Victims of Military Sexual Assault and Access to Interlocutory Appeals: The Need to Go Beyond the Ordinary Review Standard for Writs of Mandamus

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Executive Summary:

This project analyzes whether writs of mandamus filed by victims of sexual assault in the military justice system should be reviewed at the standard of an ordinary interlocutory appeal. The project conducts a policy analysis of the role of victims in the courts-martial process as well as the impact on defendants of expanded victim interlocutory appellate rights. At the end of the analysis, the author recommends that Article 6b of the Uniform Code of Military Justice should be amended in four ways. First, language should be added that requires military courts of appeals to apply ordinary standards of interlocutory appellate review for victim writs of mandamus. Second, the statute should include a time limit when the court must respond to a petition for a writ of mandamus. Third, the statute should require the judge to include a substantive opinion when issuing a decision on a petition for a writ of mandamus. Finally, the statute should explicitly give the Court of Appeals for the Armed Forces jurisdiction to hear appeals regarding victim writs of mandamus.

Disclaimer: This student paper was prepared in 2017 in partial completion of the requirements for the Master’s Project, a major assignment for the Master of Public Policy Program at the Sanford School of Public Policy at Duke University. The research, analysis, and policy alternatives and recommendations contained in this paper are the work of the student who authored the document, and do not represent the official or unofficial views of the Sanford School of Public Policy or of Duke University.
Victims of Military Sexual Assault and Access to Interlocutory Appeals: 
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I. Policy Question

Should victims’ petitions for writs of mandamus be reviewed under an ordinary 
interlocutory appellate standard, rather than the current “clear and indisputable” standard?

II. Summary of Recommendations

Article 6b of the Uniform Code of Military Justice should be amended in the following ways:

1. For victim writs of mandamus, “the courts of appeals shall apply ordinary standards of 
appellate review.”

2. Include a time limit for when the court must decide on a petition for a writ of mandamus. 
The amended language could mirror the Crime Victims’ Rights Act by requiring a 
decision within 72 hours of filing.

3. Require a substantive opinion when issuing a decision on a petition for a writ of 
mandamus.

4. Explicitly grant jurisdiction to the Court of Appeals for the Armed Forces to hear appeals 
from petitions for writs of mandamus.

III. The Judicial Proceedings Panel

Most of the resources used for this research come from the Judicial Proceedings Panel 
(JPP). The JPP was established by the Secretary of Defense in 2014.1 The JPP “is a non-
discretionary Federal advisory committee that” is directing “an independent review and 
evaluation of appellate proceedings conducted under the Uniform Code of Military Justice 
(UCMJ) involving adult sexual assault and related offenses . . . for the purpose of developing 
recommendations for improvements to such proceedings.”2 The panel members are the 
Honorable Elizabeth Holtzman, the Honorable Barbara Jones, Mr. Victor Stone, Professor 
Thomas Taylor, and VADM (Ret.) Patricia Tracey.3 The panel has been meeting monthly since 

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1 On rulings that impact their statutorily granted rights 
2 Establishment of Department of Defense Federal Advisory Committees, FEDERAL REGISTER (June 27, 2014), 
federal-advisory-committees. 
3 THE JUDICIAL PROCEEDINGS PANEL, supra note 1.
2014 on various topics relating to military sexual assault. Once the panel has had multiple meetings and speakers on a particular topic, the JPP releases a report with recommendations. Past topics have included restitution and compensation for victims, retaliation against victims, and Article 120 of the Uniform Code of Military Justice. This year, the panel has heard arguments on the appellate rights of victims. Thus, this project pulls from the transcripts, reading materials, and other relevant materials to offer a recommendation on the specific issue of interlocutory rights. The JPP, through its interest in victim appellate rights, has mostly focused on the rights of victims in the post-conviction appellate process. This project, on the other hand, centers on victims’ interlocutory appellate rights.

IV. Background

This project is situated in an atmosphere of intense public debate. Military sexual assault is a controversial topic that sprung into the public eye in the last few years. Many different events and reports sparked the renewed interest in military sexual assault. The documentary *The Invisible War* highlighted a culture of sexual assault within the military. The prosecution of then Brig. Gen. Jeffrey A. Sinclair for sexual assault of a junior officer heightened concern about acceptance of sexual assault at the highest levels of the military.

Sexual assault is facing even higher public attention in the past few weeks with a scandal stretching to all branches of the military. Active duty and veteran service members have been sharing illicit photos of female service members and civilians without consent on various online platforms. Beyond the nonconsensual sharing of photos, many users of these online sites were

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4 *Id.*  
5 *Id.*  
6 *Id.*  
9 Rebecca Huval, *The Film that Revolutionized the Discussion About Military Rape*, PBS (March 14, 2013), http://www.pbs.org/independentlens/blog/the-film-that-revolutionized-the-conversation-about-military-rape/. The film led then Secretary of Defense Leon Panetta to make immediate policy changes. *Id.*  
actively advocating for sexually assaulting the women. This revelation has heightened the need for a culture change within the military.

Amidst these and other very public displays of issues of sexual assault in the military, the Department of Defense’s Sexual Assault Prevention and Response Office released a report outlining the numbers of sexual assault. It found 26,000 instances of unwanted sexual contact in 2012, of which 3,374 were reported and only 302 went to trial.

The national attention regarding the issue of military sexual assault sparked wave after wave of policy reform. Congress has made amendments concerning sexual assault to the National Defense Authorization Act (NDAA) every year since 2013. Changes have been sweeping and in a variety of categories. The NDAA for Fiscal Year 2014, for example, included reforms such as prohibiting the military from recruiting a person convicted of a sex offense, criminalizing retaliation against victims who report sexual assault, and eliminating the statute of limitations in sexual assault cases.

One of the most debated and innovative issues regarding sexual assault in the military has centered on the rights and roles of victims in the court-martial process. Many changes, which will be outlined below, have created broader rights and protections for victims of sexual assault. These broadened rights have been hailed as a step toward better protecting victims. They have also been criticized for limiting the rights of defendants. Any new policy reform must balance these two interests.

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18 This project refers to “victims” rather than “alleged victims” to maintain brevity and consistency. The use of “victims” does not attempt to make any judgment on the merits of any case.


A. Special Victim’s Counsel and Victim Interests

One specific NDAA reform that has increased the protection for victims is the Special Victim’s Counsel (SVC). In 2013, Congress created legal counsel for victims of sexual assault within the military. The program is known as the SVC in the Army and Air Force and as the Victims’ Legal Counsel in the Navy and Marine Corps. The criminal justice system, both civilian and military, has historically consisted of a two-party system: the government and the defendant. The creation of the SVC program, however, has created a semi-third party actor in the system.

Congress created the SVC program in 2013 by amending the NDAA. The SVC statute designates the types of legal assistance to include “legal consultation regarding the military justice system.” Specifically, the SVC has the role of “[r]epresenting the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense.” But the SVC statute does not go into any further detail about what that representation means or how that representation should occur.

The rights of victims are codified in Article 6b of the Uniform Code of Military Justice. Among other protections, victims have:

(1) “[t]he right not to be excluded from any public hearing or proceeding unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.”

(2) “[t]he right to be reasonably heard at . . .”
   a. “a public hearing concerning the continuation of confinement prior to trial of the accused,”
   b. “[a] sentencing hearing related to the offense,” and
   c. “[a] public proceeding of the service clemency and parole board relating to the offense.”

The term “reasonably” is highlighted because it becomes a sticking point in a victim’s ability to have real access to appeals. “Reasonably” is not defined by the statute. It is thus left up to interpretation by the courts and the individual services.

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22 This project refers to the program as the SVC to minimize confusion.
23 § 1044e(b)(5).
24 § 1044e(b)(6).
27 § 806b(a)(3).
28 § 806b(a)(4) (emphasis added).
B. The Current Interlocutory Appeal Process and Writs of Mandamus

Congress passed an enforcement mechanism for victims’ rights in 2014. Article 6b permits victims to seek relief in the military appellate courts through a petition for a writ of mandamus. If granted, the writ of mandamus “require[s] the preliminary hearing officer or court-martial to comply” with the victim’s enumerated protections. Most pertinently, victims can petition for a writ of mandamus when they believe the rights they are guaranteed under specific statutory provisions are violated. These statutory rights include:

- those enumerated under Article 6b
- their rights at a type of military grand jury system (called an article 32)
- the privacy of a victim’s sexual history (Military Rule of Evidence (M.R.E.) 412)
- the psychotherapist-patient privilege (M.R.E. 513)
- the victim advocate-victim privilege (M.R.E. 514)
- and the exclusion of witnesses (M.R.E. 615).

Due to the statutory protections provided by Article 6b, the SVC’s role during the court-martial often involves “exercising the right to be heard on behalf of a victim of an alleged sex offense prior to the disclosure or admission of certain evidence.”

For example, a defendant may want to enter into evidence a victim’s past sexual history to argue that she consented. A victim’s past sexual history is one of her statutorily protected privacy interests under M.R.E. 412. The SVC may thus want to argue during a motion’s hearing to bar that evidence from being entered.

Writs of mandamus have a higher standard of review than a typical interlocutory appeal from a party. The standard of review for ordinary interlocutory appeals depends on the type of question on appeal and varies from de novo to an abuse of discretion. The standard for a writ of mandamus, however, requires that

1) “no other adequate means to attain relief” exist,
2) the “right to issuance of the writ is clear and indisputable,” and

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30 § 806(e).

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

32 § 806(e)(4).

33 Id.


35 United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014) (reviewing factfinding under a clearly-erroneous standard, conclusions of law under the de novo standard, and mixed questions of law and fact under an abuse of discretion).
3) that the writ is “appropriate under the circumstances.”

The standard of clear and indisputable is a difficult bar to reach. The error should be obvious and without dispute, which requires previous case law on the issue and a high standard of evidence for the victim to meet. Thus the current standard of review for these writs may not be an effective means of protecting victims’ rights on interlocutory rulings. Reformers have pushed for allowing victims to make interlocutory appeals reviewed at a standard available to a typical party to the case whenever victims’ statutorily granted rights are at stake.

The NDAA for Fiscal Year 2016 contemplated this change. An explanatory statement in the legislative history notes that the Senate version of the NDAA contained a provision amending Article 6b to allow the writs to be reviewed at the standard of ordinary interlocutory appeals. The NDAA amendments in the same year for the House of Representatives, however, did not have a similar provision. The House bill continued to authorize only the writ of mandamus.

C. Case Law and its Limiting Effect on the Ability to be Granted a Writ of Mandamus

Since the statutes defining the SVC and victims’ rights are somewhat broad, the courts, in addition to the individual military branches, have faced major interpretive challenges. Currently two cases are of high importance in the realm of SVC and a victim’s standing.

The first is LRM v. Kastenberg. The case was decided by the highest court in the military, the Court of Appeals for the Armed Forces (“CAAF”). In Kastenberg, the victim (LRM) was challenging a ruling by the military judge that prohibited her from providing legal argument in response to an issue of evidence related to M.R.E. 412 and 513. The CAAF differentiated the role of victims from other potential third parties by recognizing that they were not quite “strangers in the courts-martial.” Instead, they were the “named victim[s] in a court-martial seeking to protect the rights granted to [them] by the President in duly promulgated rules of evidence.” The CAAF, however, noted that victims are still not full parties to the case like the government and the defendant under Rules for Courts-Martial (R.C.M.) 103(16). The CAAF still couched the victims’ role by stating that precedent recognized the right of a holder of

37 There seems to be a pattern where some judges appear confused by the standard they are supposed to be reviewing these writs, where some go by the standard noted above, while others treat it under an abuse of discretion standard. See AT v. Lippert, 2015 WL 3791266, *1 (Army Ct. Crim. App. 2015) (“Under these circumstances, and in light of the lesser burden of production in any such matter, we find the judge did not abuse his discretion by ordering the production of the records in question for in camera review in accordance with [the MRE].”).
39 Id.
40 Id.
42 Id. at 368.
43 Id. (internal citations omitted).
44 Id. (internal citations omitted).
45 Id.
a privilege to protect that privilege. The CAAF further noted that a reasonable right to be heard included the ability to present a legal argument and facts through counsel.

Even though the CAAF acknowledged the reasonable right to be heard, it noted that this right was limited. That limitation, the court argued, comes from a military judge’s discretion as prescribed under R.C.M. 801. A judge “may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context.” The *Kastenberg* court thus held that M.R.E. 412 and 513 do not create a right to appeal an adverse evidentiary ruling.

In *Kastenberg*, LRM sought a writ mandating the military judge to provide her with the opportunity to be heard through counsel on legal argument and to receive any motions or accompanying papers relating to her rights. Though the CAAF argued for her right to be heard, it denied the petition, arguing that the military judge still acted within his discretion under R.C.M. 801. *Kastenberg* made clear that victims have the right to be heard. By allowing for great deference to judges on writs of mandamus, however, the case demonstrates the difficulty of having a writ of mandamus granted.

The CAAF made another important ruling on SVC standing and the protection of victims’ rights this past summer in *EV v. United States*. This case was another petition for a writ of mandamus by a victim, EV. At the start of the opinion, the CAAF declared: “The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes.” The court held that it did not have jurisdiction to hear the case because the plain language of Article 6b only provided the lower branch appellate courts jurisdiction to hear writs. This opinion, though short, creates questions about the ability of these writs to actually protect victims’ rights if the writs are “reserved for really extraordinary causes.” By reading the statute as limiting jurisdiction to hear writs of mandamus to the appellate courts, *EV* also raises the question of whether CAAF should be granted jurisdiction by a change in the statutory language of Article 6b.

These central cases make two things clear. The first is that victims, through their SVC, have a right to standing in order to exercise their right to be heard. This right is limited to issues that implicate victims’ statutorily granted rights. Second, the CAAF does not have jurisdiction to hear appeals on writs of mandamus from the branch appellate courts. Any

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46 *Id.*
47 *Id.* at 370.
48 *Id.* at 371.
49 *Id.*
50 *Id.* Note, too, that the court gave another example where the right could be limited, in that if the victim’s interest are “entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed.” *Id.*
51 In writs of mandamus and in many court-martial records, the name of the victim is often abbreviated to protect her privacy.
52 *Kastenberg*, 72 M.J. at 372.
53 *Id.*
54 75 M.J. 331 (C.A.A.F. 2016).
55 *Id.* at 332.
56 *Id.* at 334.
57 *Id.* at 332.
58 *Kastenberg*, 72 M.J. 364.
59 *Id.*
60 *EV*, 75 M.J. 331.
change to the CAAF’s jurisdiction would need to be a statutory change to Article 6b. A third, less explicit outcome of the current case law is that writs of mandamus for victims of sexual assault are interpreted by the branch appellate courts under a “clear and indisputable” standard.  

Because of the way the courts have been interpreting the standard, any change to make writs of mandamus reviewable at the standard of an ordinary interlocutory appeal would also need to be statutory.

V. Policy Analysis

A. Arguments for an Interlocutory Appeal Beyond the Writ of Mandamus

As mentioned previously, many advocates are concerned that the writ of mandamus calls for too high of a standard for victims to truly have an ability to be heard at an appellate level. One of the strongest advocates for that change has been the organization Protect Our Defenders. Its mission is to end sexual assault in the military and “ensure all survivors have access to a fair, impartially administered system of justice.” In a letter specifically for the JPP, Protect Our Defenders outlined their concern with the writ of mandamus:

In theory, victims in the military have certain rights, privileges, and protections during the military justice process. In practice, however, these rights are unenforceable because of the lack of a key mechanism – full interlocutory appeal rights. Currently, if a victim or their SVC feels that a victim’s right has been violated, she can file a writ of mandamus with the Court of Criminal Appeals (CCA). However, the writ of mandamus is for extraordinary relief and it has proved ineffective. Subsection (e) of Article 6b must be amended to provide full interlocutory appeal rights for military victims in line with the rights of civilian victims under the Crime Victims’ Rights Act . . . so that victims have these rights both in theory and in practice.

The burden on victims is to ask for a “drastic and extraordinary remedy,” as the courts have called the writ. They have to prove that the need for the writ is “clear and indisputable,” which is exceedingly difficult to prove. Proving clear and indisputable becomes even more difficult with issues that have little case law, such as questions relating to the psychotherapist-patient

65 Id.
privilege (MRE 513). Without case law on the subject, it is exceedingly difficult to show that something is “indisputable.”

Writs of mandamus are also made difficult to predict by their discretionary nature. Discretion is further complicated because judges “are not required to issue substantive opinions when they deny relief.” Advocates argue the “silence that follows a denial only serves to undermine victims’ trust and respect in the military justice system.”

i. The Need for Victim Interlocutory Appellate Rights

The first question to address is why interlocutory appellate rights would be needed in the first place. The natural assumption is that the goals of prosecutors and victims align. Thus, any appeal a victim would need is also one the prosecution would need. The prosecution, as a party to the case, has full interlocutory power, so the victim should not need it. But this assumption is flawed. A victim’s interests can be different than the prosecution’s.

A typical example is when evidence does not hurt the prosecution’s case but invades the privacy of the victim. One of the panel members, Victor Stone, outlined an example during the September JPP meeting. He was explaining an instance post-conviction. Yet, it is still an example of how the interests of the prosecution and the victim can differ:

I’ll give you an example from my practice that's a real example, that the judge at the trial level said to the defense counsel, no, you don't get the psychological records of three years before when this person who is now an adult was a young teenager, and the judge didn't go on, but the teenager did crazy stuff like had suicidal thoughts back then. And the teenager, the person now an adult, was very embarrassed by that, didn't want that to come out because they had left that all behind, had a regular job, had a normal life now, and it's even possible that that happened when they were on drugs . . . But . . . they were totally embarrassed that way back, they had suicidal inclinations. . . . Now just to play this out, why I don't think it's doubting up and . . . helping the prosecution, it is my experience, and it was in that case, the prosecution . . . did not care about those records . . . but the victim cared very much because the victim said I will be so embarrassed when this comes out that frankly, . . . I am not going to show up for that trial. So the victim's interest does not always align with the . . . prosecution . . . .

See id. (“This high standard is compounded by the fact there is a dearth of 513 case law, meaning that when it comes to a 513 issue, there is almost no issue that could be brought before the court that is clear or indisputable making relief virtually impossible.”).

Id. at 40-41; see also id. (“The lack of a mandatory review deadline makes the current mandamus process particularly ineffective when the issue at stake occurs during the court-martial proceedings where time is of the essence.”).

Id. at 41.

Id.


Mr. Stone’s example demonstrates a case where the victim’s privacy interest, though possibly irrelevant to the prosecution’s case, still matters greatly to the victim. His example also shows that such circumstances could cause a victim decide against testifying or participating in the trial, which is detrimental to the military criminal justice system.

While the prosecution interests and victims’ interests can differ, it is not an exceedingly common occurrence. If the right to interlocutory appeals is extended to victims’ interests, it would not necessarily be a procedure that is used often. Thus it is the type of change that would not overwhelm the courts. The interlocutory appeal right would only apply to statutory privileges and rights granted to victims when their interests are at stake.

Though the interlocutory appellate rights would not be a common occurrence, many advocates still argue that it is an important right. First, advocates argue that victims, with regard to standing and participation, have their own due process rights. Judge James Baker, former Chief Judge of the Court of Appeals for the Armed Forces (CAAF) and author of the Kastenberg opinion, argued to the JPP that due process concerns apply also to victims and holders of privileges, as well as to the defendant.72

Due process concerns, according to Judge Baker, stem from the idea that full participation makes for the best criminal justice system. All parties, including the victim, should “have their voices meaningfully integrated throughout the entirety of the process.”73 Having all voices heard creates transparency because “decision makers have full information of those impacted and those impacted perceive and understand the fairness and transparency of the process.”74 Further, it reinforces “the fundamental principle that no one else in the system can articulate the position of the person who has an injury or imminent injury as the same manner as that person.”75

Meg Garvin, Executive Director of the National Crime Victim Law Institute, argued in her testimony that due process includes the victim. She posited that “[a]ny assumed alignment of position not only misunderstand[s] the notion of injury and rights, but in the context of victim’s rights is actually misplaced.”76 The assumption, then, that the prosecution’s interests and the victim’s interests always align misunderstands the due process rights of the victim. It also underestimates the importance of those due process rights for the criminal justice system to be fully comprehensive. Ms. Garvin called the panel’s attention to the reason Congress added the Article 6b rights to the NDAA. She argued that Congress implemented victim participation to “increase procedural justice” in the military criminal justice system.77

ii. The Only Available Form of Relief

As an additional matter for victim due process, advocates also argue that the interlocutory appeal is necessary because it is currently the only form of relief available. The CAAF has ruled that it does not have jurisdiction over petitions for writs of mandamus. So victims are only able

72 Id. at 15.
73 JPP OCTOBER TRANSCRIPT, supra note 64, at 10-11.
74 Id.
75 Id. at 13.
76 Id.
77 Id. at 12.
to have one chance in front of the branch appellate courts.\textsuperscript{78} The CAAF is not the only court denied to victims, but so too are other Article 3 courts.\textsuperscript{79} As such, the only option for relief is one branch appellate court.

Don Christensen, President of Protect Our Defenders, further explains this problem through the \textit{EV} case. As mentioned previously, \textit{EV} is the case in which the CAAF ruled that it did not have jurisdiction to hear petitions for writs of mandamus stemming from Article 6b. EV was a civilian who accused a Marine of sexually assaulting her.\textsuperscript{80} The judge in the case ordered disclosure of some of her therapy records to the defendant.\textsuperscript{81} The victim requested the judge reconsider.\textsuperscript{82} But the judge denied any reconsideration, stating that reconsideration was limited to parties to the case.\textsuperscript{83}

\textit{EV}’s Special Victim Counsel (SVC) appealed to the Navy-Marine Corps Court of Criminal Appeals through a petition for a writ of mandamus.\textsuperscript{84} According to Christensen, the court denied the writ “the same day it was received and in a one-paragraph decision the court found EV failed to show the right to a writ was either clear or indisputable.”\textsuperscript{85} \textit{EV}’s SVC then appealed the appellate court’s decision to the CAAF, which ruled that it did not have jurisdiction to hear the appeal.\textsuperscript{86} In an attempt to find another source of relief, \textit{EV} filed in the D.C. District Court for an injunction.\textsuperscript{87} In accordance with the argument made by the Navy, the judge found that the D.C. District Court was not the proper venue for her claim.\textsuperscript{88} Her claim could only be heard in the military system.

Thus for \textit{EV}, her only option for relief was the Navy-Marine Corps Court of Criminal Appeals. She could not go before CAAF with her writ of mandamus. She was also prohibited from seeking relief in civilian Article 3 courts.\textsuperscript{89} As Christensen points out, \textit{EV}’s case imparts a few lessons. One, that the standard of clear and indisputable for the “writ of mandamus make appeals of erroneous judicial rulings nearly impossible to successfully appeal.”\textsuperscript{90} Another lesson is that “the lack of access to CAAF or Article 3 courts serves as a barrier to meaningful relief and inhibits development of law.”\textsuperscript{91} Christensen, among others, thus advocates for a shift toward regular interlocutory appeals and a statutory opening of jurisdiction to the CAAF to hear victims’ appeals.

Though not explicitly mentioned by the advocates of regular interlocutory appeals, a reading of the JPP transcripts also reveals another way in which victim options for relief are

\textsuperscript{78} See JPP SEPTEMBER TRANSCRIPT, supra note 71, at 333 (“[O]nce [victims] have gone to the [Criminal Court of Appeals], they cannot even go to CAAF to ask for additional relief and review of this petition. They have one shot.”).
\textsuperscript{79} JPP OCTOBER TRANSCRIPT, supra note 64, at 29.
\textsuperscript{80} Id. at 25-26.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 26-27.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 27-28.
\textsuperscript{88} Id. at 29.
\textsuperscript{89} Id. at 86-87.
\textsuperscript{90} Id. at 31-32.
\textsuperscript{91} Id.
limited. Under current rules, victims cannot file appeals in the post-conviction setting. Post-conviction, victims are only allowed to file amicus briefs. The JPP has been hearing arguments on whether victims’ access to post-conviction appeals should change. Because victims are limited to amicus briefs, any practical level of standing is through writs of mandamus. The writ of mandamus is a direct means of response to a violation of their rights and privileges that requires a response from the court. Amicus briefs, on the other hand, are only meant as supplementary documents for appellate courts and there is no requirement to respond to or incorporate them. As such, victims’ only practical form of relief stems from the writ of mandamus from the branch appellate court.

iii. The Analogy to The Crime Victims’ Rights Act

Advocates for a full interlocutory appeal often use the federal Crime Victims’ Rights Act (CVRA) as a tool for comparison. The CVRA grants victims various rights, such as the right to notice, to be heard, and to not suffer unreasonable delay. Moreover, the CVRA provides for a writ of mandamus if a victim wants to appeal a denial of their rights. The appellate court must decide on the writ of mandamus within 72 hours of its filing. If the appellate court is going to deny the writ of mandamus, “the reason for the denial shall be clearly stated on the record in a written opinion.” Most important, when considering a victim’s writ of mandamus, “the court of appeals shall apply ordinary standards of appellate review.” That sentence was not originally included in the language of the statute.

Before the clarification of the standard of review for writs of mandamus was added to the statute, courts defined it in conflicting ways. Some courts stuck to the traditional definition of writ of mandamus currently used under Article 6b at issue in this project. The “narrow interpretation” under the clear and indisputable standard “result[ed] in victims’ rights claims prevailing only in the most extraordinary of settings.” Other courts, however, treated it “under a standard of review more likely to correct a lower court’s ruling.”

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93 Id.
94 Id. The JPP, in its draft recommendations, recommend that post-conviction standing not be increased beyond amicus briefs. Id.
96 § 3771(a)(2).
97 § 3771(a)(4).
98 § 3771(a)(7).
99 § 3771(d)(3).
100 Id.
101 Id.
102 Id. (emphasis added).
104 Id.
105 Id.
106 Id.
Congress amended the CVRA in 2015 to alleviate the confusion and to implement a less exacting standard for victims seeking relief under writs of mandamus.\textsuperscript{107} The amending language of applying “ordinary standards of appellate review” to writs of mandamus clarified that writs of mandamus should be treated as an ordinary interlocutory appeal. “Congress’s amendment indicates that it views a CVRA mandamus petition as something that has evolved beyond its traditional formulation, whereby [civilian Article III] courts have more room to uphold and enforce victims’ rights.”\textsuperscript{108}

Arguments put forth about regular interlocutory appeals under the CVRA are informative for consideration of the same possibility under Article 6b. Advocates for a change in the CVRA argued that “Congress designed the CVRA to give victims meaningful and enforceable rights.”\textsuperscript{109} They reasoned that for those rights to actually be meaningful and enforceable, the mandamus standard, as it was traditionally interpreted, was unworkable.

Professor Paul Cassell was one such advocate. He wrote an article arguing for a broader interpretation of the mandamus standard.\textsuperscript{110} Cassell articulated that the “clear and indisputable error” standard meant “that, as a practical matter, it will be very difficult (if not impossible) for many crime victims to overturn erroneous decisions of district courts,” rendering the mandamus a meaningless mechanism of enforcement.\textsuperscript{111} Similar to one of Christensen’s arguments, Cassell maintained that it would be particularly difficult for victims to be granted a writ of mandamus because “crime victims’ rights law is a new and evolving field in which ‘indisputable’ errors may be hard to prove.”\textsuperscript{112} Cassell also posited that other third parties with rights to file writs of mandamus often “receive the functional equivalent of an appeal even though they proceed by way of mandamus.”\textsuperscript{113} Cassell discussed a colloquy in the congressional record between Senator Jon Kyl and Dianne Feinstein at the time of the creation of the CVRA. Senator Kyl argued that “without the ability to enforce the rights in the . . . appellate courts of this country, any rights afforded [to crime victims] are, at best, rhetoric.”\textsuperscript{114}

As such, early advocates of the CVRA argue that the congressional intent was to allow a broader reading that meaningfully protected victims’ rights.\textsuperscript{115} Senator Feinstein declared that “[a]ppellate review of denials of victims’ rights is just as important as the initial assertion of a victim’s rights” and that the CVRA “ensures review and encourages courts to broadly defend the victims’ rights.”\textsuperscript{116} Sen. Jon Kyl agreed that without meaningful means for relief, “a victim is

\begin{itemize}
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id. at 600.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id. at 629; see also id. at 629-30 (arguing that many First Amendment rights are asserted through writ of mandamus but are not held to the clear and indisputable standard).
  \item \textsuperscript{114} Id. at 630 (quoting 150 CONG. REC. S.10, 912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyle) (emphasis added)).
  \item \textsuperscript{115} See id. at 627 (“It is impossible for appellate courts to ‘broadly defend victims’ rights and ‘remedy errors of lower courts’ under the CVRA if they are confined to granting mandamus petitions only where the right to obtain the writ is ‘clear and indisputable.’ A crime victim is not allowed to ‘immediately appeal a denial of his rights’ if all he can obtain in the appellate courts is deferential review for clear and indisputable errors. Congress’s clear undeniable goal was to give crime victims the same appellate protections other litigants receive.”).
  \item \textsuperscript{116} 150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Feinstein).
\end{itemize}
left to the mercy of the very trial court that may have erred.”117 Senator Feinstein said that “while mandamus is generally discretionary, [the CVRA writ of mandamus provision] means that courts must review these cases.”118 These arguments, then, were put forth at the very beginning of the CVRA, and not just at the time the language was amended to fortify the regular interlocutory appellate rights of victims. The purpose behind the original CVRA can help to inform the purpose behind Article 6b and its victim interlocutory appellate right.

In presenting before the JPP, Colonel (Ret.) William Orr, former Chief Judge of the U.S. Air Force Court of Criminal Appeals argued that the “purpose of Article 6b was the incorporation of victims’ rights found in the Crime Victims’ Rights Act into the [Uniform Code of Military Justice].”119 Noting the high standard currently required under Article 6b, Mr. Stone echoed COL Orr’s statement and expounded on the conversation surrounding the writ of mandamus language in the CVRA:

When 6b was enacted, it’s quite clear from its legislative history, [it] was meant to reflect the 2004 Civilian Victims' Rights Act. That language includes the word mandamus. And there was a dispute there after about whether mandamus was used to indicate that this was a swift interlocutory appeal, under normal appellate standards, or whether this was truly a mandamus, like any other mandamus, where there was an extraordinary high degree of necessity before a court would grant it. And there was a split in the circuits[ d]espite the legislative history that said that that was taking the place of an ordinary appeal. That language has since been changed by the U.S. Congress. It now says that that mandamus is under standard appellate standards. That this is a normal appeal. The only thing that makes it a mandamus is that it happens very quickly so I think the fact that the military courts continue, both in the E.V. case [that was] talked about and Martinez, where the Military Court of Appeals denied even hearing the mandamus and the CAAF decided it wouldn't hear, not only this but any mandamus, gives short shrift to the fact that Congress is trying to make it clear that victims ought to have rights to argue before their various rights.120

Mr. Stone thus contends that the interlocutory appellate right in Article 6b should be interpreted as a regular interlocutory appeal. Mr. Stone, among others, recall some of the same concerns that advocates purported with the CVRA and the need for a full interlocutory appeal. He called attention to the practicalities of Article 6b that victims were currently facing, highlighting the extremely high standard. He argued that the current practice by judges has too often been to deny “amicus status” and “mandamus petitions on a regular basis in the Military Courts of Appeals.”121 These similarities to the CVRA give strong credence to current advocates’ arguments as well as calls attention to general congressional intent toward victims’ rights.

117 Id. (statement of Sen. Kyl).
118 Id. (statement of Sen. Feinstein); see also Jon Kyl, et al., On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Lourna Gillis, and Nila Lynn Crime Victims’ Rights Act, 9 LEWIS & CLARK L. REV. 581, 619 (2005) (“In other contexts, the mandamus remedy is an extraordinary and discretionary remedy. The CVRA alters this general rule and mandates that the writs be ‘take[n] up and decide[d].’ This is consistent with the CVRA’s goal of testing the rights established and creating a body of case law construing them.”).
119 JPP SEPTEMBER TRANSCRIPT, supra note 71, at 37.
120 Id. at 121-23.
121 Id. at 123 (also stating that “very few mandamuses have been granted”).
Advocates also propose adding a CVRA-like requirement for a timeline to respond to petitions as well as requiring judges to give a substantive, written reason for when they deny a petition. By adding a timeline, advocates hope to alleviate the concerns of unreasonable delay for both the defendant and victim. Mr. Ryan Guilds, counsel at Arnold & Porter LLP, argued that time is a major priority in the court-martial process. Without a mandatory timeline date for review of the mandamus petitions, the current process is ineffective. Mr. Guilds also argued that courts currently often do not issue substantive opinions when denying petitions. He reasoned that not issuing a substantive opinion “serves to undermine victims’ trust and respect in the military justice system.”

**B. The Impact on the Rights of Defendants**

Although not specific to the appellate rights of victims, various advocates have argued that the military justice system has been leaning too heavily in favor of victims at the expense of defendants. Heidi Brady, for example, argues that “[t]he military justice system . . . has adopted an overwhelmingly ‘victim-centric’ approach to sexual assault cases, without developing any analogous defense capabilities.” She argues that victims are now granted large teams of people and resources, including the SVC. In contrast, defendants only have the resource of their defense counsel with no investigators or other needed resources. Brady contends that victims have been given “a panoply of advantages,” including the SVC program, that often are at the expense of the accused.

Other articles note the over-politicization and victim-centric shift of the changes in the military justice system. When looking at increasing victim access to interlocutory appeals, then, it is necessary to consider the impact it will have on the rights of defendants and on the fairness of the system. As COL Orr stated during the September JPP meeting, “it is important that we critically look at every change to ensure that we are bringing about meaningful change that will preserve the rights of the accused, the rights of the victims, and the needs of commanders.”

The major concerns in allowing victims access to a full interlocutory appeal relating to their rights and privileges are twofold. The first is that of due process and a speedy trial. The second is that the military criminal justice process would become two parties against one

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123 Id. Judge Baker also noted that in avoiding delay, “perhaps the answer is to limit page numbers and limit times to file and times to decide, but I would be conscious of that.” JPP SEPTEMBER TRANSCRIPT, supra note 71, at 23.

124 JPP OCTOBER MINUTES, supra note 122, at 4.

125 Id.

126 Brady, supra note 20, at 216.

127 Victims, along with their SVC, often have a victim advocate present, who has no legal standing. The Victim Advocate is there to provide emotional support and to direct the victim to resources such as those pertaining to mental health.

128 Brady, supra note 20, at 216.

129 Id. at 218.

130 See Major Troy K. Stabenow, Throwing the Baby Out with the Bathwater: Congressional Efforts to Empower Victims Threaten the Integrity of the Military Justice System, Volume 27 FED. SENT. REP. 156 (February 1, 2015).

131 JPP SEPTEMBER TRANSCRIPT, supra note 71, at 44.
defendant, which could make the proceedings “stacked against defendants.”

Each is discussed in turn.

i. Due Process of a Speedy Trial

Judge Baker outlined due process for a defendant: “the right to put on a defense, the right to call witnesses, cross examine, and impeach, the right to a speedy trial as well as a, not speedy, but appropriate appellate process, and then a fourth more amorphous sense of due process which is one of general fairness and the perception of fairness.”

The largest possibility for infringement on a defendant’s due process if victims are given full interlocutory appellate rights is on the right to a speedy trial. Judge Baker further noted, “‘Justice delayed is justice denied.’ That is true for the victims, as well as the accused.” He emphasized that “where there is opportunity to appeal there is also opportunity to delay.”

Delay is especially important for defendants when they are on pre-trial confinement. Any appeal is going to extend their time in confinement. Further, if trial delay amounts to a level that the delay violated due process, then it can cause an appellant-defendant to be provided “relief in the form of setting aside convictions, reducing confinement time, [and] setting aside punitive discharges.”

Such results could undermine proper conviction and punishment for guilty defendants.

Interestingly, however, none of the defense counsel, judges, or other participants in the JPP argued that the speedy trial right of defendants should be a complete bar to full interlocutory appeals for victims. Instead, defense counsel, and even prosecutors, argued for time limit requirements. These requirements would require appellate courts to respond to petitions for writs of mandamus within a specific length of time. For example, Mr. Christensen declared, “I think the direct appeal should have time standards. I’m very conscious of the fact that as that appellate process is going, the accused could be sitting in pretrial confinement. The accused is under the anxiety of waiting to get his verdict. I understand that. So I think it should be quick. . . .”

Mr. Christensen added that the uniqueness of the military justice system also helps in the time delay because it does not actually require the prosecution to put effort into the briefs in

132 Id. at 256.
133 Id. at 15.
134 See Gerald Roger Bruce, Opening Comments 23 September 2017 Judicial Proceedings Panel, JUDICIAL PROCEEDINGS PANEL 3, available at http://jpp.whs.mil/Public/docs/03 Topic-Areas/11-Victims_App_Rights/20160923/13_Bruce_AF_AppellGov_OpeningComments_20160923.pdf (“Also, creating a 3-party system will certainly prolong the appellate process and likely undermine an accused’s due process right to timely appellate review. If untimely appellate review occurs, appellate courts will grant relief, which can jeopardize convictions and sentences.”); JPP OCTOBER TRANSCRIPT, supra note 64, at 142 (“Some of the objections to non-participation where it would be, put too much work on the other counsel to have to respond. It would slow down the proceedings in an unacceptable way. It would burden, be a huge burden on the court to have to consider and listen to three briefs, and finally for some reasons that we've heard here today too, it would be a violation of the defendant's due process because it would be or be viewed as two against one.”).
135 JPP SEPTEMBER TRANSCRIPT, supra note 71, at 22. Mr. Stone notes that the accused also asks for delays, which can be seen as unfair to the victim. Id. at 147-48.
136 Id. at 22.
137 Id. at 146.
139 JPP OCTOBER TRANSCRIPT, supra note 64, at 144.
response to the writ of mandamus petition. Each branch in the military has an “appellate shop” that handles all appellate matters on both the prosecution and defense side, and thus responding to a petition for a writ of mandamus is “no more work for the [prosecution] or the defense counsel.”

While saying an interlocutory appeal is “no more work” is an exaggeration, the appellate shops alleviate some of the added time and effort that would normally be required. Jason Middleton, Supervising Deputy State Public Defender in the Appellate Division for Colorado, noted that the problems of delay “are more a matter of . . . implementation” and things could be implemented to “ameliorate some of the due process concerns.”

He calls importance to things like word limits and time limits. The JPP presenters also discussed whether the speedy trial rights of defendants in the civilian system had been damaged because of the full interlocutory appellate rights of victims both under the CVRA and under similar state laws. Ms. Garvin argued there is no evidence that concerns of “too much work, slowing down proceedings and burden on courts” have occurred in the civilian system. She and other presenters noted that while the CVRA seemed to have little impact on time delays, neither did state rules of a similar variety. The question then became whether those rights also potentially increased the dockets of those jurisdictions. None of the presenters saw any evidence of increased dockets to an amount that seriously burdened the courts.

The JPP questioned whether the military system, because of the availability of SVC, might have more of an increase in their docket than in federal and state courts that have granted broader victim appellate rights. Mr. Christensen, however, provided a few responses. First, he called attention to the idea that “like the accused wants this trial to be over, most victims want the trial to be over.” As such, many victims will not want to go through the appellate process out of a desire for a short trial. This then is one reality that limits how many appeals are reaching the appellate courts. Christensen’s second limit on the floodgate of cases argument is that once this newer kind of law of victims’ rights starts to become more solidified and interpreted through case law, it will narrow the amount of cases that can be appealed. As he notes, “Once CA[A]F is forced to address this issue, judges will rule consistent with that. I have

140 Id.
141 Id.
142 Id. at 150-51.
143 Id. at 150.
144 Id. at 146-48. Ms. Garvin also argues that an objection of “too much work” (different from a speedy trial infringement), is never an acceptable objection to an exercise of rights by any participant. Id. (“But I have to say when we’re talking about people with individual rights, whether that’s a defendant or a victim, those are also offensive objections. When people, when humans have things at risk, saying that it is too much work cannot be the answer, right. We have to figure it out.”). Id.
145 Id. at 154.
146 Id.
147 Id. at 161.
148 Id. at 161-62. Christensen explains, “Many victims would say, you know, I don't care if they looked at my mental health records. Nothing in there I'm worried about. Turn it over to them. It just alleviates the issue. Or the judge rules in favor of the victim. Obviously, there's not going to be issues. So you have to have a case where a victim is willing to push it and where a judge has ruled adverse to the victim.” Id.
149 Id. at 162.
faith in the judges.” The floodgate argument, then, seems to have checks throughout the system.

On the issue of timeliness, an important aspect to keep in mind is this idea that victims also do not want a prolonged trial. As mentioned above, many victims want the cases to be resolved quickly because they can be traumatizing and life interrupting. Further, however, is the idea that was previously noted in comments made by Judge Baker that the victims also have a legal interest in a speedy trial. The legal interest is not the same as that of the defendant. It does, however, add to the balancing of interests and the idea that victims’ interest of a speedy trial will work to keep the interlocutory appellate right from unreasonably delaying the trial.

ii. Two Against One

Another concern that arises from expanding the interlocutory appellate right for victims is of a system that unfairly places the defendant in a “two against one” scenario. Panelist Tom Taylor, professor at Duke University’s Sanford School of Public Policy and former Senior Deputy General Counsel in the Army General Counsel’s office, asked the presenters to discuss their thoughts on the notion that “there sometimes is a sense in this issue of fundamental fairness that if you give the victim – the victims’ legal counsel more rights, then it is like two against one. It tilts the system in favor of the prosecution and the victim in a way that is not good for [defendants].” Major Lauren Shure, Appellate Defense Counsel for the Air Force, pointed out the seemingly lopsided resource allocation between a defendant and the prosecution: “a lot of times government has sometimes five, upwards of ten attorneys on a particular appeal, whereas it is just one of us, and then in the filings from the special victims’ counsels that we’ve seen, there are upwards of five attorneys on those appeals, and so it is sometimes a feeling of, there's 15 people over here arguing one point” and only one defense counsel arguing another.

150 Id. Mr. Christensen often uses the example of MRE 513, of which there is little case law from the branch appellate courts nor the CAAF. Id.
151 “‘Justice delayed is justice denied.’ That is true for the victims, as well as the accused.” JPP SEPTEMBER TRANSCRIPT, supra note 71, at 22.
152 See id. at 147-48 (“And the timeliness matters come up quite often in civilian victims’ rights cases. And the example I would give in the military is if you have a case where the defense counsel has moved repeatedly for delays and sometimes they may be unavoidable. Military judges get new assignments, they can't be found when needed, courtrooms are not available, people get transferred around, and a case has been repeatedly delayed. It's not uncommon for a victim to come to the victims' counsel and say this is really crazy. My right to be free from unreasonable delay is being violated either because I'm about to be transferred to a different assignment where I can't be present, or I'm about to leave the Service and I would like to see some resolution before I do, or I have an illness like AIDS. I'm going to die in a few months and I would like to see this resolved before I die. So absolutely, victims have a right and an interest, a legal interest in proceedings free from unreasonable delay.”).
153 Id. at 254.
154 Id. at 255. Mr. Roger Bruce, Air Force Senior Appellate Government Counsel, noted that if victims were granted full post-conviction appellate rights, then it would pose “due process concerns by creating an unprecedented 3-party criminal appellate system in which 2 of the ‘parties’ are aligned against 1 accused.” Bruce, supra note 134, at 3. He further argues that “[i]t is not hard to imagine an appellate court finding a due process violation with such an unbalanced appellate legal system not found elsewhere in the United States.” Id. His argument, however, focuses on the post-conviction setting, whereas the interlocutory setting has more limitations and will more often be used when the prosecution and victims disagree. Judge Baker recognizes that having SVC can allow more time and strategy to be had against a defendant. JPP SEPTEMBER TRANSCRIPT, supra note 71, at 15-16. He reasons, however, that “the real safeguard is having judges who are not persuaded by the number of arguments but by the strength of argument.” Id. at 16.
resource concern is one that merits serious consideration, especially when thinking about the investigative limitations of defense counsel. In the context of interlocutory appeals rights, however, the concern seems misplaced.

Various presenters noted that the two against one concern misunderstands the interests of the victim and their trial role. The idea that the government’s interests and the victim’s interests do not always align, as previously mentioned. Mr. Christensen recalled again the EV case, noting that the government and defense counsel took the same position of piercing the victim’s right under the psychotherapist-patient privilege (MRE 513).\(^{155}\) In that instance, the victim was “completely opposed to what the government said,” leading Christensen to argue that “the two against one . . . is a false argument.”\(^{156}\) This is not always the case, but appears to be common in the small frame of interlocutory appellate rights. Since the prosecution will conduct the interlocutory appeal when its interests align with the victim and the victim will only do so when their interests differ, the two against one situation does not seem a likely possibility.

Although a victims’ advocate, Christensen was supported by a defense attorney, Mr. Guilds. He argued:

I would note that some previous presenters in this Panel's prior session expressed concern that allowing a victim to participate in the appellate proceedings would erode a defendant's constitutional protections and constitute an unfair two on one situation. Candidly, I hear this every time I make an argument on behalf of a victim in any proceeding, whether it's at trial or at the appellate level. These concerns are misplaced – and I'm a defense attorney. These concerns are misplaced and fail to accept the fundamental truth behind victims' rights and the victims' rights movement generally, namely that victims have distinct and personal rights that cannot be fully protected or vindicated by the government. Participation of a victim in an appellate court proceeding relating directly to the rights under Article 6(b) does not, in my view, implicate any real due process concerns for the defendant, nor does it result in an unfair or unbalanced ganging up on the criminal defendant. Where a victims' [sic] right are directly implicated, the victim has a right be heard, and that right does not evaporate simply because the matter is now in a new procedural posture.\(^{157}\)

Mr. Guilds, in addition to Mr. Christensen, insisted that the interests of the prosecution and the interests of the victim can be different. He posits that victims’ rights are not always at the center of the prosecution’s interests. Thus victims need the right to be heard in order to ensure those rights.

Another defense lawyer and Chief of Defense Services Division for the Coast Guard, Lieutenant Commander Michael Meyer, also notes the lopsided availability of resources for

\(^{155}\) JPP OCTOBER TRANSCRIPT, supra note 64, at 145-46.

\(^{156}\) Id.

\(^{157}\) Id. at 43-44 (in reference to post-conviction appeals). Mr. Guilds, interestingly, also argues that “They're the same arguments we've heard before about the unfairness of the process, although no court I've ever found in the federal system has said that our intervention would violate due process. So if you look at those cases in the federal system, where intervention has been the mechanism to get into the appeal process, because of some articulated right, I have not seen any issue within any of those cases that would be considered an unintended consequence.” Id. at 158-59.
defenses. Even so, however, he notes that “[a]s long as the victim appellate rights are narrowly tailored to their real interests, . . . I think that goes a long way to rebalancing the scales.”

Even when the prosecution and victims’ interests do align, safeguards are in place to keep the system from becoming two against one. Ms. Garvin gave the example that when those interests “are directly aligned and literally I’m going to stand up and say me too, if I’m the victim’s lawyer, the court still retains control over its proceedings.” Even in the *Kastenberg* case, the CAAF mentions a similar notion. The CAAF argues that if the victim’s interests “are entirely aligned with those of trial counsel in a particular case, the opportunity to be heard could reasonably be further curtailed” by judicial discretion. Ms. Garvin further reasons that the claim of two against one “misunderstands the nature of victims’ interests” and “ignores the fact that courts retain some level of inherent authority to control actual proceedings in the moment.” It seems then, that while it is necessary to consider the possibility that full interlocutory appeals could create a system of two against one, practical checks can balance out any major concerns.

**C. Jurisdiction for the Court of Appeals for the Armed Forces to Rule on Interlocutory Appeals**

This analysis mentioned more than once that the case law holds that the CAAF does not have jurisdiction to hear writs of mandamus under Article 6b, leaving jurisdiction only to the branch courts of appeals. Because the case law has become clear through the *EV* case, the CAAF will only gain jurisdiction through a statutory change in the language of Article 6b. From all sides of the criminal justice system, there seems to be little opposition to granting jurisdiction to the CAAF to hear appeals on petitions for writs of mandamus.

The consensus is that the CAAF functions as a means of civilian control over the military. The court is made up of five judges, all civilians, in order to maintain the fundamental principle of civilian control of the military. Without the ability of the CAAF to review writs of mandamus filed by victims, the military justice system loses credibility and oversight. Without the CAAF, writs of mandamus and victims’ rights within the military justice system are not under civilian control. Mr. Guilds argues that “the Court of Appeals for the Armed Forces'
recent decision holding that it does not have authority to hear victim mandamus petitions prevents civilian oversight and undermines the development of a consistent and well-established jurisprudence in this area.”

The JPP seemed to agree. In its draft proposed recommendations, the JPP stated:

- The JPP finds that victims’ lack of access to the CAAF prevents civilian oversight of decisions by the Service Courts of Criminal Appeals.
- The JPP finds that recent decisions by the CAAF indicate that Congress must expressly grant jurisdiction to the CAAF to review adverse decisions regarding victims’ writ petitions by the Service Courts of Criminal Appeals.
- The JPP finds that granting jurisdiction to the CAAF may cause delays in the process. Such delays can be minimized if Congress imposes time limits for judicial review such as those contained in the Crime Victims’ Rights Act to ensure that cases are reviewed in a timely manner and are not subject to speedy trial challenges.

As the JPP and numerous of the presenters in front of the JPP recommend, Congress should amend Article 6b to grant jurisdiction to CAAF. Time limits should be imposed in both the CAAF’s jurisdiction as well as in interlocutory appeals to the branch appellate courts to ensure speedy processes. Each branch appellate court should be required to include a substantive opinion when issuing decisions on petitions for writs of mandamus.

VI. Conclusion

Sexual assault in the military is a national security issue. It “impacts recruiting, undermines unit cohesion, kills unit morale, and prevents mission accomplishment.” Congress has responded to the epidemic with a variety of changes, notably that of incorporating the Special Victims Counsel to protect victims’ rights. Those rights, as statutorily guaranteed under Article 6b, need to be reasonably attainable and protected.

This project sought to analyze whether the writ of mandamus appeal available to victims should be broadened to the standard of review of an ordinary interlocutory appeal. After reviewing the reasons underlying the Article 6b rights, the reasons advocates want to expand the

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167 JPP OCTOBER TRANSCRIPT, supra note 64, at 41-42.
168 Proposed JPP Recommendations, supra note 92, at 1.
169 Interestingly, Mr. Christensen also argues that Article III courts should also be granted jurisdiction over writs of mandamus to allow for civilian control. JPP OCTOBER TRANSCRIPT, supra note 64, at 86-87. He notes, “I think the EV case is a perfect case. Here we have a victim who has -- a civilian who was brought into the court-martial process purely because she was sexually assaulted and is now having the military judge, somebody who is yes a judge, but is a member of the executive branch in the military, saying I'm going to pierce your privacy rights and too bad if you don't like it. So standing is important. I think we sometimes only think of the military justice system as dealing with military people. The military justice system has the ability to reach out in a way that I think our founding fathers would be surprised at, and to tell civilians when they're only ties to the military is that they're a victim of a crime that certain rights of yours are going to be infringed. And that's why I think Article 3 review would be so important, is because right now it's the military reviewing the military, the executive branch reviewing the executive branch and rights are infringed upon without any access to an Article 3 court.” Id.
170 JPP SEPTEMBER TRANSCRIPT, supra note 71, at 11-12.
interlocutory right, and the concerns over the impact of that expansion on defendants, the recommendation is in four parts:

1. First, Congress should amend Article 6b to allow the CAAF to have jurisdiction to hear writs of mandamus appeals from the branch courts.
2. Second, Congress should amend Article 6b to add language mirroring the CVRA such that all courts of appeals “shall apply ordinary standards of appellate review” when deciding on a petition for a writ of mandamus.\textsuperscript{171}
3. Third, Congress should add language for all writs of mandamus, whether at the branch appellate level or at the CAAF, that require a time limit for responding to petitions for writs of mandamus.
4. Finally, Article 6b should be amended to require appellate courts to issue a substantive opinion with decisions regarding petitions for writs of mandamus.

\textsuperscript{171} 18 U.S.C. § 3771(d)(3).