



**UNITED STATES MARINE CORPS
VICTIMS' LEGAL COUNSEL ORGANIZATION**

MEMORANDUM

FROM: Officer in Charge, Victims' Legal Counsel Organization (VLCO)

SUBJECT: VLCO Annual Training Narrative Schedule, 26-27 Aug 2014

This schedule provides an overview of the upcoming VLCO training, which is an all hands event for officer, enlisted, and civilian VLCO personnel. Uniform for military personnel is cammies. Training will be conducted in the Crawford Room at The Bay View Restaurant, Building 132, MCRD San Diego, CA.

TUESDAY, 26 AUGUST 2014

0730-0800 **WELCOME REMARKS AND INTRODUCTION**

Instructor: [REDACTED]

0800-0850 **LECTURE – NDAA FY 14 AND STATUTE OVERVIEW**

Instructor: [REDACTED]

Overview of statutory changes impacting victims' rights and VLCO legal services.

0850-0900 **BREAK**

0900-0950 **LECTURE – EFFECTIVE CASE STRATEGY AS VLC**

Instructor: [REDACTED]

Broad case strategy and best practices to serve the clients' goals, and address the question of when a VLC is truly done assisting detailed clients. The OIC will discuss the options VLC should consider when faced with setbacks, including motions for reconsideration, writs of mandamus, assisting clients prepare IG complaints, etc.

0950-1000 **BREAK**

1000-1200 **LECTURE – PROVIDING LEGAL SERVICES TO CHILD VICTIMS**

Instructor: [REDACTED]

Best current practices assisting child victims, current trends, and way forward. This period of instruction will provide the opportunity for VLC to share their experiences and lessons learned working with minors

1200-1300 **LUNCH**

- 1300-1350 **LECTURE – PROVIDING LEGAL SERVICES TO VICTIMS OF DOMESTIC VIOLENCE**
Instructor: [REDACTED]
Unique issues and best practices providing legal services to victims of domestic violence.
- 1350-1400 **BREAK**
- 1400-1450 **LECTURE – TRANSITIONAL COMPENSATION**
Instructor: [REDACTED] Victim Advocate Program Manager
Transitional compensation available to victims and how to apply for it.
- 1450-1500 **BREAK**
- 1500-1550 **LECTURE – MILITARY RULE OF EVIDENCE 412**
Instructor: [REDACTED]
Effective advocacy of clients' rights under MRE 412.
- 1550-1600 **BREAK**
- 1600-1630 **DISCUSSION - CASE MANAGEMENT SYSTEM (CMS)**
Instructor: [REDACTED]
CMS functions, reports, and proposed changes.
- 1800-2000 **DINNER & ICEBREAKER: LOCATION TBD**

WEDNESDAY, 27 AUGUST 2014

- 0730-0820 **LECTURE – INVESTIGATIVE INTERVIEWS**
Instructor: [REDACTED]
Role of VLC during the investigative process. This period of instruction will provide the opportunity for VLC to share current practices in each region regarding interaction with investigators.
- 0820-0830 **BREAK**
- 0830-0920 **LECTURE – VIEW FROM THE BENCH**
Instructor: Military Judge TBD
Proper VLC role during both pretrial proceedings and trial, including filing an appearance, making objections, filing and arguing motions.
- 0920-0930 **BREAK**

- 0930-1130 **DISCUSSION – VLC MOTIONS PRACTICE**
Instructor: [REDACTED]
Effective VLC motions practice, including what types of motions should be considered, and recent rulings. This interactive period of instruction will provide VLC the opportunity to share lessons learned regarding VLC motions filed to date.
- 1130-1230 **LUNCH**
- 1230-1320 **LECTURE – DOCUMENT SHARING AND DISCOVERY**
Instructor: [REDACTED]
Review of what documents should be provided to VLC by the government and current practices. This period of instruction will provide opportunity for VLC to share recent experiences regarding obtaining case related materials needed to assist their clients.
- 1320-1330 **BREAK**
- 1330-1620 **DISCUSSION – JUDGE ADVOCATE BREAKOUT SESSION**
Instructor: [REDACTED]
Discussion of current issues, policies, best practices, planned victim survey, statistic tracking, weekly reports, future staffing needs, caseload levels, DTS, fitness reports, and other matters.
- OR**
- 1330-1620 **DISCUSSION – PARALEGAL BREAKOUT SESSION**
Instructor: [REDACTED]
Discussion of proper intake procedures, PII handling, document formatting, filing systems, CMS entries, and legal research.
- 1620-1630 **BREAK**
- 1630-1700 **CLOSING REMARKS AND END-OF-COURSE CRITIQUES**
Instructor: [REDACTED]

ATTACHMENT Q



FY14 NDAA Implementation Update

[REDACTED]
Deputy Officer in Charge, VLCO
Headquarters, U.S. Marine Corps
[REDACTED]

§1711 – Prevention of entry into service of convicted sex offenders	§1722 – Shortened RSP deadline	§1725 – Min. requirements for SAPR personnel
§1746 – Service Academy initial SAPR training	§1731 – Additional RSP duties	§1725 – SANE availability at MTFs
§1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees	§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)	§1733 – Review of SAPR training
§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)	§1721 – Verification of command climate surveys	§1726 – Added DOD SAPRO responsibilities
§1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault	§1704 – DC must go through TC to interview victim	§1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)
§1701 – Add Crime Victims' Rights Act to UCMJ	§1703 – Eliminate SOL for sexual assault and sexual assault of a child	§1747 – Completion of SF 86 by sexual assault victims
§1701 – Crime Victims' Rights Act implementing regulations	§1751 – Sense of Congress on command climate free of retaliation for allegations of sexual assault	§1716 – Special Victims Counsel requirement
§1724 – NG & Reserve access to SARCS	§1715 – IG investigation of retaliation claims in sexual assault and sexual harassment cases	§1707 – Repeal of consensual sodomy
§1712 – Expedited transfer for USCG	§1714 – Expanded whistleblower protection (e.g., broadens unfavorable personnel actions and covered communications)	
§1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults	§1709 – Service regulations to prohibit retaliation against members who report a criminal offense	
§1713 – Guidance on transfer of an accused following an allegation of sexual assault	§1709 – Report due on establishing a new punitive article for retaliation offenses	
§1723 – 50 year retention of restricted reports		
	§1742 – Immediate referral of sexual assault allegations to MCIIO	
	§1732 – SecDef review of MCIIO investigative practices	
	§1753 – Sense of Congress on discharge in lieu of court-martial	
	§1752 – Sense of Congress on disposition of sex offenses via court-martial	
	§1702 – Complete revision of Article 32 (now a probable cause 'preliminary hearing')	§1744 – Review of decisions not to refer sexual assaults
	§1705 – Mandatory GCM jurisdiction for penetration offenses	
	§1705 – Mandatory dismissal for DD for penetration offense convictions	
§1702 – Complete revision to commander's authority to take post-trial action	§1706 – Victim participation in clemency phase	§1745 – Inclusion and command review of records of sex-related offenses

Prevention & Response

All phases of a court-martial

Reporting

Investigation

Pre-Trial

Trial

Post-trial

Effective dates

Immediate

25 Apr 14
(120 days)

24 Jun 14
(180 days)

June 2014

26 Dec 14
(1 year)

§1711 – Prevention of entry into service of convicted sex offenders

§1746 – Service Academy initial SAPR training

Prevention & Response

§1726 – Added DOD SAPRO responsibilities

§1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)

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§1721 – Verification of command climate surveys

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Pre-Trial

§1744 – Review of decisions not to refer sexual assaults

Trial

Post-trial

§1745 – Inclusion and command review of records of sex-related offenses

Effective dates

26 Dec 13



FY14 NDAA

Section 1701 – Extension of Crime Victims Rights “Art 6b Rights”

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. [NDAA FY14 refers specifically to an Article 32.]
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.



FY14 NDAA

Sec 1713 – Temporary administrative reassignment or removal of a member on active duty accused of committing a sexual assault or related offense

- (a) GUIDANCE FOR TIMELY CONSIDERATION AND ACTION.—The Secretary concerned may provide guidance, within guidelines provided by the [SECDEF], for commanders regarding their authority to make a timely determination, and to take action, regarding whether a member of the armed forces serving on active duty who is alleged to have committed an offense under ... article 120, 120a, 120b, 120c, or 125 of the [UCMJ]) or an attempt to commit such an offense ... should be temporarily reassigned or removed from a position of authority or from an assignment, not as a punitive measure, but solely for the purpose of maintaining good order and discipline within the member's unit.



FY14 NDAA

SEC. 1744. REVIEW OF DECISIONS NOT TO REFER CHARGES OF CERTAIN SEX-RELATED OFFENSES FOR TRIAL BY COURT-MARTIAL.

REVIEW OF CASES NOT REFERRED TO COURT-MARTIAL FOLLOWING STAFF JUDGE ADVOCATE RECOMMENDATION OF REFERRAL FOR TRIAL.

In any case where SJA recommends that charges of a sex-related offense be referred for trial by court-martial and the convening authority decides not to refer any charges, the CA shall forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority.

REVIEW OF CASES NOT REFERRED TO COURT-MARTIAL FOLLOWING STAFF JUDGE ADVOCATE RECOMMENDATION NOT TO REFER FOR TRIAL.

In any case where a SJA recommends that charges of a sex-related offense should not be referred for trial by court-martial and the CA decides not to refer any charges to a court-martial, the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority.

§1725 – Min. requirements for SAPR personnel

§1725 – SANE availability at MTFs

§1733 – Review of SAPR training

§1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees

§1709 – Service regulations to prohibit retaliation against members who report a criminal offense

25 Apr 14
(120 days)

Prevention & Response

All phases of a court-martial

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Effective dates

§1722 – Shortened RSP deadline

§1731 – Additional RSP duties

Prevention & Response

All phases of a court-martial

Reporting

Investigation

Pre-Trial

Trial

Post-trial

Effective dates

24 Jun'14
(180 days)

Prevention & Response

§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)

§1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault

§1716 – Special Victims Counsel requirement

All phases of a court-martial

Reporting

§1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults

Investigation

§1709 – Report due on establishing a new punitive article for retaliation offenses

§1732 – SecDef review of MCI/O investigative practices

Pre-Trial

§1708 – Elimination of “character and military service of accused” as a factor in disposition decision

Trial

§1705 – Mandatory GCM jurisdiction for penetration offenses

§1705 – Mandatory dismissal for DD for penetration offense convictions

Post-trial

§1702 – Complete revision to commander’s authority to take post-trial action

§1706 – Victim participation in clemency phase

Effective dates

24 Jun14
(180 days)



ALNAVS (24 June 14)

On 24 June 2014, SECNAV released 4 ALNAVs to implement a variety of military justice provisions from the FY 14 NDAA within the Department of the Navy.

- **ALNAV 049/14** - implements sections 1701 and 1706(a) of the FY 14 NDAA by requiring that participants in the military justice process ensure that victims are afforded certain rights and establishing the procedures to allow a victim to provide matters to the convening authority during the post-trial processing of a case.
- **ALNAV 050/14** - implements section 1705 of the FY 14 NDAA by identifying a GCM as the only authorized court-martial for adjudication of certain sex offenses and explaining that upon a GCM conviction of the offenses, the court-martial must impose a dishonorable discharge or dismissal as part of the sentence.



ALNAV (Cont'd)

- **ALNAV 051/14** - implements sections 1708, 1706(b), and 1702(b) of the FY 14 NDAA by directing that CA cannot take into account the character of military service of the accused under RCM 306, or the character of the victim, unless such matters were presented as evidence at trial and not excluded, when taking action on findings or sentence.
- Significantly restricts the authorized actions a CA may take on the findings and the sentence of a court-martial. May only modify findings for qualifying offenses, and CA may only modify sentences that include confinement for more than six months or a punitive discharge in specific circumstances. Either modification of findings or sentence must include **written explanation** in the record of trial.
- Note: scrivener's error - the word "grant" in paragraph 4b(2) is surplus and should be ignored.



ALNAV (Cont'd)

ALNAV 052/14 - implements section 1744 of the FY 14 NDAA by requiring review by:

- (1) the next superior GCMCA when the SJA's Art 34 recommends against referral to a GCM and the GCMCA, following that advice, does not refer a preferred penetrative sex offense to a GCM; or
- (2) the SECNAV, when the SJA's Art 34 advice recommends referral to a GCM and the GCMCA does not follow that advice and does not refer a preferred penetrative sex offense to a GCM.

Prevention & Response

All phases of a court-martial

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Effective dates

51701 – Crime Victims' Rights Act implementing regulations

51702 – Complete revision of Article 32 (now a probable cause "preliminary hearing")

26 Dec 14 (1 year)



FY14 NDAA

Section 1702 – Amends Articles 32 & 60

Article 32 changes – 26 December 2014

- Investigation becomes Preliminary Hearing to Determine:
 - 1. PC; 2. jurisdiction; 3. form of charges; 4. recommended dispo
- Victim no longer required to testify – “unavailable
 - Do you have sworn testimony?
- 32 Officer Has to be JA & can’t be junior to TC/DC
 - Already implemented in LEGADMINMAN
- Hearing must be recorded and made available to victim
 - When & How?
- Hearing officer may consider uncharged misconduct



FY14 NDAA

- Extends Crime Victims' Rights (18 U.S.C. § 3771 (CVRA)) to Victims under the UCMJ
- Elimination of 5-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.
- Defense counsel interview of victim of an alleged sex-related offense in presence of trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate
- Reassignment/Removal of Accused (10 U.S.C. § 674)
- Victim Input during Clemency Phase (10 U.S.C. § 860)
- Victim may not be required to testify at an Article 32 (10 U.S.C. § 836(d)(3))
- CA cannot consider "character and military service" of accused when considering disposition of case (RCM 306)
- Designation and Availability of Special Victims' Counsel for Victims of Sex-Related Offenses (10 U.S.C. 1044e)

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Future Legislative Changes?

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Future Legislative Changes

NDAA FY15 contains additional proposals:

- **Sec. 543.** Enhancement of victims' rights to be heard through counsel in connection with prosecution of certain sex-related offenses.
- **Sec. 544.** Eligibility of members of the reserve components of the Armed Forces for assistance of Special Victims' Counsel.
- **Sec. 547.** Modification of Department of Defense policy on retention of evidence in a sexual assault case to permit return of personal property upon completion of related proceedings.
- **Sec. 552.** Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces.
- **Sec. 553.** Collaboration between the Department of Defense and the Department of Justice in efforts to prevent and respond to sexual assault.



NDAA FY15

SEC. 543. ENHANCEMENT OF VICTIMS' RIGHTS TO BE HEARD THROUGH COUNSEL IN CONNECTION WITH PROSECUTION OF CERTAIN SEX-RELATED OFFENSES.

"Special Victims' Counsel under section 1044e of title 10, United States Code (as so amended), is provided prompt and adequate notice of the scheduling of any hearing, trial, or other proceeding in connection with the prosecution of such offense in order to permit such counsel the opportunity to prepare for such proceeding."



NDAA FY15

SEC. 544. ELIGIBILITY OF MEMBERS OF THE RESERVE COMPONENTS OF THE ARMED FORCES FOR ASSISTANCE OF SPECIAL VICTIMS' COUNSEL.

Proposed amendment to Section 1044e(f) of title 10, United States Code adding:

“A member of a reserve component who is the victim of an alleged sex-related offense and who is not otherwise eligible for military legal assistance under section 1044 of this title shall be deemed to be eligible for the assistance of a Special Victims' Counsel under this section.”



NDAA FY15

SEC. 545. ADDITIONAL ENHANCEMENTS OF MILITARY DEPARTMENT ACTIONS ON SEXUAL ASSAULT PREVENTION AND RESPONSE.

“In addition to any duties authorized by section 1044e of title 10, United States Code, a Special Victims’ Counsel designated under subsection (a) of such section shall provide advice to victims of sexual assault on the advantages and disadvantages of prosecution of the offense concerned by court-martial or by a civilian court with jurisdiction over the offense before such victims express their preference as to the prosecution of the offense”



NDAA FY15

SEC. 552. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES.

- The Secretary of Defense shall establish and maintain within the Department of Defense an advisory committee to be known as the “Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces”
- The Advisory Committee shall advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct in the Armed Forces.



NDAA FY15

SEC. 553. COLLABORATION BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF JUSTICE IN EFFORTS TO PREVENT AND RESPOND TO SEXUAL ASSAULT.

- The Secretary of Defense and the Attorney General shall jointly develop a strategic framework for ongoing collaboration between the Department of Defense and the Department of Justice in their efforts to prevent and respond to sexual assault.
- An assessment of the need for, and if a need exists the feasibility of, establishing the position of advisor on military sexual assaults within the Department of Justice (using existing Department resources and personnel) to assist in the activities required under paragraph (1) and provide to the Department of Defense investigative and other assistance in sexual assault cases.

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QUESTIONS?

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DISCUSSION – VLC MOTIONS PRACTICE

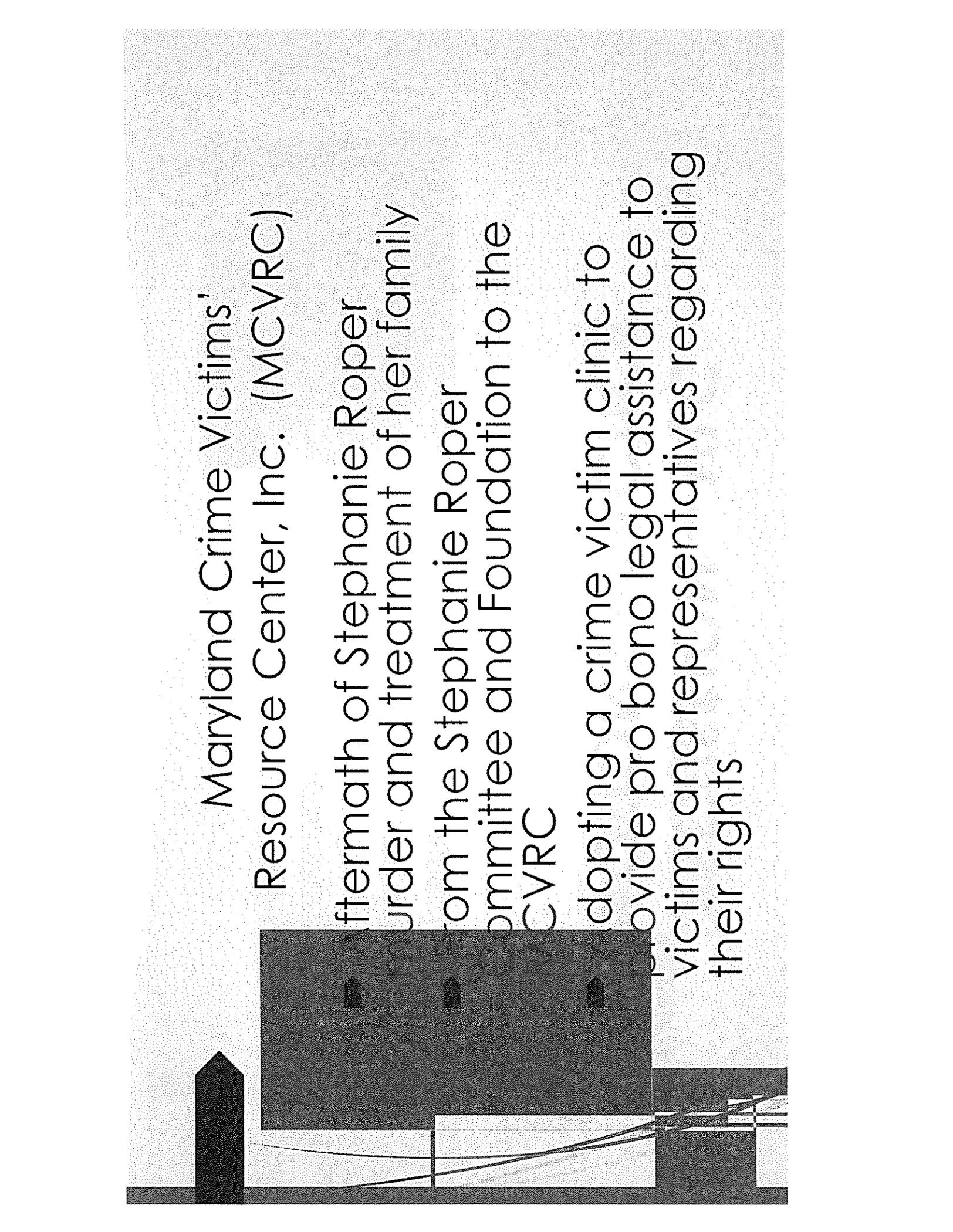
P. Butler, Executive Director
Maryland and Crime Victims' Resource
Center, Inc.

pbutler@mdcrimevictims.org

240-335-4030



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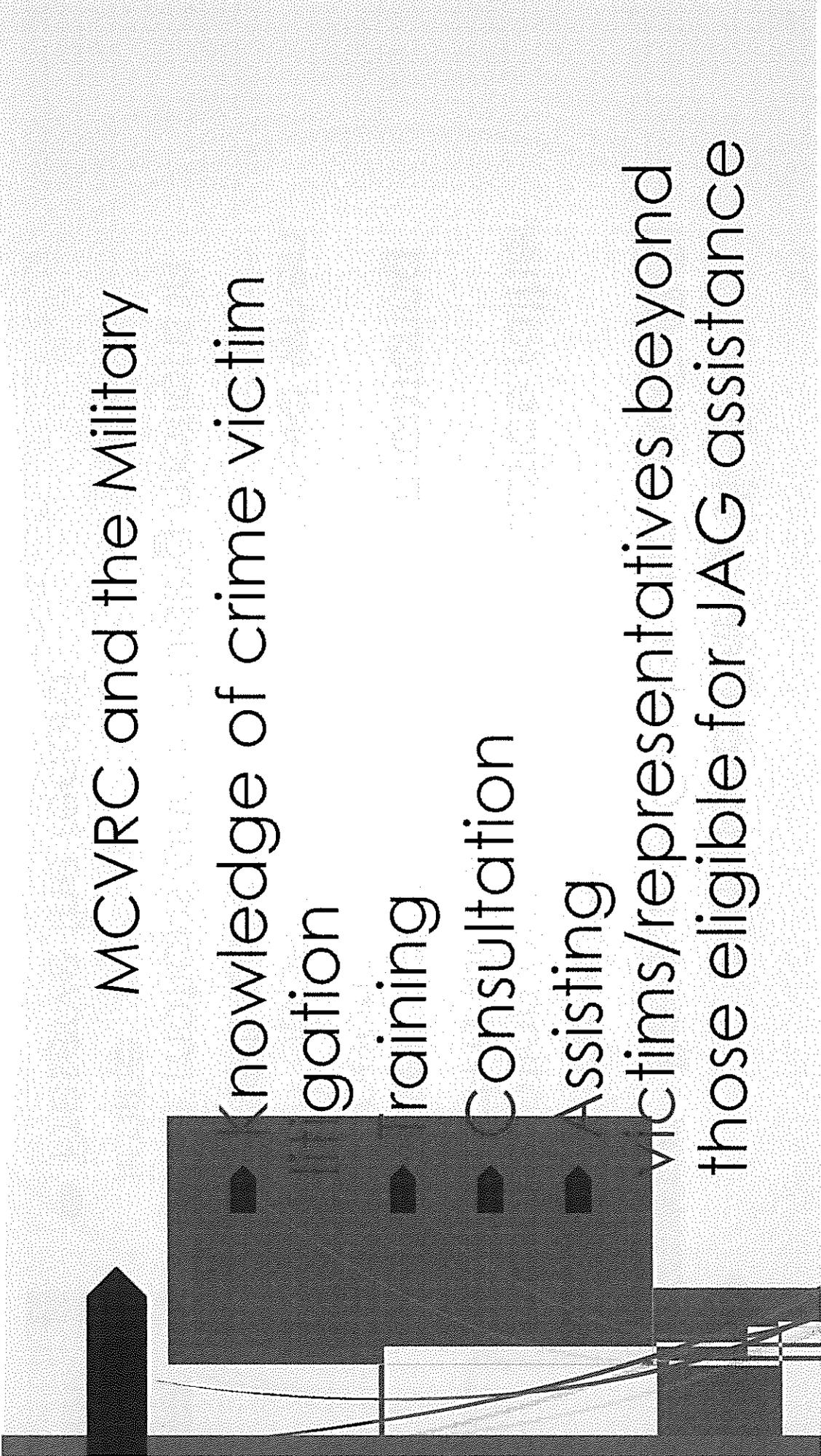
Maryland Crime Victims' Resource Center, Inc. (MCVRC)

Aftermath of Stephanie Roper
murder and treatment of her family
from the Stephanie Roper
Committee and Foundation to the
CVRC

adopting a crime victim clinic to
provide pro bono legal assistance to
victims and representatives regarding
their rights

Maryland Crime Victims' Resource Center, Inc. (MVCRC)

- ▶ Crime victim practice
- ▶ Motion and appellate practice rather than a trial practice
- ▶ Assert rights generally when entering appearance
- ▶ First appearance on the record when case is called
- ▶ File motions and including motions in limine
- ▶ Preserve the record



MCVRC and the Military

Knowledge of crime victim

igation

aining

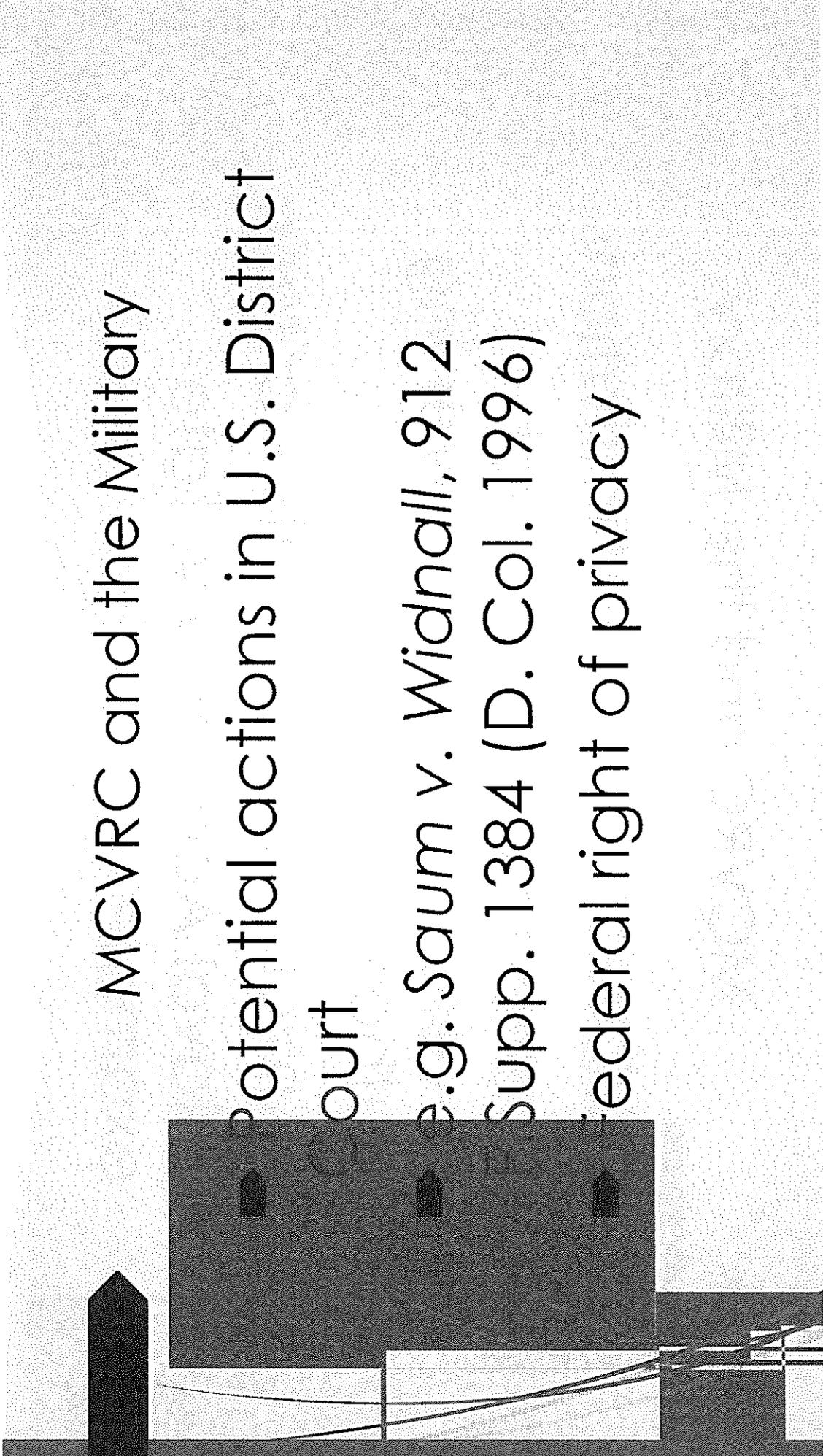
Consultation

Assisting

victims/representatives beyond
those eligible for JAG assistance

MCVRC and the Military

- MCVRC – funding/limitations
- Travel related cost not covered. i.e. Will Convening Authority cover?
- Amicus Curiae briefs – criteria
- Naval Academy v. Tate example



MCVRC and the Military

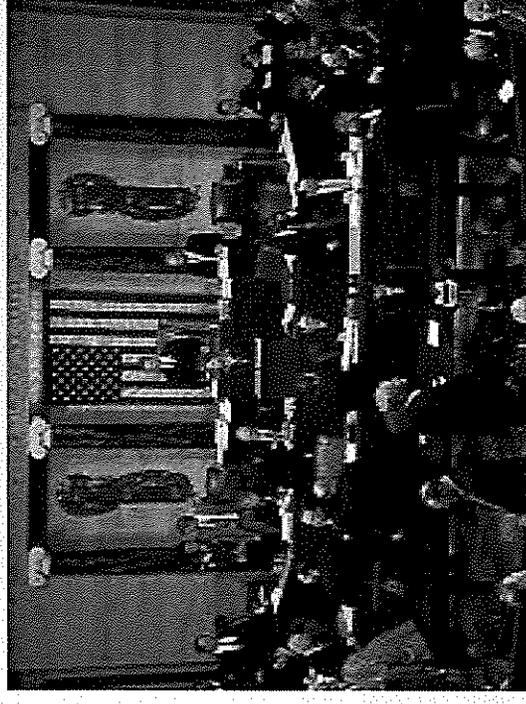
Potential actions in U.S. District
Court

e.g. *Saum v. Widnall*, 912
F. Supp. 1384 (D. Col. 1996)

Federal right of privacy

Why we have the CVRA

attempt to obtain a federal constitutional amendment
impromise regarding statutory rights and
ding
st a statutory response
victims' needs in the
federal system



CVRA rights

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court or any parole proceeding, involving the crime or of any release or revocation of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the exclusion is necessary for receiving clear and convincing evidence, determines that the victim would be materially altered if the victim heard other than that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court case, plea, sentencing, or any parole proceeding.
- (5) The right to a reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

The right not to be excluded from public court proceedings

- ▶ *In re Mikhel*, 453 F.3rd 1137 (9th Cir, 2006) (summary exclusion improper).
- ▶ *U.S. v. W.R. Grace, Unreported order* (D. Montana 2009) (construing CIPA to require burdensome proceedings).

- ▶ *U.S. v. Edwards*, 526 F.3d 747 (11th Cir. 2008) (no constitutional right of the defendant to exclude victim).

Future Issues: Right to Be Present

- ▶ Administering the procedures for determining if victims' testimony will be materially altered.
- ▶ Amending the CVRA to create an absolute right.
- ▶ Procedures to extend rights to large numbers of victims.
- ▶ Procedures to extend right to victims in remote locations (e.g., closed circuit broadcasting).

The right to be treated with fairness and with respect for dignity and privacy.

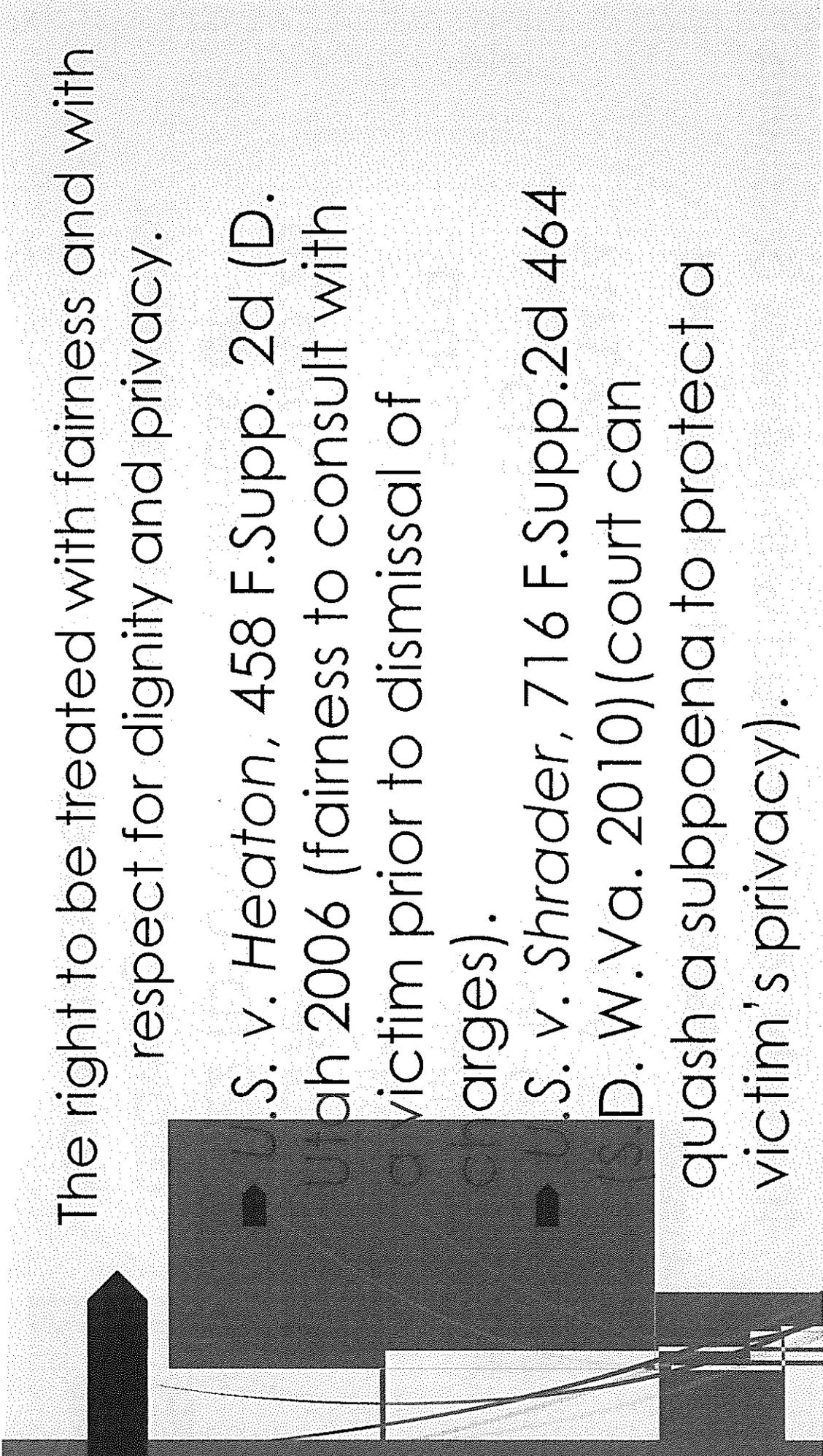
U.S. v. Kanner, 2008 WL 2663414

D. Iowa 2008) (fairness to

victims must be considered in a motion to transfer a case).

Carter v. Bigelow, 869 F.Supp.2d 1322 (D. Utah 2011) (fairness of

allowing amendment in a federal habeas case).



The right to be treated with fairness and with respect for dignity and privacy.

U.S. v. Heaton, 458 F.Supp. 2d (D. Utah 2006 (fairness to consult with victim prior to dismissal of charges).

U.S. v. Shrader, 716 F.Supp.2d 464 (D. W.Va. 2010) (court can quash a subpoena to protect a victim's privacy).

Future issues: Fairness and privacy

- ▶ Responding to defense request for sensitive victim records.
- ▶ Does *Jaffee v. Redmond* (absolute mental health privilege) apply in criminal and military cases.
- ▶ What does the right to “fairness” include?
- ▶ Expanding the litigation over right to “fairness”.

The reasonable right to confer with the attorney for the government

United States v. Dean, 527 F.3rd 391 (5th Cir. 2008) (right to confer extends before indictment).
United States v. Doe, 950 F.Supp.2d 1252 (S.D. Fla. 2013) (victims can pursue discovery on claim that they lost right to confer before filing of charges).
United States v. Heaton, 409 F.Supp.2d 1356 (D. Utah 2006) (government should consult with a victim before dismissal).

Future issues: Right to confer

- ▶ Making the right the confer meaningful.
- ▶ Applying CVRA rights before the filing of charges.

The right to be reasonably heard
regarding release, plea, or sentencing

→ *U.S. v. Mahon, 2010 U.S. Dist.
LEXIS 3629 (D. Ariz. (2010
(Counsel can receive case
filings)*

→ *Hoile v. State, 948 A.2d 30(Md.
2008) (State case of right of
attorney to represent client)*

The right to be reasonably heard regarding release, plea, or sentencing

Deon quote - The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

However note contrary case

— *In re Zackey*, 2010 WL 376474
(9th Cir. 2010) (refusing to allow
notice of appearance by
victim's counsel).

The right to be reasonably heard
regarding release, plea, or sentencing

- ▶ *Kenna v. U.S. District Court*, 435 F.3d 1011 (9th Cir. 2006) (*Kenna I*) (to be “heard” means to speak;
- ▶ *Kenna v. U.S. District Court*, 453 F.3d 1136 (9th Cir. 2006) (*Kenna II*) (no right to pre-sentencing report)

The right to be reasonably heard
regarding release, plea, or sentencing

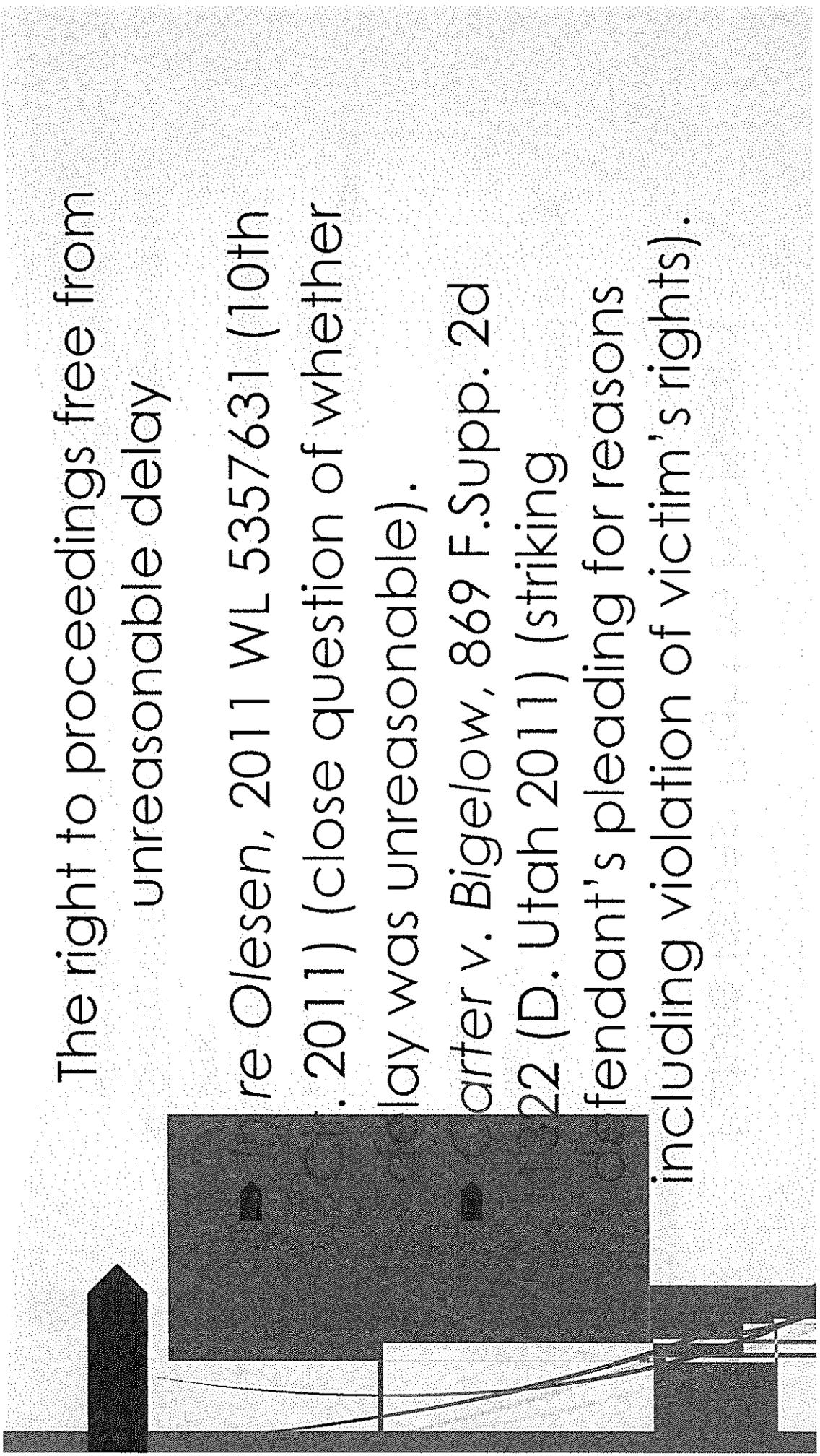
➤ *In re Brock*, 262 Fed. App'x 510 (4th Cir. 2008) (no right to be heard on sentencing guideline calculations).

➤ *United States v. Bolze*, 2012 WL 34374 (6th Cir.) (unsworn oral VIS sufficient for sentencing guideline enhancement).

➤ *Pann v. Warren*, 2010 WL 2836879 (E.D. Mich. 2010) (victim may file pleadings in federal habeas from state conviction).

Future Issues: Right to be Heard

- ▶ Providing victims an opportunity to be heard at bail hearings.
- ▶ Having judges give meaningful weight to victim objections to pleas.
- ▶ Giving victims meaningful access to information needed to be heard (for example, PSR's and discovery).
- ▶ Giving victims the right to be heard at a meaningful time.
- ▶ Giving victims the opportunity to be heard on *all* issues at sentencing (for example, on guidelines issues).



The right to proceedings free from
unreasonable delay

re Olesen, 2011 WL 5357631 (10th
Cir. 2011) (close question of whether
delay was unreasonable).
Carter v. Bigelow, 869 F.Supp. 2d
1322 (D. Utah 2011) (striking
defendant's pleading for reasons
including violation of victim's rights).

Future issues: Unreasonable delay

- ▶ Expanding the number of victims that are asserting this right (especially in post-conviction and death penalty proceedings).
- ▶ Giving content to what is “unreasonable” delay.
- ▶ Creating a 70-day speedy trial act for victims?

ASSOCIATION OF STATE ATTORNEYS GENERAL

The right to be reasonable and timely notice of public court proceedings.

Simons, 567 F.3d 800 (6th Cir. 2009) (directing district court to rule on victim's motion to unseal case to allow victim to be informed).

U.S. v. Skilling, 2009 WL 806757 (S.D. Tex March 26, 2009) (adopting reasonable procedure to allow thousands of Enron victims to exercise their

U.S. v. L.M., 425 F.Supp. 2d 948 (N.D. Iowa 2006) (veritable proceedings closed based on case-specific findings; victims not allowed in closed proceedings).

The right to full and timely restitution

— *Caroline v. U.S.*, 134 S.Ct.1710

(2014) (child pornography
restitution must be linked to
particular defendant).

— *U.S. v. Cienfuegos*, 462 F.3d 1160
(7th Cir. 2006) (full restitution
includes future lost income).

Future Issues: Notice to Victims

- ▶ Notice in mass victimization cases.
- ▶ Effective notice that truly inform the victims regarding their rights.
- ▶ Notice to victims of sentence reductions (for example, sentencing guideline reductions).
- ▶ Notice of closed proceedings (e.g., juvenile proceedings).

Future issues: Restitution

- ▶ Expanding beyond the narrow pigeon holes (e.g., medical expenses, lost income, etc.).
- ▶ Giving judges great discretion to cover non-traditional losses.
- ▶ Granting attorneys' fees as an automatic category for restitution.
- ▶ Creating meaningful collection procedures.
- ▶ Narrowing the application of the "too complex" exception to restitution requirements.

The right to be reasonably protected from the
accused

*U.S. v. Gatewood, 2012 WL
86999 (D. Ariz. 2012)*

(information regarding victims
who were concerned about
intimidation was not required
to be provided to
defendants).

Future issues: Right to reasonable protection

- ▶ Giving real content to the right.
- ▶ Separate waiting rooms and other protection from defendants and their families.
- ▶ Responding to witness intimidation (e.g., “stop snitching” campaigns).

Appellate Review

▶ *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008) (victim must meet traditional mandamus standard of review)

▶ *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005) (In light of Congress' recognition that crime victims would routinely be seeking such review, "[i]t is clear, therefore, that a [crime victim] seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus").

▶ *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012) (victim allowed to intervene in defendant's appeal challenging favorable restitution award).

Future Issues: Appellate Review

- ▶ Supreme Court review of the circuit split on the mandamus standard.
- ▶ Statutory fix to the CVRA (“interlocutory appeal”?).
- ▶ Requirement for filing a petition for mandamus within 14 days.
- ▶ Obligations that courts rule within 72 hours (too short?).
- ▶ Ability to defend victories in appellate court.
- ▶ Mandamus in District of Columbia cases.

Enforcement and Remedies

- *U.S. v. Turner*, 367 F.Supp.2d 319 (E.D.N.Y. 2005) (judges have an independent obligation to ensure CRYA compliance).
- *U.S. v. Thefford*, 935 F.Supp.2d 1280 (N.D. Ala. 2013) (no reopening of plea even though victim requested and was denied right to be heard because the defendant plead to the highest offense charge.)

Future Issues: Enforcement and Remedies

- ▶ What issues can a victim/victim attorney address?
- ▶ Crime victims Gideon/right to counsel.
- ▶ Funding for victims' clinics.
- ▶ What are the U.S. Attorney's "best efforts" obligations
- ▶ What to do about possible "conflicts of interest" by prosecutors?
- ▶ Prosecutors' duty to effectively inform victims of right to independent counsel.

Protected “victims” under the CVRA

- *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (homebuyers were “victims” of the effect of honest services conspiracy involving additional charges for loans).

- *In re Allen*, 701 F.3d 734 (5th Cir. 2012) (remanding for consideration arguing that persons surrounding refinery were “victims” of Clean Air Act violation).

Unprotected “victims” under the CVRA

— *In re Antrobus*, 519 F.3d 1123(10th Cir. 2008) (women killed with gun illegally sold to juvenile not “victim” of the illegal firearm sale).

— *In re Doe*, 264 Fed.App’x 260 (2nd Cir. 2007) (person who took oxycotin not “victim” of misbranding offense).

Future Issues: “Victim” Coverage

- ▶ What does the CVRA mean by “direct and proximate harm”?
- ▶ Better proof of “harm” by victims’ litigators.
- ▶ Protecting victims in mass victimization cases (e.g., terrorism, environmental, and cyber crimes).
- ▶ Expanding the coverage of the CVRA.

Lessons from the First Ten Years

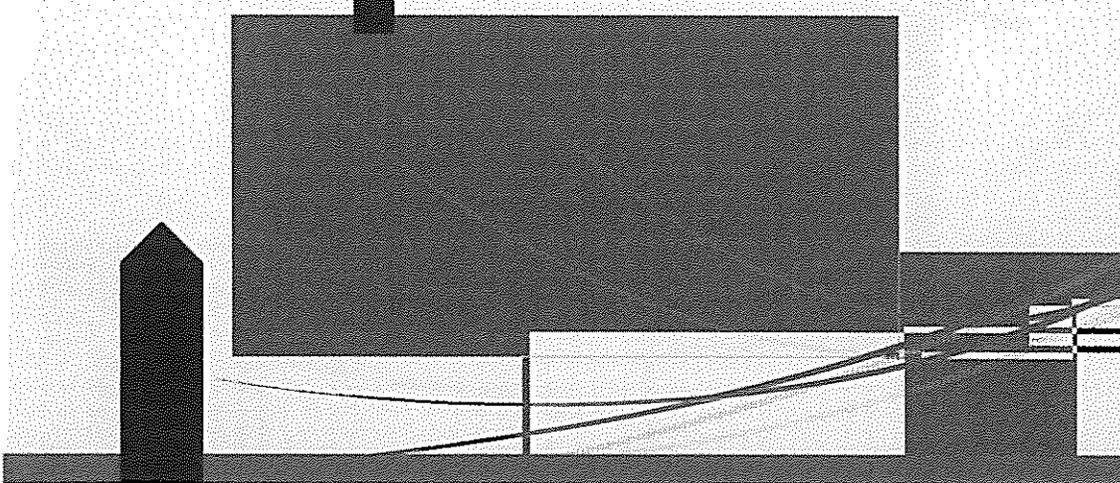
▶ Cutting our teeth – pioneering the way for the future

▶ Mixed results

▶ Need to maximize our successes and use losses as a reason for change especially when the results are unjust

Challenges for the Next Ten Years

- ▶ Making victims' rights normal and expected.
- ▶ Expanding use of technology to education victims and protect their rights.
- ▶ Operationalizing rights for victims in the military system.
- ▶ Expanding the ranks of victims' rights attorneys.
- ▶ Providing funding for victims' attorneys.

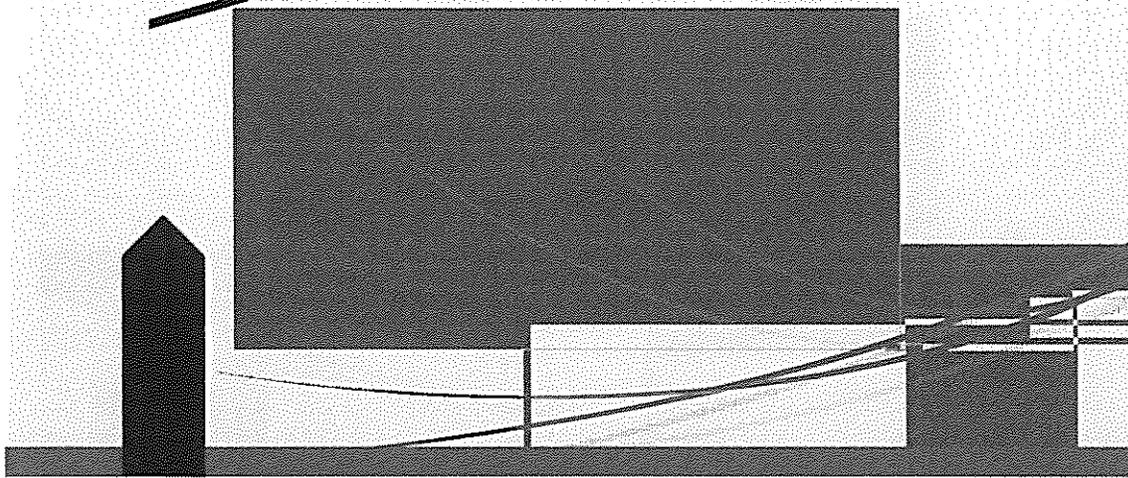


Thank you!!!

→ You for being a pioneer in
the enforcement of
victim's rights

Victim's Rights

What do you think?



DISCUSSION – VLC MOTIONS PRACTICE

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Effective Case Strategy for VLC

Colonel Carol K. Joyce
Officer in Charge, VLCO
26 August 2014

FOR OFFICIAL USE ONLY



Eligibility Criteria

- **10 U.S.C. § 1044 (“Traditional” Legal Assistance Statute)**
 - It states that “[s]ubject to the *availability of legal staff resources*, the Secretary concerned may provide legal assistance in connection with personal civil legal affairs” to eligible individuals, including:
 - Members of the armed forces who are on active duty;
 - Reservists serving on active duty;
 - Members and former members entitled to retired or retainer pay;
 - Military dependents of members and former members; and
 - Others as provided in the statute.
- **10 U.S.C. § 1565b (Legal Assistance to Victims of Sexual Assault)**
 - Legal Assistance to Victims of Sexual Assault “pursuant to” 10 U.S.C. §1044.



Eligibility Criteria (Cont'd)

- **10 U.S.C. § 1044e (SVC for Victims of Sex-Related Offenses)**
 - “Legal consultation regarding the military justice system.”
 - “Accompanying the victim to any proceedings in connection with the reporting, the military investigation, and military prosecution of the alleged sex-related offense.”
 - “Alleged Sex-Related Offense” means any allegation of (1) a violation of ...Article 120, 120a, 120b, 120c, or 125 of the UCMJ; or (2) an attempt to commit an offense as punishable under Art 80 of the UCMJ.



Eligibility Criteria (Cont'd)

- **Section 0705 of the JAGINST 5800.7E (JAGMAN)**
 - Those victims eligible under 10 U.S.C. § 1044, and the following:
 - DoD Civilians overseas.
 - Non-DoD Civilians (U.S. Citizens) overseas.
 - Contractors (U.S. Citizens) overseas employed by, serving with, or accompanying U.S. Armed Forces when they are assigned overseas more than 30 days.
 - Family members to those listed above.
 - A 20/20/20 un-remarried former spouse.
 - Spouses, former spouses, and children who are victims of abuse by members losing the right to retired pay under 10 U.S.C. 1408(h).
 - “Other persons authorized by the JAG.”
- **When in Doubt - Consult with Supervisory Chain!**
- **NDAA FY15 – Looking at Reservists and Victims not covered in Statutes/Regulations above. UCMJ Offender requirement is statutory.**



Consultation/Intake Phase

- **Who:** Who referred the victim to you?
- **What:** Victim's Desire at time – Restricted, Unrestricted, or Undecided?
 - If restricted, did victim tell anyone about their case? Who? Roommate, Close Friend, or Family Member?
- **When:** Status of victim's eligibility at time of first consultation/intake and at time of incident. Status of victim's case at the time of first consultation/intake? Investigative phase, Art 32, etc.?
- **Where:** Where did the incident occur? Was the victim transferred.
- **How:** How did it happen? Collateral misconduct? Accused, now victim? Victim, now accused?



Consultation/Intake Phase (Cont'd)

- Expedited Transfer
 - CA must balance interest of both Accused and Victim
 - Consider 2d and 3d Order Effects
 - If CO disapproves victim's request for transfer, can ask for review by the first GO/FO in the chain of command of the victim. See DoDI 6495.02 (SAPR).

- School Graduations
 - Has Assignments Branch been informed of pending investigation? Ask the SJA.
 - Keep eye on transfers mentioned at SAPR Case Management Group (CMG) meetings.

- "Hardship" Transfers - Add to SAPR Regs currently under review?



Investigative Phase

- **Coordination with NCIS**
 - Do your best to work with Investigative Agencies.
 - Understand that once command informs NCIS, they want to begin investigating immediately.
 - To preserve evidence, and
 - To interview complainant/victim -- first logical witness to be interviewed.

- **Two Factors to Consider**
 - Is it on the heels of an incident?
 - Crime Scene/Preliminary Interview of Victim and Witnesses
 - NCIS should coordinate w/VLC to conduct full interview with victim to follow later.
 - Is it delayed reporting?
 - If ACR at time of Delayed Reporting, make sure Victim coordinates with you.
 - NCIS should coordinate w/VLC to conduct full interview with victim..



Investigative Phase (Cont'd)

- Full Interview of Victim
 - When victim is ready. But need to be aware of what others are doing. E.g. Is command issuing MPO to accused? Is evidence being destroyed?
 - When VLC has been notified first.
 - Rule 4.2 of JAGINST 5803.1D – Applies to Covered Attorneys.
 - Per NDAA FY13, Special Victims Capability (SVC) teams consist of TC and investigators. Thus does the intent and spirit of Rule 4.2 transfer to NCIS agents?
 - ACR may not be a constitutional right, but it is statutory.
- Obtain all Possible Documents
 - Statements (Sworn, Unsworn, ROI); Consent Forms by Victim, and Evidence provided by Victim (E.g., Cell Phone, etc.). *Review new Chs 2 and 5 of LEGADMINMAN*
 - If not provided documents, seek assistance from TC.
- Be attentive to Command, SARC, VWAP Roles – Don't be blamed for their inactions.



Victim's View Toward Disposition of Case

- Once Complaint is Made – “Immediate Action” is Required by Commander
 - See § 1742 of NDAA FY14
 - CO who receives a report of an allegation of a sex-related offense involving a member in the chain of command must investigate via NCIS.
 - *E.g.* Military transferred case to State/County and they later decline. VLC can assist victim with requesting that CO take jurisdiction and comply with NDAA provision.

- Submit Client's Views in Writing.
 - Tell TC that a document will be forthcoming.
 - Do not express victim's views verbally or in a drive-by discussion.
 - Attach client's statement to VLC Cover Letter – Address directly “to” CA.

Victim's View Toward Disposition of Case (Cont'd)



- What can you do if Decision Unfavorable/Undesirable to Client Before Preferral?
 - No requirement by CA to explain decision.
 - Use due diligence. Was the process fair, and in accordance with CVRA?
 - If not a fair process, then submit letter on client's behalf to next superior commander with GCMCA.

- What can you do if Decision Unfavorable/Undesirable to Client After Preferral, and Before Referral?
 - CA must comply with §1744 of NDAA FY14
 - If SJA Recommends Referral/CA Does Not Refer: Must be reviewed by Service Secretary.
 - If SJA Does Not Recommend Referral/CA Does Not Refer: Must be reviewed by next Superior Commander w/GCMCA.



Article 32 Proceeding

- Provide Notice of Appearance to CA via SJA.
- Minimize decisions by IO by making requests to CA before Article 32 commences:
 - Request CA approval to be present.
 - Request CA approval to have client present at Article 32.
 - Request CA approval to sit in the well of the courtroom (with table or podium) during client's testimony.
 - Rationale: Parties like to present a lot of documents to victim. In particular, they like victim's to "adopt" their statements. As the victim's counsel, you should be able to review all documents being presented to your client at the time they are being presented.
- NDAA FY14 Provisions (to be implemented 26 Dec 2014):
 - Victim may not be required to Testify at an Article 32 (10 U.S.C. § 836(d)(3))
 - Victim entitled to Recording of Article 32 Proceeding (10 U.S.C. § 836(e))



Motions Phase

- Obtain all necessary Documents.
 - Judiciary Rules require TC to provide copy of Pleadings w/in 24 hours.
 - LEGADMINMAN requires TC to provide charge sheet, victim statements, and other documents pertaining to victim.
 - Consider what other documents will be needed to make meaningful argument.
 - If unsuccessful, submit Motion to Compel or Writ of Mandamus?.

- Ensure VLC and Supervisors are identified in Notice of Appearance Letter
 - To avoid issues with MJ in court, supervisors should be identified up front.

- Verify if TC is joining in with Victim's Motion
 - TC stated, "We are not opposing your motion, but we are not joining in."
 - Lock government's position in writing (via e-mail or request government's position in writing).



Motions Phase

- Writ of Mandamus – Authorized by CVRA
 - When should you go this route?
 - Look at whether victim has any other recourse?
 - e.g. If right to privacy violated, then can't unring the bell.

- Current Issue: Restricted Reports
 - DoD Program - DoD Reports?
 - DoD SAPR Reg: "Need to Know" or "Authorized by Law"
 - Does a MJ's order suffice?
 - DoD SAPR Reg says "Installation SJA gives legal advice."
 - Defense Discovery Requests now include Req for Restricted Reports.
 - Has defense met its burden of relevance?
 - Don't forget about Written Interrogatories.



TC v. VLC Responsibilities

- **Remember your Role as VLC - Do not assume TC's Duties and Responsibilities!**

- **TC Responsibilities:**
 - Must comply with VWAP Order (MCO 5800.14)
 - Must ensure each Victim and Witness receives a DD2701 Form.
 - Regarding Judicial Action: Must provide "notifications, assistance, and explanation of rights" via DD2702-3 Forms. (To include a DD2704 for Post-Trial Matters).
 - Must obtain the victim's views as to disposition of the case.
 - To include "consult[ing] with victims about major case decisions, such as pretrial negotiations and dismissals...."
 - Must inform victim of "the nature of the charges, date of preferral, and the commander's decisions concerning prosecution."
 - Must inform victim of Acceptance of PTA, Court-Martial Findings concerning Guilt, Sentence Adjudged; and CA's decision as to Findings and Sentencing.
 - Must inform victim of the "scheduling of each court proceeding," and "any initial appearance by the accused."



TC v. VLC Responsibilities (Cont'd)

- TC Responsibilities (Cont'd):
 - TC coordinates (with the assistance of the TAO/LAO) Military Travel and/or Invitational Orders for Victim (and Witnesses) at all court proceedings (to include Art 39a/Motion sessions). See Ch 1 of LEGADMINMAN re: TAO duties.
 - If Victim wants to be accompanied by UVAVA, TC must comply with MC SAPR Regulations (MCO 1752.5B). This may require travel expenses.
 - “To minimize re-victimization, UVAs/VAs will accompany victims through the medical, legal, and administrative processes as requested by the victim.”
 - Remember – UVAs/VAs are to provide “emotional support.”



TC v. VLC Responsibilities (Cont'd)

- TC is responsible for logistical support to the victim per MC VWAP Order:
 - TC must inform and be prepared to provide the victim with the following services:
 - Separate waiting room for victims
 - Transportation Services
 - Parking
 - Child Care Services
 - Lodging
 - Courtroom Translators/Interpreters
 - And assist in securing other needed services.
 - Inform the victim's employer as to reasons for absences from work.
 - Safeguarding victim's property that becomes evidence.
 - Setting up telephonic capability, VTC, and other electronic capabilities in the courtroom.
- TC must ensure victim is provided an opportunity "to present a statement... to court at sentencing, or to the [SCM] officer, or NJP authority." See MC VWAP Order 4d(4)(e) of Encl (3).



TC v. VLC Responsibilities (Cont'd)

- VLC Responsibilities:
 - Represent the Rights of Your Client.
 - Be their voice at proceedings.
 - Assist them with expressing their views and making requests.
 - Ensure the Process is Fair.
 - See CVRA - “The right to be treated with fairness and with respect for the victim’s dignity and privacy.”
 - Ensure Compliance with MCM, CVRA, and NDAA FY14 Provisions
 - Think like a Defense Counsel.
 - Ask yourself: How would a defense counsel or civilian attorney’s role be viewed by TC and MJ?



Post-Trial Matters

- Clemency by Victim
 - Attach victim's statement to VLC cover letter
 - Identify Rights Violations, if any, in cover letter - Similar to DC identifying Assignments of Errors (AOEs)
 - Do not be distracted by Moreno Clock.
 - Submit statements by others; to include medical professionals.
- Ensure TC is providing post-trial information to victim.
- Does Transitional Compensation apply? Retirement Pay?



When to Terminate ACR

- Detailed Per JAGINST 5803.1D
 - Detailed by Competent Authority
 - Only OIC VLCO and RVLC have Detailing Authority within the VLCO.

- Once Detailed, Must Remain Detailed unless:
 - Client gives permission to terminate;
 - Terminated for Good Cause as determined by Detailing Authority;
 - Per LEGADMINMAN - After CA's Action; or
 - Per JAGINST - "If a covered attorney's representation is limited to a specific matter, the relationship terminates when the matter has been concluded or resolved."
 - Put termination in writing for client so there is no confusion.
 - Seek approval by supervisory chain before terminating an ACR.



When to Terminate ACR (Cont'd)

- When do you know the matter has been “resolved or concluded?”
See JAGINST 5801.2B (Navy Legal Assistance Program)
 - Matters that VLC can assist with:
 - Request for Reconsideration
 - Review by next superior commander with GCMCA
 - Request Mast
 - Art 138 or Art 1150 Complaints
 - Petition for Relief to the BCNR
 - IGMC or DoD IG
 - Matters that VLC should refrain from:
 - Congressional Inquiries
 - Claims against the United States
 - Focus on military justice process/matters.
 - Be careful not to participate in other type of proceedings without approval by the OIC and JAG.



Child Victims

- **CVRA (18 U.S.C. 3771):**
 - In the case of a victim under the age of 18 years old, a legal guardian “may assume the rights” of the child.
- **NDAA FY14:**
 - In the case of a victim under the age of 18 years old, a MJ “shall” designate a legal guardian “to assume the rights” of the child.
- **ABA Rules and JAGINST 5803.1D:**
 - Child is the client. Children have right to express themselves.
 - Unless proof of diminished capacity per Rule 1.14.
 - But does language in NDAA FY 14 tie our hands?
- **Navy, Army, and Air Force:**
 - All leaning toward child is the client. AF says 16 and 17 yr olds are presumed competent.
 - Legal guardian can only assume rights listed among 8 factors in CVRA, but catch all is, “The right to be treated with fairness and with respect for the victim’s dignity and privacy.”

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QUESTIONS?

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NDAA FY14 Changes

- **Designation and Availability of SVC/MLC for Victims of Sex-Related Offenses** -
 - Recognizes Attorney-Client Relationship between VLC & Victim (10 U.S.C. § 1044e)
- **Extends Crime Victims' Rights Act (18 U.S.C. § 3771 (CVRA)) (10 U.S.C. § 806b)**
 - "Clear and Convincing Evidence" – Right to be Present
 - "Right to be treated with fairness and with respect for the Dignity and Privacy of the Victim" [Already in DoDI 1030.2 (VWAP) – 2701 Forms]
- **Reassignment/Removal of Accused (10 U.S.C. § 674)** -
 - Now Commanders are to Balance Interests of both Victim and Accused
- **Defense Counsel Interview of Victim (in VLC, TC, or VA Presence) (10 U.S.C. § 846)**
- **Victim may not be required to Testify at an Article 32 (10 U.S.C. § 836(d)(3))**
 - Victim entitled to Recording of Article 32 Proceeding (10 U.S.C. § 836(e))
- **MJ Designation of Legal Guardian for Minor Victims (10 U.S.C. § 806b)**
- **Victim Input during Clemency Phase – 10 Days after Receipt of ROT (10 U.S.C. § 860)**



Crime Victims' Rights Act (CVRA)

(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. [NDAA FY14 refers specifically to an Article 32.]
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.



Victim Rights in M.C.M. Prior to NDAA

- Right "to attend and be heard" regarding admissibility of sexual behavior or predisposition evidence in sexual assault cases (M.R.E. 412)
- Right "to be present" at military justice proceedings (M.R.E. 615)
- Right to provide "victim's view as to disposition" to the convening authority when determining how an offense should be disposed of (R.C.M. 306)
- Right not to be compelled to make statements or produce evidence when not material and tends to degrade the person (M.R.E. 303)
- Right "to refuse to disclose and to prevent any other person from disclosing a confidential communication made between victim and victim advocate" in a case arising under the UCMJ (M.R.E. 514)
- Right to receive a copy of the Record of Trial when a sexual assault victim who testified at a court-martial (Article 54, UCMJ)
- Right to be heard "through counsel" in court-martial proceedings (*LRM v Kastenberg*, C.A.A.F., 18 July 2013)



Military Rules of Evidence 412

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Overview



1. Historical develop of MRE 412
2. MRE 412
3. MRE 412 Balancing Test
4. MRE 412 Exceptions
5. Relevant Case Law
6. Best Practices
7. Lessons Learned

Historic Look at Development of 412



[The witness] could not have ruthlessly destroyed that quality [chastity] upon which most other good qualities are dependent, and for which, above all others, a woman is revered and respected, and yet retain her credit for truthfulness unsmirched.

State v. Coella, 28 P. 28, 29 (Wash. 1891)

Translation:

An unchaste woman is less credible than a more virtuous woman.

Manual for Courts-Martial (1951)



For the purpose of impeachment it may be shown that a witness has a bad character as to truth and veracity. After impeaching evidence of this kind is received, or after it has been shown that . . . the witness has an *unchaste character* . . . , proof that the witness has a good character as to truth and veracity may be introduced in rebuttal. *MRE 153 (b)(2)(a)*

So what Changed?



1. Society experienced significant changes in the 60s and 70s.
2. The Sexual Revolution took place in the 1960s.
3. Major change or shift in our views of traditional values.
4. Ultimately our attitudes in society changed on sex, marriage, divorce, chastity, etc.

The Privacy Protection for Rape Victims Act of 1978



- PUBLIC LAW 95-540—OCT. 28, 1978
 - Passed by 95th Congress
 - RULE412. RAPE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR
 - (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, **reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.** (emphasis added)
-

Military Rules of Evidence 412 (MCM 2012)

AKA: The Rape Shield Rule



- Rule: “The following evidence is not admissible in any proceeding involving an alleged sexual offense...”
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim’s sexual predisposition.

Sexual Behavior: includes any sexual behavior not encompassed by the alleged offense.

Sexual Predisposition: refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

Key Takeaway: MRE 412 is a rule of EXCLUSION!

MRE 412 Exceptions



1. Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source or semen, injury, or other physical evidence;
 2. Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution;
 3. Evidence the exclusion of which would violate the constitutional rights of the accused.
-



Purpose of MRE 412

- To “shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses.”
- *MCM Analysis of MREs (2012 ed.)*



MRE 412: Two Components

1. The evidentiary rule itself.
 - a. Basic rule: victim's sexual behavior or sexual predisposition is not admissible in any proceeding involving sexual misconduct.
2. Procedural requirements to determine admissibility.



Procedural Requirements

1. Party must file motion 5 days prior to pleas
“specifically describing the evidence & stating purpose for which it is offered”
2. Serve motion on opposing party and MJ and notify victim.
3. MJ must conduct closing hearing to determine admissibility.
4. If evidence admissible, MJ must issue order specifying admissible evidence.



Defense Bears Burden

1. MRE 412 is rule of Exclusion.
2. Defense bears burden to “demonstrate why general prohibition in MRE 412 should be lifted to admit evidence of sexual behavior of the victim.” *US v. Moulton*, 47 M.J. 227, 228 (CAAF 1997)
3. Defense must demonstrate how the evidence fits within one of the exceptions to the rule.



MRE 412(c)(3) Balancing Test

1. Balancing Test “...and the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim’s privacy” MCM (2008 & 2012 ed.)
2. Current balancing test has been stricken by *Gaddis and Ellerbrock*.
3. Still have MRE 403 balancing test



Brief History of MRE 412 Balancing Test

1. Previous balancing test: “...and that the probative value of such evidence outweighs the danger of unfair prejudice” MCM (2005 ed.)
2. *US v. Banker*, 60 MJ 216 (CAAF 2004)
 - a. Banker held “..the prejudice in question is, in part, that to the privacy interest of the alleged victim.”
 - b. Banker cited *US v. Sanchez*, “In determining admissibility there must be a weighing of the probative value of the evidence against the ***interest of shielding the victim’s privacy***.” 44 MJ 178 (1996) (emphasis added)

Brief History of MRE 412 Balancing Test

Continued



1. *US v. Gaddis*, 70 MJ 248 (CAAF 2011)
 - a. Struck balancing test b/c test is needlessly confusing and could lead to exclusion of constitutionally required evidence.
 - b. If after application of M.R.E. 403 factors the MJ determine that the probative value of the proffered evidence outweighs the danger of unfair prejudice, *it is admissible no matter how embarrassing it might be to the alleged victim.*

2. *US v. Ellerbrock*, 70 MJ 314 (CAAF 2011)



MJ Should Conducts 2-Part Review

1. First MJ must determine if evidence is relevant.
2. Second if relevant, evidence still may be excluded under MRE 403.

MRE 412 Exceptions and Case Law



- Exception (A): Another person source of semen, injury, or other physical evidence.
- Typical Issue: Will be the timing and general circumstances b/t other sexual behavior and charged incident.
- Case Law: United States v. Pickens, 17 M.J. 391 (C.M.A. 1984)



MRE 412 Exceptions and Case Law

- Exception (B): Previous sexual activity b/t the victim and accused to prove consent.
- Typical Issue: **Time span** b/t the prior consensual incidents and charged misconduct and **factual similarity** will be key factors for court to decide.
- Case Law: US v. Andreozzi , 60 M.J. 727 (ACCA 2004); US v. Torres, 937 F.2d 1469 (US App 1991); US v. Powers, 59 F.3d 1460



MRE 412 Exceptions and Case Law

- Exception (C): Evidence the exclusion of which would violate the constitutional rights of the accused.
- Typical Issue: MJ must determine if evidence is relevant, material, and favorable to defense
- Case Law: *US v. Banker*, 60 M.J. 222 (CAAF 2004); *US v. Dorsey*, 16 M.J. 1 (CMA 1983)



Dorsey Analysis

- “ ...it is quite clear that this so called “rape shield” rule is not an absolute bar to the admission of such evidence at a court-martial.” *US v. Dorsey*, 16 M.J. 1
- “ ...a criminal accused has the right to present evidence which is relevant, material, and favorable to his defense.” *Id.* 16 M.J. 1, 12



Dorsey Analysis Continued

- “The above testimony and evidence Defense requests to elicit is ‘relevant, material, and favorable to [Cpl XXXX] defense.’” *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983).
- **Key Takeaway:** Facts of Dorsey, notice that the previous sexual conduct defense sought to introduce happened **hours** not days or months before the alleged sexual assault.



Best Practices in Holding 412 Hearing

1. MJ allows party offering evidence to present oral argument supporting motion.
2. MJ present list of questions MJ plans to ask victim to proponent of evidence for comment/additional questions.
3. MJ questions victim on the stand, does not allow the proponent of evidence to question or cross-examine victim.
4. MJ allows VLC to be heard and provide oral argument in support of their motion.



What to do when MJ rules against Victim?

1. **MRE 611:** "MJ shall exercise reasonable control...protect witness from harassment or undue embarrassment."
2. **MRE 303:** "No person may be compelled to make a statement or produce evidence...is not material to the issue and may tend to degrade that person."
3. "...trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about..." *Delaware v. Van Arsdall*, 475 U.S.673, 678-79 (1986).
4. "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 US 15, 20 (1985).
5. "Right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Michigan v. Lucas*, 500 U.S. 145, 149 (1991)



Does MRE 412 apply to sentencing phase?

1. Answer: Yes
2. What about RCM 1001(c)(3) & MRE 1101(c), relaxing rules of evidence?
3. US v. Fox, 24 MJ 110 (CMA 1987):
“...limiting application of MRE 412 to findings would defeat its purpose – to protect victims of nonconsensual sexual offenses against needless embarrassment...”



MRE 412 PRACTICE (Capt Sood)

1. Scenario: Defense Counsel requested restricted reports of the Victim, or at the very least, an in camera review of those reports.
2. MJ granted in camera review.
3. How to proceed?
4. What to file?



So what was the outcome?

- Solution?
- Lessons Learned
- What to do differently next time?
- What to watch out for...



Questions?



ROLE OF VLC DURING THE INVESTIGATIVE PROCESS



Role of VLC During the Investigative Process

- First, establish rapport with existing MOCIA
- You are the legal representative for your client... act like it.
 - Shape the Battlefield with Mental Health
 - Medical/SAPR Records
- Establish parameters with investigating agents (Be there!)



- Prepare your clients (2nd and 3rd order effects)
 - Mock Interview (use your 4421s)
 - Ask the hard questions, test there recall
- Know when to stop or shut it down
- Wiretaps... Yes or no?
 - Caution should be exercised
- Maintain relationships



- Physical evidence
 - Phone
 - Do not turn over phone, could be evidence for a very long time
 - Do not allow them to make a mirror image
 - All contents are reproduced
 - They can photo the screen shots
 - You can email the conversations
 - Facebook
 - Can be long-term conversations via email



- SAFE
- Interviews
 - Sworn statement vs. Video recorded
 - Victim then accused, back to victim, possible article 31b for victim
 - Minimize for inconsistencies
 - Minimize for impact

Transitional Compensation for Abused Family Members

Najah Barton

Victim Advocate Program Manager
HQMC Family Advocacy Program

“Keeping Faith”





Overview

- MCO 1754.11 VA Responsibilities
- Program overview
- Eligibility criteria
- Program benefits
- Application process

“Keeping Faith”



Overview

- Federal Law per 10 USC 1059
- Mandated program per DoDI 1342.24,
23 May 1995*
- DoD Financial Management Regulation
Vol 7B Chapter 60*

* currently in revision/under review

“Keeping Faith”



Purpose

- To provide temporary financial assistance to eligible family members and when applicable, service members
- Financial assistance aids eligible members ease the burden of unexpected transition presented after the Marine offender is separated from the Marine Corps for a dependent-abuse offense

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Dependent Abuse Offenses

- Any domestic- abuse offense acted out by a service member upon eligible dependent(s)
- Involves abuse of the spouse or dependent child of the service member
- Must be a criminal offense as specified under UCMJ, Federal criminal law, criminal laws of the States and other jurisdictions of the U.S., and/or laws of other nations

“Keeping Faith”



Dependent Abuse Offenses

- Some examples of dependent- abuse offenses include:
 - Sexual assault, rape, sodomy
 - Assault, battery
 - Child abuse (to include child neglect)
 - Murder and manslaughter
 - Stalking

* This list is not all inclusive. Other stipulations may apply.

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Victim Advocate Responsibilities

- Educate commands aboard their respective installation and other relevant personnel:
 - **On the program**
 - **On eligibility criterion**
 - **On importance of including domestic abuse in separation documentation, when appropriate**
- Educate eligible victims or legal guardians/ representatives
- Assist in the application process
- Liaison between HQMC, victim, law enforcement, SJA, etc.

“Keeping Faith”



Eligibility Criteria

- Dependents must have been residing with **OR** married to service member at time of the offense
- Marine served minimum of **30** days on active duty
- Marine separated from service for a dependent - abuse offense via:
 - Result of a court-martial sentence
 - Forfeiture of all pay and allowances via court-martial, or
 - Administrative separation (Enlisted), or
 - Board of Inquiry (Officers)

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Eligibility Criteria - Children

- Under 18 years of age
- 18 years or older, but incapable of self-support because of mental or physical incapacity (will require proof)
- Between 18 and 23 years, but enrolled full-time in an institution of higher learning and dependent on service member for greater than ½ of support (will require proof),
or
- Still a dependent at the time of the separation or court martial

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Eligibility Criteria - Children

- Proration may occur if they are not dependent for duration of payment (i.e. child turning 18 years of age that graduates high school while TCAFM is being paid)
- Stepchildren are eligible assuming they are dependents of the member that committed the offense at the time of the separation
- Children not residing with the parent can receive payment through a payee (or legal guardian)
 - Not if child is in foster care- as state has custody
 - If child is returned to spouse, spouse can receive payment

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Eligibility Criteria - Spouse

- Must have been legally married at the time of offense
- Can be divorced as of SM's separation
- If SM is separated for an offense relating to child abuse, spouse must **NOT** have participated in the abuse

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Not Eligible

- Intimate Partner (even if residing with service member)

- Dependents when SM was not separated
 - Service member commits suicide after offense
 - Service member NJPed but not separated
 - Service member EASes before separation process is complete

- Child not residing with the service member or spouse at the time of the dependent-abuse offense
 - Child not born at time of offense
 - Service member abuses new wife while biological child from previous marriage is visiting

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Forfeiture Provisions

- Spouse co-habits with former member upon SM separation
- Dependent spouse remarries while receiving payments
- Loses custody of children (forfeits child amount)
- Noncompliance with annual re-certification requirements with DFAS and DEERS

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Benefits

- Benefits begin:
 - On the date the court-martial sentence is adjudged if the sentence includes a dismissal, dishonorable discharge, bad conduct discharge or forfeiture of all pay and allowances
 - OR
 - On the date the Marine's command informs the Marine that an administrative separation has been initiated (Notification letter)
 - OR
 - On the date the Marine's command accepts a Separation in Lieu of Trial request (entire SILT is required to process package)
 - OR
 - On the date the Marine's command notifies Marine of Board of Inquiry

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Benefits - Duration

- Determined by End of Current Contract (ECC) date
- No less than 12 months
- No more than 36 months
- If Officer, assuming augmented, 36 months
- Cannot be extended

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Benefits



- Monthly monetary payments
- Military ID card
- Medical
- Dental (space available status), and
- Commissary and Exchange

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Benefits

- JFTR provides for safety transfers in certain situations (MILPERSMAN 1300-1200 CH-40)
- Transportation is NOT a TCAFM benefit
- Medical expenses related to the abuse can be approved by SecNav on case by case basis for coverage after expiration of TCAFM (Designee Program) – includes mental health

“Keeping Faith”



Payment

- Based on the rate in effect for Dependency and Indemnity Compensation
- Monies are not reported as income
- Monies are not taxed
- 1st payment will take up to 6 weeks from approval date to receive

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Application Process

- Completion of application packet by victim with assistance from VA
 - ❖ DD Form 2698, Application for Transitional Compensation
 - ❖ Supporting legal documents
 - ❖ Direct Deposit Form
 - ❖ Cover Sheet
- Finance approval at HQMC
- HQMC notifies recipient, DFAS and DEERS

“Keeping Faith”



Exceptional Eligibility

Authorized under OSD DTM 14 April 2008

- SecNav's office authorized to review and approve cases where dependent-abuse offense was not documented as reason for separation
- Evidence of dependent-abuse offense must accompany the application
- Requires that SM already be separated at the time of application for waiver

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Exceptional Eligibility

Examples of Documentation

- IDC Letters showing met criteria for physical abuse
- Non-judicial punishment documentation (UPBs)
- SILT package (charge sheets, request letter, endorsements)
- Law enforcement reports including military blotters
- Court documents (ex parte, protective orders)
- FAP assessments

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Important Notes

- DFAS, DEERS, HQMC are not connected
- HQMC must wait for response from DFAS and DEERS
- Beneficiary maintains responsibility for follow up with DFAS/DEERS
 - VA can assist
 - HQMC can assist

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Case Examples: Who is eligible?

“Keeping Faith”



Example #1

Staff Sergeant Shoebuckle and her spouse are found to have physically abuse their 3 year-old child. As a result, the child is placed into the custody of a legal guardian (maternal grandmother). SM is separated from active service for abuse against the child...

Is spouse eligible?

Is child eligible?

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Example #2

Lance Corporal Johnson and his spouse have five children (they are all dependents in DEERS). LCpl Johnson is stationed in CA. His spouse and children reside in TN. SM abuses his spouse in TN while on leave, with 3 out of 5 children present in the home during the incident. He is separated via AdSep for the incident...

Is spouse eligible?

Is child eligible?

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Example #3

Master Sergeant Leathers is court-martialed for a domestic-abuse related offense against her spouse. At the time of the incident, the dependent son is 17 years, 11 months old and was in the home during the incident. SM is subsequently convicted and separated

Is spouse eligible?

Is child eligible?

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Example #4

Sergeant Greenleaf is arrested for home invasion, sexual assault and murder after breaking into his girlfriend's apartment one evening. Their 6-month old child laid asleep in his crib next to the bed, as SM committed the above acts. Command separated him via AdSep. He is later convicted and sentenced to life in prison in the civilian judicial system

Is child eligible?

“Keeping Faith”



HQMC Point of Contact

POC: [REDACTED]

Victim Advocacy Program Manager

HQMC Family Advocacy Program

Commercial: [REDACTED]

Fax: [REDACTED]

Email: [REDACTED]

Website: <http://www.usmc-mccs.org/transcomp/index.cfm>

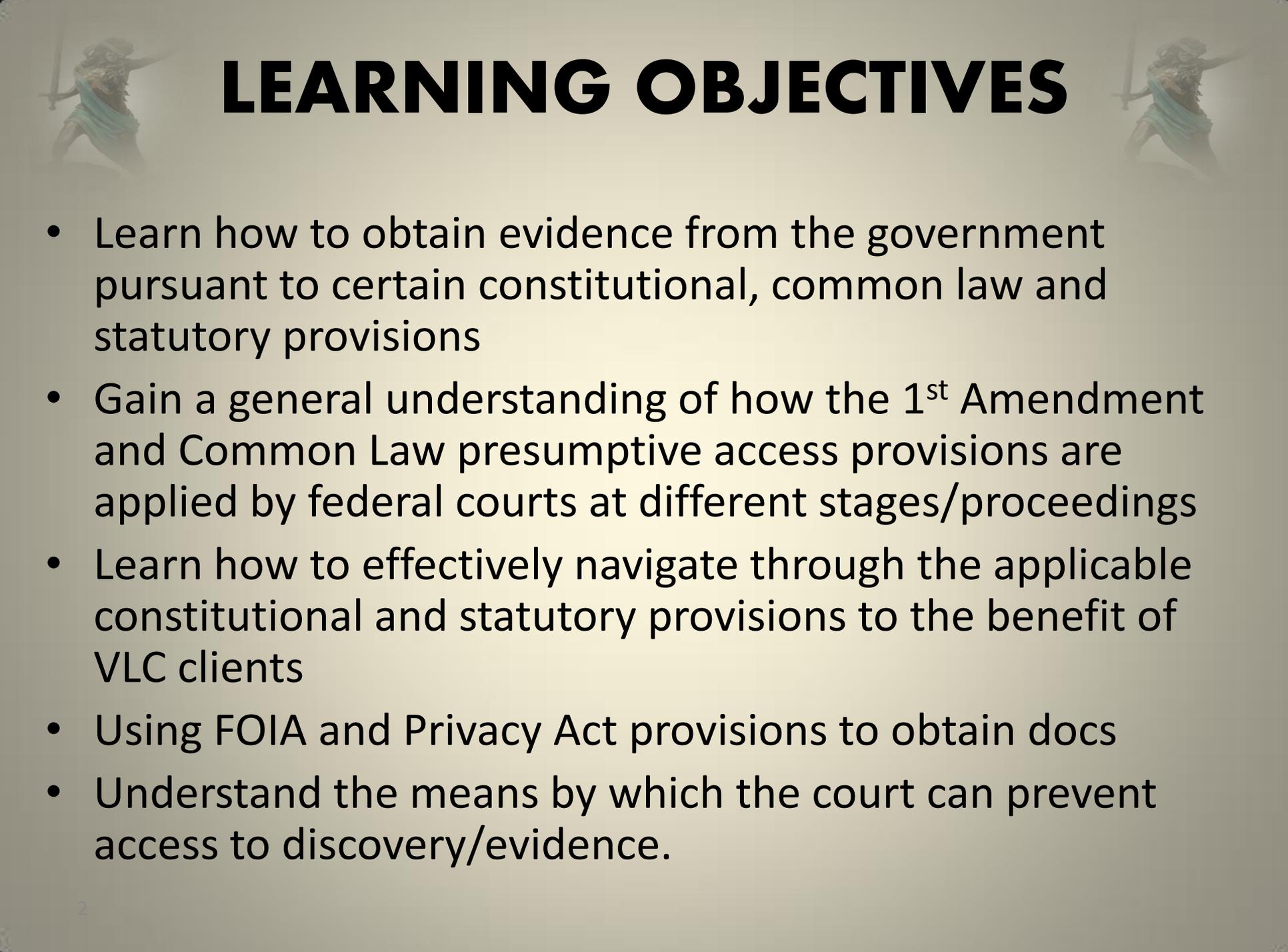
“Keeping Faith”

Victims' Legal Counsel Organization



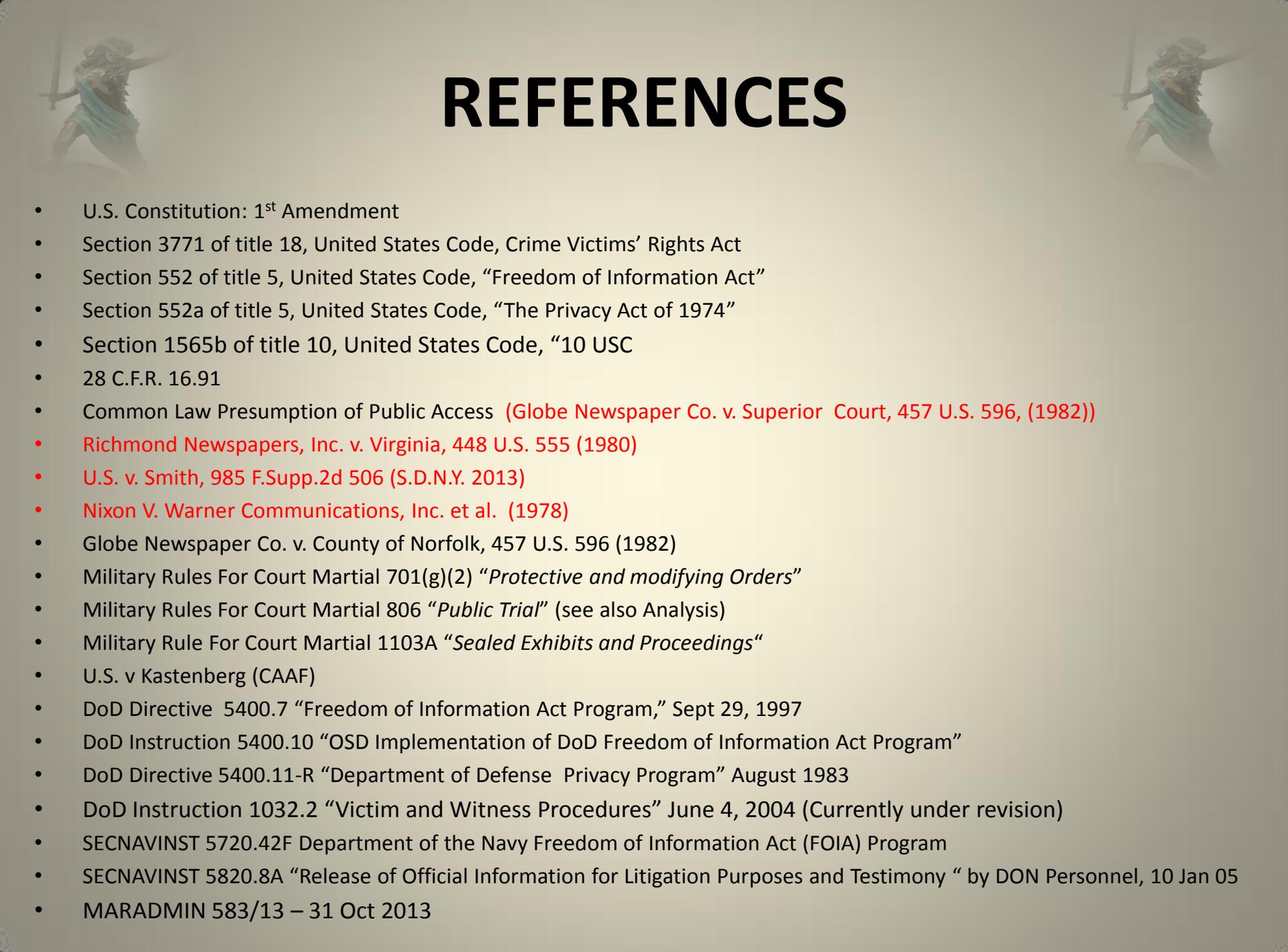
Maj [REDACTED]
Regional Victims' Legal Counsel Pacific
LSSS, Okinawa JP
27 April 2014

Office: [REDACTED]
BB: [REDACTED]



LEARNING OBJECTIVES

- Learn how to obtain evidence from the government pursuant to certain constitutional, common law and statutory provisions
- Gain a general understanding of how the 1st Amendment and Common Law presumptive access provisions are applied by federal courts at different stages/proceedings
- Learn how to effectively navigate through the applicable constitutional and statutory provisions to the benefit of VLC clients
- Using FOIA and Privacy Act provisions to obtain docs
- Understand the means by which the court can prevent access to discovery/evidence.



REFERENCES

- U.S. Constitution: 1st Amendment
- Section 3771 of title 18, United States Code, Crime Victims' Rights Act
- Section 552 of title 5, United States Code, "Freedom of Information Act"
- Section 552a of title 5, United States Code, "The Privacy Act of 1974"
- Section 1565b of title 10, United States Code, "10 USC
- 28 C.F.R. 16.91
- Common Law Presumption of Public Access (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, (1982))
- *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)
- *U.S. v. Smith*, 985 F.Supp.2d 506 (S.D.N.Y. 2013)
- *Nixon V. Warner Communications, Inc. et al.* (1978)
- *Globe Newspaper Co. v. County of Norfolk*, 457 U.S. 596 (1982)
- Military Rules For Court Martial 701(g)(2) "*Protective and modifying Orders*"
- Military Rules For Court Martial 806 "*Public Trial*" (see also Analysis)
- Military Rule For Court Martial 1103A "*Sealed Exhibits and Proceedings*"
- *U.S. v Kastenber* (CAAF)
- DoD Directive 5400.7 "Freedom of Information Act Program," Sept 29, 1997
- DoD Instruction 5400.10 "OSD Implementation of DoD Freedom of Information Act Program"
- DoD Directive 5400.11-R "Department of Defense Privacy Program" August 1983
- DoD Instruction 1032.2 "Victim and Witness Procedures" June 4, 2004 (Currently under revision)
- SECNAVINST 5720.42F Department of the Navy Freedom of Information Act (FOIA) Program
- SECNAVINST 5820.8A "Release of Official Information for Litigation Purposes and Testimony " by DON Personnel, 10 Jan 05
- MARADMIN 583/13 – 31 Oct 2013



Basis for Document/Evidence Retrieval



- CVRA
- 1st Amendment
- Common Law Presumption of Public
- Regular Discovery (KASTENBERG)
- FOIA
- Privacy Act
- RCM 806



Historical concept Crime Victims' Rights



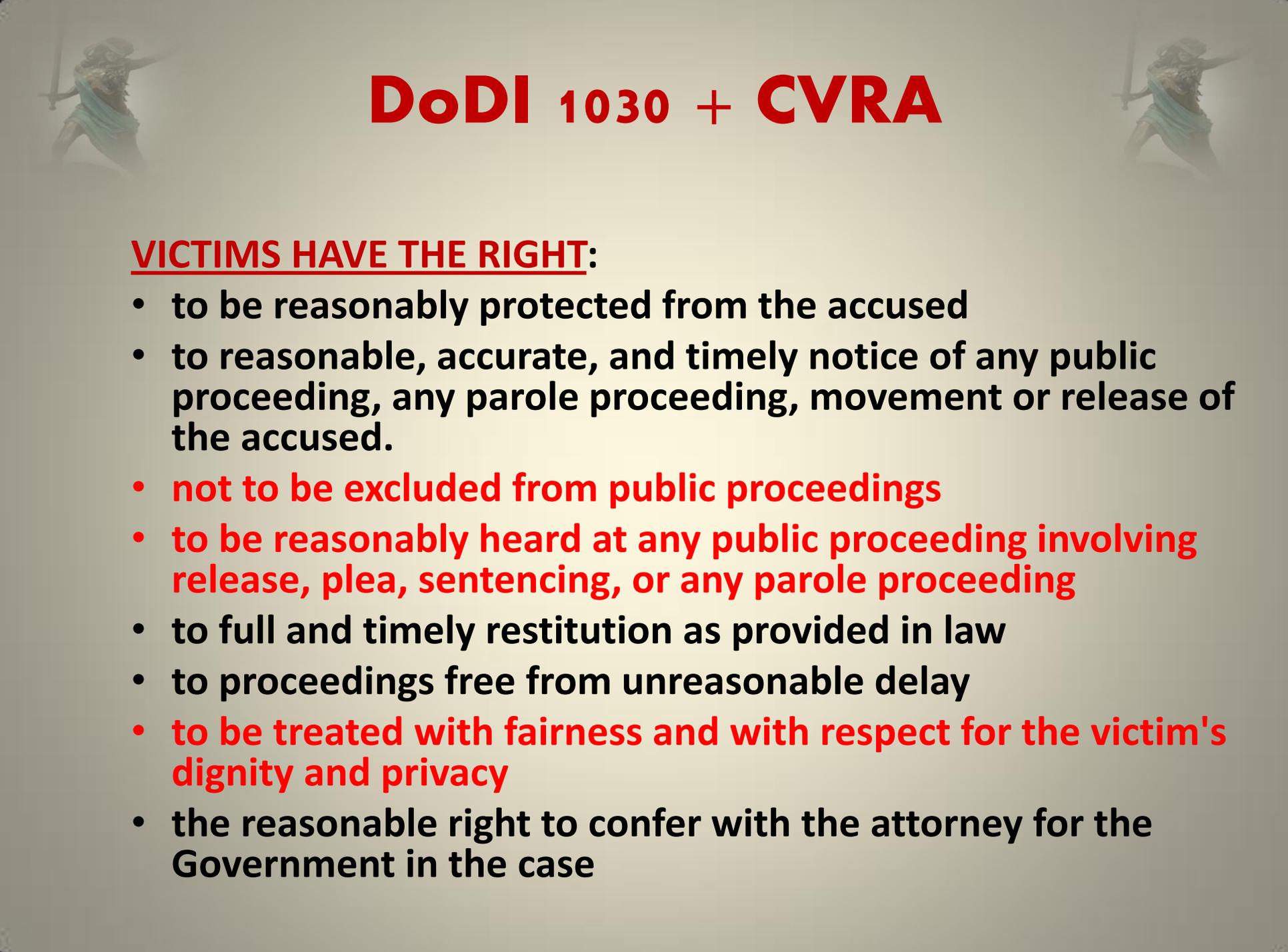
- Pre-Constitution: Prosecutrix + victim was the real party in interest to punitive criminal proceedings which were civil in nature until 1950s.
 - Victims' hired their own attorneys.
 - Victims had exclusive rights to all of the evidence
 - Exclusive right to be present at table
 - Premise: in the best position to assist the prosecutor, so of course they were permitted in the courtroom and seated at table with counsel.
 - Foundation for the CVRA (granting the victim statutory right to be present)

ACCESS TO INFORMATION

WHAT ARE SOME OF THE WAYS THAT VICTIMS CAN GAIN ACCESS TO EVIDENCE?

WHAT ARE SOME OF THE WAYS THAT VICTIMS HAVE BEEN DENIED ACCESS TO PUBLIC TRIALS IN THE MILITARY?

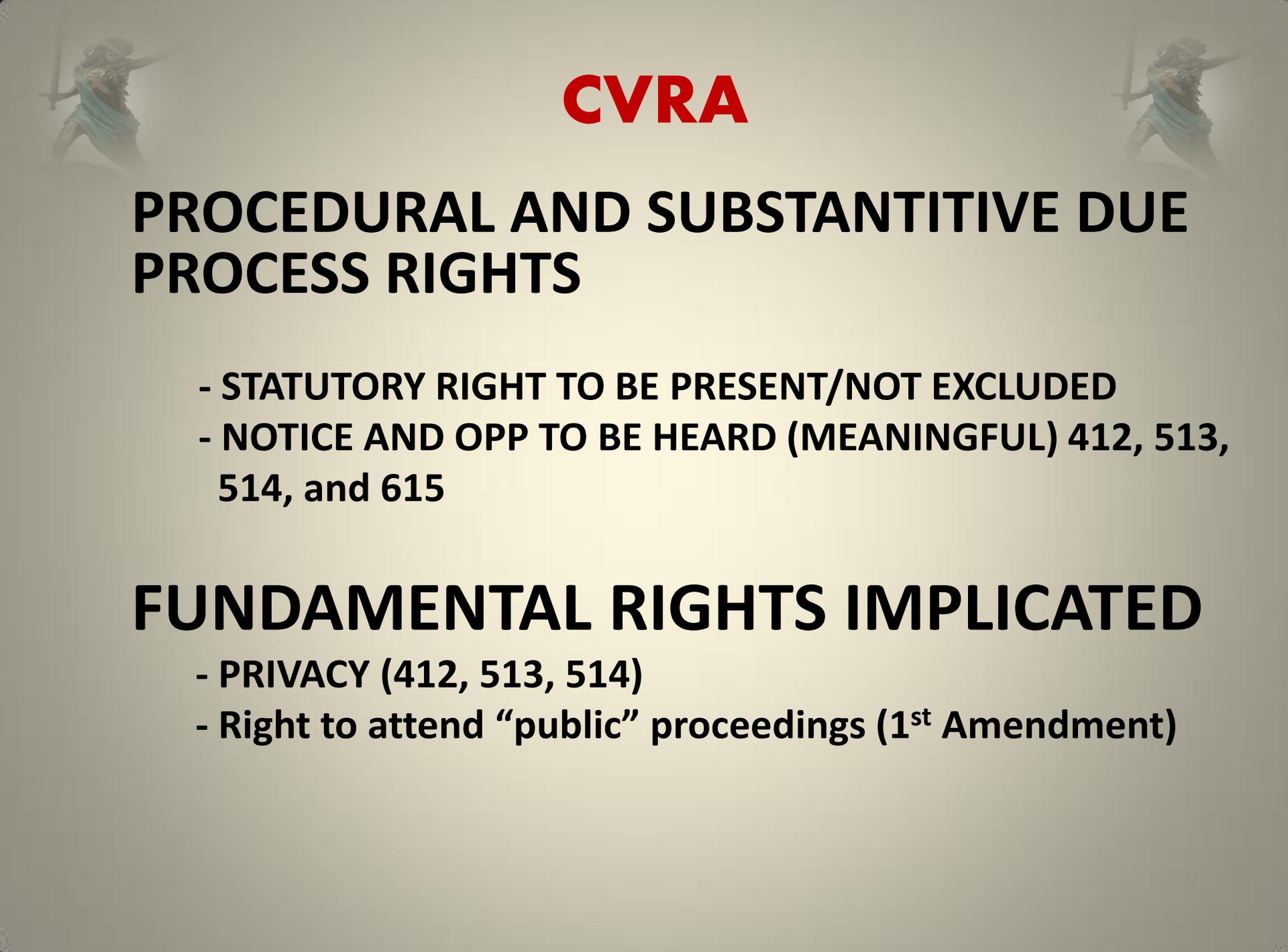
18 U.S.C. 3771



DoDI 1030 + CVRA

VICTIMS HAVE THE RIGHT:

- to be reasonably protected from the accused
- to reasonable, accurate, and timely notice of any public proceeding, any parole proceeding, movement or release of the accused.
- **not to be excluded from public proceedings**
- **to be reasonably heard at any public proceeding involving release, plea, sentencing, or any parole proceeding**
- to full and timely restitution as provided in law
- to proceedings free from unreasonable delay
- **to be treated with fairness and with respect for the victim's dignity and privacy**
- the reasonable right to confer with the attorney for the Government in the case



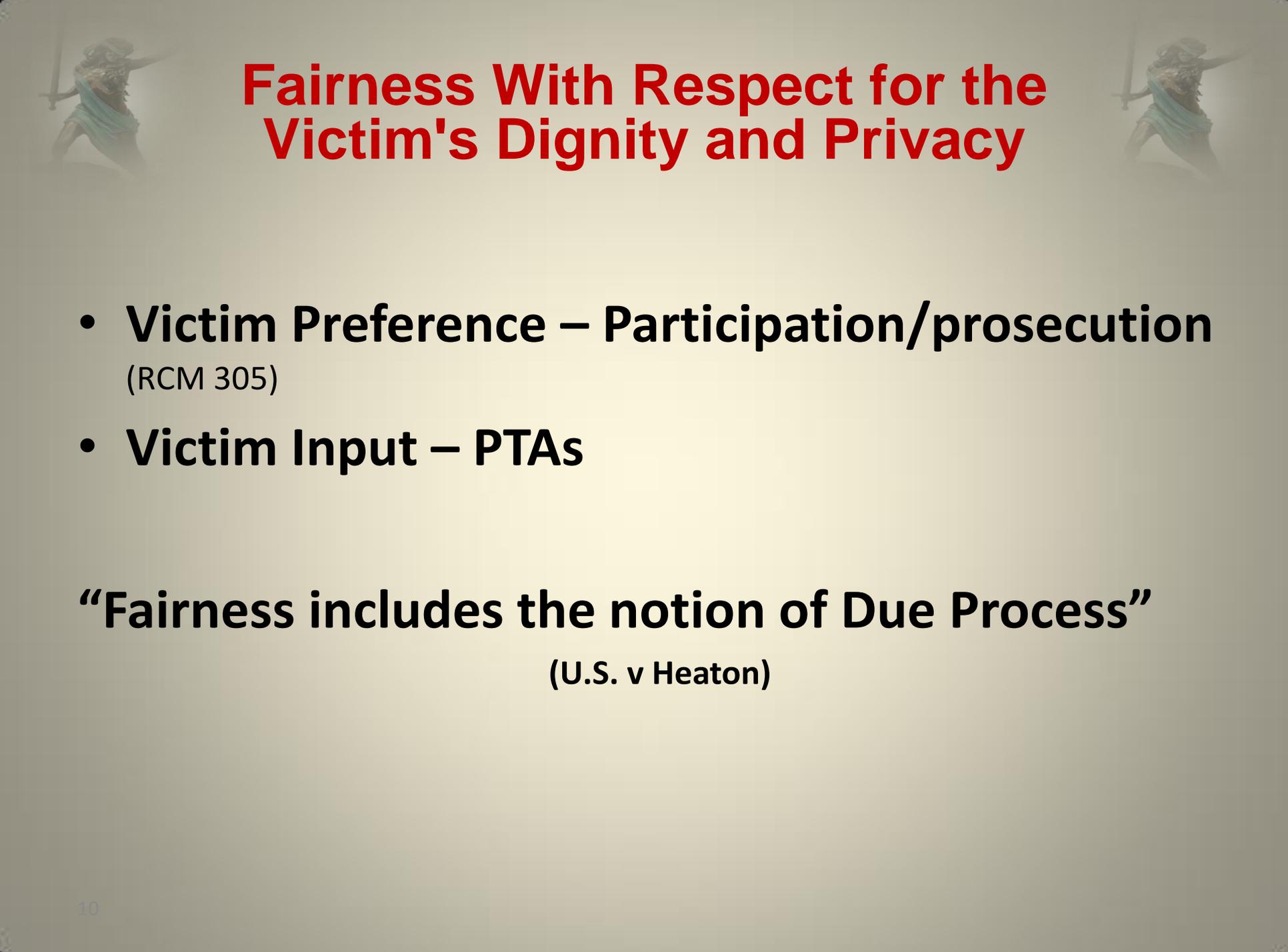
CVRA

PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

- STATUTORY RIGHT TO BE PRESENT/NOT EXCLUDED
- NOTICE AND OPP TO BE HEARD (MEANINGFUL) 412, 513, 514, and 615

FUNDAMENTAL RIGHTS IMPLICATED

- PRIVACY (412, 513, 514)
- Right to attend “public” proceedings (1st Amendment)



Fairness With Respect for the Victim's Dignity and Privacy

- **Victim Preference – Participation/prosecution**
(RCM 305)
- **Victim Input – PTAs**

“Fairness includes the notion of Due Process”

(U.S. v Heaton)



1ST AMENDMENT

**QUALIFIED RIGHT OF ACCESS
Criminal Proceedings**

1st AMENDMENT

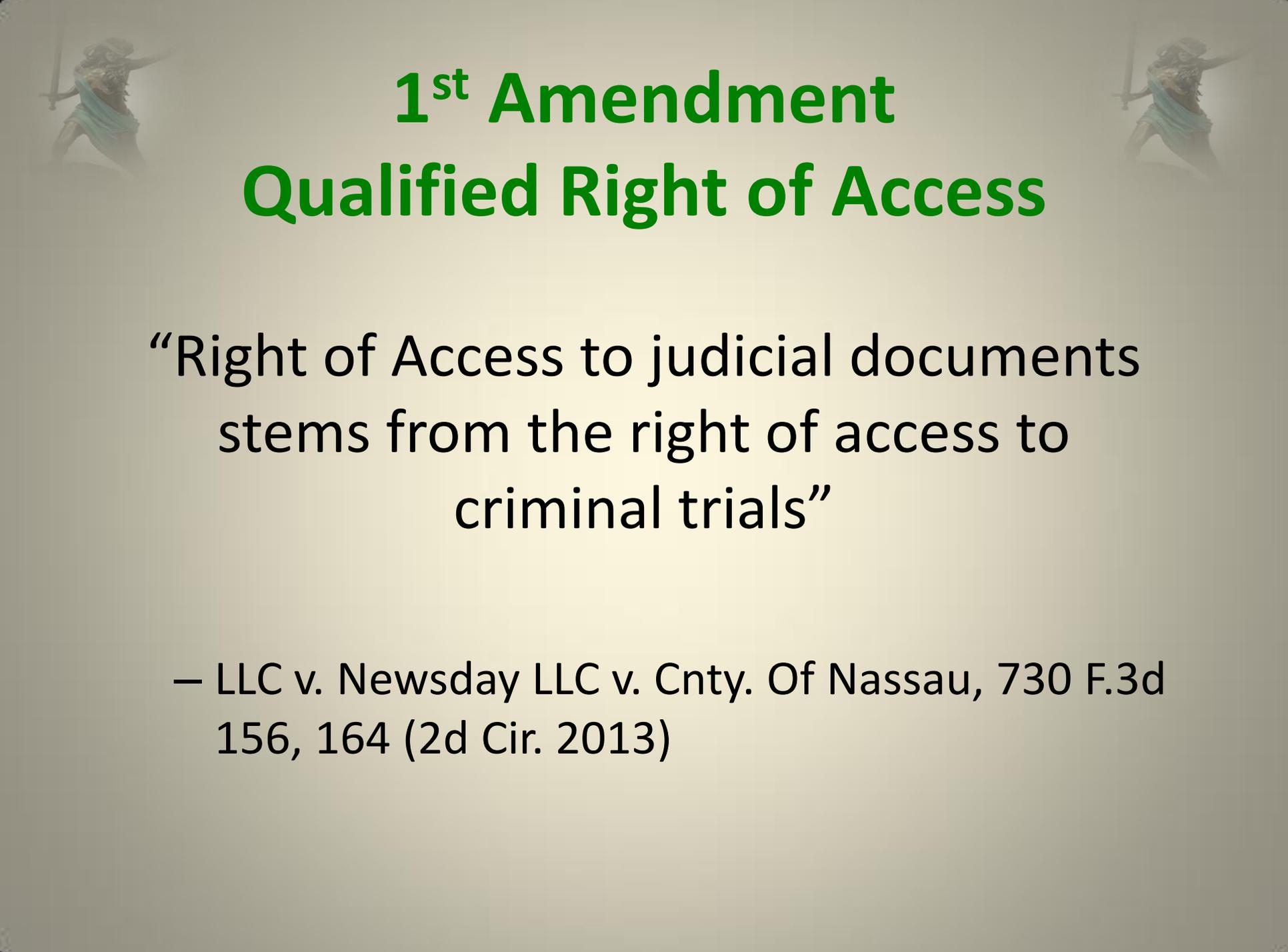


The public has a legitimate interest in the conduct of military justice proceedings. Informing the public about the operations of the criminal justice system is one of the “core purposes” of the First Amendment.

(Manual for Courts Martial, RCM 806 (Drafters’ Analysis))

“Public monitoring of the judicial system fosters the important values of quality, honesty, and respect for our legal system.”

In re Providence Journal, 293 F.3d 1, 9 (1st Cir. 2002)



1st Amendment

Qualified Right of Access

“Right of Access to judicial documents stems from the right of access to criminal trials”

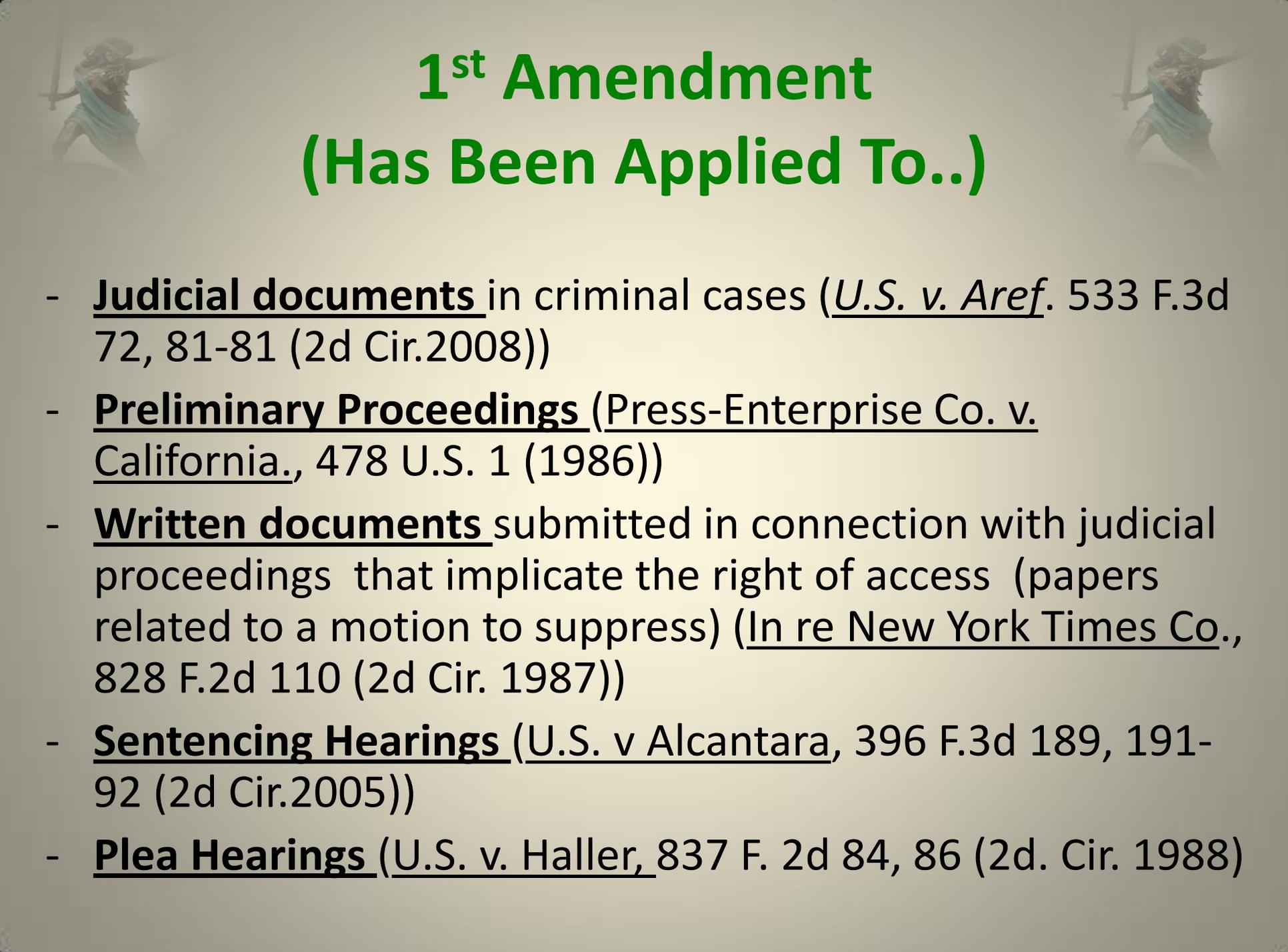
- LLC v. Newsday LLC v. Cnty. Of Nassau, 730 F.3d 156, 164 (2d Cir. 2013)



Qualified Right of Access? (Experience and Logic Approach)

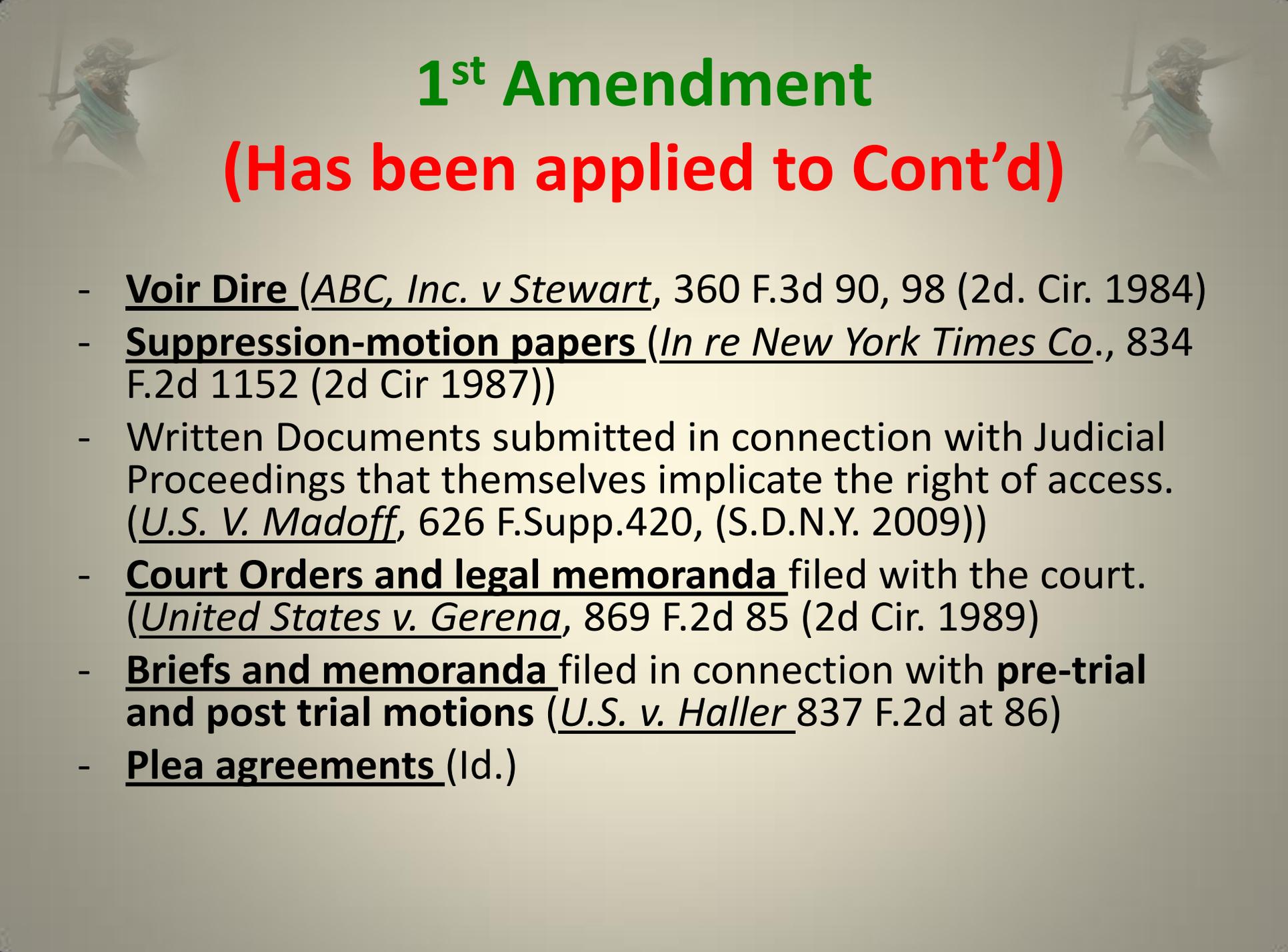


- Whether the proceeding or filing at issue has “historically been open to the press and general public” (Experience)
- Whether “public access plays a significant positive role in functioning of the particular process in question” (Logic)
- APPLIES TO BOTH **JUDICIAL PROCEEDINGS AND DOCUMENTS**
 - LLC v. Newsday LLC v. Cnty. Of Nassau, 730 F.3d 156, 164 (2d Cir. 2013)



1st Amendment (Has Been Applied To..)

- **Judicial documents** in criminal cases (*U.S. v. Aref*, 533 F.3d 72, 81-81 (2d Cir.2008))
- **Preliminary Proceedings** (*Press-Enterprise Co. v. California*, 478 U.S. 1 (1986))
- **Written documents** submitted in connection with judicial proceedings that implicate the right of access (papers related to a motion to suppress) (*In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987))
- **Sentencing Hearings** (*U.S. v Alcantara*, 396 F.3d 189, 191-92 (2d Cir.2005))
- **Plea Hearings** (*U.S. v. Haller*, 837 F. 2d 84, 86 (2d. Cir. 1988))



1st Amendment

(Has been applied to Cont'd)

- **Voir Dire** (*ABC, Inc. v Stewart*, 360 F.3d 90, 98 (2d. Cir. 1984))
- **Suppression-motion papers** (*In re New York Times Co.*, 834 F.2d 1152 (2d Cir 1987))
- Written Documents submitted in connection with Judicial Proceedings that themselves implicate the right of access. (*U.S. V. Madoff*, 626 F.Supp.420, (S.D.N.Y. 2009))
- **Court Orders and legal memoranda** filed with the court. (*United States v. Gerena*, 869 F.2d 85 (2d Cir. 1989))
- **Briefs and memoranda** filed in connection with **pre-trial and post trial motions** (*U.S. v. Haller* 837 F.2d at 86)
- **Plea agreements** (Id.)



1st Amendment (cont'd...)



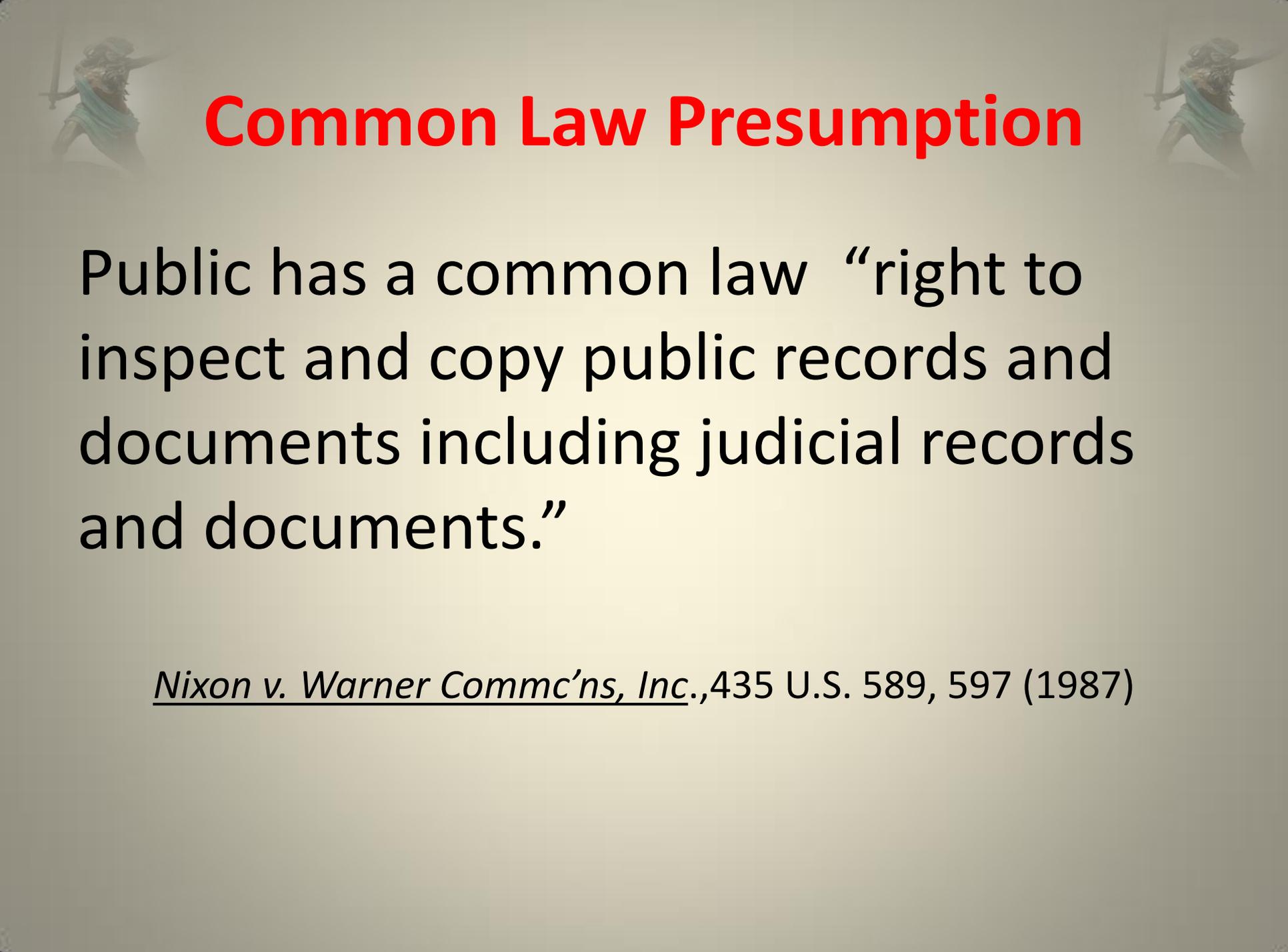
BUT NOT:

- Items viewed by the judge to make determination on admissibility (e.g. In camera review of motions to seal or discovery motions)

U.S. v. Wolfson, 55 F.3d 58, 61 (2d Cir. 1995)



Common Law Presumption of Public Access (English Common Law)



Common Law Presumption

Public has a common law “right to inspect and copy public records and documents including judicial records and documents.”

Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1987)

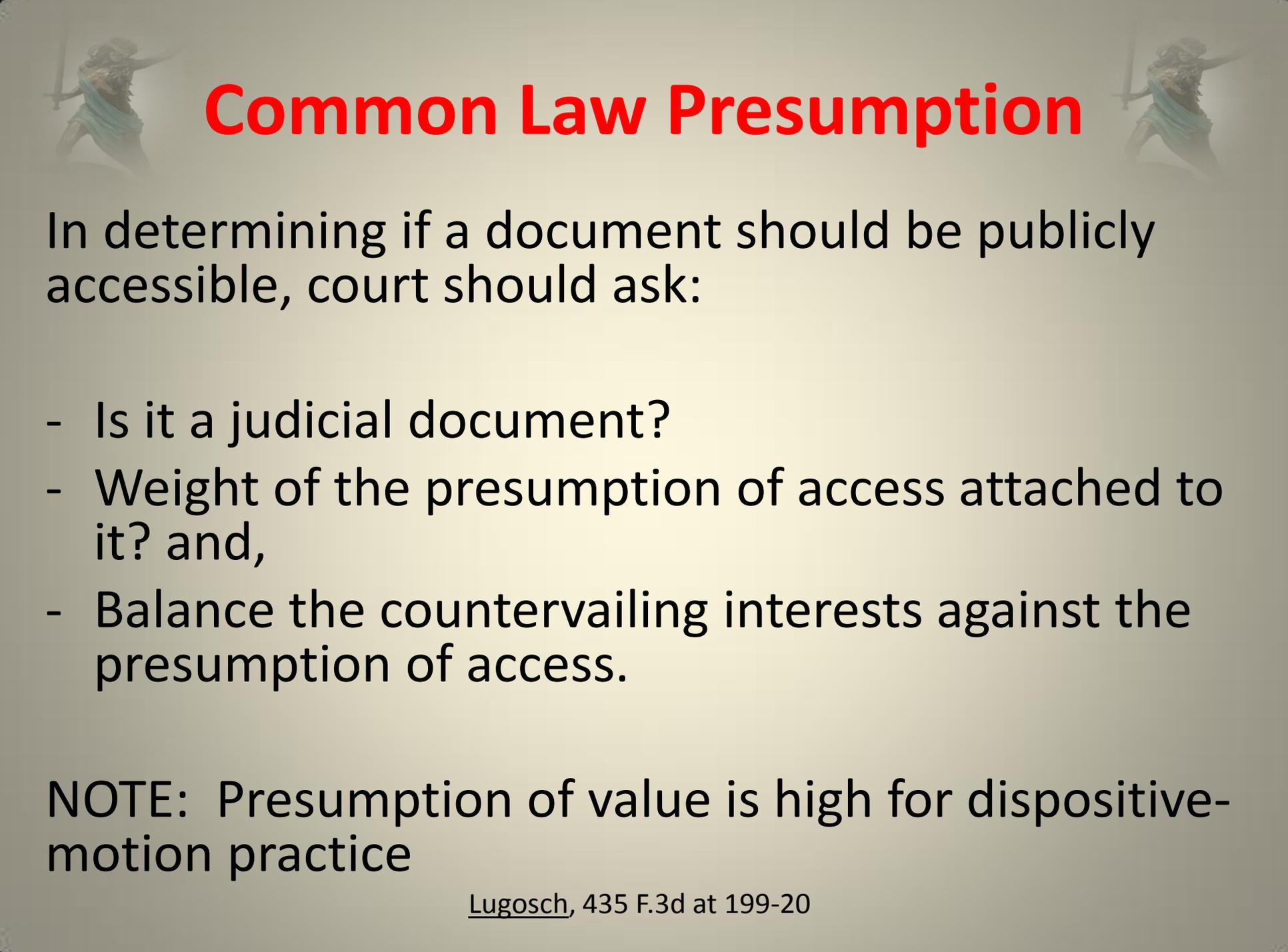


Common Law Presumption



Documents that play no role in the performance of Article III functions are accorded little weight in the presumption of access

(*Amodeo II*, 71 F.3d 1050 (2d Cir. 1996))



Common Law Presumption

In determining if a document should be publicly accessible, court should ask:

- Is it a judicial document?
- Weight of the presumption of access attached to it? and,
- Balance the countervailing interests against the presumption of access.

NOTE: Presumption of value is high for dispositive-motion practice

What's the Difference?

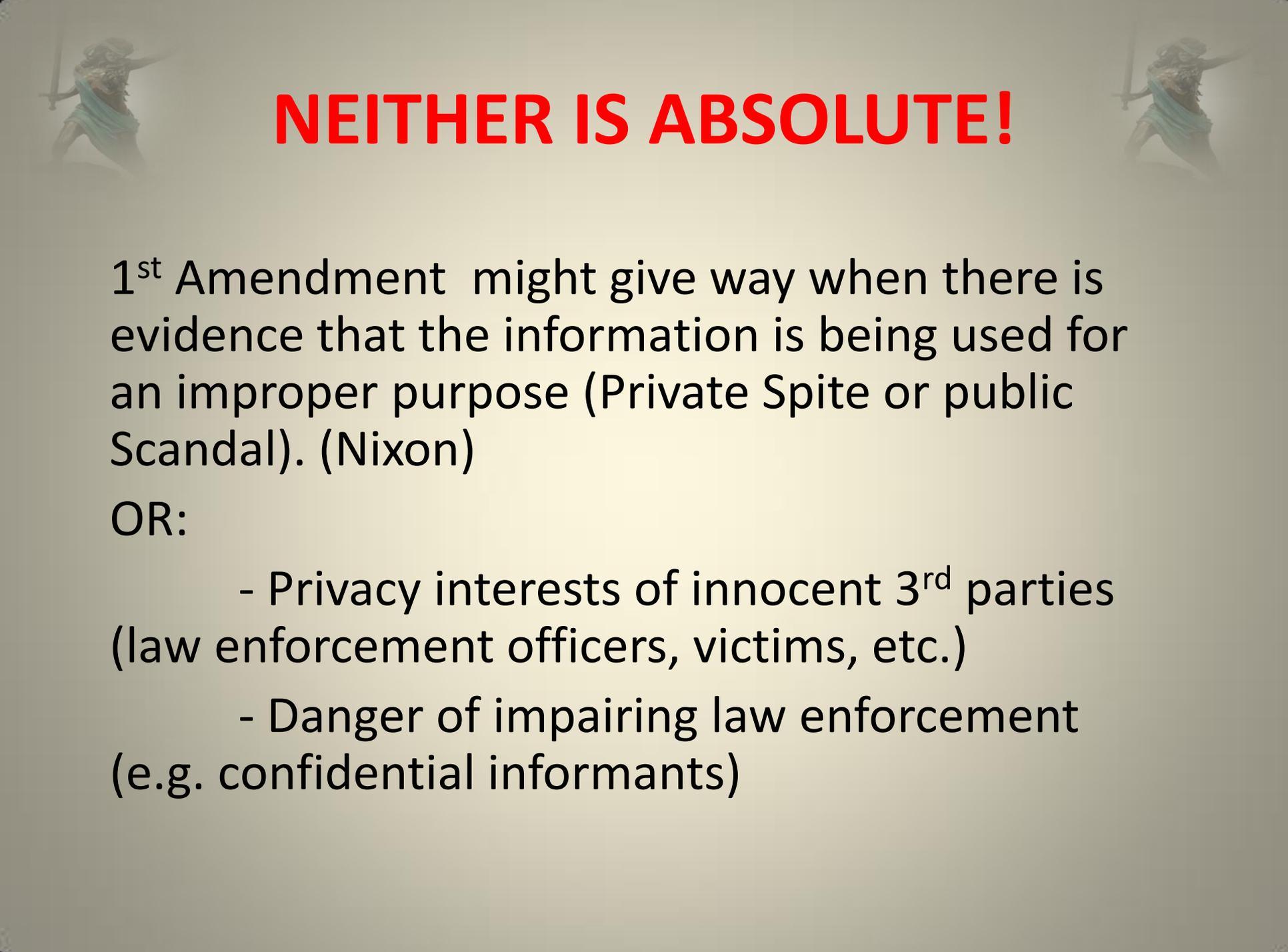
Common Law right of Access – requires a court to balance the competing considerations of providing access (*U.S. v. Smith*, 985 F.Supp.2d 506 (S.D.N.Y. 2013) (see also, *Lugosch*, 435 f.3d at 120)

NOTE: Basis for FOIA (statutory content with restrictions and privacy considerations)

While:

1st Amendment –allows for access unless sealing or closure “is essential to preserve higher values and is narrowly tailored to serve that interest (*New York Times I*, 828 f.2d at 116)

NOTE: Broader Disclosure, more stringent (General Principle)



NEITHER IS ABSOLUTE!

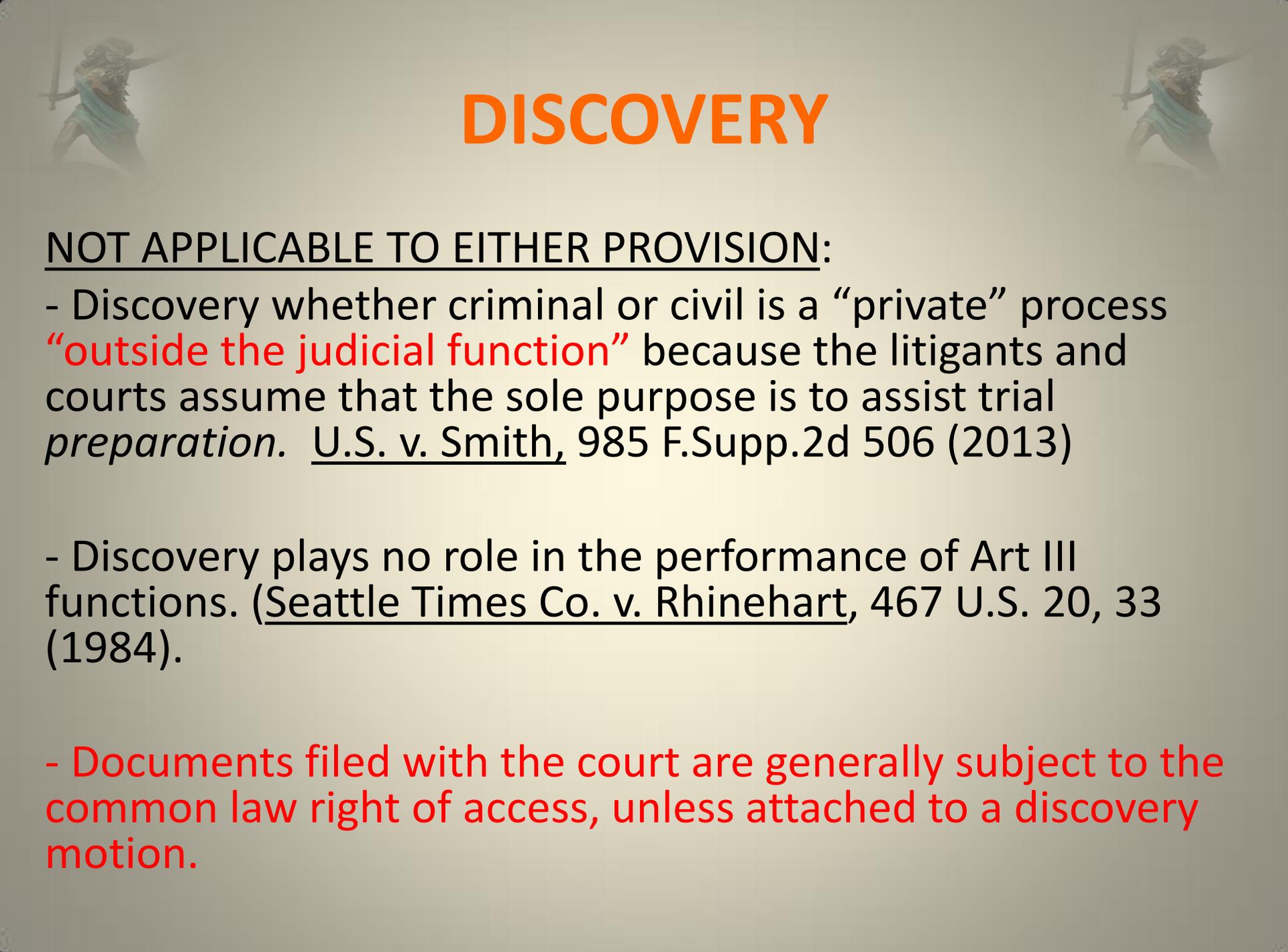
1st Amendment might give way when there is evidence that the information is being used for an improper purpose (Private Spite or public Scandal). (Nixon)

OR:

- Privacy interests of innocent 3rd parties (law enforcement officers, victims, etc.)
- Danger of impairing law enforcement (e.g. confidential informants)



Discovery



DISCOVERY

NOT APPLICABLE TO EITHER PROVISION:

- Discovery whether criminal or civil is a “private” process “**outside the judicial function**” because the litigants and courts assume that the sole purpose is to assist trial *preparation*. U.S. v. Smith, 985 F.Supp.2d 506 (2013)
- Discovery plays no role in the performance of Art III functions. (Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984)).
- Documents filed with the court are generally subject to the common law right of access, unless attached to a discovery motion.



If so, **How Do You Obtain Discovery**
from the Government prior to trial if
it is not filed with the court and
there is no presumption of public
access?

A blurred, sepia-toned background image of a woman in a green dress, possibly a warrior or a figure from a historical or mythological setting, holding a sword. The image is centered and serves as a backdrop for the text.

FOIA/PRIVACY ACT



FOIA/PRIVACY ACT

- **FOIA**: contemplates public access to any and all federal government records not exempt from disclosure
- **Privacy Act**: Permits an individual to gain access to those records which pertain to him/her and are found in a system of records maintained by a federal agency



FOIA/PRIVACY ACT

- DEFAULT – Federal agencies must consider request for both FOIA and Privacy Act.
- PRIORITY – Where substantial rights implicated



BUT SEE:

Murphy v. FBI, 490 F.Supp. 1138
(D.C. Dist. 1980): “Private litigant
cannot utilize FOIA as a means to
obtain earlier or greater access to
information, to broaden the scope,
or as a supplement or substitute for
traditional means, of discovery
available in pending litigation.”

SEE ALSO:

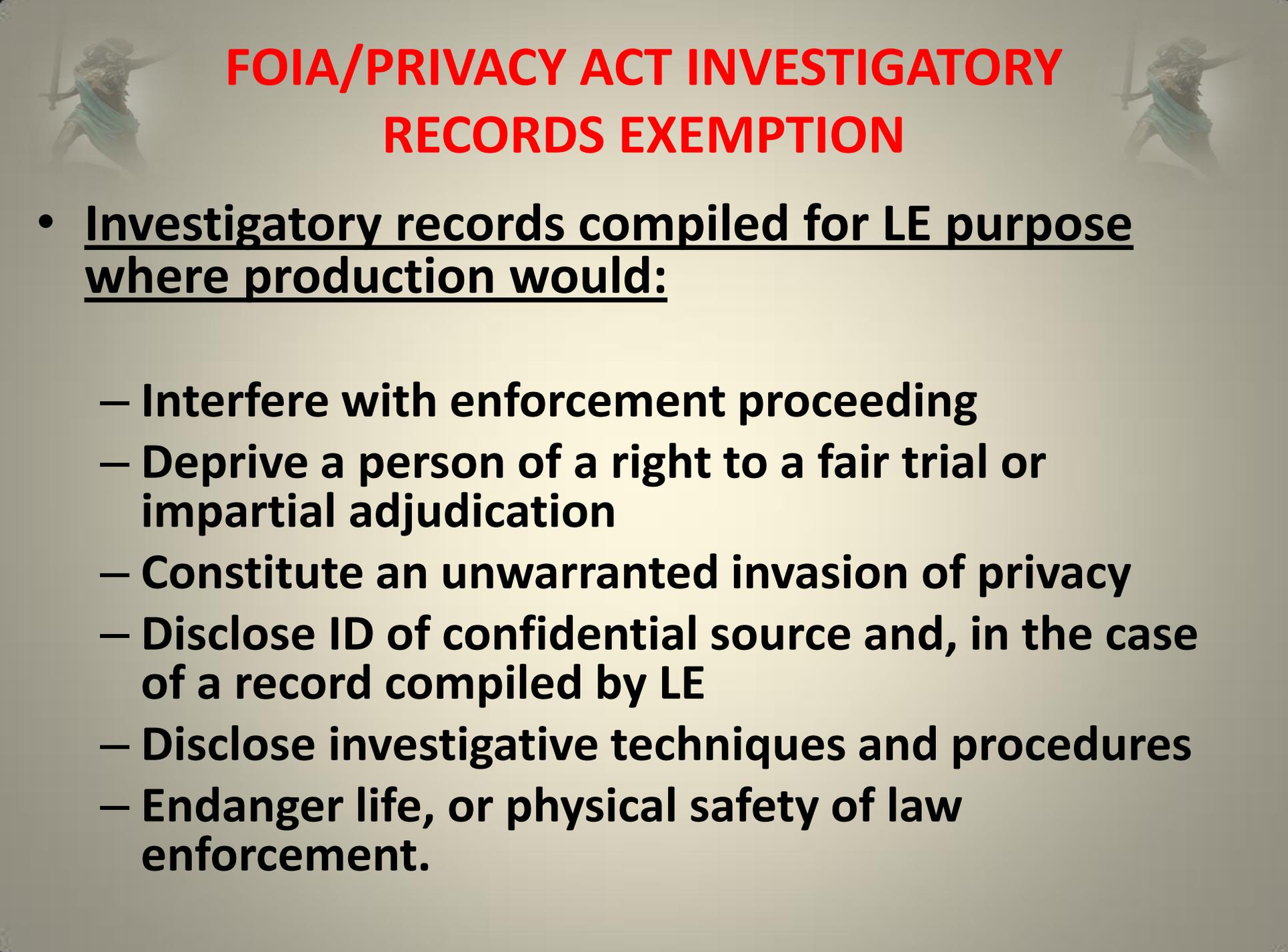
LAW ENFORCEMENT EXEMPTIONS?

9 EXEMPTIONS



- **LAW ENFORCEMENT – Almost identical (FOIA/Privacy Act)**
- **But under Privacy Act, Agency must promulgate rules pursuant to the rulemaking requirements of 5 U.S.C. 553 (b)(1)(2) and (3) (c)**

Investigatory records exemptions should be read coextensively. (*U.S. v. Exner* 612 F.2d 1202 (2d. Cir 1990))



FOIA/PRIVACY ACT INVESTIGATORY RECORDS EXEMPTION

- Investigatory records compiled for LE purpose where production would:
 - Interfere with enforcement proceeding
 - Deprive a person of a right to a fair trial or impartial adjudication
 - Constitute an unwarranted invasion of privacy
 - Disclose ID of confidential source and, in the case of a record compiled by LE
 - Disclose investigative techniques and procedures
 - Endanger life, or physical safety of law enforcement.

FBI/NCIS

- Nominally activates Privacy Act exemption under 28 C.F.R.16.96(a) regarding:
 - Central Records System
 - Electronic Surveillance Indices
 - Identification Division Records System,
 - National Crime Information Center

**WHAT IF THE TC/DC AGREE OR
MOVE TO SEAL THE RECORD OR
FOR A PROTECTIVE ORDER?**



PROTECTIVE/GAG ORDERS (RCM 806)



Usually applied to extra judicial statements to prevent prejudicial matters not of public record from being divulged by parties. But can be applied to sealing records as well.

- Notice to all parties
- Opportunity to be heard
- State on the record reason for issuing (with specificity)

Interested parties should be given an opportunity to challenge the propriety of a sealing order before the decision to seal is final

[U.S. v. City of Hartford v. Chase, 942 F.2d 130, 20 Fed. R. Serv. 3d 995 \(2d Cir. 1991\).](#)

(See also, [Stone v. University of Maryland Medical System Corp., 855 F.2d 178, 48 Ed. Law Rep. 1057 \(4th Cir. 1988\)](#))



Protective Orders



In federal courts a party opposing limitation of access to court records may file a motion to intervene.



Protective Orders



Before issuing a protective order, MJ must consider whether other available remedies would effectively mitigate the adverse



Protective/Gag Orders



(Nixon) Access to court files can only be denied if they become a vehicle for improper purpose or the judge has sealed the record after the proper finding. (Id.)



**PROTECTIVE ORDERS
SEALING THE RECORD
OR
PARTS OF DISCOVERY**



SEALING DISCOVERY (Protective Order)

Upon sufficient showing, the military judge may at any time order that discovery or inspection be denied, restricted or deferred or make such other order as appropriate.

RCM 701(g)(2)



SEALING DISCOVERY (Protective Order)



Before issuing a protective order, MJ must consider whether other available remedies would effectively mitigate the adverse affect.

RCM 806 (Drafter's Analysis)



SEALING DISCOVERY

Burden and Standard of Proof

It is the burden of an applicant seeking the sealing of criminal records to demonstrate legitimate reasons that the records should not remain open to the public; once this burden is met and those needs outweigh the legitimate interests of the state in maintaining the records, the application should be freely granted.

[U.S. v. Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon, 920 F.2d 1462, 118 A.L.R. Fed. 801 \(9th Cir. 1990\)](#)



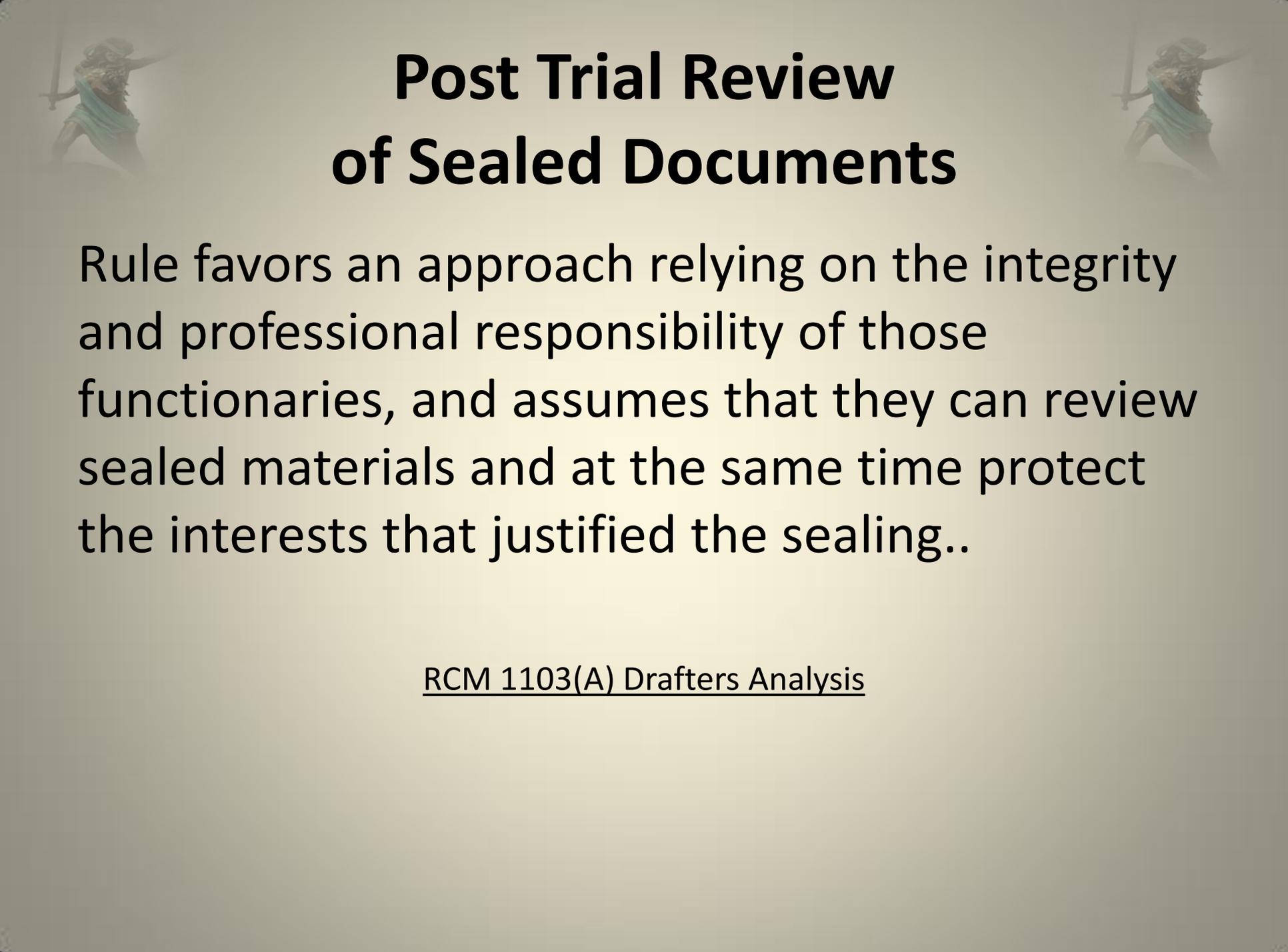
SEALING DISCOVERY

Required finding



It is an abuse of discretion when a court inexplicably orders court records to be sealed without articulated, specific reasons for closure in recognition of the presumptive right of access. The court must make particularized findings to support decision to seal evidence.

[U.S. v. Kravetz, 706 F.3d 47 \(1st Cir. 2013\).](#)



Post Trial Review of Sealed Documents

Rule favors an approach relying on the integrity and professional responsibility of those functionaries, and assumes that they can review sealed materials and at the same time protect the interests that justified the sealing..

RCM 1103(A) Drafters Analysis

Vignette

The prosecution has just filed a motion pursuant to M.R.E. 412 regarding a command investigation (CI) conducted into the misconduct of the victim's husband. The Defense intends to use the investigation during trial to impeach prior statements made by your client during the Article 32. The TC has refused turn over the CI. However, despite that the court has been provided with a copy, TC directed you to FOIA the document because it "belongs to the command."

How do you proceed?

Answer/Analysis

Has the document been filed with the court?

If so, has the document been sealed? (the only thing preventing discovery)

- If no, ask to retrieve a copy of the document from the court first as an officer of the court with a client who has a privacy interest in the proceedings, second, under the presumption of public access doctrine.

- If yes (sealed), ask for the order sealing to record. If not properly sealed (specificity, and as narrow as necessary to protect the interest), assert the potential for error citing case law, attempt to intervene and move the court for a copy of the doc since sealed or not since it contained info regarding 412.

If not yet filed with the court, attempt to retrieve the document first from the CA as an officer of the court, second, via court order, third via the Privacy Act with an expedited request since the document pertains to exercising a substantial right.

QUESTIONS?

Maj [REDACTED]

Regional Victims' Legal Counsel, Okinawa

[REDACTED]

DSN: [REDACTED]

