RIGHT OR BURDEN: VICTIM IMPACT STATEMENTS AT COURT-MARTIAL

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INTRODUCTION

"When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking-in." — President Bill Clinton[1]

In 2014, the United States military justice system faced severe public scrutiny leading to reform regarding the treatment of sexual assault victims.[2] In response, Congress passed the 2014 National Defense Authorization Act ("NDAA"), which included protections for victims meant to mirror their rights in civilian courts.[3] The most impactful protection in the Act is the victim's right to be reasonably heard during the defendant's sentencing.[4] In 2014, victims of sexual assault in civilian court could give an oral or written statement describing how their life had been affected by the crime.[5] Before 2014, victims in the military justice system only had the right to "be present at all public court proceedings related to the offense, unless the court determine[d] that testimony by the victim would be materially affected if the victim heard other testimony at trial."[6] The importance of protecting victims has also increased in child pornography cases, where victims are especially vulnerable.[7] The Supreme Court has long recognized that "the exploitative use of children in the production of pornography has become a serious national problem."[8] In May of 2018, the Court of Appeals for the Armed Forces ("CAAF") decided *United States v. Barker*, holding that victims of child pornography could not rely upon the automated submission of prewritten statements through the Federal Bureau of Investigation's ("FBI") Child Pornography Victim Assistance program.[9]

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[1] President Bill Clinton in his speech at the signing of the Victim Rights Clarification Act of 1997. Troy K. Stabenow, *Throwing the Baby out with the Bathwater: Congressional Efforts to Empower Victims Threaten the Integrity of the Military Justice System*, 27 FED. SENT'G REP. 156, 156 (2015) (quoting United States v. Spann, 51 M.J. 89, 93 (C.A.A.F. 1999)).

[2] Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, at A24.

[3] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 683 (2013) (codified as amended at 10 U.S.C. § 806b, art. 6b (2018)); 18 U.S.C. § 3771(a) (2018); *see* United States v. Parr, No. ACM 38878, 2017 CCA LEXIS 86, at *3–4 (A.F. Ct. Crim. App. Feb. 7, 2017).

[4] 10 U.S.C. § 806b, art. 6b(a)(4)(B).

[5] 18 U.S.C. § 3771(a)(4).

[6] Stabenow, *supra* note 1, at 158 (quoting DoD Directive 1030.1).

[7] *See* Paroline v. United States, 572 U.S. 434, 440 (2014) (recognizing that child pornography robs victims of their childhood).

[8] New York v. Ferber, 458 U.S. 747, 749 (1982).

[9] United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018); FED. BUREAU OF INVESTIGATION, NOTIFICATION PREFERENCE (2012), https://ucr.fbi.gov/stats-services/victim_assistance/notification-preference.

Instead, victims must actively participate in each individual case by writing and submitting a unique victim impact statement.[10]

This Note argues that the standard in *Barker* fails to meet the reasonable requirements for victim representation required by law and prevents victims from accessing the Rules for Courts-Martial ("R.C.M.") 1001A process, which allows victims to give a statement.[11] Under *Barker*, a victim must, at a minimum, be physically present at a court-martial.[12] While the court in *Barker* also explained that a victim could request to be heard, the court ignored the fact that the victim had already requested that the court hear her statements.[13] While prosecutors can submit statements by victims as evidence in aggravation during sentencing proceedings,[14] this does not satisfy the legal requirement that victims be reasonably heard.[15] Evidence in aggravation is evidence submitted to justify a stricter sentence.[16] The *Manual for Courts-Martial* ("*MCM*") describes the prosecutor's ability to submit sworn statements as evidence in aggravation under R.C.M. 1001(b)(4).[17] Admitting statements as evidence in aggravation denies victims their right to be reasonably heard because R.C.M. 1001(b)(4) is a right of the government.[18] Furthermore, statements submitted under R.C.M. 1001(b)(4) as evidence in aggravation must comply with the Military Rules of Evidence.[19] The Military Rules of Evidence impose a greater burden on victims: requiring them to either write a document that complies with legal rules they are unfamiliar with, or forfeit their right to be reasonably heard.[20] The clear intent of the Legislature in passing the victims' rights portions of the 2014 NDAA was to mirror current civilian protections for victims in military law.[21] There is a

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[10] *Barker*, 77 M.J. at 382.

[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001A(a) (2016) [hereinafter MCM].

[12] *Barker*, 77 M.J. at 382. "Military criminal trial courts are known as courts-martial. Military courts are not considered Article III courts but instead are established pursuant to Article I of the Constitution." ESTELA I. VELEZ POLLACK, CONG. RESEARCH SERV., RS21850, MILITARY COURTS-MARTIAL: AN OVERVIEW (2004).

[13] *Barker*, 77 M.J. at 382. The CPVA notification form allows victims to choose to provide a victim impact statement for use in federal cases involving documentation of the victim's abuse. NOTIFICATION PREFERENCE, *supra* note 9.

[14] MCM, *supra* note 11, R.C.M. 1001(b)(4).

[15] *Barker*, 77 M.J. at 382.

[16] Cunningham v. California, 549 U.S. 270, 277 (2007).

[17] MCM, *supra* note 11, R.C.M. 1001(b)(4).

[18] *Barker*, 77 M.J. at 378.

[19] United States v. Hamilton, (*Hamilton I*), 77 M.J. 579, 582 (A.F. Ct. Crim. App. 2017), *aff'd* 78 M.J. 335 (C.A.A.F. 2019) (finding victim impact statements improperly admitted under *United States v. Barker* under R.C.M. 1001A, but holding that the error was not prejudicial to the substantial rights of the defendant).

[20] MCM, *supra* note 11, R.C.M. 702(a);1001(b)(4).

[21] United States v. Parr, No. ACM 38878, 2017 CCA LEXIS 86, at *7 (A.F. Ct. Crim. App. Feb. 7, 2017).

low risk of substantial prejudice to the accused and no risk to the accused's constitutional rights.[22] A common theme of victim impact statements in child pornography cases is the victims' feeling of revictimization, knowing that defendants are watching videos of their abuse.[23] This devastating effect on victims is accepted as a matter of law.[24] Therefore, any harm to the defendant caused by the admission of victim impact statements is minimized, unless the jury panel conducts sentencing, as judges are presumed to know the law.[25] However, the known harms victims suffer from defendants viewing the record of their abuse is incongruent with the reasoning for allowing victim testimony: to present victims to the sentencing authority as unique individuals, worthy of justice.[26] Part I of this Note will briefly describe the military court system and lay out the history of victims' rights under civilian and military law in the United States. Part II will argue that legislative intent, previous rulings by the Supreme Court combined with the letter of the law, and public policy all support the right of victims to submit their statements in writing under R.C.M. 1001A.

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[22] *Compare* United States v. Carter, No. ACM 39289, 2018 CCA LEXIS 519, at *15–16 (A.F. Ct. Crim. App. Oct. 26, 2018) (finding error prejudicial due to judge's statement about lesser sentence he would have imposed absent consideration of victim impact statement), *and* United States v. Linton, No. ACM 39229, 2018 CCA LEXIS 492, at *29–30 (A.F. Ct. Crim. App. Oct. 12, 2018) (finding error prejudicial because "the judge did not reference the 'settled law' on the victim impact of child pornography and did not acknowledge the limited use of the victim impact statements"), *with Barker*, 77 M.J. at 384 (finding the defendant was not prejudiced by the admission of the statements because the judge recorded considering only the one properly admitted statement and the harms described in the improperly admitted statements were recognized in law), United States v. Hamilton (*Hamilton II*), 78 M.J. 335, 337– 38. (C.A.A.F. 2019), United States v. Cook, No. ACM 39367, 2019 CCA LEXIS 91, at *1–2 (A.F. Ct. Crim. App. Mar. 4, 2019), United States v. Zoril, No. 201800009, 2018 CCA LEXIS 503, at *1 (N-M. Ct. Crim. App. Oct. 22, 2018), United States v. Anderson, No. ACM 39353, 2018 CCA LEXIS 465, at *1–2 (A.F. Ct. Crim. App. Sep. 28, 2018), United States v. Machen, No. ACM 39295, 2018 CCA LEXIS 419, at *2 (A.F. Ct. Crim. App. Aug. 29, 2018), *and* United States v. Rollins, No. 201700039, 2018 CCA LEXIS 372, at *2 (N-M. Ct. Crim. App. July 30, 2018) (all finding no error for reasons similar to those in *Barker*).

[23] *Barker*, 77 M.J. at 384.

[24] *Id.* at 384 (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990)); *see* Paroline v. United States, 572 U.S. 434, 437 (2014) (holding every person who possesses images of a victim's abuse perpetuates the abuse); New York v. Ferber, 458 U.S. 747, 759 (1982) (stating the trauma of child pornography films and photos is "exacerbated by their circulation").

[25] United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007) (holding military judges are presumed to know the law and able to distinguish between "proper and improper sentencing arguments").

[26] Payne v. Tennessee, 501 U.S. 808, 823–24 (1991).

I. BUILD UP TO *BARKER*

A. *The modern victims' rights movement in the United States grew out of cases in the 1970s, President Reagan's Task Force on Victims of Crime, and the feminist movement.*

The Supreme Court began to recognize the lack of victims' rights in 1973.[27] When the Supreme Court decided *Linda R.S. v. Richard D.*, the Court acknowledged, in dicta, the contemporaneous view that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[28] The Court recognized Congress's prerogative to statutorily create legal rights, sufficient for standing.[29] A victims' rights movement began to grow throughout the 1970s, driven by the general sentiment that victims were locked out of the criminal justice system.[30] Rumblings from this movement preceded the Supreme Court's 1973 decision. Former Vice President Spiro Agnew declared in 1970 that "the rights of the accused have become more important than the rights of victims in our courtrooms."[31] His response epitomized the historic role of victims in American courtrooms. The English common law considered all crimes, except treason, subject to private prosecution.[32] The establishment of public prosecutors denied victims a role beyond witnesses in favor of the State v. Defendant model, a consequence that continued until the revolution of the 1970s.[33] The development of public prosecutors is a complicated evolution, but the major turning point can be traced to English laws passed in 1554–1555.[34]

In response to the rising awareness of the need for victims' rights in the United States, President Reagan formed the President's Task Force on Victims of Crime.[35] The Task Force recommended that judges "allow for, and give

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[27] *History of Victims' Rights*, NAT'L CRIME VICTIM LAW INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ (last visited Mar. 4, 2019).

[28] Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (holding that failure of a district attorney to bring criminal abandonment charges against fathers of illegitimate children did not cause the mothers injuries sufficient to grant them standing).

[29] *Id.* at 617 n.3.

[30] *See* Joanna Tucker Davis, *The Grassroots Beginnings of the Victims' Rights Movement*, NAT'L CRIME VICTIM LAW INST. 6, 6 (2005).

[31] Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER MAG. (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement.

[32] Davis, *supra* note 30.

[33] Lepore, *supra* note 31; Davis, *supra* note 30.

[34] John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 318 (1973).

[35] GARFIELD BOBO ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME ii (1982).

appropriate weight to, input at sentencing from victims of violent crime."[36] The report concluded that victims, like defendants, have a right to be heard in court and have their views considered because the adjudged sentence "is a statement of societal concern to the victim for what he has endured."[37] Judges cannot determine the appropriate sentence for the crime without knowing how the crime affected the victim.[38] Detractors have criticized the right of victims to speak on two main grounds: the increased burden on the court's valuable time and the risk that victim testimony would improperly sway judges.[39] In contrast to the lack of victim input at sentencing, the Task Force noted the considerable amount of time granted to defendants to speak during sentencing.[40] In response to the argument that victim testimony would improperly sway judges, the Task Force again pointed to the emphasis during sentencing on testimony in favor of the defendant.[41]

The "tough on crime" conservative movement joined as an unlikely ally in the fight for victims' rights.[42] It would be remiss of this Note to not pay tribute to the feminist movement which understood how the State v. Defendant model, coupled with a majority male bench, silenced the voices of female victims.[43] The then exclusively male bar and bench often failed to convict defendants of crimes that targeted women: marital rape, domestic violence, sexual harassment, etc.[44] In the 1970s, the Department of Justice found that victims failed to report nearly two-thirds of crimes because of the perceived leniency of the courts towards defendants and the difficulty of dealing with court proceedings.[45] In response to these studies, early police and prosecutor victim assistance focused on bringing victims into court as witnesses.[46] Beyond increased participation, this shift helped victims, especially those of child sexual abuse, by affirming that the court system viewed the defendant, rather than the victim, as responsible for the crime.[47] The feminist movement was instrumental in advocating for the court system to become more responsive to victims' needs in order to gain their trust.[48]

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[36] *Id.* at 76.

[37] *Id.*

[38] *Id.* at 76–77.

[39] *Id.* at 77–78.

[40] *Id.* at 77.

[41] *Id.* at 78.

[42] Lepore, *supra* note 31.

[43] Lucy N. Friedman, *The Crime Victim Movement at Its First Decade*, 45 PUB. ADMIN. REV. 790, 790 (1985); Lepore, *supra* note 31.

[44] Lepore, *supra* note 31.

[45] Friedman, *supra* note 43, at 791.

[46] *Id.*

[47] *Id.* at 793.

[48] *Id.*

Pressure grew from the 1995 Oklahoma City bombing, where the large number of dead and wounded meant that many family members, who would have qualified as victims under both the 2004 CVRA and the current military *MCM*, wanted to speak at the trial of the accused bomber, Timothy McVeigh.[49] Instead of a judge, the jury was required to decide McVeigh's sentence because he faced the death penalty.[50] Judge Marsh, the presiding judge at McVeigh's trial, warned the jury against relying on victim impact statements in making their determination because the statements were too emotional.[51] Judge Marsh also ruled that victims who watched the trial could not speak at the sentencing because of the risk of tainting their testimony.[52] The Tenth Circuit upheld this instruction.[53] Congress reacted by passing 18 U.S.C. § 3510, forbidding district courts from excluding victims purely because they would make a statement at sentencing.[54] A more immediate reaction to McVeigh's trial was a law that required federal courts to provide closed-circuit broadcasts to victims if the trial moved more than 350 miles from the scene of the crime.[55] In contrast to the victims, McVeigh only received the death penalty for the Oklahoma City bombing after making a statement to the court.[56] Contrast Judge Marsh's instructions with the 2018 trial of former USA Gymnastics team doctor, Larry Nassar. Nassar was convicted of assaulting seven women and was already sentenced to sixty years in prison for child pornography when the judge allowed 156 women to give statements during sentencing.[57]

If the United States charged McVeigh while the Supreme Court's decision in *Booth v. Maryland* was good law, the court most likely would not have let his victims testify.[58] The Supreme Court in *Booth* found that victim impact statements contained information that imposed an unconstitutional risk that the

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[49] Lepore, *supra* note 31; s*ee* Crime Victims' Rights Act, 18 U.S.C. § 3771(e)(2) (2016); MCM, *supra* note 11, R.C.M. 1001A(b)(1).

[50] *See* Nolan Clay & Penny Owen, *McVeigh Trial Jury to Begin Deliberations*, OKLAHOMAN (May 30, 1997), https://oklahoman.com/article/2578823/mcveigh-trial-jury-to-begin-deliberations.

[51] Lepore, *supra* note 31.

[52] *Id.*

[53] Stabenow, *supra* note 1, at 157.

[54] *Id.* (citing 18 U.S.C. § 3510(a) (2016)).

[55] In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 235(a), 110 Stat. 1214 (codified at 34 U.S.C. § 20142 (2020)). This was in response to the judge in McVeigh's trial moving the case from Oklahoma City to Denver in search of an impartial jury.

[56] Richard A. Serrano, *McVeigh Speaks Out, Receives the Death Sentence*, L.A. TIMES (Aug. 15, 1997), https://www.latimes.com/archives/la-xpm-1997-aug-15-mn-22602-story.html.

[57] Lepore, *supra* note 31.

[58] *See* Booth v. Maryland, 482 U.S. 496, 502–04 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

jury would arbitrarily decide the sentence.[59] Admitting that the holding was limited to the "unique circumstances of a capital sentencing hearing" where the jury is the sentencing authority, the Court described the jury's role in a capital case as focusing on the defendant as a unique individual.[60] Victim impact statements do not focus on the defendant, but rather on the victim, and may be unrelated to the culpability of the defendant.[61] The statements in *Booth* described the victim's family, their emotional reaction to the crime, and their opinions about the defendant and his actions.[62] The prosecution created the victim impact statements in *Booth* by interviewing the murder victims' family members in accordance with state law.[63]

In *South Carolina v. Gathers*, decided in 1989, the Supreme Court addressed the question left open in *Booth*—whether courts could admit victim impact statements containing information "relate[d] directly to the circumstances of the crime" at sentencing.[64] The Court ruled that the content of papers that the defendant riffled through while looking for valuables to steal bore no relevance to the "circumstances of the crime."[65] The court barred victim testimony about the papers and how they demonstrated the good character of the victim.[66] The reasoning of both *Booth* and *Gathers* reflect the belief that victim impact evidence describing harm to the immediate victim or the immediate victim's family does not relate to the culpability of the defendant.[67] The Supreme Court overturned this precedent against using victim impact statements in capital cases in *Payne v. Tennessee*.[68] In reaching this decision, the Court examined the historical underpinnings of criminal sentencing, with a survey ranging from the Bible's "an eye for an eye, a tooth for a tooth" to the 18th century focus on the harm done to society.[69] The Court determined that victim impact statements help the sentencing authority measure the harm caused by a crime.[70] The Court found that the language quoted in *Booth*, requiring the defendant to be treated as a "uniquely individual human being," did not describe evidence "that *could not*

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[59] *Id.*

[60] *Id.* at 504 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

[61] *Id.* at 504–05.

[62] *Id.* at 499–500.

[63] *Payne*, 501 U.S. at 817.

[64] South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (quoting *Booth*, 482 U.S. at 507 n.10, *overruled by Payne*, 501 U.S. 808).

[65] *Id.*

[66] *Id.*

[67] *Payne*, 501 U.S. at 819 (describing the Court's opinion in *Gathers*, 490 U.S. at 811 and *Booth*, 482 U.S. at 506).

[68] *Id.*

[69] *Id.* at 819–20 (quoting *Exodus* 21:24).

[70] *Id.* at 821.

be received, but a class of evidence which *must* be received."[71] The concern in *Booth*, that victim impact evidence would increase punishments for defendants whose victims were seen as more useful to society, was dismissed as the Court determined victim impact evidence is offered to show the victim's unique worth regardless of their perceived value to the community.[72]

The Court's Eighth Amendment jurisprudence requires states to rationally limit the sentencing authority's judgement to whether the particular circumstances of each defendant meets the death penalty standard.[73] States must permit the defendant to offer any relevant evidence to the sentencing authority.[74] The Court quoted Justice Cardozo's 1934 view that "[j]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[75] States may find victim impact evidence rationally related to the sentencing authority's decision on whether to implement the death penalty and the Eighth Amendment does not per se bar victim impact evidence in capital cases.[76]

B. *Military victims' rights law lagged behind civilian protections as victims' rights laws developed, but Congress continually passed legislation to reflect civilian protections in military law.*

There are three levels of court-martial in the military: a general courts-martial, a special courts-martial, and a summary courts-martial.[77] The discussion below will be limited to a general courts-martial because child pornography cases fall under their jurisdiction.[78] The military court for the court-martial is comprised of the convened judge and a panel of members—unless the accused requests a judge-only trial.[79] "The accused has the right to choose . . . whether to be tried by a military judge alone, a military judge and members, or a panel of members."[80] The trial level military courts are ad hoc and convened only for the specific trial.[81] A court-martial is part of "an integrated court-martial system that resembles civilian structures of justice."[82] Military courts afford "virtually the same" procedural safeguards to service members as those granted to

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[71] *Id.* at 822 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

[72] *Id.* at 823.

[73] *Id.* at 824 (quoting McCleskey v. Kemp, 481 U.S. 279, 305–06 (1987)).

[74] *Id.* (quoting *McCleskey*, 481 U.S. at 305–06).

[75] *Id.* at 827 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

[76] *Id.*

[77] 10 U.S.C. § 816 (2018).

[78] *See id.* §§ 819–820.

[79] *Court-Martial*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[80] R. CHUCK MASON, CONG. RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 6 n.54 (2013) ("Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused's command.").

[81] *Court-Martial*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[82] Ortiz v. United States, 138 S. Ct. 2165, 2167 (2018) (internal quotes omitted).

defendants in civilian criminal court.[83] Above the temporary trial level courts are four permanent courts of criminal appeal, one for each branch of the armed services.[84] Above these four courts is the CAAF, which consists of five civilian judges and serves as the "court of record."[85] Finally the Supreme Court has authority to review decisions by CAAF under 28 U.S.C. § 1259.[86]

Congress began expanding the rights of victims to attend courts-martials in 1990 when it instructed the Department of Justice to accord victims "the right to be present at all public court proceedings related to the offense, unless the court determines that the testimony by the victim would be materially affected if the victim heard other testimony at trial."[87] The Department of Defense's ("DoD") attempt to add this provision to military courts failed because presidents have not modified Military Rule of Evidence 615 to reflect the congressional instruction.[88] In 2002, the President amended Military Rules of Evidence 615 to allow a victim to remain in the courtroom even if the victim was a witness.[89] Fourteen years after 42 U.S.C. § 10606 granted victims the right to be present at all public court proceedings (unless their testimony would be substantially impacted), the DoD adopted the federal civilian standard articulated in 42 U.S.C. § 10606 with DoD Instruction 1030.1.[90]

But civilian law was still evolving more quickly than military law.[91] Before DoD Instruction 1030.1 took effect, Congress repealed 42 U.S.C. § 10606 and enacted even greater victim protections with the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, giving victims the right to speak in federal civilian courts during sentencing.[92] Under 18 U.S.C. § 3771 victims possess "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[93] The CVRA imposed an affirmative obligation on the judiciary to guarantee the rights of victims.[94] Judges are also directed to "make every effort" to reasonably avoid excluding a

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[83] *Id.* at 2168.

[84] *See id.* (referring to the Court of Criminal Appeals for the Army, Navy-Marine Corps, Air Force, and Coast Guard).

[85] *Id.*

[86] 28 U.S.C. § 1259 (2020).

[87] Stabenow, *supra* note 1, at 157 (quoting 42 U.S.C. § 10606(b)(4) (2000) (repealed 2004)); 18 U.S.C. § 3771(a)(3) (2018) (contains the modern iteration of this law).

[88] *See* United States v. Spann, 51 M.J. 89, 92 (C.A.A.F. 1999); *see also* Stabenow, *supra* note 1, at 157.

[89] MIL. R. EVID. § 615.01; Stabenow, *supra* note 1, at 157.

[90] Stabenow, *supra* note 1, at 157.

[91] *Id.*

[92] Crime Victims' Rights Act, 18 U.S.C. § 3771 (2020) (citing 42 U.S.C. § 10606, repealed by Pub. L. 108-405, title I, Sec. 102(c) (Oct. 30, 2004), 118 Stat. 2264).

[93] *Id.* § 3771(a)(4).

[94] United States v. Turner, 367 F. Supp. 2d 319, 322 (E.D.N.Y. 2005).

victim from attending a court proceeding.[95] In contrast, DoD Instruction 1030.1 did not grant victims the right to be heard, only allowing victims to be present if the judge thought hearing other witnesses testify would not affect the victim's testimony.[96] Military courts interpreted the right to be present under DoD Instruction 1030.1 restrictively, reflecting a belief that if witnesses hear each other the risk of their testimony being affected, even subconsciously, is too high.[97]

This tradition of narrow interpretation continues with the court's interpretation of the 2014 NDAA's adoption of 18 U.S.C. § 3771 in *United States v. Barker*.[98] In contrast with the military interpretation, Senator Jon Kyl, a sponsor of 18 U.S.C. § 3771, emphasized that the right of victims to be heard by the court in the fashion chosen by the victim and that the CVRA was never intended to deny victims the right to address the court:

> It is not the intent of the term "reasonably" in the phrase "reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication would generally satisfy this right. *On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. . . . In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.* It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person *or if the victim wishes to be heard by the court in a different fashion*, should this provision mean anything other than an in-person right to be heard.[99]

While statements of individual members of the legislature are given less weight than other forms of legislative history, such as committee reports, such statements have greater authority in determining legislative intent in the absence of expressed contrary views.[100] This is the case here: Senator Kyl's statement

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[95] § 3771(b).

[96] Stabenow, *supra* note 1, at 158 (quoting DoD Directive 1030.1 (Apr. 13, 2004)).

[97] *Id.* (citing United States v. Ducharme, 59 M.J. 816, 817 (N-M. Ct. Crim. App. 2004)).

[98] *See* United States v. Barker, 77 M.J. 377 (C.A.A.F. 2018).

[99] Stabenow, *supra* note 1, at 159 (quoting 150 Cong. Rec. S10910, S10911, 2004 WL 2271145 (daily ed. Oct. 9, 2004) (Statement of Bill Sponsor Sen. Jon Kyl)) (first emphasis added).

[100] *See* Kenna v. United States Dist. Court, 435 F.3d 1011, 1015 (9th Cir. 2006) (reasonable inference is that the members agreed with the speaker).

has considerably more weight than that of other members and his statement went unchallenged.[101] Various parties engaged in a lengthy attempt to pass the victim protections in 18 U.S.C. § 3771 as a constitutional amendment prior to its passage as law, but ultimately failed.[102] Regarding the victim's right to "be heard," the Senate Report on the proposed amendment stated "victims should always be given the power to determine the form of the statement."[103] Specifically considering written statements, the Senate Report stated victims should not be limited merely to written statements.[104]

The CVRA had ten years of judicial interpretation before Congress adopted the victims' rights provisions in the 2014 NDAA. Under Federal Rule of Criminal Procedure 32, if written statements from victims are submitted, then the statements may be attached by the Probation Office to the presentencing report.[105] In cases of suspected child pornography, the images or videos are sent to the National Center for Missing and Exploited Children and analyzed by the Child Victim Identification Program.[106] The Child Victim Identification Program uses hash values—the digital file equivalent of fingerprints unique to each file—to identify known victims of child pornography.[107] The law has been interpreted by the Third, Eighth, and Ninth Circuits as allowing anonymous victim impact statements that are not written for the case at bar to be admitted in child pornography cases, provided that the defendant possessed images of the statement's author.[108] The court in *United States v. Clark* found the victim impact statements admissible because the defendant possessed child pornography of each of the authors on his computer.[109] The law did not require the victim to submit a new victim statement for each defendant possessing or distributing their images or videos.[110] According to the court, the rights of victims to be reasonably heard under 18 U.S.C. § 3771 required the admittance

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[101] *Id.* (citing NLRB. v. St. Francis. Hosp. of Lynwood, 601 F.2d 404, 415 n.12 (9th Cir. 1979)).

[102] *Id.*

[103] *Id.* (citing S. Rep. No. 108-191, at 38 (2003)).

[104] *Id.* (citing S. Rep. No. 108-191, at 38 (2003)).

[105] FED. R. CRIM. P. 32(c), (d)(2)(B).

[106] United States v. Barker, 77 M.J. 377, 379 (C.A.A.F. 2018); United States v. Clark, 335 F. App'x. 181, 183 (3d Cir. 2009) (unpublished).

[107] State v. Lizotte, 197 A.3d 362, 367 (2018); *Barker*, 77 M.J. at 385 (Stucky, C.J., dissenting); FED. BUREAU OF INVESTIGATION, PRIVACY IMPACT ASSESSMENT (PIA) CHILD VICTIM IDENTIFICATION PROGRAM (CVIP) INNOCENT IMAGES NATIONAL INITIATIVE (INNI) (May 9. 2003), https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/cvip.

[108] United States v. Estes, 409 F. App'x. 968, 969 (8th Cir. 2011); United States v. Burkholder, 590 F.3d 1071, 1075–76 (9th Cir. 2010) (upholding trial judge's decision to strike letters from sentencing report before forwarding report to prison); *Clark*, 335 F. App'x. at 183.

[109] *Clark*, 335 F. App'x. at 183.

[110] *Id.*

of the pre-written impact statements at sentencing, even when not written specifically for the instant case.[111]

Furthermore, the redaction of the victims' names complied with the CVRA's requirement that the victims "be treated with fairness and with respect for the victim's dignity and privacy."[112] Children under civilian law may create a victim impact statement "to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability."[113] The Child Pornography Victim Assistance ("CPVA") program allows victims to choose to receive notifications whenever a case involving their image occurs.[114] When victims choose if they wish to be notified, they may also provide a victim impact statement.[115] By checking the box marked "yes," victims state:

> I wish to provide a Victim Impact Statement to be used in federal, state, and/or local sentencing or parole proceedings where the defendant's offenses involved images of my victimization, regardless of whether I have chosen to be notified of those proceedings. I understand that I will be contacted in the future by a Victim Assistance Specialist from the U.S. Attorney's Office and my Victim Impact Statement will be kept on file for use in future cases.[116]

Victims may change their notification preference at any time.[117] The redaction of names and personal information by the CPVA keeps with the rights of victims to maintain their dignity and privacy.[118]

Congress introduced legislation to include victims' rights under 18 U.S.C. § 3771 in military law with the 2014 NDAA.[119] Previously, victim testimony during sentencing could only be admitted under R.C.M. 1001(b)(4) as evidence in aggravation which must be introduced by the trial counsel.[120] The victim lacks any choice in the decision to admit evidence in aggravation.[121] R.C.M. 1001(b)(4) governs evidence in aggravation more narrowly than R.C.M. 1001A

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[111] *Id.* at 184.

[112] Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(8) (2016); United States v. Bartoli, 728 F. App'x. 424, 428 (6th Cir. 2018) (unpublished); *Clark*, 335 F. App'x. at 184.

[113] 18 U.S.C. § 3509(f) (2020).

[114] *Clark*, 335 F. App'x. at 183–84 (quoting 18 U.S.C. § 3771(b)); NOTIFICATION PREFERENCE, *supra* note 9.

[115] NOTIFICATION PREFERENCE, *supra* note 9.

[116] *Id.*

[117] *Id.*

[118] *Clark*, 335 F. App'x. at 184.

[119] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 973 (2013) (codified as amended at 10 U.S.C. § 806b, art. 6b (2019)).

[120] MCM, *supra* note 11, R.C.M. 1001(b)(4).

[121] *Id.*; MCM, *supra* note 11, R.C.M. 1001(a)(1)(A).

governs victim impact statements.[122] The language of R.C.M. 1001(b)(4) permits evidence "directly related to or *resulting* from" the offense while R.C.M 1001A permits statements "directly related to or *arising* from" the offense.[123] Most importantly, victim impact statements entered as evidence in aggravation are still subject to all Military Rules of Evidence.[124] However, judges may relax the Military Rules of Evidence at the request of the defense.[125]

The extent to which victim impact statements admitted under R.C.M. 1001A are subject to the Military Rules of Evidence—including the Rule 403 standard for unduly prejudicial, cumulative, or waste of the court's time—is an unsetted area of law.[126] As out of court statements admitted for their truth, victim impact statements are inadmissible hearsay under the Military Rules of Evidence, unless the defense stipulates to the admission of the statements or the statements fall within an exception.[127] However, victim impact statements submitted as evidence in aggravation through the CPVA do not fall within a known hearsay exception.[128]

To avoid being classified as hearsay, the text of R.C.M. 1001(b)(4) contemplates the admission of victim impact statements as depositions taken pursuant to R.C.M. 702 to avoid hearsay objections.[129] "As a practical matter, depositions, though theoretically possible, were allowed only in extreme circumstances pursuant to R.C.M. 702 and R.C.M. [1001(b)(4)]."[130] A deposition under R.C.M. 702 must be ordered by the trial court because of "exceptional circumstances of the case," and therefore a new one must be taken for each case.[131]

While military courts have held that hearsay rules apply at sentencing to victim impact statements admitted under R.C.M. 1001(b)(4), the underlying

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[122] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *6 (N-M. Ct. Crim. App. Apr. 1314, 2017).

[123] MCM, *supra* note 11, R.C.M. 1001(b)(4) (emphasis added); MCM, *supra* note 11, R.C.M. 1001A (emphasis added).

[124] MCM, *supra* note 11, R.C.M. 1001(c)(3).

[125] *Id.*

[126] *Hamilton II*, 78 M.J. 335, 342 (C.A.A.F 2019) ("The plain language of R.C.M. 1001A (2016) clearly contemplates that at least some of the Military Rules of Evidence are inapplicable to victim impact statements."); *see Hamilton I*, 77 M.J. 579, 585 (A.F. Ct. Crim. App. 2017), *aff'd* 78 M.J. 335 (C.A.A.F 2019) (holding victim impact statements admitted under R.C.M. 1001A are not evidence and thus not subject to any of the rules of evidence).

[127] *Hamilton II*, 78 M.J. at 342.

[128] *See* MIL. R. EVID. 803, 804.

[129] MCM, *supra* note 11, R.C.M. 1001(b)(4).

[130] Stabenow, *supra* note 1, at 160 n.85. Although the original quotation cites R.C.M. 1001(a)(4), Stabenow must have meant R.C.M. 1001(b)(4) as no R.C.M. 1001(a)(4) existed in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012).

[131] MCM, *supra* note 11, R.C.M. 702.

constitutional reason for the hearsay rules does not apply.[132] The Supreme Court has held the Sixth Amendment's Confrontation Clause does not apply at sentencing.[133] The Rules for Courts-Martial explicitly state the right of a victim to give a statement under R.C.M. 1001A is independent of whether the victim testifies under R.C.M. 1001(b)(4).[134] The Air Force Court of Criminal Appeals held that the plain language of R.C.M. 1001A meant unsworn victim impact statements are not governed by the Military Rules of Evidence because the victim giving the statement is not considered a witness and the word evidence is not used.[135] In making this determination, the court compared unsworn victim impact statements to the defendant's right to make an unsworn statement free from the rules of evidence.[136]

The right of the accused to make an unsworn statement at sentencing under R.C.M. 1001(c)(2)(C) is not subject to the Military Rules of Evidence.[137] On appeal, CAAF recognized in dicta that at least some of the Military Rules of Evidence do not apply to victim impact statements under R.C.M 1001A, but it is unclear how far this exception extends as the court affirmed on other grounds.[138] Consistent with the lower court, CAAF based its decision on the plain language of R.C.M. 1001A.[139] However, departing from the lower court, CAAF did not rely on comparisons to the defendant's right to make a statement, but instead on the unsworn nature of the statement and its exemption from cross-examination.[140]

Congress called Section 1701 of the 2014 NDAA, which included 10 U.S.C. § 806b granting victims the right to be reasonably heard, the "extension of crime victims' rights to victims of offenses under the Uniform Code of Military Justice."[141] Some military courts have recognized Congress's intent to replicate

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[132] *See Hamilton II*, 78 M.J. at 342; United States v. Robinson, 482 F.3d 244, 247 (3d Cir. 2007).

[133] Crawford v. Washington, 541 U.S. 36, 51 (2004) (holding not all hearsay based on the abuses the Sixth Amendment aimed to prevent); Williams v. Oklahoma, 358 U.S. 576, 583–84 (1959) (holding statements made at sentencing do not deprive a defendant of their Sixth Amendment Rights); *Robinson*, 482 F.3d at 247 (applying *Williams* as good law post *Crawford*).

[134] MCM, *supra* note 11, R.C.M. 1001A(a).

[135] *Hamilton I*, 77 M.J. 579, 583 (A.F. Ct. Crim. App. 2017) *aff'd on other grounds*, 78 M.J. 335 (C.A.A.F 2019)).

[136] *Id.*

[137] United States v. Provost, 32 M.J. 98, 99 (C.A.A.F. 1991); MCM, *supra* note 11, R.C.M. 1001(c)(2)(C).

[138] *See Hamilton II*, 78 M.J. 335, 342 (C.A.A.F 2019); *Hamilton I*, 77 M.J. at 585.

[139] *Hamilton II*, 78 M.J. at 342.

[140] *Id.* Further analysis of the reach of the Military Rules of Evidence as they pertain to victim impact statements is outside the scope of this Note.

[141] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (codified as amended at 10 U.S.C. § 806b, art. 6b (2019)); *see* Stabenow, *supra* note 1, at 161.

the protections of 18 U.S.C. § 3771 in 10 U.S.C. § 806b.[142] The rights adopted in 10 U.S.C. § 806b include the right to be reasonably protected from the defendant, to reasonable notice of court-martials and other hearings, to attend any public hearing, to confer with government counsel, and to be reasonably heard at sentencing.[143] As originally passed, the 2014 NDAA only differed from civilian law in four ways.[144] First, the 2014 NDAA did not grant victims in military court a statutory right to speak at a plea hearing.[145] Second, the 2014 NDAA did not give victims the right to "full and timely" restitution.[146] Third, the 2014 NDAA did not provide a statutory framework for victims to assert their rights.[147] Fourth, the 2014 NDAA did not include instructions requiring courts to exert maximum effort to invite victims to attend open proceedings.[148] After reforms in the 2015 NDAA and 2016 NDAA, both 18 U.S.C. § 3771 and 10 U.S.C. § 806b now permit victims to petition for a writ of mandamus if their rights are violated, bringing military law into closer parity with civilian law.[149] Under current law, the military sentencing procedure begins after a guilty finding.[150] First, the trial counsel presents the defendant's records, evidence in aggravation, and evidence of rehabilitative potential.[151] Next, the victim may exercise their right to be heard pursuant to R.C.M. 1001A.[152] Finally, the defense may present evidence to mitigate the sentence or demonstrate extenuating circumstances.[153] Congress's consistent efforts to bring military victims' rights law into compliance with civilian protections demonstrate its intent that victims possess the same rights under both systems.

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[142] *Hamilton I*, 77 M.J. at 582–83 ("10 U.S.C. § 806b nearly mirrors the rights afforded to victims in civilian criminal trials under the CVRA.").

[143] 10 U.S.C. § 806b (legitimizing right to attend any public hearing applies unless the judge finds it would taint the victim's testimony as a witness).

[144] Stabenow, *supra* note 1, at 161.

[145] *Id.*

[146] *Id.* (citing National Defense Authorization Act § 1701).

[147] *Id.*

[148] *Id.* Most likely, due to the deployed nature of the United States military and the demands of the service, such a requirement would have a marked impact on the ability of the armed forces to carry out their primary mission.

[149] Leila Mullican, *The Alleged Victim's Right to Mandamus in Military Courts-Martial*, 3 CRIM. L. PRAC. 34, 37 (2016).

[150] MCM, *supra* note 11, R.C.M. 1001(a).

[151] *Id.*

[152] *Id.*

[153] *Id.*

C. *Under current Supreme Court precedent, when the plain language of a statue is unclear, courts may use congressional intent to interpret the statute.*

The Supreme Court has debated the appropriateness of using legislative intent to interpret statutes.[154] Statutory construction begins with the plain text of the statute.[155] When the language of the statute is unambiguous, a court's job is finished.[156] However, when the language of the statute is unclear, the "words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[157] In *King v. Burwell*, the Supreme Court read the Affordable Care Act ("ACA") to operate "as Congress intended."[158] Ambiguous statutory language led the Court to look at the legislative intent underlying the ACA.[159] In his dissent, Justice Scalia offered a scathing condemnation of using legislative intent to change the plain reading of the ACA.[160] In his opinion, the American people granted Congress all legislative powers to enact laws.[161] Therefore, Justice Scalia believes if a law is poorly drafted, as was the case with the ACA, Congress possesses the power to amend the law.[162] If Congress does not exercise this power, then the law is functioning as intended.[163] In one of the cases Justice Scalia cites, *Lamie v. United States Trustee*, the plaintiff argued that the plain language of the statute conflicted with legislative intent, but the Court found language in the statute supporting both the plaintiff's position and the plain text reading as understood by the Court.[164] "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress

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[154] C-SPAN, *Justices Breyer and Scalia on Legislative Intent*, C-SPAN.ORG (Mar. 23, 2010), https://www.c-span.org/video/?c4562573/justices-breyer-scalia-legislative-intent.

[155] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

[156] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

[157] King v. Burwell, 576 U.S 473, 492 (2015) (quoting Util. Air Regulatory Group v. EPA, 573 US. 302, 320 (2014)) (holding that, despite the Affordable Care Act (ACA) only granting tax credits to people who bought insurance policies through an American Health Benefit Exchange established by a state, the tax credit applied to people who purchased policies through any exchanges established under the ACA).

[158] *Id.* at 494–95.

[159] *Id.* at 474.

[160] *Id.* at 515 (Scalia, J., dissenting).

[161] *Id.*

[162] *Id.* ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." (quoting Lamie v. United States Tr., 540 U.S. 526, 542 (2004))).

[163] *Lamie*, 540 U.S. at 541 ("The House passed the Act after having the deletion [of the disputed term], as well as its impact, called to its attention . . . . This alert, followed by the Legislature's nonresponse, should support a presumption of legislative awareness and intention.").

[164] *Id.* at 541–42.

has affirmatively and specifically enacted."[165] The Court found that the facts of *Lamie* fell into the latter category.[166] In *King*, Justice Scalia additionally relied on *Michigan v. Bay Mills Indian Community*, holding that the Court could not ignore plain language merely because Congress "must have intended" a different reading.[167]

Justice Scalia's approach has survived him. Most recently, in *Digital Realty Trust Inc. v. Somers*, three Justices declined to join the majority opinion, finding that the opinion strayed from the statutory text.[168] However, Justice Sotomayor, joined by Justice Breyer, concurred to rebut their colleagues' rejection of legislative intent.[169] Their concurrence stated "[c]ommittee reports . . . are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning."[170] Justice Sotomayor's endorsement of Committee Reports specifically relied upon a long-standing Court tradition regarding statutory construction.[171] "In surveying legislative history, [the Supreme Court has] repeatedly stated the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting.'"[172] The majority based their decision on the plain language of the statute but noted that the legislative intent appeared to coincide with the Court's reading.[173] Thus, courts may consider legislative intent except where the legislative intent conflicts with a plain text reading of the statute.[174] However, not all justices endorse this approach.[175] Furthermore, Committee Reports hold a heightened power over individual member statements when determining legislative intent because they represent the collective understanding of the drafting Congresspeople.[176]

CAAF incorporates legislative intent when interpreting a statute.[177] Consistent with the Supreme Court's rulings, CAAF begins by reading the plain text of the statute.[178] However, when the plain text is ambiguous, CAAF may

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[165] *Id.* at 538 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

[166] *Id.*

[167] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 794 (2014).

[168] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783 (2018) (Thomas, J., concurring).

[169] *Id.* at 782 (Sotomayor, J., concurring).

[170] *Id.* (citation omitted).

[171] *Id.* (quoting Garcia v. United States, 469 U.S. 70, 76 (1984)); *see* Zuber v. Allen, 396 U.S. 168, 186 (1969) (stating Committee Reports will commonly trump floor debates when the Court must rely on legislative intent to determine the proper interpretation of a statute).

[172] *See Somers*, 138 S. Ct. at 782 (quoting *Garcia*, 469 U.S. at 76).

[173] *See id.* at 777 (majority opinion).

[174] *See id.* at 782; *King v. Burwell*, 576 U.S. 473, 494–95 (2015).

[175] *See King*, 576 U.S. at 94–95; *Somers*, 138 S. Ct. at 782.

[176] *Zuber*, 396 U.S. at 186.

[177] *See* United States v. Martinelli, 62 M.J. 52, 57 (C.A.A.F. 2005).

[178] United States v. Andrews, 77 M.J. 393, 400 (C.A.A.F. 2018).

turn to other means of statutory interpretation.[179] Legislative intent is the next step, and the court begins their search for intent in other sections of the statute *in pari materia* with the section under review.[180] The first outside source CAAF turns to in determining legislative intent is the legislative history.[181] Because the Uniform Code of Military Justice ("UCMJ") consists of rules created by the President to carry out Congress's intent, congressional intent is salient in determining the meaning behind ambiguous language in the UCMJ.[182]

Other canons of Supreme Court statutory construction can govern how the Court reads the plain language of a statute.[183] The rule of continuity states that the Court will assume Congress did not legislate a difference in legal rights and obligations without clear language to the contrary.[184] The Court presumes that Congress intended the same term to hold the same meaning across different statutes.[185] When Congress adopts language for a new statute or re-enacts a statute, Congress includes judicial interpretations of the prior statutory language absent express evidence to the contrary.[186]

D. *Research shows that when victims testify in court it can be a traumatic and harmful experience that revictimizes them.*

Dr. Gail Goodman is credited with beginning the modern scientific movement of studying child victim testimony.[187] Her first large-scale study on the effect of testifying on child sexual assault victims examined child testifiers and a

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[179] *Id.*

[180] United States v. McGuiness, 35 M.J. 149, 153 (C.M.A. 1992).

[181] *See* United States v. Cooper, 58 M.J. 54, 60 (C.A.A.F. 2003).

[182] *See* United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018).

[183] *See generally* LARRY M. EIG, CONG. RESEARCH. SERV., CRS 97–589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014) (explaining the various canons of statutory construction).

[184] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521–22 (1989); Finley v. United States, 490 U.S. 545, 554 (1989).

[185] *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 253–54 (1994); Smith v. United States, 508 U.S. 223, 232–34 (1993).

[186] *See* Molzof v. United States, 502 U.S. 301, 307 (1992); Davis v. United States, 495 U.S. 472, 482 (1990) (holding that, when Congress re-enacts legislation with the same language, Congress is satisfied with the standing judicial interpretation); Pierce v. Underwood, 487 U.S. 552, 566–68 (1988); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987). *But see* Shannon v. United States, 512 U.S. 573, 581 (1994) (holding, as a general rule, when Congress uses terms from another statute enacted, the provisions must be construed as they were understood in the prior statute, but that this rule is only a "presumption of legislative intention" to be used when Congress borrowed the language without significant departure (quoting Carolene Prod. Co. v. United States, 323 U.S. 18, 26 (1944))).

[187] *See* About Gail S. Goodman, UNIV. OF CAL. DAVIS, https://psychology.ucdavis.edu/people/fzgoodmn (last visited Apr. 18, 2019).

matched control group of child victims who had not testified.[188] The victim's primary caretaker completed a Child Behavior Check List three and seven months after the child's initial testimony.[189] The study determined that at seven months, children who testified showed "greater behavioral disturbance than nontestifiers."[190] When prosecution had ended, the victim's harm diminished.[191] The number of times a child was required to take the stand amplified the harm.[192] From this study, Dr. Goodman concluded that testifying in criminal court negatively affects many child sexual assault victims, even after the prosecution ended.[193]

This result confirmed studies by previous researchers in the field.[194] Furthermore, the findings were consistent with children's reactions to other traumatic events, such as hospitalizations, and were especially congruous with the finding that multiple exposures to the traumatic events amplified trauma.[195] In 2012, Dr. Goodman conducted a review of existing literature and concluded that the majority of the research supported the view that requiring children to testify is often harmful, though other factors, such as the amount of abuse and number of times the victim is required to testify, play a large role.[196] Children often cite repeated interviews as one of the worst parts of their experience with the criminal justice system, and studies show repeated interviews result in further trauma over time.[197] Even for adults, testifying is a stressful event.[198] The continuing nature of the crime of child pornography results in a victim's revictimization by the court system when forced to testify, because they are confronted with the knowledge of how many wrongdoers viewed their victimization.[199]

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[188] Gail Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS OF THE SOC'Y FOR RESEARCH IN CHILD DEV., v, v (1992).

[189] *Id.* at 16, 32–34.

[190] *Id.* at v.

[191] *Id.*

[192] *Id.* at 51, 55.

[193] *Id.* at 114.

[194] *Id.*

[195] *Id.*

[196] Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCH. PUB. POL. & L. 392, 393 (2012).

[197] *Id.* at 401.

[198] Goodman et al., *supra* note 188, at 145.

[199] *See* United States v. Barker, 77 M.J. 378, 379 (C.A.A.F. 2018).

E. *CAAF in Barker denied child pornography victims' the right to have prewritten statements submitted through the CPVA via the prosecutor in military courts.*

The court in *United States v. Barker* found the defendant guilty of possession of and viewing child pornography.[200] On appeal, the defendant asserted one error on relevance grounds: the admission of three written victim impact statements from individuals the prosecution claimed were identified in the pornography possessed by the defendant.[201] The Air Force Court of Criminal Appeals had ruled that two of the three statements were admitted in error because victim impact statements entered as evidence under R.C.M. 1001A failed to meet the relevance standard.[202] However, the court found that there was no prejudice from the erroneous admittance of the statements.[203] The defendant appealed the remaining statement from KF, the child in the "Vicky Series" of pornographic videos, to the CAAF.[204] The Vicky series is a widely circulated series of pornographic movies and photographs.[205] The movies and photos depict Vicky's[206] abuse at the hands of her father when she was ten to eleven years old.[207] Her father was later imprisoned but depictions of her abuse continue to proliferate.[208] After considering whether the statements could be admitted under R.C.M. 1001A without "the participation of KF or her advocate," the court held that, without the presence or request of the victim, her counsel, or representative, the statements were admitted in error.[209] The court arrived at this holding despite the first statement which expressed, "I submit the statement to the court for its use in sentencing in *cases* in [sic] which involve my images."[210] The second statement provided by KF stated, "I am making this supplement to my prior Victim Impact Statement to make clear that each additional time that another person downloads and sees the computer images that are now known as the 'Vicky series,' it does me immeasurable additional harm."[211]

The defense based its arguments on R.C.M. 1001A(e)(1), which requires a separate victim impact statement for each defendant, and argued that trial

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[200] United States v. Barker, 76 M.J. 748, 750 (A.F. Ct. Crim. App. 2017).

[201] *Id.* at 751, 756.

[202] *See id.* at 752, 756.

[203] *See id.* at 757.

[204] *See Barker*, 77 M.J. at 378.

[205] United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at *1 (E.D.Va. Nov. 24, 2009).

[206] A pseudonym, the necessity of which has been shown by viewers of her abuse who track Vicky down and contact her years after the original abuse. *E.g.,* United States v. Rowe, Civil No. 1:09-cr-80, 2010 WL 3522257, at *3 (W.D.N.C. Sept. 7, 2010).

[207] *Hicks*, 2009 WL 4110260, at *1.

[208] *Id.*

[209] *See Barker*, 77 M.J. at 381.

[210] *Id.* at 379 (emphasis added).

[211] *Id.*

counsel did not contact the victim or provide her with the opportunity to give a statement as required by R.C.M 1001A(a).[212] Under R.C.M. 1001A(e)(1), a victim wishing to present a statement must provide a copy to the prosecution, defense, and judge.[213] However, a judge has the discretion to waive this requirement for good cause.[214] R.C.M. 1001A(a) lays out the basic right of a victim to be heard:

> A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense. A victim under this rule is not considered a witness for purposes of Article 42(b). Trial counsel shall ensure the victim is aware of the opportunity to exercise that right. If the victim exercises the right to be reasonably heard, the victim shall be called by the court-martial. This right is independent of whether the victim testified during findings or is called to testify under R.C.M. 1001.[215]

The right of the victim to make an unsworn statement mirrors the right of the accused to make an unsworn statement during sentencing.[216] The right of the accused to make a statement is "generally considered unrestricted."[217]

Neither the Air Force Court of Criminal Appeals nor the CAAF contested the "victim" status of KF, the girl in the Vicky Series of child pornography videos.[218] The court acknowledged Supreme Court precedent holding that "[c]hild pornography is a continuing crime: it is 'a permanent record of the depicted child's abuse and the harm to the child is exacerbated by [its] circulation.'"[219] Even a defendant who "passively" receives child pornography contributes to the child's continuing victimization.[220] In *Paroline v. United States*, the Supreme Court recognized the ongoing victimization and traumatization of child victims caused by the continuous circulation and viewing of the records of their abuse.[221] In *Barker*, the court acknowledged that the constant revictimization of children by the continued viewing of their images "is

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[212] *Id.* at 380.

[213] MCM, *supra* note 11, R.C.M. 1001A(e)(1).

[214] *Id.*

[215] *Id.* R.C.M. 1001A(a).

[216] *See* United States v. Rosato, 32 M.J. 93, 96 (C.A.A.F. 1991). At that time, under R.C.M. 1001(c)(2), the accused had the right to make an unsworn statement. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c)(2) (1984) (preserved in MCM *supra* note 11, R.C.M. 1001(c)(2)).

[217] *Rosato*, 32 M.J. at 96 (citing G. Davis, *A Treatise on the Military Law of the United States* 132–33 (3d ed. 1913)).

[218] United States v. Barker, 77 M.J. 378, 381 (C.A.A.F. 2018).

[219] *Id.* (citing Paroline v. United States, 572 U.S. 434, 440 (2014)).

[220] *Id.* (citing United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007)).

[221] *Paroline*, 572 U.S. at 440–41; *see* New York v. Ferber, 458 U.S. 747, 759 (1982); *Goff*, 501 F.3d at 259.

itself settled law."[222] The trauma inflicted on victims of child pornography is "in effect repeated; for [the victim] knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her."[223]

KF, the victim who presented the statement in *Barker* and sued for damages in *Paroline*, wrote in one of her statements about the videos: "It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera."[224] *Paroline* addressed the question of damages owed to victims of child pornography by defendants found guilty of viewing the images or videos.[225] The Supreme Court found that, when a defendant possessed a victim's child pornography and the victim had suffered financial losses due to the films' continuing circulation, courts should order restitution from the defendant in proportion to their causal connection to the victim's losses.[226]

The CAAF concluded that the rights substantiated by R.C.M. 1001A are personal to the victim in each unique case.[227] Thus, the court found that the introduction of statements under this provision is barred without at least the presence or request of the victim, the special victim's counsel, or the victim's representative.[228] The court reasoned that the procedures in R.C.M. 1001A "assume the victim chooses to offer the statement for a particular accused, as they permit only the admission of information on victim impact 'directly relating to or arising from the offense of which the accused has been found guilty.'"[229]

When military courts rule that victim impact statements were admitted in error because the victim did not personally submit the statement to the court, they rarely remand the case for a new sentencing determination. Under military law, the test for determining prejudice is "whether the error substantially influenced the adjudged sentence."[230] The court considers four factors in making this determination: (1) the merits of the government's case; (2) the merits of the defense's case; (3) the materiality of the evidence admitted in error; and (4) the quality of the contested evidence.[231] In *Barker*, the error did not substantially influence the accused's sentence.[232] The accused pleaded guilty in a stipulation of fact.[233] The judge only sentenced the accused to two and a half

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[222] *Barker*, 77 M.J. at 384 (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990)).

[223] *Paroline*, 572 U.S. at 441.

[224] *Id.*; *Barker*, 77 M.J. at 379.

[225] *Paroline*, 572 U.S. at 439.

[226] *Id.* at 458–59.

[227] *Barker*, 77 M.J. at 382.

[228] *Id.* (first citing R.C.M. 1001A(a); then citing R.C.M. 1001A(d)–(e)).

[229] *Id.* (quoting R.C.M. 1001A(b)(2)).

[230] *Id.* at 384 (citing United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)).

[231] *Id.* (citing United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017)).

[232] *Id.*

[233] *Id.* (explaining that "the Government's case was exceptionally strong").

years out of the four year sentence cap on his pretrial agreement.[234] A maximum punishment of twenty years was available if the judge rejected the pretrial agreement.[235] Moreover, the case was tried before a military judge instead of a panel.[236] Judges are presumed to know the law and to not allow errors to affect sentences.[237] The age and horrific nature of the abuse perpetuated upon the victims determined the sentence, not the "tenuously" connected letters.[238] For reasons similar to those in *Barker*, the court found in *United States v. Hamilton* that the trial judge admitting the victim impact statements did not prejudice the substantial rights of the accused.[239] At the time of the writing of this Note, only two out of the eight cases that cite *Barker* and address the alleged error of admission of victim impact statements under R.C.M. 1001A hold that the error prejudiced the substantial rights of the accused.[240]

II. *BARKER'S* FAILURE TO UPHOLD VICTIMS' RIGHTS

Congress intended the 2014 NDAA to replicate civilian protection for victims' rights in the military justice system.[241] CAAF's interpretation of R.C.M. 1001A in *Barker* stripped child pornography victims of their right to be reasonably heard by imposing heavy requirements on their testimony.[242] These requirements are not found in civilian jurisprudence and, under the Supreme

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[234] *Id.*

[235] *Id.*

[236] United States v. Barker, 76 M.J. 748, 757 (A.F. Ct. Crim. App. 2017).

[237] *Barker*, 77 M.J. at 384.

[238] *Id.*

[239] *Hamilton II*, 78 M.J. 335, 343–44 (C.A.A.F. 2019).

[240] *Compare* United States v. Carter, No. ACM 39289, 2018 CCA LEXIS 519, at *15–16 (A.F. Ct. Crim. App. Oct. 26, 2018) (finding error prejudicial because of judge's statement about lesser sentence he would have imposed absent consideration of victim impact statements), *and* United States v. Linton, No. ACM 39229, 2018 CCA LEXIS 492, at *29–30 (A.F. Ct. Crim. App. Oct. 12, 2018) (finding error prejudicial because "the judge did not reference the 'settled law' on the victim impact of child pornography and did not acknowledge the limited use of the victim impact statements"), *with Hamilton II*, 78 M.J. at 337, United States v. Cook, No. ACM 39367, 2019 CCA LEXIS 91, at *1–2 (A.F. Ct. Crim. App. Mar. 4, 2019), United States v. Zoril, No. 201800009, 2018 CCA LEXIS 503, at *1 (N-M. Ct. Crim. App. Oct. 22, 2018), United States v. Anderson, No. ACM 39353, 2018 CCA LEXIS 465, at *1–2 (A.F. Ct. Crim. App. Sep. 28, 2018), United States v. Machen, No. ACM 39295, 2018 CCA LEXIS 419, at *2 (A.F. Ct. Crim. App. Aug. 29, 2018), *and* United States v. Rollins, No. 201700039, 2018 CCA LEXIS 372, at *2 (N-M. Ct. Crim. App. July 30, 2018) (all finding no error for reasons similar to those in *Barker*).

[241] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (codified as amended at 10 U.S.C. § 806b, art. 6b (2019)); *see* Stabenow, *supra* note 1, at 161.

[242] United States v. Hanlon, No. 2:14-cr-18-FtM-29DNF, 2015 U.S. Dist. LEXIS 7833, at *8–9 (M.D. Fla. Jan. 23, 2015), *appeal dismissed*, 694 F. App'x 758, 759 (11th Cir. 2017) (noting that over 530 federal cases alone have resulted in restitution orders for KF).

Court's rules of statutory interpretation, they should not have been imposed.[243] The current civilian system, in which victims submit their statements through the CPVA, protects the victims and guarantees their rights under the law.[244] While the ongoing harm to victims of child pornography is known in law, the admission of victim impact statements both allows the victim to be heard and individualizes the victim to the sentencing authority.[245] "[A victim impact statement] is designed to show . . . *each* victim's 'uniqueness as an individual human being.'"[246]

A. *Military law on victims' rights should reflect civilian law as Congress intended when passing the 2014 NDAA.*

Military law should reflect civilian law with respect to the ability of child pornography victims to deliver written victim impact statements at sentencing. Written victim impact statements comply with the law and the rights of defendants.[247] Under current jurisprudence, it is appropriate to consider legislative intent.[248] The text of 10 U.S.C. § 806b(a)(4) is very brief and does not lay out all the ways a victim may be reasonably heard.[249] A broad interpretation of "reasonably heard" is consistent with the legislature's stated intent.[250] From a public policy perspective, the infliction of additional trauma on victims who wish to exercise their rights does not serve justice.[251]

1. The CVRA permitted victims to make their statements anonymously in writing.

Civilian law already allows the admission of written victim impact statements during sentencing.[252] The CVRA imposes an affirmative obligation on courts to guarantee the rights of victims, including "[t]he right to be reasonably heard at any public proceeding in the district court involving . . . sentencing."[253] The adoption of language from one statute to another, as occurred here, includes the

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[243] *See supra* notes 99, 108–10, 154–75 and accompanying text.

[244] *See supra* notes 99, 108–18 and accompanying text.

[245] *See supra* notes 23–24, 44 and accompanying text.

[246] Payne v. Tennessee, 501 U.S. 808, 823 (1991).

[247] 10 U.S.C. § 806b (2020).

[248] *See* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, *passim* (2018).

[249] *See* 10 U.S.C. § 806b (2019).

[250] *See supra* note 99 and accompanying text.

[251] *See supra* notes 45, 192–99 and accompanying text.

[252] *See* United States v. Clark, 335 F. App'x. 181, 184 (3d Cir. 2009).

[253] 18 U.S.C. § 3771(b) (2016); United States v. Turner, 367 F. Supp. 2d 319, 322 (E.D.N.Y. 2005); *see* 18 U.S.C.S. Appx. § 6A1.5 (stating that courts must grant victims their rights under 18 U.S.C. § 3771).

judicial interpretations of that language unless Congress states otherwise.[254] Because courts had already ruled prior to the passage of 10 U.S.C. § 806b that victims could submit prewritten statements through CPVA, Congress's adoption of language from the CVRA signals its satisfaction with the existing judicial interpretation.[255] This presumption, together with the rule of continuity, indicates that when Congress passed 18 U.S.C. § 3771, it meant to replicate existing victims' rights under civilian law.

2. Congress intended the 2014 NDAA to mirror the rights granted by the CVRA.

Congress clearly intended the 2014 NDAA to grant victims in military court cases the same rights as victims in civilian court cases. The language of R.C.M. 1001A is nondiscretionary: "If the victim exercises the right to be reasonably heard, the victim *shall* be called by the court-martial."[256] Senator Kyl, a primary sponsor of 18 U.S.C. § 3771, explained that a victim's reasonable right to be heard includes alternative methods of communication.[257] According to Senator Kyl, the court should only interpret the statute to require less than an in-court statement if the victim chooses to use a different medium of communication.[258] By calling Section 1701 the "Extension of crime victims' rights to victims of offenses under the Uniform Code of Military Justice," Congress made it clear they wanted the 2014 NDAA to extend the protections available to victims in civilian court cases to victims in military court cases.[259] The Air Force Court of Criminal Appeals recognized this in *United States v. Hamilton*.[260] The rights of victims under Article 6b of the UCMJ "nearly mirror[] the rights afforded to victims in civilian criminal trials under the CVRA."[261] The Senate Report laid out the Senate's intent that victims possess the power to choose what form their

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[254] *See* Molzof v. United States, 502 U.S. 301, 307 (1992); Davis v. United States, 495 U.S. 472, 482 (1990) ("Congress' reenactment of the statute . . . using the same language, indicates its apparent satisfaction with the prevailing interpretation of the statute."); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521–22 (1989); Finley v. United States, 490 U.S. 545, 554 (1989); Pierce v. Underwood, 487 U.S. 552, 566–68 (1988).

[255] *See Clark*, 335 F. App'x. at 183–84 (upholding the admission of a victim impact statement in 2009); *supra* notes 163–64 and accompanying text.

[256] MCM *supra* note 11, R.C.M. 1001A(a) (emphasis added).

[257] United States v. Burkholder, 590 F.3d 1071, 1075 (9th Cir. 2010); 150 Cong. Rec. S10910, S10911 (2004) (statement of Sen. Kyl regarding CVRA of 2004).

[258] *Id.*

[259] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013) (codified as amended at 10 U.S.C. § 806b, art. 6b (2019)).

[260] *Hamilton I*, 77 M.J. 579, 582–83 (A.F. Ct. Crim. App. 2017), *aff'd* 78 M.J. 335 (C.A.A.F. 2019).

[261] *Id.*

statement took.[262] The Supreme Court considers this source highly reliable in determining legislative intent because it reflects the collective understanding of the legislature on the meaning of the language in the statute.[263] In light of the concerns over how victims were treated that surrounded the passage of the 2014 NDAA, the congressional intent was that the protections for victims in civilian law be adapted by the military.

If Congress wished for military law to differ in this situation, they could have signaled that as they did with the right of victims to speak at a plea hearing.[264] Congress's decision to not change the language to specify a different interpretation of the victim's right to make a statement means it approved of the civilian judicial interpretation of that language.[265] While 18 U.S.C. § 3771 does include language that permits the government to assert the victim's rights and 10 U.S.C. § 806b does not, this should not mean Congress intended to change the practice of prosecutors requesting statements from the CPVA and attaching them to sentencing reports.[266] An explicit statement to the contrary is required to overturn the presumption that Congress does not mean to create discontinuities in legal rights and obligations, such as the right of a victim to submit a statement through the prosecutor as part of their right to be reasonably heard.[267]

While the President's interpretation of Article 6b, R.C.M. 1001A allows the victim to make an unsworn statement when the victim exercises that right, a victim must nevertheless be called by the court-martial to testify.[268] Under R.C.M. 1001A it is necessary "that the *victim* (not just the prosecution) wishes the court to consider the statement."[269] In *Barker*, CAAF found the facts did not show participation by the victim or the victim's advocate.[270] However, victims are provided with a choice.[271] The CPVA program allows victims to choose if they wish to be notified when cases involving their images are the basis for federal investigations or court proceedings.[272] The victim impact statement is clear when it asks victims if they "wish to provide a Victim Impact Statement . . . that may be used in federal . . . sentencing[] . . . proceedings

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[262] Kenna v. United States Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) (citing S. Rep. No. 108-191, at 38 (2003)).

[263] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring) (discussing committee reports).

[264] Stabenow, *supra* note 1, at 161.

[265] *See supra* note 254–255 and accompanying text.

[266] 18 U.S.C. § 3771(d)(1) (2015); 10 U.S.C. § 806b (2019).

[267] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521–22 (1989); Finley v. United States, 490 U.S. 545, 554 (1989).

[268] MCM *supra* note 11, R.C.M. 1001A(a).

[269] United States v. Barker, 76 M.J. 748, 754 (A.F. Ct. Crim. App. 2017).

[270] United States v. Barker, 77 M.J. 377, 381 (C.A.A.F. 2018).

[271] NOTIFICATION PREFERENCE, *supra* note 9.

[272] *Id.*

where the defendant's offenses involved images of their victimization."[273] The box clarifies that these statements will be kept for use in future cases involving the victim's images.[274] KF, the victim in question in *Barker*, explicitly stated she wished her statements to be used in *all cases* involving the videos of her abuse.[275] Her language is repeated in the most recent statement she submitted to the court.[276] The court interpreted the other rights of 10 U.S.C. § 806b as requirements for the victim to be reasonably heard.[277] However, each of the rights in 10 U.S.C. § 806b is listed as independent right of the victim, not requirements the victim must meet.[278] The court assumed that the victim did not provide input, because there was no evidence KF was aware of trial and trial counsel did not contact her.[279] However, this assumption proved false because KF chose not to be contacted and chose to make her statements available for all cases involving her images.[280]

B. *Requiring victims to testify in court or submit a new victim impact statement for each trial violates victims' right to be reasonably heard while not protecting the substantial rights of the accused.*

Modern technology results in an inability to stop videos or images of a child victim proliferating once they are released. Testifying in court can harm child victims and increasing the number of times they must testify amplifies the harm.[281] While requiring children and former child victims to testify might be necessary when they are often the only witness to their abuse, there is no such necessity argument regarding victim impact statements.[282] The Supreme Court has recognized the lack of harm to the rights of defendants in cases where victim impact testimony is admitted.[283] In cases following *Barker* where victim impact statements were improperly admitted, no court has found under the four-part test for prejudice that the admittance of written victim impact statements prejudiced the substantial rights of the accused.[284]

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[273] *Id.*

[274] *Id.*

[275] *Barker*, 77 M.J. at 379 (emphasis added).

[276] *Id.*

[277] *Id.* at 383 ("The problem, of course, is that this approach ignores the requirement of Article 6b, UCMJ, that victims be contacted and have the choice to participate and be consulted in cases where they are victims.").

[278] 10 U.S.C. § 806b (2019).

[279] *Barker*, 77 M.J. at 383.

[280] *Id.* at 379, 383.

[281] Goodman et al., *supra* note 188, at 50–51, 55.

[282] *Id.* at 2.

[283] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[284] *See supra* note 240 and accompanying text.

1. Requiring the presence of victims in the court room and a new statement for each case involving images or videos of their abuse does not meet the requirement that victims have a reasonable right to be heard.

When clear consent is given by the victims for the use of their impact statements, it would be a denial of their rights for military courts to not allow their prewritten statements at sentencing.[285] Analysts at the National Center for Missing & Exploited Children (NCMEC) estimated that they reviewed twenty-six million sexual abuse images and videos in 2015 alone, and reported that law enforcement had identified over 10,500 victims since 2002.[286] The Vicky series at issue in *Barker* is one of the most widely spread series of child pornography with over 530 federal convictions that resulted in restitution orders to KF.[287] Requiring KF to appear in person in over 530 cases does not fulfill her right "to be reasonably heard" ensured by the R.C.M. 1001A.[288] In one of her victim impact statements, KF describes why requiring notification of the victim when they declined to be notified would be equally burdensome.[289] "We now have in our house boxes full of victim notifications from cases all around the country involving pornographic images of me. Practically every time I've went to get the mail, there have been two or three of these notifications. They are constant reminders of the horrors of my childhood."[290] Similarly, the twelve-year-old victim in the "Blue Pillow" series has received more than 7,500 notifications of criminal investigations into the images of her abuse.[291] It is understandable in light of such a barrage of revictimizing notifications that some victims who submit victim impact statements choose to not be notified every time their statement is used.

The right to be notified is just that—a right—not a requirement imposed upon the victim before they can exercise their right to be reasonably heard.[292] Studies and clinicians agree that victims of child pornography suffer negative impacts from having to appear in court proceedings.[293] Even for adults, testifying in

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[285] NOTIFICATION PREFERENCE, *supra* note 9.

[286] *The Scourge of Child Pornography: Working to Stop the Sexual Exploitation of Children*, FED. BUREAU OF INVESTIGATION (Apr. 25, 2017), https://www.fbi.gov/news/stories/the-scourge-of-child-pornography.

[287] United States v. Barker, 77 M.J. 377, 379–81 (C.A.A.F. 2018); United States v. Hanlon, No. 2:14-cr-18-FtM-29DNF, 2015 U.S. Dist. LEXIS 7833, at *8–9 (M.D. Fla. Jan. 23, 2015), *appeal dismissed*, 694 F. App'x 758, 759 (11th Cir. 2017).

[288] MCM *supra* note 11, R.C.M. 1001A(a).

[289] United States v. Kennedy, 643 F.3d 1251, 1255 (9th Cir. 2011).

[290] *Id.*

[291] United States v. Linton, No. ACM 39229, 2018 CCA LEXIS 492, at *17 (A.F. Ct. Crim. App. Oct. 12, 2018).

[292] 10 U.S.C. § 806b (2019).

[293] Goodman et al., *supra* note 188, at 50–51, 55; Richard H. Pantell, *The Child Witness in the Courtroom*, 139 PEDIATRICS 1, 4 (2017) (citing Dr. Goodman's previous three works).

court is a stressor.[294] Dr. Goodman justifies the trauma as necessary in our adversary system because her study revealed that, given enough time, children can bounce back.[295] However, in child pornography cases, the testimony of the victim is rarely necessary to secure a conviction.[296] In Dr. Goodman's study children showed signs of recovering from their trauma once prosecution ended.[297] This lack of necessity combined with the number of times victims can be asked to testify nullifies the doctor's reasoning for why judges should not hesitate to call child witnesses.[298] Testifying multiple times negatively affects the mental health of child victims.[299] As a settled matter of law, the victim's knowledge of individuals watching their abuse compounds the harm from the original abuse.[300] Thus, a victim who chooses not to be notified about cases but submits a victim impact statement might still want that statement to be used. The Supreme Court acknowledged that "everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute[s] to [the victim's] ongoing harm."[301] The court system should not be added to this list.

2. The courts will not substantially impair the rights of the accused by admitting written victim impact statements.

Admitting hash value certified victim impact statements does not violate the rights of the accused.[302] In *Barker*, the court recognized that the theme of letters submitted on behalf of the victim—the "constant revictimization"—was settled law.[303] Rarely do the letters contain facts unknown to the law. If a letter were to include additional facts, the judge could strike the statement or request a redacted version, in line with the procedure followed for in-person victim testimony.[304] For example, in *United States v. Linton*, the victim's letter contained specific sentencing recommendations.[305] Judges are far more likely to rest their sentencing decisions on the age of the victims and the horrifying

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[294] Goodman et al., *supra* note 188, at 145.

[295] *Id.* at 145.

[296] *See id.* at 157.

[297] *Id.* at 145.

[298] *Id.*

[299] *Id.* at 55, 148.

[300] Paroline v. United States, 572 U.S. 434, 441 (2014).

[301] *Id.* at 442 (quoting United States v. Paroline, 672 F. Supp. 2d 781, 792 (E.D. Tex. 2009)).

[302] *See supra* note 22 and accompanying text.

[303] United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018).

[304] United States v. Linton, No. ACM 39229, 2018 CCA LEXIS 492, at *19–20 (A.F. Ct. Crim. App. Oct. 12, 2018).

[305] *Id.* at *15.

nature of the abuse found in child pornography than letters.[306] Harm is possibly more likely in member trials.[307] Regardless, nothing in the written statements differs from currently permissible in-person testimony.[308]

In only two cases since *Barker* have military courts found prejudicial error in the admittance of victim impact statements.[309] In the first case, the judge explicitly stated he would have given a lower sentence absent the victim impact statements which denied the higher court a chance to analyze the four factors from *Barker*.[310] In the second case, the court found the redaction of any identifying information made it impossible to determine relevance.[311] No case using the four-part test from *Barker* has found the admittance of victim impact statements to have substantially prejudiced the rights of the accused.[312] The banning of written victim impact statements under *Barker* is, therefore, pointless defiance of legislative intent.[313]

CONCLUSION

The military justice system should not participate in the continued victimization of child pornography victims by requiring them to personally appear in court and give a unique victim impact statement. The similarity of the offense does not require some new statement from a victim each time the images or videos of their abuse are viewed. The plain language of the statute requires victims be granted the right to be heard. When courts apply legislative intent to examine the meaning of this right, it becomes clear that being heard in person in

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[306] *See* United States v. Barker, 76 M.J. 748, 753, 757 (A.F. Ct. Crim. App. 2017) (finding the defendant was not prejudiced by the admission of the statements because the judge properly considered the one correctly admitted statement and the harms described in the statements were recognized in law); *Hamilton II*, 78 M.J. 335, 337 (C.A.A.F. 2019); United States v. Cook, No. ACM 39367, 2019 CCA LEXIS 91, at *11 (A.F. Ct. Crim. App. Mar. 4, 2019); United States v. Zoril, No. 201800009, 2018 CCA LEXIS 503, at *6 (N-M. Ct. Crim. App. Oct. 22, 2018); United States v. Anderson, No. ACM 39353, 2018 CCA LEXIS 465, at *10–11 (A.F. Ct. Crim. App. Sep. 28, 2018); United States v. Machen, No. ACM 39295, 2018 CCA LEXIS 419, at *12–13 (A.F. Ct. Crim. App. Aug. 29, 2018); United States v. Rollins, No. 201700039, 2018 CCA LEXIS 372, at *2 (N-M. Ct. Crim. App. July 30, 2018) (all finding no error for reasons similar to those in *Barker*).

[307] *Barker*, 77 M.J. at 382.

[308] MCM, *supra* note 11, R.C.M. 1001A(b)(2) ("'[V]ictim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense").

[309] *See supra* note 22 and accompanying text.

[310] United States v. Carter, No. ACM 39289, 2018 CCA LEXIS 519, at *15 (A.F. Ct. Crim. App. Oct. 26, 2018).

[311] United States v. Linton, No. ACM 39229, 2018 CCA LEXIS 492, at *20 (A.F. Ct. Crim. App. Oct. 12, 2018) (failing to clarify if hash values had been used to identify victims).

[312] *See supra* note 22 and accompanying text.

[313] United States v. Parr, No. ACM 38878, 2017 CCA LEXIS 86, at *7 (A.F. Ct. Crim. App. Feb. 7, 2017).

court was a right conferred by Congress to the victim. Such a conferral was meant to empower the victim, not silence their voice. Congress' intent must be honored in courts, both civilian and martial. A victim's right to be heard should not depend in this case on whether their abuser serves in the United States Military.