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Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military

Keywords

Courts, Legal representation, Right to be heard, Sex crimes, Victims

**INTO THE WILD BLUE YONDER OF LEGAL REPRESENTATION FOR
VICTIMS OF SEXUAL ASSAULT:
CAN U.S. STATE COURTS LEARN FROM THE MILITARY?**

*Erin Gardner Schenk & David L. Shakes**

*Erin Gardner Schenk, J.D., University of Denver Sturm College of Law; B.B.A., University of Oklahoma, thanks BIC, loyal EIC. She dedicates this article to those who have served, namely Maj. Jason W. Schenk, USAF, and her grandfather, the late Lt. Col. Louis R. Douglas, USAF Ret. This author owes much of her constitution and wherewithal to the instant at the Army Air Corps Aviation Cadet Training Program, housed at Yale University in 1943, when, even though no one else would, “ol’ Douglas jumped.”

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SECTION I: INTRODUCTION:

“If you sign up to defend your country and to risk your own life . . . [y]ou shouldn’t have to be running from your fellow soldiers and airmen—that is inexcusable.”¹ Despite public criticism regarding past attempts at addressing the problem of sexual assault within the military, the United States Armed Forces² have recently become frontrunners in the area of protecting the rights and privacy interests of sexual assault victims. The Air Force was the first branch of the Armed Forces to step outside the confines of its traditional core competency—protecting the population against outside threats—and begin implementing an innovative means of protecting its own servicemembers against an internal threat—sexual assault within its ranks.³ In early 2013, as part of a widespread and multifaceted effort to combat this problem, the Air Force initiated its Special Victims’ Counsel (“SVC”) program, through which the Air Force provides a JAG Corps⁴ attorney to independently represent the victim of an alleged sexual assault.⁵ The SVC attorney is separate and independent from the prosecutorial “trial counsel,” is provided by the Air Force at no cost to the victim, and is tasked with both advising the victim of the legal process and protecting the victim’s privacy interest⁶ under Military Rules of Evidence (“M.R.E.”) Rule 412.⁷ Not long after the Air Force implemented its SVC program, in the landmark decision *LRM v. Kastenber*,⁸ the highest appellate court in the U.S. military justice system—the United States Court of Appeals for the Armed Forces (“C.A.A.F.”)⁹—held that a sexual assault victim’s right to be heard under the M.R.E. permits the victim to be heard through his or her SVC attorney, subject to reasonable limitations,¹⁰ during a court-martial or “Article 32 hearing.”¹¹ Subsequent to the C.A.A.F.’s

¹ Army Sgt. 1st Class Blair Huesdens, *Face of Defense: Special Counsel Aids Sexual Assault Victims*, U.S. DEPT OF DEFENSE (Dec. 6, 2013) <http://archive.defense.gov/news/newsarticle.aspx?id=121293> (quoting Army Capt. Peter Williams, Special Victims’ Counsel for the Minn. Nat’l Guard).

² For purposes of this article, the United States Armed Forces shall be referenced as “Armed Forces” or “military” and the United States may be abbreviated, “U.S.” Furthermore, the individual United States service branches may be referred to in short, such as “Army,” for United States Army.

³ *New Air Force Program Aids Sexual Assault*, Rape Abuse and Incest National Network Survivors, <https://rainn.org/news-room/us-air-force-special-victims-council-program> (Last visited Sept. 9, 2015).

⁴ The term, “JAG Corps,” refers to the Judge Advocate General’s Corps, the legal division of each branch of the Armed Services. For purposes of this article, the authors make no branch-specific distinction unless the distinction is material to the precise topic being addressed. See *About JAG*, U.S. AIR FORCE JUDGE ADVOCATE GENERAL CORPS, <http://www.airforce.com/jag/about> (Last visited Sept. 11, 2015).

⁵ *Air Force SVCs Advocate for Sexual Assault Victims*, AMERICAN BAR ASSOCIATION: NEWS ARCHIVES (Feb. 7, 2014, 5:26 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/air_force_svcs_advoc.html.

⁶ One legal scholar asserts that, even more than a criminal conviction or a civil tort action in the victim’s favor, “[t]he first need of rape victims, both personal and legal, is privacy Securing personal control and reclaiming privacy are often the most important steps in reclaiming a sense of security. This need for reclaimed privacy begins with the fact of the rape itself.” Jeffrey Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of DeFacto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 713 (2007).

⁷ Mil. R. Evid. 412, in pertinent part provides, “[t]he 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.” 10 U.S.C. § 1044e (2014).

⁸ *LRM v. Kastenber*, 72 M.J. 364, 370 (C.A.A.F. 2013). Note: the *Kastenber* case referenced throughout the majority of this article is the case as heard on appeal by the C.A.A.F. Prior to the C.A.A.F. appeal, the case was heard under the same name by the U.S. Air Force Court of Criminal Appeals “AFCCA” (*infra* note 122), which shall be referenced herein as the “lower *Kastenber*” case. However, that court’s reasoning on the issue of victim standing was limited due to the AFCCA’s holding that it lacked jurisdiction. Therefore, the references to the lower *Kastenber* case herein will be limited to a brief procedural analysis, and unless otherwise noted, any general reference to *Kastenber* herein refer to the C.A.A.F. case.

⁹ The C.A.A.F. is the highest appellate military justice tribunal, and is “composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate. . . . Decisions by the [C.A.A.F.] are subject to direct review by the Supreme Court of the United States.” U.S. COURT OF APPEALS FOR ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited Sept. 15, 2015).

¹⁰ Such “reasonable limitations,” as discussed by the C.A.A.F. might include, for example, a requirement that the victim and his or her SVC make submissions in written form. *Kastenber*, 72 M.J. at 371.

Kastenberg decision, Congress reaffirmed the right of a military sexual assault victim to be represented through counsel when, in its National Defense Authorization Act for Fiscal Year 2015, Congress required the M.R.E. be amended to reflect that “when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such offense, the victim may exercise that right through counsel, including through a Special Victims’ Counsel.”¹²

As previously noted, the Armed Forces have been scrutinized for years for the proliferation of sexual assault occurrences, as well as the frequency with which either military sexual assault victims have slipped through the cracks of the military justice system or—worse—reports have resulted in controversial dismissals of high profile cases¹³ or threats of career retaliation against the victims.¹⁴ Given this reputation, the Armed Forces might seem an unlikely environment for the upshot of one of the most encouraging advancements for sexual assault victims since the evidentiary “rape shield” statutes of the 1970s.¹⁵ Perhaps necessity is the mother of invention. Perhaps the dire need for reform in this area catalyzed the renovation of the legal representation concept to include victims of sexual assault. Whatever the impetus, the military is now leading the U.S., not only in its traditional defense role, but also, in its new role as a pioneer in the relatively uncharted territory¹⁶ of providing independent legal representation to victims of sexual assault.¹⁷

By the metrics set forth in recent Department of Defense (“DoD”) statistics reports,¹⁸ even based on the SVC’s yet relatively short existence, the Air Force SVC and its sister

¹¹ The term, “Article 32 hearing,” comes from Article 32 of the Uniform Code of Military Justice Title VII, “Trial Practice,” (10 U.S.C. § 832). An Article 32 hearing is somewhat analogous to a grand jury, in that an Article 32 hearing is required at which sufficient evidence must be presented before the convening authority may convene a general court-martial to try the accused. 10 U.S.C. §832 (2014); *See also* Fed. R. Crim. P. 5.1(e). However, unlike a grand jury, an Article 32 hearing grants an accused the opportunity to call witnesses and cross-examine opposition witnesses. 10 U.S.C. §832(d)(2).

¹² NDAA SEC. 534. Enhancement Of Victims’ Rights In Connection With Prosecution Of Certain Sex-Related Offenses, Subsection (c), provides, “Not later than 180 days after the date of the enactment of this Act, Part III of the Manual for Courts-Martial shall be modified to provide that when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such [sic] offense, the victim may exercise that right through counsel, including through a Special Victims’ Counsel under section 1044e of title 10, United States Code (as amended by subsection (a)).” 113 H.R. 3979.

¹³ *See* Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS & STRIPES, Feb. 27, 2013, <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>. “Convening authorities have unfettered discretion to reduce penalties in criminal case dispositions and do so frequently. Dismissing an entire case, however, is extremely rare. Franklin’s disposition of the case came after a uniquely military post-trial review process in which convicted servicemembers petition the convening authority for clemency. Those petitions contain any mitigating factors and letters from supporters. Wilkerson’s 20-year career had provided him with many supporters, especially within the fighter pilot community.” *Id.*

¹⁴ “However, too many of these respondents indicated they perceived social and/or professional retaliation as a result of making a report.” DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 18, (Nov. 25, 2014), <http://i2.cdn.turner.com/cnn/2014/images/12/03/dod.sapr.report.to.potus.pdf>.

¹⁵ Privacy Protection for Rape Victims Act of 1978, 95 P.L. 540, 92 Stat. 2046.

¹⁶ Although the idea of providing legal representation to victims of sexual assault has been discussed in the literature for over a decade, and has been implemented in other national jurisdictions worldwide, as well as in the U.S. federal system, the Armed Forces have become the leader in implementing this concept in a more tangible sense in U.S. sexual assault prosecutions. Wendy J. Murphy, *The Victim Advocacy and Research Group: Serving a Growing Need to Provide Rape Victims with Personal Legal Representation to Protect Privacy Rights and to Fight Gender Bias in the Criminal Justice System*, 10 J. OF SOCIAL DISTRESS & THE HOMELESS 1, 123-38 (2001); OHIO REV. CODE ANN. § 2907.02(F) (West 2007).

¹⁷ The authors are aware that many prefer the term “survivor.” They use the term “victim” because that is the term used in the Armed Forces SVC program and the pertinent case law cited throughout this article.

¹⁸ *See e.g.*, DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE: PROVISIONAL METRICS ON SEXUAL ASSAULT, FISCAL YEAR 2014 14, (2014), http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Appendix_B.pdf; DEP’T OF

programs have the potential for success.¹⁹ However, this article does not focus solely on past achievements. Rather, the article also looks to the future and asks whether the SVC program could be effectively implemented in state criminal justice systems in the United States. Specifically, the article begins in Section II by analyzing the history of the Armed Forces' SVC programs, as well as the government's reasoning behind implementing those programs. The article continues in Section III by detailing the political path by which the Armed Forces arrived at the decision to implement the SVC programs, as well as the legislative and judicial developments since the SVC programs' inception. In Section IV, the article compares the structure and efficacy of the Armed Forces' programs to similar victims' legal representation systems worldwide. In Section V, the article addresses the constitutionality of victim representation in an adversarial justice system, including a discussion of the main objections that have been raised against the implementation of such SVC programs. The article then concludes in Section VI, in which the authors ultimately advocate for the U.S. state court systems' adoption of SVC programs in order to provide sexual assault victims with independent legal representation.

SECTION II: THE GOVERNMENT'S REASONING BEHIND ITS DECISION TO IMPLEMENT THE ARMED FORCES' SVC PROGRAMS:

The United States, on the whole, has a vested interest in reducing incidents of military sexual assault, both for the more conceptual purpose of maintaining good order and discipline, protecting the welfare of its servicemembers, and creating an environment that will attract recruits of all genders, as well as for the more concrete purpose of reducing the financial cost of investigating, prosecuting, researching,²⁰ and increasing awareness of sexual assault crimes and their effects.²¹ Although, admittedly, some critics suggest that the data reported by the DoD concerning sexual assaults is significantly exaggerated,²² it is the belief of certain political officials,²³ social justice groups,²⁴ and public media organizations,²⁵ as well as the authors' belief, that sexual assault in Armed Forces remains a persistent problem. In keeping with this belief, the development of SVC programs in response to the ongoing issue of sexual assault, as well as the political forces behind the program's conception, are detailed below.

DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2013,

http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

¹⁹ An interesting area for further research would be interviewing victims who were independently represented by counsel to inquire as to what impact their victim attorneys had on their satisfaction with the system.

²⁰ For example, the cost of producing the Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2013, according to the front page of the report itself, was "\$1,441,000 for the 2014 Fiscal Year. This includes \$183,000 in expenses and \$1,258,000 in [] labor." DEP'T OF DEF. ANN. REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2013 (2014),

http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

²¹ *Id.* at 101.

²² See, e.g., Lindsay L. Rodman, Commentary, *The Pentagon's Bad Math on Sexual Assault*, WALL STREET J. (May 19, 2013, 6:16 PM), <http://www.wsj.com/articles/SB10001424127887323582904578484941173658754>.

²³ See Tyrone C. Marshall Jr., *SAPRO Director: 'No One Declaring Success' on Sexual Assault*, U.S. DEP'T OF DEF.: DOD NEWS (Dec. 4, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=123762>. See also Stav Ziv, *Report on Sexual Assault in the Military Draws Criticism*, NEWSWEEK (Dec. 8, 2014, 4:39 PM), <http://www.newsweek.com/report-sexual-assault-military-draws-criticism-290173>. ("We still have a long way to go," outgoing Secretary of Defense Chuck Hagel said last week at a press conference . . .").

²⁴ See, e.g., *Stop Sexual Assault in the Military*, THOMAS MERTON CENTER, <http://thomasmertoncenter.org/ssam/> (last visited Sep. 16, 2015); Peter Weber, *Can the military solve its sexual assault crisis?*, THE WEEK (May 15, 2013), <http://theweek.com/articles/464390/military-solve-sexual-assault-crisis>.

²⁵ Sarah Childress, *Why the Military Has a Sexual Assault Problem*, PBS FRONTLINE (May 10, 2013, 11:49 AM), <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/why-the-military-has-a-rape-problem/>. See also Ziv, *supra* note 23 (in which a Sunday *New York Times* editorial opinion following the publication of the DoD's December 2014 report on sexual assault emphasized, "[the] measure of the scale of the problem of sexual assault in the military" and noted, "[t]he total number of assaults is too high by orders of magnitude and the incidence of reporting is far too low.") (citation omitted).

A. A RECENT HISTORY OF THE SVC PROGRAMS:

On January 28, 2013, the U.S. Air Force began a pilot program to provide licensed attorneys from the JAG Corps to serve as Special Victims' Counsel to victims of alleged sexual assault.²⁶ Unlike anything yet attempted in the U.S. civilian criminal justice arena, the program takes a revolutionary stance by providing legal representation for third parties, that is, the individuals—in these cases, victims of alleged sexual assault—who are not a legal party to a lawsuit.²⁷ These SVC advocates are unlike a “SARC” (Sexual Assault Response Coordinator) or a “VA” (Victim Advocate), both of whom fill the role of psychiatric, emotional, or logistical counselors.²⁸ Rather, the SVC are licensed JAG Corps attorneys, provided upon request, as early as the reporting stage of the process, at no cost to the victim, dedicated solely to advocating for the legal needs of that victim throughout the military criminal justice process.²⁹ Just as defense counsel represents the accused and trial counsel represents the government, “[e]very SVC is charged to zealously represent [his or her] client, even when that interest is not in the government's interest.”³⁰

Notably, the Air Force has not been alone in its strides. Two other U.S. military service branches followed, with the Department of the Navy³¹ and the Coast Guard launching similar pilot programs in the summer of 2013.³² Shortly thereafter, then-U.S. Secretary of Defense, Chuck Hagel, issued a memorandum requiring the implementation of SVC programs in each branch of the U.S. Armed Forces.³³ The Army and the Marine Corps implemented their SVC programs in November 2013, with instructions to be fully operational by January 2014.³⁴ Implementation of SVC programs advanced to the state National Guard level when Minnesota became one of the first states to implement such a system in late 2013.³⁵ Finally,

²⁶ R. CHUCK MASON, CONG. RESEARCH SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS 8 (2013). For purposes of this article, “victim,” or “sexual assault victim,” or “sexual assault” all refer only to the context of criminal sexual assault. This article excludes from its scope all evidentiary matters related to civil sexual assault hearings.

²⁷ *Id.* at 9. In traditional civilian criminal cases, the parties are limited to the defendant and the state/government.

²⁸ See U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, *Need Assistance? Help for Me*, <http://sapr.mil/index.php/victim-assistance/need-assistance/help-for-me> (last visited September 16, 2015); U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, *Responding to Reports of Sexual Assault*, http://myduty.mil/public/docs/responding_to_reports_of_sexual_assault.pdf (last visited September 16, 2015).

²⁹ See 10 U.S.C.S. § 1565b (2015); 10 U.S.C.S. § 1044 (2015).

³⁰ Michael Biesecker & Emery P. Dalesio, *New Corps of Military Lawyers Help Rape Victims*, WASH. TIMES (Mar. 30, 2014), <http://www.washingtontimes.com/news/2014/mar/30/new-hearing-set-monday-in-army-generals-sex-case/print/> (quoting Col. Jay McKee, who has managed the Army's Special Victims Counsel program since its Nov. 1, 2014 launch).

³¹ DEP'T OF THE NAVY, SECNAVINST. 1752.4B, SEXUAL ASSAULT PREVENTION AND RESPONSE (2013), <http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1752.4B.pdf>.

³² The Coast Guard SVC program became effective July 15, 2013. U.S. COAST GUARD, R. 151700Z, SEXUAL ASSAULT PREVENTION AND RESPONSE—SPECIAL VICTIMS COUNSEL (2013), available at http://www.uscg.mil/announcements/alcoast/299-13_alcoast.txt.

³³ SEC'YS OF DEF., MEM. FOR SEC'YS OF THE MILITARY DEP'TS ET AL., SEXUAL ASSAULT PREVENTION AND RESPONSE (2013), http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

³⁴ *Establishment of the Marine Corps Victims' Legal Counsel Organization (VLCO)*, MARINES: THE OFFICIAL WEBSITE OF THE U.S. MARINE CORPS, Oct. 31, 2013, <http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/153620/establishment-of-the-marine-corps-victims-legal-counsel-organization-vlco.aspx>; *SHAPR: Special Victim Couns. Program, STAND-TO!: THE OFFICIAL FOCUS OF THE U.S. ARMY*, Dec. 2, 2013, http://www.army.mil/standto/archive_2013-12-02/ (“[The U.S. Army e]stablished a Special Victim Counsel (SVC) capability as of Nov. 1, 2013, in accordance with the Aug. 14, 2013 SECDEF memorandum The SVC program is expected to achieve full operational capability no later than Jan. 1, 2014.”).

³⁵ Army Sgt. 1st Class Blair Heusdens, *Face of Def.: Special Counsel Aids Sexual Assault Victims*, DEP'T OF DEF.: DOD NEWS, Dec. 6, 2013, <http://archive.defense.gov/news/newsarticle.aspx?id=121293>.

Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 provided for the “[d]esignation and availability of Special Victims’ Counsel for victims of sex-related offenses.”³⁶

Thus far, the SVC programs have been readily utilized, and sexual assault reporting has increased. Six months after the Air Force pilot program began, 392 victims of sexual assault had requested an SVC.³⁷ As of August 9, 2013, that number had grown to 419,³⁸ and as of September 6, 2013, individuals requesting SVC numbered 458.³⁹ Just over one year into the program’s existence, Air Force “SVCs ha[d] attended 110 courts-martial and 122 Article 32 hearings (pretrial hearings), [Air Force Colonel Dawn] Hankins said. SVCs ha[d] also attended more than 930 interviews with investigators, defense counsel and trial counsel.”⁴⁰

While the mere availability of victim attorneys immensely benefits victims of past crimes, both the Armed Forces and sexual assault victims share a much further-reaching goal—reducing the occurrence of future sexual assaults.⁴¹ By increasing the percentage of sexual assaults reported,⁴² the SVC also ultimately stands to decrease the number of incidents of the underlying offenses. Numerous studies, conducted at different times and based on different statistical data, independently indicate a negative correlation⁴³ between the perceived likelihood of punishment for a societally substandard or illegal behavior and deterrence of the punishable action.⁴⁴ That is, an increase in one’s perceived likelihood of punishment relates to a decrease in the likelihood of the individual taking the punishable action. Furthermore, studies indicate the relationship between the perceived *certainty* of punishment and a reduction in commission of the underlying act is stronger than any such relationship between the perceived *severity* of the punishment and the reduction of the commission of the act.⁴⁵ Essentially, far more than an individual’s perception of the potential severity of punishment for an action, the perception that he or she is likely to be caught and punished relates to a reduced likelihood that the individual will take the action. Ultimately, based on this underlying premise, if the SVC

³⁶ 127 Stat. 672 (2013). For more information on legislative history, see Section III.(B.), “The Legal Path Leading to the Armed Forces’ SVC Implementation.”

³⁷ Nancy Montgomery, *Air Force Program a Rare Bright Spot in Military’s Sex Assault Fight*, STARS & STRIPES, Feb. 26, 2014, <http://www.stripes.com/news/air-force-program-a-rare-bright-spot-in-military-s-sex-assault-fight-1.269628>.

³⁸ R. CHUCK MASON, CONG. RESEARCH SERV., *supra* note 26, at 8.

³⁹ *Special Victims’ Counsel Program*, U.S. AIR FORCE, Sep. 9, 2013, <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>.

⁴⁰ *Air Force SVCs Advocate for Sexual Assault Victims*, *supra* note 5.

⁴¹ One of the major reasons victims of sexual assault decide to participate in the criminal justice system is to ensure that the perpetrator does not commit additional sexual assaults. Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. COMMUNITY PSYCHOL. 191, 198 (2010).

⁴² The following article makes two references to the goal of increased reporting: Ramsey Cox & Jeremy Herb, *Senate Blocks Gillibrand Sex Assault Bill*, THE HILL (Mar. 6, 2014, 2:28 PM), <http://thehill.com/policy/defense/200124-senate-defeats-gillibrand-military-sex-assault-bill>.

⁴³ Although longstanding doctrines of logic emphasize that a correlation (relationship) between two variables does not automatically indicate a causal relationship between them, a statistical correlation is, nonetheless, required before linear causation can be determined. See Saul A. McLeod, *Correlation*, SIMPLY PSYCHOL. (Sept. 2008), <http://www.simplypsychology.org/correlation.html>.

⁴⁴ See James Q. Wilson, *Thinking About Crime: The Debate Over Deterrence*, 252 THE ATLANTIC MONTHLY 72, 72-88 (Sept. 1983). Wilson references supporting studies conducted by economist Isaac Erlich, the Panel on Research on Deterrent and Incapacitative Effects (established by the National Academy of Sciences, National Research Council), and Alfred Blumstein and Daniel Nagin (who conducted a 1977 study in which they ultimately found that the higher the probability of conviction for draft evasion, the lower the evasion rates).

⁴⁵ *Id.* See also Saranath Lawpoolsre, Jingyi Li, & Elisa R. Braver, *Do Speeding Tickets Reduce the Likelihood of Receiving Subsequent Speeding Tickets? A Longitudinal Study of Speeding Violators in Maryland*, 8 TRAFFIC INJ. PREVENTION 26, 26 (2007). “PBJ [Probation before judgment] is associated with a reduced rate of recidivism more than stronger penalties; however, it is unclear whether the reduction primarily is attributable to the penalty itself or to characteristics of drivers receiving PBJ. Increasing drivers’ perceptions that they are at risk of being caught speeding may improve the effectiveness of speeding law enforcement.”

succeeds in achieving increased reporting of sexual assault in the military, the likelihood that the offender will be brought to light and punished also increases, which could then have a significant deterrent effect as to the future commission of sexual assaults.

Based on the aforementioned deterrence studies, the SVC program already shows great potential for decreasing sexual assault by way of increased reporting. For example, “[d]uring the first three quarters of [the 2013] fiscal year, servicemembers made 3,553 complaints regarding sex assault, which was defined as rape, sodomy and other unwanted sexual contact. This represented a forty-six percent increase compared to the same time period—from October to June—in 2012.”⁴⁶

Furthermore, the Report to the President of the United States on Sexual Assault Prevention and Response: Provisional Metrics on Sexual Assault Fiscal Year [“FY”] 2014 revealed that “[i]n FY 2014, the Military Services received a total of 5,983 reports of sexual assault involving Service members as either victims or subjects, which represents an 8 percent increase from the 5,518 reports made in FY 2013.”⁴⁷ The report goes on to note a dramatic increase in reporting that coincides with the implementation of the SVC programs in 2013.

The increase in reporting from FY 2013 to FY 2014 is more modest than the increase in reporting from FY 2012 to FY 2013. This is not surprising given that the increase in FY 2013 was an unprecedented 50 percent. In FY 2014, Service members sustained the high level of reporting seen in FY 2013.⁴⁸

The dramatic increase in Fiscal Years 2013 and 2014, since the SVC programs began, can be even better understood when compared with Fiscal Years 2007 through 2012, in which the number of reports received increased only slightly from 2,846 (in 2007) to 3,604 (in 2012), a difference of only 26 percent, or 758 more reports annually over the course of five years.⁴⁹ In contrast, the 5,983 reports received in 2014 almost double the 3,604 reports received in 2012, reflecting a sixty-seven percent increase in annual reporting in only two years’ time.⁵⁰ Another way of comparing the data contained in this report is that, during the six-year period from 2007 to 2012, the “Military Services” received a total of 19,751 reports of sexual assault, whereas they received 11,501 reports in 2013 and 2014 alone.⁵¹

In addition to the primary benefit increased reporting stands to have in the form of its deterrent effect on a future perpetrator, that increased deterrence could then have a secondary benefit in that it may, in turn, increase the likelihood of future reporting by victims. Studies show that one of the major reasons victims of sexual assault decide to participate in the criminal justice system is to ensure that the perpetrator does not commit additional, future sexual assaults.⁵² Therefore, knowledge that reporting an incident could, along with other

⁴⁶ Rebecca Ruiz, *Congress Passes Major Military Sex Assault Reform*, FORBES, (Dec. 20, 2013, 12:20 PM), <http://www.forbes.com/sites/rebeccaruiz/2013/12/20/congress-passes-major-military-sex-assault-reform/>. Note: The Department of Defense, via Chuck Hagel, seemed to believe this number reflects a true increase in the number of victim reports. DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, 3 (2014)

http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf.

⁴⁷ *Provisional Metrics on Sexual Assault Fiscal Year 2014*, DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, 23, (2014), http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Appendix_B.pdf.

⁴⁸ *Id.* at 24.

⁴⁹ *See id.* at 23.

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² Patterson & Campbell, *supra* note 41, at 198.

victims' reports, have the cumulative effect of reducing future incidents could encourage even more victims to report than otherwise would. Ultimately, this positive perpetual cycle could dramatically improve the dismal landscape of sexual assault.

B. DISCUSSION AS TO WHY VICTIMS OF SEXUAL CRIMES NEED REPRESENTATION, AS COMPARED TO VICTIMS OF ANY OTHER TYPE OF CRIME:

In this overarching discussion on the SVC program, one vital step is a brief discussion of how the Armed Forces arrived at their current stance on legal representation for victims of sexual assault, beginning with the historical and legislative background, both civil and military, for rape prevention. Australian studies have now documented the fact that “the percentage of . . . defendants pleading not guilty who were acquitted in the higher courts was highest in sexual assault cases.”⁵³ Even as far back as 1966, a famous study of American jurors found that the variance was greater for non-aggravated rape cases than for any other crime, as between the number of actual acquittals by jurors and the number of times the presiding judge, having been surveyed at the conclusion of the trial, would have acquitted the defendant.⁵⁴ The initial push for rape reform in the United States, at the civilian level developed shortly thereafter, in the 1970s—largely in response to the feminist movement⁵⁵ and an increase in sex crimes in the late 1960s and early 1970s—until, by the mid-1980s, most states had some type of rape reform law.⁵⁶ Among those reforms was the integration of statutory rape shield laws, the first of which was developed in 1975, which generally prevent—although to varying degrees and with varying levels of specificity—questioning as to evidence, opinion, or reputation of a sexual assault victim's past sexual conduct.⁵⁷

The military's rape shield rule came into existence in 1978.⁵⁸ Since that time, the situation for sexual assault victims in the military has continually evolved, and potential political ramifications always underlie decisions pertaining to sexual assault in the military context.

1. THE CURRENT U.S. CIVILIAN MODEL AND ITS SHORTCOMINGS AS IT PERTAINS TO SEXUAL ASSAULT TRIALS:

a. VICTIM CONSENT AS A COMMON DEFENSE:

Sexual assaults are unique crimes in the sense that most often the key witness for the prosecution is the victim of the alleged crime. Because the victim and the government usually share a common adversary—the accused—the public often perceives the objectives of the state as being aligned with those of the victim. Occasionally and coincidentally, that perception may be true. However, importantly, that perception does not always hold true from an evidentiary perspective. Because of the uniquely intimate nature of a sexual assault crime, the prosecution

⁵³ Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE at 2 (No. 344 August 2007) (Australian Institute of Criminology).

⁵⁴ David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. OF CRIM. L. AND CRIMINOLOGY 1994, 1256-57 (1997 Issue 4) (citing Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY* 249-54 (1966)).

⁵⁵ Lynn Hecht Schafran & Jillian Weinberger, *Impressive Progress Alongside Persistent Problems: Rape Law, Policy and Practice in the United States*, in INTERNATIONAL APPROACHES TO RAPE 194 (Nicole Westmarland & Geetanjali Gangoli eds., 2011); See Germaine Greer, *Seduction Is a Four Letter Word*, reprinted in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 327 (Erich Goode & Richard Troiden eds., 1974).

⁵⁶ Mitsie Smith, Comment, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 147, 174 (2011).

⁵⁷ See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 990-91 (2008).

⁵⁸ Privacy Protection for Rape Victims Act of 1978, 95 P.L. 540, 92 Stat. 2046.

may seek to disclose information about the victim that he or she would not like publicized or even made part of closed-chambers court proceedings. The admissibility of psychological counseling and other medical records is also frequently the subject of legal dispute in sexual assault cases.

When the commission of non-sexual crimes is at issue—take, for example, kidnapping—the victim may still serve as the key witness for the prosecution. Federal protections for victims of federal crimes have been in place since the implementation of the Crime Victims Rights Act of 2004,⁵⁹ which, in pertinent part, affords victims of alleged federal crimes the statutory right not to be excluded from any related public court proceeding,⁶⁰ the right to be heard in a public court proceeding as to very limited matters (“release, plea, sentencing, or any parole proceeding”), and the “right to be treated with fairness and with respect for the victim’s dignity and privacy.”⁶¹ Even though these protections are important for any victim of a serious crime, one notable distinction between most federal crimes and sexual assault is that the victim/witness in the kidnapping runs a relatively low risk of personally being socially, professionally, or criminally scorned for anything relating to the crime. In sexual assault crimes, however, due to the frequent centrality of the issue of consent, the victim’s lifestyle and the nature of his or her private, social, and sexual activities might readily exculpate the accused while, at minimum, publically embarrassing if not literally incriminating the victim who may have had little or no say in the state’s initial decision to bring criminal charges against the accused or in the strategic planning of the evidence presented at trial.⁶² Furthermore, because an estimated two-thirds of rapes and seventy-three percent of sexual assaults are perpetrated by someone previously known to the victim,⁶³ the accused may possess a great deal of personal or sensitive information about the victim that the accused might seek to introduce in his or her defense at trial.

In addition to the delicacy of sexual and mental health information generally, the frequently asserted defense of the victim’s consent to sexual contact increases the likelihood that intimate details of the victim’s life will be deemed admissible in court, statutory rape shield laws notwithstanding.⁶⁴ Essentially, unlike the prosecution of other crimes that often relies on otherwise unrelated witnesses who are able to testify to what they actually saw, heard, smelled, etcetera, the key witness in a sexual assault crime is highly likely to be the victim. Therefore, treating the sexual assault victim as a target on the witness stand immensely helps the accused because the accused is often able to make sexual activity appear to be consensual, primarily by virtue of the victim’s past activities or lifestyle.⁶⁵ Although discrediting a witness is an oft-employed trial tactic used by opposing counsel on either side of the courtroom in any type of case, in sexual assault prosecutions where the witness is also the victim, this tactic takes on a whole new meaning. “When consent is at issue, the defence [sic] strategy generally rests on the systematic destruction of the complainant’s self-confidence and bodily integrity in a manner that no other victim confronts.”⁶⁶

⁵⁹ Justice for All Act of 2004, 108 P.L. 405, 118 Stat. 2260 (effective Oct. 30, 2004) (codified as amended at 18 U.S.C.A. § 3771 (West 2015)).

⁶⁰ “[U]nless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” Crime Victim’s Rights Act, 18 U.S.C.A. § 3771(a)(3) (West 2015).

⁶¹ 18 U.S.C. §§ 3771(a)(4), (a)(8).

⁶² See Klein, *supra* note 56, at 993-94.

⁶³ *The Offenders: The Rapist isn’t a Masked Stranger*, RAPE, ABUSE, & INCEST NATIONAL NETWORK (last visited Sept. 22, 2015), <https://www.rainn.org/get-information/statistics/sexual-assault-offenders>.

⁶⁴ See Klein, *supra* note 57, at 993-94.

⁶⁵ *Id.*

⁶⁶ Fiona E. Raitt, *Independent Legal Representation for Complainants in Rape Trials*, in *RETHINKING RAPE LAW* 267, 272 (Clare McGlynn & Vanessa E. Munro eds., 2010).

**b. INADEQUACY OF THE PROSECUTOR IN PROTECTING
VICTIMS' PRIVACY INTERESTS:**

Even if the defense does not employ such a tactic, the victim's risk of personal exposure combined with the potential incongruences between the public interest and the victim's privacy interest "create[] a zone of perpetual friction [that] acutely curbs the capacity of prosecutors to protect complainants from harsh or undignified treatment."⁶⁷ Notably, "[u]nder US criminal law, the prosecutor represents the government, not the victim Sometimes courts rule that because prosecutors do not represent the victim, they lack standing to assert the victim's rights."⁶⁸ In these instances particularly, the interests of the victim are not compatible with either the prosecution or defense interests. One young female captain, a rape victim who benefitted from the independent representation provided by the SVC, explained the various forces at play in a criminal trial as follows:

The best description that can be made is that a court-martial is like a chess game The defense and the prosecution are the people making the moves and the victims are just chess pieces that don't know the overall plan. The SVC was able to support me while the prosecution and defense were moving their chess pieces.⁶⁹

The victim, naturally, may be reluctant to share testimonial information that the prosecution wants him or her to share. Granted, the prosecution may sometimes seek to exclude intimate information about the victim, as this information, including past sexual history, is frequently a tool by which the accused can raise doubt as to whether or not consent existed at the time of the act.⁷⁰ On the other hand, from the prosecution's tactical viewpoint, a distraught, exposed, or otherwise sensitive victim-witness stands to increase the general sympathy for that witness on the part of most juries.⁷¹ Notably, this is where the interests of the victim and the government might diverge. For the prosecution, certain pieces of sexual, marital, or otherwise personal information about the victim are beneficial when they are able to portray any previous relationship with the accused distinguishable from what happened during the incident.⁷² The victim may have very good reasons for not wanting to testify as to this information (in a civilian realm where prosecutorial discretion determines whether or not a case will be brought and the victim may be caught in the middle) or the victim may have very tangible career ramifications from the publication of this information (in a military realm, where information that would help the government could lead to negative and sometimes severe repercussions for the victim).⁷³

⁶⁷ *Id.* at 271.

⁶⁸ Schafran & Weinberger, *supra* note 55, at 204-05.

⁶⁹ Michael Biesecker & Emery P. Dalesio, *Lawyer Corps Helps Rape Victims*, HUFFINGTON POST (Mar. 30, 2014, 3:05 PM), http://www.huffingtonpost.com/2014/03/30/military-lawyres-sexual-assault_n_5059582.html.

⁷⁰ Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 578 (2005).

⁷¹ *Id.* at 560.

⁷² For example, although it is often the defendant/accused who seeks to admit evidence about a victim's history—especially sexual history, if the victim and the defendant had a past relationship, sexual or otherwise, a prosecutor/trial attorney might seek to show how the instance of the alleged attack was *different* than previous instances, thus requiring the admission of a great deal of evidence the victim might, for various reasons, not want to make public.

⁷³ For example, a prosecutor may wish to prove that the victim was incapable of consent because she was under the influence of some substance. The victim may suffer legal and career-affecting consequences if the use of that substance was illegal. Furthermore, career ramifications unique to the military exist if the victim's conduct implicates him or her in violation of military regulations concerning prohibited relationships.

Based on this disparity of evidentiary interests between the prosecution and the victim, some countries have long recognized the benefits of providing dedicated legal counsel to represent the trial and pre-trial needs of sexual assault victims. For instance, in a 1998 study conducted with the support of the European Union (Grotius Programme), the Dublin Rape Crisis Centre at the School of Law at Trinity College Dublin found:

Nine [out of twenty] participants in the study had their own lawyers. A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence [sic] lawyer was much lower.⁷⁴

On the other hand, a study by Wemmers in 1995 found, “[t]he vast majority of victims in the study (87%) reported feeling that the Public Prosecutor had shown little or no interest in them.”⁷⁵ Finally, “even when interests [of the prosecution and the victim] coincide, trial counsel [who represent the government] are unable to provide legal representation to victims or advice outside the scope of the Victim and Witness Assistance Program.”⁷⁶ For instance, as mentioned above, an independent SVC attorney may help a victim with civil matters related to the sexual assault, such as filing for a protection order against the accused, with which government counsel is unable to assist the victim.⁷⁷

Section IV provides a more exhaustive look at victim advocacy, using other nations' legal systems for their comparative value. However, the focus of this section is merely to acknowledge the need for victim advocacy, even in an adversarial legal system.⁷⁸ Most importantly, if the direct correlation between victims' legal counsel and victim confidence leads to increased reporting of sexual assault crimes, there is hope that increased reporting will ultimately lead to a decrease in the underlying crimes themselves.

2. MILITARY SEXUAL ASSAULT VICTIMS, IN PARTICULAR:

a. GENDER PERSPECTIVES ON SEXUAL ASSAULT IN THE ARMED FORCES:

Sexual assault in the Armed Forces has always been a concern, largely—as the U.S. Manual for Courts-Martial observes—because “[m]ilitary life requires that large numbers of young men and women live and work together in close quarters which are often highly isolated.”⁷⁹ Despite the feminist origins of modern sexual assault reform,⁸⁰ sexual assault has

⁷⁴ *The Legal Process and Victims of Rape*, DUBLIN RAPE CRISIS CENTRE (1998), <http://www.drc.ie/wp-content/uploads/2011/03/rapevic.pdf>.

⁷⁵ *Id.* at 52 (citing J. Wemmers, *Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victims' Attitudes and Compliance*, 3 INT'L REV. VICTIMOLOGY 323 (1995)).

⁷⁶ Capt. Alison A. DeVito, *An Introduction to the Special Victims' Counsel Program*, 40 THE REPORTER 1, 5 (2013), <http://www.afjag.af.mil/shared/media/document/AFD-130408-017.pdf>.

⁷⁷ Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, A.B.A.J. (Sept. 21, 2013, 9:54 PM), http://www.abajournal.com/mobile/mag_article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/.

⁷⁸ Gershman, *supra* note 70, at 560.; see also Erin C. Blondel, *Victims' Rights in an Adversarial System*, 58 DUKE L.J. 237, 240 (2008).

⁷⁹ DEP'T. OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL U.S. A22-36 (2012).

⁸⁰ See generally Lise Gotell, *Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms*, ACADEMIA (Jan. 1, 2009),

troubled the military long before women were first permitted to serve in 1917,⁸¹ and male rape within the military remains a significant problem today.⁸² According to the Annual Report on Sexual Assault in the Military: Fiscal Year 2013, fifteen percent of restricted reports⁸³ of sexual assaults in combat areas of interest were reported by male victims.⁸⁴ A survey of active duty members contained in the provisional 2014 Report to the President of the United States on SAPR revealed that 4.3 percent of active duty women and 0.9 percent of active duty men experienced unwanted sexual contact within the last year.⁸⁵ Notably, approximately 203,000 women are currently serving on active duty, as compared to approximately 1,166,000 men,⁸⁶ making the number of men responding that they had experienced unwanted sexual contact within the last year approximately 10,500, as compared to approximately 8,800 women.⁸⁷ Unsurprisingly, male victims exhibit many of the same post-attack trauma as their female counterparts, including “mood disturbances, problems in relationships with peers, and sexual difficulties[,]”⁸⁸ with the added potential for uneasiness sharing living quarters, ultimately resulting in half of the victims reportedly desiring to be discharged from the military as a result of the attack.⁸⁹

Regardless of the gender of the victim, military sexual assault has long been a command focus because deterring sexual assault is perceived as “critical to military efficiency.”⁹⁰ Due to the increased opportunities for sexual assault unique to the Armed Forces, combined with the significant potential for resultant decrease in morale and mission competency, the military service branches and the DoD have strived to create reforms to curb military sexual assault during the last decade, albeit not always with consensus.

b. EFFECT OF COLLATERAL MISCONDUCT ON A MILITARY VICTIM’S CAREER:

While this push to combat military sexual assault mirrors the increased focus placed on sexual assault reform in the civilian realm, one main difference in the civilian world, as compared to sexual assault in the military, is that the person to whom an alleged victim servicemember reports the sexual assault incident is also very likely to be in the victim’s direct

http://www.academia.edu/322349/Canadian_Sexual_Assault_Law_Neoliberalism_and_the_Erosion_of_Feminist-Inspired_Law_Reforms.

⁸¹ “1917–1918: During last two years of World War I, women are allowed to join the military. 33,000 women serve as nurses and support staff officially in the military” *Time Line: Women in the U.S. Military*, COLONIAL WILLIAMSBURG FOUND. (2008),

http://www.history.org/history/teaching/enewsletter/volume7/images/nov/women_military_timeline.pdf.

⁸² See generally *Provisional Metrics*, *supra* note 47, at 2.

⁸³ “Restricted report” is a term of art within the military. A restricted report is a particular type of reporting that “allow[s] a survivor the ability to remain anonymous and gain access to resources [such as psychological treatment and counseling services] without initiating an investigation.” 2014 DEP’T OF DEF. REPORT OF FOCUS GROUPS ON SEXUAL ASSAULT PREVENTION AND RESPONSE, p. vi (2014),

http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_3_DMDC.pdf.

⁸⁴ DEPT. OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013 44 (2014),

http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

⁸⁵ *Provisional Metrics*, *supra* note 47, at 2.

⁸⁶ OFFICE OF THE DEPUTY ASSISTANT SEC’Y OF DEF. MILITARY CMTY. AND FAMILY POLICY, 2013 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY iii (2013), <http://www.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf>.

⁸⁷ The 10,500 and 8,800 estimates are based on an extrapolation from the data provided in the two reports. These actual figures are not contained in either report.

⁸⁸ MALE VICTIMS OF SEXUAL ASSAULT 141 (Gillian C. Mezey & Michael B. King eds., Oxford Univ. Press 2d ed. 1992) (citing P.F. Goyer & J.C. Eddleman, *Same-Sex Rape of Nonincarcerated Men*, AM. J. PSYCHIATRY (1984)).

⁸⁹ *Id.*

⁹⁰ DEP’T. OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, *supra* note 79, at A22-36.

chain of command.⁹¹ During the course of the criminal legal process, information adverse to the victim may surface that poses a professional risk to the victim and that would not be a risk in civilian prosecutions. As previously noted, one of the main missions of the Armed Forces in the sexual assault realm is to increase reporting. Two different reporting options exist in the military: restricted and unrestricted.⁹² Restricted reporting does not trigger an investigation but still permits the victim to use government medical and counseling resources and in some cases provides for conversion to unrestricted reporting in the future.⁹³

Notably, SVC lawyers represent victims who file a sexual assault report, including restricted reports that don't lead to prosecution. SVC attorneys handle all of the legal needs that could arise from reporting an assault, including explaining the military criminal justice process, advocating for victims on matters like rape shield laws, and helping with related civil matters like protective orders. When necessary, they can advise on any criminal charges against the victims themselves, which sometimes arise for collateral misconduct like underage drinking.⁹⁴

Although the risk of being charged with collateral misconduct exists for sexual assault victims outside the military as well, military personnel face a greater risk than civilians, simply because the scope of what is considered "misconduct" is far greater in the military than in the civilian world. For instance, the Uniform Code of Military Justice⁹⁵ ("UCMJ") not only prohibits and punishes underage drinking⁹⁶ and the illegal possession or use of controlled substances,⁹⁷ but it also criminalizes actions that are not offenses in the civilian realm, including adultery,⁹⁸ and the catch-all offense of committing "conduct of a nature to bring discredit upon the armed forces"⁹⁹ If the victim of the alleged sexual assault was engaged in any such UCMJ violations at the time of the underlying act, he or she could face personal charges that could have detrimental professional ramifications.¹⁰⁰ Consequently, the fear of collateral misconduct allegations may have the effect of deterring a military sexual assault victim from reporting the assault to the chain of command. Although some organizations argue the actual number of sexual assault victims who experience collateral misconduct accusations

⁹¹ Charles "Cully" Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, THE HERITAGE FOUND. (Nov. 6, 2013), <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it>.

⁹² 2014 DEP'T OF DEF. REPORT OF FOCUS GROUPS, *supra* note 83, at 13.

⁹³ *Id.*

⁹⁴ Laird, *supra* note 77.

⁹⁵ 10 U.S.C. §§ 801-946 (2012).

⁹⁶ 10 U.S.C. § 815. Although the UCMJ does not expressly prohibit underage drinking, the drinking age is usually a post-specific regulation, and the offense is generally punished under Article 92—Failure to obey order or regulation, and may be subject to Article 15 non-judicial punishment. *See e.g., Article 15 Punishments Imposed in July 2007 at Eielson AFB, AK*, U.S. AIR FORCE (Aug. 20, 2007), <http://www.eielson.af.mil/news/story.asp?id=123065199>.

⁹⁷ DEP'T OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL U.S. § 37 (2012).

⁹⁸ *Id.* at § 62; 10 U.S.C. § 934 (2012).

⁹⁹ JOINT SERV. COMM. ON MILITARY JUSTICE MANUAL, *supra* note 97, at § 60.

¹⁰⁰ For example, the Air Force lists the following statistics for year 2013: "Approximately 15% of clients represented by SVCs have allegedly engaged in some form of collateral misconduct (recognizing that a percentage of clients represented by SVCs are not military members). About 75% of the time, no action has been taken. Of the 25% of victims where some action is taken, 90% of victims receive some form of administrative action. A very small percentage received NJP [Non-Judicial Punishment]. [Specifically,] AF-Wide3 – Of the 169 SA CMs [Sexual Assault Courts-Martial] in CY13, 26 involved collateral misconduct by a total of 28 victims. -5 of the 28 victims were disciplined for their collateral misconduct. -2 of the 5 victims were disciplined before the subject's trial: LOR for marijuana use; LOR for adultery. -3 of the 5 victims were disciplined after the subject's trial: SPCM for drug abuse (acquitted); 2 LORs for providing alcohol to minors." U.S. ARMY GUIDANCE DOCUMENT 26, http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q138.pdf.

is overstated,¹⁰¹ a 2004 letter from then-Under Secretary of Defense, David S.C. Chu, explicitly recognizes that, “[o]ne of the most significant barriers to the reporting of a sexual assault is the victim’s *fear* of punishment for some of the victim’s own actions leading up to or associated with the sexual assault incident.”¹⁰²

c. SVC’S SCOPE OF REPRESENTATION INCLUDES CERTAIN NON-MILITARY VICTIMS:

Finally, despite the inherently heightened risk of collateral exposure for servicemember victims, the SVC program also recognizes and protects the privacy expectations of a small pool of non-servicemember victims. Notably, the SVC program extends independent legal representation to dependents of servicemembers, overseas civilian DoD employees, and foreign military servicemembers, if the reporter claims to be the victim of a sexual assault over which the military judge would have jurisdiction, usually meaning cases in which the alleged offender is a U.S. servicemember.¹⁰³ This aspect of the program is important because it implicitly recognizes the privacy risk faced by all reporters of sexual assaults, regardless of whether the victim faces the increased risk of collateral misconduct accusation, discussed above, that is unique to military professionals.

SECTION III: THE LEGAL PATH LEADING TO THE ARMED FORCES’ SVC IMPLEMENTATION:

A. LEGISLATIVE HISTORY OF THE SVC PROGRAMS:

Special Victims’ Counsel has been one of the most recently proposed policy solutions for sexual assault victims. However, after the Air Force’s pilot SVC program began, and even after Secretary Hagel’s memorandum of August 14, 2013, requiring each service branch to provide such a program,¹⁰⁴ the legislative battle to address sexual assault in the military continued, heatedly.

On November 20, 2013, Senator Kirstin Gillibrand, [Democrat-NY], introduced the Military Justice Improvement Act of 2013¹⁰⁵ to the Senate for initial reading. The bill contained controversial changes to the military justice system concerning the prosecution of sexual assault cases. The senior military attorney of each service opposed the broad scope of the proposed changes.¹⁰⁶ When a vote on cloture—meaning to overcome a filibuster and end debate in order to vote on the substance of the bill—was taken on March 6, 2014, S. 1752 received only fifty-five votes, five votes shy of the three-fifths majority that is required to overcome a filibuster.¹⁰⁷ Notably, two cosponsors of Gillibrand’s bill—Senators Tom Carper [Democrat-Del.] and Mark Kirk [Republican-Ill.]—voted against it.¹⁰⁸ “Kirk said he cosponsored the bill because [he] strongly believe that victims of sexual assault should always

¹⁰¹ *Id.*

¹⁰² Letter from David S.C. Chu, Under Sec’y of Def., to Sec’y of the Military Dep’t et al., Dep’t of Def. (Nov. 12, 2004), <http://www.ncdsv.org/images/COLLATERALMISCONDUCT.pdf> (emphasis added).

¹⁰³ See, e.g., U.S. ARMY, OFFICE OF STAFF JUDGE ADVOCATE, SPECIAL VICTIM COUNSEL PROGRAM, <http://www.knox.army.mil/Garrison/supportoffices/sja/svc.aspx>.

¹⁰⁴ See *supra* note 33.

¹⁰⁵ Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

¹⁰⁶ *Id.*

¹⁰⁷ *On the Cloture Motion S. 1752*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/113-2014/s59> (last visited Sept. 22, 2015).

¹⁰⁸ *Id.*

be protected but voted against it because its broad scope could jeopardize our readiness and our military stationed in the field.”¹⁰⁹

However, on January 14, 2014, shortly after the introduction of S. 1752 came the introduction of another senate bill targeting sexual assault reform in the military, S. 1917, the Victims Protection Act of 2014, sponsored by Senator Claire McCaskill, [Democrat-Mo].¹¹⁰ McCaskill’s bill passed the Senate with a rare ninety-seven to zero unanimous vote on March 10, 2014.¹¹¹ Following that, the bill was referred to the House Subcommittee on Military Personnel on June 20, 2014, but was never brought to a vote.¹¹² Nonetheless, “[t]he fiscal year 2015 National Defense Authorization Act, or NDAA, signed into law [in December 2014], significantly changes the . . . UCMJ, in cases pertaining to rape and sexual assault.”¹¹³ Specifically, “[t]he FY15 NDAA requires that the preliminary hearing be conducted by a preliminary hearing officer who is a judge advocate and that qualifying victims, as defined in the statute, have a right not to testify at the hearing should they so choose.”¹¹⁴ Also notably, the 2015 NDAA codifies the holding of the landmark case, *LRM v. Kastenber*, discussed in detail in subsection III.(B.), below, by requiring that, “when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such offense [sic], the victim may exercise that right through counsel, including through a Special Victims’ Counsel”¹¹⁵

B. ANALYSIS OF *LRM v. KASTENBERG*:

*LRM v. Kastenber*¹¹⁶ provided the foundational judicial basis for the Armed Forces’ SVC programs. In July of 2013, when the C.A.A.F. decided the case, the Air Force SVC, although already experiencing success in its pilot mission, still had not received the universal validation from the DoD in the form that was soon forthcoming.¹¹⁷ In fact, on October 16, 2012—the date when the government charged underlying defendant¹¹⁸ Airman First Class Nicholas Daniels with Article 120 violations of rape and sexual assault¹¹⁹—the Air Force’s SVC pilot program had not yet begun. Even after receiving her SVC attorney, the victim, LRM, faced mounting challenges in the courtroom. The main legal issue in the case was whether LRM, through her Special Victims’ Counsel, had standing to assert legal arguments as to why certain factual information was not relevant, and therefore inadmissible evidence, as well as why medical records and counseling conversations were inadmissible under the

¹⁰⁹ Brian Tumulty, *Gillibrand’s Sexual-Assault Bill Blocked by Filibuster*, LOHUD THE JOURNAL NEWS (Mar. 7. 2014 12:01 AM), <http://www.lohud.com/story/news/politics/2014/03/06/gillibrand-military-sexual-assault-bill-hits-hurdle/6135559/> (alteration in the original) (internal quotes omitted).

¹¹⁰ H.R. Res. 1917, 113th Cong. (2013) (enacted).

¹¹¹ *U.S. Senate Roll Call Votes 113th Congress – 2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=2&vote=00062 (last visited Sept. 22, 2015).

¹¹² *All Bill Information (Except Text) for S. 1917 – Victims Protection Act of 2014*, U.S. CONG., <https://beta.congress.gov/bill/113th-congress/senate-bill/1917> (last visited Sept. 22, 2015).

¹¹³ David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, U.S. ARMY (Jan. 7, 2015), http://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual_assault/ (alteration in the original).

¹¹⁴ *Id.*

¹¹⁵ COMM. ON RULES, 113th Cong., HOUSE AMEND. TO THE TEXT OF S.1847 § 534(C) (Comm. Print 2014).

¹¹⁶ *Kastenber*, 72 M.J. at 365.

¹¹⁷ *Air Force Special Victims’ Counsel Program*, THE OFFICIAL WEBSITE OF THE JUDGE ADVOCATE GEN., <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf> (last visited Oct. 1, 2015) (“On 14 August 2013, the Secretary of Defense directed each of the Services to implement special victims’ advocacy programs to provide legal advice and representation to the victims.”).

¹¹⁸ *Kastenber*, 72 M.J. at 366. Nicholas Daniels was also a Real Party in Interest in the appellate case.

¹¹⁹ *Id.*

psychotherapist-patient privilege in M.R.E. 513.¹²⁰ LRM relied on her right to an opportunity to be heard under M.R.E. 412, titled “Sex offense cases; relevance of alleged victim’s sexual behavior or sexual predisposition,” section (c)(2) of which “provides that, before admitting evidence under the rule, the military judge must conduct a hearing where the ‘alleged victim must be afforded a reasonable opportunity to attend and be heard[.]’”¹²¹ and M.R.E. 513, section (e)(2) of which provides that “[t]he patient shall be afforded a reasonable opportunity to attend the hearing and be heard”¹²²

At the trial level:

[t]he military judge . . . found A1C LRM had no standing (1) to move the court, through her SVC or otherwise, for copies of any documents related to Mil. R. Evid. 412 and 513; (2) to be heard “through counsel of her choosing” in any hearing before the court-martial; or (3) to seek any exclusionary remedy, through her counsel, during any portion of the trial. Finding the right to be heard in the Military Rules of Evidence does not denote the right to be heard through a personal legal representative, the military judge found A1C LRM was only authorized to be heard personally; through trial counsel in pretrial hearings under Mil. R. Evid. 412 and 513; and, in the event she became incompetent, through a guardian, representative or conservator The military judge then held she received the required opportunity to assert her privacy rights when he authorized her to speak personally to him or through the trial counsel during the hearings.¹²³

Effectively, the military trial judge ruled that an opportunity to be heard under the M.R.E. was distinguishable from standing to assert an argument on a question of law, and he limited LRM’s “opportunity to be heard” to factual information, that is, her opportunity to be heard was through her witness testimony or regarding factual elements of the pretrial hearing.¹²⁴ Furthermore, the trial judge supported his conclusion by asserting, “to hold otherwise would make A1C LRM a de facto party to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence.”¹²⁵ Upon LRM’s appeal to the intermediate U.S. Air Force Court of Criminal Appeals, the court “readily acknowledge[d] the important objectives of the SVC program[.]” but then held that, “against the backdrop of authority underscoring the specific jurisdictional boundaries of military courts under Article I of the Constitution, and specifically considering the nature of the relief sought by petitioner in the case before us, [the court did] not have jurisdiction to consider the petitioner’s extraordinary writ [of mandamus].”¹²⁶ The C.A.A.F. then took up the case on further appeal.

By the time the case was argued before the C.A.A.F. in June 2013, several *amici curiae* had submitted briefs.

The Air Force Appellate Government division wrote a brief that has been recaptioned as the Amicus Brief of the United States . . . support[ing] a

¹²⁰ *Id.*

¹²¹ *Id.* at 369.

¹²² MIL. R. EVID. 513(e).

¹²³ LRM v. Kastenberg, No. 2013-05, 2013 WL 1874790, at *3 (A.F. Ct. Crim. App. Apr. 2, 2013) (internal quotations omitted), *rev’d*, 72 M.J. 364 (C.A.A.F. 2013).

¹²⁴ *Id.*

¹²⁵ *Id.* (internal quotations omitted).

¹²⁶ *Id.*

holding] that the AFCCA erred in finding no jurisdiction, and remanding the case to the CCA for consideration of the underlying issues. Additionally, the United States Air Force Trial Defense Division, Navy-Marine Corps Appellate Defense Division, the Army Appellate Defense Division, and the United States Marine Corps Defense Services Organization wrote in support of the Appellee and Real Party in Interest. Finally, the National Crime Victim Law Institute and ‘Protect Our Defenders,’ wrote in support of the Appellant.¹²⁷

Ultimately, the C.A.A.F. held the military judge’s ruling to be in error, largely based on the reasoning that privilege is a legal assertion, which, therefore, requires *ipso facto* standing to assert a legal argument.¹²⁸ Furthermore, the C.A.A.F. stated unequivocally, “every time that the M.R.E. and the R.C.M. [(Rules for Courts-Martial)] use the term ‘to be heard,’ it refers to occasions when the parties can provide argument *through counsel* to the military judge on a legal issue, rather than an occasion when a witness testifies.”¹²⁹ The C.A.A.F. did emphasize that the opportunity to be heard was not an absolute right, but rather was limited by the word, “reasonable,” which gave discretion to the military judge as to the extent of the victim’s opportunity to be heard.¹³⁰ For instance, the C.A.A.F. noted that, “restricting the victim or patient and their [sic] counsel to written submissions,” rather than presenting live, in-person arguments, might be reasonable depending on the context of the case.¹³¹ The C.A.A.F. also noted that the right to an opportunity to be heard is waivable, and if an SVC should represent to the judge that the victim’s interests are sufficiently aligned with those of the government, that representation would likely diminish the reasonableness of providing the victim with a separate, independent motions opportunity.¹³² Finally, a “reasonable opportunity to be heard” at the court-martial or arraignment proceeding does not provide any right of an appeal of an adverse evidentiary ruling.¹³³

Despite these limitations, the *Kastenberg* holding—that a victim’s right to be heard includes the right to be represented by counsel and to make legal arguments through counsel regarding the admissibility of evidence¹³⁴—has affirmed the legal foundation of the SVC program.

SECTION IV: COMPARATIVE ANALYSIS OF THE STRUCTURE AND THE EFFICACY OF THE ARMED FORCES’ SVC PROGRAMS AND OTHER SIMILAR PROGRAMS WORLDWIDE:

A. THE CURRENT ARMED FORCES MODEL:

The Armed Forces have now adopted a model that includes independent legal representation dedicated to the victim of an alleged sexual assault.¹³⁵ This dedicated representation model provides numerous and significant advantages over the victim advocate programs that the military previously had in place. For instance, an organized cadre of SARCS (Sexual Assault Response Coordinators) has been used in the military since 2005.¹³⁶ Additionally, for military victims and all civilian victims of federal crimes prosecuted in

¹²⁷ Zachary D. Spilman, *Argument Preview: LRM v. Kastenberg*, No. 13-5006/AF, NATIONAL INSTITUTE OF MILITARY JUSTICE, CAAFLOG, June 9, 2013, <http://www.caaflog.com/category/september-2012-term/lrm-v-kastenberg/>.

¹²⁸ *Kastenberg*, 72 M.J. at 371.

¹²⁹ *Id.* at 370 (emphasis added).

¹³⁰ *Id.* at 371.

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Kastenberg*, 72 M.J. at 371.

¹³⁴ *Id.*

federal court, the Drug Enforcement Administration-Victim Witness Assistance Program (“DEA-VWAP”)¹³⁷ allows for victim referrals to support services, “includ[ing], but not be limited to, counseling, medical assistance, emergency shelter, transportation, relocation, and/or information about State Crime Compensation.”¹³⁸ However, the level of support provided by SARCs¹³⁹ and the DEA-VWAP, although vital in their own right, cannot rise to the legal level of representation provided by the current SVC programs. As one Air Force-sponsored article pointed out,

SARCs and victims’ advocates are not legally trained, and, for all their victim support, work essentially for the command. Prosecutors, likewise, work for the Air Force. Sympathetic or not, their duty is to prosecute and win cases. Further, they can’t give victims legal advice, such as telling them they don’t have to answer an improper question from a defense attorney. SVCs, on the other hand, are duty-bound to work for no one but the victim, just as defense attorneys work for the accused.¹⁴⁰

B. SURVEY OF COMPARATIVE LEGAL EXAMPLES:

The U.S. Air Force, while a frontrunner within the United States in terms of victims’ legal representation, is not the first government entity worldwide to provide an SVC program. An examination of other nations who provide SVC programs is useful in fully examining the current Armed Forces’ SVC system and in determining whether the SVC program is translatable to the U.S. state criminal justice system. Notably, this comparison will focus primarily on adversarial jurisdictions, due to their shared values and procedural similarities with the U.S., even though some persuasive arguments exist as to the exaggeration of the differences between the adversarial system and the inquisitorial system often found in European civil law jurisdictions.¹⁴¹

¹³⁵ *Mission & History*, DEP’T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, <http://www.sapr.mil/index.php/about/mission-and-history> (last visited Oct. 2, 2015).

¹³⁶ *Id.*

¹³⁷ 18 U.S.C. § 3771 (2015).

¹³⁸ Victim Witness Assistance Program, U.S. DRUG ENF’T AGENCY, <http://www.justice.gov/dea/resource/center/victims-crime.shtml> (last visited Sept. 25, 2015). Furthermore, although subsection (c)(2) of the Crime Victims’ Rights provision (18 U.S.C.A. § 3771 (2015)) requires that “[t]he prosecutor shall advise the crime victim that *the crime victim can seek the advice of an attorney* with respect to the rights described in subsection (a)” (emphasis added), the government provides neither an attorney nor the financial support for one. Lastly, the victim’s “right to be reasonably heard” as provided in subsection (4) the Crime Victims’ Rights provision is limited to “any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding[.]” and, therefore, does not extend that right to be heard to any pretrial or evidentiary hearings.

¹³⁹ A public document posted on myduty.mil describes the role of the SARC program Victim’s Advocate as follows: “Victim Advocates (VAs) provide direct assistance to victims. They listen to victims’ needs and then connect them with appropriate resources, including medical care, mental health care, legal advice and spiritual support. VAs work with victims to help them make informed choices and then support them every step of the way.” U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, *Responding to Reports of Sexual Assault*, http://myduty.mil/public/docs/responding_to_reports_of_sexual_assault.pdf (last visited September 16, 2015).

¹⁴⁰ Montgomery, *supra* note 37.

¹⁴¹ See William Pizzi, *Victims’ Rights: Rethinking Our “Adversary System,”* 1999 UTAH L. REV. 349, at 350, 356 (1999); Peter Duff, *Disclosure in Scottish Criminal Procedure: Another Step in an Inquisitorial Direction?*, 11 (3) INT’L J. OF EVID. & PROOF 153, 153 (2007); Fiona E. Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials: Research Report for Rape Crisis Scotland* [hereinafter Research Report for Rape Crisis Scotland] at 23-24 (2010), <http://www.rapecrisisscotland.org.uk/workspace/publications/IndLegalRepReport-2010.pdf>. (Nonetheless, the civil law/inquisitorial system provides some compelling arguments in favor of independent legal representation. For further support for independent legal representation for sexual assault victims as evidenced by inquisitorial jurisdictions, namely in Europe); see also Susan Caringella, *Addressing Rape Reform in Law and Practice* 276 COLUM. U. PRESS (2009) (discussing the development of legal representation for victims of sexual assault in Denmark); Alexandra Goy,

1. JAPAN:

Japan has a hybrid inquisitorial/adversarial system, largely thanks to its civil law history¹⁴² combined with the influence of the United States in drafting Japan's post-World-War II constitution.¹⁴³ Therefore, admittedly, the protections provided to an accused person may, practically speaking, look different in Japan than they would in the United States, despite similarities on paper.¹⁴⁴ Those distinctions notwithstanding, since the implementation of the revision to the Code of Criminal Procedure in 2008,¹⁴⁵ Japan provides an example of an adversarial system with a broad criminal victim counsel system, in which victims' rights¹⁴⁶ include the ability to "state their opinions and ask for explanation concerning the public prosecutor's activities such as the request of examination of evidence[.]" and the ability to "question the defendant when it is deemed necessary"¹⁴⁷ Participating victims may question witnesses, make final argument, and make sentencing argument."¹⁴⁸ Additionally, victim participants [in criminal trials] "can delegate to an attorney, such acts as . . . questioning of the defendant. If their financial resources are less than 1.5 million yen . . . they can request the appointment of an attorney (referred to as an 'attorney for victim participants')."¹⁴⁹ Unlike the automatic eligibility for an attorney at government expense in the U.S. military's SVC programs, victims in Japan must meet an eligibility requirement based upon their financial resources.¹⁵⁰ However, once appointed, counsel for a victim in Japan has a far greater right to participate in all phases of the prosecution than the military's SVC.

2. IRELAND:

Ireland is a common-law, adversarial legal system even more analogous to that of the United States than Japan.¹⁵¹ Ireland also provides sexual assault victims with state-sponsored legal counsel to represent the victim in court proceedings. However, Ireland does this uniquely if the accused makes an application to the judge to cross-examine the victim about his or her sexual history.¹⁵² If that procedural requirement is satisfied, the government's Legal Aid Board will provide a victim's attorney free of charge, regardless of the financial status of the victim.

The Victim-Plaintiff in Criminal Trials and Civil Law Responses to Sexual Violence, 3 CARDOZO WOMEN'S L.J. 335, 336 (1996) (discussing in the development of legal representation for victims of sexual assault Germany).

¹⁴² Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 1, 3 (2012) ("[T]he legal system in Japan was almost entirely based on the German civil law system.")

¹⁴³ Setsuo Miyazawa, *Introduction: An Unbalanced Adversary System—Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective*, THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS 1, 1-3 (Malcolm M. Feeley & Setsuo Miyazawa, eds., 2002) (unpublished manuscript) (on file with University of Chicago at:

<http://home.uchicago.edu/~tginsburg/pdf/articles/TheJapaneseAdversarySystemInContext.pdf>).

¹⁴⁴ *Id.*

¹⁴⁵ Hiroshi Fukurai, *A Step In the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L & COMP. L. REV. 517, 54 (2013).

¹⁴⁶ Japan's adversarial system is extended to but not limited to victims of sexual assault. *See For Victims of Crime*, JAPANESE MINISTRY OF JUSTICE (Mar. 2015), <http://www.moj.go.jp/ENGLISH/CRAB/crab-02-4.html>.

¹⁴⁷ *Id.*

¹⁴⁸ Shigenori Matsui, *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, 13 ASIAN & PAC. L. & POL'Y J. 54 (2011).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *See generally* Kieran McGrath, *Protecting Irish Children Better—The Case for an Inquisitorial Approach in Child Care Proceedings*, 5:1 JUD. STUD. INST. J. 136, at 142, 145-46 (2005).

¹⁵² *Brief Guide to the Criminal Justice System*, OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, <http://www.dppireland.ie/brief-guide-to-the-criminal-justice-system/category/5/#a35>.

However, unlike other nations' SVC programs, the victim's attorney is not able to represent the victim during the actual cross-examination.¹⁵³

3. CANADA:

Out of all of these comparative examples, Canada's emphasis on due process rights of the accused most closely resembles that of the U.S.¹⁵⁴ The Canadian Charter of Rights and Freedoms has traditionally been perceived to permit victim's advocates, in the "SARC" sense of the word "advocate,"¹⁵⁵ but Canada has thus far been reticent to permit full independent victim's counsel. The concept of a federal Sexual Assault Legal Representative has been studied and proposed in Canada, but it has not yet been adopted.¹⁵⁶

4. SCOTLAND:

Although Scotland has not yet introduced a system of SVC or independent legal representation for victims, the momentum exists to do so.¹⁵⁷ This push is largely due to the belief that Scotland's previously enacted rape prevention legislation, namely the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, known as "SOPESA,"¹⁵⁸ has not produced the expected results of restricting the use of sexual history and other character evidence as to the victim.¹⁵⁹

5. NEW SOUTH WALES, AUSTRALIA:

Notably, one other adversarial system that has begun to acknowledge the potential for coexistence between the procedural rights of a defendant and the narrowly tailored introduction of an SVC into a sexual assault trial is that of New South Wales, Australia. New South Wales introduced a state-funded program for legal representation of sexual assault victims in precisely the same capacity for which these authors advocate, that is, legal representation as to protection of the victim/witness in relation to attempted disclosure of "sexual assault communications."¹⁶⁰ In comparison to inquisitorial system counterparts—for example, Germany, which frequently provides full, state-funded representation for witnesses who are termed "Private Accessory Prosecutors" and who have the right to fully join the public prosecutor in the formal charges brought against the accused¹⁶¹—New South Wales's limited and narrowly-construed system of legal representation for the sole purpose of protecting sensitive and sexual victim information from being improperly admitted at trial comports fully with the ideas of procedural due process and fairness of criminal trials that Australia shares with the U.S.¹⁶²

¹⁵³ *Id.*

¹⁵⁴ Raitt, *supra* note 66, at 270.

¹⁵⁵ *Id.* at 275.

¹⁵⁶ Lucinda Vandervort, *Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in Edmondson, Kindrat, and Brown*, SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM 111, 147 (Elizabeth A. Sheehy ed., Univ. of Ottawa Press 2012).

¹⁵⁷ See Raitt, *supra* note 66.

¹⁵⁸ *Id.* at 273.

¹⁵⁹ *Id.* (citing Michele Burman, Lynn Jamieson, Jan Nicholson, & Oona Brooks, IMPACT OF ASPECTS OF THE LAW OF EVIDENCE IN SEXUAL OFFENCE TRIALS: AN EVALUATION STUDY, (Scottish Government Social Research 2007)).

¹⁶⁰ Kerstin Braun, *Legal Representation for Sexual Assault Victims—Possibilities for Law Reform?*, 25 CURRENT ISSUES IN CRIM. JUST. 3d. 819, 829 (Mar. 2014) (citing *Criminal Procedure Act 1986* (NSW) s 299A (Austl.)).

¹⁶¹ *Id.* at 826 (citing Bestellung eines Beistands; Prozesskostenhilfe [Appointment of Attorney as Counsel], 2014, BGBL I at 397a(1) (Ger.); Befugnis zum Anschluss als Nebenkläger [Right to Join as a Private Accessory Prosecutor], 2014, BGBL I at 395(1) (Ger.)).

¹⁶² See Anthony Gray, *Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions*, UNIV. NEW S. WALES L.J. 125, at 126, 132-33 (2014).

C. ANALYSIS OF THE EFFICACY OF TWO DIFFERENT MODELS:

1. IRELAND—REPRESENTATION LIMITED TO ISSUES OF GENERAL SEXUAL HISTORY:

a. PROTECTION FOR VICTIMS UNDER THE IRISH MODEL:

The Irish model provides an example of limited independent legal representation for sexual assault victims. Although “[t]he criminal legal process begins once a crime is reported to the Gardai [police.]”¹⁶³ the victim of alleged sexual assault in Ireland obtains independent legal representation only if the accused’s defense counsel makes an application [or motion] to admit evidence pertaining to the victim’s general sexual behavior¹⁶⁴—meaning sexual behavior not related to the alleged incident currently before the court. If the accused wishes to question the victim regarding the victim’s general sexual behavior, Ireland’s Legal Aid Board will provide the victim’s legal representation free of charge.¹⁶⁵

Pragmatically, the choice to provide legal representation at that particular stage of the proceeding seems both appropriate and cost-effective in light of the statistics that, in 2009, for example, the Director of Public Prosecutions exercised its discretion in prosecuting only twenty-seven percent of all reported cases, generally based simply on lack of admissible evidence,¹⁶⁶ but that, out of that twenty-seven percent, seventy-nine percent of accused were found guilty.¹⁶⁷ Essentially, Ireland provides independent legal representation—in the form of both a solicitor and barrister¹⁶⁸—for the victim only if the adversarial nature of the legal process targets the victim’s most intimate and vulnerable sexual history. However, the decision to limit the state’s obligation serves to decrease the state’s financial costs of providing SVC but still provides for the needs of victims by providing an independent attorney to advocate for the victim’s needs during the most confrontational portion of the process, if the process reaches that stage.

However, the limited representation program in Ireland fails to address several of the issues that would constitute effective representation the victim of sexual assault in the SVC context. Counsel being appointed only if the victim’s sexual history is placed at issue means that counsel will not be available during the initial investigation, will not be available to assist the victim with resolving collateral criminal issues, will not be available to address the inherent conflict between the victim and the prosecution, and will not be available to prevent the “re-victimization” of the victim at any stage of the proceeding other than that for which he/she was appointed. As discussed below, effective representation for a victim of sexual assault should include all these elements.

¹⁶³ *Guide to the Legal Process for Survivors of Sexual Violence*, RAPE CRISIS NETWORK IRELAND, 3, <http://www.rcni.ie/wp-content/uploads/RCNIGuidetotheLegalProcessSurvivors.pdf>.

¹⁶⁴ *Id.* at 22.

¹⁶⁵ *Id.* at 22-23.

¹⁶⁶ *Id.* at 8-9.

¹⁶⁷ *Id.* at 8.

¹⁶⁸ *The Barristers’ Profession in Ireland*, THE BAR COUNCIL OF IRELAND: LAW LIBRARY, http://www.lawlibrary.ie/docs/The_Barristers_Profession_in_Ireland/1968.htm#Difference_between_a_barrister_and_solicitor [https://web.archive.org/web/20141129040316/http://www.lawlibrary.ie/docs/The_Barristers_Profession_in_Ireland/1968.htm].

b. RIGHTS OF THE ACCUSED UNDER THE IRISH MODEL:

The rights of the accused are unaffected in instances of narrowly-construed victim representation, such as Ireland's—limited to questions of sexual history of the victim—because the scope of information the accused may legally present remains unchanged. The addition of victim's counsel merely provides one other legal representative to ensure that the accused and his or her counsel limit their questioning to that which is legally permitted.¹⁶⁹ However, the procedural rights of the accused to present information are unaffected by a system of victim's representation such as Ireland's.

2. UCMJ—REPRESENTATION THROUGHOUT THE REPORTING AND TRIAL PROCESS:

a. PROTECTION FOR VICTIMS UNDER THE UCMJ:

The scope of representation of the sexual assault victim under the UCMJ is greater than that of the Irish system of independent legal representation because the military's representation is triggered at the moment of reporting, be it restricted or unrestricted, of the alleged assault.¹⁷⁰ More specifically, independent legal representation is available at each of the five stages of the military criminal justice process: 1) the reporting of the incident, 2) the investigation, 3) pre-trial (following a decision to prosecute), 4) during trial, and 5) post-trial.¹⁷¹ For this reason, military SVCs are able and authorized to provide information to the victim that pertains to the victim's rights generally, as well as to the practical aspects of the criminal process. Specifically, military SVC aids the victim by “providing effective and timely advice, being available to assist throughout the full spectrum of the military justice practice from initial investigation to convening authority action, and providing appropriate advocacy to assure rights afforded are fully realized.”¹⁷²

b. RIGHTS OF THE ACCUSED UNDER THE UCMJ:

Even though the UCMJ provides a somewhat expanded view of independent legal representation over that of Ireland, the Armed Forces' SVC concept no more violates or infringes upon the rights of the accused than does the limited system in Ireland.¹⁷³ The reasoning behind why the SVC concept does not violate an accused's rights or the U.S. Constitution are addressed in greater detail in Section V., *infra*. However, a simplified explanation of that reasoning appears in the Special Victim Counsel Handbook, which states, “[t]he SVC Program does not increase a victim's standing in court-martial hearings or other military justice proceedings beyond the standing victims are currently afforded under existing law and rules [of evidence.]”¹⁷⁴

¹⁶⁹ *Guide to the Legal Process for Survivors of Sexual Violence*, *supra* note 163.

¹⁷⁰ SPECIAL VICTIM COUNSEL PROGRAM, SPECIAL VICTIM COUNSEL HANDBOOK (Nov. 1, 2013), http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See supra* Section V.(C)(1)(b.).

¹⁷⁴ SPECIAL VICTIM COUNSEL PROGRAM, SPECIAL VICTIM COUNSEL HANDBOOK (Nov. 1, 2013), http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

SECTION V: CONSTITUTIONALITY OF VICTIM REPRESENTATION IN AN ADVERSARIAL SYSTEM:

Introducing a third party into a legal process that has historically been a two-party affair will inevitably raise some concerns. Scholars in the U.S. and other common law jurisdictions have expressed apprehension that introducing a third-party with legal standing to participate in a criminal trial, as well as that third-party's attorney, would violate the constitutional rights of the defendant in the traditional adversarial system.¹⁷⁵ Amicus counsel for the Navy-Marine Corps Appellant Defense Department in the *Kastenberg* case argued that introduction of SVC into the adversarial system would be "a serious blow to fair trial rights" of defendants, would be "diametrically foreign to the system employed by the Founders of our jurisprudence[.]" and would effectively be the "first domino to chaos."¹⁷⁶ The trial court in *Kastenberg* adopted a similar view when it reasoned that, "to hold [that LRM had standing to assert her privacy rights through counsel] would make A1C LRM a de facto party to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence."¹⁷⁷ Granted, adherence to the Constitution in prosecuting criminal trials is paramount. Despite some peripheral scholarly discussions about making the rights of victims "equal" to the rights of defendants,¹⁷⁸ the authors are of the viewpoint that an equivalence in a victim's and a defendant's rights fundamentally cannot exist because the state actively seeks to deny the liberty of the defendant—a consequence of state action to which the victim is not exposed.¹⁷⁹

The disparity in victim rights and defendant rights notwithstanding, the C.A.A.F. ultimately concluded in *Kastenberg* that allowing the SVC to participate in the hearing in regard to M.R.E. 412 and M.R.E. 513 evidentiary issues would not violate fundamental concepts of justice or the fundamental due process rights of the defendant.¹⁸⁰ However, before the court reached its holding, the Navy-Marine Corps Appellate Division, in its brief of *amicus curae* in the *Kastenberg* case, clearly stated some of the more common objections to the SVC concept. Each of these objections will be examined in subsection (A.), below, followed by the respective responses to each objection. This examination will be followed in subsection (B.) by an examination of existing civilian statutory and case law that supports the SVC concept. Ultimately, as discussed below, the due process and fair trial rights of the defendant would not be prejudiced if the SVC system was limited in capacity to protection of the sexual, psychological, or otherwise intimate history of the victim.¹⁸¹

A. OBJECTIONS TO THE SVC CONCEPT:

An exhaustive list of objections to the SVC concept was presented to C.A.A.F. in the amicus brief of the Navy-Marine Corps Appellate Defense Division (hereinafter, "N-MC

¹⁷⁵ See, e.g., Ellen Yaroshesky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 135-36 (1990).

¹⁷⁶ Brief of Navy-Marine Corps Appellate Defense Division, *infra* note 182 at 20.

¹⁷⁷ AFCCA *Kastenberg*, 2013 WL 1874790 at *3 (internal quotations omitted).

¹⁷⁸ See, e.g., Paul G. Cassell & Steven J. Twist, *A Bill of Rights for Crime Victims*, CRIM. L. & PROC. PRACTICE GRP. NEWSLETTER, (FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUDIES, D.C.) Dec. 1, 1996 ("Rightly or wrongly, the Supreme Court has already federalized many aspects of criminal procedure and extended substantial rights for defendants throughout the country. *The proposed amendment simply adopts the view that victims' rights deserve equal treatment.*") (emphasis added).

¹⁷⁹ Christopher Goddu, *Victim's "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 247 (1993).

¹⁸⁰ *Kastenberg*, 72 M.J. at 372.

¹⁸¹ *Kastenberg*, 72 M.J. at 366-67, (Conclusion of the court) ("[T]he prospect of an accused having to face two attorneys representing two similar interests [is] sufficiently antithetical to courts-martial jurisprudence" and would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial").

Defense Division”).¹⁸² The authors individually examine each of the notable objections, below, followed by a response to each objection.

1. OBJECTION: THE ACCUSED WILL BE “DOUBLE-TEAMED”:

First, the N-MC Defense Division argued that allowing SVC to participate in any part of the criminal proceedings would effectively double the prosecutorial effort against the accused.¹⁸³ This argument is based on several assumptions that have little support. First, this argument assumes that the interests of the SVC will be aligned with the prosecution. However, notably, the interests of the sexual assault victim and the prosecution frequently are not congruent, particularly with regard to privacy issues.¹⁸⁴ Second, even if the prosecution and SVC are coincidentally aligned, this argument assumes that the defendant has a constitutional right to only one adversary. No authority was presented to the C.A.A.F. to support such a right. Finally, this argument assumes that the protection of the rights of the sexual assault victim necessarily results in a diminution of the due process and fair trial rights of the accused. It is not apparent that having counsel present to protect the rights of the victim witness necessarily results in fewer rights for the accused. On the contrary, it is common practice, and at times is recommended by applicable case law, that a trial judge advise a witness and sometimes even appoint counsel for a witness whose testimony indicates he or she may incriminate him- or herself in the process of answering questions by prosecution or defense counsel.¹⁸⁵

Having legal counsel for the victim should raise no constitutional issue because such counsel only would be enforcing protections that are already legally afforded to the victim witness. If the defense receives an objection at trial or at a pre-trial hearing as to the admissibility of information about the victim, the judge will assess the validity of that objection and the admissibility of that information just as he or she currently does. If the judge acts in accordance with his or her obligations, the admissibility of that information will not change merely by virtue of the number of counsel making the assertion. That is to say the question of *who objects* to inadmissible questions or lines of questioning does not change the fact that that question was fundamentally either admissible or inadmissible, as already defined by statute or applicable rule of evidence. If a piece of information about a victim witness is inadmissible when it draws an SVC objection, that piece of information would also have been inadmissible had the prosecutor objected. Essentially, that was a question the defense was not permitted to ask or a piece of information that the defense was not legally permitted to introduce at trial. Nonetheless, “[w]ithout an SVC, the victim will often feel unnecessarily

¹⁸² Brief of Amicus Curiae of Appellate Defense Division for the Navy-Marine Corps in Opposition to L.R.M.’s Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, *LRM v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013) (No. 2013-05), 2013 WL 2419446, at 14-18. (Hereinafter, “Brief of Navy-Marine Corps Appellate Defense Division.”).

¹⁸³ *Id.* at 13.

¹⁸⁴ Pokorak, *supra* note 6, at 718-19 (“Victims also may require legal representation in order to work defensively against multi-directional attacks and intrusions on their privacy that compromise their security Unfortunately for the victim, it may not be made clear that this lawyer—a prosecutor—cannot be her attorney, may not even act in the victim’s interest, and may in fact act directly contrary to the victim’s interests.”).

¹⁸⁵ See, e.g., *Taylor v. Commonwealth*, 369 Mass. 183, 192 (1975) (“[I]n certain circumstances, where the witness is ignorant, misinformed or confused about his rights, and there is danger to him in the testimony sought to be elicited, it is a ‘commendable practice’ for the judge to intervene and advise the witness.” (citing *Commonwealth v. Slaney*, 345 Mass. 135, 142 (1962)); see also Roderick R. Ingram, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials*, 5 WM. & MARY BILL RTS. J. 299, 303 n.20 (1996) (“Judicial concern for preventing a witness from incriminating herself can result in a judge warning a witness that her testimony could lead to criminal [sic] prosecution. A judge may also choose to halt the trial and appoint counsel to the witness to explain to her the implications of her testimony and her constitutional rights.”).

compelled to answer these questions.”¹⁸⁶ For this fundamental reason, the defendant is not losing any rights, nor are his or her constitutional rights being violated by providing a second attorney, the SVC, with standing to ensure that the defendant or defense attorney does not do something he or she never had a legal right to do. Essentially, the Constitution, while rightfully protective of the accused, does not extend to a defendant of an alleged sexual assault the right to take advantage of potential prosecutorial inaction in failing to limit defense counsel to appropriate questioning of a victim witness. Granted, the judicial system must take care to ensure such a defendant receives a constitutional trial in all cases. However, an additional gatekeeper, one who answers to a third party—the victim—but merely guards the same gate that the state is currently perceived to be guarding, does not alter the rights of a sexual assault defendant. When limited to the role of protecting the victim’s privacy and providing legal counseling, the SVC concept does not constitutionally infringe upon legitimately guarded defendants’ rights. Fundamentally, the SVC concept and an accused’s due process rights are fully compatible.

2. OBJECTION: THE PROSECUTION SHOULD PROTECT VICTIMS’ RIGHTS:

The next argument made by the N-MC Defense Division was that SVC is unnecessary because the prosecution should already be protecting the interests of the sexual assault victim.¹⁸⁷ Although currently, prosecutors may find themselves filling this role and victims may often believe that prosecutors are the victims’ counsel, the ethical and practical obligations of the prosecutors are different and often, a prosecutor attempting to represent a victim creates conflicts of interest.¹⁸⁸ On this point, one author even asserted, not that SVC would infringe upon defendants’ rights, but rather that requiring “prosecutors to act as victims’ advocates [is] a posture that undermines judicial independence, prosecutorial discretion, and defendants’ rights.”¹⁸⁹ Such a posture creates inherent conflicts of interest because, for example, prosecutors whose “official decisions and judgments are explicitly undertaken to avenge the pain . . . experienced by the victim[] may find it difficult to evaluate the merits of a case and the credibility of the victim objectively[.]”¹⁹⁰ Furthermore, “[u]nfortunately for the victim, it may not be made clear that this lawyer—a prosecutor—cannot be [his or] her attorney, may not even act in the victim’s interest, and may in fact act directly contrary to the victim’s interests.”¹⁹¹

On the contrary, an SVC, as one who is clearly assigned to represent the interests of the sexual assault victim, would improve upon the current system in which the prosecution may either over- or under-zealously attempt to represent the interests of the victim while fulfilling what should be his primary goal of obtaining truth and justice for society as a whole.¹⁹² Notably, although the ABA Criminal Justice Section Standards on Prosecution Function provide that prosecutors “should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel *whenever the law so*

¹⁸⁶ 2013 Report from the Judge Advocate General of the United States Air Force to the American Bar Association 3 (Am. Bar Ass’n, 2013), http://www.americanbar.org/content/dam/aba/administrative/public_utility/USAF%202013%20Annual%20Report%200.authcheckdam.pdf.

¹⁸⁷ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 14.

¹⁸⁸ See Gershman, *supra* note 70. Pokorak, *supra* note 6, at 718-20.

¹⁸⁹ Blondel, *supra* note 78, at 240.

¹⁹⁰ Gershman, *supra* note 70, at 570 (internal quotation marks omitted).

¹⁹¹ Pokorak, *supra* note 6, at 719.

¹⁹² See generally Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537-38 (“[T]he prosecutor represents society as a whole. His goal is truth and the achievement of a just result.”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

requires[.]”¹⁹³ and prosecutors “should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded protections *where feasible*[.]”¹⁹⁴ the ABA Standards on Prosecutorial Investigations clearly state, “[t]he prosecutor’s client is the public, not particular government agencies or victims.”¹⁹⁵ SVC is not superfluous or redundant, but rather, state SVC programs would resolve the inherent conflicts that exists for prosecutors when dealing with sexual assault victims.

3. OBJECTION: THE SVC WILL COMPLICATE *BRADY* DISCLOSURES:

The landmark case, *Brady v. Maryland*, decided in the 1960s by the Supreme Court of the United States, stands for the proposition that the prosecution is required to disclose any exculpatory information to defense counsel.¹⁹⁶ The N-MC Defense Division argued in its amicus brief that the duty to disclose *Brady* information is complicated by the existence of SVC.¹⁹⁷ Specifically, the N-MC Defense Division argued that if a victim’s privacy is protected by the SVC instead of the prosecution, the SVC might discourage the victim from disclosing information to the prosecution that the prosecution would then be required under *Brady* to reveal to the defense. SVC might interfere with a victim disclosing exculpatory information to the prosecution. However, the existence of SVC does not alter the victim’s duty to answer the questions of the prosecution honestly and completely. If any exculpatory information is made available to the prosecution, then it must be disclosed to the defense. Notably, “[t]he prosecution must disclose exculpatory information to the defense whether the information is in the hands of the prosecution or not. This includes information known to the police or other prosecutorial agents[.]”¹⁹⁸ The N-MC Defense Division’s argument assumes that an SVC would advise a victim not to answer inquiries by the prosecution or investigators fully and completely. No authority was presented to the C.A.A.F. to support such an assumption.

4. OBJECTION: AN ALLIANCE BETWEEN THE SVC AND THE PROSECUTION WILL APPEAR IMPROPER:

The N-MC Defense Division also argued that the alliance of SVC with the prosecution would appear to the public to be improper.¹⁹⁹ This argument assumes that the SVC will actually be aligned with the prosecution. This assumption is simply not always true, as discussed in detail in section V.(A.)(2.), above.²⁰⁰ Second, predicting public perception is difficult. One could just as readily predict that the public’s faith in the criminal justice system would be increased by the presence of an SVC whose duties are clearly defined and readily apparent. Even though the victim’s and the public’s respective interests may at times incidentally overlap, the public, as the prosecutor’s client, should be mindful of the numerous scenarios in which a prosecutor’s interests do not overlap with that of a victim.²⁰¹ Ultimately, a prosecutor’s job, if done properly, inherently requires some degree of neutrality toward the victim, in order to avoid potential conflicts of interest, as well as to devote his or her full attention to zealous advocacy for his client—the people.²⁰²

¹⁹³ AM. BAR ASS’N, *ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 3-3.2(b): Relations with Victims and Prospective Witnesses*, 53 (James G. Exum, Jr. et al. eds., 3rd ed. 1993).

¹⁹⁴ *Id.*

¹⁹⁵ AM. BAR ASS’N, *ABA Standards for Criminal Justice, Standard 1.2: General Principles*, 52 (Mark Dwyer et al. eds., 3rd ed. 2014).

¹⁹⁶ *Brady v. Maryland*, 373 U.S. 83 *passim* (1963).

¹⁹⁷ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 14-15.

¹⁹⁸ Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33, 58 (2004).

¹⁹⁹ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 15-16.

²⁰⁰ See also Gershman, *supra* note 70.

²⁰¹ See *supra* Section V.(A.)(2.).

²⁰² Gershman, *supra* note 70, at 563.

5. OBJECTION: THE ACCUSED'S RIGHT TO CONFRONTATION WILL BE REDUCED:

Finally, the N-MC Defense Division argued²⁰³ that the existence of an attorney-client relationship between the victim and SVC would reduce the amount of impeachment evidence that would be available to the accused and would thus diminish the right of the accused to confront the victim under the Sixth Amendment to the Constitution.²⁰⁴ This argument assumes that if a victim is represented by SVC then the accused will have less access to impeachment evidence. This argument bears resemblance to objections to the SVC concept on constitutional grounds, arguing that a third attorney in the courtroom would reduce the evidentiary rights of the defendant (*see* section V.(A.)(1.), above). However, realistically, the nature and extent of impeachment evidence available to the defendant regarding the victim witness will be governed by the evidentiary rulings of the trial judge, as has long been the case.²⁰⁵ The mere presence of SVC to argue the privacy rights of the victim does not make the underlying information less admissible for purposes of impeachment.

B. EXISTING U.S. CIVILIAN AUTHORITIES SUPPORTING THE SVC CONCEPT:

Notably, “[w]hat [*Kastenberg*] has now firmly established in the military is that the reasonable right to be heard means the reasonable right [of a victim] to be heard through an attorney”²⁰⁶ The court specifically held that, under M.R.E. 513’s psychotherapist-patient privilege, “[a] reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel[.]” and that “[s]tatutory construction indicates . . . that the right to be heard in evidentiary hearings under [both] M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness.”²⁰⁷

As emphasized in this quote, the C.A.A.F. in *Kastenberg* relied on the statutory language “opportunity to attend and be heard,” in holding in favor of SVC.²⁰⁸ Admittedly, the SVC program is specific to the Armed Forces, and the statutory language, “opportunity to be heard,” is also somewhat specific to the Military Rules of Evidence. That said, the U.S. federal court system currently has express provisions providing for victims’ rights.²⁰⁹ Furthermore, the Federal Rules of Evidence (“F.R.E.”), as well as each state’s respective set of rules of evidence, has its own rape shield statute, and degrees of variations—some significant, some not—exist in the statutory language, as discussed at length in subsection V.(D.), below.²¹⁰ The F.R.E., as well as six other jurisdictions’ rules of evidence, provide some degree of a “right to be heard,” approximating that of the M.R.E. These statutory variations may largely determine the ease or even the likelihood of expanding the Armed Forces’ newfound policy of providing victim with independent counsel into the civilian world. Ultimately, however, a review of existing authorities in military, federal, and state law indicates that there may already exist a legal basis for a SVC program in state systems.

²⁰³ Brief of Navy-Marine Corps Appellate Defense Division, *supra* note 182, at 17-18.

²⁰⁴ U.S. CONST. amend. VI.

²⁰⁵ *See generally* MIL. R. EVID. 104(a), “The military judge must decide any preliminary question about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible.”

²⁰⁶ Kristin Davis, *Appeals Court Affirms Role of Victims’ Counsel*, AIR FORCE TIMES (July 28, 2013, 6:00 AM) (quote from Maj. Davis Younts, who worked with Col. Ken Theurer, chief appellate counselor on the case),

<http://www.airforcetimes.com/article/20130728/NEWS06/307280004/Appeals-court-affirms-role-victims-counsel>.

²⁰⁷ *LRM v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013).

²⁰⁸ *Id.*

²⁰⁹ *See* section V.(B.)(1.), *infra*.

²¹⁰ Section V.(D.) of this article, *infra*.

1. FEDERAL RULES OF EVIDENCE SUPPORTING THE SVC CONCEPT:

Some statutory variation exists as between F.R.E. 412(c)(2) and M.R.E. 412(c)(2). However, that difference is slight and may not have a tangible effect on the possibility of introducing the concept of SVC in federal court. F.R.E. 412 requires that “[b]efore admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard.”²¹¹ M.R.E. 412 requires, in relevant part, “[b]efore 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.”²¹² Despite the differences in some of the language of the rules, the portion of the language upon which the C.A.A.F. focused on in *Kastenberg*, “the opportunity to be heard,” remains common between the two rules. The most obvious difference between the two statutes is the absence of the qualifier “reasonable” in the F.R.E. in regard to the victim’s right to be heard. The C.A.A.F. relied on this word in *Kastenberg* in holding that the victim’s right is not absolute and may be limited.²¹³ However, because the language in the F.R.E. seems to be even more expansive than the M.R.E.—granting a broader right to be heard—arguably, the foundational statutory language is present for the prospect of introducing SVC into federal court prosecutions.

2. FEDERAL RULES OF CRIMINAL PROCEDURE SUPPORTING THE SVC CONCEPT:

Federal Rule of Criminal Procedure, Rule 60, is titled “Victim’s Rights.” This rule explicitly provides that a victim of an alleged federal crime has the right to (1) have “reasonable, accurate, and timely notice” of a pertinent court proceeding, (2) attend the proceeding, and (3) be heard on a hearing involving the accused’s “release, plea, or sentencing”²¹⁴ Furthermore, the rule goes on to provide that, “[a] victim’s rights described in these rules may be asserted by the victim [or] the victim’s lawful representative”²¹⁵ Finally, in the official Committee Notes on Rules—2008, the Committee states, “[i]n referring to the victim and the victim’s lawful representative, the committee intends to include counsel.”²¹⁶ Notably, Rule 60 does not pertain only to sexual assault victims, but rather, provides such rights to any victims of an alleged federal crime. Admittedly, Rule 60 does not provide a government-funded attorney to the victim in the same way Congress has provided SVC attorneys to military sexual assault victims. Nonetheless, taken together, these rule provisions and accompanying comments clearly indicate the federal criminal justice system’s stance that a victim’s right to be heard, as asserted through the victim’s independent legal counsel, does not violate the due process rights of a criminal defendant.

3. FEDERAL CASE LAW SUPPORTING THE SVC CONCEPT:

In addition to a foundation in the language of the Federal Rules of Criminal Procedure, the SVC concept is supported by existing federal case law. The *Kastenberg* court

²¹¹ FED. R. EVID. 412(c)(2).

²¹² MIL. R. EVID. 412(c)(2).

²¹³ *Kastenberg*, 72 M.J. at 372.

²¹⁴ FED. R. CRIM. P. 60(a).

²¹⁵ *Id.* at § (b)(2).

²¹⁶ Fed. R. Crim. P. Rule 60(b)(2) Advisory Committee’s N. to 2008 Amendment.

referenced several instances in which federal U.S. case law supports the proposition that victims may be represented by counsel at pretrial hearings, stating:

while the military judge[, Judge Kastenberg,] suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." *In re Dean*, 527 F.3d 391, 393 (5th Cir. 2008). The victims' "attorneys reiterated the victims' requests" and "supplemented their appearances at the hearing with substantial post-hearing submissions." *Id.*; see also *Brandt v. Gooding*, 636 F.3d 124, 136–37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard."). Similarly, in *United States v. Saunders*, at a pretrial Fed. R. Evid. 412(c)(1) hearing, "all counsel, including the alleged victim's counsel, presented arguments." 736 F. Supp. 698, 700 (E.D. Va. 1990). In *United States v. Stamper*, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).²¹⁷

4. STATE LAW SUPPORTING THE SVC CONCEPT:

In addition to the extensive federal authority discussed above, support for the implementation of the SVC concept also exists, at least to some degree, at the state court level. As discussed in greater detail in subsection V.D., *infra*, one U.S. state, Ohio, has already enacted laws offering a state-funded option to provide independent legal representation to indigent victims of alleged sexual assault.

C. OTHER ROLES FOR SVC IN STATE CRIMINAL TRIALS:

The SVC is clearly tasked with protecting a victim at trial or at a pretrial hearing. However, counsel for victims of sexual assault could also provide victim assistance in conceptual areas extending beyond litigating the applicability of rape shield laws or the protections of psychotherapist-patient and medical privileges. The American Bar Association recently spotlighted the military SVC programs' diverse benefits by publishing an article reflecting one ABA division's 2014 Midyear Meeting that included a discussion of the SVC program's purposes and its successes to date.²¹⁸ According to Air Force Colonel Dawn Hankins, as interviewed in the ABA article,

[t]he purpose of the SVC program is threefold. It provides advocacy, protecting the rights afforded to victims in the military justice system. It provides advice, developing victims' understanding of the investigatory and military justice processes[, a]nd it empowers victims, removing barriers and giving victims a voice. The program allows victims to 'feel like they're not getting retraumatized by the system'²¹⁹

²¹⁷ *Kastenberg*, 72 M.J. at 370.

²¹⁸ *Air Force SVCs Advocate for Sexual Assault Victims*, *supra* note 5.

²¹⁹ *Id.*; see also Rebecca Campbell, Sharon Wasco, Courtney Ahrens, Tracy Self, and Holly Barnes, *Preventing the "Second Rape": Rape Survivors' Experiences With Community Service Providers*, 16 (12) J. OF INTERPERSONAL VIOLENCE 1223, 1240 (2001). "Retraumatization," colloquially known as "the second rape," refers to situations in

In this section we examine other roles that counsel for victims could perform. Those roles could include reducing re-victimization, reducing reporting inconsistencies in the investigation, protecting victims from unwarranted mental health examinations, reducing the inherent conflict of interest between victim and prosecution, and reducing the victim's exposure to collateral legal consequences.

1. REDUCING REVICTIMIZATION:

Revictimization may occur in the investigation and trial when victims are questioned in a manner that "blames the victim," are not informed about the progress of the case, and are required to forfeit aspects of their privacy. A survey of Sexual Assault Nurse Examiners found that they believed that victims were revictimized by the investigation and prosecution phases of the case.²²⁰ The fear of being blamed for the assault is one common reason victims do not report a sexual assault to the proper authorities.²²¹

Research indicates that sexual assault victims are "often denied help by their communities, and what help they do receive often leaves them feeling blamed, doubted, and revictimized."²²² Some believe that undermining the reliability and credibility of the victim is an essential role of the defense counsel and that the confrontation, perceived as blaming the victim, is merely a structural consequence of the adversarial system.²²³ However, having the advice, counsel and advocacy of an attorney experienced with the process can reduce the anxiety and misunderstanding that may exist when victims are left to navigate the adversarial legal system without their own counsel, will increase the likelihood that the victim receives the needed support from the legal, medical and community systems, and will increase victims' confidence in their ability to participate in the criminal justice process.²²⁴

2. REDUCING UNINTENDED REPORTING INCONSISTENCIES AND OBTAINING THE BEST EVIDENCE:

A key factor in determining whether a report of sexual assault will result in a prosecution is the perceived consistency or inconsistency of the victim's initial reports.²²⁵ Victims sometimes do not report embarrassing or very private matters in their initial report to police. Facts such as substance use or prior consensual sexual relations with the defendant may not be revealed because the victims do not understand the relevance of such information or do not want to reveal private information. When such information is later revealed (often initially through the statement of the defendant) the initial statement of the victim may be viewed as inconsistent and unreliable. The "discrepancy" in statements influences decision-making by police and prosecutors when deciding to move cases to prosecution and disposition.²²⁶ Having an independent attorney to provide advice and counsel to the victim at the earliest stages of the investigation may reduce the likelihood that the victim will omit facts, either intentionally or inadvertently, in initial reporting that may later be used by police, prosecutors, or defense counsel as evidence of inconsistency and hence unreliability. Ultimately, for every party in the

which victims are blamed for the assault, or do not receive needed services or support from legal, medical and community systems.

²²⁰ Shana Maier, *Sexual Assault Nurse Examiners' Perception of Revictimization of Rape Victims*, 27(2) J. INTERPERSONAL VIOLENCE 199, 315 (2012).

²²¹ Rebecca Campbell, M. Greeson, and, Debra Patterson *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, 34(2) HEALTH & SOCIAL WORK 83, 136 (2007).

²²² Preventing the "Second Rape", *supra* note 219, at 1240.

²²³ Yaroshefsky, *supra* note 175, at 137.

²²⁴ Patterson & Campbell, *supra* note 41, at 191-203.

courtroom and for the benefit of justice to the general public, obtaining the best, most reliable evidence from the witness is an important and common goal, and “in itself is uncontroversial.”²²⁷

3. PROTECTING VICTIMS FROM UNWARRANTED MENTAL HEALTH EXAMINATIONS:

In some jurisdictions a sexual assault victim may be required to undergo a psychological examination.²²⁸ While such examinations may be necessary to safeguard a defendant’s right to due process, these examinations may infringe on the victim’s privacy rights and privilege, and may be the result of legal procedures that do not protect the rights of victims.²²⁹ An attorney appointed to represent the victim could ensure that the victim’s voice is heard concerning a compelled mental health examination and that the defendant meets the requisite level of need for such a potentially intrusive examination.

4. REDUCING INHERENT CONFLICTS OF INTEREST:

As discussed in detail above,²³⁰ practical and ethical considerations prevent a prosecutor from filling his or her true role of advocate for the state and the public while also attempting to protect a victim who may perceive the prosecutor to be his or her attorney.²³¹ Ultimately, “[n]o matter how ethical or concerned a prosecutor may be about a victim’s plight, there is an inherent conflict between the roles of representative of the State and counsel to the victim.”²³² SVC would avoid such a conflict.

5. REDUCING EXPOSURE TO COLLATERAL LEGAL CONSEQUENCES:

Fear of collateral legal consequences is often a key factor in a sexual assault victim’s decision not to report the crime to police or cooperate in prosecution.²³³ Victims may fear that participation in an investigation and prosecution will expose them to consequences for collateral legal issues such as truancy, underage drinking,²³⁴ illegal substance abuse, prostitution, violation of employment rules or immigration issues.²³⁵ An SVC could assist the victim in accomplishing agreements or immunities to protect the victim from being exposed to collateral legal consequences as a result of being targeted for a sexual assault.

D. THE UNIQUE WORDING OF EXISTING STATE STATUTORY AUTHORITIES:

²²⁵ Megan Alderen & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 541 (2012).

²²⁶ *Id.*

²²⁷ Raïtt, *supra* note 66, at 268.

²²⁸ Gregory Sarno, *Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution*, 45 A.L.R. 4th 310 § 3(a) (1986).

²²⁹ Oriana Mazza, *Re-Examining Motions to Compel Psychological Evaluations of Sexual Assault Victims*, 82 ST. JOHN’S L. REV. 763, 775 (2008).

²³⁰ *See supra* Sections V.(A).(4.), II.(B).(1).(b.).

²³¹ Pokorak, *supra* note 6 *passim*.

²³² Yaroshefsky, *supra* note 175, at 139.

²³³ PATRICIA L. FANFLIK, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, OFFICE ON VIOLENCE AGAINST WOMEN, VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? 2 (2007).

²³⁴ T.R. Reid, *Female Air Force Cadets Allegedly Punished for Reporting Rapes*, WASH. POST (Denver), Feb. 21, 2003, at A4.

²³⁵ Kavitha Sreeharsha, *Victims’ Rights Unraveling: The Impact of Local Immigration Enforcement and the Violence Against Women Act*, 11 GEO. J. GENDER & L. 649, 659 (2010).

Much more than a comparison between the M.R.E. and the F.R.E., a comparison of the variations in statutory provisions of the fifty-three available state or territorial²³⁶ rape shield statutes runs the gamut. This variation complicates the matter immensely when considering whether the Armed Forces' SVC programs could be translated into the U.S. civilian criminal justice system. In the military realm, all Article 120 and other sexual assault crimes are all brought and tried under the same evidentiary rules.²³⁷ Therefore, M.R.E. 412 and the C.A.A.F.'s *Kastenber* holding are applicable to servicemembers no matter where, geographically, the underlying alleged crime occurred. However, in the civilian world, while rape and other sexual assault crimes are occasionally prosecuted at the federal level, the vast majority of such crimes is prosecuted through the applicable state criminal justice system. Therefore, depending on where the crime allegedly occurred and where the case is properly brought, a different set of evidentiary rules applies, therefore providing different statutory protections to sexual assault victims.

All states plus the District of Columbia, Guam, and Puerto Rico have enacted some version of a rule 412 or other rape shield statute.²³⁸ However, out of those fifty-three, only six statutes²³⁹ include an "opportunity to be heard" provision or similar clause providing the victim with an express, or even, arguably, an implied right to be heard at an in-camera²⁴⁰ evidentiary hearing.²⁴¹ Even Michigan's criminal sexual conduct statute, widely considered at the time of its inception to be the most sweeping and groundbreaking of rape reform laws,²⁴² does not provide the victim with a statutory right to be heard.²⁴³ Within those six jurisdictions that have such a provision, the rights afforded the victim range from the right to *attend* the evidentiary hearing and be accompanied by counsel (but with no express right to be heard),²⁴⁴

²³⁶ Including the District of Columbia, Guam, and Puerto Rico. (Information was not provided by the National District Attorney's Association on the Virgin Islands or American Samoa.) See *Rape Shield Statutes* 65 (NAT'L DIST. ATTORNEY'S ASS'N, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, current as of Mar. 2011), <http://www.ndaa.org/pdf/NCPA%20Rape%20Shield%202011.pdf>.

²³⁷ See MIL. R. EVID. 101(a).

²³⁸ See *supra* note 236.

²³⁹ KRE 412(c)(2), "Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard."; LA. CODE EVID. ANN. art. 412(E)(2) (2015), "The victim, if present, has the right to attend the hearing and may be accompanied by counsel."; N.C. GEN. STAT. § 8C-1, RULE 412(d) (West 2010), "... the court shall conduct an in camera hearing ... to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant ..."; N.D. R. EVID. 412(c)(2), "[T]he court must conduct an in camera hearing and give the victim and parties a right to attend and be heard."; OHIO REV. CODE ANN. § 2907.02(F) (West 2011), "Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim."; UTAH R. EVID. 412(c)(2), "[T]he court must conduct an in camera hearing and give the victim and parties a right to attend and be heard."

²⁴⁰ An "in-camera" hearing, also known as "in chambers" or a hearing outside the presence of jurors and/or the public, is used in almost all state statutes to determine whether evidence of the victim's past history (usually sexual history) should be admitted to the jurors, and the burden of proof as to whether or not to admit the evidence varies greatly, from statutes freely admitting sexual evidence about the victim when "the probative value of the evidence outweighs its prejudicial effect on the victim[.]" (CT. GEN. STAT. § 54-86(f) (2013)), to evidence being admissible only when "the probative value of the evidence *substantially* outweighs the probability that its admission will create prejudice[.]" WY. STAT. § 6-2-312(a)(iv) (2014) (emphasis added), to strict statutes that prohibit admission of past sexual conduct by the victim unless the evidence "is *so highly material* that it will *substantially* support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that *justice mandates* the admission of such evidence" (GA. CODE ANN. § 24-4-412(b)(2) (2014) (emphasis added)).

²⁴¹ The tabulation of statutes was done according to a March 2011 compilation done by the National District Attorneys Association: National Center for Protection of Child Abuse. *Rape Shield Statutes*, Westlaw Services (2011), <http://www.ndaa.org/pdf/NCPA%20Rape%20Shield%202011.pdf>.

²⁴² Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25(1) LAW AND SOC'Y REV. 117, 121 (1991).

²⁴³ MICH. COMP. LAWS ANN. 750.520j (West 2014).

²⁴⁴ LA. CODE EVID. ANN. art. 412(E)(2) (2015).

to the right to be heard, with language mirroring that provided in the F.R.E.,²⁴⁵ to the right, at any evidentiary hearing, to counsel provided by the state at no cost to the victim, if indigent and with no means of repayment (almost an alleged sexual assault victim's analog to the more familiar public defender system, but also allowing for reimbursement for some costs of representation if the victim can contribute thereto).²⁴⁶ In the remaining forty-seven jurisdictions surveyed, where no express right to be heard exists at present, the decision to implement such a right, and moreover, an SVC program, would fall to the state legislature to amend the state statutes or rules of evidence to provide a sexual assault victim with a right to be heard.

Although, presently only Ohio provides state-funded counsel for indigent victims,²⁴⁷ any state with explicit statutory reference to victims' rights stands a much greater chance of a court holding that this right should be interpreted to mean the right to dedicated, state-funded legal counsel for the victim. As to state funding, admittedly, in oral argument in *Kastenber*, the Real Party in Interest and the United States conceded that the issue of whether a victim has standing to assert his or her rights through counsel does not *require* the government to provide or appoint counsel for that victim, noting that it was "merely fortuitous" that the Air Force had appointed LRM an SVC.²⁴⁸ However, at minimum, even if a state government does not provide counsel, as do the Armed Forces and Ohio, the *Kastenber* holding stands for the proposition that in limited instances,²⁴⁹ the sexual assault victim's "reasonable opportunity to be heard" means the right to be heard through his or her counsel.²⁵⁰ Granted, this right is subject to the limitations of Rule 801, meaning the right to be heard may be limited to written submissions and, furthermore, does not create to a victim's right to appeal an adverse evidentiary ruling.²⁵¹ Nonetheless, the construction of state statutes to interpret a victim's right to be heard as meaning *through counsel*, the implementation of such victim's rights statutes in states where they do not yet exist, and the forethought of the possibility of an SVC program in civilian state jurisdictions are all ideas that provide immense potential for the improvement of both the plight of sexual assault victims and the efficacy and reliability of the criminal justice system overall.

²⁴⁵ KRE 412(c)(2); N.D. R. EVID. 412(c)(2); UTAH R. EVID. 412(c)(3).

²⁴⁶ OHIO REV. CODE ANN. § 2907.02(F) (West 2008).

²⁴⁷ *Id.*

²⁴⁸ Oral Argument of U.S. Air Force at 34:41, LRM v. Kastenber, 72 M.J. 364 (C.A.A.F. 2013) (No. 13-5006/AF), <http://www.armfor.uscourts.gov/newcaaf/CourtAudio3/20130611.wma>.

²⁴⁹ *Kastenber*, 72 M.J. at 372.

²⁵⁰ *Id.* at 371; MIL. R. EVID. 412(c)(2).

²⁵¹ *Kastenber*, 72 M.J. at 371.

SECTION VII: CONCLUSION AND RECOMMENDATION:

The military system of legal representation for victims of sexual assault remains in its infancy and will likely continue to evolve and improve. Nonetheless, the Air Force has introduced a groundbreaking concept into the realm of criminal law in the United States—a concept on which the other military service branches modeled their SVC programs and from which U.S. civilian state courts could derive analogous programs. Although critics of the SVC concept have often taken the position that the creation of SVC programs in an adversarial justice system would create an imbalance in the courtroom dynamic, the Armed Forces' SVC programs and similar programs in other adversarial systems such as Ireland and New South Wales, prove there is potential for coexistence between Special Victims' Counsel and a defendant's fundamental due process rights.

In sum, state criminal justice systems can—and should—consider the virtues of the SVC concept and the realistic possibility of implementing such a program. The full potential of the Special Victims' Counsel, even within the Armed Forces paradigm, may not yet be fully realized. Nonetheless, SVC programs have already begun to address many of the longstanding inadequacies of existing attempts to protect complainants' privacy interests. Although, in the U.S., this solution originated in the context of the military justice system, the inadequacies catalyzing its development are not new, and they are not limited to the military environment. State criminal justice systems have for decades left gaping holes in the realm of victim advocacy that future generations must address in order to achieve the universal goal of reducing the underlying incidences of sexual assault. The Air Force and other military branches' Special Victims' Counsel programs provide the promise of such a solution.

