COMMENTARY: Throwing the Baby Out with the Bathwater: Congressional Efforts to Empower Victims Threaten the Integrity of the Military Justice System

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Text

> When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking-in .

-- President Bill Clinton [1]

This ***article*** explores the ***history*** of victims' rights in both the military and civilian criminal justice systems. The ***article*** then evaluates several imminent changes to the Uniform Code of Military Justice (UCMJ). In particular, this ***article*** explains why mandating a grand jury--like hearing for the military will damage the integrity of the system and will result in a series of future problems. Far beyond shielding victims from abusive questioning, the new rules will combine the least reliable aspects of both present criminal systems into one amalgamated mess, with innocent servicemembers suffering the consequences.

Congress passed the National Defense Authorization Act of 2014 (2014 NDAA) on December 26, 2013, [2] extending provisions of the Crime Victims' Rights Act of 2004 [3] to victims in military courts. [4] The practical effect is that such

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[1] President Clinton on the event of the signing of the Victim Rights Clarification Act of 1997; quoted at United States v. Spann, 51 M.J. 89, 93 (C.A.A.F. 1999).

[2] See National Defense Authorization Act for Fiscal Year 2014 [hereinafter 2014 NDAA], Pub. L. No. 113-66, 127 Stat. 672 (2013), available at https://www.congress.gov/bill/113-th-congress/house-bill/3304/text.

[3] See 18 U.S.C. § 3771.

[4] See 2014 NDAA §§ 1701, 1704, 1706, and 1747, creating an ***Article*** 6b of the Uniform Code of Military Justice (UCMJ), the so-called victim's bill of rights.

victims will soon get to select how they participate in public hearings throughout their case. [5] The first crime to which all of these rules will apply should occur about the time this ***article*** goes to press. [6]

Congress intends the 2014 NDAA provisions to protect sexual assault victims from abusive treatment during the trial process, especially during ***pretrial*** proceedings. [7] Toward this goal, Congress directed the military to broadly change trial procedures in use since at least World War I. [8] In the process of creating new rights for victims, did Congress endanger the integrity of the military justice system?

This ***article*** should facilitate informed discussion of the best ways to implement the new "victim's bill of rights" into military practice. [9] In particular, this ***article*** will examine the various means by which Congress intends to empower victim participation at public hearings.

This ***article*** is divided into three parts:

Part I reviews the ***history*** of victim participation in the federal and military systems, and outlines ways in which the 2014 NDAA attempts to bring military practice in line with civilian criminal procedure.

Part II considers the preliminary hearing process in each system. It compares the ***Article 32*** hearing with the civilian grand jury proceeding, with a special emphasis on explaining ***Article 32*** hearings to civilian practitioners. Part II then explores reasons why the 2014 NDAA's attempt to mirror the grand jury system is doomed to failure. Finally, Part II suggests that the presumptive win for victims' rights during the ***pretrial*** hearing phase will fundamentally undermine the integrity of the military justice system and require further adjustments to military practice.

Part III suggests evidentiary challenges the military faces as it designs rules for victim participation at trial and sentencing. This section identifies significant, foreseeable difficulties in adapting the victim-witness procedures employed in civilian courts to military practice, and recommends needed reform to protect the integrity of the military justice system.

I. The *History* of Victim's Rights

A. The Right to Attend a Trial

Over the years, military and civilian courts used similar terms to identify who a victim [10] was, but developed diverging guarantees of what victims could demand and expect . The difference was nowhere more obvious than

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[5] Id. at §§ 1701 and 1702.

[6] The changes in question apply to cases occurring on or after December 27, 2014; id. at §§ 1701 and 1702.

[7] See, e.g., Senator McCaskill's statement of intent: "The pre-trial '***Article 32***' process, which came under scrutiny following a case at the Naval Academy, has been reformed to better protect victims"; available at Senator McCaskill's website, http://www.mccaskill.senate.gov/violence.

[8] See, e.g., 2014 NDAA § 1702.

[9] Per § 1701(b) of the 2014 NDAA, the Secretary of Defense shall, by December 26, 2014, recommend changes to the Manual for Courts-Martial to implement ***Article*** 6b of the UCMJ into regular practice.

[10] n10 In federal district courts, a victim is a person "directly and proximately harmed as a result of the commission of a federal offense" or a surviving spouse, parent, family member, or other person designated by the court to stand in for aminor or an incompetent, incapacitated, or deceased victim. See 18 U. S.C. § 3771(e). In the military, victim status was historically defined by Department of Defense (DoD) Directive 1030.1, which specified "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the Uniform Code of Military Justice." DoD Directive 1030.1 para. E1.1.5.3.; United States Army Regulation 27-10 [hereinafter AR 27-10], para. 18-5(a)(3). Section 1701(b) of the 2014 NDAA codifies this definition at 10 U.S.C. § 806(b).

when a victim wanted to attend the merits phase of a contested trial. Both systems applied nearly identical versions of Federal Rule of Evidence 615 to determine who could attend a public hearing, [11] and each system limited the exclusion of "a person authorized by statute to be present." [12] Over time, however, Congress broadened statutory rights in civilian courts while electing not to extend comparable provisions to the military. Victims in federal courts began to enjoy far broader access to observe the presentation of evidence than their counterparts in military courts. [13] The 2014 NDAA attempts to rectify much of the disparity by providing a statutory claim for victims to attend public proceedings in military courts. [14]

1990 to 1997. For many years, the federal and military courts treated victims no differently than any other witness; either party to the trial could exclude a victim-witness from the courtroom. [15] Beginning with the Crime Control Act of 1990, however, Congress instructed "officers and employees of the Department of Justice and agencies of the United States" to "make their best efforts" to see that victims were accorded "the right to be present at all public court proceedings related to the offense, unless the court determines that the testimony by the victim would be materially affected if the victim heard other testimony at trial." [16] The Department of Defense (DoD) modified DoD Directive 1030.1 to adopt this provision to military courts, but the President never ordered a change to Military Rule of Evidence (MRE) 615. In the absence of a new rule, military courts determined that the guidelines did not apply, thus ensuring victims in military courts enjoyed no greater status than before the directive. [17]

1997 to 2002. In 1997, Congress mandated broader victim access to federal courts after one federal court notoriously excluded victims from watching the TimothyMcVeigh trial. In upholding the district court's ruling, the Tenth Circuit outraged the public by observing that the Crime Control Act: [18]

> [C]harily pledges only the "best efforts" of certain executive branch personnel to secure the rights listed . . . The district court judge, a judicial officer not bound in any way by this pledge, could not violate the Act. Indeed, the

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Victim status includes, but is not limited to: military family members, authorized representatives of institutional entities, and in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court or the component responsible official or designee. DoD Directive 1030.1 para. E1.1.5.1; AR 27-10 para. 18-5. See E1.1.5 for a more detailed nonexclusive list of persons who may claim victim status. This definition is mirrored in AR 27-10, Military Justice para. 17(a) and (a)(1)-(a)(4) (3 Oct. 2011). A victim of sexual assault is defined at DoD Directive 1350.2 at glossary.

The only current reference in the Manual for Courts-Martial to a definition of a victim is found at Manual for Courts-Martial, United States, Mil. R. Evid. 615, at A22-51 (2012) [hereinafter MCM] (adopting the definition found at 42 U.S.C. § 10607(e)(2)). The commentary to Rule 615 is similar to DoD Directive 1030.1, but predates this Directive and is less inclusive. See AR 27-10 para. 18, which also references DoD Directive 1030.1, as well as several pre-1994 statutes.

[11] MCM, id., Mil. R. Evid. 615, "Exclusion of Witnesses," very closely mirrors Fed. R. Evid. 615, with only minor changes in terminology. See Mil. R. Evid. 615, Exclusion of Witnesses (analysis), at A22-51.

[12] Manual For Courts-martial, United States, Rule For Courts-martial 615(4) (2012) [hereinafter MCM, R.C.M.]; Fed. R. Evid. 615(4).

[13] MCM, id., R.C.M. 615(4); Fed. R. Evid. 615(4). Note: From 1982 to 2004, Congress passed no fewer than eight separate major bills designed to interpret and reform these victim-witness rights. A detailed guide to the federal implementation of these rights was promulgated by the Attorney General in 2005; see Attorney General Guideline for Victim and Witness Assistance (May 2005), available at http://www.justice.gov/archive/olp/ag_guidelines.pdf, and The Victims of Child Abuse Act of 1990 (18 U.S.C. § 3509).

[14] See 2014 NDAA at § 1701(a)(1)(A)(3).

> Act's prescriptions were satisfied once the government made its arguments against sequestration--before the district court even ruled. [19]

Within months, Congress responded by enacting 18 U.S.C. § 3510(a):

> Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence. [20]

Unfortunately, Congress never directed similar changes to the UCMJ. Only five years later did the President amend MRE 615(5) [21] so that victims could watch a military trial even if they should later testify at sentencing. [22]

April 2004: The Military Tries to Catch Up. In 2004, the Department of Defense recognized that it had fallen behind the federal courts in implementing assistance and protections for victims. [23] DoD Instruction 1030.1 sought to rectify the situation by directly adopting the federal standards articulated at 42 U.S.C. § 10606. [24] These standards were then incorporated into a new version of Army Regulation (AR) 27-10 released on 16 November 2005. [25] This new "DoD Bill of Rights for Victims" [26] assured victims the following rights:

1. To be treated with fairness and with respect for the victim's dignity and privacy; [27]

2. To be reasonably protected from the accused; [28]

3. To be notified of court proceedings; [29]

a4. To be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would bematerially affected if the victim heard other testimony at trial; [30]

5. To confer with the attorney for the Government in the case; [31]

6. To receive available restitution; ***32***[1] and

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[15] United States v. Spann, 51 M.J. 89 (C.A.A.F. 1999) (holding that because the military had not updated military exclusion rules to match federal practice, it was proper to exclude certain victims from court proceedings). This case provides an excellent summary of the changes in exclusionary rules in both systems from pre-1992 through 1999.

[16] See 42 U.S.C. § 10606(b)(4); § 502 of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4820.

[17] See Spann, supra note 15, at 92 (holding that Mil.R. Evid. 615 did not provide the same benefits to victims as Fed. R. Evid. 615).

[18] See, e.g., Sue Lindsay, Victims Yield Right to Testify at Trial, Several More Decide to Attend Proceedings, Forego Witness Stand, Rocky Mountain News, June 28, 1996; Associated Press, Victims, relatives barred from court, The Day, June 24, 1996, available at http://news.google.com/newspapers?id=hBIiAAAAIBAJ&sjid=C3MFAAAAIBAJ&pg=5937,5159842&dq=mcveigh+trial+victim+witness+excluded&hl=en (quoting a victim who stated "I'm angry and I'm hurt . . . the judge is treating us more like the accused instead of a family member.").

[19] United States v. McVeigh, 106 F.3d 325, 335 (10th Cir. 1997).

[20] 18 U.S.C. § 3510; Spann, supra note 15, at 91.

[21] MCM, supra note 10, Mil. R. Evid. 615(e) (relabeled).

[22] See MCM, id. Mil. R. Evid. 615, at A22-51 (describing the 2002 amendment).

[23] See Spann, supra note 15.

[24] DoD Directive 1030.1 (April, 2004) at references. Note: 42 U. S.C § 10606 was repealed on 30 October 2004, and replaced by 18 U.S.C. § 3771.

[25] AR 27-10, Summary at i.

7. To receive information about conviction, sentencing, imprisonment, and release of the offender. [33]

The senior lawyer at each post was charged with independently developing the policies and procedures necessary to implement and protect these rights. [34]

October 2004: The Military Falls Further Behind. But, even before the new DoD standards took effect, the federal system had moved on. In October of 2004, Congress repealed 42 U.S.C. § 10606, the model upon which DoD Directive 1030.1 was based. [35] In its place, Congress enacted 18 U.S.C. § 3771, creating a more expansive set of rights for victims, including the rights: [36]

(a) To reasonable, accurate, and timely notice of any public court proceeding, including detention or release hearings; [37]

(b) 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; [38]

(c) To be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; [39]

(d) To full and timely restitution as provided in law; [40]

(e) To proceedings free from unreasonable delay; [41]

(f) For the victim, their lawful representative, or the government (on their behalf) to file motions to the court asserting their rights; [42] and

(g) A guarantee that "in any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described" and "the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from

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[26] As set forth in DoD Directive 1030.1 and AR 27-10. These rights are also mirrored in U.S. Department of Defense (DD) Forms 2701, Initial Information for Victims and Witnesses of Crimes (August 2013), 2702, Court-Martial Information for Victims and Witnesses of Crimes (May 2004), and 2703, Post-Trial Information for Victims and Witnesses of Crime (May 2004), which are intended for distribution to suspected victims. Note: These forms reference 42 U.S.C. §§ 10601-10607, which were repealed on 30 October 2004, and replaced by 18 U.S.C. § 3771.

[27] AR 27-10, para. 17-10(a)(1).

[28] AR 27-10, para. 17-10(a)(2).

[29] AR 27-10, para. 17-10(a)(3).

[30] AR 27-10, para. 17-10(a)(4).

[31] AR 27-10, para. 17-10(a)(5).

[32] AR 27-10, para. 17-10(a)(6).

[33] AR 27-10, para. 17-10(a)(7).

[34] AR 27-10, para. 17-10(b).

[35] 42 U.S.C. § 10606, repealed by Pub. L. 108-405, title I, Sec. 102(c) (Oct. 30, 2004), 118 Stat. 2264.

[36] Emphasis added to highlight some of the major differences from the repealed statement of rights.

[37] See 18 U.S.C. § 3771 (a)(2), (a)(4), and (b)(1).

[38] See 18 U.S.C. § 3771 (a)(3) and (b)(1).

[39] See 18 U.S.C. § 3771(a)(4).

[40] See 18 U.S.C. § 3771(a)(6).

> the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record." [43]

Federal courts interpreting 18 U.S.C. § 3771 took very expansive views of the right against exclusion. For example, the Ninth Circuit held that district courts could exclude victims only after making specific findings and detailing clear and convincing proof that a victim's testimony will, not merely may, be altered if the victim witnessed the hearing. [44]

Victims in the military enjoyed no such privileged position. DoD Directive 1030.1 merely promised victims the right:

> To be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial. [45]

Though DoD Directive 1030.1 defined victims' rights in a far more circumscribed manner than 18 U.S.C. § 3771, even those aims were not always met. Indeed, the 2004 directive remained largely aspirational in nature because it failed to provide clear direction to the trial court on how to evaluate rights of the victim vis-à-vis those of the accused. In the absence of clear statutory guidance, or informative case law, each trial judge had to fashion their own criteria for evaluating how to implement the goals of the Directive. These judgments were strongly influenced by the general principle that "if witnesses were allowed to hear each other's testimony, the possibility for collusion or the unconscious melding of their stories is simply too great." [46]

Moreover, the military trial process did not encourage prosecutors to litigate the issue. Most, if not all, trial attorneys in the military are relatively junior captains with little experience. For instance, a 2013 study of the entire Army determined that the average prosecutor had participated in only two jury trials in their career, and that the average Chief of Justice [47] had participated in only eight jury trials in their career. [48] As a result, "it is a luck of the draw whether any particular TC [trial counsel, i.e., prosecutor] or DC [defense counsel] has access to a supervisor with any meaningful experience." [49] Litigating greater access for victims was therefore likely constrained by the facts that (a) many prosecutors were too inexperienced to realize they could petition for greater access for their victims, (b) prosecutors may not have considered the issue until the moment of trial, and (c) the military rules did not expressly state that a victim or their representative could petition directly to the court on their own behalf.

While MRE 615(5) still permitted a victim to testify at sentencing if they observed the merits, [50] prosecutors tended to make the attendance decision on the victim's behalf. When the victim was an important witness, no prosecutor

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[41] See 18 U.S.C. § 3771(a)(7).

[42] See 18 U.S.C. § 3771(d)(1) and (d)(3).

[43] See 18 U.S.C. § 3771(b)(1).

[44] See United States v. Mikhel, 453 F.3d 1137, 1139 (9th Cir. 2006) (emphasis added).

[45] As a procedural aside, the DoD Directive needed updating. Congress repealed the statute DoD Directive 1030.1 referenced in October 2004 (18 U.S.C. § 10606), so the "right" enumerated in Directive 1030.1 was technically not enforceable by reference to statutory authority. In a similar way, counsel could not argue that Mil. R. Evid. 615(4) should follow 18 U.S.C § 3771, because § 3771 specifically limits itself to federal district courts. While a military judge would undoubtedly feel compelled to honor the DoD Directive if they were aware of the directive, or trial counsel invoked that provision, this oversight remained until the 2014 NDAA.

[46] United States v. Ducharme, 59 M.J. 816, 817 (N.M. Ct. Crim. App., 2004) (discussing United States v. Gordon, 27 M.J. 331,332 (C.M.A.,1989)).

[47] The Chief of Justice in military practice is the functional equivalent, in civilian practice, of the Criminal Law Chief in a United States Attorney's Office.

[48] Major Jeffrey A. Gilberg, The Secret to Military Justice Success: Maximizing Experience, 220 Mil. L. Rev. 1, 11-12 (2014).

[49] Id. at 11.

[50] MCM, supra note 10, Mil. R. Evid. 615(5).

wanted to find themselves precluded from recalling that victim-witness. The safe move [51] for trial counsel, focused on getting the conviction, would be to temporarily (rather than permanently) excuse the victim after their testimony. Essentially, the victim would testify, and then at the trial counsel's request, the judge would direct the victim to return to the witness waiting room, with orders not to discuss anyone's testimony until the trial ends.

This is not to suggest that the military ignored victims. The military offered some support for victims not often seen in civilian courts: for example, fully funded access to proceedings where they were not appearing as a witness. Subject to the zeal of the trial counsel, and the willingness of the convening authority to approve the expenditure of funds, DoD Instruction 1030.2 granted that, "if applicable . . . trial counsel or designee" may provide:

> Prior to the actual court-martial, assistance in obtaining available services such as transportation, parking, child care, lodging, and courtroom translators or interpreters that may be necessary to allow the victim or witness to participate in court proceedings. [52]

No such corresponding provision exists in the civilian system, although federal prosecutors may subpoena and fund the attendance of victim-witnesses. [53]

2004-2013: Growing Congressional Dissatisfaction with the Military System. In 2004, Congress directed the military to convene a panel to "examine matters relating to sexual harassment and violence" at the service academies. [54] The panel did not report to Congress until 2009, but its eventual analysis included a service-wide study of the problem. [55] The Task Force on Sexual Assault in theMilitary Services encouraged the services to: [56]

1. Provide victims benefits and protections comparable to those in the civilian community. [57]
2. Empower victim input during the criminal justice process, including at referral, sentencing, and posttrial. [58]
3. Provide victims a copy of the verbatim record of trial, free of charge, regardless of the outcome. [59]
4. Create a privilege between victims and victim advocates. [60]

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[51] At the very least, a wise trial counsel needed to explore the individual court's interpretation of Mil. R. Evid. 615(4) and (5) before calling and then temporarily excusing a victim-witness.

[52] See DoD Instruction 1030.2 (4 June 2004) at §§ 6.3.1 and 6.3. 1.8 (emphasis added).

[53] Interview with Department of Justice personnel on 23 September 2013. There is a fund managed by the DOJ for special circumstance cases, but the procedure is not available to the vast majority of victims, and authorization is withheld from the actual prosecutor.

[54] See 118 Stat. 1924, Pub. L. No. 108-375 (2004).

[55] See Task Force on Sexual Assault in the Military Services, Report of the Defense Task Force on Sexual Assault in the Military Services (December 2009) [hereinafter Task Force Report 2009], available at *http://www.ncdsv.org/images/SAPR_DTFSAMS_Report_Dec_2009.pdf* .

[56] This nonexhaustive list of recommendations by the Task Force is listed in an order suited for this ***article***, not in the exact order and number used in the Task Force Report.

[57] Task Force Report 2009, supra note 55, at 67.

[58] Id. at 81, App. K--1--K--2.

[59] Id. at 70. Although a victim may file a "Restricted" report and opt not to pursue criminal process, should they file an unrestricted complaint, they have no further opportunity to stop the process.

[60] Id. at 69; made law by the National Defense Authorization Act of 2012.

5. Provide military victims an attorney and legal advice, to include advice on how they may choose to terminate participation in criminal proceedings. [61]

6. Provide victims a procedural means to opt-out of further cooperation with an ***investigation***/ prosecution. [62]

Incremental changes to military processes followed. On its own, Congress prepared statutory changes designed to benefit the victims of sexual assault. [63] The Department of Defense also initiated internal efforts to improve the treatment of victims of sexual assault. For example, on August 14, 2013, the Secretary of Defense issued a memorandum entitled "Sexual Assault Prevention" that directed each service to "develop draft language for an Executive Order to amend the Manual for Courts-Martial to provide victims of crime the opportunity to provide input to the post-trial action phase of courts-martial." [64] Ultimately however, the Department of Defense's efforts failed to satisfy either the public or Congress, and disquiet over the military's handling of sexual assault cases grew. [65]

As 2013 drew to an end, the military process still did not provide guarantees for victims who wanted to attend trial.

B. Participation at Sentencing

Military victims also faced potential obstacles that hindered their full participation at the sentencing hearing of the accused.

Federal Sentencing Hearings. 18 U.S.C § 3771 guarantees victims the "right to be reasonably heard," [66] and provides that the victim, not the prosecutor or court, determines the means by which they appear. Courts reviewing this statute considered the articulated intent of the bill's sponsor, provided in Congress shortly before final passage:

> It is not the intent of the term "reasonably" in the phrase "reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication would generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings . . . In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.

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[61] Id. at 68. The Special Victim's Counsel pilot program of the Air Force has since secured the right of a sexual assault victim to have a legal representative intercede in some limited military justice proceedings. See LRM v. Kastenberg, 72 M.J. 364 (C.A. A.F., 2013).

[62] Id. at 70.

[63] See, e.g., The National Defense and Authorization Act for Fiscal Year 2011 at Title XVI: Improved Sexual Assault Prevention and Response in the Armed Forces, Pub. L. No. 111-383, signed into law Jan. 7, 2011; 124 Stat. 4429 at §§ 1602(a) and (b), 1632(c), 1632(d), 1614, and 1631(a) and (b)(6); and The National Defense Act for Fiscal Year 2012, H.R. 1540 at §§ 561-566, 112th Cong. (2011), available at *https://www.gov-track.us/congress/bills/112/hr1540*.

[64] Memorandum entitled "Sexual Assault Prevention and Response," dated 14 August 2013; available at *http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf*.

[65] See, e.g., Jennifer Steinhauer, Reports of Military Sexual Assault Rise Sharply, N.Y. Times, November 7, 2013, available at *http://www.nytimes.com/2013/11/07/us/reports-of-mili-tary-sexual-assault-rise-sharply.html?_r=0*.

[66] 18 USC § 3771(a)(4).

> It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion, should this provision mean anything other than an in-person right to be heard. [67]

From this language, federal courts determined "victims now have an infeasible [sic] right to speak, similar to that of the defendant." [68] Again, the format of the right to address the court is largely within the control of the victim, rather than the court or the prosecutor.

Federal Rule of Criminal Procedure ***32*** (the rule regarding sentencing) also creates a process designed to elicit input by victims. Per the rule, the Probation Office, a nominally neutral arm of the court, prepares a report detailing "information that assesses any financial, social, psychological, and medical impact on any victim." [69] There are no formal limitations on the contents of the report, so hearsay and suppressed evidence, [70] including solicited written statements by victims and their families, are included. The probation officer preparing the report normally contacts the victim, and then reports his or her losses, needs, and feelings in the final sentencing document. If offered, a written statement can be attached to the report.

As a check on accuracy, the federal process offers both parties a period of time to review the proposed sentencing documents [71] and litigate any objections to the form or content of the victim's claims. [72]

The federal rules of evidence generally do not apply at sentencing, [73] so the court may also choose to consider other evidence that is not required by statute. This could include hearsay statements by friends, family, or other persons who are familiar with the effects of the crime. A common example in federal court involves allowing an agent familiar with the consequences of a crime to testify about its known effects on the victim, their family, and the local community, including a report of the detective's discussions with those same persons regarding the outcome of the case. [74]

Fortunately, the risks normally associated with these relaxed rules are mitigated by the nature of the sentencing authority. Federal judges are seasoned lawyers and scholars, chosen by the President and confirmed by the Senate. They often have decades of experience on the bench to use in weighing what evidence is relevant. The federal process is also subject to both the United States Sentencing Guidelines and 18 U.S.C. § 3553(a), both of which provide very specific factors for a court to use when evaluating a sentence. Finally, the lengthy process (often half a year) between trial and sentencing ensures that sentencing filings are considered in an atmosphere that mitigates the chance they will be influenced by fatigue or undue emotion.

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[67] 150 Cong. Rec. S10910, S10911, 2004 WL 2271145 (daily ed. Oct. 9, 2004) (Statement of Sen. Jon Kyl); discussed at United States v. Burkholder, 590 F.3d 1071 (9th Cir. 2010) (emphasis added).

[68] Kenna v. United States District Court, 435 F.3d 1011, 1016 (9th Cir. 2006).

[69] Fed. R. Crim. P. ***32***(c) and (d)(2)(B).

[70] Office of Probation and ***Pretrial*** Services, Publication 107, The Presentence ***Investigation*** Report (2007), at III-3, available at http://wvn.fd.org/pdf/Part_D%20107.pdf.

[71] Fed. R. Crim. P. ***32***(e).

[72] Fed. R. Crim. P. (f) and (i).

[73] Fed. R. Crim. P. 1101(d)(3).

[74] Some circuits require, in the event of a defense objection, either a hearsay exception, or for the court to find the statements are otherwise reliable. See, e.g., United States v. Lowrimore, 923 F.2d 590, 594 (8th Cir. 1991). Other circuits have determined that "[t]he Confrontation Clause … does not prevent the introduction of hearsay testimony at a sentencing hearing" so long as the statements have "some 'minimal indicium of reliability beyond mere accusation'." 355 Fed. Appx. 181, 2009 WL 1931172 (3rd Cir.) (unpublished), citing United States v. Robinson, 482 F.3d 244, 246 (3d. Cir. 2007), United States v. Kikumura 918 F.2d 1084, 1102 (3d. Cir. 1990), and U.S. Sentencing Guidelines § 6A1.3(a).

Military Sentencing Hearings. In contrast to federal practice, the military panel (jury) that adjudicates guilt also determines punishment. [75] The military panel is arguably the ultimate example of community justice, for good and bad. Its members are chosen based upon a finding by the convening authority that each member is among those "best qualified" by "reason of their age, education, training, experience, length of service, and judicial temperament" to sit in judgment of a fellow soldier. [76] They are not, however, required to be attorneys, and many have never witnessed a trial before they sit in judgment of the accused. In the military courts, sentencing also occurs immediately after trial, often with only a bathroom break between the verdict and the sentencing proceeding, which often runs late into the night or weekend. [77] Furthermore, the panel issues the sentence in any contested case while emotions are often quite high from the presentation on the merits. This in particular can lead to unwarranted disparities between similar defendants when this relatively inexperienced body imposes a sentence in a relative vacuum, ignorant of other such cases. In this context, and perhaps rationally, military sentencing has traditionally required both parties to continue following rules of evidence at sentencing, and requires both sides to offer more narrowly tailored evidence, subject to tighter standards of admissibility. [78]

Until the service adopts rule changes implementing the 2014 NDAA, DoD Instruction 1030.2 remains the only directive pertaining specifically to the rights of the victim at sentencing. That instruction promises victims an "opportunity to present to the court at sentencing, in compliance with applicable rules and regulations, a statement of the impact of the crime on the victim, including financial, social, psychological, and physical harm suffered by the victim." [79] The applicable rules however, found in RCM 1001, do not provide a means for a court to consider any evidence not offered by a party to the case. [80] Furthermore, the prosecutor is constrained when presenting

> evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. [81]

Evidence in aggravation does not include testimony suggesting the appropriateness of a punitive discharge, nor evidence of other uncharged instances of poor character. [82]

In practice, most prosecutors eagerly call a victim who has useful evidence to offer in aggravation. Nevertheless, a victim's opportunity to address the court depends upon other factors, such as:

1. A victim can only address the court if the trial counsel chooses to call the victim to the stand; [83]

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[75] See MCM, supra note 10, R.C.M. 1001, 1002.

[76] See id. at R.C.M. 502(a)(1).

[77] See id. at R.C.M. 1001(a)(2). In this author's experience, trials frequently ran from early in the morning to past midnight each day, with minimal breaks, in order to return panel members to their combatant commands as quickly as possible. As an example, the author tried a fully contested murder case, involving approximately twenty German-speaking witnesses, in only two lengthy days.

[78] See id. at R.C.M. 1001.

[79] DoD Instruction 1030.2 at Section 6.3.1.13.

[80] See MCM, supra note 10, R.C.M. 1001.

[81] See id. at R.C.M. 1001(b)(4).

[82] See id. at R.C.M. 1001(b)(5)(D).

[83] See id. at R.C.M. 1001(a)(1)(A)(v) and (a)(4).

2. The trial court determines how to interpret the generic suggestion that "there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses"; [84]

3. Even generous judges are bound by rule to allow affidavits, emails, and other forms of victim-impact statements, even if incontrovertibly authentic, only if the accused first asked the court to relax the rules of evidence, and then the prosecutormay offer these other items into evidence; [85]

4. All of the rules of evidence (e.g., hearsay) still apply at sentencing unless the defense requests otherwise; [86] and,

5. If a victim provides input during sentencing, the victim can testify as to impact evidence or about the accused's rehabilitative potential, but they can not testify about how they will feel if the defendant does not receive a term of imprisonment and a punitive discharge. [87]

Although trial counsel tend to call victims to testify at sentencing if that testimony will help secure a just sentence, they may forego such testimony if the victim is emotionally overwrought, prone to make objectionable statements, or likely to provide redundant or cumulative testimony. Judges, though they exercise great caution and consideration in their rulings, have to consider the potential effect of loosing such victims upon the untrained jury. In other words, the victim has no guarantee they can participate in their sentencing hearing, even if they travelled a great distance to the hearing.

However, attendance is essentially necessary if the victim wants to maximize their chance to address the court. If the victim is unwilling or unable to travel, they can address the court only if: (1) the prosecutor decides to call them as a witness, (2) the prosecutor adequately convinces the court that their testimony would prove useful, and (3) the court decides to allow telephonic or other forms of alternate testimony (often over defense objection).

Although these provisions may seem unduly restrictive, they exist to protect the accused from unfair treatment. Soldiers, sent far from home, can find themselves suddenly, and on short notice, forced to defend themselves against the accusations of the same employer (the command) who removed them from contact with their friends and family. Fairness provides that soldier the right to decide whether to call for relaxed rules for both parties. If the accused opts to offer letters of support from home, they do so knowing this may allow the government to potentially offer similar letters in aggravation. On the other hand, the soldier can, by not seeking to relax the rules, protect themselves from the government collecting and presenting statements from witnesses around the world while the defendant, without resources and far from home, falls into comparative disadvantage.

Special Rules for Child Victims at Sentencing. These military procedures do not adequately consider the needs of some child victims. While Whereas Congress created special procedures just specifically for child victims in federal courts, they did not do so for the military. 18 U.S.C. 3509(f) [88] provides:

(f) Victim Impact Statement. In preparing the presentence report pursuant to rule ***32***(c) of the Federal Rules of Criminal Procedure, the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children

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[84] See id. at R.C.M. 1001(e)(1). This author is not able to generalize a "normal" way military judges exercise this discretion.

[85] See id. at R.C.M. 1001(c)(3). In point of fact, there is even an argument that this rule only allows relaxation of the rules in regards to presenting or factually rebutting evidence in extenuation and mitigation. In practice, however, this author has witnessed numerous judges declare that a relaxing for purposes of mitigation would permit comparable relaxation for purposes of aggravation. As a practical matter, depositions, though theoretically possible, were allowed only in extreme circumstances pursuant to R.C.M. 702 and R.C.M. 1001(a)(4).

[86] MCM, supra note 10, Mil. R. Evid. 101, 1101(d), 1001(c)(3).

[87] United States v. Prevatte, 40 M.J. 396, 398 (CMA 1994).

[88] 18 USC § 3509 also provides rules for remote testimony and other procures not germane to this ***article***.

> who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

Federal courts have also determined that district courts may consider generalized impact statements, without any requirement that the victim has been informed of the case at hand, in special cases. [89] In the case of child pornography victims, for instance, these statements must bear some indicia of reliability, but so long as some portion of the letter deals with the harm suffered in the production of an image, and a copy of the image was later found in the defendant's child pornography collection, the letter is admissible in each case, without renotifying the child victim. [90] In contrast, military rules provided the option for "remote" testimony by a child in some circumstances, but provide no other specially defined means of admitting victim impact evidence for child victims. [91]

2014: An Attempted Synchronization of the Systems. Ad hoc modifications to help military victims arguably ended on December 26, 2013, via the 2014 NDAA, in which Congress mandated the upcoming, sweeping changes to military law. [92] The very title of Section 1701, "Extension of Crime Victim's Rights to Victims of Offenses Under the Uniform Code of Military Justice," [93] demonstrates Congressional intent that this change should synchronize the two systems.

In essence, the 2014 NDAA extends federal victims' rights detailed above directly into military practice, though the NDAA language is slightly different in several particulars reflecting military reality. [94] In comparison to items (a) through (g) of the civilian system (see infra), the military rules differ only in that:

1. A military victim has no statutory right to speak at a plea hearing; [95]

2. A military victim's entitlement to restitution provided by law does not include any reference to the words "full and timely;" [96]

3. The 2014 NDAA does not provide any statutory means for a military crime victim or their representative to file motions asserting their rights; [97] and,

4. There is no instruction to the courts guaranteeing maximum effort to provide full attendance for victims at open proceedings.

C. An Explanation of Remaining Differences Restitution and Attendance. The military uses DD Form 2701 to inform victims of their rights to restitution. The form reads:

> Restitution: If an individual is arrested and prosecuted in federal court, you may be eligible for restitution. Restitution is a court-ordered payment to you as a victim of crime. It is made by the offender for any out of

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[89] United States v. Clark, 335 Fed. Appx. 181 (3rd Cir. 2009) (unpublished).

[90] Id. at 183.

[91] MCM, supra note 10, R.C.M. 703(b)(1).

[92] See The National Defense and Authorization Act of 2014 at Title XVI, Public Law 113-66, signed into law December 26, 2013, H. R. 4435, 113th Cong. (2013), available at *https://www.con-gress.gov/bill/113th-congress/house-bill/3304/text*.

[93] Id. at § 1701.

[94] Id. at § 1701(a)(1)(a).

[95] Id. at § 1701(a)(1)(a)(3)

[96] Id. at § 1701(a)(1)(a)6).

[97] But see LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F., 2013), which recognizes a limited right for victim's counsel to be heard in hearings on evidentiary matters.

pocket expenses caused by the crime. Restitution cannot be ordered as a sentence in a military court-martial, but it can be included as a condition of a ***pretrial*** agreement to plead guilty to an offense, or as a condition of clemency or parole. [98]

This form hints at why a military victim cannot be guaranteed full and timely restitution. Put simply, a military court does not have the authority to order restitution payments. Similarly, a military court does not have the authority to direct anyone to provide travel for persons who are not witnesses to a trial proceeding.

These limitations on the military judge's authority do not mean a victim cannot seek monetary compensation. Victims in federal court must often wait until sentencing for a court-imposed means of recovering losses. Since large losses tend to result in lengthier sentences, [99] restitution orders often go unfulfilled and represent a futile means of compensation. In the military, however, the defendant is paid throughout the trial process, even if in ***pretrial*** confinement. [100] The military encourages victims to appeal to any officer for ordered restitution to compensate for loss or destruction of property immediately after the offense occurs. [101] ***Article*** 139 then allows the Army to conduct an administrative ***investigation*** and, upon a showing of satisfactory evidence, garnish the defendant's wages, even while the criminal ***investigation*** is ongoing.

Plea Hearings. But what about a victim's right to speak at a plea hearing? DoD Instruction 1030.2 grants victims the right to "consultation concerning any decision to dismiss charges or to enter into a ***pretrial*** agreement" and "notification of the disposition of the case." [102] From the victim's standpoint, consultation appears a poor substitute for the assurances of federal court, in which 18 U.S.C. § 3771 guarantees the right to address the district judge during the plea hearing. [103] In practice, federal courts almost always ask, during the plea hearing, if there is a victim present who wishes to address the court. [104] Although practitioners may question whether either format makes a meaningful difference in plea outcomes, victims would surely prefer the federal policy.

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[98] DD Form 2701.

[99] See, e.g., U.S. Sentencing Guidelines § 2B1.1, which increases offense levels, based upon the amount of loss.

n100 "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions or discipline." UCMJ ***art.*** 13 (2012).

"A forfeiture of pay and allowances shall be applicable to pay and allowances accruing on or after the date on which the sentence takes effect." UCMJ ***art.*** 57(a)(3).

"Forfeiture of future pay 'can only be imposed by the sentence of a lawful court-martial.'" Dock v. United States, 46F. 3d 1083, 1087 (Fed. Cir. 1995) (citing Walsh v. United States, 43 Ct. Cl. 225, 231 (1908).

"(a) The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service .. . under section 205 of this title--

(1) a member of a uniformed service who is on active duty; … " 37 U.S.C. § 204(a)(1).

[100] n100 "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions or discipline." UCMJ ***art.*** 13 (2012).

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So why did Congress not require identical language? This author speculates that the reason has to do with practical differences in the systems. In both federal and state courts, plea deals may require a Judge's approval, [105] and sentencing often takes place on a much later date. In the military, however, any plea arrangement involves solely the convening authority and the accused; the judge cannot refuse the deal. Once the military judge hears the plea, the judge must determine if the accused is provident to the plea, and upon acceptance of the plea, the court immediately proceeds to sentencing. [106] Under the new ***Article*** 6b of the UCMJ, the victim is now assured a right to speak at sentencing, so the victim is assured the opportunity to speak at the hearing.

Summation. To some degree, it is impossible to describe how victim-witness participation will change military practice because the services had until December 26, 2014, to recommend final implementation changes to the Rules for Courts-Martial. [107] At the very least however, we know that victim-witnesses will soon be allowed the opportunity to participate in public hearings during their own cases. The victims of crimes occurring after December 26, 2014, will have the right to reasonable, accurate, and timely notice of public proceedings, the right not to be excluded from such proceedings, the right to be reasonably heard at those proceedings, and the right to immediately litigate any infringements of those rights. [108] With this background knowledge, we can now discuss how the terms of the 2014 NDAA will affect the three main public hearings in a military case: the ***Article 32*** hearing, trial, and sentencing.

II. The *Article 32* Hearing

A. The Controversy

In the days leading up to passage of the NDAA, Congress expressed particular concern that because of a military ***pretrial*** procedure called the ***Article 32 investigation***, [109] "the deck is stacked against victims." [110] One case that contributed to this impression involved a naval midshipman who accused three former U.S. Naval Academy football players of rape. [111] During the ***pretrial*** hearing on the matter, the prosecutor's questioning apparently waived applicable Rape-Shield provisions during the victim's direct testimony, resulting in a multiday cross-examination into

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"(a) The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service .. . under section 205 of this title--

(1) a member of a uniformed service who is on active duty; … " 37 U.S.C. § 204(a)(1).

[101] MCM, § 939. ***Art.*** 139. at A2-36; AR 27-20 at 18-16(b); and U. S. Dep't of Army, Pam. 27-162, Claims Procedures (Mar. 2008).

[102] DoD Instruction 1030.2, at §§ 6.3.1.11 and 6.3.1.13.

[103] For example, federal magistrates, as standing authorities, enjoy assigned court staff. A consequence is that a federal courts will not make a detention decision pursuant to 18 U.S. C. § 3771(a)(4) until the ***Pretrial*** Services Officer has had the chance to interview the defendant, verify their prior personal and criminal ***history***, investigate a release plan, provide a summary of the weight of evidence against the accused, prepare a written report for all parties to review, etc.

[104] See, e.g., Federal Judicial Center, Benchbook for U.S. District Court Judges, at §§ 1.01 and 1.03(B)(3)(e) and (f) (5th ed. 2007).

[105] See, e.g., Fed. R. Crim. P. 11(c)(1)(C).

[106] UCMJ ***art.*** 45(a); United States v. Care, 40 C.M.R. 247, 18 USCMA 535 (1969).

[107] 2014 NDAA at § 1701(a)(1)(b), Note, however, that a first draft, for public comment, was published in the Federal Register on October 3, 2014; available at *http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-23546.pdf*.

[108] UCMJ ***art.*** 6b; 2014 NDAA at § 1701.

[109] 10 U.S.C. § 832; UCMJ ***art. 32***.

her sexual past and preferences. [112] This unfortunate spectacle led to speculation in the New York Times that victims have no protections in the military and that, "[i]f this is what ***Article 32*** has come to be, then it is time to either get rid of it or put real restrictions on the conduct during [the ***Article 32*** hearing]." [113] Speaking in support of the 2014 NDAA, Senator Carl Levin (D-MI), addressed the Senate on December 9, 2013, asserting:

> The bill will do the following that will be hopefully coming here next week: Make the ***Article 32*** process more like a grand jury proceeding. Under the UCMJ, the Uniform Code of Military Justice, currently the proceeding that is taken under ***Article 32*** is more like a discovery proceeding rather than a grand jury proceeding, and it has created all kinds of problems, including for victims of sexual assault who would have to appear and be subject to cross-examination by the defense. [114]

B. The Federal Grand Jury

These comments, even if true (a subject explored later in this ***article***), presume that the civilian grand jury process represents the gold standard for balancing victim rights and the protection of defendants from unfounded or malicious charges. But is it? The Fifth Amendment envisions the grand jury process as performing "a vital function . . . as a check on prosecutorial power," [115] and as the "defendant's main protection against the bringing of unfounded charges." [116] In federal court, the grand jury consists of not less than sixteen, nor more than twenty-three people, [117] who meet with the prosecutor(s) in secret and outside the presence of the suspect. [118] In principle, the grand jury is the body that should:

> Deliberate and decide whether a suspect should be indicted or charged for committing a crime. [119]

In practice, grand juries sign almost anything put before them. One North Carolina grand jury recently made news after it "heard" and approved 276 separate indictments in four hours, a process requiring "the 18 jurors [to have]

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[110] Comments of Sen. Kirsten Gillibrand, as quoted by Rebecca Kaplan, Military Sexual Assault prosecutions will stay in the chain of command, CBS News, March 6, 2014, available at *http://www.cbsnews.com/news/military-sexual-assault-prosecutions-will-stay-in-the-chain-of-command*.

[111] Jennifer Steinhauer, Navy Hearing in Rape Case Raises Alarm, N.Y. Times, Sept. 20, 2013, available at *http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?_r=1&*; see also David Vergun, New Law Brings Changes to Uniform Code of Military Justice, Dod News, Jan. 8, 2014; available at *www.defense.gov/news/newsarticle.aspx?id=121444*.

[112] Steinhauer, id.; Vergun, id.

[113] Steinhauer, id.

[114] 159 Cong. Rec. S8548 (daily ed. Dec. 9, 2013) (statement of Sen. Carl Levin), available at *https://www.congress.gov/congressional-record/browse-by-date*.

[115] United States v. Cotton, 535 U.S. 625, 634 (2002)

[116] United States v. Suarez, 263 F.3d 468, 481 (6th Cir. 2001); for a discussion, see Federal Defenders of San Diego, Defending A Federal Case (2010).

[117] Fed. R. Crim. P. 6(a)(1).

[118] Fed. R. Crim. P. 6(d) and (e).

[119] United States Depart of Justice, Federal Justice Statistics 2010--Statistical Tables at 13 (2010), available at *http://www.bjs.gov/content/pub/pdf/fjs10.pdf*.

heard evidence, asked questions, weighed whether the charges merit[ed] a trial, then voted on the indictments--all at the average rate of one case every 52 seconds." [120]

Although the sheer speed in North Carolina demonstrated a lack of care, federal judges have long questioned the validity of federal grand jury processes as well. In 1973, the Supreme Court cited a senior federal judge as observing, "any experienced prosecutor will admit that he can indict anybody, at any time, for almost anything before a grand jury." [121] Some forty years later, legal scholars continue to write about "the ongoing national disgrace that is contemporary federal grand jury practice." [122] One judge put it succinctly, arguing that the typical grand jury "would indict a ham sandwich" at a prosecutor's request. [123]

Internal Department of Justice studies prove that grand juries almost always adopt the suggestions of federal prosecutors:

1. In 1984, federal grand juries issued 17,419 indictments, and declined the prosecutor's case only 68 times. [124]

2. In 2006, federal prosecutors secured 83,125 indictments and received a vote of "no true bill" only 15 times. [125]

3. In 2010, federal prosecutors secured 93,422 indictments and received a vote of "no true bill" only 11 times. [126] In other words, when a federal prosecutor asks a grand jury to issue a specific indictment, there is 99.988 percent likelihood that the grand jury will approve the charges. [127]

Experienced practitioners know that sometimes a prosecutor prefers a grand jury to no-vote a particularly sensational or sensitive case rather than publicly decline it. In other words, the one in 8,493 cases in which the grand jury says "no" to a case might still reflect the grand jury taking the decision the prosecutor intended.

The grand jury is demonstrably not an active mechanism shielding the public from unwarranted charges. Instead, the federal civilian system depends almost exclusively upon the integrity of experienced prosecutors to exercise careful discretion and send only appropriate cases to a grand jury. During 2006, federal prosecutors declined 29,677 cases, including 7,291 cases rejected due to "weak evidence." [128] During 2010, federal prosecutors declined 30,670 cases, including 7,127 cases described as involving "weak" evidence. [129] In fact, the United States Attorney's Manual requires more than probable cause to initiate any prosecution. It requires:

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[120] Michael Gordon, Officer Kerrick's indictment reveals grand jury debate," Charlotte Observer, February 1, 2014, available at http://www.charlotteobserver.com/2014/02/01/4656417/offier-kerricks-indictment-reveals.html#.Uu_eStGYbmR.

[121] United States v. Dionisio, 410 U.S. 19, 23 (1973) (quoting Senior District Judge William Campbell of the Northern District of Illinois).

[122] Roger Roots, Grand Juries Gone Wrong, 14 Rich. J.L. & Pub. Int. 331 (Fall 2010).

[123] Id. at note 3, citing In Re Grand Jury Subpoena of Stewart, 545 N. Y.S.2d 974, 977 n.1 (N.Y. App. Div. 1989).

[124] Id. at note 4; Roger Roots, If It's Not a Runaway, It's Not a Real Grand Jury, 33 Creighton L. Rev. 821 (June, 2000); Fred A. Bernstein, Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury, 69 N.Y.U. L. Rev. 563, 578 (1994).

[125] Calculated using data at U.S. Department of Justice, Federal Justice Statistics 2006 at Table 2.2, available at http://www.bjs.gov/content/pub/html/fjsst/2006/fjs06st.pdf.

[126] Calculated using data at U.S. Department of Justice, Federal Justice Statistics 2010 at Table 2.2, available at http://www.bjs.gov/content/pub/pdf/fjs10st.pdf.

[127] Id.

[128] See 2006 Statistics, supra note 125, at Table 2.3.

[129] See 2010 Statistics, supra note 126, at Table 2.3

> Both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. [130]

As one former prosecutor explained, the grand jury is too likely on its own to pass a case to trial, where:

> Even when the criminal charge does not result in conviction, the mere filing of a criminal charge can have a devastating effect upon an individual's life, including potential ***pretrial*** incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges. Such consequences may well have a permanent effect that is not cured even by an acquittal at trial. As a consequence, many prosecutors do, and all should, regard the possibility of charging an innocent person as "the single most frightening aspect of the prosecutor's job." [131]

For these reasons, Attorney General Eric Holder recently reminded all federal attorneys in a charging policy memo:

> the exercise of discretion over charging decisions has always been an "integral feature of the criminal justice system" United States v. LaBonte, 520 U.S. 751, 762 (1997) and is among the most important duties of a federal prosecutor. [132]

Attorney General Holder also used this memo to direct all federal prosecutors to carefully consider not only the circumstances of the case, but the particular ***history*** and past behavior of each suspect when determining whether and how to proceed. [133]

Finally, the Attorney General confirmed an existing policy that, in addition to considered thought by the prosecutor,

> all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution. . . . [134]

This entire internal review takes place in a system in which investigating agents report to the prosecutor, continue to work the case through trial, and tend to be significantly older, more experienced, and better trained than their military counterparts. This institutional competence and restraint is why, in the same 2010 Department of Justice study, federal prosecutors reported accepting for prosecution less than half of all cases officially presented to them and only 57 percent of sexual abuse cases. [135]

C. The *Article 32* Hearing

In themilitary, the commander, not the prosecutor, decides what happens to a criminal case. [136] The military commander is not an attorney, but holds the singular power, unparalleled in our civilian system, to accuse a

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[130] U.S. Department of Justice, United States Attorney's Manual, at 9-27.220B, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220.

[131] Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 Byu L. Rev. 669, 672 (1992) (internal citations omitted).

[132] Attorney General Eric Holder, Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division, August 12, 2013, available at http://www.popehat.com/wp-content/uploads/2013/08/holder-mandatory-drugminimums-memo.pdf.

[133] Id.

[134] Id. at 3.

[135] 2010 Statistics, supra note 129.

[136] See MCM, supra note 10, R.C.M. 305, 307(a). Although "any person subject to the code" may swear-out ("prefer") charges against another soldier, all cases must proceed up and through command channels.

subordinate soldier, order them detained, hold them in a foreign land, control their access to witnesses, choose their jury, and even approve their eventual punishment if convicted. The minimum threshold to charge an offense does not even require a consideration of whether the government can prove the case; there is no articulated quantum of evidence. The accuser must merely assert under oath that he/she "has personal knowledge of, or has investigated the matters set forth" and "that the same are true to the best of his/her knowledge and belief." [137] The scope for command abuse was dramatized in the 1957 Stanley Kubrick film Paths of Glory, in which a commander hides his own battlefield incompetence by court-martialing soldiers for alleged cowardice. The screenplay was not a fanciful drama; contemporary World War I commentaries provide a litany of real-life instances in which abusive commanders improperly prosecuted subordinates. [138] World War II duplicated the experience, as the military conducted some 1.7 million trials, resulting in 45,000 sentences of imprisonment and 100 instances in which a soldier was condemned to death. [139]

Given these charging rules, it is accordingly more important to test the legitimacy of any accusations against the accused before that person is subjected to the rigors and dangers of a trial. Since at least World War I, [140] a ***pretrial investigation***, conducted by a neutral officer in the presence of the accused, has helped prevent prosecutorial abuses by commanders. [141] Today, 10 U.S.C. § 832, also known as ***Article 32*** of the UCMJ, continues the practice. It specifies:

> (a) No charge or specification may be referred to a general court martial for trial until a thorough and impartial ***investigation*** of all the matters set forth therein has been made. This ***investigation*** shall include inquiry as to the truth of the matters set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.
>
> (b) . . . The accused has the right to be represented at that ***investigation*** . . . full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the ***investigation*** officer shall examine available witnesses requested by the accused. . . . [142]

RCM 405 implements the directives of ***Article 32*** and provides:

> 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

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[137] See DD Form 458 (May 2000), available at *http://www.dtic.mil/whs/directives/forms/eforms/dd0458.pdf*; See also Report of the Response Systems to Adult Sexual Assault Crimes Panel through the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives, at p. 126, June 27, 2014, available at *http://responsesystemspanel.whs.mil/*.

[138] See, e.g., Col. William Winthrop, Military Law and Precedents, at 15057 (1920).

[139] See discussion at Frank E. Kostik, Jr., If I Have to Fight for My Life--Shouldn't I Get to Choose My Own Strategy? An Argument to Overturn the Uniform Code of Military Justice's Ban on Guilty Pleas in Capital Cases, 220 Mil. L. Rev. 242, 251 (2014); id. at n.50 (citing Jonathan Lurie, Military Justice in America: The U. S. Court of Appeals for the Armed Forces, 1775-1980 at 77 (rev. & abr. ed. 2001).

[140] The 1918 version of the Manual for Courts-Martial, at para. 76, mandated a careful and impartial investigative hearing to provide "the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him." MCM ***art.*** 76 (1918).

[141] For an excellent discussion of this ***history***, see Zachary Spilman's online blog of Jan. 9, 2014, available at *http://www.caaflog.com/2014/01/09/2013-changes-to-the-ucmj-part-4-**article-32**/*; ***Articles*** of War, available at *http://www.caaflog.com/wp-content/uploads/**Articles**-of-War-1920.pdf#page=11*.

[142] 10 U.S.C. § 832.

> 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. [143]

Consistent with its protective function, the rules require a neutral investigating officer who can neither serve as the accuser nor act later in any capacity in the case. [144] The hearing itself remains open to the public whenever possible, in order to provide both a fair process and the appearance to the public of a fair process. [145] Only in rare instances, after making specific findings of fact on a witness-bywitness (and even issue-by-issue) basis, may an investigating officer close any portion of an ***Article 32*** proceeding. [146]

The rules permit many forms of evidence during the hearing. [147] Unlike the federal grand jury process, however, the military does not tolerate the prosecutor simply calling one investigator to read another investigator's report into the record. [148] In the absence of special circumstances, the Manual for Courts-Martial expresses a clear preference for live testimony:

> any witness whose testimony would be relevant to the ***investigation*** and not cumulative, shall be produced if reasonably available. [149]

The remainder of Rule 405 details the procedures and rules the investigating officer must apply during the hearing. All witnesses testify under oath, both sides get an opportunity to cross-examine witnesses, and the defense enjoys "wide latitude in cross-examining witnesses." [150] In part, this is designed also to compensate for the fact that assigned defense counsel all tend to be exceptionally junior and inexperienced.

The ***Article 32*** hearing is not, however, a free-for-all. The New York Times' implication that only civilian courts prohibit or limit questions about a woman's sexual ***history*** is flatly wrong. [151] Military Rules of Evidence 301, 302, 303, 305, and 412 (the Rape Shield rule) are all enforced during the preliminary ***investigation*** unless waived by the witness, [152] and the investigating officer has authority, by rank and position, to order parties for both sides to confine questions and evidence to relevant issues. [153] What the ***Article 32*** hearing does provide is an opportunity for the accused to investigate their own case and presentmatters in their defense.

At the conclusion of the hearing, the ***Article 32*** investigating officer issues a report to the general officer serving as the convening authority in the case. [154] The report must include:

> (H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

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[143] See MCM, supra note 10, R.C.M. 405(a) (discussion).

[144] Id. at R.C.M. 405(d)(1).

[145] See id. at R.C.M. 405(h) (discussion).

[146] Id.

[147] Id. at R.C.M. 405 (g)(4).

[148] Id. at R.C.M. 405.

[149] Id. at R.C.M. 405(g)(1).

[150] Id. at R.C.M. 405 (h)(1).

[151] See Steinhauer, supra note 65.

[152] MCM, supra note 10, R.C.M. 405(i).

[153] Id. at R.C.M. 405(d)(1).

[154] The convening authority is the general officer whose orders govern the accused. See id. at R.C.M. 601(c) (discussion).

(I) The recommendations of the investigating officer, including disposition. [155]

The court-martial convening authority then reviews the case and decides whether to send it to trial, a process known as "referral." In determining how to dispose of a case, the command may consider a variety of factors, including the nature of the offense, the quality of the evidence, and information about the accused's background and character of service. [156] Unlike a civilian prosecutor, the convening authority has a broad array of potential means for punishing misconduct other than to send a case to trial. [157]

D. Impending Changes to *Article 32*

To accomplish the goal of protecting victims of sexual assault, Congress ordered a complete revision of the ***Article 32 investigation***, beginning with the word "***investigation***." [158] The newly styled "preliminary hearing" provides that in all cases, not only in those of sexual assault:

The purpose of the preliminary hearing shall be limited to the following:

(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

(C) Considering the form of charges.

(D) Recommending the disposition that should be made of the case. [159]

The emphasis on a "limited" scope is repeated throughout the NDAA modifications. For example:

The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2). [160]

On October 3, 2014, the military published proposed changes to the Manual for Courts-Martial that would implement this guidance. [161] The proposed Rule 405(a) provides:

A preliminary hearing conducted under this rule is not intended to serve as a means of discovery and will be limited to an examination of those issues necessary to determine whether there is probable cause to conclude an offense or offenses has been committed . . . [162]

The new ***Article 32*** rules encourage the use of lawyers as hearing officers, an idea that has no apparent downside to the fair application of justice. The new rules also, however, provide special treatment for any person:

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[155] Id. at R.C.M. 405(j)(2).

[156] See id. at R.C.M. 401(c).

[157] For example, the convening authority may impose a General Officer Memorandum of Reprimand into a person's file, effectively killing their career, may use nonjudicial punishment under UCMJ ***art.*** 15 (a system that authorizes reductions in rank, fines, extra duty, and restrictions on liberty), or direct the case to a lower-level court-martial. It is also worth noting that the decision of the military to not go forward to trial does not foreclose another sovereign from doing so.

[158] 2014 NDAA at § 1702(a).

[159] 2014 NDAA at § 1702.

[160] 2014 NDAA at § 1702 (emphasis added).

[161] Defense Department, Office of the Secretary, "Manual for Courts-Martial: Proposed Amendments," 79 Fed. Reg. 59,939 (Oct. 3, 2014), available at http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-23546.pdf.

[162] Id.

> (1) alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; or
>
> (2) named in one of the specifications.

Such a person may:

> not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing. [163]

In addition, the 2014 NDAA directs the President to "strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of a case." [164] These latter provisions shall prove problematic (as we shall see later).

E. Loss of Command Discretion

As noted earlier, the integrity of the federal system depends upon prosecutors exercising broad discretion not to send every allegation to a grand jury, and only taking forward cases they believe can and should result in a conviction at trial. In contrast, existing military law imposes no requirement that the accuser evaluate the strength or viability of the case before initiating charges. Congressional studies have also confirmed that military commanders "have shown consistent willingness to go forward in cases" where "civilian prosecutors had declined to prosecute." [165]

The NDAA takes reflexive charging in the military a step farther. Even while minimizing the scope of the ***Article 32***, Congress is strongly encouraging commanders to treat all sexual assault allegations as necessarily worthy of trial. Section 1752 of the NDAA codifies "the sense of Congress that any charge regarding [a sexual assault] should be disposed of by court-martial." [166] In fact, if a commander, upon review of a given case, chooses not to refer a sex-related offense to trial, they must report themselves and the case to a higher general officer, who must then consider reporting the case for review by the Secretary of the applicable service (i.e., Army, Marines, etc.). [167] These procedures are triggered whenever "a sex-related offense has been alleged by a victim of the alleged offense." [168]

Commanders are taking the implied threat to their careers to heart. In an ***article*** published by the U.S. Army, an experienced Army attorney warns practitioners that:

> Even if command authority remains intact, potential loss of a star or the lack of promotion to the next rank in these aforementioned cases sends the message to senior leaders that severe professional consequences will result if commanders take what they think Congress believes to be the incorrect action in sexual assault cases. [169]

This lawyer's analysis also details disturbing admissions by senior officers that they refer to trial even particularly questionable accusations based on the fear that they "will be scrutinized for not seeming to take the matter [of sexual assaults] seriously enough" if they take any lesser action. [170] These commanders express the "hope that

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[163] 2014 NDAA at § 1702

[164] 2014 NDAA at § 1708

[165] 2013 Report of the Response Systems, supra note 137, at 129.

[166] 2014 NDAA at §§ 1752 (a)(1) and (b).

[167] 2014 NDAA at § 1744.

[168] 2014 NDAA at § 1744(a)(1).

[169] Major Elizabeth Murphy, The Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process, 220 Mil. L. Rev. 129 (2014).

[170] Id. at 149.

justice is served in the end," but perceive that there is "unlawful command influence from the top," [171] an impression encouraged by the forced retirement of senior generals who were perceived as "soft" on sexual assaults. [172] These perceptions matter, because the "professional" attorney who will help the commander evaluate the relative strengths and weakness of each case is the same, young, junior officer who has prosecuted only two jury trials of any type in their entire career. Furthermore, that prosecutor is depending upon the information gathered by investigating agents who tend to be very junior and inexperienced, and who belong to an organization that does not report to the prosecutor and therefore has little motivation to continue an ***investigation*** once the investigators "opine" that probable cause has been established. In this context, a commander would be seriously and perhaps foolishly endangering their own career if they did not charge and refer any alleged sexual assault case to general court-martial.

It is in this charged atmosphere that Congress has elected to constrain the focus of the ***Article 32***, empower purported victims to refuse to participate, and effectively squash a commander's discretion not to refer a case to trial, without providing any of the counterbalancing factors that protect against unwarranted civilian prosecutions. Furthermore, the Manual for Courts-Martial provides written guidance to ***Article 32*** officers and convening authorities about how to evaluate a case. In the 2014 NDAA, Congress redacts any reference to the very factors Attorney General Holder insists every ethical and responsible federal prosecutor should weigh heavily in deciding how to proceed in a given case: the personal ***history*** and record of the accused.

These changes will not occur in a vacuum, either; they impact the viability of other, unaltered rules that the existing ***Article 32*** structure permits. For instance, the integrity of the ***Article 32*** process arguably compensates for the fact that in the military, a jury can convict with a two-thirds majority rather than the unanimous vote necessary in civilian courts. [173] Going forward, we are basically telling our serving military members that by choosing to serve, they will be entitled to the protections against unjust accusations of neither existing system, and that they can be convicted by a lower standard of certainty.

Additionally, these new ***Article 32*** rules do not apply only to sexual assault cases. Under the new rules it could be possible for a commander to accuse a soldier of insubordinate conduct, invoke victim status, and refuse to testify at the ***Article 32*** hearing. On the other side of the ledger, the new rule would then omit any reference to consideration of the subordinate's past ***history*** when evaluating the legitimacy of the claimed conduct or whether to send the case to trial. In essence, the new rules expose military soldiers to risks last permitted during the nineteenth century, and to circumstances that previously resulted in systemic false convictions so frequent and deplorable that a new justice system was designed to correct them.

Nor does this new process hurt only the defense. The new rules deny the prosecutor tools available in the civilian system to guarantee the integrity of testimony. The federal grand jury's "extraordinary powers of ***investigation***" allow it to call necessary witnesses with "no limits to the questions that may be asked of the grand jury witness, other than the objections and privileges previously sustained by a court." [174] The grand jury and the prosecutor may therefore call witnesses, including the victim, [175] to testify under oath, subject to perjury charges, secure in the knowledge that each witness must testify and a verbatim transcript will be made for each witness, but that each witness will remain ignorant of the other's testimony throughout the trial process. [176] As one commentator summarized:

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[171] Id.

[172] See, e.g., Kristin Davis, Lt. Gen. Franklin will retire as a 2-star, Navy Times, Jan. 9, 2014, available at *http://www.navytimes.com/**article**/20140109/NEWS/301090021/Lt-Gen-Franklinwill-retire-2-star*.

[173] 10 U.S.C. § 852(a)(2)

[174] Federal Defenders, supra note 116, at 2-55.

[175] See, e.g., 2013 Report of the Response Systems, supra note 137, at 128.

[176] Fed. R. Crim. P. 6(e)(2).

> There's reason to believe that even Congress doesn't quite understand what it's done. . . . Senator Carl Levin (D-MI), said that it will "make the ***Article 32*** process more like a grand jury proceeding." But it will do nothing of the sort. A federal grand jury is both "grand," consisting of at least 16 people, and a "jury," chosen at random from the community. In contrast, both the current and the future versions of ***Article 32*** require a hearing conducted by only one officer, and that officer is appointed by the commander responsible for the prosecution. ***Article 32*** proceedings are also open to the public and the press, while grand juries are protected by secrecy rules that preserve the independence of their investigative function. And the victim who will be allowed to refuse to participate in an ***Article 32*** proceeding could never do so when served with a grand jury subpoena. [177]

The proposed changes to MRE 405 confirm this interpretation. Although a victim "is not required to testify at the preliminary hearing," the purported victim:

> Has the right not to be excluded from any portion of the preliminary hearing related to the alleged offense, unless the preliminary hearing officer, after receiving clear and convincing evidence, determines the testimony by the victim would be materially altered if the victim heard the other testimony at the proceeding. [178]

In sum, the new ***Article 32*** goes far beyond shielding victims from abusive questioning. It seeks to empower them by combining the least reliable aspects of both present criminal systems into one amalgamated mess, with the unstated but apparent purpose of ensuring that every sexual assault case proceeds to trial. For the first time in either system, a purported victim of any crime will have the power to basically send a case to trial, watch every other witness in a case testify on two separate occasions, and only then provide their version of events under oath and subject to cross-examination. Their testimony will then get "tested" by a system that requires only a two-thirds majority to convict. The attendant consequences of these policies will affect every type of military case, including military-specific offenses in which the past performance of the accused soldier was traditionally the most critical issue.

F. Imminent Areas of Litigation

Investigative Help. In 1970, the Court of Military Appeals considered a petition of a defendant asking for appointment of an experienced criminal investigator to assist in preparing his defense to allegations that he participated in the Mÿ Lai Massacre. [179] As the court described the claim:

> Petitioner asserts that such relief is provided for indigent defendants inUnited States district courts, under the provisions of 18 U.S.C. § 3006A, and that an analogous procedure should be made available for indigent military defendants, who are otherwise at the mercy of Government-conducted ***investigations***. [180]

The Court of Military Appeals denied the claim. It explained:

> In the Federal courts, relief has been provided by Congress under 18 U.S.C. § 3006A, supra. In the military system, it has been so far provided by Congress only in the form of the usual ***Article 32 pretrial investigation*** . . . It should be noted that the ***pretrial investigation*** to which these charges have been referred is the accused's only practicable means of discovering the case against him. As such, his counsel is certainly entitled to interview the witnesses prior to the ***investigation*** and to make such preliminary ***investigations*** in connection with their appearance and the defense's own case as will enable him properly to represent his client. We are certain that he will be afforded the opportunity to do so . . . [181]

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[177] Spilman, supra note 141.

[178] Defense Department, Office of the Secretary, supra note 161.

[179] Huston v. United States, 42 C.M.R. 39, 19 USCMA 437 (1970).

[180] Id.

[181] Id. at 40, 438.

To this day, military defense attorneys must often serve as attorney, investigator, and secretary. The ***Article 32*** provided counsel the rare opportunity to question witnesses under oath while others were present to witness the resultant testimony. [182] Given that the revised ***Article 32*** will now limit the taking of evidence, preclude broad investigative questioning, and allow the victim to abstain from testimony, military practitioners will almost certainly need and seek professional investigative help. At least one Congressional panel has already advised the Secretary of Defense to "direct the Services to provide independent, deployable defense investigators" in order "to correct an obvious imbalance of resources" that now exists, especially in comparison to the civilian process in which public defender offices retain investigators on staff. [183] The Secretary should immediately initiate a study of the matter, because the creation of a deployable corps of investigators will like require an entirely new military occupational specialty or subspecialty.

Depositions. For the immediate future, defense counsel will seek to depose victims who abstain from the ***Article 32***. In the August 2014 case of United States v. McDowell, the Armed Forces Court of Criminal Appeals affirmed an order requiring a victim who had terminated questioning during an ***Article 32*** hearing to make herself available for a deposition. [184] As the court explained:

> ***Article*** 49(a), UCMJ, 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." [185] "The fact that a witness is or will be available for trial is good cause for denial in the absence of unusual circumstances. . . . " [186] 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. [187]

Although the Court made quite clear that it decided the case on existing rules, and that "how ***Article*** 6(b) and the new ***Article 32*** interplay with an accused's rights is not addressed in this case," the new ***Article 32*** rules designate any victim who opts out "unavailable." Within existing deposition rules, military counsel should therefore be able to depose the victim. On the other hand, the current political climate suggests that any temporary success in this regard by the defense will likely lead to "corrective" legislation in short order. "The trend is clear and long in the making: Witnesses for one side at a court-martial (and particularly alleged victims) have broad and growing power to avoid ***pretrial*** questioning by the other side." [188]

III: Anticipated Issues at Trial and Sentencing

A. Trial

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[182] This author was often forced, while serving as a military defense counsel, to locate and interview witnesses without assistance, resulting in a situation where a witness confessed to a shooting for which another person was on trial, but refused to admit the confession afterward.

[183] 2013 Report of the Response Systems, supra note 137, at 38.

[184] See United States v. McDowell, Military Judge, and DeMario, Real Party in Interest, No. 2013-28 (A.F. Ct. Crim. App., Mar. 13, 2014); see also discussion of the case at Zachary D. Spilman, CAAF affirms the AFCCA's denial of a Government petition for a writ to stop the deposition of an alleged victim of sexual assault (Aug. 12, 2014), available at http://www.caaflog.com/2014/08/12/caaf-affirms-the-afccas-denial-of-agovernment-petition-for-a-writ-to-stop-the-deposition-of-analleged-victim-of-sexual-assault/; and Spilman, Deposing the Alleged Victim, Now and in the Future (Aug. 18, 2014), available at http://www.caaflog.com/2014/08/18/deposing-thealleged-victim-now-and-in-the-future/#more-28625.

[185] MCM, supra note 10, R.C.M. 702(c)(3)(A).

[186] See id. at R.C.M. 702(a)(3)(A) (discussion).

[187] McDowell, supra note 184.

[188] Spilman, Deposing the Alleged Victim, supra note 184.

The military has proposed to implement a victim's right under the 2014 NDAA to attend trial by inserting a provision into RCM 806(b)(2) providing:

> A victim of an alleged offense committed by the accused may not be excluded from a court-martial proceeding 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. [189]

Letting victims attend trial proceedings provides inherent value to victims: attendance helps victims better understand the military justice process, it allows them to observe and appreciate the testimony that influenced the resulting verdict, and it underscores their inherent value as a person invested in the outcome of the case. The 2014 broadening of victim rights is presumptively a "win" for the system as well as for victims, if it validates victims and increases public understanding of the justice process. This new standard, however, will prove far more dangerous to the integrity of results in military court than in the federal system.

Federal courts receive ***pretrial*** service reports and ***pretrial*** briefs, expect proposed jury instructions far in advance of trial, and generally possess a far greater capacity to preevaluate and control the trial than does a military judge. [190] The military judge frequently has no idea of the specifics of the case prior to the commencement of trial, nor of the behavior of the various parties. This is even truer now that the 2014 NDAA allows purported victims to both refuse to participate in the preliminary hearing and to refuse to meet with defense attorneys without the prosecutor's presence. [191]

Furthermore, federal judges know, prior to trial, that they will conduct any eventual sentencing. Federal judges know the exact U.S. Sentencing Commission's Guideline enhancements and departures at issue in each case before trial, so they can reasonably anticipate the issues that a victim's testimony might impact. In contrast, the military judge surrenders both findings and sentencing to an often novice panel composed of unknown personalities applying uncertain, internal evaluation criteria.

Finally, most, although not all, federal trials resolve around yes/no issues focused on the existence of overt acts (such as whether the defendant possessed a gun), whereas most military trials resolve around much more nebulous issues of subjective intent. Given all these variables, practitioners should question how a military court will reliably anticipate how the testimony of one unknown witness might affect the later testimony of another, practically unknown witness, while also anticipating the way that effected testimony might then influence the jury at both findings and potential punishment. It is difficult to conceive of a circumstance in which the defense, after having no guaranteed opportunity to ever speak to the victim, will be able to persuade the judge that the unknown testimony of this particular victim-witness will surely change during the trial if they watch other witnesses. This is particularly true in cases in which alcohol use by the victim is a factor in their memory of events.

The 2014 NDAA format virtually ensures, given the unknowns of the typical military case, that judges will have to rule in favor of attendance (the desired goal). The 2014 NDAA also significantly increases the likelihood, particularly in sexual assault cases in which alcohol and imperfect memories are often an issue for both sides, that victimwitness testimony will be materially altered to the defendant's disadvantage in at least some cases. This author anticipates that on a practical level, identical rules will result in much greater risk to the rights of the accused in military court than in federal courts.

Due process for the accused is obviously not the exclusive consideration. As a society, however, we should care about both victims' needs and the integrity of the system. When a purported victim of a bar fight, marital dispute, or alleged sexual assault gets to preview every other witnesses testimony, twice--once at a public preliminary hearing

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[189] Defense Department, Office of the Secretary, supra note 161, at 59,338.

[190] For example, a federal judge has access to ***Pretrial*** Service reports summarizing the case facts and describing the ***pretrial*** conduct of the accused and the victim(s).

[191] 2014 NDAA at § 1704.

and again at trial--before they ever testify, reasonable people should suffer doubt as to the reliability of that testimony. Is there any way to inject more balance into the trial, given the existing mandates from Congress?

This author suggests that the military should modify clause 4 of MRE 615 to provide:

> the victim, after initially testifying,may attend all court proceedings, without regard to whether they may be recalled, unless the court, by clear and convincing evidence, finds a substantial likelihood that their testimony will be materially altered.

Given RCM 806's provision that the victim can attend the entire trial hearing, a revised MRE 615 would force the prosecutor to call the victim as the first witness in the case. As a longtime prosecutor, this author can appreciate that such a process might sometimes interfere with the prosecutor's preferred order of presenting evidence. This procedure would, however, significantly mitigate the risk that the purported victim would either intentionally or subconsciously alter their testimony to account for details they heard from other witnesses during the trial.

B. Sentencing

Live Testimony. RCM 1001 must change to comply with a victim's new statutory right to be reasonably heard at sentencing. [192] The exact format of these changes remains unknown, but the proposal published on October 3, 2014, would create a new rule, RCM1001A, which would read as follows:

> A victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense. For the purposes of this rule, the right to be reasonably heard means the right to testify under oath. Trial counsel shall ensure the victim has the opportunity to exercise that right. As used in this rule a "victim" is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense. If the victim exercises the right to be reasonably heard, the victim shall be called by the court. [193]

The 2014 NDAA guarantees the victim a right to speak, even if the trial counsel does not endorse them as a witness. When a victim takes the stand, a real danger exists that the victim might inadvertently make an impermissible argument that violates the other provisions of RCM 1001, thereby jeopardizing the trial result. Given that the jury decides the sentence, it would be better to anticipate that a victim might, for example, improperly ask the panel to impose a punitive discharge. Rather than attempt to remedy violations after the fact, the military should simply amend the duty of the military judge under RCM 1001A as follows:

> The military judge shall, outside the presence of members, and on the record, ensure that the victim is advised of the nature and scope of testimony permitted during a sentencing hearing. The military judge shall also ensure the victim has the opportunity to exercise their right to be heard on these permitted matters.

Alternate Forms of Evidence. The October 3, 2014, proposals for reforming the Rules for Courts-Martial create a new rule, 1001A, to ensure victim testimony at sentencing, but the proposal does not provide victims any alternative means to be heard at sentencing other than by live testimony. [194] Unfortunately, not every victim can, or should, be forced to appear in court.

Consider child pornography cases as an example. Victims and their families are often readily identifiable, but are also often too traumatized to even consider the prospect of travelling the world to attend the hearing of each soldier found distributing an image of their sexual molestation. Additionally, psychologists counseling these families frequently recommend against repeated recitations of the same details, over and over again, as they can retraumatize the victim. In such cases, victims, their families, and their communities all have an interest in presenting to the court concrete and verified details of effects created by the ongoing use and distribution of the

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[192] 2014 NDAA at § 1701.

[193] Defense Department, Office of the Secretary, supra note 161, at 59,943.

[194] Id.

photos at issue. [195] Similarly, in cases involving many remote victims, such as in identity theft cases or in cases where the death of a soldier impacts a sizeable portion of a community far away, those impacted might strongly wish to address the court, but may lack the opportunity or means to attend a remote military trial.

Federal practice demonstrates that the defendant has no Constitutional entitlement to demand hearsay rules apply at sentencing.

The military should welcome a revision to RCM 1001 that permits affidavits regarding victim impact in the sentencing of all accused, regardless of how they were found guilty. The child victim and their family should, for instance, be allowed to provide input in the form of memorialized comments rather than bear the burden of endlessly reliving the same experiences over a period of decades.

Trial counsel may introduce evidence in aggravation that includes direct testimony of financial, social, psychological, and medical impacts of the offense. [196] This author proposes broadening the proposed RCM 1001A to provide:

(b) Alternate Forms of Testimony:

(1) If a victim is unable or unwilling to attend the sentencing hearing, they may submit a concise letter, not to exceed two pages, that addresses any financial, social, psychological, or physical impacts of the offense. The document must be received no later than ten days before trial, and must conform to the permitted scope of witness testimony under RCM 1001.

(2) Trial counsel shall ensure, no later than twenty-one days before trial, that the victim is notified of this provision and given an opportunity to submit such a document in lieu of testifying at sentencing.

(3) Trial counsel must disclose any victim-witness document, upon receipt, to defense counsel, who may appropriately object to any matters otherwise precluded by RCM 1001.

(4) Upon objection, the military judge shall review the document and order redacted any prohibited or irrelevant arguments or information.

(5) The final, redacted copy of the concise document shall be read to the panel during the government's presentation of evidence at the sentencing hearing.

History suggests that if themilitary does not adopt some procedural allowance for remote or alternate testimony, Congress will take independent action, and likely in a way that reflects less sensitivity to existing military concerns.

IV. Conclusion

The 2014 NDAA represents an unquestioned win for victims. Unfortunately, in an attempt to shield victims from unfair treatment, Congress increased, without adequate consideration or need, the likelihood that innocent parties will be found guilty of serious crimes. The 2014 NDAA exceeds the changes necessary to give victims a voice in the system; it effectively eliminates the single military mechanism that has, for almost a century, compensated for a host of safeguards provided only in the civilian courts. At the very least, the new rules ensure that military defendants will enjoy far fewer procedural protections from injustice than are extended to the worst, repeat career criminals in the civilian system. Rather than wait to experience the host of abuses and unjust convictions predicted by past experiences, we should begin now to develop and implement rules that will ensure the integrity of the military justice system.

Federal Sentencing Reporter

[195] Both Congress and the courts have recognized that the child in such a photo is an ongoing victim of any redistribution, receipt, or possession of such a photo.

[196] MCM, supra note 10, R.C.M. 1001(b)(4).

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