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Where is the Justice? The Sexual Assault Crisis Plaguing the Military and a Lack of Meaningful Justice

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Where is the Justice? The Sexual Assault Crisis Plaguing the Military and a Lack of Meaningful Justice

Marc Edward Rosenthal

Abstract

Sexual assault is a major problem in every branch of the American Armed Forces. The current military justice system is flawed in such a way as to deny victims of sexual assault in the military meaningful and competent justice. Victims of sexual assault in the military do not receive the same due process that their civilian counterparts receive. The bottom line is that our service-members deserve more than the current military justice system provides because service-members leave their loved ones and homes to fight--sometimes never to return-- in order to protect our homeland and promote American justice and democracy abroad.

One of the military justice system's many failures is the lack of procedural protections in pretrial probable cause determination (Article 32) hearings. Unlike the closed-door civilian grand jury proceedings, which do not allow defense counsel to attend, Article 32 hearings are public, and defendants are legally entitled to thoroughly cross-examine government witnesses. While rape shield protections are supposed to prevent many of the abuses that have occurred, the protections have not been competently enforced. Two laws applicable in Article 32 hearings completely contradict each other, resulting in an impediment of important procedural protections. However, if the military justice system is amended and the rape shield laws are properly followed, many injustices, i.e., the fall 2014 Maryland Naval Academy pretrial hearing, will be averted. In addition to the rape shield problem, the National Defense Authorization Act ("NDAA") of 2014 did not create laws prohibiting the use of non-legally trained investigating officers in all situations. Additionally, even

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though NDAA 2014 amended the “availability” options for Article 32 witnesses by giving witnesses the legal right to not attend the hearing in certain circumstances, there is still a loophole that allows defense counsel to depose and thoroughly cross-examine key government witnesses. Most importantly, the deposition officer charged with overseeing the deposition is not required to rule on objections or to possess any legal training.

Some victims fed up with the failure of the military justice system are turning to federal district courts—desperate for relief and crying for help. While district courts are sympathetic to the allegations, the courts do not have the legal ability to provide redress for the victims. Finally, although NDAA 2014 was not as revolutionary as Senator Gillibrand’s proposed Military Justice Improvement Act, it still passed several key improvements. It is a positive half-step forward.

Table of Contents

I. INTRODUCTION.....	297
II. MILITARY PROCEDURE PRIOR TO 2014, THE SEVERITY OF THE SEXUAL ASSAULT CRISIS, AND THE NEED FOR ARTICLE 32 HEARING REFORM.....	301
A. <i>The Military Justice System Prior to the Passage of The National Defense Authorization Act of 2014</i>	301
B. <i>The Story That Sparked Public Outrage: Maryland Naval Academy, Fall 2013</i>	307
C. <i>NDAA 2014 Reforms</i>	310
D. <i>The Procedural Paradox</i>	313
i. <i>How M.R.E. 412 Should Be Applied Versus How M.R.E. 412 Has Been Applied</i>	313
ii. <i>A Legally Trained Hearing Officer “Whenever Practicable”</i>	323
iii. <i>The “Availability” Issue</i>	326
III. MJIA AND THE NDAA OF 2014	337
A. <i>United States Senator Kirsten Gillibrand’s (D-NY) Reform Proposal</i>	337
B. <i>The National Defense Authorization Act of 2014</i>	339
C. <i>A Positive Half Step Forward</i>	340
IV. CONCLUSION.....	341

I. INTRODUCTION

No one will believe you, and even if someone did believe you, you have a long road ahead. You came overseas to fight for your country, for something you believe in, and for something bigger than yourself. You spend your nights away from your loved ones, while they live out their lives at home without you. One night something tragic happens. Something you never thought would happen to you. You become one of the many service members who are sexually assaulted every single day in the military.¹ You, someone minding your own business on your walk back to the barracks, got knocked over the head from behind with a metal pipe and subsequently blacked out. You wake up, not realizing you are bound at your hands and feet. Then the beating starts. You are raped and told you will be killed if you open your mouth.²

The next day it hits you. You were raped last night. You feel disassociated from yourself, a sort of numb depression you have never felt before. You are too embarrassed to talk to anyone about it. You feel resentment toward the military establishment, and resentment toward yourself for having such naïve preconceptions of people and justice. What happened to you *personally* goes against everything you thought you knew about the glory and the fraternal nature of military service. Feeling violated and angry, you talk to one of your peers, who encourages you to file a report with military law enforcement.

You don't want to make it a big deal. Why would you want everyone talking about you? Your anger grows. Finally, you file a report with law enforcement. At your Article 32 hearing³, where your superiors determine if there is enough evidence to court-martial the accused, you are vigorously, in an almost hazing like fashion, asked disgusting and

¹ Jackie Speier, *Why Rapists in Military Get Away With It*, CNN OPINION (June 21, 2012, 8:19 AM EDT), <http://www.cnn.com/2012/06/21/opinion/speier-military-rape/>. The statistics cited in this article were compiled by the Department of Defense and presented to Congress and can be found in the Sexual Assault Prevention & Response Office ("SAPRO"), *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012*, (2013) (hereinafter "*2012 SAPRO Report*"). See <http://www.sapr.mil/index.php/annual-reports>.

² Michael F. Matthews, Op-Ed., *The Untold Story of Military Sexual Assault*, N.Y. TIMES (November 25, 2013), available at <http://www.nytimes.com/2013/11/25/opinion/the-untold-story-of-military-sexual-assault.html#>.

³ See 10 U.S.C. § 832 (2014).

embarrassing questions about your sexual habits, including whether you invited the alleged sexual assault because you did not wear underwear, and how wide you opened your mouth while performing oral sex.⁴ All the while, your peer, the one who you trusted and confided with, is testifying on the stand saying none of what you said actually happened. Now it is your chance to testify and you cringe into a tight little ball, as you start to relive what happened as you testify. You feel a horrific wave of anxiety overcome you as you make eye contact with your peers and realize that once you testify, you are an outsider. Your mind begins to race. You think about how you rely on your military employment for important government benefits, that you would feel dishonored if you were discharged from the armed services, and how much you value your job security. Are you going to inculcate one of your brothers or sisters, in front of anyone? Is anyone going to believe you? Will you be ostracized and retaliated against?⁵ Can't the commander disregard any verdict against the accused?⁶

The aforementioned hypothetical⁷ illustrates something wrong with our military justice system. Consider the following facts and statistics. If you serve in the U.S. Military and you rape or sexually assault a fellow service member, chances are you won't be punished.⁸ In fact, you have an estimated 86.5% chance of keeping your crime a secret and

⁴ See Jennifer Steinhauer, *2 Face Court-Martial in Naval Academy Assault Case*, N.Y. TIMES (October 10, 2013), http://www.nytimes.com/2013/10/11/us/2-ex-navy-football-players-face-court-martial-in-rape-case.html?_r=0 (hereinafter "Steinhauer 1"); Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES (September 20, 2013), <http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?ref=us> (hereinafter "Steinhauer 2").

⁵ Common reasons for victim's not reporting include: (1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident. See *AZ v. Shinseki*, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing Gov't Accountability Office, GAO-08-1013T, *Military Personnel: Preliminary Observations on DoD's and the Coast Guard's Sexual Assault Prevention and Response Programs* 14 (2008)).

⁶ R. CHUCK MASON, CONG. RESEARCH SERV., R41739, *MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW* at 8 (Aug. 12, 2013) (citing Art. 60, UCMJ; 10 U.S.C. § 860; RCM 1107).

⁷ This hypothetical was created based on facts taken from the sources cited in footnotes 1, 2, 4, 5, and from Jesse Ellison, *The Military's Secret Shame*, NEWSWEEK, (Apr. 3, 2011), <http://www.newsweek.com/militarys-secret-shame-66459>.

⁸ See Speier, *supra* note 1.

a 92% chance of avoiding a court-martial.⁹ Service members who report being sexually assaulted by a commanding officer or military colleague do so at their own peril.¹⁰ They face ridicule, demotion, investigation that includes a review of their sexual history and even involuntary discharge.¹¹ A Department of Defense report released in May 2013 estimated that there were 26,000 instances of unwanted sexual contact in the military in 2012, an increase of 35% compared with 2010.¹² The Department of Defense estimates that between 2006 and 2012, fewer than 15% of military sexual assault victims reported the assault to a military authority.¹³ There were 3,553 sexual assault complaints reported in the first three quarters of this fiscal year (2013), a nearly 50% increase over the same period a year earlier.¹⁴ Of the 3,553 sexual assault complaints, fewer than 500 were brought to trial and 200 resulted in a conviction.¹⁵ Additionally, according to *The Invisible War*, a 2012 documentary detailing the gravitas of the sexual assault crisis in the military¹⁶, a Navy study conducted anonymously reported that 15% of incoming recruits had attempted or committed rape before entering the military, twice the percentage of an equivalent civilian population.¹⁷ Women who have been raped in the military have a higher Post-Traumatic Stress Disorder

⁹ See *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Tom Vanden Brook, *Congress Aims to Fix Military Sexual Assault Crisis*, USA TODAY (Dec. 10, 2013), available at <http://www.usatoday.com/story/news/nation/2013/12/10/military-sexual-assault-congress/3953705/>.

¹³ *AZ v. Shinseki*, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing 2012 *SAPRO Report*, *supra* note 1, at 53).

¹⁴ Jonathon Weisman & Jennifer Steinhauer, *Negotiators Reach Compromise on Defense Bill*, N.Y. TIMES (December 9, 2013), available at http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bill.html?_r=0.

¹⁵ Lauren Fox, *Gillibrand Versus McCaskill and Levin: The War to Solve Military Sexual Assaults Heats Up. Lawmakers Feud Publicly on How to Stop Rape in the Military*. U.S. NEWS & WORLD REPORT (July 29, 2013), available at <http://www.usnews.com/news/articles/2013/07/29/gillibrand-versus-mccaskill-and-levin-the-war-to-solve-military-sexual-assaults-heats-up>.

¹⁶ *THE INVISIBLE WAR* (Amy Ziering & Tanner King Barklow 2012).

¹⁷ Nancy Ramsey, *'Invisible War': New Documentary Exposes Rape in the Military*, ABC NEWS (June 27, 2012), available at <http://abcnews.go.com/Politics/rape-military-invisible-war-documentary-exposes-assaults/story?id=16632490&page=1>.

(“PTSD”) rate than men in combat.¹⁸ In 2010, there were 2, 617 military sexual assault victims (women and men), but that represented only about 14% of the estimated number of victims; 86% did not report they had been sexually assaulted.¹⁹ 40% of homeless female veterans have been raped.²⁰ In 2012, the Department of Defense (“DoD”) estimated that only about 11% of the sexual assaults involving service members that occurred each year are reported to authority²¹, and that between 2006 and 2012, fewer than 15% of military sexual assault victims reported the assault to a military authority²². Common reasons victims cite for not reporting include: (1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident.²³ These statistics²⁴ make clear that the current situation is unacceptable and must change.

With these facts in mind, my article will argue that the military justice system is in need of reform that will actually make a difference. My article will argue that the National Authorization Act of 2014 (“NDAA 2014”)²⁵ does not go far enough to ensure that victims of sexual assault in the military are afforded justice during a critical point in the criminal adjudicative process. My article will argue that there is a large lack of accountability because victims do not receive fair and meaningful justice.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *AZ v. Shinseki*, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing 1 DoD Sexual Assault Prevention & Response Office (“SAPRO”), *Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012*, at 18 (2013) (“2012 SAPRO Report”).

²² *Id.* (citing 2012 SAPRO Report, *supra* note 1, at 53).

²³ *Id.* (citing Gov’t Accountability Office, GAO–08–1013T, *Military Personnel: Preliminary Observations on DoD’s and the Coast Guard’s Sexual Assault Prevention and Response Programs* 14 (2008))

²⁴ How are these statistics gathered? Data about Unrestricted Reports of sexual assault reports is drawn from official investigations conducted by the Military Criminal Investigation Organizations. Sexual Response Coordinators collect data about Restricted Reports of sexual assault and forward it to the Military Service Sexual Assault Prevention and Response program offices. Each Fiscal Year, the Under Secretary of Defense for Personnel and Readiness submits a data call to the Military Departments to collect the required statistical and case synopsis data. DoD SAPRO aggregates and analyzes this data. See 2012 SAPRO Report, *supra* note 1, at 56.

²⁵ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, 127 Stat 672.

Specifically, my article will argue that the mandated procedural requirements of Military Rule of Evidence (“MRE”) 412²⁶ have not been enforced thus leading to the harassment of victims during pretrial proceeding, a prevalent occurrence. I argue that these injustices could be cured if officials simply abide by MRE 412’s explicit procedural requirements. Additionally, I will argue that a legally trained judicial officer must oversee pretrial proceedings in *every* situation involving cross-examination.

My article will illustrate the defectiveness of the current military justice system, as evidenced by the military justice system’s inability to provide victims with relief, which is causing victims to bring their cases to civilian courts. Specifically, I will discuss *Cioca v. Rumsfeld*, a U.S. Fourth Circuit Court of Appeals decision that twenty-eight victims, discussed in the documentary *The Invisible War*, brought in federal district court. My article will address Senator Gillibrand’s Military Justice Improvement Act (“MJIA”)²⁷. Finally, my article will analyze the benefits and shortcomings of other sexual assault related reforms in NDAA 2014²⁸.

II. MILITARY PROCEDURE PRIOR TO 2014, THE SEVERITY OF THE SEXUAL ASSAULT CRISIS, AND THE NEED FOR ARTICLE 32 HEARING REFORM

A. *The Military Justice System Prior to the Passage of the National Defense Authorization Act of 2014*²⁹

To understand why reform is so important, one must understand the fundamental differences between the military and civilian legal systems. While my article does go on at some length to lie out the relevant military legal procedures, I believe such an overview is necessary to fully grasp why it has the potential for implementing subpar justice. “The Constitution, in order to provide for the common defense³⁰, gives Congress the power to raise, support, and regulate the Armed Forces³¹, but makes the President

²⁶ Mil. R. Evid. 412.

²⁷ Military Justice Improvement Act, S. 967, 113TH Cong. (2013).

²⁸ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, 127 Stat 672.

²⁹ *Id.*

³⁰ See Mason, *supra* note 6, at 1 (citing U.S. CONST. Preamble).

³¹ See *Id.* at 1 (citing U.S. CONST. art. I §8, cls. 11-14 (War Power)).

Commander-in-Chief of the Armed Forces.³² “Article III, which governs the federal judiciary, does not give that judiciary any explicit role in the military, and the Supreme Court has taken the view that Congress’s power ‘[t]o make Rules for the Government and Regulation of the land and naval Forces’³³ is entirely separate from Article III.”³⁴ Therefore, courts-martial are not considered to be Article III courts and are not subject to all of the rules that apply in federal courts.³⁵

“Discipline is as important as liberty interests in the military justice system.”³⁶ “The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment, from which the Supreme Court has inferred there is no right to a civil jury in courts-martial.”³⁷ Article 32 of the Uniform Code of Military Justice (“UCMJ”) mandates a pre-trial hearing that performs the same function as a grand jury, finding probable cause to move forward with prosecution.³⁸ Court-martial panels consist of a military judge and several panel members, who function similarly to a jury.³⁹

Under Article I, Section 8 of the U.S. Constitution, Congress retains the powers to raise and support armies, provide and maintain a navy, and provide for organizing and disciplining them.⁴⁰ Pursuant to this power, Congress enacted the UCMJ,⁴¹ which is the code of military criminal laws applicable to all U.S. military members around the globe.⁴² The President implemented the UCMJ through the Manual for Courts-Martial (“MCM”), which was initially promulgated by Executive Order 12473 (April 13, 1984).⁴³ Military courts are considered Article I courts, and as a result are of limited jurisdiction.⁴⁴

³² See *Id.* at 1 (citing U.S. CONST. art. II §2, cl. 1).

³³ See *Id.* at 1 (citing U.S. CONST. art. I §8, cl. 14).

³⁴ See *Id.* at 2 (citing *Dynes v. Hoover*, 61 U.S. (How.) 65 (1857)).

³⁵ See *Id.* at 2 (internal citations omitted).

³⁶ See *Id.* at 2.

³⁷ See *Id.* at 2.

³⁸ *Id.* at 2, note 9 (citing *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

³⁹ See *Id.*

⁴⁰ See *Id.* at 2.

⁴¹ See *Id.* at 2 (citing 10 U.S.C. §§801-941).

⁴² See *Id.* at 2.

⁴³ See *Id.*

⁴⁴ See *Id.* at 2, n. 15 (citing *United States v. Wuterich*, 67 M.J. 32 (2007)).

Article I of the U.S. Constitution, addressing legislative powers of Congress, includes the power to regulate the Armed Forces, and by implication, the power to create legislative courts to enforce those regulations.⁴⁵ In creating legislative courts, Congress is not limited by the restrictions imposed in Article III.⁴⁶

The UCMJ gives court-martial jurisdiction over service members⁴⁷ and other categories of individuals, including retired members of a regular component of the Armed Service entitled to pay; retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military; and persons with or accompanying the military in the field during 'times of war,' limited to declared wars.⁴⁸ The MCM contains the Rules for Courts-Martial ("RCM"), the MRE,⁴⁹ and the UCMJ.⁵⁰ The MCM covers nearly all aspects of military law.⁵¹ Jurisdiction of a court-martial does not depend on where the offense happened; it depends exclusively on the status of the accused.⁵² Courts-martial try "military offenses," which are listed in the punitive articles of the UCMJ and are also codified in 10 U.S.C. 877 et seq.⁵³ The Supreme Court does not promulgate procedural rules for courts-martial.⁵⁴ Congress regulates the Armed Forces primarily through Title 10 of the United States Code.⁵⁵ Congress established three types of courts-martial: (1) summary court-martial, (2) specific court-martial, and (3) general

⁴⁵ *See Id.*

⁴⁶ *See Id.* at 3, n. 16 ("The term service members, as used in this report, includes uniformed members of the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, and the U.S. Coast Guard.")

⁴⁷ *See Id.* at 3.

⁴⁸ *See Id.* at 3 (citing Art. 2, UCMJ; 10 U.S.C. § 802).

⁴⁹ *See Id.* at 3, n. 13 ("Rules of procedure and rules of evidence for courts-martial are established by the President and authorized by Art. 36, UCMJ (10 U.S.C. § 836)").

⁵⁰ *See Id.* at 3.

⁵¹ *See Id.*

⁵² *See Id.* at 3 (citing *Solorio v. United States*, 483 U.S. 435, 447 (1987)).

⁵³ *See Id.* at 3, n. 19.

⁵⁴ *See Id.* at 5.

⁵⁵ *See Id.* at 5.

court-martial.⁵⁶

When a service member has allegedly committed an offense, the accused's immediate commander will conduct an inquiry.⁵⁷ Such inquiry may range from an examination of the charges and an investigative report or summary of expected evidence to a more thorough investigation, depending on the offense(s) alleged and the complexity of the case.⁵⁸ The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials.⁵⁹ Once evidence has been collected and a complete inquiry has been made, the commander can choose to dispose of the charges by either (1) taking no action, (2) initiating administrative action, which can include separation from the military,⁶⁰ (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for referral of charges.⁶¹

The first formal step in a court-martial, referral of charges, is comprised of the drafting of a charge sheet containing the charges and specifications, which is a plain and concise statement of the essential facts constituting the offense charged against the accused.⁶² The charging document must be signed by the accuser under oath before a commissioned officer authorized to administer oaths.⁶³ A charge amounts to a statement of the Article of the Code or other law allegedly violated.⁶⁴ A specification is a concise statement of the essential facts constituting the offense charged.⁶⁵ Once the charges have been preferred, they may be referred to one of the three types of courts-martial.⁶⁶

Before convening a general court-martial, a pretrial Article 32 investigation hearing must be conducted; this is meant to ensure that

⁵⁶ See *Id.* at 4 (citing Art. 16 UCMJ; 10 U.S.C. § 816).

⁵⁷ See *Id.* at 3 (citing R.C.M. 303).

⁵⁸ See *Id.* at 3.

⁵⁹ See *Id.*

⁶⁰ See *Id.* at 4, n. 24 (citing 10 U.S.C. §§ 1161 *et seq.*).

⁶¹ See *Id.* at 4 (citing R.C.M. 306(c)).

⁶² See *Id.* at 4 (citing R.C.M. 307(c)(3)).

⁶³ See *Id.* at 4 (citing R.C.M. 307(b)).

⁶⁴ *United States v. Franklin*, 68 M.J. 603, 604 (A. Ct. Crim. App. 2010) (citing R.C.M. 307(c)(2)).

⁶⁵ *Id.* (citing R.C.M. 307(c)(3)).

⁶⁶ See *Mason*, *supra* note 6, at 4 (citing R.C.M. 401(c)).

there is a basis for prosecution.⁶⁷ An investigating officer (“IO”), who must be a commissioned officer, presides and *should be an officer in the grade of major or lieutenant commander or higher or one with legal training*.⁶⁸ Unlike a civilian grand jury proceeding, at an Article 32 hearing the accused has the opportunity to examine the evidence presented against him or her, cross-examine witnesses, and present his or her own arguments.⁶⁹ In the event that the investigation uncovers evidence that the accused has committed an offense not charged, the investigating officer can recommend that new charges be added.⁷⁰ Additionally, if the investigating officer believes that evidence is insufficient to support a charge, the investigating officer can recommend dismissal of the charge.⁷¹ When the Article 32 investigation is complete, the investigation officer makes recommendations to the convening authority (“CA”) through the CA’s legal advisor.⁷² The legal advisor then provides the CA with a formal written recommendation, called the Article 34 UCMJ advice, as to the disposition of the charges, and then the CA determines whether to convene a court-martial or to dismiss the charge(s).⁷³

Before any charge may be referred for trial by a general court-martial, it shall be referred to the Staff Judge Advocate (“SJA”) of the CA for consideration and advice.⁷⁴ The advice of the SJA shall include a written and signed statement which sets forth that person’s: 1) conclusion with respect to whether each specification alleges an offense under the code; 2) conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation; 3) conclusions with respect to whether a court-martial would have jurisdiction over the accused and the offense; and 4) recommendation of the action to be taken by the CA.⁷⁵

Referral is the order of a CA that charges against an accused

⁶⁷ See *Id.* at 7 (citing Art. 32 UCMJ; 10 U.S.C § 832).

⁶⁸ See *Id.* at 7, n. 61 (citing R.C.M. 405(d)(1)) (emphasis added).

⁶⁹ See *Id.* at 7 (citing Art. 32(b)-(c), UCMJ; 10 U.S.C § 832(b)-(c); R.C.M. 405(f); United States v. Davis, 64 M.J. 445 (2007)).

⁷⁰ See *Id.* at 7 (citing Art. 32(d), UCMJ; 10 U.S.C. § 823(d); R.C.M. 407).

⁷¹ See *Id.* at 7 (citing Art. 32(d), UCMJ; 10 U.S.C. § 823(d); R.C.M. 407).

⁷² See *Id.* at 7.

⁷³ See *Id.* at 7 (citing Art. 33-35, UCMJ; 10 U.S.C. § 833-835; R.C.M. 407) (emphasis added).

⁷⁴ R.C.M. 406(a).

⁷⁵ R.C.M. 406(b).

will be tried by a specified court-martial.⁷⁶ The CA may not refer a specification under a charge to a general court martial unless: 1) there has been substantial compliance with the pretrial investigating requirements under RCM 405; and 2) The CA has received the advice of the staff advocate required under RCM 406.⁷⁷ However, both of these prerequisites may be waived by the accused.⁷⁸ The CA or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence that may arise at trial.⁷⁹

A court-martial is created by a convening order of the CA.⁸⁰ The court-martial must be convened by an officer with sufficient legal authority, meaning the CA, who will most likely be the commander of the unit to which the accused is assigned.⁸¹ A general court-martial is the highest trial level in military law and is usually used for the most serious offenses.⁸² A general court-martial panel is composed of a military judge sitting alone, or in the alternative, not less than five members and a military judge.⁸³ The accused has the right to choose the composition of the court-martial except in capital cases, where jury members are required.⁸⁴

Convictions at a general court-martial that include a punitive discharge are subject to an automatic post-trial review by the CA.⁸⁵ This process begins with a review of the trial record by the SJA, who makes a recommendation to the CA as to what course to pursue.⁸⁶ “The review is ‘probably the accused’s best chance for relief, as the CA has broad powers to act on the case.’”⁸⁷ After the CA has reviewed the trial record and the SJA’s recommendation(s), the CA may, among

⁷⁶ R.C.M. 601(a).

⁷⁷ R.C.M. 601(d).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ R.C.M. 504(a); *See also* R.C.M. 103 (“‘Convening authority’ includes a commissioned officer in command for the time being and successors in command.”).

⁸¹ *See Id.*, at 4 (citing R.C.M. 103(6)).

⁸² *See Id.* at 7.

⁸³ *See Id.* at 7 (citing Art. 16, UCMJ; R.C.M. 201(f)(1)(C)); Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused’s command. *See Id.* at 6 n. 53.

⁸⁴ *See Id.* at 7 (citing Art. 16, UCMJ; R.C.M. 903).

⁸⁵ *See Id.* at 8.

⁸⁶ *See Id.* at 8 (citing Art. 32(d), UCMJ; 10 U.S.C. § 823(d); R.C.M. 407).

⁸⁷ *See Id.* at 8 (citing *United States v Davis*, 58 M.J. 100, 102 (2003)).

other remedies, suspend all or part of the sentence, disapprove a finding or a conviction, or commute the sentence, but cannot increase the sentence.⁸⁸ Once the CA takes action on the case, the conviction is ripe for an appeal.⁸⁹

B. The Story That Sparked Public Outrage: Maryland Naval Academy, Fall 2013.

Reforms to Article 32 hearings were included in the NDAA 2014, at least in part, because of the public outrage that followed from the Article 32 hearing that took place in August and September of 2013 at the United States Naval Academy.⁹⁰ For roughly thirty hours over several days, defense lawyers for three former Naval Academy football players grilled a female midshipman about her sexual habits.⁹¹ In a public hearing, they asked the woman, who accused the three athletes of raping her, whether she wore a bra, how wide she opened her mouth during oral sex, and whether she had apologized to another midshipman with whom she had intercourse “for being a ho.”⁹²

This Naval Academy case stems from a 2012 “yoga and toga” off-campus party near the academy in Annapolis, Maryland, where, according to the alleged victim’s testimony, she arrived intoxicated and continued to drink.⁹³ In testimony at the hearing, she said she had no memory of parts of the evening and may have passed out.⁹⁴ The next day, the woman testified that she heard from a friend of one of the three football players via social media that she had sex with them at an Annapolis home known as “the football house.”⁹⁵ The three football players were charged with sexually assaulting and making false statements.⁹⁶

Commander Robert J. Monahan Jr., a Navy Judge Advocate

⁸⁸ See *Id.* at 8 (citing Art. 60, UCMJ; 10 U.S.C. § 860; R.C.M. 1107).

⁸⁹ See *Id.* at 8.

⁹⁰ Steinhauer 1, *supra* note 4.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Steinhauer 2, *supra* note 4.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

General (“JAG”), served as the Article 32 IO at the pretrial hearing.⁹⁷ After four days and more than twenty hours of relentless questions about the alleged victim’s medical history, motivations, dance moves, and underwear, the twenty-one-year-old midshipman pleaded for a day off from testimony.⁹⁸ The investigating officer granted the victim’s request, but not before the request triggered more skepticism from defense attorneys, who said the young woman was faking her exhaustion.⁹⁹ The IO made his decision after a pointed request by Susan Burke, the woman’s attorney, who said her client was being worn down by limitless and repetitive questioning by three separate legal teams representing the defendants.¹⁰⁰ By the time the alleged victim concluded, she had been on the stand for more than twenty-four hours over five days.¹⁰¹ When asked why she did not come forward sooner, the alleged victim said that she “didn’t want to make it a big deal” and began tearing up as she said she “didn’t want to disappoint her mother.”¹⁰² She added, “I guess I just didn’t have the courage.”¹⁰³

During cross-examination, defense lawyers repeatedly asked the victim about a consensual sexual encounter she said she had the

⁹⁷ Anny Shin, *Three Former Naval Academy Football Players Face Accuser at Hearing on Rape Charges*, WASH. POST, (Aug. 27, 2013), available at http://www.washingtonpost.com/local/three-former-naval-academy-football-players-face-accuser-at-hearing-on-rape-charges/2013/08/27/ffb6607c-0f23-11e3-85b6-d27422650fd5_story.html.

⁹⁸ Melinda Henneberger & Anny Shin, *Military’s Handling of Sex Assault Cases on Trial at Naval Academy Rape Hearing*, WASH. POST, (Aug. 31, 2013), available at http://www.washingtonpost.com/local/militarys-handling-of-sex-assault-cases-is-on-trial-at-naval-academy-rape-hearing/2013/08/31/5700c9de-10d3-11e3-b4cb-fd7ce041d814_story.html.

⁹⁹ *Id.*

¹⁰⁰ Lyndsey Layton, *Accuser in Naval Academy Rape Case Concludes Testimony After Five Days on Stand*, WASH. POST, (Sep. 1, 2013), available at http://www.washingtonpost.com/local/accuser-in-naval-academy-rape-case-resumes-testimony/2013/09/01/e39b1b96-1313-11e3-880b-7503237cc69d_story.html.

¹⁰¹ *Id.*

¹⁰² Ali Weinberg, *Woman at Center of Alleged Naval Academy Gang Rape Testifies For First Time*, NBC NEWS, (Aug. 28, 2013), available at <http://www.nbcnews.com/news/other/naval-academy-sex-assault-accuser-grilled-memory-alleged-attack-f8C11042678>.

¹⁰³ *Id.*

day after the alleged rape.¹⁰⁴ One of the defendants' attorneys, asked the victim whether she wore a bra or other underwear to the party and whether she "felt like a ho" afterward.¹⁰⁵ An attorney for one of the other defendants asked the victim repeatedly about her oral sex technique, arguing over objections from the prosecution that oral sex would indicate the "active participation" of the woman and therefore her consent.¹⁰⁶ Even when the IO did sustain the prosecutors' objections, barring, for example, a question about whether the alleged victim carried condoms in her purse, the tone of the cross-examination did not change.¹⁰⁷ "This was a case of defense lawyers gone wild, unhampered by strict rules of evidence and with clearly inadequate supervision by the officer who presided over the melee."¹⁰⁸

In an interview, the victim's attorney told the New York Times, "I have been contacted by many, many victims told they had to go through this abusive process. One of the complexities is they are forced to go through this, but the decision maker is not in the room."¹⁰⁹ Article 32 proceedings permit "questions not allowed in civilian courts and can include cross-examination of witnesses *so intense that legal experts say they frighten many victims from coming forward.*"¹¹⁰ The New York Times reported in the same article that "[s]everal military justice experts said Article 32 proceedings should be eliminated."

Legal scholar, Victor M. Hansen, a former military lawyer, told the New York Times that military rape proceedings should be changed to look more like proceedings for civilian rape trials, where questions about a woman's sexual techniques would not be allowed and where rape shield laws would either prohibit or limit questions about a woman's sexual history.¹¹¹

¹⁰⁴ Steinhauer 2, *supra* note 4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Henneberger & Shin, *supra* note 98.

¹⁰⁸ Ruth Marcus, Op-Ed., *In Navy Rape Case, Defense Lawyers Go Wild*, WASH. POST, (Sep. 5, 2013), http://www.washingtonpost.com/opinions/ruth-marcus-in-navy-rape-case-defense-lawyers-go-wild/2013/09/05/2c729520-1647-11e3-a2ec-b47e45e6f8ef_story.html.

¹⁰⁹ Steinhauer 2, *supra* note 4.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.*

C. NDAA 2014 Reforms

Title XVII of The NDAA 2014, includes a series of “Sexual Assault Prevention and Response Related Reforms.”¹¹² I will discuss only those relevant to my argument. Section 1701 provides specific rights for victims of offenses under the UCMJ including the rights to: (1) be protected from the accused; (2) reasonable, accurate, and timely notice of any public proceeding involving the offense; (3) not be excluded from such proceeding¹¹³; (4) confer with trial counsel in the case; (5) full and timely restitution; (6) proceedings free from unreasonable delay; and (7) be treated with fairness and respect for the victim’s dignity and privacy.¹¹⁴ Section 1701 also provides for the assumption of such rights by a legal guardian in the case of a victim who is under eighteen years of age, incompetent, incapacitated, or deceased.¹¹⁵ Section 1701 is required to be implemented “[n]ot later than one year after the date of the enactment of [the] Act.”¹¹⁶

Section 1702 amends Article 32 proceedings, and is codified in 10 U.S.C. § 832.¹¹⁷ The amendment changes the name of the hearing from an “investigation under section 832” to “a preliminary hearing under section 832.”¹¹⁸ No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.¹¹⁹ The purpose of the hearing is limited to a determination of probable cause, appropriate jurisdiction, the form of charges, and a recommendation of case disposition.¹²⁰

Additionally, section 1702 amends the IO qualification

¹¹² NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, 127 Stat 672.

¹¹³ Unless the military judge or IO, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard testimony at that hearing or proceeding. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1701, 127 Stat 672 (codified as amended at 10 U.S.C. § 806b (2014)).

¹¹⁴ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1701, 127 Stat 672 (codified as amended at 10 U.S.C. § 806b (2014)).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1702, 127 Stat 672 (codified as amended at 10 U.S.C. § 832 (2014)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

requirements.¹²¹ Under the amendment, a preliminary hearing shall be conducted by an impartial JAG *whenever practicable* or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a JAG.¹²² If the hearing officer is not a JAG, a JAG shall be available to provide legal advice to the hearing officer.¹²³ After conducting a preliminary hearing, the JAG or IO conducting the preliminary hearing shall prepare a report.¹²⁴ Section 1702 amends §832 by stating: "A victim may not be required to testify at the preliminary hearing."¹²⁵ A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing."¹²⁶ The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing.¹²⁷ Failure to follow the requirements of this section does not constitute jurisdictional error.¹²⁸

Section 1704 requires defense counsel to make any request to interview the alleged victim of a sex-related offense, who the trial counsel of the alleged victim intends to call to testify at a preliminary hearing, through the trial counsel.¹²⁹ Any interview under Section 1704 must be conducted in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate ("SAVA").¹³⁰

Section 1716 also directs the Secretary concerned to designate legal counsel, known as Special Victims' Counsel ("SVC") for the purpose of providing legal assistance to a member or dependent

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *United States v. Burton*, ACM 36296, 2007 WL 2300788, at *3 (A.F. Ct. Crim. App. July 16, 2007) *aff'd*, 67 M.J. 150 (C.A.A.F. 2009) ("The requirements for pretrial investigations are binding but failure to follow them does not constitute jurisdictional error. An error in the Article 32, UCMJ, investigation process is not a structural error subject to reversal without testing for prejudice." (internal citations omitted)).

¹²⁹ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1704, 127 Stat 672 (codified as amended at 10 U.S.C. § 846 (2014)).

¹³⁰ *Id.*

who is the victim of a sex-related offense.¹³¹ Section 1716 authorizes several forms of legal assistance, which include in part: 1) legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense; 2) legal consultation regarding the military justice system, including the victim's responsibility to testify, and other duties to the court; 3) to accompany the victim at any proceeding in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense¹³²; 4) legal consultation regarding eligibility and requirements for services available from appropriate agencies or officers for emotional and mental health counseling and other medical services; and 5) legal consultation and assistance in any proceedings of the military justice process in which a victim can participate as a witness or other party.¹³³ Section 1716 makes the relationship between an SVC and victim one protected by attorney-client privilege.¹³⁴ Victims of an alleged sex-related offense shall be offered the option of receiving assistance from a SVC upon report of an alleged sex-related offense or at the time the victim seeks assistance from a SAVA, a military criminal investigator, a victim/witness liaison, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary.¹³⁵ Section 1716 will be implemented 180 days from the

¹³¹ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1716, 127 Stat 672 (codified as amended at 10 U.S.C. § 1044e (2014)).

¹³² Although a non-party to the Courts-Martial, an alleged victim of sexual assault has standing. See *LRM v. Kastenberg*, 72 M.J. 364, 368, 370, 372 (C.A.A.F. 2013) (“[The] [victim’s] position as a nonparty to the courts-martial does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege. . . . Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness. . . . M.R.E. 412. . . create[s] certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801. . . .”)

¹³³ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1716, 127 Stat 672 (codified as amended at 10 U.S.C. § 1044e (2014)).

¹³⁴ *Id.*

¹³⁵ *Id.*

passage of NDAA 2014.¹³⁶

D. *The Procedural Paradox*

- i. How M.R.E. 412 *Should Be Applied* Versus How M.R.E. 412 *Has Been* applied.

MRE 412¹³⁷ is inapplicable at Article 32 hearings despite

¹³⁶ *Id.*

¹³⁷ Mil. R. Evid. 412. "Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition:

(a) Evidence generally inadmissible

The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) Procedure to determine admissibility

(1) A party intending to offer evidence under subsection (b) must--

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

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the

statutory language requiring MRE 412 to apply at Article 32 hearings.¹³⁸ MRE 412 requires a party intending to offer evidence to file a written motion at least five days prior to entry of a plea that specifically describes the evidence and states the purpose for which it is offered.¹³⁹ The party intending to offer evidence under this rule must also “serve the motion on the opposing party and the military judge and notify the alleged victim....”¹⁴⁰ Before admitting evidence under this rule, the military judge must conduct a hearing, *which shall be closed.*¹⁴¹ “The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.”¹⁴²

Prior to 1993, MRE 303¹⁴³, the rule regarding degrading

presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

(d) For purposes of this rule, the term “sexual offense” includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. “Sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.” Mil. R. Evid. 412.

¹³⁸ See Mil. R. Evid. 1101(d) (“[The] [MRE], other than with respect to privileges and Mil. R. Evid. 412, do not apply in investigative hearings pursuant to Article 32. . .”)

¹³⁹ Mil. R. Evid. 412(c)(1)(A).

¹⁴⁰ Mil. R. Evid. 412(c)(1)(B).

¹⁴¹ Mil. R. Evid. 412 (c)(2) (emphasis added).

¹⁴² Mil. R. Evid. 412 (c)(2).

¹⁴³ Mil. R. Evid. 303. “Degrading questions: No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or

questions, was the “means by which the substance of MRE 412 applie[d] to Article 32 proceedings, and no person [would] be compelled to answer a question that would be prohibited by Rule 412.”¹⁴⁴ In MRE 303’s comments discussing MRE 412’s application before the 1993 amendment, the analysis states:

It should also be noted that it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination formerly typical of sexual cases would have intended to permit the identical examination at a military preliminary hearing that is not even presided over by a legally trained individual.¹⁴⁵

In 1993, RCM 405(i) and MRE 1101(d) were amended to make the provisions of MRE 412 applicable at pretrial investigations.¹⁴⁶ The MRE 303 analysis states: “[The 1993 Amendment] ensure[s] that the same protections afforded victims of nonconsensual sex offenses at trial are available at pretrial hearings.”¹⁴⁷

The analysis for MRE 412 states in part:

Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults.¹⁴⁸

Like MRE 303’s analysis, MRE 412’s analysis section states:

1993 Amendment. R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations. Congress intended to protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial when it passed Fed. R. Evid. 412.¹⁴⁹

evidence is not material to the issue and may tend to degrade that person.”

¹⁴⁴ *Manual for Courts–Martial, United States*, Analysis of the Military Rules of Evidence app. 22 at A22–9 (2012 ed.) (hereinafter “*Manual for Courts–Martial*”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (discussing the 1993 Amendment).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at A22–36.

¹⁴⁹ *Id.*

In 1998, MRE 412 was amended again to more closely resemble its civilian counterpart. In discussing MRE 412's replacement of an in camera procedure with a closed hearing, the analysis states:

[A] closed hearing was substituted for the in camera hearing required by the Federal Rule. Given the nature of the in camera procedure used in Military Rule of Evidence 505(i)(4), and that an *in camera* hearing in the district courts more closely resembles a closed hearing conducted pursuant to Article 39(a), the latter was adopted as better suited to trial by courts-martial. Any alleged victim is afforded a reasonable opportunity to attend and be heard at the closed Article 39(a) hearing. The closed hearing, combined with the new requirement to seal the motion, related papers, and the record of the hearing, fully protects an alleged victim against invasion of privacy and potential embarrassment.¹⁵⁰

Despite the above language, MRE 412 has never been amended to make the procedural requirements applicable in an Article 32 hearing. MRE 412's procedural requirements as currently written state in relevant part:

(c) Procedure to determine admissibility

(1) A party intending to offer evidence under subsection (b) must--

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

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

¹⁵⁰ *Id.* at A22-37.

(3) If the military judge determines on the basis of the hearing .
 . . .¹⁵¹

As mentioned *supra*, MRE 412(c)'s procedural requirements mandate at least five day's notice prior to the entry of a plea by the party intending to offer MRE 412 evidence.¹⁵² However, fulfilling this requirement before the end of an Article 32 hearing is impossible because the accused cannot enter a plea until the CA refers the case to a court-martial.¹⁵³ The CA cannot refer the case to a court-martial without probable cause, which is determined, at least in part, by an Article 32 hearing.¹⁵⁴ The entry of pleas is done at the beginning of trial, ordinarily at arraignment, unless deferred by defense counsel to a later time.¹⁵⁵ Thus, because the event referenced in MRE 412(c)'s notice requirement cannot take place until after the Article 32 hearing concludes, MRE 412(c) procedural gatekeeping cannot be implemented. Despite the 1993 amendment's optimistic language, "the same protections afforded victims of nonconsensual sex offenses

¹⁵¹ Mil. R. Evid. 412(c).

¹⁵² Mil. R. Evid. 412(c)(1)(A).

¹⁵³ R.C.M. 601(d)(2).

¹⁵⁴ R.C.M. 405(a) ("[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.")

¹⁵⁵ See R.C.M. 910; R.C.M. 904; See also R.C.M. 910(e) (Discussion). ("Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused."); See also Lieutenant Colonel Le T. Zimmerman, USAF, *The Trial Script Everything You Didn't Even Know You Didn't Know*, 36 NO. 2 The Reporter 18, 22 (2009) (citing R.C.M. 904, Arraignment) ("Arraignment is the reading of the charges and specifications to the accused and calling on the accused to plead. The entry of the pleas is not part of the arraignment and the accused can ask to defer entry of pleas; therefore, arraignment is complete when the military judge utters the words "Accused, how do you plead?" The arraignment triggers certain legally significant events; therefore, as counsel, you should listen for the judge to ask the accused to plead and should be aware of the consequences when requesting an arraignment, especially if you don't plan to immediately proceed to trial. Once an accused is arraigned, no additional charges may be referred against the accused to that court-martial.")

at trial are [not] available at pretrial hearings.¹⁵⁶

In addition to MRE 412's explicit language, recent case law has attempted to explain the rule's application. The highest military court tried to clarify the application of the rule in 2011.¹⁵⁷ The following excerpt from a 2013 Air Force Court of Criminal Appeals case illustrates the application of MRE 412:

[E]vidence of a victim's past sexual behavior is inadmissible in a case involving an alleged sex offense. Evidence offered to prove that any alleged victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense except as provided in [Mil. R. Evid. 412] subdivisions (b) and (c). Subdivision (b) provides three exceptions to this general rule of exclusion. The third of these exceptions, the constitutionally required exception, permits the admission of evidence the exclusion of which would violate the constitutional rights of the accused. Mil. R. Evid. 412(c) provides the procedure to determine the admissibility of evidence offered under the three exceptions. This procedure includes the Mil. R. Evid. 412 balancing test, . . . [The] [balancing] [test] [provides] [that] [i]f the military judge determines ... that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403. Evidence may be admitted under Mil. R. Evid. 412(b)(1)(C) when the evidence is relevant, material, and its probative value outweighs the dangers of unfair prejudice. Relevant evidence is any evidence that has any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence. The evidence must also be material, which requires looking at the importance of the issue for which the evidence was offered in relation to the other issues in th[e] case; the extent to which th[e] issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue. If evidence is material and relevant, then it must be admitted under subsection (b)(1)(c) when the accused, under the Mil. R. Evid. 412 balancing test, can show that the probative value of the evidence outweighs

¹⁵⁶ *Manual for Courts-Martial, supra* note 144, at A22–9 (discussing the 1993 Amendment).

¹⁵⁷ *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011).

the dangers of unfair prejudice to the victim's privacy. If the military judge, after then applying the Mil. R. Evid. 403 balancing test, finds that the probative value of the evidence outweighs the danger of unfair prejudice, it is admissible no matter how embarrassing it might be to the alleged victim. Unfair dangers include concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. Likewise, if a military judge determines that the evidence is not constitutionally required, the military judge must exclude the evidence under Mil. R. Evid. 412 because the evidence does not fall under an exception to the rule of exclusion.¹⁵⁸

MRE 412 as currently written requires that a closed hearing by a military judge occur before admitting MRE 412 evidence and for the record of the closed hearing to remain sealed.¹⁵⁹ No MRE 412(c) closed hearings were conducted in the 2013 Naval Academy case discussed *supra*. If MRE 412(c) was amended to make closed hearings possible for MRE 412 Article 32 purposes, maybe the abuses that occurred in Maryland would have been avoided. The MCM should be amended to add specific procedural requirements to accommodate pretrial proceedings.

The MRE 412's mandated applicability at pretrial hearings mixed with its apparent lack of procedural requirements specific to a pre-trial setting create a paradox. To further add to the confusion, under RCM 405, the investigating officer is not required to rule on the admissibility of evidence.¹⁶⁰ An investigating officer may consider any evidence, even if that evidence would not be admissible at trial.¹⁶¹

An Article 32 IO "is not required to rule on objections, [but] may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the [IO] believes such action is appropriate."¹⁶² Additionally, the IO "is not required to rule on the admissibility of evidence and need not consider such matters except as the [IO] deems necessary to an informed

¹⁵⁸ *United States v. Evans*, ACM 38218, 2013 WL 6913159, at *3 (A.F. Ct. Crim. App. Dec. 3, 2013) *review denied*, 14-0381/AF, 2014 WL 1760008 (C.A.A.F. Apr. 3, 2014) (internal citations and quotations omitted).

¹⁵⁹ Mil. R. Evid. 412 (c).

¹⁶⁰ R.C.M. 405(h)(2); R.C.M. 405(h)(2) (Discussion).

¹⁶¹ R.C.M. 405(i) (Discussion).

¹⁶² R.C.M. 405(h)(2) (Discussion).

recommendation.”¹⁶³ Case law has extrapolated on the types of corrective action an IO may take. For instance: 1) An IO conducting a pretrial investigation can restrict defense cross-examination of government witnesses at investigation, to prevent defense counsel from merely rephrasing questions five, six or seven times¹⁶⁴; 2) An Article 32 pretrial investigation is judicial in nature, and the IO presiding over investigation has an obligation to regulate matters before him to ensure that the hearing is fair and impartial; and 3) An IO presiding over Article 32 pretrial investigation has the authority to limit redundant, repetitive or irrelevant questions.¹⁶⁵

The RCM provide no practical guidance beyond the ability of “the [IO] may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the IO believes such action is appropriate.”¹⁶⁶ Furthermore, “[i]f an objection raises a substantial question about a matter within the authority of the commander who directed the investigation . . . the IO should promptly inform the commander who directed the investigation.”¹⁶⁷ However, what happens after the IO informs his commander and returns to finish the hearing? How does the MRE 412 issue go away? How does the IO informing his commander fix the evidentiary concerns? If MRE 412 is intended to act as a rape shield and protect victims from improper questioning but the only powers the IO has is to note an objection in a report, and the IO is not bound by the rules of evidence, how are victims protected?

Because both the MRE and RCM apply with equal authority, when applied in conjunction with one another they lead to a dead end. As a result of MRE 412’s procedural inapplicability in Article 32 hearings, the IO uses his ability to control the conduct of the hearing as a way to prevent the victim from abuse. This standard is based on the IO’s subjective “my gut says this does not feel right” standard. An IO’s conduct determinations have the potential to limit relief on appeal due to its non-legally based subjective standard. The law is unclear on how an IO’s conduct determinations will be reviewed on

¹⁶³ R.C.M. 405(e) (Discussion).

¹⁶⁴ *United States v. Lewis*, 33 M.J. 758, 762 (A.C.M.R. 1991) *aff’d*, 36 M.J. 299 (C.M.A. 1993) (internal citations omitted).

¹⁶⁵ *Id.* at 763 (internal citations omitted).

¹⁶⁶ R.C.M. 405 (h)(2) (Discussion).

¹⁶⁷ *Id.*

appeal.

What happens if the IO does not want to rule on evidentiary objections?¹⁶⁸ For instance, if an IO does not allow the defendant the right to thoroughly cross-examine a key witness against him or her, over the accused's objections, and the accused moves the trial court to cure Article 32 defects before trial on the merits, the accused will be entitled to relief without needing to show prejudice.¹⁶⁹ Thus, the defendant at least has an explicit procedural mechanism to cure legitimate Article 32 defects. However, what happens if the IO does not want to rule on evidentiary objections posed by the government in the event defense counsel is abusively cross-examining an alleged victim? I searched military case law and the MCM to find what remedy the government has to cure Article 32 defects. I spoke to three high-ranking JAGs from different branches of the Armed Forces, and they all said the same thing: There is no explicit procedural remedy for the government to cure Article 32 defects.¹⁷⁰

Several JAGs confirmed the procedural defectiveness of the current military justice system, noting the lack of explicit statutory avenues for government relief to cure alleged defects in Article 32 hearings. For instance, in the event an IO attempted to let in the type of evidence that would normally be prohibited under MRE 412 (c)'s closed hearing and advance written notice requirements, the

¹⁶⁸ See R.C.M. 405(h)(2).

¹⁶⁹ United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007) ("The UCMJ and the *Manual for Courts-Martial* provide an accused with a substantial set of rights at an Article 32 proceeding. . . . As a general matter, an accused is required to identify and object to any errors in the Article 32 proceeding at the outset of the court-martial, prior to trial on the merits. . . . When an accused makes an objection at that stage, the impact of an Article 32 violation on the trial is likely to be speculative at best. The time for correction of such an error is when the military judge can fashion an appropriate remedy under R.C.M. 906(b)(3) before it infects the trial, not after the members, witnesses, and parties have borne the burden of trial proceedings. . . . In the event that an accused disagrees with the military judge's ruling, the accused may file a petition for extraordinary relief to address immediately the Article 32 error. . . ." (internal citations and quotations omitted)); see United States v. Davis, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006) *aff'd*, 64 M.J. 445 (C.A.A.F. 2007) (holding if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial).

¹⁷⁰ Telephone & E-mail Interviews with JAGs, who requested to remain anonymous (Thursday, May 22, 2014).

government would stop the Article 32 hearing and demand that the IO speak with his independent legal advisor. If, after speaking to the independent legal advisor, the IO continued to allow prohibited cross-examination, the government would speak to CA to potentially seek a new IO. However, the RCM 905(b)(1) pretrial motion option available for the accused is not available for the government.¹⁷¹ The government should be able to petition to the trial court judge to review Article 32 abuses. Other JAGs, who wish to remain anonymous, share similar concerns about the clear lack of guidance regarding how the Article 32 IO is supposed to make preliminary MRE 412 admissibility determinations during the pretrial hearing, especially when one of the procedural requirements, five day's-notice of intent to offer MRE 412 evidence, is required to be filed prior to the entry of pleas.

Currently, the system is rigged for abuse because of a major problem with the military justice system's procedures. However, there is a simple solution. Both MRE 412 and RCM 405 should be amended to make MRE 412 practically applicable in Article 32 hearings. If a defendant wants to offer in evidence that falls within the ambit of 412, then they must follow the procedures laid out in MRE 412(c). This is not a revolutionary idea. The rule requires procedures that are intended to benefit the victim from embarrassing and degrading testimony and ensures that the accused is entitled to evidence, the exclusion of which would violate his or her constitutional rights.¹⁷² My remedy calls for enforcing procedures already required to be enforced by both the MRE and the RCM. If the rule is properly enforced, many of the problems sexual assault victims face in initially coming forward and in pretrial hearings will be alleviated.

¹⁷¹ R.C.M. 905(b)(1) ("Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered: Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation or referral of charges; . . ."); R.C.M. 905 (Discussion) ("Such non-jurisdictional defects include unsworn charges, inadequate Article 32 investigation, . . .")

¹⁷² See *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011).

ii. A Legally Trained Hearing Officer “Whenever Practicable”¹⁷³

In addition to legally trained IOs either attempting to or not employing MRE 412 at all in pretrial hearings, the fact that there is a loophole in NDAA 2014’s language to continue to allow for non-legally trained IOs is equally, if not more, problematic. The 2014 amendment dealing with the legal qualifications of investigating officers is not an absolute ban on non-legally IOs at Article 32 hearings. The problem with the 2014 amendment to § 832(b) is the statute’s “whenever practicable” language¹⁷⁴. “Practicable” is not statutorily defined in the UCMJ; however, military courts have interpreted “practicable” in non-Article 32 contexts. Regarding an Article 62 government appeal, the highest military court stated: “[P]racticable [is] not statutorily defined, but surely [its] plain English meaning is clear—the case is supposed to move to the front of the line if *feasible*.”¹⁷⁵

Other military courts have similarly concluded that “practicable” is generally synonymous with “if feasible”. Therefore, the “whenever practicable” language provides for an opportunity where, if the use of a JAG to serve as an IO is not feasible, then the IO does not have to be legally trained, so long as a JAG is available to serve as a legal advisor to the non-legally trained IO.¹⁷⁶ Presumably, there will be situations¹⁷⁷ where the use of a JAG will not be feasible,¹⁷⁸ resulting in a deprivation of both party’s rights due to a non-legally trained IO’s incompetency on legal matters. In addition to the “whenever practicable” language in §832(b), none of the Article 32 amendments go into effect until December 26, 2014.¹⁷⁹

¹⁷³ See 10 U.S.C. § 832 (2014).

¹⁷⁴ See 10 U.S.C.A. § 832(b) (2014).

¹⁷⁵ United States v. Danylo, 73 M.J. 183, 190 (C.A.A.F. 2014) (interpreting “practicable” in an Article 62 appeal context, where, like in the Article 32 context, it is similarly not defined) (emphasis added).

¹⁷⁶ 10 U.S.C. § 832(b) (2014).

¹⁷⁷ David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, ARMY NEWS SERVICE (Jan. 8, 2014), available at <http://www.defense.gov/news/newsarticle.aspx?id=121444>.

¹⁷⁸ See *Id.* (describing a situation where a shortage of JAGs resulted in the inability to provide legally trained IOs in the Army, prior to the passage of NDAA 2014).

¹⁷⁹ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1702, 127 Stat 672 (codified as amended at 10 U.S.C. § 832(b) (2014)).

Regarding the NDAA 2014 Article 32 amendment's "whenever practicable" language, in a situation where there is a shortage of JAGs, litigants will pay the price. A shortage of JAGs is cited by the policy branch chief of the Army's Criminal Law Division as the reason for not using legally trained IOs in all instances prior to the 2014 amendment.¹⁸⁰ The branch chief stated that JAGs did not always serve as Article 32 IOs "largely because we try four times the number of cases of any of the other services" and that legally trained IOs were not used exclusively because of a shortage JAGs and the Army's high volume of cases.¹⁸¹ Obviously a shortage of lawyers would make the use of legally trained IOs not "practicable." If JAGs were not being used at Article 32 hearings because of a legal personnel shortage and the 2014 amendments do not address the legal personnel shortage discussed *supra*, it stands to reason that there will be instances where non-legally trained IOs preside over Article 32 hearings, at least in the Army.

Assuming the military starts to enforce MRE 412 procedural requirements at pretrial proceedings, how can someone with no legal training enforce the rules of evidence in any meaningful way that would not prejudice either the victims or the accused? How can someone with no legal training enforce the rule's protections in the event a deposition is required? Especially when the highest military court in the United States stated "[t]he M.R.E. 412(c)(3) 'balancing test'. . .is anything but simple to understand or apply, but it is not facially unconstitutional. . . ."¹⁸² To a certainty, though, it has done nothing but add additional layers of confusion and uncertainty to the application of M.R.E. 412."¹⁸³

Confusion for a judge trying to apply an evidentiary balancing test and confusion for an IO, a legal layman, trying to apply the same evidentiary balancing test are of a different magnitude. A trained judicial officer has endured the rigors of law school, and has been trained to think in a specific way. This legal training and experience makes a judge more qualified to make these rulings than a person with no legal training. An investigating officer should be required to possess formal legal training because they make evidentiary rulings with the potential for grave constitutional harms to both parties. It is not an unreasonable requirement, considering the potential for great harm. IOs are

¹⁸⁰ Vergun, *supra* note 177.

¹⁸¹ *Id.*

¹⁸² United States v. Gaddis, 70 M.J. 248, 253 (C.A.A.F. 2011).

¹⁸³ *Id.*

significantly restricted in their ability to seek legal advice. An Article 32 investigating officer violates his role as judicial officer when he receives advice from an individual who serves in a prosecutorial function or when he obtains advice from a non-prosecutor advisor on a substantive question without prior notice to all other parties.¹⁸⁴ Errors relating to Article 32 investigations, when preserved by timely motion, will only constitute grounds for reversal when the accused has been prejudiced; however, prejudice is presumed when investigating officer receives advice from an individual who serves in prosecutorial function or receives advice from non-prosecutor on substantive question without prior notice to all other parties.¹⁸⁵ The highest military court included “*evidentiary standards*” as an example of a substantive, rather than a procedural matter.¹⁸⁶

The Investigative Officer is charged with determining whether probable cause exists, a prosecutorial task. However, the highest military court has repeatedly held that “Article 32 investigation[s] [are] judicial in nature.”¹⁸⁷ Noting the potential for unconstitutional bias in civilian administrative adjudication, the Supreme Court correctly stated, “under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”¹⁸⁸ The Army’s highest court shared similar concerns when “it found that it was error for the investigation officer to prevent the defense counsel from fully cross-examining one of the Government’s

¹⁸⁴ See *United States v. Grimm*, 6 M.J. 890, 893 (A.C.M.R. 1979).

¹⁸⁵ See *Id.*

¹⁸⁶ See *United States v. Payne*, 3 M.J. 354, 355 n. 4 (C.M.A. 1977).

¹⁸⁷ *United States v. Davis*, 20 M.J. 61, 65 (C.M.A. 1985) (“Furthermore, we do not wish to establish a rule which will lead to the appointment of line officers, rather than military lawyers, as investigating officers. An Article 32 investigation is judicial in nature. . . and use of legally trained persons to perform the judicial duties involved avoids some of the complaints lodged against lay judges.” (citing *United States v. Payne*, 3 M.J. 354, 355 n.5 (C.M.A. 1977); *United States v. Samuels*, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959); *Payne*, 3 M.J. at 355 note 6) (internal quotations omitted)).

¹⁸⁸ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (discussing the potential for unconstitutional bias in civilian administrative adjudication) (internal citations and quotations omitted).

principal witnesses on a matter that affects the witness' credibility."¹⁸⁹ In arriving at their conclusion, the Court noted that it did "*not expect a layman in the law to know the niceties of the rules of evidence.*"¹⁹⁰ As mentioned *supra*, the MCM states that "it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination . . . typical of sexual assault cases would have intended to permit the identical examination at a military preliminary hearing that is not even presided over by a legally trained individual."¹⁹¹ RCM 405 and MRE have a paradoxical relationship.

iii. The "Availability" Issue

The Article 32 amendments fall short in another important area. The amendments added the right of military witnesses to lawfully refuse to appear at a pretrial hearing, thus giving military witnesses the same right civilian witnesses had prior to the NDAA 2014.¹⁹² Civilians have never been legally obligated to appear or testify at Article 32 hearings.¹⁹³ The Rules for Courts-Martial state in relevant part: "If a witness is not reasonably available the investigating officer may consider alternatives to that witness's testimony."¹⁹⁴ A civilian witness who refuses to testify is not reasonably available, because civilian witnesses may not be compelled to attend a pretrial investigation."¹⁹⁵ Therefore, even before NDAA 2014, if a key government civilian victim-witnesses did not want to appear or testify at an Article 32 hearing, they would be declared unavailable and could not be compelled to appear.¹⁹⁶ However, just because a key government witness is unavailable, this does not mean that the accused cannot request the military judge to subpoena the witness for a

¹⁸⁹ U. S. v. Harris, 2 M.J. 1089, 1090 (A.C.M.R. 1977) *aff'd*, 5 M.J. 266 (C.M.A. 1978) (emphasis added) (internal citations omitted).

¹⁹⁰ *Id.*

¹⁹¹ *Manual for Courts-Marital, supra* note 144, Analysis of Mil. R. Evid. 303, App. 22, at A2-29.

¹⁹² The amendment provides in relevant part:

"(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing." 10 U.S.C.A. § 832(d)(3) (2014)

¹⁹³ See R.C.M. 405(g)(2)(B) (Discussion).

¹⁹⁴ See *Id.*

¹⁹⁵ See *Id.*

¹⁹⁶ See R.C.M. 405(g)(2)(B) (Discussion).

deposition.¹⁹⁷ The presence of a civilian witness may be obtained by subpoena.¹⁹⁸ NDAA 2014 does nothing to cure the deposition loophole regarding victim availability.¹⁹⁹

A March 2014 Air Force Court of Criminal Appeals decision illustrates this issue. In *McDowell*, the Government preferred a charge and specification on August 14, 2013 alleging rape against the accused.²⁰⁰ An Article 32 hearing was scheduled for September 4, 2013.²⁰¹ On August 27, 2013, trial defense counsel contacted the mother of BB, the alleged civilian victim, to arrange an interview with BB.²⁰² The interview took place on September 3, 2013, the first mutually available day and one day before the pretrial hearing.²⁰³ After three hours of answering questions from trial defense counsel, BB and her mother ended the interview, noting that it was late and that BB had to meet with trial counsel to prepare for the Article 32 hearing the next day.²⁰⁴ At the pretrial hearing, defense counsel noted they had not completed their interview of BB.²⁰⁵ The IO allowed defense counsel additional latitude on cross-examination because of the limited pre-trial interview of BB.²⁰⁶ BB completed her testimony on direct, and cross-examination began before the lunch break.²⁰⁷ During the lunch break, the IO observed that BB appeared upset by the questions asked on cross-examination.²⁰⁸ The IO was unsure if BB knew that she was not legally obligated to appear at the hearing.²⁰⁹ The IO informed counsel for both parties that he intended to inform BB that she was not required to appear, in order to preclude any possible claim

¹⁹⁷ See R.C.M. 702(a).

¹⁹⁸ See R.C.M. 703(g)(2).

¹⁹⁹ The amended version of 10 U.S.C. § 832(d)(3), which will go into effect at the end of 2014 says: "A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing."

²⁰⁰ *United States v. McDowell*, MC 2013-28, 2014 WL 1323102, at *1 (A.F. Ct. Crim. App. Mar. 13, 2014).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

that BB was forced to testify against her will.²¹⁰ Both sides agreed with the IOs decision, and after the break, the IO informed BB, and cross-examination resumed.²¹¹

Defense counsel asked BB a number of probing questions on issues not immediately related to the offense charged.²¹² During interrogatories posed by the military judge during pre-trial motions practice, the IO responded that many of the questions defense counsel asked at first glance seemed irrelevant and intended to harass, but justified the questions based on the defense's lack of a complete pretrial interview.²¹³ The IO raised relevancy objections, but defense counsel insisted the questions were necessary and refused to move on to questions relevant to the offense charged.²¹⁴

Cross-examination took place for more than two hours.²¹⁵ BB was asked a number of questions about the type of shoes the accused wore.²¹⁶ The IO did not know why defense counsel was not satisfied with BB's first response indicating she did not remember the accused's shoe type.²¹⁷ The IO believed defense counsel was "needling her for a reaction."²¹⁸ BB asked whether the type of shoes the accused wore was relevant and asked permission to leave.²¹⁹ The IO informed BB she was free to leave.²²⁰ BB left before defense counsel questioned her about the offense charged.²²¹ Defense counsel objected to the IO's Article 32 report.²²² The IO considered the objections and prepared a recommendation that included BB's testimony.²²³

During pre-trial motions practice, defense counsel moved the military judge to order a deposition of the victim, arguing that the investigation was not sufficiently thorough and denied the accused a

²¹⁰ *Id.* at *2.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at *3.

substantial pretrial right by not being afforded a full opportunity to cross-examine the key witness-victim, who was central to the government's case.²²⁴ Defense counsel previously requested that the convening authority order a deposition, but their request was denied.²²⁵ Additionally, defense counsel moved the military judge to dismiss the charge and specification, or to direct a new Article 32 hearing.²²⁶ The government opposed both motions.²²⁷ The military judge granted both motions, ordering the reopening of the Article 32 hearing so the IO could consider the victim's testimony.²²⁸ In granting the motion, the judge concluded that although the victim would be available for trial, a deposition was proper because the victim provided incomplete testimony at the Article 32 hearing, which denied the accused a substantial pretrial right to cross-examine an available witness.²²⁹ Sixteen days after the motions were granted, the United States filed a Petition for Extraordinary Relief²³⁰, seeking a writ of mandamus ordering the military judge to reverse the order.²³¹

On review, the Air Force Court of Criminal Appeals concluded it was proper to consider the petition under the All Writs Act²³² but

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* ("The All Writs Act, 28 U.S.C. § 1651(a), authorizes all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. This Court is among the courts authorized under the All Writs Act to issue all writs necessary or appropriate in aid of their respective jurisdictions. The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have no other adequate means to attain the relief; (2) the party seeking the relief must show that the right to issuance of the relief is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." (internal citations and quotations omitted)).

²³¹ *Id.*

²³² *Id.* at *4 ("To justify reversal of a discretionary decision by mandamus, we must be satisfied that the decision amounted 'to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur. A decision by a trial judge may be erroneous but not rise to the level of a usurpation of judicial power, so long as the trial judge's ruling is "made in the course of the exercise of the court's

nevertheless denied the government's petition.²³³ The appellate court discussed Article 32 proceedings, stating:

A formal pretrial investigation is a predicate to the referral of charges to a general court-martial unless the accused waives the pretrial proceeding. The procedures for an Article 32 hearing include representation of the accused by counsel, the right to present evidence, and the right to call and cross-examine witnesses. The Article 32 investigation operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges. However, the accused has no absolute right to examine or cross-examine all relevant witnesses at this proceeding. If a witness is not reasonably available the investigating officer may consider alternatives to that witness's testimony. A civilian witness who refuses to testify is not reasonably available, because civilian witnesses may not be compelled to attend a pretrial investigation.²³⁴

Regarding depositions, the appellate court stated:

A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial. A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the Article 32 investigation or at trial. After referral, either the convening authority or the military judge may order that a deposition be taken on request of a party. A request for a deposition may be denied only for good cause. Good cause for denial includes failure to state a proper ground for taking a deposition, failure to show the probable relevance of the witness's testimony, or that the witness's testimony would be unnecessary. The fact that the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a

jurisdiction to decide issues properly brought before it. Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous, and therefore limited application of the All Writs Act for writs of mandamus to the exceptional case where there is clear abuse of discretion or usurpation of judicial power." (internal citations and quotations omitted)).

²³³ *Id.*

²³⁴ *Id.* (internal citations and quotations omitted).

witness.²³⁵

Consequentially, the appellate court held that the military judge decided an issue the parties properly placed before him, and he elected a lawful option in response to the motions.²³⁶ Therefore, there was no judicial usurpation of power in either of the trial court's rulings.²³⁷ Based on the Discussion to RCM 702(c)(2)(A), which indicates that ordering a deposition may be proper if an essential witness is unavailable at an Article 32 hearing, the appellate court agreed that a "reasonable argument could be made that an essential witness—BB—was made unavailable at the Article 32 hearing when she excused herself before cross-examination concluded."²³⁸ While "BB was not required to appear at the Article 32 hearing at all, the highest military court has held that the absence of a key civilian witness can 'deprive the accused of a substantial pretrial right,' and that the mere refusal of a civilian to testify do at an Article 32 hearing 'does not *eo ipso* nullify the defense right to cross-examine.'"²³⁹ The highest military court held that where the defense did not file a timely motion to depose the absent civilian witness, and the absence of the civilian witness at the pretrial hearing did not adversely affect the trial, there was no reason to set aside the conviction.²⁴⁰ However, in the instant case, defense counsel timely filed a motion to depose a key civilian witness.²⁴¹

"Assuming without deciding that [BB's] departure after more than two hours of cross-examination constituted her 'unavailability' that 'deprived the accused of a substantial pretrial right,' [binding precedent] indicates that ordering [BB's] deposition was an authorized course of action."²⁴² Despite affirming the trial court's course of action, the appellate court viewed the trial court's ruling with caution.²⁴³ Here, defense counsel "had the benefit of more than five hours with BB: three hours during the defense interview and more than two hours of cross-

²³⁵ *Id.* (internal citations and quotations omitted).

²³⁶ *Id.* at *5.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* (quoting *United States v. Chuculate*, 5 M.J. 143, 144–46 (C.M.A. 1978)).

²⁴⁰ *Id.* (citing *Chuculate*, 5 M.J. at 144-46).

²⁴¹ *Id.*

²⁴² *Id.* (quoting *Chuculate*, 5 M.J. at 144-46).

²⁴³ *Id.*

examination during the Article 32 hearing.”²⁴⁴ If defense counsel “could not cover this relatively straight-forward accusation during that time, then perhaps defense counsel should not be entitled to another unlimited block of time in which to question BB during a deposition.”²⁴⁵ The court cautioned trial judges and IOs to ensure that their rulings do not generate an incentive for defense counsel to create a situation that renders a witness unavailable at an Article 32 hearing.²⁴⁶ BB was available to testify at trial.²⁴⁷

In conclusion, the appellate court stated: “We know of no other instance in which a military judge has ordered a deposition under similar facts such as the instant case, and the parties and amicus briefs have pointed us to none.”²⁴⁸ Furthermore, because the Article 32 process will soon be more limited in scope, with “explicit statutory language” requiring that “[a] victim may not be required to testify at the preliminary hearing [d]efense counsel may or may not have greater occasion to request depositions of alleged victims after this legislation²⁴⁹ takes effect....”²⁵⁰

The *McDowell* court’s decision was based on earlier binding precedent. For instance, in *Jackson*²⁵¹, the highest military court found that the accused was denied a substantial pretrial right, requiring reversal, where the accused was denied the right to cross-examine a key government witness prior to trial and the trial court denied defendant’s motion for further proceedings under Article 32.²⁵² Thus, whether a deposition will be granted or not will be determined by the importance of the initially unavailable witness’s testimony. Submitting to a deposition would not be that big of an issue if the person overseeing the deposition was required to possess legal training. However, the RCM does not require a deposition officer to be legally trained. Additionally, unlike in an Article 32 hearing, where the IO may rule on objections, the deposition

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at *6.

²⁴⁹ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1702, 127 Stat 672.

²⁵⁰ *Id.*

²⁵¹ *United States v. Jackson*, 3 M.J. 597 (N.C.M.R. 1977) *aff’d*, 3 M.J. 206 (C.M.A. 1977).

²⁵² *See Id.* at 599.

officer shall “record, *but not rule upon*, objections or motions and the testimony to which they relate. . . .”²⁵³

“When any unusual problems, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the [CA].”²⁵⁴ Regarding deposition testimony: “Part or all of a deposition, so far as otherwise admissible under the [MRE], may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable. . . .”²⁵⁵ Additionally, the deposition officer is charged with “maintain[ing] order during the deposition and protect[ing] the parties and witnesses from annoyance, embarrassment, or oppression.”²⁵⁶ The deposition officer decides whether to adjourn the proceedings and inform the convening authority.²⁵⁷

MRE 1101 applies MRE 412 to Article 32 hearings.²⁵⁸ However, MRE 1101 does not apply MRE 412 to depositions, but RCM 702 says deposition testimony can be used on the merits and as substantive evidence if the witness is unavailable.²⁵⁹ In the civilian legal system, “[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.”²⁶⁰ However, in the military, a party cannot move to terminate the deposition. Only the deposition officer can terminate the deposition. Considering deposition officer’s responsibilities are “primarily ministerial in nature”²⁶¹, the RCM gives a deposition officer a significant

²⁵³ R.C.M. 702(f)(7).

²⁵⁴ R.C.M. 702(f) (Discussion).

²⁵⁵ R.C.M. 702(a) (Discussion).

²⁵⁶ R.C.M. 702(f)(3).

²⁵⁷ See R.C.M. 702(f) (Discussion) (“When any unusual problem, such as improper conduct by counsel or witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.”)

²⁵⁸ Mil. R. Evid. 1101(d).

²⁵⁹ R.C.M. 702(a) (Discussion).

²⁶⁰ Fed. R. Civ. P. 30; See also Fed. R. Civ. P. 30(d) (B) (“The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.”)

²⁶¹ *United States v. Hughes*, ACM 37958 (F REV), 2013 WL 4734857, at *5 (A.F. Ct. Crim. App. Aug. 28, 2013) *review denied*, 14-0144/AF, 2014 WL 1345428 (C.A.A.F. Mar. 6, 2014) (“R.C.M. 702(f) outlines the duties of a deposition officer. Our superior

amount of discretion resulting in the potential for victim abuse. Both parties should be allowed to move the military judge to terminate the deposition. At least in the civilian system, the military judge is in a separate branch of the government, free from the appearance of and potential actual biases involved. In the military, the CA, IO, and deposition officer are all members of the same executive branch. Furthermore, in the military, the RCM do not explain what happens after the deposition officer decides to inform the CA because according to the deposition officer, the conduct of the deposition is out of control. Can the CA terminate the deposition? Does the CA just tell the deposition officer to take a break and continue?

A legally trained officer should be required for depositions because, in addition to the concerns of admissibility of evidence at trial, MRE 412 is also intended to protect the victim from degrading and embarrassing cross-examination. Even if a deposition officer were forbidden from ruling on objections, at least a legally trained officer would have a better idea of when the MRE 412 line is crossed. MRE 412's application is explained in the MRE and in case law. However, the RCM, do not provide guidance on how to handle a situation where cross-examination becomes so abusive as to warrant the deposition officer to use his powers to control conduct as a means to stop the cross-examination. The deposition officer's conduct determination is too subjective to afford any meaningful protections to an alleged victim. Questions that a legally trained officer would properly exclude under MRE 412 might be allowed under a deposition officer's conduct determination if that officer did not subjectively think that a specific line of questioning passed into his bad conduct threshold.

The benefit of allowing witnesses the option of appearing at Article 32 hearings is undermined in the event the accused timely objects to not having an opportunity to cross-examine a key witness before trial. If the accused object before trial starts, the victim will be required to appear at a deposition potentially overseen by a non-legally trained deposition officer. Thus, victims are subject to the same legal incompetence and unfairness that precipitated reforms in the first place;

court has stated such responsibilities are primarily ministerial in nature.... As a deposition officer, [the] [deposition] [officer] would not have been called upon to ask her own questions or make conclusions of law or findings of fact."(internal citations and quotations omitted)).

only the venue has changed.

The victim-witness is left with a Hobson's choice. One option is for the victim to choose to testify at an Article 32 hearing, where hopefully the use of a JAG is "practicable" and MRE 412's procedural requirements are enforced completely. However, because the hearing is public, and MRE 412's procedures are not adequately enforced, ostracism and retaliation from peers who either attended the hearing or heard about the victim's testimony are likely.²⁶² The other choice is a deposition, where the accused will have the right to cross-examine the witness without the requirement of a legally trained judicial officer to rule on objections and with either all or part of the deposition testimony considered on the merits in pretrial proceedings by the IO.²⁶³

The addition of SVCs for sexual assault victims will benefit victims by providing victims with an attorney who will advocate for them exclusively²⁶⁴. However, because IOs are neither required, nor in the case of deposition officers, qualified, to rule on evidentiary objections at pretrial proceedings²⁶⁵, in the event an SVC attempts to invoke MRE 412 protections, the remedy to the victim in a pretrial setting is unclear. Regardless, for victims, the benefit of SVCs will be seen at trial.

While there are definitely some legal procedures in the military that justify a deviation from civilian procedures, criminal justice proceedings should not be one of them. The need for reform has never been more important, especially because victims are taking their grievances to federal civilian courts, only to be denied justice.²⁶⁶ Both

²⁶² Common reasons for victim's not reporting include: (1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident. See *AZ v. Shinseki*, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (citing Gov't Accountability Office, GAO-08-1013T, *Military Personnel: Preliminary Observations on DoD's and the Coast Guard's Sexual Assault Prevention and Response Programs* 14 (2008)).

²⁶³ R.C.M. 702(a) (Discussion).

²⁶⁴ 10 U.S.C.A. § 1044e (2014)

²⁶⁵ See R.C.M. 405(e) (Discussion); R.C.M. 405(h)(2) (Discussion); R.C.M. 702(f)(7); R.C.M. 702(h).

²⁶⁶ See *Cioca v. Rumsfeld*, 720 F.3d 505, 513-515 (4th Cir. 2013) (holding that service members' allegations that former Secretaries of Defense, through their acts and omissions in their official capacities, contributed to a military culture of tolerance for sexual crimes were either incident to, or arose out of, their military service, and, thus, no federal *Bivens* remedy was available for their injuries; allegations, including that Secretaries failed to appoint any members to a commission to investigate policies and procedures with respect to reports of sexual misconduct and that they

legal systems encounter victims who are afraid to speak up because of fear of retaliation and embarrassment. The psychological trauma and social consequences that haunt a victim of sexual assault do not differ because they happened on a military base or at a college fraternity party.

The procedural requirements of MRE 412 must be completely enforced. The ability of defense counsel to cross-examine witnesses in any circumstance where a JAG is not present must be eliminated. Additionally, an independent legally trained officer should make evidentiary rulings in both depositions and Article 32 hearings to ensure that MRE 412 fulfills its intended purpose as a rape shield. As long as the defense is afforded a meaningful and thorough opportunity to cross-examine witnesses at trial, due process will not be offended. Grand juries do not permit the defendant to cross-examine witnesses, let alone be present at the grand jury proceeding, and I see no reason other than tradition to justify its continuance, at least in sexual assault cases.

permitted command to use non-judicial punishment for sexual crimes, directly challenged wisdom of a wide range of military and disciplinary decisions made within ultimate chain of command.); see *Klay v. Panetta*, 924 F. Supp. 2d 8, 20 (D.D.C. 2013) (“[T]he Court finds that a *Bivens* remedy is unavailable to plaintiffs both because their injuries arose from, or were suffered in the course of activity incident to, their military service, and because their particular claims raise the very public policy considerations underlying the abstention doctrine. This decision is not meant to question in any way the seriousness of the alleged sexual assaults and retaliation, to minimize plaintiffs' suffering, or to express any doubts about the allegations that the culture and management of the military has allowed this kind of harassment and retaliation to persist. All parties agree that there is no question that allegations of rape and sexual assault by service-members should be investigated and, if appropriate, prosecuted, and that victims of any such assaults should be treated with care and compassion, and receive the full range of available support services and medical treatment to address their needs.... But the fact remains, as plaintiffs recognized in open court, that the constitution vests the ultimate power to decide how the military should run itself in Congress. Notwithstanding the deeply troubling nature of the allegations in plaintiffs' complaint, the Court is not free to infer a *Bivens* remedy under these circumstances. The special status of the military has required, the Constitution contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel....”(internal citations and quotations omitted)).

III. MJIA AND THE NDAA OF 2014

A. *United States Senator Kirsten Gillibrand's (D-NY) Reform Proposal*

In an article written by U.S. Senator Kirsten Gillibrand outlining her proposed reforms to the military justice system, she begins with, “[t]o find a common-sense solution, [one] just [has] to listen to the victim’s stories.”²⁶⁷ Gillibrand then describes the story of Air Force First Lieutenant Adam Cohen, who after telling his superiors that he was sexually assaulted and threatened, became the target of a criminal investigation.²⁶⁸ “In April of 2013, he was told by his commander, ‘I don’t believe you were raped.’”²⁶⁹ After Cohen described the attack, he was then told, “[t]hat’s good acting, but I still don’t believe you.”²⁷⁰ Cohen was then denied an expedited transfer request.²⁷¹ Gillibrand included this victim’s account as just one example of what commanders say directly to victims that are brave enough to come forward.²⁷²

In Gillibrand’s proposed Military Justice Improvement Act (“MJIA”)²⁷³, decision-making regarding whether serious crimes go to trial moves “from the chain of command to professionally trained military prosecutors, where it belongs.”²⁷⁴ Gillibrand points out that critics of the MJIA say that moving decision making will diminish good order, discipline, and unit cohesion.²⁷⁵ However, Gillibrand counters by arguing that “America’s closest allies like the U.K., Canada, and Israel have already adopted this approach without reported negative consequences to the ‘good order and discipline’ our military leaders are trying, but failing, to uphold.”²⁷⁶

²⁶⁷ Kirsten Gillibrand, *Justice Equal to Their Sacrifices: Military Leadership Can’t Ensure Justice For Sexual Assault Victims*, U.S. NEWS & WORLD REPORT (July 5, 2013), available at <http://www.usnews.com/opinion/articles/2013/07/05/military-leadership-cant-solve-the-problem-of-sexual-assault>.

²⁶⁸ *See Id.*

²⁶⁹ *See Id.*

²⁷⁰ *See Id.*

²⁷¹ *See Id.*

²⁷² *See Id.*

²⁷³ Military Justice Improvement Act, S. 967, 113TH Cong. (2013).

²⁷⁴ *See Gillibrand, supra note 267.*

²⁷⁵ *See Id.*

²⁷⁶ *See Id.*

The MJIA also leaves many crimes within the chain of command, including thirty-six crimes unique to the military, such as insubordination and other crimes punishable by less than one year of confinement.²⁷⁷ Additionally, the Act provides the offices of the military chiefs of staff with the authority and discretion to establish courts, empanel juries, and choose judges to hear cases (i.e. convening authorities).²⁷⁸ The MJIA would not amend Article 15,²⁷⁹ which deals with a commanding officer's non-judicial punishment option.²⁸⁰ Commanding officers would still be able to order non-judicial punishment for lesser offenses not directed to trial by the prosecutors.²⁸¹

"Despite ongoing advances in the areas of military medicine, technology, weaponry, and tactics, U.S. military justice remains rooted in an obsolete, eighteenth century system."²⁸² Commanders, rather than highly trained military legal personnel, are vested with the authority to administer justice."²⁸³ Prior to the enactment NDAA of 2014,²⁸⁴ the convening authority had the ability to make charging decisions, select jury members, and modify or overturn court decisions.²⁸⁵ Because the commander making these important decisions is in the accused's chain of command, military justice is unfairly biased, compromising both the accused's right to a fair and impartial trial as well as the alleged victim's access to meaningful justice.²⁸⁶

The MJIA still equips commanders with the tools to prevent and respond to sexual assault by empowering them to continue to create and maintain the climate within their respective units.²⁸⁷ If a military prosecutor decided not to try a case, a commander could still impose

²⁷⁷ *See Id.*

²⁷⁸ *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND U.S. SENATOR FOR N. Y., <http://www.gillibrand.senate.gov/mjia>.

²⁷⁹ 10 U.S.C. § 815 (2014).

²⁸⁰ *See Gillibrand, supra* note 371..

²⁸¹ *See Id.*

²⁸² THE MILITARY JUSTICE IMPROVEMENT ACT OF 2013 (S. 967) INFORMATIONAL FLYER (2013), *available at* <http://www.vva.org/MJIA/Documents/MJIA-Informational-Flyer.pdf>.

²⁸³ *See Id.*

²⁸⁴ National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. (2013) (enacted).

²⁸⁵ *See supra* note 376.

²⁸⁶ *See Id.*

²⁸⁷ *See Id.*

other forms of military discipline, including non-judicial punishment and administrative separation.²⁸⁸ Contrary to the critics' contentions, good order and discipline do not depend on just one person.²⁸⁹ The convening authority itself does not determine good order and discipline in a unit.²⁹⁰ Most leaders responsible for maintaining good order and discipline (i.e., Non-Commissioned Officers, Staff Non-Commissioned Officers, and junior officers) do not even have convening authority.²⁹¹

B. *The National Defense Authorization Act of 2014*²⁹²

The NDAA of 2014, signed into law by President Obama on December 26, 2013,²⁹³ fell short of enacting Gillibrand's transformative "taking the decision out of the chain of command" proposal, but did enact some significant and progressive reforms.²⁹⁴ The NDAA of 2014 will provide a victim advocate to every service member who reports an assault.²⁹⁵ Additionally, it will also make it a crime to retaliate against service members who report assaults, and it will prevent commanding officers from overturning sexual assault verdicts.²⁹⁶ The NDAA of 2014 gives the armed services one year to implement the use of judge advocates to conduct Article 32 investigations *where practicable*.²⁹⁷ Any

²⁸⁸ THE MILITARY JUSTICE IMPROVEMENT ACT OF 2013 (S. 967) INFORMATIONAL FLYER (2013), *available at* <http://www.vva.org/MJIA/Documents/MJIA-Informational-Flyer.pdf>.

²⁸⁹ *See Id.*

²⁹⁰ *See Id.*

²⁹¹ *See Id.*

²⁹² National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. (2013) (enacted).

²⁹³ *Obama Signs Budget Bills, Addresses Sexual Assault*, USA TODAY (Dec. 26, 2013), *available at* <http://www.usatoday.com/story/news/politics/2013/12/26/obama-military-defense-bill-sex-assault-cases/4210213/>.

²⁹⁴ Ashley Parker, *Senate Passes Pentagon Bill After Compromise on Obama Nominees*, N.Y. TIMES (Dec. 19, 2013), *available at* http://www.nytimes.com/2013/12/20/us/politics/senate-pentagon-policy-bill.html?_r=1&.

²⁹⁵ *See Id.*

²⁹⁶ *See Id.*

²⁹⁷ David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, LEMOORE NAVY NEWS, (Jan. 24, 2014), *available at* http://www.hanfordsentinel.com/lemoorenavynews/news/new-law-brings-changes-to-uniform-code-of-military-justice/article_9727c3e8-8516-11e3-8f57-0019bb2963f4.html (emphasis added).

victim of a crime who suffers pecuniary, emotional, or physical harm and is named in one the charges as a victim does not have to testify at the Article 32 hearing.²⁹⁸ Finally, there is no longer a five-year statute of limitations on rape and sexual assault on adults and children under Article 120 cases.²⁹⁹

C. *A Positive Half-Step Forward*

The military justice system must adopt Senator Gillibrand's idea to take prosecution outside of the chain of command if service-members are to receive true and meaningful justice. The NDAA of 2014 is a massive improvement, but it does not go far enough. Making retaliation a crime is a step in the right direction, especially because the complaining party can bring the claim directly to the Inspector General ("IG") of their respective military branch for an independent investigation of alleged retaliation.³⁰⁰ The IG of the specific branch will also be required to notify the IG of the Department of Defense of the inquiry.³⁰¹ Therefore, because the IG is several ranks above the immediate superior a victim would normally consult about alleged retaliation, there is a better chance of an impartial investigation and determination due to the IG's lack of personal relationships and therefore bias against or for the victim or accused. However, victims may still fear ostracism and retaliation because now instead of simply going to the teacher, they must go directly to the principal.

The auxiliary legal assistance to sexual assault victims will definitely benefit alleged victims by putting someone by their side throughout the proceedings for emotional support and by providing competent legal representation.³⁰² However, as mentioned *supra*, the benefits of SVCs will largely be felt at trial because a judge knowledgeable in the law can rule on objections. Certain victims named in charges but

²⁹⁸ *See Id.*

²⁹⁹ *See Id.*

³⁰⁰ NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1714, 127 Stat 672 (codified as amended at 10 U.S.C. § 1034 (2014)).

³⁰¹ *Id.*

³⁰² NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1704, 127 Stat 672 (codified as amended at 10 U.S.C. § 846 (b)(2014)); NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, PL 113-66, § 1716, 127 Stat 672 (codified as amended at 10 U.S.C. § 1044e (2014)).

not having to testify at Article 32 hearings will also ensure more just outcomes and protect victim interests, assuming people “in the know” do not gossip. Regarding legally trained judicial officers at pretrial proceedings, hopefully, “whenever practicable” will turn out to mean every time there is a pretrial proceeding. Overall, the passage of the NDAA of 2014 was a substantial and very positive move in the right direction, but without a doubt, more must be done.

VII. CONCLUSION

A few weeks after the Naval Academy Article 32 hearing concluded, a reporter from the Washington Post went to the Naval Academy to interview the victim.³⁰³ “As [the victim approached] the Naval Academy gate to meet [the] reporter, the guard who had just been so chatty and welcoming stop[ed] smiling.”³⁰⁴ “No one acts like they know her anymore; no one speaks or even looks her way as she crosses the campus.”³⁰⁵ During the interview, the victim said that the questions she was asked at a public preliminary hearing in the case—whether she wore underwear to the party, for instance—“were more humiliating than [she] could have imagined.”³⁰⁶ The victim told the reporter that regardless of the case’s disposition, she intends to finish her remaining seven months at the academy and become a commissioned officer, despite what the victim calls her “complete and total isolation” on campus.³⁰⁷ The victim believes that that “If someone committed a heinous crime, they should be held accountable.”³⁰⁸ Additionally, last fall, the young woman was required to attend football games with the rest of the cheerleading team, where some of the cheers were directed at her.³⁰⁹ Since the case made the news, she no longer has to attend the games.³¹⁰ The victim believes that that “[i]f someone committed a

³⁰³ Melinda Henneberger, *Alleged Victim in Navy Rape Case: ‘This is Still My School’*, WASH. POST, (Oct. 10, 2013), available at

http://www.washingtonpost.com/politics/alleged-victim-in-navy-rape-case-this-is-still-my-school/2013/10/10/d4592c18-30ff-11e3-9c68-1cf643210300_story.html.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

heinous crime, they should be held accountable.”³¹¹ Anytime someone walks in and sees the victim sitting in the café, they turn their head in avoidance.³¹² Prior to this case, the victim was a popular cheerleader who “used to interact with lots of people” but after the pretrial hearing, she said she had to write off having a social life.³¹³ The victim’s boyfriend told the reporter “[s]he still flashes back to a defense lawyer asking her how she ‘performs certain activities’ — oral sex, she means, and can’t believe it.”³¹⁴

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”³¹⁵ This Naval Academy victim was denied due process. The military needs reform that will ensure that both the accused and the accuser are afforded meaningful justice. Article 32 hearings are supposed to determine probable cause so that justice is served. Instead, they are used to scare victims into silence and isolation. Although Article 32 hearings are not trials, they are equally as important. If the IO does not believe there is probable cause, the accused will not be tried, and the victim will be denied justice. Without a victim’s complete and accurate testimony of what occurred, probable cause will most likely be lacking, and the accused will not be adjudicated. If defense counsel can make the victim recant, not because the victim is lying, but because defense counsel is abusing the victim on the witness stand, the victim will never get his or her day in court.

Substantial progress will be made if MRE 412’s procedural requirements are enforced. This does not require committee meetings, bill drafting, or any additional legislative energy. The rules are already written—they just need to be addressed and enforced. How can service-members be denied the same protections afforded to American civilians, when service-members are the one’s sacrificing their time and their lives to ensure that our country’s democratic and judicial values are protected? “Bitter experience has sharpened our realization that a major test of true democracy is the fair administration of justice.”³¹⁶ “If the

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Kaley v. United States*, 134 S. Ct. 1090, 1114, 188 L. Ed. 2d 46 (2014) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotations omitted)).

³¹⁶ *Sacher v. United States*, 343 U.S. 1, 23-24 (1952) (Frankfurter, J., dissenting).

conditions for a society of free men formulated in our Bill of Rights are not to be turned into mere rhetoric, independent and impartial courts must be available for their enforcement.”³¹⁷



³¹⁷ *Id.*