b, Article 32, and specific Military Rules of Evidence. (cite) “Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.”

Accordingly, Article 6b provides the alleged victim with limited standing to file a writ of 

A. Standing for Alleged Victims

Prior to the CVRA

“[P]rior to the CVRA most courts denied crime victims any opportunity to challenge lower court decisions impairing their rights as victims, whether through mandamus or otherwise.” In United States v. McVeigh, the Tenth Circuit dismissed the victims’ mandamus petition for lack of standing when they appealed a district court order prohibiting the victims from attending trial. That court held the victims did not have a personal First Amendment right to attend the trial.

[46] Rachel King, Why a Victims’ Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims, 68 U. Cin. L. Rev. 357, 366-67 (2000); see also id. at 368 (“[Bills of] rights were supposed to guard against the tyranny of autocrats and kings. Abuse of power by Federalist judges only strengthened the ideas that underlay the Bill of Rights. Criminal procedure, on paper, gave a whole battery of protections to persons accused of [sic] crime. The defendant had the right to appeal a conviction; the state had no right to appeal an acquittal.”) (quoting Lawrence M. Friedman, A History of American Law 150 (2d ed. 1985)).

after the CVRA, several courts have found victims do not have standing to appeal a criminal restitution order.\textsuperscript{55} However, at least one court found it could hear a petition from an alleged victim concerning Federal Rule of Evidence 412, which is substantially similar to Mil. R. Evid. 412,\textsuperscript{56} concerning the admissibility of the alleged victim’s other sexual behavior.\textsuperscript{57} In \textit{Doe}, the Fourth Circuit found the district court’s order on such an issue met the test of “practical finality” but never squarely addressed whether the victim had standing.\textsuperscript{58}

\textbf{B. Rights under the CVRA and Article 6b, UCMJ}

A comparison of the CVRA with Article 6b is instructive in understanding Article 6b’s limitations on standing. The CVRA provides victims, their lawful representatives, and government attorneys standing to petition for a writ of \textit{mandamus} to assert the following victims’ rights:

(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 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

\textsuperscript{55} \textit{United States v. Mindel}, 80 F.3d 394, 398 (9th Cir. 1996) (dismissing victim’s appeal of criminal restitution order and related \textit{mandamus} petition for lack of standing); see also \textit{United States v. Aguirre- González}, 597 F.3d 46, 54 (1st Cir. 2010) (“[T]he default rule [is] that crime victims have no right to directly appeal a defendant’s criminal sentence, under the CVRA or otherwise.”); \textit{United States v. Kelley}, 997 F.2d 806, 807 (10th Cir. 1993) (finding victim has no standing under the Victim and Witness Protection Act, 18 U.S.C. 3663, Pub. L. No. 97-291, § 3(a), 96 Stat. 1253 (1984) (as amended by Pub. L. No. 110-326, § 202, 122 Stat. 3561 (September 26, 2008)), to appeal a court’s criminal restitution order); \textit{United States v. Johnson}, 983 F.2d 216, 221 (11th Cir. 1993); \textit{Grundhoefer}, 916 F.2d at 791-792.

\textsuperscript{56} Federal Rules of Evidence 412 provides:

\begin{quote}
(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim’s sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant’s constitutional rights.
\end{quote}
and with respect for the victim's dignity and privacy.\textsuperscript{59}

Under Article 6b(a), the victim has substantially similar rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A preliminary hearing . . . 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 . . . [the UCMJ].

Significantly, both Article 6b(e) and the CVRA primarily focus on the procedural rights of victims, such as their rights to be present and heard.

\textbf{C. Rights v. Protections under Article 6b, UCMJ}

To understand whether Article 6b grants standing to petition for substantive versus procedural rights under Mil. R. Evid. 412, the practitioner must analyze the meaning of the word "rights" under Article 6b(e)(1) as compared to the word "protections" under Article 6b(e)(4), as the terms are not interchangeable. The subsections are contradictory. Article 6b(e)(1) states that an alleged victim may file a writ if he or she "believes that a court-martial ruling violates the rights of the victim afforded by a
section (article) or rule specified in paragraph (4)”; whereas, Article 6b(e)(4) states that 6b(e) (1) “applies with respect to the protections afforded by” those articles and rules. 

A right is defined as “[a] power, privilege, or immunity secured to a person by law.” A substantive right is “[a] right that can be protected or enforced by law; a right of substance rather than form.” For example, psychotherapist-patient, victim advocate-victim, or attorney-client privilege are substantive rights. A procedural right is a right that derives from legal or administrative procedure” and can also be used to “help[] in the protection or enforcement of a substantive right.” For example, a procedural right is the right to notice or to be heard at a proceeding. However, the word “protection,” the “state of being protected,” is much broader and denotes being “shield[ed] from injury or destruction.”

Mil. R. Evid. 513 clearly grants a victim the substantive right, and the protection, of confidential, privileged communications with a psychotherapist, and the procedural right to assert the psychotherapist-patient privilege. Because of this dual grant, the alleged victim has the ability to petition both substantive and procedural aspects of a judge’s Mil. R. Evid. 513 rulings. Therefore, this section primarily addresses a victim’s rights vs. protections under Mil. R. Evid. 412.

Defense practitioners may aver the rights afforded to an alleged victim under Mil. R. Evid. 412 only include the procedural rights to notice of any Mil. R. Evid. 412 motion; to attend the hearing; and to a reasonable opportunity to be heard and provide argument at the hearing before a military judge determines whether the evidence is admissible. If the alleged victim was afforded these rights and does not claim they were violated, the accused could claim the alleged victim lacked standing to petition a CCA for a writ of mandamus under Article 6b.

On the other hand, the alleged victim could claim that the rights afforded under Mil. R. Evid. 412 extend to challenging the military judge’s substantive evidentiary rulings if they fail to comply with that rule. For example, the alleged victim may argue the military judge errred by admitting evidence that was not covered by one of the exceptions under Mil. R. Evid. 412. Such a writ of mandamus would then “appl[y] to the protections afforded by” Mil. R. Evid. 412. To determine whether Article 6b applies to the “rights” or “protections” of Mil. R. Evid. 412, would-be petitioners would turn to the intent of the rule.

Mil. R. Evid. 412 was intended to “safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. . . . By affording victims protection in most instances, the rule encourages victims of sexual misconduct to

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60 Mil. R. Evid. 412 (emphasis added); Mil. R. Evid. 513 (emphasis added).
62 Id. at 1324.
63 Id. at 1323.
64 Webster’s New Collegiate Dictionary 926 (1975).
65 Mil. R. Evid. 513(e) (On 17 June 2015, the President signed Exec. Order No. 13,696, 80 C.F.R. 119 (Jun. 22, 2015), implementing significant changes to the MCM, including Mil. R. Evid. 513 and 514. Mil. R. Evid. 513(e) now provides the patient the procedural rights to notice of the evidence, a “reasonable opportunity to attend the [closed] hearing and be heard,” and the opportunity to call witnesses and present evidence).
66 See E-mail from David W. Warning, Appellate Defense Counsel, Navy-Marine Corps Appellate Review Activity, to Leila Mullican (May 28, 2015, 15:49:36 EST) (on file with author); see also Mil. R. Evid. 412 (requiring the hearing to be closed and the record of the hearing sealed but not stating whether those are enforceable procedural rights of the alleged victim).
67 UCMJ, Article 6b(e).
institute and to participate in legal proceedings against alleged offenders.” Further, Mil. R. Evid. 412 was intended to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense.

Guarding the alleged victim’s privacy is clearly one of the “protections” afforded by Mil. R. Evid. 412. The alleged victim-petitioner would argue nothing from legislative history supports that Congress intended to limit the rights under Mil. R. Evid. 412 to the procedural rights of notice and an opportunity to appear and be heard. They would support that reasoning by also claiming that the military judge’s substantive ruling violated their “right to be treated with fairness and with respect for the dignity and privacy” under Article 6b(a)(8). A reading that mandamus can only be granted for procedural violations of Mil. R. Evid. 412 could deprive an alleged victim of a remedy even when a military judge’s ruling depriving the alleged victim of privacy amounted to a clear deviation from established law or precedent. Such a result could frustrate the intent of Congress.

However, since the alleged victim in a criminal trial does not have constitutional rights equivalent to those of the accused in the trial, the text of the statute granting the victim’s right to appeal prevails. But the rights and the protections afforded to the alleged victim under Mil. R. Evid. 412 differ, making Article 6b’s use of those two words in different subsections contradictory. Although Mil. R. Evid. 412 provides the victim with protection from improper disclosure of his or her sexual history and predisposition, the text of the rule does not endow the alleged victim with any substantive right to privacy, as Mil. R. Evid. 513 or 514 do with privilege. Rather, the alleged victim is provided the following procedural rights: the right to notice of a motion seeking to admit evidence of the victim’s sexual behavior under Mil. R. Evid. 412(c)(1)(B) and the right to “be afforded a reasonable opportunity to attend and be heard” under Mil. R. Evid. 412(c)(2). Therefore, a plain reading of the statute reveals that alleged victims can only petition CCAs for writs of mandamus if their procedural rights under Mil. R. Evid. 412 are violated.

Courts should also deny victims’ petitions claiming that a military judge violated an alleged “right to privacy” under Article 6b(a)(8) in a Mil. R. Evid. 412 ruling. Article 6b(a)(8)...

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69 See United States v. Ellerbrock, 70 M.J. 314, 322 (C.A.A.F. 2011) (“M.R.E. 412 is a rape shield law. It is intended to protect the privacy of victims of sexual assault while at the same time protecting the constitutional right of an accused to a fair trial through his right to put on a defense.”); United States v. Sanchez, 44 M.J. 174, 177-78 (C.A.A.F. 1996) (finding Mil. R. Evid. 412 is “designed to protect a victim’s privacy and thereby protect them from further trauma”); United States v. Fox, 24 M.J. 110, 112 (C.M.A. 1987) (finding purpose of Mil. R. Evid. 412 is to “protect victims of nonconsensual sexual offenses against needless embarrassment and unwarranted invasions of privacy”); MCM, App. 22, at A22-36 (“Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common in prosecutions of such offenses. . . . “The purpose of the 1998 amendment is to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.”).
(8)'s "right to be treated with fairness and with respect for . . . dignity and privacy" does not guarantee a victim a substantive right to privacy. Rather, it guarantees a procedural right to be treated with fairness and respect. In a criminal proceeding, the victim's privacy interest takes a back seat to the government's interest in prosecuting the case and the accused's constitutional rights. (cite). Therefore, if the trial judge adequately follows the procedures outlined in Mil. R. Evid. 412, the judge has complied with Article 6b(a)(8) by treating the victim with fairness and respect for the victim's privacy, and the victim should have no right to a writ of mandamus attacking the substantive ruling.72 Even if no plain meaning can be ascertained from the statute, established cannons of interpretation also promote such a result. Under the general/specific cannon of interpretation,73 the broader word "protection" under Article 6b(e)(2) should be limited by the more specific word "rights" in Article 6b(e)(1). The legislative history of the 2015 version of Article 6b states subsection (e) authorizes a victim "who believes that a court-martial ruling violates the victim's rights afforded by" Mil. R. Evid. 412 and 513 "to petition the Court of Criminal Appeals for a writ of mandamus to require the court-martial to comply with the MRE."74 Therefore, under this rubric, the alleged victim would only have standing to petition for a writ of mandamus to assert his or her stated procedural rights under Mil. R. Evid. 412; the alleged victim would not have standing to assert a substantive right of privacy.

Under the nearest reasonable referent cannon,75 Article 6b(e)(1)'s phrase, "violates the rights of the victim afforded by" one of the enumerated articles or rules, means only those rights provided by the specified article or rule of evidence are applicable.

This reading of Article 6b(e) is consistent with the CAAF's decision in Kastenberg, which held the alleged victim had standing to assert her right to be heard but the military judge retained appropriate discretion to determine "the manner in which her argument [wa]s presented."76 As stated by CAAF, "M.R.E. 412 and 513 do not create . . . any right to appeal an adverse evidentiary ruling."77 Article 6b(e) may be Congress' sanction of Kastenberg's decision that a petitioner has standing to request a writ when his or her procedural rights have been violated, and Kastenberg should not be read to further expand the alleged victim's standing to substantive issues.78

72 See United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at *50 (S.D. Tex. Feb. 21, 2008) ("The reasonable right to confer with the government and the government's obligation to use its best efforts to provide notice of this right are . . . mechanisms through which the CVRA guarantees victims' right to fairness").
73 Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails."); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) (citing Morton v. Mancari, 417 U.S. 535, 550-51 (1974)) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").
75 See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 152 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."); see also United States Fire Ins. Co v. Kelman Bottles, 538 Fed. Appx. 175, 180 (3d Cir. 2013) (applying the nearest reasonable referent cannon).
76 72 M.J. at 371.
77 Id.
78 E-mail from David W. Warning, Appellate Defense Counsel, Navy-Marine Corps Appellate Review Activity, to Leila Mullican (May 28, 2015, 15:49:36 EST) (on file with author). However, Congress seemingly did extend
Article 6b(e)(4) limits standing to only the protections afforded by Articles 6b and 32 and Mil. R. Evid. 412, 513, 514, and 615. Therefore, many potential victims do not have standing to file mandamus petitions under Article 6b(e) even though subsection (b) broadly defines a victim to be anyone who "has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense" under the UCMJ. For example, under Article 6b(e), a victim of an assault does not have standing under Article 6b(e) to contest a military judge's decision under Mil. R. Evid. 403, 404, or 405 even if the military judge errs in entering a negative trait of the victim's character into evidence. An assault victim does not have standing to petition a military judge's ruling admitting evidence that the victim was the aggressor under Mil. R. Evid. 404(a)(2). A victim, even a victim of sexual assault, cannot petition a military judge's ruling admitting evidence of his or her bias under Mil. R. Evid. 608 or of his or her former crime under Mil. R. Evid. 609. Although such evidence could be just as harmful to the privacy of the alleged victim of a sexual assault as evidence that he or she had a certain sexual relationship in the past or a discussion with a psychotherapist, Congress did not include those rules of evidence as grounds for mandamus petitions under Article 6b(e).

Congress also decided to leave out other provisions related to Mil. R. Evid. 412 and 513, such as Mil. R. Evid. 413 (similar crimes in sexual offense cases) and 414 (similar crimes in child-molestation cases), under the article's grant of standing. Even though Mil. R. Evid. 413 and 414 cover other similar offenses of an alleged accused, they could become relevant to the alleged victim in a case of sexual assault if, for example, the prosecution sought to admit evidence of the alleged victim's past abuse by the same accused under those rules. Although Mil. R. Evid. 412 may also be implicated under those circumstances, the alleged victim could have a desire to keep such prior abuse private or have a different perspective about the admissibility of such evidence under Mil. R. Evid. 413 and 414 than the military judge or the prosecutor.

D. Standing under the CVRA

Federal case law concerning the CVRA focuses on procedural, rather than substantive, potential errors of the lower courts. This procedural focus highlights the petitioner's heavy burden when petitioning for writs of mandamus on substantive issues and reflects how narrowly courts have interpreted congressional grants of standing to petition for mandamus relief. Several appellate cases decided under the CVRA involve the right to be "reasonably heard" at hearings and obtain evidence. Other

79 See notes 84-86 infra; cf. In re K.K., 756 F.3d 1169, 1170 (9th Cir. 2014) (per curiam) (deciding substantive issue of whether district court abused its discretion in denying victim's motion to squash subpoena requested by defendant).
80 See also Lippert, No. 20150769, 2016 CCA LEXIS 63, at *33 (interpreting Article 6b and focusing on improper procedure).
81 See, e.g., In re Siler, 571 F.3d 604, 611 (6th Cir. 2009) (finding no abuse of discretion in court's denial of disclosure of presentence report (PSR) to victim); In re Brock, 262 Fed. Appx. 510, 512 (4th Cir. 2008) (per curiam) (finding no abuse of discretion in denying the victim access to the PSR because victim could exercise right to be heard without such access and no abuse of discretion in refusing to consider victim's arguments on sentencing guidelines because the court considered his statements regarding the assault); United States v. Moussaoui, 483 F.3d 220, 233-34, 236-39 (4th Cir. 2007) (reversing district court's order granting victims access to all the government's information turned over to defense counsel in discovery in the criminal case for use in civil litigation); In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006) (per curiam) (finding that CVRA
er cases involve the victim’s right to attend the court hearing. At least one court has found the victim’s right to confer with the prosecutor “on a proposed plea agreement and the government’s obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion.”

“Neither the text of the [CVRA] nor its legislative history provides guidance as to what specific procedures or substantive relief, if any, Congress intended [the provision concerning the victim’s right to be treated with fairness and with respect for the victim’s dignity and privacy] to require or prohibit.” Some courts have applied the right to fairness broadly, finding that the right to fairness provision was “intended to conform to the sponsors’ expectation that the statute will be applied liberally to the extent consistent with other law.” However, even those courts have focused on the procedural rights of crime victims and the fact that the other protections afforded by the CVRA are mechanisms to ensure the victim’s right to fairness is upheld. This provision has also been used to protect the disclosure of victims’ private information to the general public.

E. Conclusion

The Constitution requires that CCAs must strictly construe statutes providing standing to request a writ of mandamus. A comparison between the CVRA and Article 6b, along with a review of the plain reading of the statutes and historical precedent, highlights Congress’ narrow grant of standing in Article 6b(e). Although a petitioner has a privacy interest in Mil. R. Evid. 412 evidence, that privacy interest does not rise to the level of a right guaranteed by Mil. R. Evid. 412. Petitioners should not be

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86 BP Prods. N. Am. Inc., No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at *50; United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (“When the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim’s right to be treated fairly and with respect for her dignity is to consider the victim’s views on the dismissal.”); Turner, 367 F. Supp. 2d at 335 (mandating that the government must provide the court with the victims’ names and contact information so the court could ensure their rights are afforded them);
88 See Will, 389 U.S. at 96 (“All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court.”); Carroll v. United States, 354 U.S. 394, 415 (1957) (“Delays in the prosecution of criminal cases are numerous and lengthy enough without sanctioning appeals that are not plainly authorized by statute.”); see also Lippert, No. 20150769, 2016 CCA LEXIS 63, at *33 (declining to determine whether Mil. R. Evid. 513 records were admissible at trial in deciding victim’s petition for writ of mandamus because there had “not yet been a proceeding or determination that correctly applies the procedural and substantive requirements of Mil. R. Evid. 513 to the facts of this case”).
granted standing to claim the military judge clearly abused his or her discretion on substantive matters. Only if a military judge does not properly afford alleged victims their procedural rights under Mil. R. Evid. 412 should they be allowed to petition for a writ of *mandamus* under that rule. For the other articles and rules enumerated under Article 6b(e), CCAs should primarily focus on whether the alleged victim’s procedural rights under the articles and rules were violated prior to ruling on any substantive issues presented by the petition.

IV. Issuance of the Writ of *Mandamus*

Once the petitioner shows the requested writ is “in aid of’’ the [CCA’s] existing jurisdiction” and that he or she has standing to bring the claim, the petitioner must next prove that “the requested writ is ‘necessary or appropriate.’” For the purposes of this Part, the Author will assume *arguendo* that the CCAs allow alleged victims to petition for writs of *mandamus* on procedural and substantive claims of error under the articles and rules under Article 6b(e) (4).

A. Traditional *Mandamus* Standard of Review for CCA Petitions

*Mandamus* is an extraordinary remedy that should be used in only extraordinary circumstances. Otherwise, “every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction.”

Under military precedent, a “writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations.” To establish that a writ of *mandamus* is necessary or appropriate, the petitioner “must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.” Petitioners bear the heavy burden to show they have “a clear and indisputable right’ to the extraordinary relief’ requested. Under this heightened standard, a CCA must find a discretionary “judicial decision [amount[s] to more than even ‘gross error’” in order to reverse. Instead, only exceptional circumstances amounting to a “clear abuse of discretion or usurpation of judicial power . . . justify the invocation of this extraordinary remedy.” A military judge exceeds his or her discretionary power under a Military Rule of Evidence if “by its very language, the rule of evidence relied upon as the basis for [the judge’s] ruling can, under no circumstance as applied to the limited issue presented to him, support that ruling.”

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99. *Ex parte Rowland*, 104 U.S. 604, 617 (1882) (“The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy.”).
B. Circuit Split on Standard of Review for CVRA Petitions

The federal circuits are split on the question of which standard of review applies to mandamus petitions brought under the CVRA. Four circuits apply the traditional, heightened mandamus standard.98 These circuits reason that “Congress could have drafted the CVRA to provide for ‘immediate appellate review’ or ‘interlocutory appellate review,’ something it has done many times. Instead, it authorized and made use of the term ‘mandamus.’”99 When Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.100

“Mandamus is the subject of longstanding judicial precedent.”101 Courts should “assume that Congress knows the law and legislates in light of federal court precedent.”102

Four other circuits apply an appellate review standard of “abuse of discretion.”103 The circuit courts that eschew the traditional mandamus standard do so because they find “the CVRA contemplates active review of orders denying victims’ rights claims even in routine cases . . . The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.”104 Since those circuit courts find the CVRA creates a presumption that courts of appeals will review an alleged victim’s petition, they find the victim is not required to meet the heightened standard of traditional mandamus review. Such courts issue a writ of mandamus under the CVRA whenever they “find that the district court’s order reflects an abuse of discretion or legal error.”105

C. When a Writ of Mandamus Should Issue for Violations of Articles and Rules Enumerated Under Article 6b(e)(4)

CCAs should decline to depart from CAAF precedent on writs of mandamus and instead concur with the District of Columbia Circuit that since “Congress called for ‘mandamus’ strongly suggests it wanted ‘mandamus.’”106 The case for the traditional mandamus standard of review is particularly strong since Congress knew of the circuit split on the interpretation of the mandamus standard under the CVRA and yet drafted Article 6b(e) to specifi-
cally state the victim may petition the CCA “for a writ of mandamus.” Furthermore, the Army Court of Criminal Appeals recently applied the heightened standard in its review of an alleged victim’s mandamus petition. 102

1. Other Adequate Means to Attain Relief

Under the traditional mandamus standard, the petitioner must first show there is no other adequate means to attain relief. 103 Issuance of a writ of mandamus may be the only available means for an alleged victim suffering violations of his or her rights under the articles and rules under Article 66(b)(4) to attain the relief requested. By requesting a writ of mandamus for substantive issues under those rules, alleged victims would complain of an improper ruling to admit evidence of the petitioner’s sexual history, conversations with a victim advocate, or mental health records. The relief they request is to keep that information private. Once such evidence is admitted, the alleged victim’s privacy rights, if violated, would be difficult, if not impossible, to repair on appeal because the information would have already been disclosed at a public trial. 109 As a result, the relief requested by such a petitioner would not be attainable on direct review of any potential findings and sentence approved by a convening authority under Articles 66 or 69, UCMJ, because the loss in his or her privacy interest would have already occurred.

Other alleged victims may complain that the military judge did not provide them with their procedural rights as required. CAAF has already found there may be “no other meaningful way for these issues to reach appellate review.” 110

2. Clear and Indisputable Right to Issuance of the Writ

Once the petitioner establishes there are no other adequate means to attain relief, he or she must next show that his or her right to “issuance of the writ is clear and indisputable.” 111 Petitioners show a clear and indisputable right to the issuance of a writ of mandamus, if the military judge’s discretionary “judicial decision amounts to more than even ‘gross error’” 112 and is a “usurpation of judicial power.” 113

For a procedural claim of error under Mil. R. Evid. 412, the petitioner must show that the military judge did not allow the petitioner one of his or her procedural rights, such as the right to be present and heard at the hearing. “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.” 114

To prevail on a substantive claim of error under Mil. R. Evid. 412, the petitioner must show the military judge usurped his or her judicial authority in admitting evidence in violation of the petitioner’s right to privacy. Mil. R. Evid. 412(a) is a rule of exclusion, which provides that, unless an exception applies, “[e]vi-

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102 Lippert, No. 20150769, 2016 CCA LEXIS 63, at *5.
103 Hasan, 71 M.J. at 418 (citing Cheney, 542 U.S. at 380-81).
109 See Doe, 666 F.2d at 46 (“Without the right to immediate appeal, victims aggrieved by the court’s order will have no opportunity to protect their privacy from invasions forbidden by the rule. Appeal following the defendant’s acquittal or conviction is no remedy, for the harm that the rule seeks to prevent already will have occurred.”).
110 Kastenberg, 72 M.J. at 372.
111 Hasan, 71 M.J. at 418 (citing Cheney, 542 U.S. at 380-81).
112 Murray, 16 M.J. at 76 (citations omitted).
113 Booker, 72 M.J. at 791.
114 Kastenberg, 72 M.J. at 370.
dence offered to prove that any alleged victim engaged in other sexual behavior” is “not admissible in any proceeding involving an alleged sexual offense.”115

The rule provides three exceptions. “[D] efense counsel has the burden of demonstrating why the general prohibition in [Mil. R. Evid.] 412 should be lifted to admit evidence of the sexual behavior of the victim . . .”116 “In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule.”117 If the military judge performs the proper analysis on the record under each exception, his or her discretionary ruling admitting or excluding such evidence will rarely amount to a usurpation of judicial authority.118

First, Mil. R. Evid. 412(b)(1)(A) allows the entry of “evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence.” For example, evidence that the alleged victim had sexual intercourse with another person on the same evening as the alleged sexual assault by the accused would be admissible under this subsection to show that the other person may have caused the victim’s injuries that the victim attributed to the accused. Second, “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct [can be] offered by the accused to prove consent or by the prosecution.”119 For example, evidence that the alleged victim had consensual sex with the accused on the morning prior to the alleged sexual assault may be admissible to show the victim consented to the sexual conduct at issue. Under the first and second exceptions, the military judge is also required to perform the Mil. R. Evid. 412(c)(3) balancing test: to determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the petitioner’s privacy. The military judge must also review the admissibility of the evidence under Mil. R. Evid. 401 and 403.120

The third exception under Mil. R. Evid. 412(b)(1)(C) allows evidence of prior sexual acts that is “constitutionally required.”121 Evidence is constitutionally required if it is “essential to a fair trial.”122 Under this exception, the “alleged victim’s privacy interests cannot preclude the admission of evidence ‘the exclusion of which would violate the constitutional rights of the accused.’”123 Therefore, the military judge is

115 Ellerbrock, 70 M.J. at 322 (citation omitted) (finding several legitimate interests in the military context support Mil. R. Evid. 412’s limitation of an accused to present relevant testimony, including “a societal interest in the reporting and prosecution of sexual offenses and maintenance of a justice system that is fair to both the accused and to the victims. They also include maintenance of good order and discipline in the military as well as the morale and welfare of those who serve in the armed forces”).


117 Banker, 60 M.J. at 222 (citing Moulton, 47 M.J. at 228-29).

118 A military judge’s proper analysis generally is not even overturned under the lower abuse of discretion standard. See, e.g., Banker, 60 M.J. at 225 (“In the context of M.R.E. 412, it was within the judge’s discretion to determine that such a cursory argument did not sufficiently articulate how the testimony reasonably established a motive to fabricate.”); Moulton, 47 M.J. at 228 (agreeing with CCA that military judge did not abuse his discretion in precluding further questioning under Mil. R. Evid. 412 because the defense had failed “to articulate a theory of admissibility”).

119 Mil. R. Evid. 412(b)(1)(B).

120 Mil. R. Evid. 412(c)(3); see United States v. Andreozzi, 60 M.J. 727, 738 (A.C.C.A. 2004) (citing Banker, 60 M.J. at 220).

121 See, e.g., United States v. Gray, 40 M.J. 77, 80 (C.M.A. 1994) (finding abuse of discretion to exclude evidence that same 9-year-old girl who was currently accusing defendant of rape had previously falsely accused him of rape).

122 Ellerbrock, 70 M.J. at 322.

123 Gaddis, 70 M.J. at 250 (citing Mil. R. Evid. 412(b)(1)(C)).
not required to perform a Mil. R. Evid. 412(c)(3) balancing test to determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the petitioner’s privacy.\textsuperscript{124}

“In order to properly determine whether evidence is admissible under the constitutionally required exception the military judge must evaluate whether the proffered evidence is relevant, material, and favorable to the defense.”\textsuperscript{125} The military judge must then conduct a Mil. R. Evid. 403 balancing test.\textsuperscript{126} If a military judge “does not sufficiently articulate [the Mil. R. Evid. 403] balancing on the record, his [or her] evidentiary ruling will receive less deference from” appellate courts.\textsuperscript{127} The military judge’s decision to admit Mil. R. Evid. 412 evidence is further safeguarded by a determination that a reasonable panel might receive a significantly different impression of the petitioner’s credibility if defense counsel was permitted to inquire into the other sexual behavior.\textsuperscript{128}

An accused has the constitutional right “to be confronted by the witnesses against him.”\textsuperscript{129} That right includes the right to cross-examine those witnesses.\textsuperscript{130} “[T]he exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”\textsuperscript{131} “[A]n accused’s Confrontation Clause rights are violated when a reasonable jury might have received a significantly different impression of the witness’s credibility had defense counsel been permitted to pursue his proposed line of cross-examination.”\textsuperscript{132} To cross-examine a witness on a subject, the proponent must establish the subject has “a direct nexus to the case that is rooted in the record.”\textsuperscript{133}

Evidence of motive is relevant and essential to the trier of fact to determine the petitioner’s reason for reporting the alleged sexual assault at issue. “There is little question that . . . the credibility of the putative victim is of paramount importance, and that a statement by that person that she had made up some or all of the allegations to get attention might cause members to have a significantly different view of her credibility.”\textsuperscript{134} Generally, Article 120, UCMJ, charges concern the accused’s conduct with the petitioner, the only other witness to the activity in question. In such a scenario, the petitioner’s credibility is central to the government’s case. Under those circumstances, military judges are more likely to find that evidence is constitutionally required and petitioners are less likely to show the military judge usurped his or her judicial authority in admitting the evidence.

\textsuperscript{124} See id. (For example, the military judge can find the evidence to be constitutionally required in order to preserve the accused’s rights to confrontation and due process).

\textsuperscript{125} United States v. Smith, 68 M.J. 445, 452 (C.A.A.F. 2010) (citation omitted).

\textsuperscript{126} Ellerbrock, 70 M.J. at 319 (citations omitted) (finding the probative value of the evidence must outweigh the danger of unfair prejudice, to include “‘repression, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant’”).


\textsuperscript{128} See Gaddis, 70 M.J. at 256 (quoting Del. v. Van Arsdale, 475 U.S. 673, 680 (1986)); United States v. Dorsey, 16 M.J. 1, 7 (C.M.A. 1983) (concluding that the judge erred in excluding relevant evidence that “would have had a reasonable likelihood of affecting the judgment of the trier of fact”).

\textsuperscript{129} U.S. Const. amend. VI.

\textsuperscript{130} Van Arsdale, 475 U.S. at 678 (citation omitted).

\textsuperscript{131} Id. at 678-79 (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)).


\textsuperscript{133} United States v. Sullivan, 70 M.J. 110, 115 (C.A.A.F. 2011).

\textsuperscript{134} Jasper, 72 M.J. at 281.
To prevail on a claim of error under Mil. R. Evid. 513 or 514, the petitioner must show the military judge usurped his or her judicial authority in admitting evidence in violation of the petitioner’s psychotherapist-patient or victim-victim advocate privilege or procedural rights under those rules. Under Mil. R. Evid. 513(d), the psychotherapist-patient privilege does not apply in seven circumstances:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist . . . believes that a patient’s mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation . . .

133 Until 2015, there had always been an eighth exception: “(8) when admission or disclosure of a communication is constitutionally required.” However, the 2015 NDAA struck that exception. See § 537. That change may be unconstitutional because, in many cases, it would violate the accused’s right to confrontation. See, e.g., Davis, 415 U.S. at 320 (“The State’s policy interest in protecting the confidentiality of a juvenile offender’s record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.”); United States v. Lindstrom, 698 F.2d 1154, 1167 (11th Cir. 1983) (“While we recognize the general validity of those interests, they are not absolute and, in the context of this criminal trial, must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case.”). The Supreme Court has not squarely addressed this issue. See Swidler & Berlin v. United States, 524 U.S. 399, 408 n.3 (1998) (not addressing whether “exceptional circumstances implicating a criminal defendant’s constitutional rights might warrant breaching the [attorney-client] privilege”); Jaffee v. Redmond, 518 U.S. 1, 17 (1996) (holding, in a civil case, the psychotherapist-patient privilege is not subject to a test balancing “the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure”); Johnson v. Norris, 537 F.3d 840, 846 (8th Cir. 2008) (finding that, although “in at least some circumstances, an accused’s constitutional rights are paramount to a State’s interest in protecting confidential information, . . . [there is no] specific legal rule that answers whether a State’s psychotherapist-patient privilege must yield to an accused’s desire to use confidential information in defense of a criminal case”); Sullivan, 70 M.J. at 117 (citing Lindstrom, 698 F.2d at 1165-66) (“In sexual assault cases, evidence of an alleged victim’s psychological condition could directly impact the members’ impressions of the accused’s mistake of fact as to consent, the alleged victim’s credibility in making the accusation, and the alleged victim’s consent to the alleged sexual assault. CAAF has found a witness’s psychological state ‘should be admitted if it relates to the witness’s ability to perceive events and testify accurately.’”); see infra Part V(,Psychological evidence regarding the sexual assault complainant, especially if he or she was diagnosed with an attention-seeking disorder, bipolar disorder, or some
When a party seeks to admit evidence covered under the psychotherapist-patient privilege, Mil. R. Evid. 513(e)(2) provides the patient with the following procedural rights: “a reasonable opportunity to attend the hearing and be heard,” which “includes the right to be heard through counsel,” and the opportunity to call witnesses and present evidence. Before ordering production of or admitting such evidence, the military judge “must conduct a hearing, which shall be closed.” The military judge may examine the patient’s records in camera and may issue protective orders concerning the evidence or “admit only portions of the evidence.” “Any production or disclosure permitted by the military judge must be narrowly tailored to only the specific records or communications . . . that meet the requirements for one of the enumerated exceptions to the privilege . . .”

Under Mil. R. Evid. 514, a victim or victim advocate can claim a privilege to the victim’s confidential communications with a victim advocate. The privilege does not apply in six circumstances: (1) if the victim is dead; (2) if there is a duty to report under law; (3) if the advocate believes the victim may be a danger to any person, including the victim; (4) if the communication clearly contemplated the future commission of a fraud or crime; (5) when necessary to ensure the safety and security of military personnel, property, or information; and (6) when disclosure is constitutionally required. Before communications between a victim and his or her victim advocate may be produced to the defense or admitted as evidence at trial, the court must hold a closed hearing, where the victim has a right to be in attendance and heard. Any disclosure of such information must be “narrowly tailored” to meet one of the six exceptions to the privilege and to the stated use of the information.

Petitioners may also attempt to claim a privilege in their restricted reports of sexual assault that do not pertain to the case at trial under Mil. R. Evid. 514. Such petitioners may request a writ of mandamus if they believe the military judge did not adequately protect their restricted reports from the defense or from release. An alleged victim's communications to his or her victim advocate “made for the purpose of facilitating advice or supportive assistance to the victim” are confidential com-
munications protected by Mil. R. Evid. 514. However, "[c]ommunications between the victim and a person other than the SARC, SAPR VA, or healthcare personnel are NOT confidential and do not receive the protections of Restricted Reporting."148

The rights given to victims under Mil. R. Evid. 615(e) and Articles 6b and 32, UCMJ, are primarily procedural. Under Mil. R. Evid. 615(e), a victim of an offense cannot be excluded from a trial of an accused for that offense "unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding." Article 32, UCMJ, states that the victim will not be forced to testify at a preliminary hearing and allows the victim to obtain a copy of a recording of the preliminary hearing.

A petition that effectively proves a clear and indisputable right to the issuance of the writ would clearly state how the military judge usurped his or her judicial authority at any of the decision points under the articles and rules.

3. Issuance Is Appropriate under the Circumstances

Finally, the petitioner must establish that the issuance of the writ is appropriate under the circumstances.150 Courts analyze at least two separate factors to determine whether the issuance of the writ is appropriate. First, is the lower court’s ruling “an oft-repeated error” or likely to reoccur; in other words, does it “manifest[] a persistent disregard of federal rules”?151 Second, does “[t]he lower court’s order raise[] new and important problems, or issues of law of first impression”?152 The CCA is more likely to grant a petitioner’s petition for a writ of mandamus if the military judge’s decision is likely to reoccur and/or raises new issues that have not been previously addressed on appellate review.

V. FALSE COMPLAINTS OF SEXUAL ASSAULT

False complaints of sexual assault cause practitioners confusion. Alleged victims may attempt to petition CCAs on these matters. However, under Article 6b, petitioners do not have standing to seek writs of mandamus concerning military judges’ rulings on admission of false complaints of sexual assault.

As stated in the drafter’s analysis of Mil. R. Evid. 412, evidence of past false complaints of sexual assault by an alleged victim does not fall within the protections of Mil. R. Evid. 412 and is “not objectionable when otherwise admissible.”153 Therefore, an alleged victim does not have standing to petition the admission of evidence of a false complaint under Article 6b. Insofar as the allegations are proven to be false by a preponderance of the evidence154 and the evidence to be presented at trial does not in-

147 DoDI 6495.02 at Enclosure 4, ¶ 1(b)(4).
148 Id. at ¶ 1(e)(2).
149 (Supp. 2015).
150 Hasan, 71 M.J. at 418 (citing Cheney, 542 U.S. at 380-81).
152 Dew, 48 M.J. at 649 (citations omitted); Booker, 72 M.J. at 807 (providing “we are aware that the circumstances present here have not been addressed in any decision revealed in the parties’ pleadings or by this court”).
153 MCM, App. 22-36; Mil. R. Evid. 412.
154 R.C.M. 801(e)(4) (“Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.”).
clude other evidence protected under Mil. R. Evid. 412, the military judge is not required to conduct a Mil. R. Evid. 412 analysis in order to admit such evidence.\(^\text{155}\) Even if the CCA decides to review a petition concerning the admission of a false complaint, a military judge has not usurped his or her judicial authority in admitting that evidence after the complaint is proven to be false by a preponderance of the evidence.

Defense counsel should not overlook the false complaint exception to Mil. R. Evid. 412. The three major reasons an alleged victim would file a false sexual assault complaint include “providing an alibi, seeking revenge, and obtaining sympathy and attention.”\(^\text{156}\) At least one scholar has written that false rape allegations “reflect impulsive and desperate efforts to cope with personal and social stress situations.”\(^\text{157}\) Military culture is rife with personal and social stress situations, including being far from loved ones, uprooted every two to four years, and sent on deployments to war zones and onboard military ships. At the same time, the military climate provides several potential economic and personal incentives for an alleged victim to falsely report a sexual assault. First, a report can enable a false complainant to avoid, or return early from, a deployment or be moved from a command or a duty location the alleged victim does not like. If the complainant files an unrestricted report, meaning the alleged offender would be investigated and that investigation could ultimately lead to a court-martial, the alleged victim is entitled to immediate transfer to another duty station, including off of a deployment or ship that is at sea.\(^\text{158}\)

Second, false complainants can use their complaint to avoid personal misconduct.\(^\text{159}\) For example, if service members from the same command had a consensual sexual relationship, one could accuse the other of sexual assault to avoid personal fraternization charges. The stakes for a service member facing discipline are high in the context of the military justice system. Charges of misconduct could lead to the service member’s non-judicial punishment, where the person’s military commander can adjudge several punishments, including but not limited to forfeiture of pay, reduction to an inferior pay grade, restriction to specified limits, and extra duties.\(^\text{160}\) Charges of misconduct could also subject the service member to loss of their military career through administrative separation, which can result in something other than an honorable discharge, or a federal crime, and its attendant punishments and consequences, by court-martial.

Third, an alleged victim-complainant has access to medical and psychological services, including potential medical separation with disability benefits. Because “[s]exual assault victims shall be given priority, and treated as emergency cases,”\(^\text{161}\) a person who regretted engaging in a consensual one-night stand could claim sexual assault to jump to the first of the line to obtain birth control and/or a sexually transmitted disease check. In such a scenario, false complainants may feel more comfortable saying they were sexually assaulted to avoid the

delicable, of the option to request a temporary or permanent expedited transfer from their assigned command or installation . . . ”).

\(^{155}\) Id. at 42, Encl. 5, ¶ 7(a) (“Commanders shall have discretion to defer action on alleged collateral misconduct by the sexual assault victims (and shall not be penalized for such a deferral decision), until final disposition of the sexual assault case, . . . so as to encourage reporting of sexual assault and continued victim cooperation . . . ”).

\(^{156}\) MCM, Part V(5).

\(^{157}\) Id. at 4, ¶ 4(f).

\(^{158}\) See Eugene J. Kanin, False Rape Allegations, 23.1 Archives of Sexual Behavior 81, 81 (1994).
potential judgment they may receive if they just stated the truth.

VI. CONCLUSION

Because the landscape surrounding sexual assault cases is frequently changing, practitioners must be aware of all changes to the law. Several of the changes in the 2014-2016 NDAAs and subsequent executive orders have potential constitutional implications and consequences for both defendants and alleged victims.

CCAs have jurisdiction to hear any writ of mandamus brought forward by an alleged victim under those articles and rules enumerated in Article 6b(e)(4). However, the Constitution requires, and a comparison between the CVRA and Article 6b along with a review of the plain reading of the statutes and historical precedent highlights, that CCAs strictly construe statutes providing standing to file a writ of mandamus.162

A petitioner may request a writ of mandamus if a military judge does not afford the petitioner procedural rights under Mil. R. Evid. 412. However, petitioners should not be granted standing to claim the military judge abused his or her discretion on substantive Mil. R. Evid. 412 matters because, although Mil. R. Evid. 412 may generally protect an alleged victim’s privacy interest, that protection does not rise to the level of a right. For the other articles and rules enumerated under Article 6b(e), CCAs should primarily focus on whether the alleged victim’s procedural rights under the articles and rules were violated prior to ruling on any substantive issues presented by the petition.

The heightened mandamus standard should be used to review alleged victims’ petitions for writs of mandamus under Article 6b. Under that standard, the petitioner “must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.”163 The alleged victim most likely will be able to meet the first prong in claims of violations of the applicable articles and rules under Article 6b(e)(4). The most difficult prong for the petitioner to meet is the second one because the military judge’s decision must have amounted to more than “gross error,”164 it must have been a “usurpation of judicial power.”165 Finally, if the petitioner meets the first and the second prong, the CCA may not grant a writ of mandamus unless the same type of usurpation of judicial power is likely to reoccur and/or raises new issues that have not been previously addressed on appellate review.

False allegations of sexual assault present additional challenges for practitioners. False complaints do not fall under Mil. R. Evid. 412, and, thus, claims regarding their improper admission should not be taken up on a writ to a CCA.

Aspects of Congress’ new, wide-sweeping changes to military justice legislation encroach upon, and sometimes violate, the constitutional protections historically afforded to criminal defendants at courts-martial. At trial and on interlocutory appeal, an accused is entitled to the presumption of innocence unless and until he or she is eventually proven guilty by “reasonable and competent evidence beyond a reasonable doubt.”166 By granting standing to alleged victims only under the specific circumstances outlined under Article 6b, CCAs provide an appropriate rampart against the heavy weight of sexual assault charges upon an accused.

162 See Will, 389 U.S. at 96-97; Carroll, 354 U.S. at 415.
163 Hasan, 71 M.J. at 418 (citing Cheney, 542 U.S. at 380-81).
164 Murray, 16 M.J. at 76 (citations omitted).
165 Booker, 72 M.J. at 791 (citations omitted).
166 UCMJ, Article 51(c)(1).
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