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NOTE

SPECIAL VICTIM'S PRIVILEGES:
HOW JUDICIAL ACTIVISM AND A COURT'S EXPANSIVE APPLICATION OF LAW MADE FOR A GOOD RESULT

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As interest in the topic of sexual assaults in the military peaked among federal legislators, the Court of Appeals of the Armed Forces ("CAAF") heard the case of LRM v. Kastenberg. *This case is particularly significant because it was the first to address the role of the Special Victim's Counsel, military attorneys appointed to represent alleged victims during courts-martial proceedings arising from such assaults. While the* Kastenberg *majority found that hearing the case was appropriate under the circumstances, given the notion of judicial economy and CAAF's broad jurisdiction to hear cases, the dissenting judges felt that the majority's decision both circumvented established precedent and violated provisions of the Uniform Code of Military Justice.*

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This Note seeks to determine why Kastenberg *was heard when it was and whether the decision to do so was based upon sound legal principles. While political considerations may have influenced the timing of the Court's decision to hear the case to some degree, the majority achieved a proper outcome, despite the fact that one or both of the dissenters may have had a stronger legal argument.*

INTRODUCTION

Legal and constitutional scholars have been unable to agree upon a single meaning for the term "judicial activism" since Arthur Schlesinger, Jr. first coined it in 1947.[1] Indeed, at least five different definitions have been attached to the phrase over the past sixty-six years, including: "(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial 'legislation,' (4) departures from accepted interpretive methodology, and (5) result-oriented judging."[2] In addressing the issues in *LRM v. Kastenberg*, the Court of Appeals of the Armed

[1] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism*," 92 CALIF. L. REV. 1441, 1446 (2004).
[2] *Id.* at 1444.

Forces ("CAAF") appears to have engaged in both judicial legislation and result-oriented judging, most likely for reasons of judicial economy,[3] but perhaps also at least in part because of the political climate surrounding sexual assault in the military at that time. Further, by choosing to interpret prior case law and statutes in a manner that allowed it to address such offenses when it did, the CAAF majority imposed a novel interpretation on jurisdiction and third party standing that both cements the role of Special Victim's Counsel ("SVC") advocates in future cases and requires military judges to develop a more comprehensive record at the trial level.[4]

When an Article III court engages in judicial activism, it does so in violation of the principle of separation of powers.[5] CAAF, however, is an Article I court that has the "power to make 'rules for the conduct of its business' under the Judicial Code."[6] Additionally, unlike the trial-level military courts and the service courts of criminal appeals, CAAF, despite being the highest court in the military justice system, is controlled by civilian judges rather than active military personnel.[7] Because of this unique dynamic, CAAF has traditionally interpreted its jurisdiction very broadly, as demonstrated by its expansive approach to its ability to hear cases under the All Writs Act.[8] Likewise, CAAF has tended to "err on the side of generosity" when dealing with appellant issues because it views its role as achieving substantive justice and protecting the accused from "potential lapses on the part of the military or civilian defense counsel . . . ."[9] As a result, CAAF has on occasion broadened the

[3] LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013).
[4] *See id.*
[5] This principle is illustrated by the dissent in *Turpin v. Mailet*, which criticized the majority for stepping "beyond its constitutional bounds by adopting the function of a legislature." Kmiec, *supra* note 1, at 1460 (citing Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978)).
[6] The term "Judicial Code" utilized by the author of this source is synonymous with the UCMJ. EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 1 (13th ed. 2010); *see also* 53A AM. JUR. 2D *Military and Civil Defense* § 302 (2014).
[7] 53A AM. JUR. 2D, *supra* note 6 at § 302.
[8] FIDELL, *supra* note 6.
[9] *Id.*

scope of its review beyond issues framed by the parties.[10] Though these actions are largely opposite the approaches taken by CAAF's Article III counterparts, they offer some context as to why CAAF operates in this manner.

Procedurally, however, CAAF is required to make legal determinations in accordance with the Uniform Code of Military Justice ("UCMJ"), the Rules for Courts-Martial ("RCM"), and the Military Rules of Evidence ("MRE"), all of which are contained within the Manual for Courts-Martial ("MCM").[11] The UCMJ, established by Congress in 10 U.S.C. Chapter 47, serves as the foundation for all military law.[12] It allows for personal jurisdiction over all active-duty service members as well as other individuals attached to military units or activated under specific circumstances.[13] The RCM and MRE, respectively, dictate the rules of procedure and of evidence in court-martial proceedings.[14] Provisions within the MCM are reviewed each year by the Department of Defense ("DoD").[15] Once this review is complete, the President receives the DoD's recommendations and authorizes any revisions by an annual Executive Order.[16]

On July 18, 2013, CAAF decided *LRM v. Kastenberg*, a case involving an alleged sexual assault by Airman First Class ("A1C")[17]

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[10] *Id.*

[11] R. CHUCK MASON, CONG RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 2 (2013), *available at* http://fpc.state.gov/documents/organization/213982.pdf; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM].

[12] *See generally Uniform Code of Military Justice Legislative History*, LIBRARY OF CONG., http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html (last visited Aug. 26, 2014).

[13] UNIFORM CODE OF MILITARY JUSTICE art. 2 (2012) [hereinafter UCMJ].

[14] *See* MCM, *supra* note 11, R.C.M. [hereinafter R.C.M.]; *see also* MCM, *supra* note 11, MIL. R. EVID. [hereinafter MIL. R. EVID.].

[15] Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984).

[16] *Id.*

[17] For pay grade purposes, an A1C is an E-3, which is the third enlisted grade a service member can attain in the military hierarchy. *See Grade and Insignia*, AIRFORCE.COM, http://www.airforce.com/pdf/insignia_enlisted_ranks.pdf (last visited Aug. 26, 2014).

Nicholas Daniels on A1C LRM.[18] The primary issue on appeal stemmed from a ruling by the trial-level military judge that LRM did not have the right to be heard at future evidentiary proceedings involving MRE 412 (Rape Shield) and 513 (Patient-Psychotherapist Privilege).[19] When LRM appealed that ruling to the Air Force Court of Criminal Appeals ("AFCCA"), that court dismissed her case for lack of subject-matter jurisdiction.[20] Nevertheless, The Air Force Judge Advocate General ("TJAG") certified three questions to CAAF, ostensibly as a *bona fide* "case" as defined in Article 67(a) of the UCMJ,[21] but actually as an interlocutory appeal by LRM. The critical question here was whether CAAF should have heard that application when it did.

The questions certified were (1) whether AFCCA erred in its determination that it lacked jurisdiction; (2) whether the trial judge's denial of LRM's demand to be heard violated her right to due process; and (3) whether CAAF should accept a writ of mandamus as the procedural vehicle to address these issues.[22] By a three-to-two majority, the CAAF judges determined that AFCCA had appropriate jurisdiction to hear the case and that LRM had standing to be heard before CAAF.[23] Even so, the CAAF majority also decided that a writ of mandamus was not the appropriate method by which LRM should have sought relief, and remanded the case to the trial court.[24] The focus of this Note, however, is not only to examine the majority's

[18] To protect the victim's identity, only the victim's initials, "LRM," are used in all available legal documentation.
[19] LRM v. Kastenberg, 72 M.J. 364, 366 (C.A.A.F. 2013).
[20] *Id.* at 367.
[21] Article 67(a) reads:

> The Court of Appeals for the Armed Forces shall review the record in: (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death; (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

UCMJ art. 67(a) (2012).
[22] *Kastenberg*, 72 M.J. at 366.
[23] *Id.* at 367.
[24] *Id.* at 372.

holdings on jurisdiction and standing, but also to address the fact that by choosing to hear LRM's interlocutory appeal at all at the point in the proceedings that it did, the CAAF majority may have at least partly engaged in judicial activism motivated by political considerations.

Part I of this Note will address relevant statutes and precedent affecting *Kastenberg*, including the development and application of MRE 412 and 513. It will also discuss some of the political and policy considerations surrounding the issue of sexual assault in the military at the time this case was heard. Part II will discuss the legal history of the case, including the decisions of the Military Judge and AFCCA, and the reason that CAAF heard the case. Part III will provide a brief statement of CAAF's analysis and holdings. Part IV will then discuss the three issues TJAG certified and the differences between the majority and the dissent in terms of their respective approaches to those issues and the outcomes they reached. This discussion will place particular emphasis on the issues of jurisdiction, standing, and the judicial activism that likely contributed to CAAF's decision to accept jurisdiction over the interlocutory appeal. In sum, while political considerations are perhaps one of the least supportable reasons to engage in judicial review, the political and social circumstances surrounding *Kastenberg* may well have contributed to the CAAF majority reaching appropriate conclusions, even though by strict construction standards, the process by which the court attained those results was both substantively and procedurally deficient.

I. LEGAL AND POLITICAL BACKGROUND

A. A Roadmap to the Military Justice System

To those unfamiliar with the military justice system, its processes and procedures can be complex and difficult to understand. As such, it is first important to understand that within the military justice system there are no permanently established trial-level courts.[25] Rather, when an accused is first charged with offenses,

[25] United States v. Denedo, 556 U.S. 904, 925-26 (2009) (Roberts, J., dissenting).

the convening authority (generally the accused's commanding officer or another officer higher in the accused's chain of command) has the ability to determine whether the accused has committed an offense worthy of a court-martial or if the offense(s) are better handled through administrative disciplinary processes that are unique to the military.[26] If the convening authority elects to refer charges to a court-martial, and provided that no bargain is struck in the interim that disposes of the charges through administrative channels,[27] a court-martial is convened on an "as needed" basis via a convening order that sets out the designated time and place for the court-martial.[28] The court-martial itself is a trial proceeding presided over either by a military judge alone (bench trial) or with members (the equivalent of a civilian jury, but with some aspects unique to the military system).[29] Once the adversarial aspect of the court-martial concludes, the military judge (if a bench trial) or the members (if it is a member trial) determine the accused's guilt or innocence.[30] If there are findings of guilt on one or more charges, the military judge (bench trial) or the members (if a member court-martial) determine the appropriate sentence.[31] If the sentence involves either a bad-conduct discharge or confinement for a year or more, the accused is entitled to appellate review under Article 66 of the UCMJ[32] (unless the accused waives that right).[33]

The first level of appellate review in the military justice system is the respective service's court of criminal appeals, which in this case is the AFCCA.[34] Once the appropriate service court conducts its review and issues a decision, the appellant (accused) has the right to petition the CAAF for further review.[35] Within the confines of Article 67 of the UCMJ, CAAF can choose first to accept or deny jurisdiction over the case, and then, if it accepts jurisdiction,

[26] *See* R.C.M. 501(a).
[27] R.C.M. 604.
[28] R.C.M. 601; *see also* R.C.M. 504(d).
[29] R.C.M. 501.
[30] R.C.M. 502(b).
[31] R.C.M. 1002, 1006.
[32] UCMJ art. 66 (2012).
[33] R.C.M. 1110.
[34] UCMJ art. 66.
[35] UCMJ art. 67.

to conduct its review accordingly.[36] Once CAAF's review is complete (barring exceptional circumstances or additional petitions), appellate review concludes at that point. On rare occasions, the U.S. Supreme Court will accept petitions for certiorari over military justice cases, but in general such high level review is rarely granted.[37]

B. CAAF's Power to Assume Jurisdiction

In *Kastenberg*, the CAAF majority and dissent each used various sections of Article 67, UCMJ to explain why, in their respective opinions, the court did or did not properly decide that CAAF had jurisdiction to accept this case for review.[38] The purpose of Article 67 is to outline the legal parameters within which CAAF, as a legislative court, may assume subject-matter jurisdiction to hear cases and appeals.[39] Article 67(a)(2) grants CAAF specific authority to hear "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the CAAF for review."[40] This provision is one of the primary issues addressed in this Note because, although TJAG does have such authority in certain instances, under the circumstances in this case, TJAG made unprecedented use of Article 67 by certifying issues to CAAF that involved a non-party claiming no current injury and only hypothetical future harm from a ruling that was not dispositive of the case.[41] As a result, as argued by Judge Ryan in her dissent, under Article 67 of the UCMJ, *Kastenberg*'s issues were not yet ripe for CAAF review.

In this same analytical vein, the All Writs Act states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[42] In *Noyd v. Bond,* the Supreme Court found that the All Writs Act applies in military cases, so while it is clear that a writ of mandamus

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[36] *Id.*
[37] *Id.*
[38] *See* LRM v. Kastenberg, 72 M.J. 364, 367, 371-76.
[39] *See* UCMJ art. 67.
[40] UCMJ art. 67(a)(2).
[41] *Kastenberg*, 72 M.J. at 373 (Ryan, J., dissenting).
[42] 28 U.S.C. § 1651 (2012).

could have issued in *Kastenberg,* whether such a writ should have issued remains an open question because the case did not come before the CAAF via that method.[43] Further, in *United States v. Denedo*, the Supreme Court held that the All Writs Act is not a source of subject-matter jurisdiction in all circumstances[44] and that appellate courts may invoke the All Writs Act only when it aids the "actual jurisdiction" granted under Articles 62, 66, 67, 69, or 73 of the UCMJ.[45] In *Kastenberg*, however, because the issues were presented to CAAF not as a writ, but as questions certified by TJAG after AFCCA had declined to hear LRM's interlocutory appeal in that court, by choosing to hear the issue at all, the CAAF majority at least arguably disregarded the dictates of Article 67, UCMJ, in finding that it had jurisdiction to accept the case.

C. Privileges and Standing

In this particular case, another issue of great concern to the dissenting judges was that LRM did not have standing to be heard by CAAF because she had suffered no injury-in-fact and could not demonstrate any impending harm that she would suffer if CAAF chose not to assume jurisdiction over her interlocutory application.[46] For obvious reasons, where issues involving sexual assaults are concerned, MRE 412 (Rape Shield) and MRE 513 (Patient-Psychotherapist Privilege) have become essential considerations. Not surprisingly then, another provision of the MCM that CAAF heavily relied upon in rationalizing LRM's right to be heard is MRE 412, a rule providing standing in certain cases involving "nonconsensual sexual acts."[47]

In 1978, Congress enacted the Privacy Protection for Rape Victims Act, which gave rise to Federal Rule of Evidence ("FRE")

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[43] Noyd v. Bond, 395 U.S. 683, 695-99 (1969).
[44] United States v. Denedo, 556 U.S. 904, 913 (2009) (citing Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999)).
[45] *See* Major Tyesha E. Lowery, *The More Things Change, the More They Stay the Same: Has the Scope of Military Appellate Courts' Jurisdiction Really Changed since* Clinton v. Goldsmith*?*, ARMY LAW. Mar. 2009, at 49.
[46] *Kastenberg*, 72 M.J. at 373-74 (Ryan, J., dissenting).
[47] *Id.* at 371. S*ee generally* MIL. R. EVID. 412(c)(2).

412.[48] FRE 412 protected rape victims from having to disclose details about themselves and their intimate relationships during rape trials.[49] Two years later, under a mandate by President Carter to bring the FRE and MRE into closer alignment, FRE 412 was adopted for military practice as MRE 412.[50] Unlike its federal counterpart, which applies only in cases of rape and sexual assault, however, MRE 412 is broader in scope in that it applies to all "nonconsensual sexual acts" and has less stringent procedural requirements.[51]

Regarding the procedural admissibility of evidence, MRE 412(c)(2) states, "Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. *The alleged victim must be afforded a reasonable opportunity to attend and be heard.*"[52] This language was crucial in *Kastenberg* since the majority cites it as the principal reason LRM had the right to be heard.[53]

Similarly, MRE 513 also bears upon LRM's request for documents made through her SVC because the impetus behind LRM's desire to argue before the military judge was to prevent A1C Daniels' trial defense counsel from admitting evidence related to her.[54] Like MRE 412, MRE 513 has its origin in civilian law. In 1965, an Advisory Committee drafted proposed Federal Rules of Evidence,[55] which the Supreme Court approved and passed on to

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[48] *See* Carol DiBattiste, *Federal and Military Rape Shield Rules: Are They Serving Their Purpose?*, 37 NAVAL L. REV. 123, 124 (1988); *see also* MCM, *supra* note 11, App. 22, at A22-36.
[49] DiBattiste, *supra* note 48, at 124.
[50] *Id.*
[51] *Id.*; *see also* MCM, *supra* note 11, App. 22, at A22-36.
[52] MIL R. EVID. 412(c)(2) (emphasis added).
[53] *Kastenberg*, 72 M.J. at 368-70.
[54] Although neither this case nor the briefs clarify what evidence the Trial Defense Counsel sought to admit against LRM's wishes, most often such matters involve either medical/counseling records or the prior sexual history of the victim (to include past interactions between the victim and the accused).
[55] Major Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW. Sept. 2003, at 1, 2.

Congress in 1972.[56] Within these proposed rules, FRE 501 and 502 were the only portions adopted by Congress, so those two provisions, coupled with independent state laws, govern federal practice with respect to privileges. The Advisory Committee drafters had proposed nine additional privileges in 1965, including the attorney-client privilege, marital privileges, and patient-psychotherapist privileges.[57] However, because Congress never formally adopted these additional provisions, federal courts split over whether or not FRE 501's language extended to the patient-psychotherapist relationship until *Jaffee v. Redmond*, when the U.S. Supreme Court held that FRE 501 did include that privilege; even so, Congress has yet to explicitly adopt this privilege in the federal rules.[58]

While civilian law on this privilege remains precedential, not statutory, in 1999, at the specific behest of President Clinton, the military adopted most of the language from the proposed federal version of the patient-psychotherapist privilege and established MRE 513 as a stand-alone provision in the MCM.[59] Before that date, military courts had never recognized a patient-psychotherapist privilege and today, over fifteen years later, military courts still struggle to define its applicability and bounds within the military justice system.[60] Additionally, much like MRE 412, MRE 513 contains a provision with respect to procedural admissibility that allows patients to claim the privilege either personally or through trial counsel, affords victims the opportunity to attend hearings related to the privilege, and allows them to be heard if doing so does not unduly obstruct or delay the court-martial process.[61]

D. The Sexual Assault Problem

Beyond MRE 412 and 513 considerations, numerous legislative and policy initiatives have focused on addressing sexual assault throughout all branches of the military given the nature of

[56] *Id.* at 2.
[57] *Id.*
[58] *Id.* at 3.
[59] *Id.* at 2.
[60] *Id.*
[61] *See* MIL R. EVID. 513(c), 513(e)(2).

these crimes and their seemingly high incidence in recent years.[62] Major changes began in 2007 when, contrary to DoD Subcommittee recommendations, Congress approved significant changes to Article 120 of the UCMJ, a decision that caused it to read more like Title 18 of the United States Code and less like any other article in the MCM.[63] In the 2005 MCM, Article 120 was termed "Rape and Carnal Knowledge" and contained only four subsections;[64] the current version of Article 120 specifies 14 categories of sexual offenses, including rape, sexual assault, aggravated sexual contact, and abusive sexual contact.[65] Unfortunately, the fact that little legislative history, policy guidance, or congressional statements of intent accompanied this revision has made uniform application of this article difficult.[66]

As concern grew over the issue of sexual assaults in the military, the Air Force, the Senate Armed Services Committee ("SASC"), and DoD all took action. Perhaps partially in response to two high-profile incidents involving the Air Force's handling of sexual assault amongst its personnel,[67] in January 2013, the Air Force

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[62] *See* SEXUAL ASSAULT PREVENTION AND RESPONSE, U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 12-13, 25 (Vol. 1, 2012) [hereinafter SEXUAL ASSAULT REPORT], *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf; *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672 (2013); Jackie Speier, *Why rapists in military get away with it*, CNN.COM (June 21, 2012), http://www.cnn.com/2012/06/21/opinion/speier-military-rape/ (last visited Aug. 26, 2014); Craig Whitlock, *Military chiefs balk at sexual-assault bill*, WASH. POST (June 4, 2012), http://www.washingtonpost.com/world/national-security/military-chiefs-balk-at-sex-assault-bill/2013/06/04/cd061cc4-cd1c-11e2-ac03-178510c9cc0a_story.html (last visited Aug. 26, 2014).

[63] Lieutenant Colonel Thomas E. Wand, *The New Article 120, UCMJ*, 34 REPORTER, no. 1, 2007, at 28, 29; *see also* 18 U.S.C. §§ 2241-2248 (2012).

[64] *See* UCMJ art. 120 (2005).

[65] Brigadier General (Ret.) Jack Nevin & Lieutenant Joshua R. Lorenz, *Neither a Model of Clarity nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the "New" Article 120*, 67 A.F. L. REV. 269, 277 (2011).

[66] *Id.* at 277.

[67] *See* United States v. Wilkerson, General Court-Martial Order No. 10, dated Feb. 26, 2013, *available at* http://www.foia.af.mil/shared/media/document/AFD-130403-023.pdf; *see also Lackland sex scandal prompts U.S. Air Force to discipline former commanders*, THE ASSOCIATED PRESS, May 2, 2013, *available at*

created SVC as a pilot program to assign military counsel to help victims of sexual crimes navigate the military justice system and to ensure that the victims' interests (predominantly as they pertained to MRE 412 and 513) were protected. Later that spring, the DoD's Sexual Assault and Prevention ("SAPR") Office released an extrapolated survey alleging that in 2011 alone, some 26,000 service members were victims of sexual assaults ranging in severity from unwanted touching to forcible rape.[68] A month later, SASC called on the Joint Chiefs of Staff to testify at hearings that addressed this survey and more generally the need to stem sex crimes in the military.[69] At the same time, members of Congress demanded the removal of military commanders from the court-martial process and began work on sweeping reforms to the UCMJ via the National Defense Authorization Act for Fiscal Year 2014, thereby tying compliance with these enactments to overall military funding.[70] In the midst of this volatile political atmosphere, CAAF decided *Kastenberg*, a case that may be one of its most influential decisions in recent years. Indeed, because it effectively determines the nature and extent of the SVC Program, the holding in *Kastenberg* will likely shape the way that Judge Advocates in all branches of military service approach, structure, and try cases in the future.

II. OVERVIEW OF THE CASE

In 2012, A1C Nicholas Daniels was accused of raping and sexually assaulting A1C LRM at Holloman Air Force Base in New Mexico.[71] His arraignment hearing occurred only one day after the

http://www.cbsnews.com/news/lackland-sex-scandal-prompts-us-air-force-to-discipline-former-commanders/.

[68] SEXUAL ASSAULT REPORT, *supra* note 62. *But see* Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 19, 2013, http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754 (disputing this 26,000 figure based on the methods of extrapolation used from the survey results).

[69] *Pending Legislation Regarding Sexual Assaults in the Military,* 113th Cong. (2013), *available at* http://www.armed-services.senate.gov/hearings/oversight-pending-legislation-regarding-sexual-assaults-in-the-military.

[70] The NDAA for Fiscal Year 2014, which included a provision requiring all branches of the Armed Forces to establish a SVC Program, became law on December 26, 2013. National Defense Authorization Act for Fiscal Year 2014 § 1716.

[71] LRM v. Kastenberg, 72 M.J. 364, 366 (C.A.A.F. 2013).

Air Force had established its SVC test program and, following that hearing, A1C Daniels was charged with three violations of Article 120, UCMJ.[72]

Prior to Daniels' arraignment hearing, LRM's SVC filed a formal notice of appearance.[73] Among other things, the notice asserted that LRM had standing to be heard on any MRE 412, 513, or 514 (Victim-Advocate Privilege)[74] issues in which she was either the victim, patient, or witness.[75] During the arraignment proceeding, LRM's SVC initially indicated that he did not wish to argue at any future MRE 412 or 513 hearing.[76] However, later in the same hearing, he alleged that there might be occasions where LRM's interests diverged from the government's prosecutorial interests[77] and that, in those instances, he wished to reserve LRM's right to present argument or otherwise participate in the proceeding.[78]

When the SVC attorney made this statement, Lieutenant Colonel Kastenberg, the Military Judge, using his statutory discretion,[79] chose to treat each of the attorney's requests for production of documents as a motion in fact, and then found that LRM had no standing either personally or through counsel to petition the court for such relief.[80] Judge Kastenberg further determined that LRM's SVC could not argue evidentiary matters that were in LRM's interest because it would force the accused to face two independent government attorneys on each of the same facts.[81]

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[72] *Id.*
[73] *Id.*
[74] *Id.* Reference to MRE 514 is made in this note as it is mentioned in the CAAF opinion. However, its implications are never explicitly addressed by the Court so it will not be discussed here either.
[75] *Kastenberg*, 72 M.J. at 366.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Military Judges are statutorily granted broad discretion with respect to the types of issues they choose to hear and the manner in which a court-martial is conducted. *See* R.C.M. 801.
[80] *Kastenberg*, 72 M.J. at 366*; see also* Brief for Appellant at 5, LRM v. Kastenberg, 72 M.J. 346 (C.A.A.F. 2013) (No. 2013-05).
[81] *Kastenberg*, 72 M.J. at 366-67.

Following this ruling, LRM filed a motion to reconsider.[82] In that motion, LRM

> ask[ed] for relief in the form of production and provision of documents, and that the military judge grant LRM limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, [Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)], and the United States Constitution.[83]

The Military Judge denied that motion.[84] This denial led LRM to apply for extraordinary relief in the form of a writ of mandamus addressed to AFCCA,[85] but that court dismissed the petition when the judges concluded that AFCCA lacked the jurisdiction necessary to review it.[86] This ruling prompted all of the further proceedings in the case.

III. THE COURT'S HOLDING

Following AFCCA's dismissal of the petition, TJAG's office certified three issues to CAAF, exercising what it believed to be its statutory prerogative under Article 67(a)(2) of the RCM:[87]

> I. Whether the AFCCA erred by holding that it lacked jurisdiction to hear A1C LRM's petition for a writ of mandamus;
>
> II. Whether the military judge erred by denying A1C LRM the opportunity to be heard through counsel thereby denying her due process under the military rules of evidence, the Crime Victims' Rights Act and the United States Constitution; and
>
> III. Whether this honorable court should issue a writ of mandamus.[88]

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[82] *Id.* at 367.
[83] *Id.* (internal quotation marks omitted).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Kastenberg*, 72 M.J. at 367.

In answering these questions, the CAAF majority in *Kastenberg* held three-to-two that the trial judge's ruling was erroneous for three reasons.[89] First, the majority decided that by preventing LRM from presenting arguments concerning MRE 412 and 513, the Military Judge improperly limited her ability to be heard on claims of privilege and admissibility.[90] Second, the majority believed that the Military Judge's ruling at the outset of the court-martial was a "blanket prohibition" that prematurely precluded LRM from being represented by counsel on MRE 412 or 513 issues without first knowing all of the circumstances surrounding those requests.[91] Third, CAAF stated that the Military Judge erroneously interpreted the law when he cast the issue as one of "judicial impartiality."[92]

In dissent, Judge Ryan, joined in part by one other CAAF judge, disagreed with the majority's holdings on two separate bases. First, the dissenting judges argued that LRM lacked standing to petition CAAF because she had not suffered any actual or "certainly impending" legal harm at that stage in the proceeding.[93] Second, Judge Ryan alone took exception to TJAG's certification of the three issues to CAAF because she believed TJAG did so prematurely and in violation of the United States Constitution and the UCMJ.[94]

IV. ANALYSIS

The CAAF majority's holding that AFCCA's determination that it lacked jurisdiction was erroneous is consistent with CAAF's traditionally expansive view of the military courts' appellate jurisdiction, and its own recent decision in *Center for Constitutional Rights v. United States*.[95] Nonetheless, because TJAG appears to have prematurely certified issues to CAAF in violation of Articles 67(a)(2), 62, 66, and 69, the ruling by those same judges that CAAF had

[88] *Id.* at 365.
[89] *Id.* at 364.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Kastenberg*, 72 M.J. at 373 (Ryan, J., dissenting).
[94] *Id.* at 376.
[95] Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129-30 (C.A.A.F. 2013).

proper authority to hear and decide the issue when it did was contrary to established precedent by other courts, including the U.S Supreme Court.

When examining LRM's right to be heard, the CAAF majority also found that LRM had a statutory right to be heard on matters related to MRE 412 and 513.[96] However, because TJAG's certified questions involved interlocutory matters raised by a non-party to the court-martial that were not necessarily finally dispositive of the case, the CAAF majority also appears to have circumvented the principle of justiciability because the issue was neither ripe for review nor had LRM sustained her burden of articulating a particularized present or future harm sufficient to warrant a finding of legal standing at that point in the proceeding.

CAAF's decision regarding a writ of mandamus provides substantive guidance to military judges who must exercise discretion in making trial determinations. Further, although it could have taken up LRM's writ of mandamus denied by the AFCCA, by choosing not to do so, CAAF reaffirmed its own long-standing deference to the discretion of military trial judges in hearing and deciding cases.

A. Subject-Matter Jurisdiction

The majority opinion in *Kastenberg* begins with the determination that CAAF had jurisdiction to hear this case under Article 67(a)(2) because the matter had been reviewed by AFCCA and TJAG had exercised its statutory prerogative to certify the case to CAAF under Article 62, UCMJ.[97] In support of its decision, the majority cited *United States v. Curtin* for the principle that LRM's application was properly considered a "case" under Article 67(a)(2) as, in *Curtin*, a petition for extraordinary relief filed by the government was denied by AFCCA, then subsequently certified by TJAG to CAAF.[98] Indeed, CAAF expressly held in *Curtin* that "the definition of a case as used within that statute [Article 67(a)(2)]

[96] *Kastenberg*, 72 M.J. at 369-70 (majority opinion).
[97] UCMJ art. 67(a)(2).
[98] *See* United States v. Curtin, 44 M.J. 439, 440 (C.A.A.F. 1996).

includes a final action by an intermediate appellate court on a petition for extraordinary relief."[99] In this case, the final action was the dismissal of LRM's petition by AFCCA, so it seems at first blush that jurisdiction exists.

The fallacy in this reasoning, however, is that *Curtin* relies on the holding in *United States v. Redding*, a case where, unlike here, CAAF dealt with an interlocutory ruling on the right to counsel that would unquestionably have ended the litigation at the trial level.[100] Indeed, in finding that CAAF must act in that case, the majority in *Redding* explicitly based their decision on the fact that the lower court ruling was dispositive of the entire proceeding.[101] Then, in *Curtin*, where the issue was a non-dispositive interlocutory order on issuance of subpoenas, with no discussion and contrary to its own precedent in *Redding*, the CAAF majority simply extended its ability to assume jurisdiction to those cases as well, a point emphasized in the *Kastenberg* dissent.[102] Thus, the majority's extension of *Redding*'s holding to *Curtin* as a way to find jurisdiction over LRM's interlocutory appeal in *Kastenberg* is potentially problematic because it circumvents the otherwise stringent requirements of Article 67(a)(2) that a "case" be properly certified.

After its determination that CAAF would accept jurisdiction over the matter, the CAAF majority found that AFCCA's determination regarding lack of jurisdiction was erroneous given the language contained in the All Writs Act[103] and Article 66 of the UCMJ.[104] As the first appellate court to hear this case, AFCCA had determined that it lacked jurisdiction to hear LRM's case under the

[99] *See id.* (citing United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981)).
[100] *Redding*, 11 M.J. at 104.
[101] *Kastenberg*, 72 M.J. at 375 (Ryan, J., dissenting).
[102] *See Curtin*, 44 M.J. at 440.
[103] The All Writs Act provides that "(t)he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law." 28 U.S.C. § 1651 (2012).
[104] Article 66 of the UCMJ provides for mandatory appellate review in any case where: (1) the approved sentence is death, dismissal, dishonorable discharge, or a bad conduct discharge and (2) appellate review has not been waived by the service member under Article 61. UCMJ art. 66.

All Writs Act because the judge believed that a finding of jurisdiction would grant rights and powers to AFCCA not otherwise enumerated in any enabling legislation.[105] However, the CAAF majority found that AFCCA did have jurisdiction to hear the matter[106] both under the plain language of the All Writs Act and the standard for application of that Act as articulated in *Denedo*.[107]

To buttress this conclusion, the *Kastenberg* majority observed that CAAF had previously extended the meaning of "in aid of" to include interlocutory matters where no finding or sentence had yet been adjudged.[108] Further, the majority noted that CAAF had also recently expanded the criteria necessary to satisfy the "in aid of" requirement by determining that the harm alleged must have the potential to affect the findings and sentence of the court-martial at issue directly.[109] Through these holdings, the CAAF majority determined that LRM met the required standard for jurisdiction because her request stemmed from the court-martial process rather than a civil or administrative proceeding, and that, as the alleged victim, she was not a stranger to that process. Therefore, the majority stated that the outcome of AFCCA and/or CAAF decisions in this case might well bear on the court-martial's ultimate findings and sentencing.[110]

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[105] LRM v. Kastenberg, 2013 WL 1874790 1, 6 (A.F. Ct. Crim. App. 2013) (referring to the UCMJ, MCM, federal statutes, governing precedent, or the SVC Program).
[106] Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (stating that the standard application of the All Writs Act requires only that the requested writ be "in aid of" the court's existing jurisdiction and "necessary and appropriate" given the circumstances of the case).
[107] LRM v. Kastenberg, 72 M.J. 364, 367-68 (C.A.A.F. 2013) (citing Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008)).
[108] *See* Hasan v. Gross, 71 M.J. 416, 416-17 (C.A.A.F. 2008).
[109] *Kastenberg*, 72 M.J. at 368. *See also* Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129-30 (C.A.A.F. 2013).
[110] *Kastenberg*, 72 M.J. at 367; c*f. Ctr. for Constitutional Rights*, 72 M.J. at 129-30 (finding that the news media had not met their burden of establishing that the CAAF had jurisdiction to grant anticipatory jurisdiction to their claim because the matter concerned involved a civil action that was brought by strangers to the courts-martial process who were asking for relief, which had no bearing on the findings or sentence that may ultimately be adjudged at courts-martial).

While Judge Ryan's dissent did not take issue with the majority respecting AFCCA's jurisdiction to hear the case at some point, she did argue that it was inappropriate for CAAF to hear the certified issues when it did. Her contention was that CAAF hearing the case allowed TJAG to make "unprecedented use" of Article 67(a)(2) by subverting the otherwise stringent requirements of Article 62[111] and the jurisdictional requirements of Article 67 necessary for invoking the All Writs Act.[112] Stated another way, while it is true that LRM could have submitted an ex writ in accordance with the All Writs Act directly to CAAF after the AFCCA denied her application there that is not what happened. Instead, TJAG chose to certify questions to CAAF, which would require CAAF to accept jurisdiction on the basis of Article 67, UCMJ. Because this was the manner in which these issues reached CAAF, Judge Ryan found a variety of facts and circumstances that made TJAG's actions inappropriate.[113] In particular, she took issue with the fact that TJAG's certification was improper under the applicable provisions of the UCMJ, most notably Article 69(a)-(d).[114] That Article details the circumstances under which TJAG may seek to modify or set aside the findings and sentence adjudged by AFCCA, and specifically includes a requirement that there must be a finding or sentence before TJAG can certify any issues.[115] Based on these factors, Judge Ryan's dissent concluded that Article 69 provides no basis or authority by which the TJAG could pursue interlocutory relief on issues that are not dispositive to the case, let alone certify such issues to CAAF.[116] Indeed, under Article 67(a)(2) and CAAF's own decision in *Center for Constitutional Rights*, Judge Ryan opines that TJAG had not even properly certified a "case" on which relief could be granted within the meaning of the aforementioned

[111] Article 62 of the UCMJ describes the government appeals process, to include the instances in which appeals may be made and the process for making such appeals. UCMJ art. 62 (2012).
[112] *Kastenberg*, 72 M.J. at 374 (Ryan, J., dissenting). *See generally* Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012) (requiring that a heightened standard for mandamus relief be applied when determining whether a military judge should be removed for inability to exercise and maintain impartiality towards the defendant).
[113] *Kastenberg*, 72 M.J. at 374 (Ryan, J., dissenting).
[114] *Id.*
[115] UCMJ art. 69(a)-(d) (2012).
[116] *Kastenberg*, 72 M.J. at 374-75.

statute.[117] Finally, the dissent challenges the majority's use of *Curtin* (citing *Redding*) to legitimize CAAF's decision to hear the case on the ground that *Redding* is only applicable after a final disposition had been reached, and here the lower court ruling was not a final disposition.[118]

Given CAAF's propensity to interpret statutory construction broadly when deciding issues of jurisdiction, the majority's determination that AFCCA likely had jurisdiction in *Kastenberg* was nonetheless consistent with CAAF's history of expansive application of its own jurisdiction.[119] Specifically, because of CAAF's past liberal interpretation of its right to accept jurisdiction under the All Writs Act in *Denedo* and *Hasan*, the majority's determination to accept jurisdiction in this case is consistent, predictable, and defensible. Indeed, this is a particularly appropriate conclusion given that CAAF often relies almost entirely upon its own precedent to justify such decisions even when, as in *Curtin*, the legal basis for the precedent is quite weak.[120] By relying upon such precedent in this case, however, CAAF broadly interpreted its ability to accept jurisdiction of an interlocutory issue that did not reach CAAF via an ex writ, and was not dispositive of the case—a novel result that tends toward judicial activism.

From an activist standpoint, a prompt decision by CAAF on the SVC Program both promotes judicial economy and provides political and social benefits in future litigation, justifying the

[117] *Id.* at 375.
[118] *Id.* at 376 (citing United States v. Redding, 11 M.J. 100, 102-04 (C.M.A. 1981)).
[119] *Id.* at 367.
[120] While the subject matter and types of appeals or writs submitted for the CAAF's consideration varied, in both of these cases the CAAF found that subject-matter jurisdiction existed. *See* Denedo v. United States, 66 M.J. 114, 120 (C.A.A.F. 2008) (finding that despite the fact a final disposition was issued over seven years prior, the CAAF had subject-matter jurisdiction to review the findings and sentence under Article 66 given that Denedo's claim of ineffective assistance of counsel was "in aid of" the existing jurisdiction); *see also* Hasan v. Gross, 71 M.J. 416-17 (C.A.A.F. 2012) (finding that when applying a "heightened standard" for mandamus relief, the CAAF should issue the requested writ for removal of the military judge given that the surrounding circumstances of the case would impair the military judge's impartiality).

assumption of jurisdiction. From a more judicially restrained perspective, such as the position advocated by the dissent, the majority erred in its interpretation of Article 67(a)(2) and CAAF's prior holdings in *Curtin* and *Redding*, undermining the rule of law.[121] Indeed, from the dissent's strict constructionist viewpoint, although *Curtin* appears to lend support to the majority's position, the majority's improper extension of *Redding* and the distinguishable subject matter in that case make *Curtin* applicable only sparingly, if at all.[122] On the other hand, the CAAF majority's finding is generally in keeping with the expansive view these particular CAAF judges have shown in prior jurisdictional decisions under the All Writs Act, petitions for extraordinary relief, and on interlocutory appeals.[123]

Unlike CAAF, however, the U.S. Supreme Court does not favor interlocutory appeals and on many occasions has limited their use because intermediate applications and relief generally hinder judicial efficiency, waste judicial resources, and delay final dispositions.[124] For example, in *Clinton v. Goldsmith*, a case that involved predominantly administrative matters rather than legal issues, the Supreme Court limited CAAF's broad interpretation of its ability to assume jurisdiction over a wide array of issues by finding that CAAF had exceeded its jurisdictional limits in hearing the *Clinton* case at all.[125] *Clinton* is viewed by many as an effort by the Supreme Court to rein in CAAF's expansive interpretation of its jurisdictional prerogative.[126] Despite this ruling, CAAF continues to apply a broad approach to its jurisdictional limits when hearing cases involving the All Writs Act, extraordinary relief petitions (including writs of mandamus), and interlocutory appeals.[127]

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[121] *Kastenberg*, 72 M.J. at 375 (Ryan, J., dissenting).
[122] *See id.*
[123] *See Denedo*, 66 M.J. at 120; *see also Hasan*, 71 M.J. at 416-17.
[124] *See* Erwin Chemerinsky, *Court Keeps Tight Limits on Interlocutory Review*, 46 TRIAL 52 (Mar. 2010).
[125] Clinton v. Goldsmith, 526 U.S. 529, 1544-45 (1999) (stating that CAAF did not have authority to hear this case given that it focused predominantly on administrative matters that were outside the scope of CAAF's jurisdiction).
[126] *See* Lowery, *supra* note 45, at 51.
[127] *Id.* at 49; *see also Ctr. for Constitutional Rights*, 72 M.J. at 129-30; *Hasan*, 71 M.J. at 416-17; *Denedo*, 66 M.J. at 119.

What is likely happening in *Kastenberg* then is that, while acting in a manner consistent with its own history of broadly interpreting its ability to accept jurisdiction over a myriad of issues, by declining to remand this case back to the AFCCA or the trial court for lack of jurisdiction to hear the case when it did, CAAF has seemingly disregarded both procedural and substantive missteps by TJAG in order to weigh in on sexual assault in the military at the earliest opportunity, possibly because it is an issue of high current interest and the future success of the SVC Program would almost certainly be impacted by the outcome of the case. Further, by stepping in to hear *Kastenberg*, CAAF will necessarily shape the implementation and limitations (or lack thereof) for the SVC Program. Thus, despite the likely propriety of CAAF's finding that the trial court and the appellate court have jurisdiction to consider a victim's right to be heard independently, CAAF potentially sets a dangerous precedent by accepting the question on an interlocutory basis, without a fully developed record, and contrary to the petitioner's clear statutory obligation to show both harm and legal interests diverging from the government's case. Indeed, while it can be argued that an advisory opinion on a writ of mandamus may have been an appropriate avenue for CAAF to address the important issues in this case,[128] the case did not arrive at CAAF via such a writ, but through certification by TJAG. Under these circumstances, not even the significant legal, political, and social effects of sexual assault in the military warrant such an open approach to litigation.

Another practical factor that may have impacted CAAF's decision to hear this case on interlocutory appeal is the highly-charged political atmosphere currently surrounding the issue of sexual assaults in the military. Against that background, it is not surprising that CAAF heard this case and that the majority adopted an interpretation of MRE 412 and 513 that allows alleged victims (through counsel) to participate actively in the prosecution of such crimes. While this is a laudable end-state, such external considerations should not interfere with the legal procedure that allows cases to reach CAAF in the first place. Further, the impact of this case is multiplied because, being the first case that CAAF has

[128] Sampson v. United States, 724 F.3d 150, 159-160 (1st Cir. 2013).

heard involving the SVC Program, *Kastenberg*'s holding will undoubtedly have a significant influence upon all similar cases in the future.

In sum, *Kastenberg* illustrates how CAAF has used *Curtin* and *Redding* to once again support a liberal interpretation of its own jurisdiction. It does so by finding that LRM's appeal satisfied the requirements enunciated in *Hasan* and *Center for Constitutional Rights* and by disregarding the strictures of Article 67(a)(2) regarding the matter's presence before CAAF by way of an incorrect use of certification to seek review of an interlocutory trial-level ruling.[129] Additionally, while largely ignoring the statutory language of Article 67(a)(2) for jurisdiction, the CAAF majority then relies on literal application of MRE 412 and 513 to find that LRM has legal standing to be heard in this case.[130] As argued in Judge Ryan's dissent, however, *Curtin* and *Redding* are distinguishable cases that offer no sound legal basis for circumventing the clear statutory language of Article 67(a)(2) and the All Writs Act, and interpreting those cases otherwise invites significant problems in the future.[131] Indeed, in what can be construed as its zeal to find jurisdiction to hear a "hot button" case of high current interest, CAAF has opened the door to interlocutory appeals that would never have been granted in the past and which will likely tie up judicial resources and delay ultimate disposition of future cases in ways that CAAF and the framers of the statutes at issue never envisioned. This outcome is problematic with respect to the precedent it sets for future cases.

B. Standing

Regarding the question of whether or not LRM had standing to be heard in *Kastenberg*, the CAAF majority found that, although LRM was properly considered a nonparty in the government's original case, by the holding in *United States v. Daniels* she did have standing to be heard under MRE 412(c)(2) and 513(e)(2).[132] The quintessential test for standing was articulated by the Supreme Court

[129] LRM v. Kastenberg, 72 M.J. 364, 374-75 (C.A.A.F. 2013) (Ryan, J. dissenting).
[130] *Id.* at 369-70 (majority opinion).
[131] *Id.* at 374-75 (Ryan, J., dissenting).
[132] *Id.* at 368 (majority opinion).

in *Lujan v. Defenders of Wildlife*.[133] In *Lujan*, the Supreme Court stated that for a party to have standing, they must prove: (1) that the individual has suffered an "injury in fact;" (2) that a causal connection exists between the injury and conduct complained of; and (3) the injury is redressable by a favorable court decision.[134] In 2010, the Supreme Court qualified the *Lujan* test in *Monsanto Co. v. Geertson Seed Farms*, stating that "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'"[135] The Supreme Court reaffirmed that holding in *Clapper*, when it applied that language in determining whether an injury-in-fact had occurred.[136] By that standard, the dissent is correct that neither present nor future injury had been shown and, as a result, that TJAG's certified issues were not properly before the court.

Instead of adopting the legal precedent established by those cases, however, the majority chose to focus on the statutory language of MRE 412 and 513. Specifically, the majority relied upon the language that "before admitting evidence under the rule,[137] the military judge must conduct a hearing where 'the alleged victim must be afforded *a reasonable opportunity to attend and be heard*.'"[138] According to the majority, this language allows LRM to protect her rights and privileges by active participation in the litigation,[139] as both MRE 412 and 513 allow for the calling of witnesses and neither contains any indication that the legislative authors intended that a victim could or should be excluded as such a witness.[140]

Further, the majority stated that every other time that the MRE or RCM uses the term "to be heard," it appears in the context of

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[133] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).
[134] *Id*.
[135] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 140 (2010).
[136] Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138, 1147 (2013).
[137] In this particular quotation, the majority is directly addressing MRE 412(c)(2). However, MRE 513(e)(2) contains nearly identical language. MIL. R. EVID. 412(c)(2), 513(e)(2).
[138] LRM v. Kastenberg, 72 M.J. 364, 369 (C.A.A.F. 2013) (citing MIL. R. EVID. 513(e)(2)) (emphasis added).
[139] *Id.* at 368.
[140] *Id*. at 370.

allowing parties to be heard through counsel on legal matters.[141] To support this argument, the majority cites *Carlson v. Smith*, a case where the petitioners were given the opportunity to present evidence, arguments, and legal authority to a military judge regarding the disclosure of covered documents. The majority used *Carlson* to show that on at least one other occasion CAAF had permitted extraordinary relief for sexual assault victims in cases involving MRE 412. [142] The majority concluded by discrediting Judge Kastenberg's assertion that LRM's request should be viewed as "novel" by citing a number of federal cases[143] that allow victims of sexual assault to be represented at pretrial proceedings by legal counsel[144] and by noting that the Supreme Court and other federal courts have frequently acknowledged and upheld limited participant standing.[145]

Judge Ryan's dissent counters the majority's arguments by asserting that LRM's request did not merit consideration because, at the time of her request, neither the prosecution nor the defense had objected to LRM receiving copies of any motion that pertained to MRE 412, 513, or 514,[146] and in fact had actually provided all documentation that had been requested by LRM's SVC up to that point in the proceedings.[147] Further, at the beginning of A1C Daniels' arraignment hearing, LRM's SVC attorney had stated that LRM's interests were aligned with those of the government.[148] Because the parties' interests were aligned, at the time this issue was certified to the appellate court, Judge Ryan argues that LRM had suffered no "actual harm" with respect to any rights or privileges

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[141] *Id.*
[142] According to the majority opinion, the case relied upon for this assertion is still in a summary disposition status. *Id.* at 370 (citing Carlson v. Smith, 43 M.J. 401 (C.A.A.F. 2005)).
[143] *See* Brandt v. Gooding, 636 F.3d 124, 136-37 (4th Cir. 2011); In re Dean, 527 F.3d 391, 393 (5th Cir. 2008).
[144] *Kastenberg*, 72 M.J. at 370.
[145] *Id.* at 368; *see also* Church of Scientology v. United States, 506 U.S. 9, 11, 17 (1992); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).
[146] *Kastenberg*, 72 M.J. at 373 (Ryan, J., dissenting).
[147] *See id.*
[148] *Id.*

pertaining to MRE 412 or 513.[149] In addition, LRM had not articulated any "impending harm" that she might suffer in the future if she were not allowed to present legal arguments at the hearing, as is necessary under the standard adopted by the Supreme Court in *Clapper v. Amnesty Int'l USA*.[150] Rather, according to the dissent, LRM's SVC merely sought to "reserve the right" to argue at future evidentiary hearings concerning MRE 412 or 513 should LRM's interests diverge from those of the government at some later time.[151] The dissent deemed this vague prospect of future injury insufficient to warrant a finding that LRM had standing as a party to the court-martial.[152]

Stated another way, the thrust of the dissent was not that the victim could never be entitled to participate in the proceeding at hand, but rather that LRM did not sustain the required procedural burden to do so at the time she brought this particular application. This is a strong argument given the Supreme Court's recent decision in *Hollingsworth v. Perry*, which reaffirmed its holding in *Clapper* concerning "impending harm."[153] Had LRM's SVC been able to articulate adequately the harms that LRM had suffered or likely would suffer in the future if she was not allowed to participate in MRE 412 or 513 hearings, then it is probable that the trial judge and/or the dissenting judges on appeal would have found that her request merited consideration. Since this did not occur, the dissent appears to be correct in its argument that LRM did not have current standing.

What LRM's SVC perhaps should have argued was that LRM would or could be severely prejudiced if, in the course of the government's prosecution or the accused's defense, exculpatory evidence was admitted under an exception to the military rape shield law's otherwise stringent protections against admission of a victim's prior sexual history. Such exceptions include proof that the source of

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Kastenberg*, 72 M.J. at 374 (Ryan, J., dissenting) (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1136, 1143 (2013)).
[153] Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013).

evidentiary semen or physical injury to the victim came from someone other than the accused, evidence of sexual behavior by the alleged victim with the defendant that could be offered to prove consent, and/or evidence that if excluded could harm the constitutional rights of the defendant.[154] If any one or more of these exceptions are alleged, then the military judge would be compelled to weigh and balance the probative value of the evidence versus its prejudicial effect before deciding whether it will be admitted.[155]

The brief submitted on behalf of LRM gives reason to believe that LRM and Daniels were already engaged in or had previously engaged in sexual acts with one another at the time LRM demanded that Daniels cease sexual contact with her.[156] It is therefore likely that his trial counsel would seek to invoke at least the second or third exception, an effort that would clearly impact the government's case and implicate LRM's rights under MRE 412. Accordingly, had her attorney particularized the harm that would befall LRM by such disclosure (the victim's interests in the case would clearly be damaged if the defendant raised any of these exceptions but the victim was not present to refute them), it is likely that no one would have questioned her standing to be heard when the issues arose. By way of example, had LRM sought assistance from a mental health provider, signed a consent form in the belief that her disclosures to that provider would be confidential, then discovered that her case file had been subpoenaed by the defense for use in the court-martial, the CAAF majority would have had stronger justification to find that she had standing.[157] In the absence of such showings, however, the dissenting opinion makes a persuasive argument that, at least at that point in the proceedings, LRM's application merited no consideration at all.

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[154] DiBattiste, *supra* note 48, at 124.

[155] *Id.* at 133.

[156] Brief for Appellant, *supra* note 80, at 3 (implying that LRM and Daniels were already engaged in sexual activity when LRM requested that Daniels stop having sex with her, based on LRM's statement made to A1C Daniels that "[s]he was done having sex").

[157] *See* Major Christopher J. Goewert & Captain Seth W. Dilworth, *The Scope of a Victim's Right to be Heard Through Counsel*, 40 THE REPORTER no. 3 27, 29 (2013) (discussing a similar hypothetical for why it is insufficient to have trial counsel represent a victim's interests at court-martial).

C. *Writ of Mandamus*

The CAAF majority determined that deciding the issues raised in LRM's writ of mandamus to the AFCCA was not appropriate at their level, and chose instead to remand the case to the trial judge for further proceedings consistent with CAAF's opinion on the issues of jurisdiction and standing.[158] Given this determination, the argument that CAAF ought not have taken up this case at all is somewhat ameliorated by the fact that it ultimately followed its own precedent and that of Article III courts to allow writs of mandamus only sparingly.[159] Thus, though CAAF declined to make a first or final ruling on these matters at the appellate level,[160] its decision provides substantive guidance and broad parameters within which the Military Judge is required to operate regarding LRM's ability to be heard through her SVC on evidentiary matters.

The majority decision allows LRM to be heard through her SVC with respect to MRE 412 and 513 issues without requiring her to show personal interests contrary to the government's case or the possibility of present or future harm. However, by remanding the case without taking action on LRM's requested writ, CAAF adhered to its policy of deference to military trial judges under RCM 801.[161] Further, while requiring the lower court to afford LRM the opportunity to be heard, CAAF also stated that the trial judge could still impose limitations on LRM's opportunities.[162] Indeed, CAAF reminded practitioners that the military judge can prescribe restrictions concerning the manner in which the victim may be "heard," and that the majority's determination did not apply to victims who were not already represented by counsel at the time of their MRE 412 or 513 hearings. In addition, the *Kastenberg* decision

[158] LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013).
[159] *See* Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (citing Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986)) (stating that the use of the All Writs Act as the source of the Court's authority to issue a requested injunction should be used sparingly and only in exigent circumstances).
[160] *Kastenberg*, 72 M.J. at 372.
[161] R.C.M. 801; *see also* United States v. Mosley, 42 M.J. 300, 303 (C.A.A.F. 1995) ("[A] military judge enjoys broad discretion on evidentiary and procedural matters.").
[162] *Kastenberg*, 72 M.J. at 371.

did not allow for appeal of former adverse evidentiary rulings and reaffirmed that if the victim's interests are entirely aligned with the government's case, it could curtail the victim's ability to be heard.[163] Thus, the majority decision here may not be as arbitrary as it might otherwise seem.

V. CONCLUSION

Kastenberg illustrates how government policy can affect and even drive judicial decision-making. Arguably, the substantive and procedural defects in this case were sufficient to warrant affirming AFCCA's dismissal if, as urged by the dissenters, CAAF had strictly applied existing law and precedent. Such a course would still have preserved the issues for resolution after development of a full record at the trial level. Equally clear in this decision is the CAAF majority's desire to address the issue of sexual violence in the military promptly and in as comprehensive a manner as possible through utilization of the SVC Program. As a result, the majority struggled to disregard substantive and procedural defects, which in other circumstances might well have resulted in dismissal of the interlocutory application as premature. However, having decided to hear the interlocutory appeal at all, the majority made the proper decision concerning the court's jurisdiction and the victim's standing to participate in the court-martial in at least a limited fashion, and softened the blow by remanding the case to the trial court for further proceedings consistent with that decision.

The concern in this case arises from CAAF reaching its conclusions by finding implicit injury to the alleged victim instead of requiring her to make affirmative allegations and to prove interests divergent to the government's case, as well as actual or potential harm if the court denied her the right to participate in the proceeding through counsel. This "short-cutting" of settled statute and case law, while perhaps undertaken for salutary reasons of judicial economy and protection of victims of sexual assault, nonetheless sets a potentially dangerous precedent for the future. Even though CAAF did not take up the writ of mandamus before the AFCCA and decide

[163] *Id.*

Kastenberg on the merits, it certainly flirted with conduct cautioned against by the Supreme Court in *Hollingsworth* when it said that given the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." [164] Legislators make laws and, absent violence to Constitutional protections of life, liberty and property, courts owe deference to that process because a nation built on law must have the ability to know its laws. More importantly, the nation needs to know that its law and its courts are impervious to the vagaries of expediency and transient political winds.

Since the majority's decision in *Kastenberg*, the SVC Program has expanded from just the Air Force to all of the Armed Services in accordance with congressional mandates set forth in the 2014 National Defense Authorization Act.[165] Further, the rights of victims to be heard have been modestly expanded by the same legislation.[166] In the final analysis, then, regardless of whatever can be said about the manner and means by which the majority heard and decided the issues in the *Kastenberg* case, its determination ultimately led to a "good result" for victims of sexual assault in the military.

[164] Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).
[165] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672 (2013).
[166] *Id.*