

**TAKING VICTIMS' RIGHTS TO THE NEXT LEVEL:  
APPELLATE RIGHTS OF CRIME VICTIMS UNDER THE  
UNIFORM CODE OF MILITARY JUSTICE**

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*Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to remedy errors of lower courts and this provision [of the Crime Victim Rights Act (CVRA)] requires them to do so for victim's rights. For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning.<sup>1</sup>*

## I. Introduction

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<sup>1</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statement of Senator Jon Kyl).

The rights of crime victims have been under a spotlight in military criminal jurisprudence since approximately 2013, but many questions remain regarding the rights of victims to appeal decisions from trial courts.<sup>2</sup> Although the recent expansion of, and emphasis on, victims' rights may have appeared novel to military justice practitioners, victims' rights were first established in federal law in 1982 with the passage of the Victim and Witness Protection Act.<sup>3</sup> Since 1982, Congress has passed multiple pieces of legislation to expand and clarify the rights of victims,<sup>4</sup> including the addition of Article 6b to the Uniform Code of Military Justice (UCMJ).<sup>5</sup>

The goal of the victims' rights movement in the military is to articulate base-level rights of victims, increase their understanding of the process, and finally to provide a proper avenue for them to participate in the military justice process.<sup>6</sup> In light of this effort, Congress and the military services established programs for attorneys to represent sexual assault victims throughout investigation and prosecution.<sup>7</sup> In 2013, The Court of Appeals for the Armed Forces (CAAF) established that victims have a right to be represented by counsel during proceedings.<sup>8</sup> Two years later,

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<sup>2</sup> See U.S. DEP'T OF DEF., FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (15 Apr. 2013); U.S. Senator John Cornyn, R-Texas, Opinion., *Someone to Speak For and Protect Sexual Assault Victims*, SAN ANTONIO EXPRESS-NEWS, Aug. 4, 2013, at F6; Joe Nocera, Opinion, *This War is No Longer Invisible*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/2013/02/23/opinion/this-war-is-no-longer-invisible.html>.; Jennifer Steinhauer, *Widening Spotlight on Assault of Women*, N.Y. TIMES (Dec. 4, 2014), <https://www.nytimes.com/2014/12/05/us/string-of-sexual-assault-cases-may-lead-to-tipping-point.html>.

<sup>3</sup> Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

<sup>4</sup> Victims of Crimes Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837; Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, § 502, 104 Stat. 4789, 4820, *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12; Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509 (2012); Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-62 (2004) (codified as amended at 18 U.S.C. § 3771 (2012 & Supp. IV 2016)).

<sup>5</sup> 10 U.S.C. § 806b (Supp. IV 2016).

<sup>6</sup> *Id.*

<sup>7</sup> 10 U.S.C. § 1044e (Supp. IV 2016).

<sup>8</sup> *LRM v. Kastenberg*, 72 M.J. 364, 371 (C.A.A.F. 2013) ("It is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context

Congress explicitly gave victims the right to file petitions for a writ of mandamus with the service appellate courts if they believe their rights were not protected by trial judges.<sup>9</sup> While the enactment of Article 6b was a major advancement in articulating the rights of crime victims and their enforcement mechanisms, it fails to address whether victims have the right to participate in post-trial appellate proceedings.<sup>10</sup> As such, Article 6b should be considered the starting point for applying principles of victims' rights to the military justice system, like an introductory course.

Clarifying aspects of a victim's right to appeal adverse decisions by trial judges and a limited direct appeal right in post-trial appellate processing are necessary to protect the procedural justice rights of crime victims. In short, the legal process simply works better when standards are clear and processes are well defined. Article 6b has been amended in each of the three National Defense Authorization Acts since it was originally passed in 2013.<sup>11</sup> This article recommends improvements to Article 6b's interlocutory appeal provisions, the establishment of uniform procedures for filing appeals, and the establishment of a limited right of appeal for victims at the post-trial appellate level. It is time for the enforcement mechanisms for crime victim rights to be raised to the more advanced level.

The article begins by briefly explaining the history of interlocutory appeals by victims in the civilian court system, how it evolved in the military, and how the military must make amendments based on lessons learned in the civilian and military courts. This article then proposes that the standard of review and the deference given to lower court rulings, and the procedures for timely filing and hearing of appeals must be amended to make them more clear. Next, a case will be made for the addition of statutory authority for victims to appeal adverse rulings by the Courts of Criminal Appeals (CCA) to CAAF. Finally, this article will address the need for victims to have a defined role in the post-trial appeal process, focused on the privacy and privilege rights already articulated in Article 6b.

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of Military Rule of Evidence 412 or 513 before a military judge, any more than it is to allow a party to have a lawyer.”)

<sup>9</sup> 10 U.S.C. § 806b.

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

## II. The History of Victims' Rights in Civilian and Military Jurisprudence

Congress has been examining the rights of crime victims and the appropriate role for victims to play in the investigation and prosecution of offenses for at least the last thirty years.<sup>12</sup> It is important to understand at least some of this history at the outset in order to understand the evolution of victim's rights under, and to provide the basis for the argument that the proposed amendments are the next logical step in the evolution of victims' rights in the larger scope of American criminal jurisprudence.

Beginning with state legislation and even the adoption of state constitutional provisions, Congress began examining the rights of crime victims in the mid-1980s.<sup>13</sup> The initial action by Congress revolved around addressing victim restitution, compensation, and participation by victims at presentencing proceedings.<sup>14</sup> This legislation included the Victims' Rights and Restitution Act of 1990 (VRRRA), which provided a statutory list of rights for crime victims.<sup>15</sup> The VRRRA required federal law enforcement and prosecutors to make their best efforts to ensure that all crime victims are afforded seven rights identified in the statute: 1) notice of court proceedings; 2) opportunity to confer with the prosecutor; 3) be present at public court proceedings regarding the crime; 4) reasonable protection from the accused; 5) fair and respectful treatment for the victim's dignity and privacy; 6) restitution; and 7) information about the offender's conviction, sentencing, imprisonment, and release.<sup>16</sup> The major limitation of the VRRRA was a lack of a built-in enforcement mechanism for these rights; rather, federal employees were just charged with making their *best efforts* to ensure compliance.<sup>17</sup>

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<sup>12</sup> Peggy M. Tobolowsky, *Mandamus Muddle: The Mandamus Review Standard for the Federal Crime Victims' Rights Act*, 5 U. DENV. CRIM. L. REV. 109, 111 (2015).

<sup>13</sup> *Id.* at 110.

<sup>14</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-54, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 14–17, 113–16 (2008).

<sup>15</sup> 42 U.S.C. § 10606 (2000) (repealed 2004).

<sup>16</sup> *Id.* All of the rights initially enumerated in the VRRRA are included in Article 6b, UCMJ (compare VRRRA, 42 U.S.C. § 10606 with CVRA, 18 U.S.C. § 3771 (2012 & Supp. IV 2016)).

<sup>17</sup> *Id.*

In 2004, Congress passed the Justice for All Act, which repealed the VRRRA and replaced it with the Crime Victims' Rights Act (CVRA).<sup>18</sup> The CVRA provides the following rights to federal crime victims:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.<sup>19</sup>

In addition to slightly expanding the rights provided in the VRRRA,<sup>20</sup> the CVRA included a definition of "crime victim": a "person directly and

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<sup>18</sup> Crime Victims' Rights Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260 (2004) (codified as amended at 18 U.S.C. § 3771).

<sup>19</sup> 18 U.S.C. § 3771.

<sup>20</sup> Compare VRRRA, 42 U.S.C. § 10606 with CVRA, 18 U.S.C. § 3771. Both the VRRRA and the CVRA are statutory bills of rights for victims of crimes committed in violation of federal law or the laws of the District of Columbia. The CVRA enumerated additional rights not contained in the VRRRA: the limited circumstance when a judge may exclude a

proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.”<sup>21</sup> In order to protect the rights provided in the CVRA, victims were given statutory authority to petition the court of appeals for a writ of mandamus if they believed a trial judge’s decision violated their rights.<sup>22</sup>

While the CVRA was federal legislation and might therefore be thought to apply to courts-martial, military courts have held that not all generally applicable federal statutes apply to military justice.<sup>23</sup> As a result, Congress began to examine the position of victims of sexual assault in the military justice system separately. Following media attention after the release of the military sexual assault documentary, *The Invisible War*,<sup>24</sup> and allegations that over forty trainees were assaulted by their instructors at Lackland Air Force Base,<sup>25</sup> Congress began to consider legislation to define the rights of crime victims.<sup>26</sup>

Although no statute yet existed to articulate the rights of victims in courts-martial, in 2013, CAAF held that victims had standing to file a writ of mandamus when a military judge’s ruling would “preclude the victim

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victim from the courtroom, the right to be heard by the fact finder during proceedings, and the right to proceedings free from unreasonable delay. 18 U.S.C. § 3771(a)(4), (a)(7). The CVRA also added enforcement mechanisms for investigating violations and the authority for victims to file interlocutory appeals when they believe a judge has violated the rights provided in the CVRA. 18 U.S.C. § 3771(d) (Supp. IV 2016).

<sup>21</sup> 18 U.S.C. § 3771(e)(2) (Supp. IV 2016).

<sup>22</sup> 18 U.S.C. § 3771(d)(3).

<sup>23</sup> See *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998) (explaining military courts must “exercise great caution in overlaying a generally applicable [victim rights] statute . . . onto the military system”); *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (stating that although they have many similarities, “the military and civilian justice systems are separate as a matter of law,” and changes to the latter do not directly affect the former).

<sup>24</sup> *THE INVISIBLE WAR* (Chain Camera Pictures 2012).

<sup>25</sup> See Chris Carroll, *Air Force has identified 31 alleged victims in Lackland sex abuse scandal*, STARS AND STRIPES (June 28, 2012), <http://www.stripes.com/news/air-force-has-identified-31-alleged-victims-in-lackland-sex-abuse-scandal-1.181597>; James Risen, *Attacked at 19 by an Air Force Trainer, and Speaking Out*, N.Y. TIMES, Feb. 26, 2013, <http://www.nytimes.com/2013/02/27/us/former-air-force-recruit-speaks-out-about-rape-by-her-sergeant-at-lackland.html>.

<sup>26</sup> See Military Judicial Reform Act of 2013, H.R. 1079, 113th Cong.; Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong.; Military Justice Improvement Act of 2013, S. 967, 113th Cong.; Equal Justice for Our Military Act of 2013, H.R. 1435, 113th Cong.; Article 32 Reform Act, S. 1644, 113th Cong. (2013); Article 32 Reform Act, H.R. 3459, 113th Cong. (2014).

from exercising a claim of privilege or exclusion.”<sup>27</sup> The court went on to hold that a victim also had the right to be heard on these issues through counsel.<sup>28</sup> This ruling gave rise to a shift in military jurisprudence and the creation of victims’ counsel programs in each of the military services.<sup>29</sup>

In 2013, Congress first provided statutory rights to crime victims under the UCMJ.<sup>30</sup> Article 6b included all of the victims’ rights contained in the CVRA with the noticeable exception of an enforcement mechanism.<sup>31</sup> The next year, Congress amended Article 6b to add a subsection (e), which included a vehicle for enforcement authorizing an alleged victim to seek mandamus in the relevant court of criminal appeals.<sup>32</sup> Congress further expanded this enforcement mechanism in 2015 to allow victims to petition for a writ if they believed their rights were infringed during pre-trial proceedings, and expanded the list of protections that could be appealed:

(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

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<sup>27</sup> LRM v. Kastenberg, 72 M.J. 364, 368 (C.A.A.F. 2013).

<sup>28</sup> *Id.* at 369.

<sup>29</sup> Memorandum from Secretary of Defense to Secretaries of the Military Departments et al., subject: Sexual Assault Prevention and Response (14 Aug. 2013); Policy Memorandum 14-01, The Judge Advocate General, U.S. Army, subject: Office of the Judge Advocate General Policy Memorandum # 14-01, Special Victim Counsel (1 Nov. 2013).

<sup>30</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013). This statute was enacted after CAAF’s decision in *Kastenberg*, which established a victim’s authority to file a petition for a writ of mandamus to protect a victim’s privilege right in mental health records, under the All Writs Act, 28 U.S.C. § 1651. See *Kastenberg*, 72 M.J. at 368–69.

<sup>31</sup> Compare Pub. L. No. 113-66, § 1701(a)(1), 127 Stat. 672, 952 (2013), with 18 U.S.C. § 3771 (2012 & Supp. IV 2016). Both Article 6b and the CVRA begin with a list of enumerated rights of crime victims. The major differences in the statutes is that the CVRA (1) lists responsibilities of government representatives to inform crime victims of their rights; (2) provides judicial enforcement procedures in the form of writ of mandamus petitions; and (3) provides an administrative enforcement mechanism in the form of an office to receive and investigate complaints against government representatives alleged to have violated the rights contained in the CVRA. 18 U.S.C. § 3771. As originally passed in 2013, Article 6b only listed rights of victims and then provided a definition of “victims of crime.” Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013).

<sup>32</sup> National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 535, 128 Stat. 3292, 3368 (2014) (amending Article 6b, UCMJ).

violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

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

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

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

(A) This section (article).

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

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

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

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

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.<sup>33</sup>

Article 6b(e)'s enforcement provision only provides for filing a petition for a writ of mandamus with each service's CCA, and is silent regarding any additional appellate review.<sup>34</sup> Following the passage of

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<sup>33</sup> *Id.*

<sup>34</sup> In the American military justice system, each branch of the military has a court of criminal appeals that is staffed by military judges who hear appeals of rulings by trial judges and post-trial appeals. 10 U.S.C. § 866. For example, the Army has the U.S. Army Court of Criminal Appeals (ACCA). In 1950, Congress enacted the UCMJ, which created boards of review that reviewed the results of courts-martial, as well as the U.S. Court of Military Appeals, which provided civilian oversight of courts-martial. Brigadier General (ret.) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY



Article 6b(e), in *EV v. United States*, CAAF held that it lacked jurisdiction to decide a petition for a writ based on Article 6b(e) because the statute only provides for filing a petition with the CCA.<sup>35</sup>

The current statutory structure does not address any post-trial rights of victims beyond notice of parole or clemency proceedings, or the release or escape of the accused.<sup>36</sup> The Senate version of the 2017 National Defense Authorization Act (NDAA) included a provision that would have amended Article 6b to provide victims with standing as a *real party in interest* during appellate review.<sup>37</sup> The amendment would have allowed victims to file pleadings if an accused appeals his conviction.<sup>38</sup> The House version did not have such a provision and in committee, the decision was made to leave out any changes to victim appellate rights because the congressionally created Judicial Proceedings Panel (JPP) was continuing to study the issue.<sup>39</sup>

The understanding of victim appellate rights is still relatively new in the military justice system. Congress only acted after CAAF recognized a victim's ability to seek to enforce their rights and be represented by counsel in *LRM v. Kastenberg*.<sup>40</sup> Congress' initial focus has been on ensuring victims have the ability to file an interlocutory appeal, thereby immediately seeking relief from the ruling of a trial judge that infringed on a privacy right or privilege held by a victim. It is to that aspect of the recent reforms we now turn.

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LAW., Mar. 2000, at 2. The Military Justice Act of 1968 introduced additional reforms to the military justice system, making it closely resemble the civilian criminal justice system including the introduction of a tiered appellate system. *Id.* In 1983, Congress first authorized direct appeals to the Supreme Court of the United States of cases decided by the Court of Military Appeals. *Id.* at 4. In 1994, Congress redesignated the Court of Military Appeals as the U.S. Court of Appeals for the Armed Forces (CAAF). *The History of the U.S. Army Court of Criminal Appeals*, U.S. ARMY COURT OF CRIMINAL APPEALS, <https://www.jagcnet2.army.mil/Sites/ACCA.nsf> (last visited Mar. 10, 2017). In summary, under the current system, issues stemming from a U.S. Army court-martial can be appealed to the ACCA, then to CAAF, and then to the Supreme Court of the United States. *Appellate Review of Courts-Martial*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, [http://www.armfor.uscourts.gov/newcaaf/appell\\_review.htm](http://www.armfor.uscourts.gov/newcaaf/appell_review.htm). (last visited Mar. 10, 2017).

<sup>35</sup> *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016).

<sup>36</sup> 10 U.S.C. § 806b (2015).

<sup>37</sup> S. 2943, 114th Cong. § 547 (2016).

<sup>38</sup> *Id.*

<sup>39</sup> H.R. 114-840, at 1042 (2016) (Conf. Rep.).

<sup>40</sup> 72 M.J. 364 (C.A.A.F. 2013).

### III. Interlocutory Appeals

It is essential for victims of crime to have the opportunity to seek appellate review of a military judge's ruling if it infringes on their statutory rights. The first successful interlocutory appeal by a victim came in *LRM v. Kastenberg*, which was decided by CAAF in 2013.<sup>41</sup> The court held that the All Writs Act<sup>42</sup> gave the victim the authority to appeal a military judge's ruling that limited the victim's opportunity to be heard through counsel at evidentiary hearings.<sup>43</sup> Following *Kastenberg*, and with the intent to formalize a victim's right to appeal, Congress enacted Article 6b(e), which gives victims the authority to file for a writ of mandamus to appeal a military judge's ruling.<sup>44</sup>

Unfortunately, the writ of mandamus is a difficult appellate vehicle as writs of mandamus have traditionally carried a high burden for the appellate courts to grant relief.<sup>45</sup> Writs of mandamus are considered *extraordinary writs*, which are looked at with greater scrutiny by the appellate courts. Congress made the same mistake in the original drafting of the CVRA, but later amended the CVRA to clarify that when reviewing writs under the CVRA, the appellate courts should apply an *ordinary* standard of appellate review to CVRA petitions.<sup>46</sup> Congress must learn from these mistakes and should correct Article 6b in the same manner that it did for the CVRA.

An interlocutory appeal is simply an appeal that occurs before the trial court's final ruling.<sup>47</sup> Interlocutory appeals come in various forms and may involve legal points necessary to the determination of a case. In the case of appeals by victims, they may involve collateral orders that are separate from the merits of the case, but which may impact privileges or rights of the victim.<sup>48</sup> On appeal, the courts will apply a standard of review based on the type of ruling made by the trial judge. *Ordinary* standards of review include de novo review of questions of law, clear error review of

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<sup>41</sup> 72 M.J. 364 (C.A.A.F. 2013).

<sup>42</sup> 10 U.S.C. § 1651(a) (2012).

<sup>43</sup> *Kastenberg*, 72 M.J. at 372. It is important to note that while the court held that the All Writs Act gave the court the jurisdiction to hear the victim's petition, the court declined to issue a writ of mandamus because it was not the appropriate remedy. *Id.*

<sup>44</sup> 10 U.S.C. § 806b(e) (Supp. IV 2016).

<sup>45</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

<sup>46</sup> Tobolowsky, *supra* note 12, at 110.

<sup>47</sup> *Appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>48</sup> *Id.*

questions of fact, and abuse of discretion review of matters entrusted to the trial court's discretion.<sup>49</sup>

The Supreme Court has held that mandamus review is a higher, *extraordinary* standard, and that traditional mandamus “is a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’”<sup>50</sup> The Court goes on to state, “only exceptional circumstances amounting to a judicial ‘usurpation of power,’ or a ‘clear abuse of discretion,’ ‘will justify the invocation of this extraordinary remedy.’”<sup>51</sup> In practice, these heightened requirements make a victim's attempt to appeal a trial judge's ruling a discretionary matter. Discretionary appeals are not guaranteed, but rather, certain standards must be met or the appellate court must grant permission before they will consider the appeal.<sup>52</sup>

The original version of the CVRA gave victims the authority to seek a writ of mandamus but it did not specify whether the courts must review petitions or what standard of review should be applied to the decisions of trial judges.<sup>53</sup> The confusion resulted in a split in the circuit courts of appeals and subsequent congressional amendments to the CVRA.<sup>54</sup>

When Congress passed Article 6b, legislators left out multiple essential provisions, which this section will advocate either Congress or the President address. First, Congress drafted the mandamus provision in the same manner as the original version of the CVRA, presenting military courts with the same problem with confusing language that federal civilian criminal courts faced. Second, the authority to establish procedures for filing appeals has been delegated to the Judge Advocate General of each military department, but the President should issue a new rule that creates uniform standards for appellants and the courts across the services.<sup>55</sup>

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<sup>49</sup> See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005).

<sup>50</sup> *Cheney*, 542 U.S. at 370 (citing *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947)).

<sup>51</sup> *Cheney* 542 U.S. at 380 (citing *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

<sup>52</sup> *Review*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>53</sup> Crime Victims' Rights Act, Pub. L. 108-405, 118 Stat. 2260 (2004) (current version at 18 U.S.C. § 3771 (2012 & Supp. IV 2016)).

<sup>54</sup> Tobolowsky, *supra* note 12, at 110.

<sup>55</sup> See 10 U.S.C. § 806b(e)(3) (Supp. IV 2016) (delegating authority to the President to establish procedures for the filing of petitions for a writ of mandamus), *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203(g) (2016) [hereinafter MCM] (delegating the authority to the Judge Advocates General to establish means by which petitions for writs of mandamus are forwarded to the Courts of Criminal Appeals).

Finally, Article 6b(e) only authorizes appeals to the courts of criminal appeals for each military service. CAAF recently held that there is no authority to appeal decisions of a service CCA to CAAF.<sup>56</sup> This may lead to splits between the various service CCAs resulting in disparate treatment of crime victims in different branches of the military. Although Article 6b is still relatively new to the UCMJ, given that the JPP is considering recommendations on how to improve the enforcement mechanisms for victims' rights now is the perfect time to analyze the issues of confusion and propose solutions.<sup>57</sup> The first major source of confusion and disparity in how a victim's appeal is treated in the civilian versus military justice system is the standard of review applied by the courts.

#### A. Standard of Review

##### 1. Traditional Writ of Mandamus Principles

American jurisprudence regarding writs of mandamus goes back to the U.S. Supreme Court and *Marbury v. Madison*.<sup>58</sup> Mandamus is a writ issued by a court to compel a lower court or government body to correct a prior act or failure to act.<sup>59</sup> The Supreme Court has held the function of mandamus is to correct "an abuse of judicial power, or refusal to exercise it."<sup>60</sup>

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<sup>56</sup> *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016).

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(d)(2); additional duties added by National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(b)(1); additional duties added by the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 545.

<sup>58</sup> 5 U.S. 137 (1803). The case resulted from a petition to the Supreme Court by William Marbury who had been appointed Justice of the Peace in the District of Columbia by outgoing President John Adams. *Id.* at 138. Once the new President James Madison took office, he did not deliver the commission in favor of making a different appointment himself. *Id.* Marbury sought a writ of mandamus to order President Madison to deliver the commission. *Id.* While the Court declined to grant the writ, the Court established the basis for judicial review. *Id.* at 175, 179–80. The Court recognized that a writ of mandamus would have been the proper vehicle to order President Madison to deliver the commission but they found the law that Congress passed to give the Court original jurisdiction over the issue violated the Constitution. *Id.*

<sup>59</sup> *Mandamus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>60</sup> *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 31 (1943).

Since 1789, federal courts have had jurisdiction to consider petitions for writs of mandamus.<sup>61</sup> This authority was later updated and codified in the All Writs Act.<sup>62</sup> Under the All Writs Act, federal courts could grant all writs necessary or appropriate to aid the jurisdiction of that particular court.<sup>63</sup> The courts still retain discretion on whether to actually issue the writ, based on whether the writ was in line with traditional legal principles.<sup>64</sup>

In *Cheney v. United States District Court*,<sup>65</sup> a case decided during the time Congress was considering the CVRA, the Court again reviewed its mandamus jurisprudence. The Court quoted precedent that the extraordinary remedy of a writ of mandamus is justified only in “exceptional circumstances amounting to a judicial usurpation of power” or a “clear abuse of discretion.”<sup>66</sup> The *Cheney* Court also articulated the now commonly accepted three requirements for an issuance of a writ of mandamus: 1) there must be no other adequate means for the party requesting the writ to attain relief; 2) the petitioner must show a right to the issuance of the writ; and 3) issuance of the writ by the appellate court must be appropriate under the circumstances.<sup>67</sup> The Second Circuit later interpreted these requirements to mean that for the court to grant mandamus relief, petitioners must show a “usurpation of power, clear abuse of discretion and the presence of an issue of first impression.”<sup>68</sup> Accordingly, “mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ.”<sup>69</sup> This high standard carries with it almost insurmountable hurdles for petitioners, including victims of crime, to overcome.

## 2. *The Writ of Mandamus: History of Crime Victim Appeals*

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<sup>61</sup> The Judiciary Act of 1789, 1 Stat. 73 (1789).

<sup>62</sup> 28 U.S.C. § 1651 (2012).

<sup>63</sup> *Id.* § 1651(a).

<sup>64</sup> *Id.*

<sup>65</sup> 542 U.S. 367.

<sup>66</sup> *Id.* at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

<sup>67</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

<sup>68</sup> *In re “Agent Orange” Prod. Liab. Litig.*, 733 F.2d 10, 13 (2d Cir. 1984).

<sup>69</sup> *Id.*

Article 6b is in large part a mirror image of the CVRA with minor changes to include specific references to uniquely military proceedings such as Article 32 preliminary hearings.<sup>70</sup> Article 6b(e) authorizes victims to file a petition for a writ of mandamus, but it does not specify which standard of review an appellate court should apply in the review of a trial judge's decision.<sup>71</sup> When the CVRA was initially passed in 2004, the mandamus provision similarly did not specify a standard of review.<sup>72</sup> Following a split in the civilian circuit courts of appeals regarding the standard of review, Congress amended the CVRA's writ of mandamus provision in 2015 to reflect that appellate courts "shall apply ordinary standards of appellate review," which gives less deference to the ruling of a trial judge.<sup>73</sup> Although there is no legislative history to explain why Article 6b(e) leaves out the standard of review that appears in the CVRA, Congress should look to the history of the CVRA's mandamus provision for why it is necessary to amend Article 6b(e).<sup>74</sup>

*a. Legislative History of the CVRA's Mandamus Provision*

When the CVRA was introduced in Congress in 2004, Senator Dianne Feinstein, one of its primary co-sponsors, addressed the use of the mandamus provision:

And a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately appeal a denial of their rights by a trial court to the court of appeals, which will rule "forthwith." Simply put, the mandamus procedure allows an appellate court to take timely action to ensure that the trial court follows the rule of law set out in this statute.<sup>75</sup>

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<sup>70</sup> Compare 10 U.S.C. § 806b (Supp. IV 2016), with 18 U.S.C. § 3771 (2012 & Supp. IV 2016).

<sup>71</sup> 10 U.S.C. § 806b(e).

<sup>72</sup> 18 U.S.C. § 3771(e).

<sup>73</sup> *Id.* § 3771(d).

<sup>74</sup> See also Tobolowsky, *supra* note 12; Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U. L. REV. 599 (2010).

<sup>75</sup> 150 CONG. REC. S4, 261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

Senator Feinstein and Senator Jon Kyl, the other primary co-sponsor of the CVRA, elaborated on the importance of the mandamus provision:

Mrs. FEINSTEIN. ... I now want to turn to another critical aspect of enforcement of victims' rights, section 2, subsection (d)(3). This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim's right. This provision is critical for a couple reasons. First, it gives the victim standing to appeal before the appellate courts of this country and ask for review of a possible error below. Second, *while mandamus is generally discretionary, this provision means that courts must review these cases*. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. *This provision ensures review and encourages courts to broadly defend the victims' rights.*

Mr. President, does Senator KYL agree?

Mr. KYL. Absolutely. *Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred.* This country's appellate courts are designed to remedy errors of lower courts and this provision requires them to do so for victim's rights. For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning.<sup>76</sup>

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<sup>76</sup> *Id.* at 270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl) (emphasis added); *see also id.* at 271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); *id.* at 230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

Juxtaposing the *Cheney* Court's standard of "exceptional circumstances amounting to a judicial usurpation of power,"<sup>77</sup> and Senator Feinstein's calls for review to "broadly defend the victims' rights,"<sup>78</sup> it perhaps should have been clear that there would be conflict. After all, the traditional mandamus vehicle is an extraordinary writ, giving appellate courts discretion over whether to decide the merits of an appeal, whereas Congress clearly expressed a desire for victims to have a robust authority to appeal a trial judge's ruling. It did not take long for this conflict to manifest itself in a split among the federal appeals circuits.

*b. Second and Ninth Circuit Courts Adopt an Ordinary Standard of Appellate Review for CVRA Petitions*

The Second Circuit was the first appellate court to articulate a CVRA mandamus review standard in *In re W.R. Huff Asset Management Co.*<sup>79</sup> After considering traditional mandamus review standards, the Second Circuit looked to the "plain language" of the CVRA's mandamus remedy.<sup>80</sup> The Second Circuit found that Congress had chosen the mandamus remedy "as a mechanism by which a crime victim may appeal" a trial judge's denial of relief under the CVRA and thus a CVRA mandamus petitioner "need not overcome the hurdles" of a traditional mandamus review.<sup>81</sup>

The Ninth Circuit followed the Second Circuit's lead when it announced its CVRA mandamus review standard in *Kenna v. United States District Court*.<sup>82</sup> Noting that the "CVRA contemplates active review of orders denying victims' rights claims even in routine cases . . . . [T]he CVRA [mandamus provision creates] a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."<sup>83</sup> The Ninth Circuit applied an abuse of discretion or legal error standard to reviewing the lower court's ruling, rather than a traditional mandamus analysis.<sup>84</sup>

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<sup>77</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004).

<sup>78</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

<sup>79</sup> *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005).

<sup>80</sup> *Id.* at 562.

<sup>81</sup> *Id.*

<sup>82</sup> 435 F.3d 1011 (9th Cir. 2006).

<sup>83</sup> *Id.* at 1017.

<sup>84</sup> *Id.*



The Second and the Ninth Circuits established their view that an ordinary standard of appellate review should be applied. However, the Fifth and Tenth Circuits took a more literal reading of the CVRA and did not want to look to Congress' intent behind the legislation.

*c. Fifth and Tenth Circuit Courts Adopt an Extraordinary Standard of Appellate Review*

The Tenth Circuit was the first appellate circuit court to apply a traditional mandamus review standard when it “respectfully disagree[d]” with the Second and Ninth Circuits in *In re Antrobus*.<sup>85</sup> The Tenth Circuit noted that Congress “authorized and made use of the term ‘mandamus’” in the CVRA rather than terms such as “immediate appellate review” or “interlocutory appellate review” that Congress had previously used in statutes.<sup>86</sup> Citing the “plain language” of the CVRA, the Tenth Circuit applied “traditional” mandamus standards.<sup>87</sup> In a subsequent petition by the *Antrobus* petitioners, the Tenth Circuit referenced the mandamus remedy as a “well-worn term of art in our common law tradition.”<sup>88</sup>

The Fifth Circuit was the next circuit to adopt a traditional mandamus review standard regarding the CVRA in the petition of *In re Dean*.<sup>89</sup> The Fifth Circuit noted the split in the circuits and announced that it was in accordance with the Tenth Circuit's approach.<sup>90</sup> In *Dean* this standard led to the Fifth Circuit denying relief to a petitioner when the district court “misapplied the law and failed to accord the victims the [notice and ability to confer with the prosecutor] rights conferred by the CVRA,” because under traditional mandamus standards, relief was not appropriate.<sup>91</sup>

With the split in the circuits, the appeal by a victim in one area of the country was being held to a different standard than a similar appeal filed

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<sup>85</sup> 519 F.3d 1123, 1124 (10th Cir. 2008).

<sup>86</sup> *Id.* at 1124–25.

<sup>87</sup> *Id.* at 1125.

<sup>88</sup> *Id.* at 1127–28 (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004); *Morrisette v. United States*, 342 U.S. 246, 263 (1952); and *Marbury v. Madison*, 5 U.S. 137, 170–71 (1803)).

<sup>89</sup> 527 F.3d 391 (5th Cir. 2008).

<sup>90</sup> *Id.* at 393–94.

<sup>91</sup> *Id.* at 394.

in a different area. Congress or the Supreme Court would have to resolve the disagreement.

*d. Congress Resolves the Split in Favor of “Ordinary Standard of Appellate Review”*

Eleven years after passing the CVRA and years of division over the standard of review to be applied to CVRA appeals, Congress amended the CVRA to state explicitly that the appellate courts “shall apply ordinary standards of appellate review” in deciding CVRA mandamus petitions.<sup>92</sup> The CVRA was now clear: appellate courts would apply ordinary review standards including de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the trial court’s discretion.<sup>93</sup> Congress clearly identified the Second and Ninth Circuits as correctly interpreting the original intent behind the CVRA. Although the standard of review for a victim’s appeal in civilian courts was now clear, the CVRA was not being applied to crime victims in military courts.

*e. Consideration of Crime Victim Petitions for Writs of Mandamus in the Military*

In 2013, before Article 6b(e) was enacted, the U.S. Air Force Court of Criminal Appeals (AFCCA) in *LRM v. Kastenberg*,<sup>94</sup> concluded that it did not have jurisdiction to decide a victims’ mandamus petition.<sup>95</sup> In addition to denying its authority to issue the writ under the All Writs Act, AFCCA also held that the CVRA was a “generally applicable [victim rights]

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<sup>92</sup> See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113; see also Tobolowsky, *supra* note 12, at 171. The only discussion of the proposed legislative clarification of the CVRA mandamus review standard appears in the House of Representatives Committee on the Judiciary report: “This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims’ rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards.” H.R. REP. NO. 114-7, at 8 (2015).

<sup>93</sup> See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Huff*, 409 F.3d at 562.

<sup>94</sup> Not Reported in M.J., 2013 WL 1874790 (A.F. Ct. Crim. App. Apr. 2, 2013).

<sup>95</sup> *Id.* at \*5.

statute” that did not apply to the military court-martial system.<sup>96</sup> The victim appealed AFCCA’s decision to CAAF. The court reversed AFCCA with respect to the authority to consider a petition for a writ of mandamus although the court ultimately declined to issue a writ in that case.<sup>97</sup> Neither AFCCA nor CAAF ultimately articulated the standard that they would apply when considering a victim’s petition for a writ of mandamus.

The Army Court of Criminal Appeals (ACCA) in *CC v. Lippert* considered the first Army mandamus petition from a victim’s Special Victim Counsel (SVC) when the military judge ordered disclosure of a victim’s mental health records without conducting an evidentiary hearing as required by Military Rule of Evidence (MRE) 513.<sup>98</sup> Although the procedures outlined in MRE 513 are clear that the military judge must hold a hearing prior to ordering the production (even for *in camera* review) of privileged mental health records, the military judge in this case ordered production for an *in camera* review based simply on the request by defense counsel.<sup>99</sup> Again, this appeal was made prior to the enactment of Article 6b(e), so the victim relied on the All Writs Act for the authority to file the appeal. The court did not address the standard of review it used to analyze the question, seemingly because it was immediately evident from the record that the military judge had erred by not following the process required under MRE 513.<sup>100</sup> ACCA granted the victim’s petition and sent the matter back to the military judge with the instruction that a hearing be held before the production of any mental health records.<sup>101</sup>

Two months later, ACCA received a similar mandamus petition in *HC v. Bridges*.<sup>102</sup> At the trial court, a scheduling conflict arose when the victim’s SVC was unavailable for the trial date set by the military judge.<sup>103</sup> Prior to setting the trial date, the military judge consulted with counsel for the government and defense, but not with counsel for the victim.<sup>104</sup> The military judge refused to alter the trial date after a request by the SVC, because the victim and by extension the victim’s counsel, are not parties

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<sup>96</sup> *Id.* at \*6.

<sup>97</sup> LRM v. Kastenber, 72 M.J. 364 (C.A.A.F. 2013).

<sup>98</sup> *CC v. Lippert*, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *HC v. Bridges*, ARMY MISC 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (order).

<sup>103</sup> *Id.* at 2–3.

<sup>104</sup> *Id.* at 3.

to the proceedings.<sup>105</sup> Significantly, the government later requested a continuance based on the victim's insistence that she be accompanied by her SVC during the trial.<sup>106</sup> In response, the defense filed a request for a speedy trial because the continuance requested by the government and the SVC would have delayed the trial date significantly.<sup>107</sup> The military judge denied the request for a continuance and the SVC filed the mandamus petition using the All Writs Act for authority, as Article 6b(e) still had not been enacted.<sup>108</sup> ACCA denied the petition based on the fact that the victim is not a party to the proceedings and that they could find no abuse of discretion in the military judge's balancing the request for a continuance with the accused's constitutional right to a speedy trial.<sup>109</sup>

The facts of the case and the court's ruling are not the most significant takeaways from this case. In analyzing its jurisdiction to review the petition, ACCA cited the All Writs Act but it also cited *Kastenberg* for the proposition that while victims are not a party to the proceedings, they are not "strangers," and they enjoy "limited participant standing," and may therefore file interlocutory matters.<sup>110</sup> This recognition of authority to file interlocutory matters is significant because CAAF, in the 2013 *Kastenberg* decision, was the first military court to recognize this authority.<sup>111</sup> In *HC v. Bridges*, ACCA begins to apply CAAF's recognition of victims as having an interest in the proceedings and standing that is on par with those of the government and defense.<sup>112</sup>

In denying HC's petition, ACCA held that the petitioner failed to satisfy each of the traditional extraordinary writ threshold requirements for writs of mandamus.<sup>113</sup> For the first time, ACCA applied the *Cheney*

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6–7.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

<sup>112</sup> *HC*, ARMY MISC 20140793 at 3.

<sup>113</sup> *Id.* at 4–7 (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)). With respect to the three threshold requirements, the Court held: (1) petitioning an appellate court to deconflict the calendar and schedules of multiple parties at a court-martial is not an appropriate remedy, and the Rules for Practice Before Army Courts-Martial provide no remedy or relief for failing to follow procedural rules (in this case the SVC failed to follow procedural rules of providing notice of conflict dates to the trial counsel); (2) there was no clear and indisputable right to issuance of the writ because the right to status as a party to the court-martial and therefore the authority to influence the scheduling of the proceedings is not a right provided by case law or in Article 6b; and (3) the issuance of a writ in this

standard for extraordinary writs to an appeal by a victim of crime.<sup>114</sup> The application of the extraordinary writ standard was not altogether unexpected because Article 6b(e) had not been enacted yet, so the appeal was filed under the All Writs Act.<sup>115</sup>

*f. Military Courts Have Applied an Extraordinary Standard of Appellate Review to Article 6b(e) Mandamus Petitions.*

Article 6b(e) was enacted in December 2014, creating a new jurisdictional authority for appeal by victims. In the two years following enactment of Article 6b(e), military courts have consistently applied traditional extraordinary writ standards of review, and there has been no discussion of whether Congress intended a different standard of review for Article 6b(e) appeals. The written orders coming from ACCA have included a statement of jurisdiction and the standard of review with absolutely no analysis. This is in stark contrast to the extensive analysis conducted by the civilian courts after the passage of the CVRA, often amounting to multiple pages of discussion. While the sample size is small and the service appellate courts have not given a thorough analysis of the standard of review, only two military courts have even published opinions articulating a standard of review.<sup>116</sup> Both ACCA and the Coast Guard Court of Criminal Appeals (CGCCA) use the traditional mandamus review standard when they refer to petitions as requests for *extraordinary relief*<sup>117</sup> even though the term *extraordinary* does not appear in the language of Article 6b.<sup>118</sup>

*DB v. Lippert* was the first published opinion in a case where the appeal was filed under the Article 6b(e) mandamus provision.<sup>119</sup> The case involved a military judge's ruling regarding production of privileged mental health records of an alleged sexual assault victim. The military

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circumstance would not be appropriate because there was no evidence that the military judge abused his discretion in denying the SVC's request for a continuance. *HC*, ARMY MISC 20140793 at 5–6.

<sup>114</sup> *Id.* at 4 (citing *Hasan*, 71 M.J. at 418; *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)).

<sup>115</sup> *HC*, ARMY MISC 20140793 at 3.

<sup>116</sup> *HV v. Kitchen*, 75 M.J. 717, 718 (C.G. Ct. Crim. App. 2016); *DB v. Lippert*, 2016 WL 381436, at \*2 (A. Ct. Crim. App. Feb. 1, 2016). Other petitions have resulted in unpublished orders and not published opinions from the Courts of Criminal Appeals.

<sup>117</sup> *Id.*

<sup>118</sup> 10 U.S.C. § 806b(e) (Supp. IV 2016).

<sup>119</sup> 2016 WL 381436, at \*1 (A. Ct. Crim. App. Feb. 1, 2016).

judge ordered the government to produce the victim's mental health records for an *in camera* review before the defense had even submitted a request for the records and before holding a hearing in accordance with MRE 513.<sup>120</sup> The defense filed a motion requesting production of the records after the military judge had already ordered the government to issue a subpoena for production of the records.<sup>121</sup> The military judge eventually did hold a hearing to address the defense motion.<sup>122</sup> The military judge noted his error in ordering production before the hearing had occurred and stated that while the records had already been obtained by the government, he had not reviewed the records prior to the hearing.<sup>123</sup> At the hearing, neither the government nor the defense presented any evidence or called any witnesses.<sup>124</sup>

MRE 513 establishes that a patient has a privilege to refuse to disclose and prevent any other person from disclosing the patient's mental health records.<sup>125</sup> Before the privilege can be overcome, a party must file a written motion, the military judge must hold a hearing, and the military judge must find by a preponderance of the evidence that: 1) there is a specific factual basis demonstrating a likelihood that the records would be admissible; 2) the records meet one of the exceptions to the privilege; 3) the records are not cumulative of other available evidence; and 4) the moving party attempted to obtain the same information through non-privileged sources.<sup>126</sup> Despite the fact that neither party presented evidence at the hearing, the judge issued a verbal ruling that he would conduct an *in camera* review of the records. Following that review, the judge emailed the parties stating that he would disclose "numerous" records.<sup>127</sup> The victim's SVC requested reconsideration by the military judge, which was granted. However, the judge reaffirmed his ruling.<sup>128</sup> The SVC subsequently petitioned ACCA for a writ of mandamus citing Article 6b(e).

The analysis by ACCA first establishes that Article 6b(e) created a new and separate statutory authority for military appellate courts to

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<sup>120</sup> *Id.* at \*4.

<sup>121</sup> *Id.* at \*3.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*4 (citing MCM, *supra* note 55, MIL. R. EVID. 513 (2012)).

<sup>126</sup> *Id.*

<sup>127</sup> DB v. Lippert, 2016 WL 381436, at \*3–4 (A. Ct. Crim. App. Feb. 1, 2016).

<sup>128</sup> *Id.* at \*4.

consider writs from victims of crime.<sup>129</sup> This is significant because up until this point the only authority for a military court of appeals to consider a petition for a writ of mandamus was through the All Writs Act.<sup>130</sup> In other words, this was the first Army case to use Article 6b's new appellate enforcement mechanism.

The ACCA opinion provides no analysis of the standard of review and only dedicates a single paragraph to stating the standard of review as the *Cheney* three-pronged test.<sup>131</sup> The court does not discuss the level of deference to be applied to the military judge's ruling; however, the *Cheney* Court described a writ of mandamus as being "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes,'" suggesting that they would normally give extreme deference to the trial judge.<sup>132</sup>

Unfortunately the actions of this particular judge make it difficult to determine the level of deference the court would apply to the rulings of any other lower court. Less than a year before the military judge's actions in this case, ACCA had directed the same judge to follow MRE 513's requirement to conduct a hearing before ordering production of privileged mental health records.<sup>133</sup> As this was the military judge's second time failing to follow MRE 513's procedures and a prior decision of the appellate court in just a one-year period, ACCA gave little deference to his ruling.

The court found that the military judge's decision to release the privileged materials was a clear abuse of discretion. The court declined to find that the records were inadmissible because a proper hearing had never been held.<sup>134</sup> ACCA set aside the military judge's ruling and remanded the issue for the judge to hold a hearing and make proper findings.<sup>135</sup> This

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<sup>129</sup> *Id.* at \*2.

<sup>130</sup> All Writs Act, 28 U.S.C. § 1615(a) (2012).

<sup>131</sup> *DB*, 2016 WL 381436, at \*2 (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)).

<sup>132</sup> *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

<sup>133</sup> *DB*, 2016 WL 381436, at \*4 ("[L]ess than a year prior to the military judge's actions in this case, we were required to direct that this same judge follow this same rule. Finally, ordering the production of privileged mental health records 'for the purpose of an in camera review' prior to receiving any motion or conducting a hearing may undermine public confidence in the fairness of the court-martial proceedings.").

<sup>134</sup> *Id.* at \*11.

<sup>135</sup> *Id.*

left open the possibility that the privilege could be pierced if the defense could make a sufficient showing at a new hearing.<sup>136</sup>

The only other published opinion by a service CCA dealing with an Article 6b(e) appeal is from the U.S. Coast Guard in *HV v. Kitchen*.<sup>137</sup> Similar to *DB v. Lippert*, at trial the defense moved to compel production of the alleged victim's mental health records. The military judge held a hearing and then ruled that MRE 513 did "not prevent the disclosure of dates on which a patient was treated, the identity of the provider, the diagnostic code, or the therapies used."<sup>138</sup> The military judge ordered the government to produce for the defense the portions of the victim's mental health records pertaining to psychiatric diagnosis, medications prescribed and their duration, therapies used, and information relating to any resolution of the diagnosed condition.<sup>139</sup> The victim filed a petition for a writ of mandamus asking CGCCA to overturn the military judge's ruling and find that the privilege covering a patient's communications also extends to the psychotherapist's conclusions and resulting treatments.<sup>140</sup>

Unfortunately, the CGCCA gives an even more abridged recitation of the standard of review, citing the traditional three-element test for the issuance of a writ of mandamus with no discussion of the deference to be given to the trial judge.<sup>141</sup> The CGCCA cites *Hasan v. Gross*, a CAAF case as authority for the standard of review.<sup>142</sup> In *Hasan*, CAAF clearly articulated a traditional mandamus review with threshold requirements for a petitioner to succeed when the court held that there is a "heightened standard required for mandamus relief."<sup>143</sup> In CGCCA's analysis, it does not mention "deference" or "abuse of discretion" at all.<sup>144</sup> Without stating as much, CGCCA appears to review the issue of what psychotherapist information is privileged under MRE 513 *de novo*.<sup>145</sup> The court identified the issue as one of first impression for military and civilian appellate courts.<sup>146</sup> After analyzing arguments from a handful of federal district court cases, the CGCCA held that a patient's diagnosis and treatment does

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<sup>136</sup> *Id.*

<sup>137</sup> *HV v. Kitchen*, 75 M.J. 717, 718 (C.G. Ct. Crim. App. 2016).

<sup>138</sup> *Id.* at 718.

<sup>139</sup> *Id.* at 717–18.

<sup>140</sup> *Id.* at 717–19.

<sup>141</sup> *Id.* at 717–18 (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)).

<sup>142</sup> *HV*, 75 M.J. at 717–18 (citing *Hasan*, 71 M.J. at 418).

<sup>143</sup> *Hasan*, 71 M.J. at 416–17.

<sup>144</sup> *HV*, 75 M.J. at 717.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 719.



fall within the privilege in MRE 513. The court reasoned that a psychotherapist's diagnosis and treatment plan is directly based on the communications and descriptions of symptoms that the provider received from a patient and releasing the information would therefore necessarily breach the privilege.<sup>147</sup> The court found that dates of treatment and the identity of the provider are not covered by the privilege but declined to address whether this information would even be considered relevant without the details of those appointments, leaving that question to the trial judge.<sup>148</sup> The CGCCA held that the judge erred as a matter of law.<sup>149</sup>

In these two cases, the courts appear to apply the same standard, but they provide very little discussion or analysis of why they are applying that standard of review. The lack of published opinions from the CCAs on Article 6b(e) petitions and their lack of discussion of the standard of review is illustrative of the need for the standard to be clearly defined by Congress.

### *3. Article 6b(e) Should be Amended to Specify an "Ordinary Standard of Appellate Review"*

The standard of review and the level of deference an appellate court gives to a trial judge's ruling should be added to Article 6b(e) to ensure the rights of victims are protected, to ensure equal treatment across the military branches of service, and to assist in preventing the circuit splits that occurred in civilian courts after the initial passage of the CVRA. The *Congressional Record* makes it clear that Congress intended a mechanism less deferential to the ruling of the trial judge than the writ of mandamus for protecting the rights of victims of crime.<sup>150</sup> Beyond the evidence from the *Congressional Record* surrounding the passage of the CVRA, Congress amended the CVRA to provide for an *ordinary* standard of review rather than the *extraordinary* standard traditionally applied to mandamus review.<sup>151</sup> Nevertheless, the mandamus remedy is an

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Cassell, *supra* note 74 at 600.

<sup>151</sup> See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113; See also Tobolowsky, *supra* note 12 at 171. The only discussion of the proposed legislative clarification of the CVRA mandamus review standard appears in the House of Representatives Committee on the Judiciary report: This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for the Central District of*

important component of both Article 6b and the CVRA.<sup>152</sup> Congress should learn from the history of the CVRA's 2008 amendment, and should amend Article 6b to include a defined standard of review as soon as possible.

As previously mentioned, there are three ordinary appellate review standards: de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the lower court's discretion.<sup>153</sup> These standards form the basis of the understanding of "ordinary standards of appellate review," first identified by the Second and Ninth Circuits and then subsequently endorsed by Congress' amendment of the CVRA.<sup>154</sup>

To understand the difference between *ordinary* and *extraordinary* standards of review, it is helpful to understand that both apply the same ordinary standards. For example under ordinary standards of review, decisions where the trial judge has discretion are reviewed for an abuse of discretion, as opposed to questions of law, which are reviewed de novo.<sup>155</sup> The difference is that an *extraordinary* standard applies to threshold questions before an appellate court can even get to the ordinary standard of review of the trial judge's decision. The writ of mandamus has traditionally been considered an extraordinary writ, meaning that before analyzing the decision, the court must find that the issue is somehow novel,<sup>156</sup> that the relief sought is the only possible option for relief,<sup>157</sup> or that there has been a true "usurpation of power"<sup>158</sup> by the trial judge. If the court doesn't find that the appeal satisfies these threshold requirements, the court will not even consider whether the judge abused his discretion. These threshold standards in effect make the review of the alleged violation of the victims' rights discretionary for the CCA, allowing the court to pick and choose what appeals they want to review on the merits of the military judge's ruling. Instead, it appears Congress intended to

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*California*, 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims' rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards. H.R. REP. NO. 114-7, at 8 (2015).

<sup>152</sup> Tobolowsky, *supra* note 12 at 169.

<sup>153</sup> *Huff*, 409 F.3d at 562 (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*; *Pierce*, 487 U.S. at 558.

<sup>156</sup> *Huff*, 409 F.3d at 562.

<sup>157</sup> *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

<sup>158</sup> *Will v. United States*, 389 U.S. 90, 95 (1967).

provide victims an avenue to petition the appellate court to review any ruling of a military judge that implicates Article 6b rights.<sup>159</sup>

While one alternative would be to amend Article 6b(e) to replace the mandamus mechanism with a more generic term such as “interlocutory appeal,” there are benefits to keeping an improved mandamus system. First, a mandamus system will maintain the similarity between the military and civilian practices, leading to the opportunity to compare outcomes and hopefully achieve equitable results. Second, because civilian courts are using mandamus “under ordinary standards of review,” military courts would be able to look to civilian case law as persuasive authority in analyzing military petitions.<sup>160</sup> With Article 6b(e) in its infancy and only two published opinions from military appellate courts, military courts would greatly benefit from the analysis of the CVRA made by their civilian counterparts.

It is worth noting that the results in *DB v. Lippert* and *HV v. Kitchen* would have been the same under this alternative because, in each case, the court found that the extraordinary writ thresholds had been met so they progressed to applying the ordinary standards of review. *DB v. Lippert* dealt with an appeal of the trial judge’s decision to review mental health records without following the procedures outlined in MRE 513.<sup>161</sup> The trial judge’s decision was reviewed for an abuse of discretion.<sup>162</sup> In *HV v. Kitchen*, the CGCCA dealt with a question of which pieces of a patient’s mental health records were privileged under MRE 513.<sup>163</sup> Whether MRE 513 extends to information such as a diagnosis or specific treatments is a question of law, which received a de novo review.<sup>164</sup> If Article 6b(e) clearly stated Congress’ intended ordinary standard of review, the CCAs would not have stopped at threshold questions and would have actually addressed the decisions of the lower court judges. The result would be the

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<sup>159</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl) (emphasis added); *see also id.* at 271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); *id.* at 230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

<sup>160</sup> *See LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013) (discussing the rights of third parties to assert their interests in preventing the disclosure of materials by looking to practices in numerous civilian federal civilian courts).

<sup>161</sup> *DB v. Lippert*, 2016 WL 381436, at \*11 (A. Ct. Crim. App. Feb. 1, 2016).

<sup>162</sup> *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005) (referencing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

<sup>163</sup> *HV v. Kitchen*, 75 M.J. 717, 718 (C.G. Ct. Crim. App. 2016).

<sup>164</sup> *Huff*, 409 F.3d at 562 (citing *Pierce*, 487 U.S. at 558).

protection of victims' rights and additional precedent for practitioners in the area of rights and privileges of victims.

Congress should amend Article 6b to clarify its intentions. Congress' goal was not to add "mandamus hurdles," such as requiring a "novel and significant legal question"<sup>165</sup> to be raised; rather, their expectation was that Article 6b would provide a meaningful process for alleged impermissible violations of a victim's rights to be reviewed.<sup>166</sup> The primary sponsor of the CVRA, Senator Feinstein, made it clear that the mandamus provision included in the law was fundamentally different from traditional mandamus review. On the floor of the Senate, Senator Feinstein stated, "while mandamus is generally discretionary, this provision means that courts must review these cases."<sup>167</sup> Amending Article 6b would benefit counsel and the courts by producing a more predictable analysis of petitions. The initial split in the federal circuit courts of appeals and Congress' amendment of the CVRA proves that amending the language would make a difference.

Amending Article 6b is not the only improvement needed to clarify a victim's interlocutory appeal rights. Guidance is also needed on what procedures must be followed by victims and the courts when an appeal is filed.

## B. Procedural Improvements

There are no current rules or procedures that specifically address a victim's filing of a writ of mandamus petition with the CCAs. RCM 1203 places the responsibility for creating procedures on the Judge Advocate Generals of each military service.<sup>168</sup> This is an unacceptable and unsustainable state of the law and it should be remedied through the amendment of Article 6b and the enactment of a new provision in the RCM. These amendments would make process for filing petitions similar to the requirements of the CVRA and Article 62, UCMJ.

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<sup>165</sup> *Huff*, 409 F.3d at 562.

<sup>166</sup> 150 CONG. REC. S4, 270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl) (emphasis added); *see also Id.* at 271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); *Id.* at 230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

<sup>167</sup> *Id.* at 270 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

<sup>168</sup> MCM, *supra* note 55, R.C.M. 1203(g).

### *1. Requirements for Filing Petitions*

Article 6b simply provides that a petition for a writ of mandamus should be filed with the CCA “by such means as may be prescribed by the President.”<sup>169</sup> While the President issued an executive order requiring the Judge Advocate General of each service to establish procedures for petitions to be filed, it does not appear that the services have issued any particular guidance as of the time of the drafting of this paper.<sup>170</sup> The lack of implementing guidance may serve to discourage victims from asserting their rights or at least result in inconsistent quality and uniformity in petitions for relief. The UCMJ already lays out specific procedural requirements for appeals by the Government, which can be used as an outline for Article 6b filings.<sup>171</sup>

Procedural guidance should contain, at a minimum, rules regarding the notice that must be given to parties and the trial judge of the intent to appeal, the effect on the court-martial, and who should act as appellate counsel. RCM 908 addresses each of these issues when the Government elects to file an appeal, and would be a helpful starting point for analysis.<sup>172</sup>

When the Government elects to appeal, counsel must inform the court and the defense that they are considering whether to file an appeal and then request a continuance of no more than 72 hours.<sup>173</sup> Government counsel must decide whether to file an appeal within that 72 hours, and if they decide to appeal, written notice must be served on the military judge and defense counsel, identifying the ruling or order that is being appealed.<sup>174</sup> Government counsel must then “promptly and by expeditious means” file their appeal with the appellate court.<sup>175</sup> If the government decides not to file an appeal, counsel must immediately notify the military judge and the defense so that the stay may be lifted.<sup>176</sup>

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<sup>169</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016).

<sup>170</sup> Exec. Order. No. 13730, 81 Fed. Reg. 33331, 18 (May 20, 2016) (Annex, Section 1(yy)) (adding R.C.M. 1203(g) to the Manual for Courts-Martial).

<sup>171</sup> MCM, *supra* note 55, R.C.M. 908.

<sup>172</sup> *Id.*, R.C.M. 908.

<sup>173</sup> *Id.*, R.C.M. 908(b)(1).

<sup>174</sup> *Id.*, R.C.M. 908(b)(2)–(3).

<sup>175</sup> *Id.*, R.C.M. 908(b)(6).

<sup>176</sup> *Id.*, R.C.M. 908(b)(8).

The procedures of R.C.M. 908 could be easily applied to victim appeals. Despite the concern that continuances may become more prevalent, in the 18 months from June 1, 2014, until January 1, 2017, ACCA only received five mandamus petitions from victims.<sup>177</sup> All five of the petitions filed included a request for a stay of the proceedings until ACCA could consider the petition and the stay was granted in each case in which the appeal was likely to impact the established trial date.<sup>178</sup> Therefore, the concern that the right to appeal would unduly burden or slow down the system is not supported by the evidence. An automatic stay would allow the SVC the opportunity to consider whether to appeal the issue in question without concern for whether the issue could be mooted by the military judge's ruling. In many of these cases, disclosure of privileged information is at issue and once disclosed, the writ is moot. The remaining provisions regarding notice and timely filing, serve to ensure the parties are informed and that the appeal is expedited.

There is one major concern with applying the RCM 908 construct to victim appeals. RCM 908 requires trial counsel to forward their appeal to "a representative of the Government designated by the Judge Advocate General."<sup>179</sup> Army regulations go further by providing that the appeal can only be filed with the appellate court if that representative, the Chief of the Government Appellate Division, approves of the filing.<sup>180</sup> Defense counsel do not have a similar requirement, presumably because their responsibility to zealously represent their client should not be abridged by the judgment of an official in a military chain of command.<sup>181</sup> While it

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<sup>177</sup> This assertion is based on the author's recent communication with the Clerk of Court's Office, U.S. Army Court of Criminal Appeals, and personally traveling to the Court to examine the records of petitions filed by Special Victims Counsel from the time period of June 1, 2014 thru January 1, 2017. The five petitions were: CC v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. 16 Oct. 2014) (order); SC v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. 12 Nov. 2014) (order); HC v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. 1 Dec. 2014) (order); AT v. Lippert, ARMY MISC 20150387 (A. Ct. Crim. App. 11 Jun. 2015), DB v. Lippert, 2016 WL 381436 (A. Ct. Crim. App. 1 Feb. 2016) [hereinafter Army Mandamus Petitions].

<sup>178</sup> Army Mandamus Petitions, *supra* note 177.

<sup>179</sup> MCM, *supra* note 55, R.C.M. 908(b)(6).

<sup>180</sup> AR 27-10, para. 12-3.

<sup>181</sup> There is no RCM that provides procedural rules for defense counsel to file an interlocutory appeal, as they are instead governed by the All Writs Act. 28 U.S.C. § 1651(a) (2012). Interlocutory appeals by defense counsel are rare, likely due to the fact that the issues can be addressed in a post-trial appeal of a conviction. The Government would be prevented from filing a post-trial appeal of an evidentiary ruling because double jeopardy would apply after an acquittal. Victims have been granted the authority to file a

would undoubtedly benefit an SVC to consult with an experienced appellate practitioner when deciding to draft an appeal, it would not be appropriate to require a victim appellate division to approve or disapprove the appeal because in the end, that decision should rest with the client and their counsel.

While the services may have differences in the way they formed victims' counsel organizations, procedures for filing appeals are the same for the government and defense to file appeals regardless of their branch of service, and they should also be the same for victims. As such, the President should use his authority to issue procedural rules for courts-martial and either issue a new RCM or amend RCM 1203(g) to provide victims with easy-to-understand and uniform procedures for filing appeals.<sup>182</sup>

## 2. *Requirements for the Appellate Court to Respond*

Timelines for the appellate courts to process petitions, and a requirement that the courts issue written opinions that clearly outline the reasons for granting or denying the petition, are required in order to advance the procedural justice rights of victims and to advance case law in this new area of military jurisprudence. The CVRA contains these procedures for the civilian federal court system and the rationale for the requirements apply equally to the military justice system.<sup>183</sup>

Even without statutory requirements, ACCA has generally responded to petitions in a timely manner<sup>184</sup> and it has also issued written responses to all petitions filed with the court.<sup>185</sup> ACCA's written responses have come in the form of unpublished orders.<sup>186</sup> The orders contain limited analysis and—by virtue of the fact that they are unpublished—they have limited value to practitioners in the field.

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petition for a writ of mandamus under Article 6b. 10 U.S.C. § 806b(e) (Supp. IV 2016). The procedural rules should more closely match those of the Government because their interests in preserving evidentiary issues before a verdict is issued and double jeopardy may apply are more closely analogous.

<sup>182</sup> See *infra* Appendix D.

<sup>183</sup> 18 U.S.C. § 3771(d)(3) (Supp. IV 2016).

<sup>184</sup> See *infra* Appendix B.

<sup>185</sup> See *infra* Appendix A.

<sup>186</sup> Army Mandamus Petitions, *supra* note 177.

In the two years following *Kastenber*, ACCA has issued orders in response to petitioners in as few as two days<sup>187</sup> and as long as 70 days.<sup>188</sup> The time it has taken for ACCA to decide petitions has steadily increased over these two years as the court has increasingly invited amicus curiae from the SVC programs of other military services, as well as civilian victims' rights organizations.<sup>189</sup> The longer it takes the CCA to decide a petition, the greater the impact on the accused and the government's case. For example, accused faces continued stigma, could be subjected to extended pre-trial confinement,<sup>190</sup> and the government could be forced to expend more resources for witness travel and lodging.<sup>191</sup>

The CVRA requires the court of appeals to take up a petition within 72 hours of being filed unless the parties and the court agree to an extended time period.<sup>192</sup> Article 6b(e) provides that "to the extent practicable, [petitions] shall have priority over all other proceedings before the court."<sup>193</sup> ACCA has demonstrated the ability to respond to a petition within as few as 48 hours so the timeline provided in the CVRA would not be completely unreasonable.<sup>194</sup> The petitions that have taken longer to decide have been due to ACCA's solicitation of amicus curiae.<sup>195</sup> Under the CVRA, the government and defense can agree to extend the timeline for the appellate court to decide the petition so amicus can be solicited.<sup>196</sup> Military appellate court judges are generally less experienced and under-resourced compared to their civilian counterparts, so it is reasonable to

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<sup>187</sup> CC v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).

<sup>188</sup> DB v. Lippert, 2016 WL 381436, at \*1 (A. Ct. Crim. App. Feb. 1, 2016). ACCA requested Amicus Curiae from the SVC programs of other military branches as well as civilian victims' rights organizations, which delayed the decision in this case.

<sup>189</sup> See *infra* Appendix B.

<sup>190</sup> In order to address speedy trial issues, the CVRA provides that the continuance will be no more than five days. 18 U.S.C. § 3771(d)(3) (Supp. IV 2016). The same section requires the court of appeals to decide petitions within 72 hours. *Id.* A similar limit on the continuance could be implemented in Article 6b but the length may be different depending on how long the service courts of criminal appeals have to decide petitions.

<sup>191</sup> Under the military justice system, the government is responsible for resourcing witness travel and expert witness expenses for both government and defense witnesses. MCM, *supra* note 55, R.C.M. 703(b).

<sup>192</sup> 18 U.S.C. § 3771(d)(3).

<sup>193</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016). Pending legislation passed by the House will make this into its own sentence and revise the language to read: "To the extent practicable, such a petition shall have priority over all other proceedings before the Court of Criminal Appeals." H.R. 2810, 115th Cong., 1st Session.

<sup>194</sup> CC v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).

<sup>195</sup> See *infra* Appendix B.

<sup>196</sup> 18 U.S.C. § 3771(d)(3).



extend the timeline beyond 72 hours. Even with those challenges, setting a standard for an expedited appeal would allow parties to better predict the impact of the appeal on a trial, and it would bring the military justice system more in line with civilian federal courts.<sup>197</sup>

The CVRA includes a requirement for the court of appeals to issue a written opinion clearly stating the reasons for the denial of a petition.<sup>198</sup> As noted earlier, ACCA has issued written orders in response to all of the petitions that have been received from victims, although the level of detail regarding the reasons for denial have varied.<sup>199</sup> Because the courts are already issuing written orders, codifying this requirement with an emphasis on explaining the reasons for a denial would only serve to improve military justice practice. With increased transparency in the form of published opinions from the CCAs, oversight by CAAF will be even more important to resolve any potential split among the CCAs and their interpretation of victims' rights.

### C. CAAF Review of CCA Decisions

When Congress enacted Article 6b(e) in 2014, it added the authority for victims to file petitions for writs of mandamus with "the Court of Criminal Appeals."<sup>200</sup> There is no mention whatsoever of the authority to file appeals with any other court or to appeal decisions from the CCA.<sup>201</sup>

In 2016, CAAF heard the case of *EV v. United States*, where a victim sought to appeal the denial of a writ of mandamus by the Navy-Marine Corps Court of Criminal Appeals (NMCCA).<sup>202</sup> The accused in the case was seeking discovery of the victim's mental health records.<sup>203</sup> The military judge, after conducting a hearing under MRE 513, conducted an in camera review and ordered portions of the victim's records to be turned over to the Defense.<sup>204</sup> In analyzing its authority to hear the appeal, CAAF

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<sup>197</sup> See Judicial Proceedings Panel (Sept. 23, 2016) [hereinafter *September 2016 JPP*] (statements of Judge James Baker, Rear Admiral (Ret.) Christian Reismeier, Colonel (Ret.) William Orr Jr., and Colonel (Ret.) Denise Lind), [http://jpp.whs.mil/Public/docs/05-Transcripts/20160923\\_Transcript\\_Final.pdf](http://jpp.whs.mil/Public/docs/05-Transcripts/20160923_Transcript_Final.pdf).

<sup>198</sup> 18 U.S.C. § 3771(d)(3).

<sup>199</sup> Army Mandamus Petitions, *supra* note 177.

<sup>200</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016).

<sup>201</sup> 10 U.S.C. § 806b.

<sup>202</sup> 75 M.J. 331 (2016).

<sup>203</sup> *Id.* at 332–33.

<sup>204</sup> *Id.*

first determined that while they had authority to grant mandamus and other writs under the All Writs Act, the All Writs Act was not itself a source of jurisdiction.<sup>205</sup> The All Writs Act could only be used to aid a court in the exercise of its jurisdiction.<sup>206</sup> This was the rationale CAAF applied in deciding *Kastenberg*.<sup>207</sup> Because Congress passed Article 6b(e) as an independent means of victims to file appeals, the jurisdictional landscape had changed, and CAAF examined Article 6b(e) to determine whether it granted CAAF authority to review the appeal from the NMCCA.<sup>208</sup> The court dispensed with this review quickly by stating, “[T]he statute is quite straightforward. It is a clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals . . . .”<sup>209</sup> The court noted that there is no mention of CAAF in Article 6b(e) and although Congress could have provided for review of a CCA decision, “it did not.”<sup>210</sup> The court went even further to clarify that the court’s holding in *Kastenberg* also did not provide jurisdiction because *Kastenberg* was decided before Congress enacted legislation in the area of victims’ rights and since Congress acted, the court was bound by the new regime Congress put in place.<sup>211</sup>

During a time when victims’ rights in the military have received so much scrutiny by Congress, it seems incongruous that Congress would go through the effort of creating a victims’ right—the right to file a writ of mandamus—but then severely limit its use through the application of the high hurdles of the *Cheney* standard and then restriction of the reviewing court to only the CCA. Likewise, it makes no sense that Congress would draft Article 6b to create the very same level of authority already granted by the All Writs Act. The authority to file a mandamus petition under standards of extraordinary review had already been recognized by CAAF in *Kastenberg*.<sup>212</sup> The only logical understanding is that Congress intended to create a system whereby the CCA would thoroughly review all petitions from victims and that these reviews would be uniformly conducted across the service courts as ensured by their higher court, CAAF.

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<sup>205</sup> *Id.* at 333.

<sup>206</sup> *Id.*

<sup>207</sup> LRM v. *Kastenberg*, 72 M.J. 364, 372 (C.A.A.F. 2013).

<sup>208</sup> 75 M.J. 331, 333 (C.A.A.F. 2016).

<sup>209</sup> *Id.* at 334.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Kastenberg*, 72 M.J. 364.

Nonetheless, CAAF correctly points out that Article 6b(e) is brief and clearly identifies the CCA and no other court.<sup>213</sup> While one could argue that limiting appeals to only one court serves the interest of judicial economy, the impact of victim mandamus petitions appears minimal based on the evidence of few appeals having been filed with the Army in the first two years since *Kastenber*.<sup>214</sup> Additionally, oversight by CAAF would assist in ensuring that there is equal treatment of mandamus petitions across the service CCAs and equal treatment of victims across the military services.

Adding the authority to appeal denials from the CCA to CAAF would be a simple amendment. The JPP held hearings on this issue in 2016, and in November voted to recommend Congress amend Article 6b to add the authority to file appeals to CAAF.<sup>215</sup>

Improving Article 6b(e)'s interlocutory appeal provision is essential to clarifying the current enforcement mechanism for victims' rights in the military. The next level of concern is the lack of authority to protect a victim's rights and privileges during the post-trial appellate process.

### III. Post-Trial Appeals

The Senate version of the 2017 NDAA included a provision for victims of crime to have *real party in interest* standing during post-trial appellate review.<sup>216</sup> While a few states have passed laws explicitly giving victims standing in the post-trial appellate process,<sup>217</sup> both Article 6b and the CVRA are silent on the issue.<sup>218</sup> The JPP held public hearings on the issue and as noted earlier, Congress did not enact any changes to post-trial

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<sup>213</sup> 10 U.S.C. § 806b(e)(3) (Supp. IV 2016).

<sup>214</sup> See *infra* Appendix A.

<sup>215</sup> See Judicial Proceedings Panel, at 156 (Nov. 18, 2016), [http://jpp.whs.mil/Public/docs/05-Transcripts/20161118\\_Transcript\\_Final.pdf](http://jpp.whs.mil/Public/docs/05-Transcripts/20161118_Transcript_Final.pdf) [hereinafter November 2016 JPP] (voting conducted by Hon. Elizabeth Holtzman).

<sup>216</sup> S. 2943, 114th Cong. § 547 (2016).

<sup>217</sup> Judicial Proceedings Panel, at 17 (Oct. 14, 2016), [http://jpp.whs.mil/Public/docs/05-Transcripts/20161014\\_Transcript\\_Final.pdf](http://jpp.whs.mil/Public/docs/05-Transcripts/20161014_Transcript_Final.pdf) [hereinafter October 2016 JPP] (testimony of Ms. Meg Garvin citing laws in Oregon, Arizona, and New Hampshire).

<sup>218</sup> 10 U.S.C. § 806b; 18 U.S.C. § 3771 (2012 & Supp. IV 2016).

appellate rights at that time in order to allow the JPP and others to provide more input to Congress.<sup>219</sup>

The arguments for victim appellate rights are focused around the concept of procedural justice, a concept most commonly used to view the rights of an accused.<sup>220</sup> Procedural justice centers on the belief that our justice system functions best when those who are directly impacted have their voices integrated throughout the process.<sup>221</sup> This practice is necessary to ensure a system that is transparent and fair to the interests of both victims and accused.<sup>222</sup> This is why Congress codified interlocutory appeal rights for victims in the NDAA<sup>223</sup> and CVRA.<sup>224</sup> However, those laws primarily focused on rights during the pre-trial and trial phases, creating a gap when it came to post-trial rights.<sup>225</sup> Congress is now looking at how to fill that gap.<sup>226</sup>

The first step is to understand that there are differences between the civilian and military criminal justice systems, including differences in terminology. Understanding the fundamental structure of post-trial appeals and the military justice system's appellate process must be the starting point for analysis.

#### A. Terminology

The terminology applied to a victim's interest and the types of appeals can become exceptionally confusing unless it is defined at the outset. First, a *real party in interest* is someone entitled under substantive law, to

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<sup>219</sup> H. REP. NO. 114-840 (2016) (Conf. Report Accompanying S. 2943) (Commentary on Legislative Provisions Not Adopted, Section titled: Appellate standing of victims in enforcing rights of victims under the Uniform Code of Military Justice).

<sup>220</sup> October 2016 JPP, *supra* note 217, at 10 (testimony of Ms. Meg Garvin).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> 10 U.S.C. § 806b.

<sup>224</sup> 18 U.S.C. § 3771 (2012 & Supp. IV 2016).

<sup>225</sup> *See* United States v. Laraneta, 700 F.3d 983, 986 (7th Cir. 2012) (recognizing the CVRA's failure to make provision for appellate participation by a victim who has been successful in the trial court and allowing victim intervention in defendant's appeal when the victim's right was at issue).

<sup>226</sup> H. REP. NO. 114-840 (2016) (Conf. Report Accompanying S. 2943) (Commentary on Legislative Provisions Not Adopted, Section titled: Appellate standing of victims in enforcing rights of victims under the Uniform Code of Military Justice).

enforce a right.<sup>227</sup> This may not necessarily mean that they will benefit from the eventual outcome of a case, but as to the statutory right, they have an interest.<sup>228</sup> For example, MRE 412 provides that a victim must be given the reasonable opportunity to attend and be heard at an evidentiary hearing involving a defense request to introduce evidence of a victim's prior sexual behavior or predisposition.<sup>229</sup> Military Rule of Evidence 412 therefore creates a substantive right for the victim to be heard through counsel during one of these evidentiary hearings. The accused is the one who may be convicted or acquitted at the end of the trial, but the victim has a substantive right and is a *real party in interest* with respect to rights provided by MRE 412. This is in contrast to a party to the trial, of which there are only two—the government, which is bringing the charges, and the accused, who is facing prosecution.<sup>230</sup> Nevertheless, the law recognizes that the victim has a legal interest in enforcing a statutory right to privacy enumerated in MRE 412. The same could be said for the other rights of victims articulated in Article 6b: The victim would be a *real party in interest* with respect to enforcing those rights.

There are various types of appeals that often get confused, especially considering differences between the civilian and military justice systems. In its most basic form, an *appeal* is simply a request to have the decision of a court reconsidered by a higher court.<sup>231</sup> An *interlocutory appeal* is an appeal that occurs before the trial court's final ruling on an entire case, such as the mandamus petitions discussed earlier.<sup>232</sup> After the conclusion of a trial, there is an *appeal by right*<sup>233</sup> where the party making the appeal has a statutory right to appeal, versus when a party must request *leave to appeal* and ask the appellate court to consider their appeal.<sup>234</sup> In the *leave to appeal* circumstance, the appellate court has discretion as to whether to grant the request.<sup>235</sup> A *direct appeal* is an appeal from a trial court's decision directly to the jurisdiction's highest court without having to appeal with an intermediate appellate court.<sup>236</sup> A *cross-appeal* occurs when an appellee files its own appeal against an appellant who generated

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<sup>227</sup> *Party*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>228</sup> *Id.*

<sup>229</sup> MCM, *supra* note 55, MRE 412.

<sup>230</sup> MCM, *supra* note 55, R.C.M. 103(16) (defining parties to a court-martial as the accused and the government).

<sup>231</sup> BLACK'S LAW DICTIONARY, *supra* note 47.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Application for Leave to Appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>235</sup> *Id.*

<sup>236</sup> BLACK'S LAW DICTIONARY, *supra* note 47.

the appeal.<sup>237</sup> In the criminal law context, cross-appeals are rare because the accused generally wants to cite any and all error in an attempt to have a conviction overturned and a cross-appeal will not generally assist the government.

Under the military justice system, unless waived, all convictions receive some level of appeal or administrative review.<sup>238</sup> The CCA must review any conviction that results in a sentence to death, a punitive discharge, or confinement for one year or more.<sup>239</sup> The Judge Advocate General can also direct the CCA to review a conviction that would not otherwise qualify.<sup>240</sup> CAAF must review conviction resulting in a death sentence and issues sent to CAAF from the Judge Advocate General of each of the military services.<sup>241</sup> CAAF further has discretion to review any other petitions for review from decisions by the CCA.<sup>242</sup>

Therefore, an accused who is convicted and receives one of the aforementioned significant sentences has an *appeal by right*, which is automatically forwarded to the CCA and they are assigned appellate defense counsel who can allege grounds for overturning the conviction. If an accused receives a lesser sentence, he may seek *leave to appeal* by requesting that the service's Judge Advocate General direct the CCA to review his conviction, but the Judge Advocate General has discretion. There are no *direct appeal* rights to CAAF or the U.S. Supreme Court other than the possibility of filing a writ of habeas corpus.<sup>243</sup>

The UCMJ and Article 6b do not provide any post-trial appellate rights for crime victims<sup>244</sup> and under current rules, they would not be able to file a *cross-appeal* because a victim is not a party to the original appeal. Therefore, we must examine what standing, if any, a victim might have to be heard before the CCA after the final ruling at a court-martial.

## B. The Question of Standing

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<sup>237</sup> *Id.*

<sup>238</sup> MCM, *supra* note 55, R.C.M. 1110 (describing when the accused may waive or withdraw appellate review).

<sup>239</sup> MCM, *supra* note 55, R.C.M. 1201.

<sup>240</sup> *Id.*

<sup>241</sup> MCM, *supra* note 55, R.C.M. 1204.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* 1205.

<sup>244</sup> 10 U.S.C. § 806b (Supp. IV 2016).

The concept of standing revolves around the understanding that a person who has an injury or potential injury to a legal right, can and must be heard by the court before a decision is made in the case.<sup>245</sup> This concept in American jurisprudence dates back to 1803 and the Supreme Court case of *Marbury v. Madison*.<sup>246</sup> CAAF has recognized this concept of standing extends to military courts and specifically that privilege holders have long been known to have standing to protect that privilege in court.<sup>247</sup>

Without specific statutory authority, a victim must argue they have standing on the issues presented, essentially taking a shot in the dark on whether the CCA will hear the case. While the standing argument was successful in *Kastenberg*, the victim in that case had the All Writs Act as authority to file the petition. There is no such statutory authority for victims in the post-trial process.<sup>248</sup> Further complicating the matter, CAAF's recent ruling in *EV v. United States* implies that the appellate courts would find that by passing Article 6b without an express provision for post-trial appeals, Congress signaled its intent to deny victims standing to file post-conviction appeals.<sup>249</sup> The best course of action would be for Congress to establish clear authority and processes for victims to protect their rights and privileges before the appellate courts instead of forcing victims to take that shot in the dark in the argument for standing.<sup>250</sup>

The history of appellate standing in both military and civilian courts has demonstrated the need for a clear and explicit provision for victim

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<sup>245</sup> October 2016 JPP, *supra* note 217, at 12 (testimony of Ms. Meg Garvin).

<sup>246</sup> 5 U.S. 137 (1803).

<sup>247</sup> *LRM v. Kastenberg*, 72 M.J. 368 (C.A.A.F. 2013) (citing *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013) (assuming that CCR had trial level standing to make request); *United States v. Wuterich*, 67 M.J. 63, 66–69 (C.A.A.F. 2008) (assuming standing for CBS in part under R.C.M. 703); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for victim's mental health provider); *United States v. Johnson*, 53 M.J. 459, 461 (C.A.A.F. 2000) (finding standing for a nonparty challenge to a subpoena duces tecum or a subpoena ad testificandum during an Article 32 pretrial investigation); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); *Carlson v. Smith*, 43 M.J. 401 (C.A.A.F. 1995) (summary disposition) (granting a writ of mandamus where the real party in interest did not join petitioners, but rather was added by the court as a respondent).

<sup>248</sup> *Kastenberg*, 72 M.J. at 368.

<sup>249</sup> 75 M.J. 331, 334 (C.A.A.F. 2016).

<sup>250</sup> *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011, 1018 (9th Cir. 2006) (encouraging district courts to modify procedures so as to give full effect to the CVRA after noting hurdles caused by less than clear procedures in victims' rights context).

standing<sup>251</sup> focused on defending the rights and privileges already identified by Congress in Article 6b.<sup>252</sup> This expression of standing could be as simple as stating that victims of crime have standing to assert the rights contained in Article 6b before both trial and appellate courts.<sup>253</sup> Along with standing, there is a need to define the victim's role in the post-trial proceedings.

### C. What is the Victim's Role? The Importance of a Name

The Senate version of FY17 NDAA bestowed victims with the title of a "real party in interest,"<sup>254</sup> while others have argued that victims should be recognized as *amicus curiae* in appellate proceedings. There are benefits and drawbacks for both designations, but in order to meet the necessity for a clear and unambiguous expression of standing, the focus needs to remain on victims having a statutory right to file an appeal.<sup>255</sup>

The argument for *amicus curiae* status is derived from the current practice in the AFCCA and other military appellate courts where the courts have requested *amicus* from service SVC programs and civilian victims' rights organizations.<sup>256</sup> *Amicus* standing recognizes that the victim is not the appellant or the appellee in the appellate proceeding and therefore is not a named party. It is therefore clear that *amicus* do not have the ability to file an appeal directly, only the opportunity to request to file a brief if proceedings are already underway.

The argument against *amicus* status is that it fundamentally fails to recognize that the individual's rights are at stake.<sup>257</sup> *Amicus curiae* translates to "friend of the court," and it is generally reserved for individuals or organizations who file briefs for a court's review, when the courts request assistance in understanding the wider legal policy implications in deciding a case.<sup>258</sup> A victim who has a legally recognized

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<sup>251</sup> October 2016 JPP, *supra* note 217, at 15–16 (testimony of Ms. Meg Garvin).

<sup>252</sup> 10 U.S.C. § 806b (Supp. IV 2016).

<sup>253</sup> October 2016 JPP, *supra* note 217, at 16 (testimony of Ms. Meg Garvin).

<sup>254</sup> S. 2943, 114th Cong. § 547 (2016).

<sup>255</sup> October 2016 JPP, *supra* note 217, at 11–12 (testimony of Ms. Meg Garvin).

<sup>256</sup> September 2016 JPP, *supra* note 197, at 40 (testimony of Colonel (Ret.) William Orr Jr.) (stating that the current practice at AFCCA is for victims to seek leave to file as an *amicus*. While the AFCCA has not defined a real party in interest, the government and defense have generally agreed that the victim is not a party to the proceedings).

<sup>257</sup> October 2016 JPP, *supra* note 217, at 19–20 (testimony of Ms. Meg Garvin).

<sup>258</sup> *Id.* at 19.



privilege over information contained in mental health records, for example, may want to make an argument to an appellate court when a petitioner seeks to have his or her conviction overturned because the trial judge arguably improperly excluded the victim's records from the trial. The victim has an individual right that is at stake, namely, the privacy of the victim's privileged mental health records, which is a fundamentally different role than a "friend of the court."<sup>259</sup> Appellate courts have discretion regarding whether to accept amicus briefs and court rules generally give lesser page limits to amicus briefs.<sup>260</sup> Courts may also limit the ability of an *amicus* to make an oral argument.<sup>261</sup>

Examining the two major proposals, the Senate's *real party in interest* designation is the most appropriate.<sup>262</sup> The Senate's proposal bestows the status on victims only once counsel for the accused or the government file appellate proceedings that implicate MREs 412, 513, 514, or any other right protected under Article 6b.<sup>263</sup> The victim therefore has the authority to file a brief in response to the appeal on the collateral issue of the military judge's ruling on an Article 6b protected issue. The term identifies the victim as having a legally cognizable interest in the proceedings, which more closely recognizes the stake a victim has than that of amicus. As a *real party in interest*, the victim would be entitled to notice of when their interests are in jeopardy as part of a post-trial appeal.

#### D. Notice

In order to exercise standing in post-trial proceedings, victims must first receive notice of the proceedings.<sup>264</sup> A person who would have standing to speak on an issue must receive notice so that the person can defend the right in question.<sup>265</sup> Article 6b requires victims receive notice of court-martial and clemency or parole hearings but not appellate proceedings.<sup>266</sup> The individual military services can implement

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<sup>259</sup> *Id.* at 20.

<sup>260</sup> *Id.* at 20, 85–88 (testimony of Ms. Meg Garvin, Mr. Don Christensen, Mr. Ryan Guilds, and Mr. Jason Middleton).

<sup>261</sup> *Id.*

<sup>262</sup> S. 2943, 114<sup>th</sup> Cong. § 547 (2016).

<sup>263</sup> *Id.*

<sup>264</sup> October 2016 JPP, *supra* note 217, at 21 (testimony of Ms. Meg Garvin).

<sup>265</sup> *Id.*

<sup>266</sup> 10 U.S.C. § 806b(a)(2) (Supp. IV 2016).

regulations and policies to inform victims of appellate proceedings but the requirement has not been uniformly applied or codified.<sup>267</sup>

One of the major challenges in notifying victims of post-trial proceedings has been the lack of a uniform system of record for court-martial and appellate information similar to the federal court's Public Access to Court Electronic Records (PACER) system. PACER contains a variety case information including documents filed with the court, and the documents are made available to the public via the Internet.<sup>268</sup> In order to meet the notice requirements of the CVRA, the Department of Justice created an automated Victim Notification System (VNS), which gives federal officials and victims access to a repository of information about a case.<sup>269</sup>

Military service regulations require a representative of the government to notify victims of post-trial processes, including receiving an election of whether the victim wants to be notified of post-trial matters.<sup>270</sup> The Army is the only one of the military services that currently has a victim liaison, who works in the Office of the Clerk of Court at ACCA to send notice to victims when an appeal has been filed.<sup>271</sup> The liaison is not an attorney and does not represent or give legal advice to the victim. The military services also differ in terms of whether SVC representation continues past the completion of the court-martial and through appellate proceedings, making contact with the victim more challenging.

The 2017 NDAA included a provision for the creation of a military justice case management system within the next four years.<sup>272</sup> The law requires the Secretary of Defense to establish uniform standards for the creation of the system within two years and for the system to be effective within four years.<sup>273</sup> The JPP has also looked at the issue and has voted to recommend legislation to require victims to be served with copies of all appellate briefs in proceedings that implicate rights enumerated in Article

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<sup>267</sup> AR 27-10, para. 17-14.

<sup>268</sup> November 2016 JPP, *supra* note 215, at 220-3 (Panel Deliberations). PACER is an online electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts. <https://www.pacer.gov/>.

<sup>269</sup> October 2016 JPP, *supra* note 217, at 60 (testimony of Ms. Ann Vallandingham).

<sup>270</sup> *See, e.g.*, AR 27-10, para. 17-14b.

<sup>271</sup> November 2016 JPP, *supra* note 215, at 231 (testimony of Lt. Col. Angela Wissman).

<sup>272</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) [hereinafter FY17 NDAA].

<sup>273</sup> *Id.* at § 543.

6b.<sup>274</sup> With the enactment of the 2017 NDAA,<sup>275</sup> the Department of Defense must create a record system, but there is still no specific requirement to proactively notify victims of appellate proceedings. While the Department of Defense might take this on themselves through internal regulations, Congress should add this as a requirement through the amendment of Article 6b.<sup>276</sup>

#### IV. Conclusion

Victims' rights have only been codified in the military justice system since 2014 and they have undergone steady changes every year since then. The time has come to make improvements to Article 6b and allow victims of crime to have a voice in the military justice appellate process.

The standard of review for writs of mandamus under Article 6b must be amended to clearly provide ordinary standards of appellate review. Within the first four years of the CVRA, Congress amended the legislation to make this same clarification. The time is right to do the same for Article 6b.

Congress and the President must also work together to clarify the procedures for appeals by victims. Congress must amend Article 6b to explicitly allow appeals to CAAF. At the same time, the President needs to promulgate a new R.C.M. to establish uniform standards for how victims and the courts process appeals. There is a current R.C.M. spelling out what steps the government must take to file an interlocutory appeal and similar processes can be applied to victims. The courts also need specific guidance that once an appeal is filed, the proceedings must be stayed while the appellate courts engage in an expedited review of the petition. Clear guidance is likely to result in well-reasoned and uniform petitions that all of the parties to a court-martial can understand and timelines that can be relied on.

To guarantee procedural justice for victims of crime, Congress must ensure that there are adequate enforcement mechanisms for the rights and privileges of crime victims. This imperative is based on the fundamental principle that those who are impacted by crime must have their voices

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<sup>274</sup> November 2016 JPP, *supra* note 215, at 235 (Panel Deliberations).

<sup>275</sup> FY17 NDAA, *supra* note 272, at § 543.

<sup>276</sup> *See infra* Appendix C.

heard through a fair and transparent criminal justice system. The development and understanding of victims' rights have advanced significantly since the enactment of Article 6b in 2013, but enforcement is the means by which we can ensure these developments are protected. The recommendations above are the next evolutionary step in the advancement of procedural justice for victims of crime throughout our military justice system.

## Appendix A

## Army Victim Mandamus Outcomes Table

Petitioner	Primary Issue	Outcome
<i>CC v. Lippert</i> ARMY MISC 20140779 16 October 2014	MRE 513 - Release of records without a hearing.	Granted in Part
<i>SC v. Schubert</i> ARMY MISC 20140813 12 November 2014	Request to Quash Deposition Order	Denied
<i>HC v. Bridges</i> ARMY MISC 20140793 1 December 2014	Scheduling of C-M - granting SVC a continuance of trial	Denied
<i>AT v. Lippert</i> ARMY MISC 20150387 11 June 2015	MRE 514 - Victim - Victim Advocate Privilege	Denied
<i>DB v. Lippert</i> ARMY MISC 20150769 1 February 2016	MRE 513 - Release of records following an in camera review conducted without a hearing.	Granted in Part

## Appendix B

Army Victim Mandamus Processing Table

Petitioner	Stay?	TJ Order	Petition	ACCA Ruling	Days Petition was Pending
<i>CC v. Lippert</i> ARMY MISC 20140779 16 October 2014	Denied as Moot	7-Oct-14	14-Oct-14	16-Oct-14	2
<i>SC v. Schubert</i> ARMY MISC 20140813 12 November 2014	Yes	22-Oct-14	29-Oct-14	12-Nov-14	14 *
<i>HC v. Bridges</i> ARMY MISC 20140793 1 December 2014	No (Moot)	2-Oct-14	20-Oct-14	1-Dec-14	42 *
<i>AT v. Lippert</i> ARMY MISC 20150387 11 June 2015	No	2-Jun-15	3-Jun-15	11-Jun-15	8
<i>DB v. Lippert</i> ARMY MISC 20150769 1 February 2016	Yes	6-Nov-15	23-Nov-15	1-Feb-16	70 *

\* Court requested and received amicus curiae input.

## Appendix C

## Recommended Revision of Article 6b, UCMJ

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS AND COURT OF APPEALS FOR THE ARMED FORCES.—

(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) A petition as described in this chapter may not be received by the Court of Criminal Appeals unless the victim provides the preliminary hearing officer or military judge, and counsel for the Government and accused, with written notice of the petition within 72 hours of the order or ruling. Such notice shall include a certification by the victim that the petition is not taken for the purpose of delay and which of the protections listed in paragraph (7) are implicated.

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

(4) The Court of Criminal Appeals must take up and decide such petition within five calendar days after the petition has been filed, unless the victim and the parties, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the Court of Criminal Appeals will apply ordinary standards of appellate review. If the Court of Criminal Appeals denies the relief sought, the reasons for the denial must be clearly stated on the record in a written opinion.

(5) The victim may petition the Court of Appeals for the Armed Forces to review the decision of the Court of Criminal Appeals within 10 days of being notified of the decision of the Court of Criminal Appeals.

~~(2)~~ (6) 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.

~~(4)~~ (7) 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.



## Appendix D

## Proposed Rule for Courts-Martial

## Article 6b(e) Petition for Writ of Mandamus

(a) *In general.* In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, a victim of an offense as defined in Article 6b, may file a petition for a writ of mandamus as described in Article 6b(e).

(b) *Special Victims' Counsel.* Pursuant to 10 U.S.C. §1044e, the rights of a victim of an offense defined in Article 6b may be asserted by counsel representing the victim.

(c) *Procedure.*

(1) *Delay.* After an order or ruling which may be subject to an appeal by a victim, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the victim requests a delay to determine whether to file notice of appeal under this rule. The victim is entitled to no more than 72 hours under this subsection.

(2) *Decision to appeal.* The decision whether to file notice of appeal under this rule must be made within 72 hours of the ruling or order to be appealed.

(3) *Notice of appeal.* If the victim elects to appeal, the victim must provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice must identify the ruling or order to be appealed and the charges and specifications affected. The victim must certify that the appeal is not taken for the purpose of delay.

(4) *Effect on the court-martial.* Upon written notice to the military judge under subsection (c)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun, (i) a severance may be granted upon request of all the parties; (ii) a severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) *Record.* Upon written notice to the military judge under subsection (c)(3) of this rule, trial counsel must cause a record of the proceedings to be prepared. Such record must be verbatim and complete to the extent necessary to resolve the issues appealed. R.C.M. 1103(g), (h), and (i) will apply and the record must be authenticated in accordance with R.C.M. 1104(a). The military judge or the Court of Criminal Appeals may direct that additional parts of the proceeding be included in the record; R.C.M. 1104(d) will not apply to such additions.

(6) *Forwarding.* The Judge Advocate General may designate a representative responsible for representing the victims of offenses identified in Article 6b on appeal. If such a representative has been identified, the representative will have an attorney-client relationship with the victim. If such a representative has been identified, and upon written notice to the military judge under subsection (c)(3) of this rule, the victim must promptly and by expeditious means forward the appeal to the designated representative. The victim must forward to the representative: the appeal; a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe.

(7) *Appeal filed.* If the victim elects to file an appeal, it must be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.

(8) *Appeal not filed.* If the victim elects not to file an appeal, the victim must promptly notify the military judge and the parties.

(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the victim files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the

victim, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(d) *Appellate proceedings.*

(1) *Appellate counsel.* The Judge Advocate General may appoint counsel to represent the victim of an offense under Article 6b in appellate proceedings, in addition to counsel already representing the victim at the court-martial. The Government and Defense will be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Counsel for the victim must diligently prosecute an appeal under this rule.

(2) *Court of Criminal Appeals.* The Court of Criminal Appeals must take up and decide a petition under Article 6b(e) forthwith within 5 calendar days after the petition has been filed, unless the litigants, with the approval of the Court of Appeals, have stipulated to a different time period for consideration. In deciding such application, the Court of Appeals will apply ordinary standards of appellate review.

(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 6b(e), the victim or the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a question to the Court of Appeals for the Armed Forces. The parties must be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the victim or the accused, the aggrieved party must be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the aggrieved party is notified orally on the record, trial counsel must forward by expeditious means a certificate that the aggrieved party was so notified to the Judge Advocate General, who must forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Appeals for the Armed Forces, it must be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 will apply.

(e) *Military judge.* For purposes of this rule, “military judge” does not include the president of a special court-martial without a military judge.