Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

Meeting Materials

March 12-13, 2024

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
34th Public Meeting

March 12-13, 2024
Preparatory Materials

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Tab 4 Materials relevant to the DAC-IPAD's proposal to amend Article 34, UCMJ, (DAC-IPAD Recommendation 32), in a letter to Congress

Tab 4a Draft Article 34 Transmittal Letter to Congress with Enclosure

– *Staff-prepared draft transmittal letter to Congress regarding amendment to Article 34, with draft Article 34 legislative proposal enclosed (5 pages)*

Tab 4b Uniform Code of Military Justice, Article 34. Advice to convening authority before referral for trial *(2 pages)*

Tab 4c Manual for Courts-Martial, Chapter VI. Referral, Service, Amendment, and Withdrawal of Charges, Rule for Courts-Martial 601. Referral *(3 pages)*

Tab 4d Manual for Courts-Martial, Appendix 2.1, Disposition Guidance *(4 pages)*

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

34th PUBLIC MEETING

March 12-13, 2024

Location: United States Air Force Academy
Blue & Silver Club, 4900 Stadium Boulevard, Air Force Academy, CO

Virtual Zoom Link:
https://www.zoomgov.com/j/16178117058?pwd=RTRLYi9NOEF2STZYeXd0TkJING00Zz09
Meeting ID: 161 7811 7058 Passcode: DACIPAD
Phone: (669) 254-5252 / (646) 828-7666

Tuesday, March 12, 2024	Day 1
8:25 a.m. – 9:25 a.m.	*Administrative Session* *(1 hour)* *Over view of public meeting materials and Air Force Academy site visit*
9:25 a.m. – 9:30 a.m.	**Welcome and overview of Day 1** *Director: Mr. Pete Yob* *DFO: Mr. Dwight Sullivan*
9:30 a.m. – 11:00 a.m.	**Special Victim's Counsel** *(90 minutes)* *Major Alexandria McCrary-Dennis, U.S. Air Force* *Captain Ryan C. Speray, U.S. Army* *Commander Rebecca Shults, U.S. Coast Guard* *Lieutenant Colonel Stacy Allen, U.S. Marine Corps* *Commander Sara de Groot, U.S. Navy* Purpose: To hear military justice practitioners' perspectives on Mil. R. Evid. 513 litigation, Art. 6b victims' rights litigation, judicial practice in military sexual offense cases, and investigator access to digital evidence on victims' personal devices. Staff: *Ms. Terri Saunders*
11:00 a.m.	**Public meeting Day 1 Adjourns**
11:00 a.m. – 1:30 p.m.	*Working Lunch and Site Visit Roundtable Discussions at the Air Force Academy* *(2 hours, 30 minutes)*
1:30 p.m.	**Public Meeting Day 1 Reconvenes**

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

34th PUBLIC MEETING

1:30 p.m. – 3:00 p.m.	**Senior Defense Counsel** *(90 minutes)* *Major Matthew Leal,U.S. Air Force* *Major Ira Gallagher, U.S. Army* *Lieutenant Commander David Rehfuss, U.S. Coast Guard* *Lieutenant Colonel Cory Carver, U.S. Marine Corps* *Captain Hayes Larsen, U.S. Navy* Purpose: To hear military justice practitioners' perspectives on Mil. R. Evid. 513 litigation, Art. 6b victims' rights litigation, judicial practice in military sexual offense cases, and investigator access to digital evidence on victims' personal devices. Staff: *Mr. Mike Libretto*
3:00 p.m. – 3:15 p.m.	**Break** *(15 minutes)*
3:15 p.m. – 4:45 p.m.	**Special Trial Counsel** *(90 minutes)* *Major Alexis Brown, U.S. Air Force* *Major Alexandria Altimas, U.S. Army* *Lieutenant Commander Case Colaw, U.S. Coast Guard* *Lieutenant Colonel Nicholas Henry, U.S. Marine Corps* *Captain R.J. Stormer, U.S. Navy* Purpose: To hear military justice practitioners' perspectives on Mil. R. Evid. 513 litigation, Art. 6b victims' rights litigation, judicial practice in military sexual offense cases, and investigator access to digital evidence on victims' personal devices. Staff: *Ms. Terri Saunders*
4:45 p.m. – 5:00 p.m.	**Meeting Wrap-up**

5:00 p.m. **Public Meeting Day 1 Adjourns**

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

Wednesday, March 13, 2024	Day 2
8:30 a.m. – 9:15 a.m.	*Administrative Session; Annual Ethics Training (Mr. Dean Raab)*
9:15 a.m. – 9:20 a.m.	**Welcome and Overview of Day 2** *Director: Mr. Pete Yob* *DFO: Mr. Dwight Sullivan*
9:20 a.m. – 10:00 a.m.	**Deliberations on Day 1 Panel Sessions** *(40 minutes)*
10:00 a.m. – 11:00 a.m.	**El Paso County, Colorado, practioners** *(1 hour)* *Ms. Deana M. O'Riley, Supervising Deputy Public Defender, Office of the Public Defender, Colorado Springs, CO* *Mr. Kelson Castain, Senior Deputy District Attorney, Special Victim's Unit, 4th Judicial District Attorney's Office, Colorado Springs, CO* Purpose: To hear comparative perspectives from civilian practitioners on issues of interest to the DAC-IPAD. *Staff: Ms. Meghan Peters*
11:00 a.m. – 11:10 a.m.	**Policy Subcommittee Update** *Staff: Ms. Terri Saunders and Ms. Terry Gallagher*
11:10 a.m. – 11:20 a.m.	**Case Review Subcommittee Update** *Staff: Ms. Kate Tagert and Ms. Nalini Gupta*
11:20 a.m. – 11:30 a.m.	**Special Projects Subcommittee Update and Discussion of draft DAC-IPAD Letter on amending Article 34, UCMJ** *Staff: Ms. Eleanor Vuono*
11:30 a.m. – 12:00 p.m.	**Public Comment** *(30 Minutes)*
12:00 p.m. – 12:30 p.m.	**Meeting Wrap-Up and Deliberations on draft DAC-IPAD Letter on amending Article 34, UCMJ** *(30 minutes)* *Director: Mr. Pete Yob; Ms. Eleanor Vuono* *DFO: Mr. Dwight Sullivan*

12:30 p.m. **Public Meeting Day 2 Adjourns**

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Wendell E. MELLETTE Jr.,
Electrician's Mate (Nuclear) First Class Petty Officer
United States Navy, Appellant

No. 21-0312
Crim. App. No. 201900305

Argued February 8, 2022—Decided July 27, 2022

Military Judge: Warren A. Record

For Appellant: *Lieutenant Commander Michael W. Wester*, JAGC, USN (argued).

For Appellee: *Lieutenant Commander Jeffrey S. Marden*, JAGC, USN (argued); *Lieutenant Colonel Christopher G. Blosser*, USMC, *Major Clayton L. Wiggins*, USMC, *Lieutenant John L. Flynn IV*, JAGC, USN, and *Brian K. Keller*, Esq. (on brief).

Amicus Curiae on behalf of Patient/Victim SS: *Peter Coote*, Esq. (on brief).

Amici Curiae on behalf of the United States Navy, the United States Marine Corps, and the United States Coast Guard Victims' Legal Counsel and Special Victims' Counsel Programs: *Major Nathan H. Cox*, USMC, *Lieutenant Commander Adam J. Sitte*, JAGC, USN, and *Paul T. Markland*, Esq. (on brief).

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON and Senior Judge RYAN joined. Judge MAGGS filed a dissenting opinion in which Judge SPARKS joined.

Judge HARDY delivered the opinion of the Court.

The Government charged Appellant with sexually abusing and assaulting SS, a fifteen-year-old girl with a history of mental health issues. In preparation for his court-martial, Appellant sought access to SS's mental health diagnoses and treatments on the basis that the records could prove relevant to SS's credibility as a witness. The Government declined to

provide the requested records, asserting that the psychotherapist-patient privilege provided by Military Rule of Evidence (M.R.E.) 513 protected the records in toto from disclosure. Appellant filed a motion to compel production and in camera review of SS's mental health records, arguing primarily that the psychotherapist-patient privilege does not sweep so broadly as to protect a patient's diagnoses and treatment plan.

The military judge denied the motion, and the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed, holding that the psychotherapist-patient privilege protects not only confidential communications, but diagnoses and treatment plans contained within medical records. *United States v. Mellette*, 81 M.J. 681, 691–93 (N-M. Ct. Crim. App. 2021). We granted review to determine the scope of the patient-psychotherapist privilege under M.R.E. 513. *United States v. Mellette*, 82 M.J. 13 (C.A.A.F. 2021) (order granting review).

Based on the plain language of M.R.E. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513. The decision of the NMCCA is set aside, and we return the case to the Judge Advocate General of the Navy for further proceedings consistent with this opinion.

I. Background

While serving in the Navy, Appellant engaged in a sexual relationship with SS, the fifteen-year-old sister of Appellant's then-wife. After Appellant's wife discovered the relationship, the couple divorced, with Appellant's now ex-wife receiving custody of their young daughter. During a later dispute over Appellant's visitation rights, Appellant's ex-wife reported his prior sexual relationship with SS to Appellant's commanding officer, leading to an investigation by the Naval Criminal Investigative Service (NCIS).

After the NCIS investigation, which included an interview with SS in which she revealed that she had spent time in a mental health facility, the Government charged Appellant with one specification of sexual abuse of a child and one specification of sexual assault of a child, both under Article 120b,

Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b (2012). A critical element of each charge was that the alleged misconduct occurred prior to SS's sixteenth birthday in July 2014. *See* Article 120b(h)(4), UCMJ (defining a child as "any person who has not attained the age of 16 years").

In parallel to the criminal investigation and proceedings, Appellant and his ex-wife continued their legal dispute over custody of their daughter. As part of those civil proceedings, SS sat for a deposition in which she discussed her prior sexual relationship with Appellant. During the deposition, SS disclosed that in August 2013, she voluntarily spent a week in a mental health facility after her high school administrators discovered she had engaged in self-harm. SS revealed at least part of the mental health diagnoses she received at the facility, her treatment plan during her stay, and the follow-up treatment plan she received when she was discharged.

Prior to his court-martial, Appellant sought discovery of any evidence that SS "sought or received mental health treatment" and copies of "S.S.'s medical records related to mental health and prescriptions" from the period when SS was in the mental health facility through the start of Appellant's court-martial. The Government denied the request, partially on the basis that the requested information was protected by the psychotherapist-patient privilege provided in M.R.E. 513. In response, Appellant moved to compel production and in camera review of SS's mental health records. Appellant asserted that the requested information was "relevant to issues of suggestion, memory, and truthfulness" with respect to SS.

The military judge denied Appellant's motion to compel, holding that the documents sought by Appellant were protected by the psychotherapist-patient privilege under M.R.E. 513. The military judge further concluded that Appellant had not provided any evidentiary or legal basis to order production of the documents and perform in camera review.

At Appellant's court-martial, SS testified that she had engaged in self-mutilation and spent time in a mental health treatment facility for depression and anxiety in August 2013. SS stated that she started spending more time with Appellant in the months following her discharge from the mental health

facility. SS described how Appellant starting sexually abusing her during those encounters, but she struggled to provide precise dates for when the abuse occurred. Although Appellant departed for deployment in February 2014, SS testified that the sexual abuse escalated when Appellant returned in April 2014.

Given the need for the Government to prove beyond a reasonable doubt that Appellant's alleged misconduct occurred before SS's sixteenth birthday in July 2014, Appellant's defense counsel focused on SS's inability to provide specific dates for the incidents of abuse and assault during SS's cross-examination. SS repeatedly answered that she didn't know or was not sure when the events she described during her direct testimony occurred, a fact that Appellant's counsel highlighted during his closing arguments.

The members, sitting as a general court-martial, convicted Appellant of one specification of sexual abuse of a child but acquitted him of sexual assault of a child, both offenses under Article 120b, UCMJ. The members sentenced Appellant to confinement for five years and a dishonorable discharge. The convening authority approved the sentence.

Before the NMCCA, both Appellant and the Government argued that the military judge erred in holding that medical records that revealed SS's diagnoses and treatments were privileged under M.R.E 513. *Mellette*, 81 M.J. at 691. The NMCCA disagreed, holding both that the plain language of M.R.E. 513 protected such records and that it would be absurd to conclude otherwise. *Id.* at 692. The NMCCA further held SS had waived the privilege by discussing her mental health diagnoses and treatment, including her prescribed medications, with her family, with NCIS, and during her civil deposition. *Id.* at 693.[1]

Having found error, the NMCCA then held that Appellant's lack of access to the requested information about SS's

[1] Even if SS had not waived the privilege, the NMCCA held in the alternative that the military judge abused his discretion in concluding that Appellant had not shown, at the very least, that in camera review of the pertinent mental health records was constitutionally required to protect Appellant's due process and confrontation rights. *Mellette,* 81 M.J. at 694.

mental health diagnoses and treatments only prejudiced Appellant with respect to the post-deployment allegations, which were supported solely by SS's testimony. *Id.* at 695–96. Because strong corroborating evidence existed for the predeployment allegations, the NMCCA held that the error was harmless beyond a reasonable doubt with respect to those findings. *Id.* Accordingly, the NMCCA struck the words "on divers occasions" from Appellant's conviction for sexual abuse of a child and reduced Appellant's sentence to three years of confinement and a dishonorable discharge. *Id.* at 701.

This Court granted review of the following three issues:

> I. M.R.E. 513 extends the psychotherapist-patient privilege to a "confidential communication" between patient and psychotherapist or assistant. Did the lower court err by concluding diagnoses and treatment are also subject to the privilege, invoking the absurdity doctrine?
>
> II. Did the NMCCA depart from Supreme Court and CAAF precedent by not reviewing the evidence at issue—diagnoses and treatment, including prescriptions—in concluding: (1) the mental health evidence was both prejudicial and non-prejudicial; and (2) failure to produce it was harmless beyond a reasonable doubt where the unknown evidence could have negated the evidence the NMCCA claimed to be "overwhelming" evidence?
>
> III. Whether the Court of Criminal Appeals erred by holding that [SS] waived the psychotherapist-patient privilege.

Mellette, 82 M.J. at 13–14.

II. Discussion

We granted review of three questions in this case, but our answer to the first question—whether the patient-psychotherapist privilege established by M.R.E. 513 protects a patient's diagnoses and treatments from disclosure—moots the remaining two. Because we conclude that such records are not privileged under M.R.E. 513, we do not reach the second or third questions presented.

A. Standard of Review

This Court reviews questions regarding the scope of the patient-psychotherapist privilege established by the Military

Rules of Evidence de novo. *United States v. Beauge*, 82 M.J. 157, 162 (C.A.A.F. 2022). When construing those rules, we apply the standard principles of statutory construction. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019). When the language of a rule is susceptible to only one interpretation, we enforce the rule according to its terms. *Id.* (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 6 (2000)). But when a rule's language is ambiguous, we interpret that language within the broader context of the rule. *Beauge*, 82 M.J. at 162.

When interpreting M.R.E. 513, we must also account for the Supreme Court's guidance that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence," *Trammel v. United States*, 445 U.S. 40, 50 (1980) (alteration in original removed) (internal quotation marks omitted) (citation omitted), and our own view that "privileges 'run contrary to a court's truth-seeking function,' " *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)). The Supreme Court has further advised that evidentiary privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotation marks omitted) (citation omitted); *see also Jasper*, 72 M.J. at 280 (recognizing that privileges must be "narrowly construed").

B. Military Rule of Evidence 513

We begin our analysis, as we must, with the text of the rule. M.R.E. 513(a) states:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

By its terms, the rule protects "confidential communication[s]" between a patient and a psychotherapist "made for

the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[2]

Although the first question presented asks whether "diagnoses and treatment are also subject to the privilege," that is not precisely the correct query. We have no doubt, and neither party disputes, that communications between a patient and a psychotherapist involving diagnoses and treatments are privileged and that a medical record could transcribe a communication in such a way to make it privileged. The critical question in this case is whether *other* evidence that does not qualify as a communication between a patient and a psychotherapist—such as a patient's routine medical records—are also protected by the rule. Essentially, the question before us is whether "communication[s]" in rule M.R.E. 513(a) should be interpreted narrowly to exclude medical records and other similar evidence that does not constitute a confidential communication or interpreted broadly to include all evidence that in some way reflects, or is derived from, confidential communications.

The Government argues that the plain language of M.R.E. 513(a) protects medical records that contain diagnoses and treatment, but we disagree. The phrase "communication made between the patient and a psychotherapist" does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist. We must begin with the assumption that the President's specific choice of the word "communication" in M.R.E. 513(a)—rather than broader nouns such as "documents," "information," or "evidence"—and the President's inclusion of the limiting phrase "made between the patient and a psychotherapist" have meaning. Otherwise, nothing would distinguish the language of M.R.E 513(a) from a hypothetical, alternative rule that

[2] More accurately, the rule protects such communications between a patient and "a psychotherapist *or an assistant to the psychotherapist*." M.R.E. 513(a) (emphasis added). To be clear, all references to communications with a psychotherapist in this opinion include communications to an assistant to the psychotherapist.

simply protected "documents made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

The President has the authority, within the limits of the Confrontation Clause, to define the scope of the patient-psychotherapist privilege as broadly as he sees fit. If the President intended M.R.E. 513(a) to broadly protect all patient medical records, the President could have used express language that unambiguously reflected that intent. Indeed, other jurisdictions have done exactly that. In Florida, for example, the legislature expressly protected mental health patients' records and diagnoses:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or *records* made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. *This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.*

Fla. Stat. Ann. § 90.503(2) (West 2018) (emphasis added).[3] But here, the President chose a different path, including only confidential communications made between the patient and a psychotherapist with no mention of any other types of evidence.

The Government argues that, despite the specific language of M.R.E. 513(a), broader consideration of the entire rule makes clear that M.R.E. 513 protects all evidence that discloses a patient's diagnoses and treatment, regardless whether that evidence qualifies as a communication made between the patient and the psychotherapist. In support of this

[3] *See also, e.g.*, Wyo. Stat. Ann. § 33-38-113(a) (1999) (preventing the disclosure of "confidential information, including information contained in administrative records"); 740 Ill. Comp. Stat. Ann. 110/10(a) (West 2017) (preventing the disclosure of a patient's "record or communications"), Ark. R. Evid. 503(b) (preventing the disclosure of a patient's "medical records or confidential communications").

argument, the Government points to two provisions, M.R.E. 513(e)(2) and M.R.E. 513(b)(5). Again, we disagree. Neither provision overcomes the plain language of M.R.E. 513(a), especially given that we are required to narrowly construe the language of the rule. *Trammel*, 445 U.S. at 50; *Jasper*, 72 M.J. at 280.

M.R.E. 513(e) establishes a procedure to determine the admissibility of patient records or communications. Because the rule authorizes a military judge to examine the proffered evidence in camera "if such examination is necessary to rule on the production or admissibility of *protected* records or communications," M.R.E. 513(e)(3) (emphasis added), the Government argues that the patient-psychotherapist privilege must extend to all patient records. We disagree. Military Rule of Evidence 513(e)(3)—the only provision in M.R.E. 513(e) that uses the word "protected"—does nothing more than acknowledge the well-established rule that documents that are not themselves communications may be partially privileged to the extent that those records memorialize or otherwise reflect the substance of privileged communications. *See, e.g., Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962) ("Documentary evidence of confidential communications is necessarily privileged as much as testimonial evidence."). It does not mean that every document or record related to the diagnosis or treatment of a patient's mental health is privileged.

Similarly, M.R.E. 513(e)(2) requires a military judge to conduct a hearing before ordering the production or admission of "evidence of a patient's records or communication," defined as "testimony of a psychotherapist, or assistant to the same, or patient records *that pertain to* communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition." M.R.E. 513(b)(5) (emphasis added). The Government argues that because all patient records "pertain to communications" between the patient and the psychotherapist, they must all be included within the scope of M.R.E. 513(a). Again, we disagree. We interpret these provisions as simply recognizing that to the extent testimonial or documentary evidence reveals what M.R.E. 513(a) expressly

protects—confidential communications—they are also partially protected; not, as the Government argues, that the entirety of every patient record is necessarily included within the patient-psychotherapist privilege.

The Government also argues that we should interpret M.R.E. 513(a) as protecting all patient records related to the diagnosis or treatment of a patient's mental health because the textually similar lawyer-client privilege established by M.R.E. 502 protects attorney records. This argument is fatally flawed because it disregards the fact that the attorney work-product privilege is separate and distinct from the attorney-client privilege. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975). As defined by the Federal Rules of Evidence, attorney-client privilege is "the protection that applicable law provides for confidential attorney-client communications," while the work-product protection is "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial." Fed. R. Evid. 502(g)(1)–(2).

This distinction between communications and tangible materials (i.e., records and other nontestimonial evidence), is also reflected in the *Manual for Courts-Martial, United States*. Although the military's attorney-client privilege protects "*confidential communications* made for the purpose of facilitating the rendition of professional legal services," M.R.E. 502(a) (emphasis added), an entirely separate provision—Rule for Courts-Martial (R.C.M.) 701(f)—protects attorney-work product. That provision expressly shields from disclosure or production "notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." *Id*. Thus, the existence of an entirely separate provision from M.R.E. 502 protecting attorney-work product—and the lack of any parallel provision establishing a psychotherapist work-product privilege—undermines the Government's argument that M.R.E. 513(a) protects patient records.

Finally, the Government argues that a psychotherapist's diagnoses and treatment of a patient should be protected by M.R.E. 513(a) in the same way that an attorney's legal advice is protected by the attorney-client privilege. This argument fails because it conflates the content of communications with

underlying facts. *See* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 5:1 (2014) ("An important but commonly misunderstood limitation of the privilege is that it does not protect the information contained within communications to the attorney."); *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .").

As explained by the United States Court of Appeals for the Second Circuit in a case where the government prosecutors sought answers from witnesses to a series of factual questions related to work performed by the corporate defendant's employees at the direction of their attorneys in preparation for litigation:

> Although an attorney-client communication is privileged and may not be divulged, the underlying information or substance of the communication is not, as appellants incorrectly believe, so privileged. Further, the remaining 19 questions seek underlying factual information to which the prosecutor is clearly entitled. The factual information is not protected by the attorney-client privilege just because the information was developed in anticipation of litigation.

In re Six Grand Jury Witnesses, 979 F.2d 939, 945 (2d Cir. 1992) (citation omitted). Even though the answers to the prosecutor's questions might reveal the substance of the legal advice provided by the defendant's attorneys, the government was still entitled to ask the recipients of the legal advice specific factual questions, such as:

- What analysis did you perform?
- What records did you review?
- What conclusions did your draw?
- What information did you give anyone other than an attorney?
- When did you give them this information?

Id. at 946 (Appendix A). This case demonstrates the fundamental principle that the attorney-client privilege prevents the disclosure of what an attorney advised a client to do, but

it does not prevent the disclosure of what the client actually did or did not do in response to that advice.

Accordingly, the Government is incorrect in its assertion that M.R.E. 513(a) must extend "not just to confidential communications . . . , but also to the underlying diagnoses and treatments." Brief for Appellee at 22, *United States v. Mellette*, No. 21-0312 (C.A.A.F. Dec. 20, 2021). A patient's diagnosis and the treatment that a patient received to care for those conditions are "underlying facts," *Upjohn Co.*, 449 U.S. at 395, not confidential communications. Although M.R.E. 513(a) prevents a witness from being required to disclose the substance of the communications between a patient and a psychotherapist, it does not extend to all evidence that might reveal a patient's diagnoses and treatments. The NMCCA erred in holding otherwise.

It is worth emphasizing that this conclusion is not based on our views on the proper scope of the patient-psychotherapist privilege or a belief that the benefits of protecting a patient's diagnoses and treatment from disclosure fail to "transcend[] the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotation marks omitted) (citation omitted). Instead, our analysis rests solely on the specific text of M.R.E. 513(a) and the Supreme Court's mandate—and our own precedent—that states that evidentiary privileges "must be strictly construed." *Trammel,* 445 U.S. at 50; *see Jasper*, 72 M.J. at 280. As the promulgator of the Military Rules of Evidence, the President has both the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy. Unless the President's decision with respect to that balance contravenes a constitutional or statutory limitation, we must respect that choice.

C. Remaining Issues

Because we hold that the NMCAA erred when it concluded that M.R.E. 513(a) protects all evidence of a mental health patient's diagnoses and treatments from disclosure, we need not decide whether SS waived the privilege with respect to those topics or whether the NMCCA erred by performing its

prejudice analysis without examining the undisclosed evidence.

D. Remedy

Before trial, Appellant filed a motion to compel production and in camera review of "S.S.'s mental health records: to include the dates visited said mental health provider, the treatment provided and recommended, and her diagnosis." These documents were not protected from disclosure by M.R.E. 513(a), and as noted by the NMCCA, they involved key areas of concern that "go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events." *Mellette*, 81 M.J. at 694 (internal quotation marks omitted) (citation omitted). To the extent that these documents existed—and were otherwise admissible under the Military Rules of Evidence and the Rules for Courts-Martial—they should have been produced or admitted subject to the procedural requirements of M.R.E. 513(e).

The military judge's error may have denied Appellant from reviewing relevant and material evidence before his court-martial. Without any way of knowing whether any such evidence existed, or if so, how important that evidence might have been to Appellant's defense, we decline to decide whether Appellant was prejudiced by this error. Instead, we remand to the NMCCA to order a *DuBay* hearing for the purpose of obtaining any records that were responsive to Appellant's original motion to compel and determining whether those records should have been provided to Appellant prior to his court-martial.[4] Once all the responsive, relevant, and admissible evidence has been identified, the lower court shall determine whether the military judge's original denial of Appellant's motion to compel materially prejudiced Appellant's defense pursuant to its authority under Article 66, UCMJ, 10 U.S.C. § 866 (2012). Following these proceedings, Article 67, UCMJ, 10 U.S.C. § 867 (2012), shall apply.

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[4] *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). This may require the *DuBay* military judge to conduct an in camera review, issue appropriate protective orders, and place portions of the record under seal as necessary. *See* R.C.M. 701(g); R.C.M. 1113.

III. Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The record is returned to the Judge Advocate General of the Navy for remand to the lower court for further proceedings consistent with this opinion.

Judge MAGGS, with whom Judge SPARKS joins, dissenting.

The first assigned issue, and the only question that the Court decides in this appeal, is whether the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) erred in concluding that the psychotherapist-patient privilege established by Military Rule of Evidence (M.R.E.) 513 covers diagnoses and treatments. This issue is difficult and important. Indeed, it has divided the Courts of Criminal Appeals. *Compare H.V. v. Kitche*n, 75 M.J. 717, 719 (C.G. Ct. Crim. App. 2016) (holding that the privilege covers diagnoses and treatments), *and United States v. Mellette*, 81 M.J. 681, 692 (N-M. Ct. Crim. App. 2021) (same), *with United States v. Rodriguez*, No. ARMY 20180138, 2019 CCA LEXIS 387, at *7–8, 2019 WL 4858233, at *4 (A. Ct. Crim. App. Oct. 1, 2019) (unpublished) (holding that the privilege does not cover diagnoses and treatments).

In its thoughtful opinion, the Court determines, with some qualifications, that the privilege does not extend to diagnoses and treatments and holds that the NMCCA erred in deciding otherwise. My analysis is different, leading me to conclude that the privilege covers diagnoses and treatments to the extent that they reveal what a patient told a psychotherapist or a psychotherapist told a patient for the purpose of facilitating the diagnosis and treatment of the patient's mental condition. I therefore do not believe that the military judge or the NMCCA erred in their resolution of this issue.

The Court's conclusion with respect to the first assigned issue makes it unnecessary for the Court to reach the other assigned issues in this case. Because I disagree with the Court's resolution of the first assigned issue, I must go further and also address the other assigned issues. For the reasons that I present below, although I disagree with some aspects of the NMCCA's opinion in this case, I would affirm that court's judgment. *Mellette*, 81 M.J. at 701.

I. Background

Prior to the trial in this case, Appellant moved for production of the victim's mental health records, requesting information about any "treatment provided and

recommended, and her diagnosis."[1] Appellant sought these records for their potential value in cross-examining the victim when she testified against him with respect to the sole specification at issue in this appeal.[2] Appellant asserted that this evidence would be "relevant to issues of suggestion, memory, and truthfulness."

The military judge, however, denied Appellant's motion, ruling that the psychotherapist-patient privilege in M.R.E. 513(a) shielded the records from discovery. Relying on the opinion of the United States Coast Guard Court of Criminal Appeals (CGCCA) in *H.V. v. Kitchen*, 75 M.J. at 719, the military judge further ruled that even if the records were not privileged, they were not discoverable under R.C.M. 703 because Appellant had failed to show that they were "relevant and necessary." The military judge reasoned that Appellant had no basis for believing that any nonprivileged records of the kind he sought existed or that such records would not be merely cumulative of information that he already had. Indeed, the military judge further ruled that there was no evidence that the victim might be suffering from a condition relevant to issues of "suggestion, memory, and truthfulness." The military judge accordingly concluded that "the defense [was] engaged in a 'fishing expedition.' "

The NMCCA partially agreed and partially disagreed with the military judge's ruling. *Mellette*, 81 M.J. at 688, 691–93. The NMCCA's analysis consisted of four steps relevant to this appeal.[3] First, the NMCCA held that the psychotherapist-patient privilege in M.R.E. 513(a) covers "diagnoses and

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[1] Appellant also sought records concerning the dates that the victim visited her mental health provider, but the production of records concerning these dates is not at issue in this appeal.

[2] The sole specification at issue in this appeal alleged that Appellant, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b (2012), "did at or near Trenton, Florida, on divers occasions, between on or about August 2013 to on or about 12 July 2014, commit lewd acts upon [the victim], a child who had not attained the age of 16 years."

[3] The NMCCA addressed a possible alternative to the second and third steps but discussion of this alternative is not relevant to this appeal.

treatment, including prescribed medications." *Id.* at 691–92. Second, the NMCCA held that the victim waived this privilege under M.R.E. 510(a) by making voluntary disclosures of some of her diagnoses and treatments. *Id.* at 693. Third, the NMCCA held that the military judge abused his discretion in concluding that the requested medical records were not "relevant and necessary" under R.C.M. 703 given that other diagnoses "could impact her credibility" and medications could have a "potential for adverse effect on memory." *Id.* Fourth, the NMCCA held that the military judge's error caused material prejudice to the Appellant by limiting how effectively he could challenge the victim's allegations. *Id.* at 695–96. The NMCCA redressed the error by excepting from the specification at issue the words "on divers occasions," but it otherwise affirmed the finding of guilt. *Id.* at 696. In so doing, the NMCCA reasoned that other evidence corroborated the victim's testimony with respect to at least one occurrence of the charged offense. *Id.*

In this appeal, Appellant challenges the first and fourth steps of the NMCCA's reasoning. With respect to the first step, Appellant contends that the NMCCA erred in concluding that the psychotherapist-patient privilege in M.R.E. 513(a) extends to diagnoses and treatments. With respect to the fourth step, Appellant argues that the NMCCA erred in conducting its prejudice analysis because the NMCCA did not conduct an in camera review of the victim's mental health records to determine their content. Appellant asks this Court to set aside the NMCCA's decision and remand for a *DuBay* hearing with respect to the issue of prejudice. *See United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967).

The Government, in contrast, generally supports the NMCCA's analysis. But the Government asserts that if we choose to revisit the second step of the NMCCA's analysis, we should hold that the NMCCA erred in concluding that the victim completely waived her psychotherapist-patient privilege. In any event, the Government argues that this Court should affirm the adjudged and approved findings and sentence.

In my view, the NMCCA chose the correct four-step framework for deciding this case and its decision should be

affirmed. I also generally agree with the NMCCA's reasoning in these steps. But that said, I would qualify the NMCCA's conclusions as follows:

With respect to the NMCCA's first conclusion, I agree that the psychotherapist-privilege in M.R.E. 513(a) covers diagnoses and treatments *but only to the extent that they reveal confidential communications between the patient and psychotherapist that were made for the purpose of diagnosing or treating the patient's mental condition*.

With respect to the NMCCA's second conclusion, I agree that the victim in this case waived her psychotherapist-patient privilege *but only with respect to the communications containing the information that she revealed*.

With respect to the NMCCA's third conclusion, I agree that the military judge erred in denying production of the victim's medical records *but only to the extent that he denied production of the narrow class of records that contained communications about diagnoses and treatments with respect to which the victim previously had waived her privilege*.

With respect to the NMCCA's fourth conclusion, the qualifications above cause my prejudice analysis to differ somewhat from the analysis of the NMCCA. Unlike the NMCCA, I conclude that any error did not prejudice Appellant. Having reached that determination, I conclude that regardless of whether the NMCCA's remedial measure (i.e., excepting the words "on divers occasions" from the specification at issue) was required for addressing an error with respect to M.R.E. 513(a), no further remedy is necessary.

II. Standards of Review

Several different standards of review apply to this case. This Court must uphold the military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Issues about the meaning of evidentiary rules such as M.R.E. 510(a) and M.R.E. 513(a) are questions of law that this Court must decide de novo. *United States v. Matthews*, 68 M.J. 29, 35–36 (C.A.A.F. 2009). This Court reviews a military judge's denial of production of evidence under M.R.E. 703(e)(1) for abuse of discretion. *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995).

Finally, "[w]e review prejudice determinations under a de novo standard of review." *United States v. Ward*, 74 M.J. 225, 227 (C.A.A.F. 2015) (citing *United States v. Diaz*, 45 M.J. 494, 496 (C.A.A.F. 1997)).

III. Discussion

Following the framework of the NMCCA's opinion, I address the following issues: (A) the application of the psychotherapist-patient privilege in M.R.E. 513(a) to diagnoses and treatments; (B) the victim's possible waiver of the psychotherapist-patient privilege under M.R.E. 510(a); (C) Appellant's right to production of records under R.C.M. 703; and (D) the prejudice to Appellant under Article 59(a), UCMJ, 10 U.S.C. § 859(a).

A. Application of the Psychotherapist-Patient Privilege in M.R.E. 513(a) to Diagnoses and Treatments

M.R.E. 513(a) creates an evidentiary privilege that protects from disclosure certain communications between a patient and a psychotherapist.[4] The rule states in relevant part:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

M.R.E. 513(a).

This Court interprets the M.R.E., including those rules establishing privileges, according to their plain meaning. *Matthews*, 68 M.J. at 38. Although the Supreme Court strictly construes federal common law privileges to limit their application, *Trammel v. United States*, 445 U.S. 40, 50 (1980), this practice has no clear application to the interpretation of codified privileges. 25 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence*

[4] M.R.E. 513(b)(2) defines the term "[p]sychotherapist" in part to include "a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed . . . to perform professional services."

§ 5586, at 715 (1989) (explaining that *Trammel* does not affect the meaning of privileges codified in statutes). Consistent with this view, this Court has not construed privileges in the M.R.E. to be more limited than what their text provides. *See United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007) (declining to create an exception to M.R.E. 504 by departing from the rule's text notwithstanding what the Supreme Court said in *Trammel*).

In this case, the parties' dispute over the meaning of M.R.E. 513(a) is simply summarized. Appellant argues that the psychotherapist-patient privilege covers "communication[s] . . . made *for the purpose of facilitating diagnosis or treatment*" but does not extend to the diagnosis and treatment themselves. Relying on the opinion of the United States Army Court of Criminal Appeals in *Rodriquez*, 2019 CCA LEXIS 387, at *7–8, 2019 WL 4858233, at *4, Appellant contends that the plain meaning of M.R.E. 513's text supports this conclusion. The Government responds that diagnoses and treatments are privileged. Quoting the CGCCA's opinion in *H.V. v. Kitchen*, 75 M.J. at 719, the Government argues that " 'diagnoses and the nature of treatment necessarily reflect, at least in part, the patient's confidential communications to the psychotherapist' because '[m]ost diagnoses of mental disorders rely extensively on what the patient has communicated to the psychotherapist.' " (Alteration in original.) The Government further contends that diagnoses and treatment are part of the confidential communications that a psychotherapist makes to facilitate treatment.

In my view, the text of M.R.E. 513 supports the view of the Government and the *H.V. v. Kitchen* opinion. M.R.E. 513(a) grants a patient a privilege to prevent anyone from "disclosing" a confidential communication between the patient and a psychotherapist that was made for the purpose of facilitating diagnosis or treatment of the patient's mental condition. Key to interpreting this provision is a careful consideration of how someone might "disclose" a covered communication. In general, the verb "to disclose" means "to reveal in words (something that is secret or not generally known)." *Merriam–Webster Unabridged Dictionary* https://unabridged.merriam-webster.com/unabridged/disclose (last

visited July 26, 2022). The central question here is whether M.R.E. 513(a) addresses only complete and verbatim disclosures of covered communications or instead addresses any disclosures of such communications.

M.R.E. 513(a) certainly empowers a patient to prevent a complete and verbatim disclosure of a covered communication. For example, the patient could prevent the psychotherapist from releasing either the original copy or a photocopy of a confidential written communication between the psychotherapist and the patient that was made for the purpose of facilitating the diagnosis or treatment of the patient's condition. Similarly, if the covered communication was made orally, the patient could prevent the psychotherapist from releasing a video or audio recording or a transcription of the communication. Such acts would be disclosures within the meaning of M.R.E. 513(a) because they would reveal the covered communications.

But M.R.E. 513(a) does not qualify the term "disclosing" in such a way that the privilege only allows a patient to prevent someone from disclosing a complete and verbatim record of a covered communication. A partial or nonverbatim disclosure is still a disclosure so long as it reveals some of what would otherwise be secret. Accordingly, a patient may use the privilege in M.R.E. 513(a) to prevent the psychotherapist from disclosing notes of what was discussed during covered communication, even if those notes are not necessarily a complete and verbatim transcript of what was said. *See United States v. Beauge*, 82 M.J. 157, 159–60 (C.A.A.F. 2022) (holding that the military judge did not abuse his discretion in denying the appellant's motion for in camera review of the victim's psychiatric records including "the psychotherapist's notes"). Similarly, the privilege allows a patient to prevent a psychotherapist from testifying about what he or she remembered was said in a covered communication, even if the psychotherapist could not necessarily recollect the exact words that were uttered. *See United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006) (assuming that a psychotherapist's testimony was covered by M.R.E. 513(a) but determining that it fell within the exceptions in M.R.E. 513(d)(4) and (6)).

Much like a nonverbatim summary or recollection, a diagnosis or treatment also may provide some evidence of what a patient confidentially told the psychotherapist or what the psychotherapist confidentially told the patient for the purpose of treating the patient's mental condition. As a U.S. district court explained in *Stark v. Hartt Transportation Systems, Inc.*, "[a] person's mental health diagnoses and the nature of his or her treatment inherently reveal something of the private, sensitive concerns that led him or her to seek treatment and necessarily reflect, at least in part, his or her confidential communications to the psychotherapist." 937 F. Supp. 2d 88, 91 (D. Me. 2013); *see also H.V. v. Kitchen*, 75 M.J. at 719 (citing and following *Stark*). Or as another U.S. district court explained in *United States v. White*, "[a] party armed with knowledge of a patient's diagnosis will be able to make an educated guess about the substance of the communications that gave rise to the diagnosis." Criminal Action No. 2:12-cr-00221, 2013 U.S. Dist. LEXIS 49426, at *23, 2013 WL 1404877, at *7 (S.D.W.Va. Apr. 5, 2013), *rev'd sub nom. Kinder v. White*, 609 F. App'x 126, 131 (4th Cir. 2015) (agreeing with the trial court that the records of a diagnosis were privileged but overruling its determination that an exception to the privilege applied). In other words, disclosing a diagnosis or a treatment may reveal what the patient said to the psychotherapist or what the psychotherapist said to the patient for the purpose of facilitating treatment of the patient's mental condition.

Accordingly, I would hold that a record of a patient's diagnosis is privileged to the extent that its disclosure would reveal what the patient confidentially told the psychotherapist or what the psychotherapist confidentially told the patient for the purpose of diagnosing or treating the patient's mental condition. For example, a record containing a diagnosis of anxiety or depression would be privileged to the extent that disclosure of the diagnosis reveals, even if only indirectly, that the patient told the psychotherapist that the patient was anxious or depressed for the purpose of obtaining treatment. Likewise, I would hold that a treatment is privileged to the extent that its disclosure would reveal what the psychotherapist confidentially told the patient or what the patient confidentially told the psychotherapist for the

purpose of diagnosing or treating the patient's mental condition. For example, a record showing that the psychotherapist prescribed a regimen of counseling or medication would be privileged to the extent that disclosing the treatment regimen provides some evidence about what the psychotherapist confidentially told the patient for the purpose of treating the patient's mental condition.[5]

Similar questions about what constitutes a disclosure have arisen with respect to other privileges. A leading treatise notes that "[a]n important question about the power of the client to prevent disclosure of attorney-client confidences . . . is whether the privilege bars circumstantial as well as direct evidence of attorney-client communications." 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5489, at 424 (1986). Some courts have reasoned, correctly in my view, that a "lawyer's papers should be privileged if they would be circumstantial evidence of the client's communication" under the attorney-client privilege. *Id.* § 5491, at 459; *see also* 24 Charles Alan Wright, Kenneth W. Graham, Jr. & Ann Murphy at 318 n.89 (1986 & Supp. 2022) (citing cases). Likewise, although the government deliberations privilege generally does not cover portions of documents that contain only facts, the privilege will cover factual "material [that] is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

In this case, as explained above, Appellant moved for production of the victim's mental health records, requesting information about any "treatment provided and

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[5] Communications from a psychotherapist to a patient about a diagnosis or treatment might be beneficial or even required. After observing that "psychiatrists often have to break difficult news to patients," the author of one peer-reviewed study discusses both the "negative and positive effects of disclosing the diagnosis to patients." Michelle Cleary et al., *Delivering Difficult News in Psychiatric Settings*, 17 Harv. Rev. Psychiatry 315, 319 (2009). Such disclosures, the author asserts, may facilitate treatment by providing patients the benefits of "increased insight into their symptoms, ability to access treatment, and plans for the future." *Id.*

recommended, and her diagnosis." To the extent that any such records containing a diagnosis and treatment would reveal what the victim confidentially told her psychotherapist or the psychotherapist confidentially told the victim for the purpose of facilitating her diagnosis and treatment, they are privileged. Such records are not discoverable.

But what about possible records containing diagnoses and treatments that somehow disclose nothing about the confidential communications between the victim and her psychotherapist? The answer is twofold. First, if any such records somehow existed, they would not be privileged under M.R.E. 513. Second, as the military judge recognized, they still would not necessarily be discoverable. Under R.C.M. 703(e)(1), the accused "is entitled to the production of evidence which is relevant and necessary." To obtain an order of production under this rule, the accused must show more than a mere prospect or possibility that a production order will yield relevant and necessary evidence. "[T]he defense, as the moving party, . . . [is] required as a threshold matter to show that the requested material exist[s]." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

In this case, the military judge found that "the defense has offered some evidence that the records might include an additional diagnosis." But the military judge concluded that the defense "has offered no factual basis upon which to conclude the records would yield evidence admissible under M.R.E. 513." I agree with the military judge's assessment. Appellant has not provided any reason for this Court to believe that the victim's mental health records contain any information about diagnoses and treatments *that do not reveal what the victim confidentially told her psychotherapist or what the psychotherapist confidentially told the victim for the purpose of facilitating her diagnosis or treatment.* And even if the records somehow might exist, I agree with the military judge's assessment that such records would not be "reasonably segregable from records of communications between [the victim] and her mental health providers." Appellant in this case has not suggested any method by which a military judge could decide whether a diagnosis or treatment provides evidence of their confidential

communications.[6] For these reasons, Appellant has not shown that he is entitled to the records or even an in camera review of the records.

B. Waiver of the Privilege Under M.R.E. 510(a)

Under M.R.E. 510(a), a party may waive the protection of the psychotherapist-patient privilege. This provision states in relevant part:

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.

M.R.E. 510(a). Appellant argues that the victim waived whatever privilege she may have had by voluntarily revealing numerous details about her mental health in a deposition, in an interview with agents of the Naval Criminal Investigative Service, and in an interview with trial counsel. The Government responds that when the victim disclosed some of her diagnoses and treatments, she waived her privilege *only for* "that particular communication" between her and her psychotherapist that "included the diagnoses and treatments that she disclosed."

I agree with the Government because its argument accords with the text of both M.R.E. 510(a) and M.R.E. 513(a). Although M.R.E. 510(a) states a general waiver rule applicable to any disclosure of a privileged "matter or communication," M.R.E. 513(a) provides a privilege only for "communication[s]," not for "matters." Thus, the test for waiver of the psychotherapist-patient privilege in M.R.E. 513(a) is not whether the patient talked about her mental health in general, but is instead whether she disclosed a "significant part" of a particular privileged "communication."

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[6] Perhaps in other cases, the record might contain evidence that would allow a military judge to make such a decision. For example, a psychotherapist might testify that he or she made a diagnosis without relying on confidential communications with the patient for the purpose of treating the patient's mental condition.

See Custis, 65 M.J. at 371 (holding that under M.R.E. 510(a), the appellant did not waive the spousal privilege because a "comment to his coworker did not relay either the actual conversation between Appellant and his wife or the substance of the privileged communications between Appellant and his wife").

The NMCCA appears to have missed this distinction when it concluded that the victim waived her psychotherapist-patient privilege when she "openly discussed her *mental health matters* with multiple people on multiple occasions." *Mellette,* 81 M.J. at 693 (emphasis added). The NMCCA instead should have determined whether particular disclosures by the victim waived her privilege with respect to particular communications. In my view, because the NMCCA did not follow this approach, it overstated the victim's waiver of her privilege in this case.

Under M.R.E. 510(a), when the victim disclosed evidence of her diagnosis and treatment for two mental health conditions (hereinafter the "two disclosed conditions"), she waived the privilege over her psychotherapist's communications to her about the diagnoses and treatments with respect to these two disclosed conditions. The victim, however, did not waive her privilege over other communications—including other communications that might have led to additional diagnoses and treatments. As discussed immediately below, this important distinction affects the analysis of the necessity of producing records containing communications for which the privilege was waived.

C. Production of Records Under R.C.M. 703(e)(1)

Under R.C.M. 703(e)(1), a "party is entitled to the production of evidence which is relevant and necessary." Under R.C.M. 703(f), an accused seeking production of an item of evidence must "include a description of [the] item sufficient to show its relevance and necessity." The military judge, in my view, did not abuse his discretion in concluding that Appellant could not meet these requirements in seeking records of diagnoses and treatments for possible conditions other than the two that the victim had disclosed. Although Appellant "offered some evidence that the [psychotherapist's]

records *might* include an additional diagnosis," the military judge concluded that the defense "has offered no factual basis upon which to conclude the records would yield evidence admissible under M.R.E. 513." *See Rodriguez*, 60 M.J. at 246 (holding that, where the appellant "did not carry his burden as the moving party to demonstrate that the [evidence] he requested existed," he could not show it was relevant or necessary). To the extent the NMCCA ruled otherwise, I disagree.

But in my view, the military judge did abuse his discretion in denying production of records containing diagnoses and treatments for the two disclosed conditions. These records were not privileged because the victim waived her privilege with respect to them. And even if such records would be mostly cumulative, I agree with the NMCCA that they were still subject to production under R.C.M. 703, to "confirm [the victim's] stated diagnoses" and "prescribed medications, not all of which she could remember the names of." *Mellette*, 81 M.J. at 693.

D. Prejudice Under Article 59(a), UCMJ

In the foregoing discussion, I have concluded that the military judge abused his discretion in not ordering the production of records concerning the victim's diagnoses and treatments with respect to two disclosed conditions. The final question is whether this abuse of discretion materially prejudiced Appellant under Article 59(a), UCMJ. I conclude that it did not.

When assessing prejudice for nonconstitutional errors, this Court weighs "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks omitted) (citations omitted). Here, although the first two factors do not strongly favor either party, I do not believe the materiality and quality of the evidence are such that the error could have substantially impacted the findings. As explained above, Appellant already knew from the victim's own statements that she had been diagnosed with the two disclosed conditions and had received treatments for them. Her mental health

records might have provided confirmation of what the victim disclosed. But the record of trial provides no suggestion that having such mental health records would have benefitted Appellant at trial.

After the victim testified, trial defense counsel cross-examined and then recross-examined her. During these cross-examinations, trial defense counsel never asked the victim about her two disclosed conditions. Unless trial defense counsel erred (which Appellant has not alleged), then the most reasonable inference is that trial defense counsel believed that the two disclosed conditions were not "relevant to issues of suggestion, memory, and truthfulness." And if they are not so relevant, then I cannot see how additional or confirmatory communications about those two disclosed conditions would have made a difference.

The NMCCA believed that there was prejudice but that the appropriate remedy for addressing the prejudice was to except from the specification at issue the words "on divers occasions."[7] Because I would not have awarded any remedy for the failure to produce the medical records, I easily conclude that Appellant is not entitled to any additional remedy.

IV. Conclusion

For the foregoing reasons, I would affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals.

[7] The NMCCA also based its decision to except this language because some of the evidence purporting to support it was improper opinion testimony. *Mellette*, 81 M.J. at 698.

Rule 508. Political vote

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts and juries

Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege

(a) *General Rule*.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) *Use of Communications Media*.

The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) *Comment or Inference not permitted*.

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) *Claiming a Privilege Without the Knowledge of the Members*. In a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members.

(c) *Instruction*. Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subdivision (a)(2).

Rule 513. Psychotherapist—patient privilege

(a) *General Rule*. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State,

territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel, defense counsel, or any counsel representing the patient to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

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

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

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

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

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

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.

(e) *Procedure to Determine Admissibility of Patient Records or Communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the

military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subdivision (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subdivision (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

Rule 514. Victim advocate—victim privilege

(a) *General Rule*. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and Department of Defense Safe Helpline staff, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.

(b) *Definitions*. As used in this rule:

(1) "Victim" means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) "Victim advocate" means a person, other than a prosecutor, trial counsel, any victims' counsel, law enforcement officer, or military criminal investigator in the case, who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(3) "Department of Defense Safe Helpline staff" are persons who are designated by competent authority in writing as Department of Defense Safe Helpline staff.

(4) A communication is "confidential" if made in the course of the victim advocate-victim relationship or Department of Defense Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a victim's records or communications" means testimony of a victim advocate or Department of Defense Safe Helpline staff, or records that pertain to communications by a victim to a victim advocate or Department of Defense Safe Helpline staff, for the purposes of advising or providing assistance to the victim.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or Department of Defense Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, Department of Defense Safe Helpline staff, guardian, conservator, or a counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

M.W.
Appellant

v.

UNITED STATES
Appellee

and

Marshall R. ROBINSON, Staff Sergeant,
United States Air Force, Real Party In Interest

No. 23-0104
Crim. App. No. 2022-15

Decided July 13, 2023

Military Judge: Dayle P. Percle

For Appellant: *Captain Nicholas J. Hall* and *Devon A. R. Wells*, Esq. (on brief).

For Appellee: *Lieutenant, Colonel Matthew J. Neil*, *Captain Jocelyn Q. Wright,* and *Mary Ellen Payne*, Esq. (on brief); *Colonel Naomi P. Dennis*.

For Real Party In Interest: *Major Matthew Blyth* and *Captain Thomas Govan* (on brief).

Amici Curiae for Appellant: *Colonel Edward J. O'Sheehan*, *Captain Rocco J. Carbone III*, and *Paul Markland*, Esq. (on behalf of the National Guard Special Victims' Counsel Program and the United States Coast Guard Victims' Legal Counsel Program) (on brief).

Judge MAGGS delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge HARDY, and Judge JOHNSON joined.

Judge MAGGS delivered the opinion of the Court.

In *EV v. United States*, 75 M.J. 331, 332 (C.A.A.F. 2016), this Court held that it did not have jurisdiction to review a decision of a Court of Criminal Appeals (CCA) at the request of a "victim of an offense" as that term is used in Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b (2018). Although Congress has since amended Article 6b, UCMJ, and other provisions of the UCMJ, we are compelled to hold again today that this Court lacks jurisdiction to review a petition filed by a victim of an offense. Our decision rests solely on the statutory language of the UCMJ. It does not reflect any policy decision about whether this Court should have statutory jurisdiction, which is a matter solely for Congress. We further see no reason that Congress could not amend the UCMJ to grant this Court jurisdiction to review a petition filed by the victim of an offense. However, as currently written, neither the language of Article 6b, UCMJ, nor any other statute, grants this Court the necessary jurisdictional authority to review a petition filed by a victim of an offense. We therefore dismiss the petition in this case.

I. Background

Appellant, M.W., is the named victim of the charged offenses in this ongoing court-martial. Following voir dire, M.W.'s counsel communicated with trial counsel about how the Government might exercise challenges to some of the members detailed to the court-martial under Rule for Courts-Martial 912. The military judge ruled that this communication constituted unlawful influence in violation of Article 37, UCMJ, 10 U.S.C. § 837 (2018). To cure the unlawful influence and prevent any possible prejudice, the military judge prohibited challenges by the Government to any of the members detailed to the court-martial.

M.W. and the Government each contested the military judge's ruling by petitioning the United States Air Force Court of Criminal Appeals (AFCCA) for writs of mandamus. M.W. filed her petition in the AFCCA as "the victim of an offense" under the jurisdiction provided by Article

6b(e)(1), UCMJ. She argued that the military judge's ruling limited her statutory right under Article 6b(a)(5), UCMJ, to confer with trial counsel. The Government filed two petitions for mandamus. The Government recognized that Article 62, UCMJ, 10 U.S.C. § 862 (2018), did not expressly identify the issue as a ground for interlocutory appeal, but the Government contended that the AFCCA could issue writs of mandamus under the All Writs Act, 28 U.S.C. § 1651 (2018), in aid of its jurisdiction under Article 62, UCMJ. In the two petitions, the Government challenged the merits of the military judge's ruling and also sought relief in part on grounds that the military judge had improperly excluded trial counsel from a hearing at which the military judge considered the matter.

The AFCCA agreed with the Government that the military judge had erred in excluding trial counsel from the hearing. *In re United States*, Misc. Dkt. Nos. 2022-09, 2022-10, 2022-15, 2023 CCA LEXIS 57, at *27, 2023 WL 1525021, at *10 (A.F. Ct. Crim. App. Feb. 3, 2023) (unpublished). Accordingly, the AFCCA vacated the military judge's ruling and ordered the military judge to reconsider the matter after including the Government in a new hearing. *Id.* at *31, 2023 WL 1525021, at *11-12. Having vacated the military judge's order on this procedural ground, the AFCCA concluded that it did not need to address M.W.'s challenge to the merits of the military judge's ruling. *Id.* at *29, 2023 WL 1525021, at *10-11. Accordingly, the AFCCA denied M.W.'s petition for a writ of mandamus as moot. *Id.*, 2023 WL 1525021, at *11.

M.W. then petitioned this Court for review, asking this Court to hold that her counsel has a right to confer with trial counsel when the case returns to the court-martial. She styled her filing in this Court as either a "Writ-Appeal Petition *or* Petition for Extraordinary Relief." In her petition, M.W. recognized this Court's holding in *EV*, 75 M.J. at 332, that this Court did not have jurisdiction to review a CCA's denial of a writ of mandamus under Article 6b, UCMJ, at the request of the victim of an offense. But

M.W. asserted that a statutory amendment in 2017,[1] which added Article 6b(e)(3)(C), UCMJ, "is a *clarification* affirming this Court's jurisdiction to *review* orders of Courts of Criminal Appeals issued pursuant to petitions for relief filed by crime victims under Article 6b, U.C.M.J. jurisdiction."

Upon consideration of M.W.'s petition, together with answers filed by the Government and the Real Party in Interest[2] and a brief by amici curiae, this Court decided that the question of our jurisdiction required further briefing. We accordingly ordered M.W., the Government, and the Real Party in Interest to brief the following four issues:

> (a) whether Article 67, UCMJ, 10 U.S.C. § 867 grants this Court jurisdiction to review such a writ-appeal;
>
> (b) whether Article 6b(e)(3), UCMJ, grants this Court jurisdiction to review such a writ-appeal (as opposed to only requiring that this Court give priority to writ-appeals for which Article 67, UCMJ, or some other statute provides this Court jurisdiction);
>
> (c) whether any other statute provides this Court jurisdiction to review such a writ-appeal; and

[1] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 531(a), 131 Stat. 1283, 1384 (2017). The amendment modified Article 6b(e)(3), UCMJ, by redesignating the existing provision as Article 6b(e)(3)(A), UCMJ, and by adding what is now Article 6b(e)(3)(B) and (C), UCMJ. *Id.* These provisions are quoted later in this opinion. The amendments made in § 531(a) became effective on January 1, 2019. *See id.* § 531(p), 131 Stat. at 1388 ("The amendments made by this section shall take effect immediately after the amendments made by the Military Justice Act of 2016 (division E of Public Law 114-328) take effect as provided for in section 5542 of that Act (130 Stat. 2967).").

[2] In a case involving a petition for extraordinary relief, the accused may be denominated as "the real party in interest" by a filing party or may be so designated by this Court. C.A.A.F. R. 17.

> (d) whether subsequent amendments to the UCMJ require this Court to reconsider its holding in *E.V. v. United States*, 75 M.J. 331 (C.A.A.F. 2016), that this Court does not have jurisdiction to review such a writ-appeal.

The parties duly complied with this order.

Having now considered the issue further with the aid of the parties' briefing, we conclude that this Court must dismiss M.W.'s petition for lack of jurisdiction. Although Congress has amended Article 6b, UCMJ, and other provisions of the UCMJ since we issued our opinion in *EV*, this Court still lacks jurisdiction to review a petition filed by a victim of an offense. We therefore dismiss the petition in this case.

II. Standard of Review

This Court considers de novo the question of whether it has jurisdiction. *EV*, 75 M.J. at 333 (citing *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009), and *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)). Like all federal courts, we "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

III. Discussion

We consider in order the four questions that the parties address in their supplemental briefs.

A. Article 67, UCMJ

Neither M.W., nor the Government, nor the Real Party in Interest contends that Article 67, UCMJ, provides this Court with jurisdiction to review M.W.'s petition in this case. We agree with this assessment.

Article 67(a), UCMJ, grants this Court jurisdiction to review only three categories of cases, and this case does not fit into any of them. Article 67(a)(1), UCMJ, requires this Court to review "all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." This language does not provide jurisdiction over M.W.'s petition because this is not a capital case in which a sentence

of death has been adjudged and affirmed. Article 67(a)(2), UCMJ, requires this Court to review "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General . . . orders sent to the Court of Appeals for the Armed Forces for review." We have held that this provision allows the relevant Judge Advocate General to seek review of a denial of a writ of mandamus by a CCA. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013). But Article 67(a)(2), UCMJ, does not provide jurisdiction in this case because the Judge Advocate General of the Air Force has not ordered this case sent to this Court for review. Article 67(a)(3), UCMJ, provides this Court with jurisdiction in "all cases reviewed by a Court of Criminal Appeals in which, upon petition *of the accused* and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." (Emphasis added.) This Court accordingly has jurisdiction when an accused has sought review of a CCA's decision on writ of mandamus. *Fink v. Y.B.*, 83 M.J. 222, 225 (C.A.A.F. 2023) (per curiam). But Article 67(a)(3), UCMJ, does not provide jurisdiction in this case because an accused has not filed the petition now before us.

No other provision in Article 67, UCMJ, grants jurisdiction to this Court. Article 67(b), UCMJ, specifies how an accused may file a petition for review when seeking review under Article 67(a)(3), UCMJ, but it does not grant any jurisdiction. Article 67(c), UCMJ, enumerates the actions that this Court can take when it reviews cases under the jurisdiction provided in Article 67(a), UCMJ, but it also does not grant this Court any jurisdiction. Article 67(d), UCMJ, addresses this Court's power to order a rehearing if it sets aside the findings or the sentence of a court-martial, but it too does not grant this Court jurisdiction. And Article 67(e), UCMJ, concerns circumstances in which this Court has acted on a case and returned it to the Judge Advocate General, but it also does not grant this Court jurisdiction.

B. Article 6b(e)(3), UCMJ

The second question that the parties briefed is whether Article 6b(e)(3), UCMJ, provides this Court jurisdiction to review this case. To answer this question, we first examine the structure of Article 6b, UCMJ. The provision starts with Article 6b(a), UCMJ, which grants various rights to a "victim of an offense under this chapter." Article 6b(e), UCMJ, subsequently addresses "Enforcement by [a] Court of Criminal Appeals." Article 6b(e)(1) and (2), UCMJ, gives the victim of an offense the right to seek review of certain adverse rulings by petitioning a CCA for a writ of mandamus. Section 6b(e)(3) then provides:

> (3)(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a).
>
> (B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all other proceedings before the Court of Criminal Appeals.
>
> (C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

The first two of the quoted subsections, Article 6b(e)(3)(A) and (B), UCMJ, concern a CCA's review of a petition for mandamus filed by the victim of an offense. They say nothing about this Court. Accordingly, they do not provide this Court with jurisdiction. In contrast, the third subsection, Article 6b(e)(3)(C), UCMJ, directly addresses this Court. The question before us is whether this provision either expressly or implicitly grants jurisdiction to this Court to review a petition filed by the victim of an offense. We conclude that it does not.

In our view, Article 6b(e)(3)(C), UCMJ, addresses only the question of *how this Court should proceed* when it

reviews a decision of a CCA upon a petition for a writ of mandamus authorized by Article 6b(e), UCMJ. Specifically, the provision requires this Court to give priority to such cases. Thus, if this Court were to review a CCA's decision on a petition for a writ of mandamus at the direction of the relevant Judge Advocate General under Article 67(a)(2), UCMJ, then Article 6b(e)(3)(C), UCMJ, would require this Court to give the case priority. Likewise, if this Court were to review such a case after granting a petition of the accused under Article 67(a)(3), UCMJ, then Article 6b(e)(3)(C), UCMJ, would require us to give the review priority. But Article 6b(e)(3)(C), UCMJ, contains no language that expressly or implicitly grants this Court jurisdiction to review any class of cases.

Unlike Article 67(a), UCMJ, which specifies three categories of cases that this Court "shall review," Article 6b(e)(3)(C), UCMJ, merely provides that in this Court "review" of such cases "shall have priority." An instruction about how to exercise jurisdiction is different from a provision granting it. We thus hold that Article 6b(e)(3), UCMJ, does not grant us jurisdiction to review a petition filed by the victim of an offense which asks us to review a decision of a CCA on petition for writ of mandamus.

M.W. disagrees with this analysis and conclusion. One of her arguments is that Congress in Article 6b(e), UCMJ, created a self-contained appellate review system that exists apart from the avenues of review that Article 66(b)(2), UCMJ, provides for the CCAs and that Article 67(a), UCMJ, provides for this Court. M.W. explains: "The CCAs need not seek jurisdiction in Article 66 to review and issue writs under Article 6b(e); thus, a need to look to Article 67 for C.A.A.F. to review those actions contradicts the statutory scheme within Article 6b."

We agree that the text of Article 6b(e)(1), (2), and (3)(A), UCMJ, grants jurisdiction to the CCAs by providing that "the victim may petition the Court of Criminal Appeals for a writ of mandamus," and that a "petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals." The victim of an

offense may rely on these provisions without relying on Article 66(b), UCMJ, when seeking a writ of mandamus. But we see nothing comparable in Article 6b(e)(3)(C), UCMJ, that creates jurisdiction in this Court. As explained above, Article 6b(e)(3)(C), UCMJ, addresses *how* this Court must review decisions of the CCAs but does not grant jurisdiction to review such decisions. And interpreting the provision to contain an implied grant of jurisdiction to this Court is not reasonable because the same provision contains an express grant of jurisdiction to the CCAs. Moreover, the express grant of jurisdiction to the CCAs would be redundant if Article 6b(e)(3)(B), which instructs the CCAs to give priority to petitions for mandamus, itself granted jurisdiction. *See City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (explaining the canon against surplusage); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (explaining the presumption of consistent usage).

M.W. also asks us to follow what she considers the apparent intent of Congress. M.W. contends that Congress added Article 6b(e)(3)(C), UCMJ, after this Court's decision in *E.V.* for the specific purpose of providing jurisdiction in this Court. In *EV*, this Court held that Article 6b, UCMJ, did not grant jurisdiction to this Court to consider a petition of a victim of an offense because at the time there was "no mention whatsoever of this Court" in Article 6b, UCMJ. 75 M.J. at 334. But M.W. observes that is no longer true. She asserts: "To address C.A.A.F.'s language in *E.V.* finding Congress clearly intended no role for C.A.A.F. as the statute did not mention the Court . . . Congress specifically referred to C.A.A.F. in the amended statute to guarantee it contemplated a role for the Court."

We are unpersuaded. While it is true that Article 6b(e), UCMJ, now expressly mentions this Court, the pertinent passage, as explained above, is not a grant of jurisdiction. Instead, the added language concerns only *how* this Court must act (i.e., by according priority) if it reviews a CCA decision.

The Government also disagrees with our analysis and conclusion. Although the Government cannot point to

language in Article 6b(e)(3), UCMJ, that expressly grants this Court jurisdiction, the Government asserts "it is apparent Congress intended to allow CAAF to review CCA decisions on victims' requests for writs of mandamus." The Government asserts: "There is no reason for this Court to be required to give priority to review of a decision by a CCA on a writ of mandamus, if this Court did not already have jurisdiction to review such a decision in the first place." We disagree with the Government's argument because, as we have explained above, Article 67(a)(2) and (3), UCMJ, provides this Court with jurisdiction if a Judge Advocate General or the accused seeks review of the CCA, even though they do not provide jurisdiction when the victim of a crime seeks review.

The Government also asks us to consider the context in which Congress added Article 6b(e)(3)(C), UCMJ. The Government asserts that Congress made the amendment "at a time when neither a victim nor an accused could petition this Court for review of a CCA's Article 6b decision." In support of this argument the Government cites *EV*, 75 M.J. at 334 (holding that this Court lacked jurisdiction over a petition by the victim), and *Randolph v. HV*, 76 M.J. 27, 31 (C.A.A.F. 2017) (holding that this Court lacked jurisdiction over a petition by the accused). The implication is that it would not have made sense for Congress to require expedited review at a time when *no review* was possible.

This argument is unpersuasive for two reasons. First, even before Congress enacted Article 6b(e)(3)(C), UCMJ, we had held that Article 67(a)(2), UCMJ, grants this Court jurisdiction to review a decision of a CCA on a petition for mandamus at the direction of the relevant Judge Advocate General. *LRM*, 72 M.J. at 367. Second, also before Congress enacted Article 6b(e)(3)(C), UCMJ, Congress already had enacted an amendment to this Court's jurisdiction under Article 67(c), UCMJ. The earlier amendment superseded this Court's decision in *Randolph* by giving this Court jurisdiction to review a decision of a CCA on a petition for mandamus at the request of the accused. *Fink*, 83 M.J. at 225. The effective date of this earlier amendment was

selected by Congress to be the effective date for Article 6b(e)(3)(C), UCMJ, so that Article 6b(e)(3)(C), UCMJ, would take effect "immediately after" the amendment to Article 67(c), UCMJ.[3] Therefore, on the effective date of Article 6b(e)(3)(C), UCMJ, both the relevant Judge Advocate General and the accused could appeal the decision of a CCA upon a petition for mandamus under Article 6b(e), UCMJ, and Article 6b(e)(3)(C), UCMJ, required this Court to give priority to such cases. Thus, we do not agree that the timing of the amendment implicitly shows that Article 6b(e)(3)(C), UCMJ, grants this Court jurisdiction.

C. Other Statutes

As noted previously, M.W. styled her filing in this Court as both a "Writ-Appeal Petition" and a "Petition for Extraordinary Relief." As an alternative to the arguments discussed above, M.W. contends in her supplemental brief that the All Writs Act, 28 U.S.C. § 1651 (2018), provides this Court with jurisdiction to grant her a writ of mandamus even if this Court holds that Article 6b(e), UCMJ, does not provide this Court with jurisdiction to review the AFCCA. We rejected a similar contention in *Randolph*, 76 M.J. at 31, when we held that the All Writs Act did not provide us jurisdiction to grant an *accused* a writ of

[3] The National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5331, 130 Stat. 2000, 2934-35 (2016), amended Article 67(c). These amendments took effect on January 1, 2019. *See id.* § 5542, 130 Stat. at 2967 (authorizing the President to designate the effective date of the amendments subject to certain constraints); 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13825, § 3(a), 83 Fed. Reg. 9889, 9889 (Mar. 1, 2018) (specifying an effective date of January 1, 2019). The National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 531(p), 131 Stat. at 1388, provided that the amendments to Article 6b(e), UCMJ, "shall take effect immediately after the amendments made by the Military Justice Act of 2016 (division E of Public Law 114-328) take effect as provided for in section 5542 of that Act (130 Stat. 2967).)"

mandamus as an alternative way of reviewing a CCA decision on a petition for a writ of mandamus. We explained:

> We also conclude that this Court lacks jurisdiction to consider this case under the All Writs Act. We have authority to act "in aid of" our existing jurisdiction, 28 U.S.C. § 1651(a), when "the harm alleged . . . ha[s] the potential to directly affect the findings and sentence." *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)). But "[t]he All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction." *LRM*, 72 M.J. at 367 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)). Because Article 6b(e) is a unique grant of statutory authority that limits appellate jurisdiction to the CCA, Appellant cannot use that article and the All Writs Act to artificially extend this Court's existing statutory jurisdiction.

Id. (alterations in original).[4] In *EV*, 75 M.J. at 333, we similarly reasoned that the All Writs Act could not provide this Court jurisdiction to grant a victim a writ of mandamus if Article 6b, UCMJ, did not provide us jurisdiction. We conclude that the same reasoning prevents us from reviewing the AFCCA's decision by granting a writ of mandamus to the victim.

D. *EV v. United States*

A final question is whether subsequent amendments to the UCMJ require this Court to reconsider its holding in *EV*. As mentioned above, this Court held in *EV* that it did not have jurisdiction to review the petition filed by a victim of an offense that seeks review of a CCA's denial of a writ of mandamus. 75 M.J. at 334. This Court reasoned in that

[4] This Court held in *Fink* that amendments to Article 67, UCMJ, now provide this Court with jurisdiction to review the decision of a CCA upon the petition of an accused. *See Fink*, 83 M.J. at 225. (concluding that *Randolph* has been superseded by statute). Our decision in *Fink*, however, did not change our reasoning with respect to the All Writs Act.

case that Article 6b, UCMJ, did not grant this Court jurisdiction in part because Article 6b, UCMJ, did not even mention this Court. *Id.* Article 6b(e)(3)(C), UCMJ, now mentions this Court, so that rationale of *EV* is no longer valid. But the result is the same because, as we have explained, while Article 6b(e)(3)(C), UCMJ, requires this Court to give priority to such appeals when this Court has jurisdiction, Article 6b(e)(3)(C), UCMJ, does not confer jurisdiction. Thus, the holding of *EV* has not been superseded.

IV. Conclusion

The petition is dismissed for lack of jurisdiction. The stay of proceedings that was ordered on February 10, 2023, is hereby lifted.

(2) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.

§806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges

(a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military appellate judge, military judge, or military magistrate to perform the duties of the position involved. To the extent practicable, the procedures shall be uniform for all armed forces.

(b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

§806b. Art. 6b. Rights of the victim of an offense under this chapter

(a) RIGHTS OF A VICTIM OF AN OFFENSE UNDER THIS CHAPTER.—A victim of an offense under this chapter has the following rights:

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

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

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

(B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.

(C) A court-martial relating to the offense.

(D) A post-trial motion, filing, or hearing that may address the finding or sentence of a court-martial with respect to the accused, unseal privileged or private information of the victim, or result in the release of the accused.

(E) A public proceeding of the service clemency and parole board relating to the offense.

(F) The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:

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

(B) A sentencing hearing relating to the offense.

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

(9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

(b) VICTIM OF AN OFFENSE UNDER THIS CHAPTER DEFINED.—In this section, the term "victim of an offense under this chapter" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter.

(c) APPOINTMENT OF INDIVIDUALS TO ASSUME RIGHTS FOR CERTAIN VICTIMS.—In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.

(d) RULE OF CONSTRUCTION.—Nothing in this section (article) shall be construed—

(1) to authorize a cause of action for damages;

(2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages; or

(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS.—

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

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

(3)(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a).

(B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals.

(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

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

(A) This section (article).

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

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

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

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

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

(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—

(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.

SUBCHAPTER II—APPREHENSION AND RESTRAINT

§807. Art. 7. Apprehension

(a) Apprehension is the taking of a person into custody.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

§808. Art. 8. Apprehension of deserters

Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Commonwealth, possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

§809. Art. 9. Imposition of restraint

(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§810. Art. 10. Restraint of persons charged

(a) IN GENERAL.—

(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—

(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

(A) to inform the person of the specific offense of which the person is accused; and

(B) to try the person or to dismiss the charges and release the person.

(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if applicable, the preliminary hearing report submitted under section 832 of this title (article 32).

§811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

(B) the information submitted during the sentencing proceeding; and

(C) any information required by rule or order of the Court of Criminal Appeals.

(f) LIMITS OF AUTHORITY.—

(1) SET ASIDE OF FINDINGS —

(A) IN GENERAL—If the Court of Criminal Appeals sets aside the findings, the Court—

(i) may affirm any lesser included offense; and

(ii) may, except when prohibited by section 844 of this title (article 44), order a rehearing.

(B) DISMISSAL WHEN NO REHEARING ORDERED.—If the Court of Criminal Appeals sets aside the findings and does not order a rehearing, the Court shall order that the charges be dismissed.

(C) DISMISSAL WHEN REHEARING IMPRACTICABLE.—

(i) IN GENERAL.—Subject to clause (ii), if the Court of Criminal Appeals orders a rehearing on a charge and the convening authority finds a rehearing impracticable, the convening authority may dismiss the charge.

(ii) CASES REFERRED BY SPECIAL TRIAL COUNSEL.—If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

(2) SET ASIDE OF SENTENCE.—If the Court of Criminal Appeals sets aside the sentence, the Court may—

(A) modify the sentence to a lesser sentence; or

(B) order a rehearing.

(3) ADDITIONAL PROCEEDINGS.—If the Court of Criminal Appeals determines that additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue, subject to such limitations as the Court may direct and under such regulations as the president may prescribe. If the Court of Appeals for the Armed Forces determines that additional proceedings are warranted, the Court of Criminal Appeals shall order a hearing or other proceeding in accordance with the direction of the court of Appeals for the Armed Forces.

(g) ACTION IN ACCORDANCE WITH DECISIONS OF COURTS.—The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the appropriate authority to take action in accordance with the decision of the Court of Criminal Appeals.

(h) RULES OF PROCEDURE.—The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(i) PROHIBITION ON EVALUATION OF OTHER MEMBERS OF COURTS.—No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(j) INELIGIBILITY OF MEMBERS OF COURTS TO REVIEW RECORDS OF CASES INVOLVING CERTAIN PRIOR MEMBER SERVICE.—No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

§867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c)(1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to—

(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals;

(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

(C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)).

(2) In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him.

(3) In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review.

(4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based

on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges. Notwithstanding the preceding sentence, if a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

§867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§868. Art. 68. Branch offices

The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Criminal Appeals with one or more panels. That Assistant Judge Advocate General and any Court of Criminal Appeals established by him may perform for that command under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Criminal Appeals established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§869. Art. 69. Review by Judge Advocate General

(a) IN GENERAL.—Upon application by the accused or receipt of the record pursuant to section 864(c)(3) of this title (article 64(c)(3)) and subject to subsections (b), (c), and (d), the Judge Advocate General may—

(1) with respect to a summary court-martial, modify or set aside, in whole or in part, the findings and sentence; or

(2) with respect to a general or special court-martial, order such court-martial to be reviewed under section 866 of this title (article 66).

(b) TIMING.—

(1) To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than—

(A) for a summary court-martial, one year after the date of completion of review under section 864 of this title (article 64); or

(B) for a general or special court-martial, one year after the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 865(c)), unless the accused submitted a waiver or withdrawal of appellate review under section 861 of this title (article 61) before being provided notice of appellate rights, in which case the application must be submitted to the Judge Advocate General not later than one year after the entry of judgment under section 860c of this title (article 60c).

(2) The Judge Advocate General may, for good cause shown, extend the period for submission of an application, except that—

(A) in the case of an application for review of a summary court martial, the Judge Advocate may not consider an application submitted more than three years after the completion date referred to in paragraph (1)(A); and

(B) in case of an application for review of a general or special court-martial, the Judge Advocate may not consider an application submitted more than three years after the end of the applicable period under paragraph (1)(B).

(c) SCOPE.—

(1)(A) In a case reviewed under section 864 of this title (article 64), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(D)(i) Subject to clause (ii), if the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impracticable, the convening authority shall dismiss the charges.

(ii) If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

(2) In a case reviewed under section 865(b) of this title (article 65(b)), review under this section is limited to the issue of whether the waiver or withdrawal of an appeal was invalid under the law. If the Judge Advocate General determines that the waiver or withdrawal of an appeal was invalid, the Judge Advocate General shall send the case to the Court of Criminal Appeals.

(d) COURT OF CRIMINAL APPEALS.—

(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)(1) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

(2) The Court of Criminal Appeals may grant an application under paragraph (1) only if—

(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error; and

(B) the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

JUDICIAL PROCEEDINGS PANEL

REPORT ON VICTIMS' APPELLATE RIGHTS

June 2017

V. Victim Access to the Court of Appeals for the Armed Forces under Article 6b of the Uniform Code of Military Justice

A. Background and Current Practice

When Congress enacted Article 6b in 2013, it required that the Secretary of Defense recommend to the President changes to the Manual for Courts-Martial to implement the statute. These were to include "[m]echanisms for the enforcement of [Article 6b] rights."[107]

Before the President had made any such changes, Congress amended Article 6b in 2014 to allow a victim to "petition the Court of Criminal Appeals for a writ of mandamus" if the victim believed that a court-martial ruling violated his or her rights protected by M.R.E. 412 or 513.[108] Congress expanded this enforcement mechanism in 2015.[109] The current version of Article 6b provides a victim with the ability to "petition the Court of Criminal Appeals for a writ of mandamus" if the victim believes that a preliminary hearing ruling or court-martial ruling violated his or her rights afforded by Article 6b or M.R.E. 412, 513, 514, or 615.[110] In addition, if a victim "is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such an order."[111] Under Article 6b, the petition for writ of mandamus "shall be forwarded directly to the [CCA] . . . and, to the extent practicable, shall have priority over all other proceedings before the court."[112]

While a victim has the ability to seek redress in the CCA, under current case law the victim may not appeal a writ denial by the CCA to the CAAF. In the 2016 case *EV v. United States and Martinez*, a victim petitioned the CCA for a writ of mandamus after a military judge ordered portions of her mental health records released.[113] After the CCA denied the victim's petition, the victim appealed to the CAAF. The CAAF dismissed the victim's writ appeal on the grounds of lack of jurisdiction, finding that Article 6b "is a clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals" and that the CAAF "must be guided by the choices Congress has made."[114]

In a 2017 case decided by the CAAF, *Randolph v. HV and United States*, an accused appealed the CCA's grant of a writ of mandamus under Article 6b.[115] The CAAF specified the following issue:

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107 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701(b)(2)(C), 127 Stat. 672 (2013).

108 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 535, 128 Stat. 3292 (2014).

109 National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726 (2015).

110 10 U.S.C. § 806b(e) (UCMJ art. 6b(e)). M.R.E. 514 relates to the victim advocate-victim privilege and the Department of Defense Safe Helpline staff-victim privilege. *See* MCM, *supra* note 7, Mil. R. Evid. 514. M.R.E. 615 relates to the exclusion of victims. *See* MCM, Mil. R. Evid. 615.

111 10 U.S.C. § 806b(e) (UCMJ art. 6b(e)).

112 *Id*.

113 *EV v. United States & Martinez*, 75 M.J. 331, 333 (C.A.A.F. 2016).

114 *Id*. at 334.

115 *Randolph v. HV & United States*, 76 M.J. 27, 29 (C.A.A.F. 2017).

"Whether the United States Court of Appeals for the Armed Forces has jurisdiction over a writ-appeal petition filed by an accused who is seeking review of a court of criminal appeals' decision rendered pursuant to Article 6b(e), UCMJ." The CAAF dismissed the petition for lack of jurisdiction, again finding that Congress has limited review of Article 6b petitions to the CCAs. The CAAF wrote, "As Article 6b is meant to confer rights on victims, not the accused, it would violate congressional intent for this Court to review Article 6b cases upon petition by the accused but not the victim."[116]

B. Proposals and Considerations

Presenters observed that neither Section 547 nor the SVC/VLC program managers' legislative proposal would expressly grant the CAAF jurisdiction to hear a victim's writ appeal.[117] However, many urged the Panel to consider recommending such a change. In the view of Mr. Don Christensen, President of Protect Our Defenders, victims' lack of access to the CAAF "serves as a barrier to meaningful relief and inhibits development of law."[118] Others emphasized the importance of uniformity and civilian oversight in military cases.[119] Judge Baker noted that limiting jurisdiction to hear Article 6b petitions to the CCAs increases the risk that different Services will develop different standards or processes, resulting in discrepancies in how victims are treated across the Services. In addition, giving victims the ability to appeal a writ denial to the CAAF would allow civilian oversight of these cases, which is particularly important "in an area where the credibility of the military is at stake and the concerns about sexual assault are so well-founded[.]"[120] Judge Baker added that the CAAF has tended to read jurisdictional grants literally; therefore, if Congress wants the CAAF to have jurisdiction to hear a writ appeal under Article 6b, Congress should explicitly say so.[121]

Some presenters cautioned that permitting victims to appeal writ denials to the CAAF would further slow the resolution of cases, creating delays that would be particularly problematic if an accused was in pre-trial confinement.[122] In contrast to the federal CVRA, which requires that a federal court of appeals decide a victim's petition for a writ of mandamus within 72 hours after the petition has been filed, Article 6b places no specific limit on the amount of time allotted to a CCA to decide a victim's petition.[123] Allowing victims to appeal a writ denial to the CAAF would only exacerbate any delay that

116 *Id*. at 30.

117 *See, e.g.*, *Transcript of JPP Public Meeting* 286 (Sept. 23, 2016) (testimony of Major Anne Hsieh, U.S. Army, Senior Appellate Attorney and Branch Chief); *id*. at 211 (testimony of Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division).

118 *Transcript of JPP Public Meeting* 32 (Oct. 14, 2016) (testimony of Mr. Don Christensen, President, Protect Our Defenders).

119 *See Transcript of JPP Public Meeting* 18–19 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces); *transcript of JPP Public Meeting* 18–19 (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

120 *Transcript of JPP Public Meeting* 18–19 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

121 *Id*. at 20.

122 *Transcript of JPP Public Meeting* 146 (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals); *see also transcript of JPP Public Meeting* 20 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

123 *Compare* 10 U.S.C. § 806b(e) (UCMJ art. 6b(e)), *with* 18 U.S.C. § 3771(d)(3) (Crime Victims' Rights Act). Under the CVRA, the litigants, with the approval of the court, may stipulate to a different time period for consideration. However, the CVRA specifies that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter."

might occur. Presenters noted that this problem could be mitigated if Congress included in Article 6b clearly defined timelines for reviews by the CCA and the CAAF.[124]

C. JPP Findings and Recommendations

The JPP is concerned that victims' lack of access to the CAAF under Article 6b of the UCMJ prevents civilian oversight of CCA decisions affecting victims' rights and creates the potential for lack of uniformity across the Services. In light of the CAAF's recent decision in *EV vs. United States and Martinez*,[125] the JPP recommends that Congress amend Article 6b to grant the CAAF jurisdiction to hear a victim's appeal if a Service CCA denies the victim's petition for a writ of mandamus under Article 6b.

The JPP recognizes that under *Randolph v. HV and United States*,[126] the CAAF does not have jurisdiction over a writ appeal petition filed by an accused seeking review of a CCA decision rendered pursuant to Article 6b. The JPP has not heard testimony on whether the CAAF should have jurisdiction over an Article 6b writ appeal filed by an accused, or whether granting victims the right to seek review at the CAAF of a CCA decision on an Article 6b petition would also confer such a right on the accused. The JPP considers this to be outside the scope of this report and refrains from making a recommendation on this issue.

124 *See, e.g.*, *Transcript of JPP Public Meeting* 23 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

125 *EV v. United States & Martinez*, 75 M.J. 331 (C.A.A.F. 2016).

126 *Randolph v. HV & United States*, 76 M.J. 27 (C.A.A.F. 2017).

THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

March 13, 2024

The Honorable Jack Reed
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mike Rogers
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

The DAC-IPAD believes that the time is right to amend Article 34, UCMJ, to align the statutory referral standard with the most recent regulatory guidance from the Department of Defense. Four years ago, this Committee recommended amending Article 34, UCMJ, to require a determination of sufficient admissible evidence to obtain and sustain a conviction before a charge could be referred to trial by general court-martial. This recommendation was the result of a three-year comprehensive case study that culminated in the DAC-IPAD October 2020 *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017.* In that report, the DAC-IPAD found there is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction. In the Committee's view, the decision to refer charges to trial by general court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process. As a remedy, the DAC-IPAD recommended Congress amend Article 34, UCMJ.

Then, in its June 2023 report, *Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards: Recommendations for Article 32, UCMJ, and the Secretary of Defense's Disposition Guidance in Appendix 2.1, MCM* the DAC-IPAD recommended the Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to establish uniform prosecution standards. These standards are familiar to every prosecutor—both military and civilian—practicing across the United States and its territories. These standards necessary to enhance uniformity, reliability, and consistency in case disposition and charging decisions. The Military

Justice Review Panel joined the DAC-IPAD's recommendation. As a result, in October 2023, the Secretary of Defense revised Appendix 2.1 to reflect the heightened referral standard—creating the first of its kind uniform prosecution standards on par with the Federal Principles of Prosecution contained in the Justice Manual. The new referral language provides, in relevant part:

> "2.3. Referral.
> b. A special trial counsel should not refer, and a staff judge advocate or other judge advocated involved in the disposition process should not recommend that a convening authority refer, a charge to a court-martial unless the special trial counsel, staff judge advocate, or other judge advocate believes that…the admissible evidence will probably be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder."

Commented [CS1]: Guilt?

Commented [VEMCWE2R1]: "guilty" (not guilt) is the quoted language for this paragraph of Appendix 2.1, MCM

In addition, the President amended Rule for Courts-Martial 601(d)(2) in Executive Order 14103. The new language provides, in relevant part: "Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction."

The effect of the change in the referral standard ~~—that is, cases will only be referred to court-martial if a judge advocate believes the evidence can obtain and sustain a conviction at trial—~~ will be transformative: trial counsel will more carefully screen cases and service members can be assured that judge advocates wielding prosecutorial authority will use these criteria when making or advising on ~~as an aspirational guide for~~ disposition decisions. The DAC-IPAD therefore recommends that the time is right for Congress to amend Article 34, UCMJ to align the statutory language with the new referral standard that all judge advocates are presently using as outlined in Appendix 2.1, MCM and Rule for Courts-Martial 601(d)(2). We have enclosed a draft amendment for your consideration.

Commented [VEMCWE3]: Member comment: As written, this phrase misstates the referral standard. *STAFF response: Agree. Recommend deletion. The point of the sentence is intended to explain the transformative nature of these changes.*

Commented [VEMCWE4]: Member comment: as written, the phrase "as an aspirational guide" is unclear. *STAFF response. Agree. Sentence edited to clarify the point.*

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

Respectfully submitted,

_____
Karla N. Smith, Chair

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Marcia M. Anderson

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Martha S. Bashford

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William S. Cassara

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Margaret A. Garvin

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Suzanne B. Goldberg

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Jenifer Markowitz

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Jennifer M. O'Connor

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James R. Schwenk

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Cassia C. Spohn

_____
Meghan A. Tokash

_____
Reggie B. Walton

Enclosure:
As stated

§834. Art. 34. Advice to convening authority before referral for trial

(a) GENERAL COURT-MARTIAL.

(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—Subject to subsection (c), before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

(A) the specification alleges an offense under this chapter;

(B) there is probable cause to believe that the accused committed the offense charged; and

(C) a court-martial would have jurisdiction over the accused and the offense.

(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to whether the admissible evidence will probably be sufficient to obtain and sustain a conviction, and as to the disposition that should be made of the specification in the interest of justice and discipline.

(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.—Subject to subsection (c), before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues, including whether the admissible evidence will probably be sufficient to obtain and sustain a conviction.

(c) COVERED OFFENSES.

A referral to a general or special court-martial for trial of charges and specifications over which a special trial counsel exercises authority may only be made—

(1) by a special trial counsel, subject to a special trial counsel's written determination accompanying the referral that—

(A) each specification under a charge alleges an offense under this chapter;

(B) there is probable cause to believe that the accused committed the offense charged; ~~and~~

(C) a court-martial would have jurisdiction over the accused and the offense; and

(D) the special trial counsel believes that the admissible evidence will probably be sufficient to obtain and sustain a conviction;

or

Commented [VEMCWE1]: Member comment: should the 'sufficiency of the evidence' advice be moved from para. (a)(2) to para. (a)(1)? *STAFF comment: Recommend leaving the SJA's recommendation as to 'sufficiency of the evidence' in para. (a)(2), because it supports a disposition recommendation for a GCM and is not a statutory bar. In other words, the CA might disagree with the judgment of the SJA as to the appropriate disposition of the case. And, unlike a finding of probable cause, the likelihood of conviction is a predictive belief by the prosecutor, not a certainty. Depending on future motions, judicial rulings, and testimony, the trial may or may not result in a conviction.*

Commented [VEMCWE2]: Member comment: The 'sufficiency of the evidence' consideration should apply to Special CMs too (not just GCMs*). Staff response: Agree. New language added here. JAs must advise the convening authority on sufficiency of the evidence before referral to a special court-martial, just like a GCM. RCM 601(d)(2) requires the same consideration of sufficiency of the evidence for both GCMs and SPCMs. The only difference is the legal advice must be in writing for a GCM, but not for a SPCM.*

Commented [VEMCWE3]: Member comment: Same as previous comment. The OSTC must consider 'sufficiency of the evidence' before referral, just like the SJA must opine in writing to the CA in (a)(2). *Staff response: Agree. Simplified the proposal to clarify that covered offenses require the OSTC to make 4 written determinations.*

(2) in the case of charges and specifications that do not allege a covered offense and as to which a special trial counsel declines to prefer or, in the case of charges and specifications preferred by a person other than a special trial counsel, refer charges, by the convening authority in accordance with this section.

any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.

(2) Recommendations for any necessary modifications to the form of the charges or specifications.

(3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34).

(4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).

(d) RIGHTS OF ACCUSED AND VICTIM.—(1) The accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel at the preliminary hearing under this section. The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence that is relevant to the issues for determination under subsection (a)(2).

(3) A victim 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. A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49).

(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to determinations under subsection (a)(2).

(e) RECORDING OF PRELIMINARY HEARING.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording under such rules as the President may prescribe.

(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE.—If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused—

(1) is present at the preliminary hearing;

(2) is informed of the nature of each uncharged offense considered; and

(3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).

(g) EFFECT OF VIOLATION.—The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error. A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.

(h) VICTIM DEFINED.—In this section, the term "victim" means a person who—

(1) is 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; and

(2) is named in one of the specifications.

§833. Art. 33. Disposition guidance

The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of the department in which the Coast Guard is operating when it is not operating as a service in the Navy, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.

§834. Art. 34. Advice to convening authority before referral for trial

(a) GENERAL COURT-MARTIAL.—

(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—Subject to subsection (c), before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

(A) the specification alleges an offense under this chapter;

(B) there is probable cause to believe that the accused committed the offense charged; and

(C) a court-martial would have jurisdiction over the accused and the offense.

(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to the disposition that should be made of the specification in the interest of justice and discipline.

(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.—Subject to subsection (c), before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues.

(c) COVERED OFFENSES.— —A referral to a general or special court-martial for trial of charges and specifications over which a special trial counsel exercises authority may only be made—

(1) by a special trial counsel, subject to a special trial counsel's written determination accompanying the referral that—

(A) each specification under a charge alleges an offense under this chapter;

(B) there is probable cause to believe that the accused committed the offense charged; and

(C) a court-martial would have jurisdiction over the accused and the offense; or

(2) in the case of charges and specifications that do not allege a covered offense and as to which a special trial counsel declines to

prefer or, in the case of charges and specifications preferred by a person other than a special trial counsel, refer charges, by the convening authority in accordance with this section.

(d) GENERAL AND SPECIAL COURTS-MARTIAL; CORRECTION OF CHARGES AND SPECIFICATIONS BEFORE REFERRAL.—Before referral for trial by general court-martial or special court-martial, changes may be made to charges and specifications—

(1) to correct errors in form; and

(2) when applicable, to conform to the substance of the evidence contained in a report under section 832(c) of this title (article 32(c)).

(e) REFERRAL DEFINED.—In this section, the term "referral" means the order of a convening authority or, with respect to charges and specifications over which a special trial counsel exercises authority in accordance with section 824a of this title (article 24a), a special trial counsel, that charges and specifications against an accused be tried by a specified court-martial.

§835. Art. 35. Service of charges; commencement of trial

(a) IN GENERAL.—Trial counsel detailed for a court-martial under section 827 of this title (article 27) shall cause to be served upon the accused a copy of the charges and specifications referred for trial.

(b) COMMENCEMENT OF TRIAL.—

(1) Subject to paragraphs (2) and (3), no trial or other proceeding of a general court-martial or a special court-martial (including any session under section 839(a) of this title (article 39(a)) may be held over the objection of the accused—

(A) with respect to a general court-martial, from the time of service through the fifth day after the date of service; or

(B) with respect to a special court-martial, from the time of service through the third day after the date of service.

(2) An objection under paragraph (1) may be raised only at the first session of the trial or other proceeding and only if the first session occurs before the end of the applicable period under paragraph (1)(A) or (1)(B). If the first session occurs before the end of the applicable period, the military judge shall, at that session, inquire as to whether the defense objects under this subsection.

(3) This subsection shall not apply in time of war.

SUBCHAPTER VII—TRIAL PROCEDURE

§836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.

§837. Art. 37. Command influence

(a)(1) No court-martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.

(2) No court-martial convening authority, nor any other commanding officer, may deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial. The denial of a request to travel at government expense or refusal to make a witness available shall not by itself constitute unlawful command influence.

(3) No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President.

(4) Conduct that does not constitute a violation of paragraphs (1) through (3) may include, for example—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing persons on the substantive and procedural aspects of courts-martial;

(B) statements regarding criminal activity or a particular criminal offense that do not advocate a particular disposition, or a particular court-martial finding or sentence, or do not relate to a particular accused; or

(C) statements and instructions given in open court by the military judge or counsel.

CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral

(a) *In general*. Referral is the order of a convening authority or a special trial counsel that one or more charges and specifications against an accused will be tried by a specified court-martial.

Discussion

If a court-martial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, see R.C.M. 401(d) and 407(b).

(b) *Who may refer*.

(1) Except as provided in R.C.M. 601(b)(2), any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

(2) For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may refer charges to a court-martial.

Discussion

See R.C.M. 306(a), 403, 404, 407, and 504.

The convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority's control to assure the appearance of the accused at trial. The convening authority's power over the accused may be based upon agreements between the commanders concerned.

(c) *Disqualification*.

(1) Except as provided in R.C.M. 601(c)(2), an accuser may not refer charges to a general or special court-martial.

(2) A special trial counsel shall not be disqualified from referring charges to a general or special court-martial as a result of having preferred charges or having caused charges to be preferred.

Discussion

Convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser. For a definition of "accuser," see Article 1(9). A convening authority who is disqualified may forward the charges and allied papers for disposition by competent authority superior in rank or command. See R.C.M. 401(c) concerning actions which the superior may take.

See R.C.M. 1302 for rules relating to convening summary courts-martial.

(d) *When charges may be referred*.

(1) *Basis for referral*.

(A) Except as provided in R.C.M. 601(d)(1)(B), if the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general or special court-martial except in compliance with R.C.M. 601(d)(2) or (d)(3). The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(B) For offenses over which a special trial counsel has exercised authority and has not deferred, if a special trial counsel makes a written determination that each specification under a charge alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charged, and the court-martial would have jurisdiction over the accused and the offense, a special trial counsel may refer it. The finding may be based on hearsay in whole or in part. A special trial counsel may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with R.C.M. 601(d)(2) or (d)(3). A special trial counsel shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

Discussion

For a discussion of selection among alternative dispositions, see R.C.M. 306. The referral authority is not obliged to refer all charges that the evidence might support. The referral authority should consider the options and considerations under R.C.M. 306 and Appendix 2.1 (Disposition Guidance) in exercising the discretion to refer charges and specifications to court-martial.

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(2) *Consideration.* Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction.

(3) *General courts-martial.* Charges may not be referred to a general court-martial unless there has been substantial compliance with the preliminary hearing requirements of R.C.M. 405 and:

(A) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406(a)(1) and Article 34(a); or

(B) A special trial counsel has made a written determination as required under R.C.M. 406(b) and Article 34(c).

(4) *Special courts-martial.* Charges may not be referred to a special court-martial unless:

(A) The convening authority has consulted with a judge advocate as required under R.C.M. 406(a)(2) and Article 34(b); or

(B) A special trial counsel has made a written determination as required under R.C.M. 406(b) and Article 34(c).

Discussion

See R.C.M. 201(f)(2)(C) concerning limitations on referral of capital offenses to special courts-martial.

See R.C.M. 103(4) for the definition of the term "capital offense."

See R.C.M. 201(f)(2)(D)and (E) and R.C.M. 1301(c) concerning limitations on the referral of certain cases to special and summary courts-martial.

See R.C.M. 905(b)(1) and (e) for the rule regarding forfeiture for failure to object to a defect under this rule.

(e) *How charges shall be referred*.

(1) *Order, instructions*. Referral shall be by the personal order of the referral authority.

(A) *Capital cases*. If a case is to be tried as a capital case, the referral authority shall so indicate by including a special instruction on the charge sheet in accordance with R.C.M. 1004(b)(1).

(B) *Special court-martial consisting of a military judge alone*. If a case is to be tried as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the referral shall so indicate by including a special instruction on the charge sheet prior to arraignment.

Discussion

Under the UCMJ as amended though the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 136 Stat. 2395 (2022), a special trial counsel may not refer a charge to a special court-martial consisting of a military judge alone. *See* Article 16(c)(2)(A), 10 U.S.C. § 816(c)(2)(A) (2019) ("if the case is so referred by the *convening authority* . . . .") (emphasis added)."

(C) *Other instructions*. The referral authority may include any other additional instructions in the order as may be required.

Discussion

Referral is ordinarily evidenced by an indorsement on the charge sheet. Although the indorsement should be completed on all copies of the charge sheet, only the original must be signed. The signature may be that of a person acting by the order or direction of the referral authority. In such a case, the signature element or block should reflect the signer's authority.

If, for any reason, charges are referred to a court-martial different from that to which they were originally referred, the new referral is ordinarily made by a new indorsement attached to the original charge sheet. The previous indorsement should be lined out and initialed by the person signing the new referral. The original indorsement should not be obliterated. *See also* R.C.M. 604.

The failure to include a special instruction that a case is to be tried as a capital case at the time of the referral does not bar the referral authority from later adding the required special instruction, provided that the referral authority has otherwise complied with the applicable notice requirements. If the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy. *See* R.C.M. 1004(b)(1).

For limitations regarding offenses that may be referred to a special court-martial consisting of a military judge alone, see R.C.M. 201(f)(2)(E).

If the only officer present in a command refers the charges to a summary court-martial and serves as the summary court-martial under R.C.M. 1302, the indorsement should be completed with the additional comments, "only officer present in the command."

Any special instructions must be stated in the referral indorsement.

When the charges have been referred to a court-martial, the indorsed charge sheet and allied papers should be promptly transmitted to the trial counsel.

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(2) *Joinder of offenses*. In the discretion of the referral authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless of whether the offenses are connected. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) *Joinder of accused*. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

Discussion

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. See the Discussion accompanying R.C.M. 307(c)(5). Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

(f) *Superior convening authorities*. Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.

(g) *Parallel convening authorities*.

(1) Except as provided in R.C.M. 601(g)(2), if it is impracticable for the original convening authority to continue exercising authority over the charges, the convening authority may cause the charges, even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and in accordance with such regulations as the Secretary concerned may prescribe. Subsequent actions taken by the parallel convening authority are within the sole discretion of that convening authority.

(2) For offenses over which a special trial counsel has exercised authority and has not deferred, a convening authority seeking to transfer charges to a parallel convening authority may do so in accordance with these rules and such regulations prescribed by the Secretary concerned.

Discussion

Parallel convening authorities are those convening authorities that possess the same court-martial jurisdiction authority. Examples of permissible transmittal of charges under this rule include the transmittal from a general court-martial convening authority to another general court-martial convening authority, or from one special court-martial convening authority to another special court-martial convening authority. It would be impracticable for an original convening authority to continue exercising authority over the charges, for example, when a command is being decommissioned or inactivated, or when deploying or redeploying and the accused is remaining behind. If charges have been referred, there is no requirement that the charges be withdrawn or dismissed prior to transfer. *See* R.C.M. 604. In the event that the case has been referred, the receiving convening authority may adopt the original court-martial convening order, including the court-martial panel selected to hear the case as indicated in that convening order. When charges are transmitted under this rule, no recommendation as to disposition may be made.

The transfer process is subject to the limitations contained in these rules, including the requirement that only a special trial counsel may withdraw, dismiss, or refer charges over which a special trial counsel has exercised authority and has not deferred.

Rule 602. Service of charges

(a) *Service of charges*. Trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet.

Discussion

Trial counsel should comply with this rule immediately upon receipt of the charges. Whenever after service the charges are amended or changed the trial counsel must give notice of the changes to the defense counsel. Whenever such amendments or changes add a new party, a new offense, or substantially new allegations, the charge sheet so amended or changed must be served anew. *See* R.C.M. 603.

Service may be made only upon the accused; substitute service upon defense counsel is insufficient. The trial counsel should promptly inform the defense counsel when charges have been served.

If the accused has questions when served with charges, the accused should be told to discuss the matter with defense counsel.

APPENDIX 2.1
DISPOSITION GUIDANCE

This Appendix provides non-binding guidance issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 833.

SECTION 1: IN GENERAL

1.1. Policy.

a. This Appendix provides guidance regarding factors that convening authorities, commanders, special trial counsel, staff judge advocates, and other judge advocates should consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purposes of military law.[1]

b. This Appendix supplements the Manual for Courts-Martial. The guidance in this Appendix does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this Appendix are cast in general terms, with a view to providing guidance rather than mandating results. The intent is to promote regularity without regimentation, encourage consistency without sacrificing necessary flexibility, and provide the flexibility to apply these factors in a manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

1.2. Purpose. This guidance is intended to:

a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;

b. Promote the fair and effective exercise of prosecutorial discretion and foster confidence on the part of the public and Service members that disposition decisions will be made rationally and objectively on the merits of each case;

c. Serve as a training tool for convening authorities, commanders, special trial counsel, staff judge advocates, and other judge advocates involved in the disposition process;

d. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources;

e. Enhance the relationship between military commanders; special trial counsel; staff judge advocates; other judge advocates involved in the disposition process; and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions; and

f. Guide the significant decision whether to prosecute a matter at court-martial recognizing the profound consequences for the accused and crime victims regardless of the outcome.

[1] "The purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Manual for Courts-Martial, United States, Pt. I, ¶ 3 (2024 ed.).

APPENDIX 2.1

1.3. Scope. This Appendix is designed to promote the reasoned exercise of discretion with respect to the following:

a. Initiating and declining action under the UCMJ;

b. Selecting appropriate charges and specifications;

c. Special trial counsel's decisions to prefer or refer a charge or defer an alleged offense;

d. Selecting the appropriate type of court-martial or alternative mode of disposition, if any;

e. Preliminary hearing officers' disposition recommendations; and

f. Entering into a plea agreement.

1.4. Non-Litigability. This Appendix was developed solely as a matter of internal policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to create a right, benefit, or defense, substantive or procedural, enforceable at law or in equity by any person and may not be relied upon by any party or person in litigation with the United States.

SECTION 2: CONSIDERATIONS IN ALL CASES

2.1. Interests of Justice and Good Order and Discipline. The military justice system is a powerful tool that promotes justice and assists in maintaining good order and discipline while protecting the rights of Service members. In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, the factors listed below should be considered. The weight and priority given to each of these factors may vary depending on the facts and circumstances of the case.

a. Whether admissible evidence will probably be sufficient to obtain and sustain a finding of guilty in a trial by court-martial when viewed objectively by an unbiased factfinder;

b. The truth-seeking function of trial by court-martial;

c. The nature, seriousness, and circumstances of the alleged offense and the accused's culpability in connection with the alleged offense;

d. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;

e. The accused's willingness to cooperate in the investigation or prosecution of others;

f. The accused's criminal history or history of misconduct, whether military or civilian, if any;

g. The probable sentence or other consequences to the accused of a finding of guilty;

h. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

i. In cases involving an individual who is a victim of the alleged offense as defined by Article 6b(b), that individual's views as to disposition;

j. The extent of the harm caused to any victim of the alleged offense;

k. The availability and willingness of the victim of the alleged offense and other witnesses to testify;

l. The effect of the alleged offense on the morale, health, safety, welfare, and good order and discipline of the command;

m. The extent to which the conduct tends to bring discredit upon the armed forces;

n. Whether the alleged offense occurred during wartime, combat, or contingency operations; and

o. The mission-related responsibilities of the command.

2.2. Consultation with a Judge Advocate. Commanders and convening authorities shall at all times communicate directly with their assigned judge advocates in matters relating to the administration of military justice (*see* R.C.M. 105).

2.3. Referral.

a. Probable cause must exist for each charge and specification referred to a court-martial (*see* R.C.M. 601(d)(1)). In addition to the consideration required by R.C.M. 601(d)(2),[2] when making a referral decision, the referral authority should also consider the matters described in paragraph 2.1 of this appendix.

b. A special trial counsel should not refer, and a staff judge advocate or other judge advocate involved in the disposition process should not recommend that a convening authority refer, a charge to a court-martial unless the special trial counsel, staff judge advocate, or other judge advocate believes that the Service member's conduct constitutes an offense under the UCMJ and that the admissible evidence will probably

[2] "Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction." Rule for Courts-Martial 601(d)(2), Manual for Courts-Martial, United States (2024 ed.).

be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder.

c. A convening authority should not refer a charge to a court-martial unless the admissible evidence will probably be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder. In assessing whether there is sufficient admissible evidence, a convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice.

2.4. Determining the Charges and Specifications to Refer. A referral authority should avoid referring multiple charges when they would:

a. Unnecessarily complicate the prosecution of the most serious readily provable alleged offense or offenses;

b. Unnecessarily exaggerate the nature and extent of the accused's alleged criminal conduct or add unnecessary confusion to the issues at court-martial;

c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or

d. Be disposed of more appropriately through an alternative disposition.

2.5. Determining the Appropriate Type of Court-Martial. In determining the appropriate type of court-martial, a convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice. Additionally, a referral authority should consider:

a. The interests of justice and good order and discipline (*see* paragraph 2.1);

b. The authorized maximum and minimum punishments for the charged offenses;

c. Any unique circumstances in the case requiring immediate disposition of the charges;

d. Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and

e. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

2.6. Alternatives to Referral. In determining whether to refer charges and specifications, a referral authority should consider whether an adequate alternative to referral exists. If an adequate alternative to referral exists, in addition to the considerations in paragraph 2.1, a referral authority should consider:

a. The effect of the alternative disposition on the interests of justice and good order and discipline;

b. The options available under the alternative disposition;

c. The views of the victim of the alleged offense, if any, concerning the alternative disposition of the case; and

d. The likelihood of an effective outcome.

2.7. Inappropriate Considerations. The disposition determination must not be influenced by:

a. The accused's race; ethnicity; religion; sex; gender (including gender identity); sexual orientation; national origin; or lawful political association, activities, or beliefs;

b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of alleged offenses concerning the accused, the accused's associates, the victim of the alleged offense, or any witness;

c. The time and resources already expended in the investigation of the case;

d. The possible effect of the disposition determination on the commander's, convening authority's, or special trial counsel's military career or other professional or personal circumstances;

e. Political pressure to take or not to take specific actions in the case; or

f. Improper consideration of the race; ethnicity; religion; sex; gender (including gender identity); sexual orientation; national origin; or lawful political association, activities, or beliefs of the victim of an alleged offense.

SECTION 3: SPECIAL CONSIDERATIONS

3.1. Prosecution in Another Jurisdiction. When the accused is subject to effective prosecution in another jurisdiction, a convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice. Additionally, a referral authority should consider the following additional factors when determining disposition:

a. The strength of the other jurisdiction's interest in prosecution;

b. The other jurisdiction's ability and willingness to prosecute the case effectively;

c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;

d. The views of the victim of the alleged offense, if any, as to the desirability of prosecution in the other jurisdiction;

e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and

f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

3.2. Plea Agreements. In accordance with Article 53a, the referral authority may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. A convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice. Additionally, a referral authority should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

a. The accused's willingness to cooperate in the investigation or prosecution of others;

b. The nature and seriousness of the charged offense or offenses;

c. The accused's remorse or contrition and willingness to assume responsibility for the accused's conduct;

d. Restitution, if any;

e. The accused's criminal history or history of misconduct, whether military or civilian;

f. The desirability of prompt and certain disposition of the case and of related cases;

g. The likelihood of obtaining a finding of guilty at court-martial;

h. The probable effect on victims of alleged offenses and witnesses;

i. The probable sentence or other consequences if the accused is convicted;

j. The public and military interest in having the case tried rather than disposed of by a plea agreement;

k. The time and expense associated with trial and appeal;

l. The views of the victim of an alleged offense with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and

m. The potential of the accused for rehabilitation and continued service.

3.3. Agreements Concerning Disposition of Charges and Specifications. With respect to plea agreements regarding the disposition of charges and specifications, the plea agreement should require the accused to plead guilty to charges and specifications that:

a. Appropriately reflect the nature and extent of the criminal conduct;

b. Are supported by an adequate factual basis;

c. Would support the imposition of an appropriate sentence under all the circumstances of the case;

d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and

e. Appropriately serve the interests of justice and good order and discipline.

3.4 Agreements Concerning Sentence Limitations. A plea agreement should ensure that any sentence limitation takes into consideration the sentencing guidance set forth in Article 56(c).

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Analysis:

This appendix implements Article 33, UCMJ, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and section 12 of Executive Order 13825 of March 1, 2018. The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association, Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association, National Prosecution Standards. Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as those related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of the military justice system.