

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	Misc Dkt. No. 2013-05
<i>Respondent,</i>)	
)	
&)	
)	
Airman First Class (E-3))	
NICHOLAS E. DANIELS, USAF,)	
)	REPLY TO UNITED STATES
<i>Real Party In Interest,</i>)	ANSWER TO ORDER
)	TO SHOW CAUSE
v.)	
)	
Airman First Class (E-3))	
██████████,)	Panel No. 2
<i>Petitioner.</i>)	
)	
)	

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS**

On 22 February 2013, the United States submitted an answer to this court’s order to show cause. In that answer they agreed that this Court should issue a writ of mandamus and order the trial judge to allow ██████████ the opportunity to be heard through counsel in hearings pursuant to Mil. R. Evid. 412 and 513. We file this reply to further clarify issues raised in the Government’s brief.

I.

**THIS COURT MAY DECIDE THE ISSUE OF A1C L.R.M.’S
RIGHT TO BE HEARD THROUGH COUNSEL ON
NARROW GROUNDS**

If this Court determines that ██████████ has the right to be heard through counsel under Mil. R. Evid. 412 and Mil. R. Evid. 513 it need analyze the issue no further. However, if this Court determines it should consider and rule upon the issue of the applicability of the Crime Victims’ Rights Act (herein “CVRA”) and the United States Constitution to victims in courts-martial, then

it should conclude that [REDACTED]. has standing to assert her right to privacy and dignity as guaranteed to her under the CVRA and her right to informational privacy stemming from the United States Constitution. Three potential violations of due process are at play in this case. The first being the deprivation of rights as articulated in Mil.R. Evid. 412 and 513, insofar as the government has created a process based on statute and regulation it must conduct that process fairly. The second violation stems from the requirement that when the government seeks to invade an individual's fundamental right to informational privacy, it must accord the individual due process by weighing that right against competing interests. The third deprivation is of the due process required when the government invades rights created by statute, namely the CVRA.

II.

THE CONSTITUTIONAL RIGHT TO PRIVACY GIVES A1C L.R.M. THE RIGHT TO DUE PROCESS OF LAW WHICH MEANS A HEARING THAT BALANCES THE RIGHT TO BE FREE FROM DISCLOSURE OF INTIMATE PERSONAL DETAILS AGAINST OTHER INTERESTS

The Respondent has taken the position that, for L [REDACTED], no constitutional right to privacy exists in this case. We respectfully disagree. While acknowledging that the right to privacy regarding intimate personal matters has been recognized by the Supreme Court, the Respondent seemingly asserts that a victim does not have a constitutionally recognizable right to privacy regarding the matters at issue. (Resp. Br. at 18.) That position is simply not tenable based on binding precedent. *See e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). Even before the *Casey* decision, the Court in *Whalen* and *Nixon*, while upholding the constitutionality of the statutes at issue in those cases, noted that an element of constitutionally protected privacy rights includes, “the individual interest in avoiding disclosure of personal matters...” *U.S. v. Nixon*, 433 U.S. 425, 457 (1977) (quoting, *Whalen v. Roe*, 429 U.S. 589, 599-

600 (1977)). Assessing an individual's legitimate expectation of privacy is part of the constitutional analysis that must occur before information is disclosed to the public by government action. "When information is inherently private, it is entitled to protection." *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 812 F.2d 105, 116 (3d Cir.1987); *See also, York v. Story*, 324 F.2d 450, 455 (9th Cir.1963)("We cannot conceive of a more basic subject of privacy than the naked body.") *cert. denied*, 376 U.S. 939 (1964).

The privacy interests that are protected from disclosure by the Constitution include the highly personal and "intimate aspects of human affairs" that are at issue in the present case. *See, Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996)(quoting, *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir.) *cert. denied*, 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988)). Private information is protected under the U.S. Constitution when it is of "[a] particular class of information [that] well-established social norms recognize the need to maximize individual control over its dissemination and used to prevent unjustified embarrassment or indignity." *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 165 P.3d 488 (2007) (Ultimately holding that names and salaries of public employees when balanced against the public's need for information about government figures should be releasable). Intimate details of a person's sexual history fall squarely within that protected sphere. It is clear that A1C [REDACTED] has a right to privacy and dignity and that her status as a victim does not eviscerate that right. It is foreseeable that a compelling interest might override the right to privacy in a given case; however that does not mean that the right does not exist because of her status as a victim. It appears that in asserting that A1C [REDACTED] right to privacy and dignity are not grounded in the Constitution, the Respondent has simply jumped to

the conclusion that an accused's right to a fair trial would outweigh a victim's right to privacy. Such a conclusion might ultimately be true in a given case, but the fact that one person's right might be more compelling than another in a given circumstance does not mean that the other's right simply ceases to exist. (Resp. Br. at 16-20).

Both the right to a fair trial and the right to privacy are grounded in the Constitution. By reporting a sexual assault, [REDACTED], has not waived her right to privacy and opened up her intimate sexual history to public scrutiny--it is the governmental action in prosecuting the accused that might compel this information, thereby putting her right into jeopardy. Because there is a constitutionally protected right to privacy that includes the avoidance of disclosure of personal matters, [REDACTED] is entitled to due process through limited non-party standing to be heard prior to government action that deprives her of that right. *See, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

III.

THE CVRA APPLIES TO VICTIMS OF CRIME IN COURTS-MARTIAL AS IT IS A STATUTE OF GENERAL APPLICABILITY INTENDED TO APPLY TO ALL VICTIMS OF FEDERAL CRIMES THAT IS CONSISTENT WITH MILITARY LAW AS UNDERSTOOD BY *U.S. V. DOWTY*, *U.S. V. MCELHANEY* & *U.S. V. SPANN*

The CVRA protects the rights of all victims of federal offenses, including those within the military justice system. The fact that [REDACTED]'s assailant was a military member, does not--nor should it--deprive her of rights as a United States citizen. "Congress has plenary control over *rights*, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies" (emphasis added). *United States v. Dowty*, 48 M.J. 102,

106 (C.A.A.F. 1998)(quoting *Weiss v. United States*, 510 U.S. 163 (1994). The paradoxical result advocated by the Respondent is that a United States citizen victimized in the United States would have fewer rights if victimized by a military member. Victims who are sexually assaulted by military members would suffer the additional misfortune of being informed that their congressionally mandated federal rights to be treated with “dignity” and “privacy” do not apply. Victims, military or civilian, hauled into military courts should not have to suffer the further indignity of being told they are the only victims of a federal offense in the United States without the right of privacy or dignity.

While military members’ rights are at times different than the rights of civilians, absent an explicit and clear military necessity, military members are afforded the same statutory and constitutional rights. *Dowty*, 48 M.J. at 107 (“in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members.”). Since both Congress and the President took action in response to *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), there is nothing in the Manual for Court-Martial that is contrary or inconsistent with the recognition of victim rights as described in the CVRA. As the Court of Appeals for the Armed Forces has recognized, absent clear inconsistency or contrary purpose, there is a “general direction to apply civilian procedures.” *Dowty*, 48 M.J. at 107.

Not only are there no contrary provisions or inconsistent purposes remaining in the Manual for Court-Martial, the existing provisions are entirely consistent with the recognition and protection of victim’s rights. *See generally*, Mil. R. Evid. 303; Mil. R. Evid. 502; Mil. R. Evid. 503; Mil. R. Evid. 513; Mil. R. Evid. 514, discussion of R.C.M. 806 (recognizing prohibitions on degrading

questions, various privileges and accordant rights therewith, and the ability to close the courtroom to avoid “embarrassment or extreme nervousness.”) Further, the now defunct version of Mil. R. Evid. 615 that in 1999 appeared contrary to federally created victim’s rights was repealed and superseded both by an amendment to the Military Rules of Evidence and by subsequent passage of the CVRA. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2004). The purpose and language of the CVRA is wholly aligned and consistent with current military law. In applying the CVRA to victims in courts-martial, this Court would not be “overlaying a generally applicable statute specifically onto the military system” with “uncritical application,” which has been a concern of military appellate courts. *See, United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000). Instead, this Court would be applying the law as written by Congress that fits logically within the military justice system.

The rights provided by the CVRA are not alien to those currently provided to victims within the Department of Defense. For eight years, the Department of Defense has expressly instructed, *inter alia*, that a victim has the right to “[b]e treated with fairness and respect for the victim's dignity and privacy.” Department of Defense Directive 1030.01, Page 2. That directive and its accompanying instruction, Department of Defense Instruction 1030.2, implemented 42 U.S.C. § 10606, the predecessor to the CVRA. Virtually all of the rights provided by the CVRA are included in this DoD Directive and Instruction and were further implemented in Air Force Instruction 51-201 Chapter Seven, which states unequivocally that a victim has the right to “[b]e treated with fairness and respect for the victim's dignity and privacy.” Air Force Instruction 51-201, *Administration of Military Justice*, 21 December 2007, updated by Air Force Guidance

Memorandum 25 October 2012. In considering whether a general statute has modified the UCMJ or applies to courts-martial, *Dowty* considered as factors whether the statute interfered with a fundamental principle of military law and whether or not the military had implemented any of the rights contained in the legislation. 48 M.J. at 110-11. The Department of Defense has for eight years instructed its trial counsel and law enforcement officials that a victim's rights to privacy and dignity are paramount. A victim's rights to privacy and dignity have themselves become a fundamental principle, having been included in instructions and directives for eight years with little reverberation in the greater body of military law. While the current Department of Defense and Air Force Instructions reference the implementation of 42 U.S.C. § 10606, that statute was superceded in 2004 by the CVRA. Hence, current DoD Directives and Instructions, Air Force Instructions, and Military Rules of Evidence should be read to incorporate the CVRA. Congress clearly intended to incorporate the rights mentioned in 42 U.S.C. § 10606 into the CVRA and simply "moved" those rights from one volume and section to another in order to aid practitioners in locating those rights. H.R. REP. 108-711, pt. A, at pg 2. ("Crime victims have a listing of rights in Title 42 of the United States Code. However, because those rights are not enumerated in the criminal code, most practitioners do not even know these rights exist.") The clerical laxity in not updating the departmental instructions with the title of the correct and then operative legislation, the CVRA, is of no right-depriving import.

The passage of the CVRA marked a turning point for all victims in the United States. As the Respondent's brief makes clear, Congress's intent when passing the CVRA was sweeping. (Resp. Br. at 17). "Victims' advocates received nearly universal congressional support for a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (daily ed. 22

April 2004) (statement of Sen. Feinstein).”(Resp. Br. at 17). The broad, encompassing, “plain meaning” of the words speaks volumes—“in *any court* proceeding involving an offense against a crime victim.” 18 U.S.C. § 3771. Crime victim was defined to include any person directly or even proximately harmed as a result of any “federal offense.”¹ *Id.* Furthermore, in addition to the mandate for courts to apply these rights, all “departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime” are held to task as well. *Id.*

The conclusion that the CVRA provides rights to U.S. citizens that can be exercised in military court is consistent with current law and controlling precedent. *See Dowty*, 48 M.J. at 102. In *Dowty*, the Court was forced to address the applicability of the Right to Financial Privacy, 12 U.S.C. §3401-3422 (RFPA). *Dowty*, 48 M.J. at 102. The RFPA was created in response to a Supreme Court decision denying the Fourth Amendment protection to certain types of searches and seizure of bank records. *Id.* at 106. In response, Congress created the RFPA which provided privacy rights to all U.S. citizens with regard to their banking records. *Id.* Just like the RFPA the CVRA has protections and rights that exist separate and apart from a courtroom. Indeed of the eight right creating provisions of the CVRA, six have clear application outside of courtroom. The CVRA is not simply a procedural evidentiary statute; rather, it is the codification of broad rights for all victims of federal offenses.

In *Dowty*, the Court was cautious in holding that the RFPA was applicable because the result would be directly inconsistent with a UCMJ provision. *Dowty*, 48 M.J. at 105 (noting conflict between RFPA and UCMJ Art. 43). In overcoming this inconsistency, the Court first noted that the RFPA created actionable rights for all service members. *Id.* at 108. Similar to the language

¹ All military offenses under the UCMJ are federal offenses. *See*, 10 U.S.C. § 877 et. al.

of the CVRA, the court in *Dowty* relied on the language from the act extolling its application by “any agency or department of the United States.” *Id.* at 108; 18 U.S.C. § 3771. The Court further noted that although Congress could have excluded the Department of Defense, the Act “provides **no exemption** for the Department of Defense in general or **military disciplinary matters** in particular”² (emphasis added). 48 M.J. at 109. Likewise, there is no military disciplinary exemption in the CVRA. 18 U.S.C. § 3771. After finding the RFPFA created rights for service members, the Court had to determine if the Act’s provisions regarding the statute of limitations would apply in military courts, affecting UCMJ Art. 43. *Dowty*, 48 M.J. at 110-11. The RFPFA mandated that the tolling provision apply to “any applicable statute of limitations” accordingly that Court found with “no reservations” that the RFPFA was applicable to the military’s statute of limitations. *Id.* at 110. The CVRA uses similar sweeping language. 18 U.S.C. § 3771.

In *Dowty*, the Court of Appeals for the Armed Forces explicitly rejected the argument that Congress was required to use any specific language when passing legislation that had the effect of modifying prior legislation. 48 M.J. at 109 (“Congress is not required to use specific language”). Further, the court rejected an argument that an intervening amendment to UCMJ Art. 43 had any effect on their analysis. *Id.* at 110. After the passage of the RFPFA, Congress amended UCMJ Art. 43--extending the statute of limitations from 3 to 5 years and modifying some of the exceptions. *Id.* Congress did not in those amendments acknowledge, embrace, reference, or codify the tolling exception from the RFPFA. *Id.* Appellant argued that Congress’s inaction or silence with regard to the RFPFA’s application to UCMJ Art. 43 suggested their intent. *Id.* The court rejected this “repeal by implication” argument. *Id.* at 110. In finding the RFPFA

² In applying a rule of evidence, the presumption that federal statutes and regulations apply to trial by court-martial is even stronger. *See*, Mil. R. Evid. 1102 (Requiring the President to affirmatively opt out of the existent Federal Rules of Evidence before they are automatically applied to Military Rules of Evidence).

applicable, significant to the court was the absurdity of ruling otherwise—that active duty military members would have recognizable privacy rights in civilian courts, but military courts would be forbidden from enforcing the corollary response to the exercise of those rights. *Id.* at 111. No such absurdity was tolerated in *Dowty*, nor should it be in the present case.

Resolving the applicability of the CVRA to military courts is a simpler issue than the application of the RFPA in *Dowty*, 48 M.J. at 106. Unlike *Dowty*, where the Court was cautious because of the direct inconsistency between the RFPA and the UCMJ, there is no need for such caution here. The CVRA is consistent with all existing provisions of military law.

Both *McElhaney* and *Spann* were mentioned in the Respondent’s Brief. (Resp. Br. at 20-23). *Spann*, 51 M.J. at 89; *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). In *McElhaney*, the court addressed an issue similar to *Dowty*, namely, whether to enforce a federal law that was inconsistent with existing military law. 54 M.J. at 120. Unlike in *Dowty*, *McElhaney* did not deal with the creation of broad encompassing federal rights. *McElhaney*, 54 M.J. at 120; *Dowty*, 48 M.J. at 106. Instead, *McElhaney*, addressed the narrower issue of the Congressional update to federal child abuse laws. 54 M.J. at 120. Congress extended the statute of limitations for child abuse cases. *Id.* The military already had crimes for child abuse victims and already had a statute of limitations. UCMJ Art. 128; Art. 134. The court noted, first, that Congress’s language in the new statute seemed to limit the application to federal district court—as opposed to the language of the CVRA “in *any court* proceeding involving an offense against a crime victim.” 54 M.J. at 125-126; Victims of Child Abuse Act, 18 U.S.C. § 3283; Crime Victims’ Rights Act § 3771. Second, the court noted that the law appeared to only apply to crimes “prosecuted by the

Department of Justice” as opposed to the language of the RFPA and CVRA “any agency or department of the United States.” *McElhaney*, 54 M.J. at 125-6; *Dowty*, 48 M.J. at 106. Not surprisingly, the court ultimately held that the new contrary and inconsistent statute of limitations did not repeal *sub silentio* the existing UCMJ Art. 43. *McElhaney*, 54 M.J. at 120. *McElhaney* and *Dowty* when read together, reveal only what *Dowty* actually stated: absent clear inconsistency or contrary purposes, there is a “general direction to apply civilian procedures,” and “in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members.” *Dowty*, 48 M.J. at 106-7.

The decision in *Spann* now serves as a historical marker and turning point for victim’s rights in the military justice system. *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999). In *Spann*, the Court addressed whether the Victim’s Rights and Restitution Act, 42 U.S.C. § 10606 repealed by implication the then existing Mil. R. Evid. 615. 51 M.J. 89. At the time of *Spann*, the military’s existing evidentiary rule of sequestering witnesses was entirely inconsistent with the rights putatively created by the new law. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). In 1999, there were only three existing exceptions to the general rule of sequestration, (1) the accused, (2) a representative of the United States designated by trial counsel, and (3) a person whose presence is shown by a party to be essential to the presentation of the party’s case. *Spann*, 51 M.J. at 90. In addition to the inconsistency, it was unclear if the Victim’s Rights and Restitution Act actually created any rights. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997). While Congress had previously passed the Victim’s Rights and Restitution Act to create rights for victims, it was dubious at the time, even in federal courts, that any actionable rights were created. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997)(holding that victims had

no appellate standing because the act did not create legally recognizable rights). The court in *Spann* was “primar[ily] concern[ed with] the lack of clarity lack of 42 U.S.C. § 10606 in federal civilian trials.” *Spann*, 51 M.J. at 92. It was the ambiguities of the language, legislative history and judicial interpretation that kept the court from applying the statute. *Id.* Faced with an ambiguous provision that was inconsistent with military law and not apparently creating any federally recognizable rights, the Court, for good reason, found that Mil. R. Evid. 615 was not “repealed by implication” by 42 U.S.C. § 10606. This contrasts with the position the court took in *Dowty*, where the clarity of the language, argued in favor of applying the RFPA’s tolling provision. *Id.* at 109 (citing *Dowty*, 48 M.J. 102). Similarly, the CVRA’s language is also clear as to its intent and general applicability.

The decision in *Spann* prompted both congressional and presidential action to correct the apparent inconsistency between military law regarding victim’s rights and their intent to protect those rights. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims’ Rights Act, § 3771. First, the President fixed Mil. R. Evid. 615. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Federal Rule of Evidence 615 and subsequently Mil. R. Evid. 615 were both amended to add a fourth exception forbidding automatic sequestering of “a person authorized by statute to be present.” Both federal cases and the analysis of the amendments of Rule 615 make clear that “a person authorized by statute to be present” refers to victims protected by victim’s rights legislation.³ *United States v. Edwards*, 526 F.3d 747 (11th Cir. 2008)(holding that CVRA is a statute under the fourth exception of Fed. R. Evid. 615 and that the accused has no Constitutional right to exclude witnesses); *See generally*, SALZBURG,

³ *See*, Mil. R. Evid. 101, which directs a court-martial to apply federal district court interpretation of rules of evidence.

SCHINASI, & SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL § 615.02[5]. Next, Congress, in response to the *McVeigh* decision passed the CVRA. *McVeigh*, 106 F.3d at 325. The CVRA superseded the earlier victim's rights legislations "mov[ing]" and "amplify[ing] the current rights." H.R. REP. 108-711, pt. A, at pg 2. The newly drafted legislation worked. The CVRA ushered in a renaissance in federal courts where victim's were afforded limited participant standing through counsel to exercise their rights. *In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011); *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006); *Pann v. Warren*, 2010 WL 2836879 (E.D.Mich. 2010); *United States v. Mahon*, 2010 WL 94247 (D. Ariz. 2010). Federal courts throughout the country have uniformly recognized that victim's now have standing to assert their rights created by the CVRA. *Id.* The decision in *Spann* was based on the existing landscape of victim's rights. 51 M.J. at 89. At the time, they were inconsistent with military law and it was uncertain whether they even existed as drafted. *Id.* The current landscape could not be more certain. Since the time *Spann* was decided, there has been new legislation, updated Department of Defense Directives and Instructions, updated Air Force Instructions and updated Military Rules of Evidence. Each have all provided significant rights for victims. Accordingly, this Court should recognize the applicability of the CVRA, and permit [REDACTED] standing to assert those rights.

CONCLUSION

Wherefore we respectfully request this Honorable Court to hold that [REDACTED] has the right under the U.S. Constitution, the CVRA and Mil.R.Evid. 412 and 513 to be heard through counsel and order the lower court to permit her counsel to make arguments in these matters on her behalf.

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CERTIFICATION OF COMPLIANCE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division and to the Air Force Appellate Government Division on 27 February 2013 via electronic filing.



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