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Military Rule of Evidence 412: Can Too Much Balancing Tip the Scales of Justice?

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COMMENT

MILITARY RULE OF EVIDENCE 412: CAN TOO MUCH BALANCING TIP THE SCALES OF JUSTICE?

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ABSTRACT

Although the Military Rules of Evidence closely mirror the Federal Rules of Evidence, some modifications have necessarily been made to the Military Rules for use in court-martial proceedings. This Comment addresses Rule 412, the "rape shield" statute, in particular. It discusses the heightened constitutional issues that arise due to Military Rule of Evidence 412(c)(3)'s "balancing test" and proposes amending the rule to more closely follow its federal counterpart.

Despite the fact that controversy surrounds Rule 412, whether it is the federal version of the rule or the military version, most would agree that shielding rape victims from the line of questioning that once was allowed, at common law, is necessary. Protecting the interests of victims of sexual assault is of high importance, but one must not forget that defendants also have interests that are worth protecting. The interests of the defendants stem from the Constitution—the right to a fair trial, the right to confront the witnesses against him, and the right to present evidence in his defense. These interests must all be weighed in determining whose interest is prevailing and what evidence will either be admitted or excluded.

Two recent cases from the United States Court of Appeals for the Armed Forces, United States v. Gaddis and United States v. Ellerbrock, discuss the balancing that Military Rule of Evidence 412 imposes on evidence of a sexual assault victim's prior sexual history before the accused will be allowed to admit such evidence. Prior to any balancing taking place, however, the proffered evidence must first meet one of the narrow exceptions provided in Rule 412(b).

To determine whether the evidence meets one of the exceptions, the accused must first fulfill certain procedural requirements and the evidence must be heard at a closed hearing. After these procedural hurdles are met, the military judge must determine whether the evidence in fact meets an exception, and then she must weigh that evidence against the alleged victim's

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privacy interest under Military Rule of Evidence 412(c)(3). If the military judge finds that the probative value of the proffered evidence outweighs the alleged victim's privacy interest, she must then conduct another balancing test, under Military Rule of Evidence 403, to determine whether this evidence that is now deemed relevant and material is substantially outweighed by the danger of unfair prejudice. Subjecting the same evidence to such scrutiny may appear thorough and necessary, given the history of sexual assault prosecutions; however, the potential for depriving the defendant of his constitutional rights is high. Thus, the balancing test under Rule 412(c)(3) should be abolished.

Eliminating this test will not only remove confusion within court-martial proceedings, but will protect the defendant's constitutional rights to cross-examine witnesses against him and to present an adequate defense. The protection to the alleged victim's privacy interest will not be diminished by amending the rule in this way since Rule 412 evidence is still subject to consideration under Rule 403. Protecting the privacy of sexual assault victims and protecting defendants' constitutional rights are both interests that must be guarded. Subjecting the accused's proffered evidence, however, to too much balancing may infringe on his ability to present a defense more than the Constitution allows.

I. INTRODUCTION

Protecting the privacy interests of victims of sexual assault is an important endeavor in our society. It is also just as important, if not more so, when that protection appertains to our military personnel. The individuals who serve in our military, and put their lives on the line to ensure that we maintain our liberty as Americans, deserve to be protected from embarrassment and humiliation should they become a victim of sexual misconduct.[1] Embarrassment and humiliation usually come in the form of cross-examination during a criminal proceeding for charges of sexual assault. A defense tactic used to be to introduce "evidence of the victim's 'unchaste' character."[2] Protecting victims of sexual assault from this line of questioning in court is important; however, protecting the constitutional rights of defendants in the military who are accused of sexual

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 analysis, at A22-36 (2012) [hereinafter MIL. R. EVID. 412 analysis].

2. *Id.*

misconduct must not be overlooked in the interest of shielding the privacy interests of victims.[3]

This Comment discusses Military Rule of Evidence 412(c)(3) and the "balancing test" found therein. Part II explains the background to Federal Rule of Evidence 412 and Military Rule of Evidence 412. It discusses the policy concerns that prompted the passage of this particular Federal Rule of Evidence, and the history of the rule's incorporation into military criminal justice practice. Part III looks at how a case in civilian court balances proffered evidence that is to be admitted under Federal Rule of Evidence 412; and it analyzes three military cases that employed Military Rule of Evidence 412. It discusses differences between the applications of Rule 412 in federal versus military courts. Part IV proposes the change that should be made to Military Rule of Evidence 412 to better comport with constitutional considerations in a way that still takes into account the interests of the victim, the defendant, and society.[4]

II. BACKGROUND

A. *Enactment of Federal Rule of Evidence 412*

Prior to enactment of Federal Rule of Evidence (F.R.E.) 412[5] in 1978, "[i]f a defendant in a rape case raise[d] the defense of consent, that defendant

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3. The author served as a Hospital Advocate for The Rape Crisis Center of San Antonio, Texas for nearly two years. Protecting victims, seeing to their immediate medical needs once a sexual assault has occurred, helping them heal from the trauma of sexual assault, and protecting them in court from being assaulted all over again are extremely important issues that must not be overlooked. This Comment is not meant to ignore these concerns. Protecting explicit constitutional rights, however, remains an area of law in which every member of our society has a vested interest. Ignoring the constitutional rights of a single defendant can begin a rapid decent down the proverbial "slippery slope" toward a tyrannical form of government for all American citizens.

4. For an interesting discussion on the possibility of eliminating FED. R. OF EVID. 412 altogether, *see* Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 874-75 (2013) ("We may find that we have reached the point at which, instead of a prohibition with a finite number of exceptions, what we need is a return to basics—an approach in which judges can consider, on a case-by-case basis, the probative value of the proffered evidence to the issue sought to be established."). While an analysis of FED. R. OF EVID. 412 in its entirety is beyond the scope of this Comment, Professor Capers's view on rape shield statutes as a whole raises legitimate concerns.

5. Rule 412. 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

[could] then offer evidence about the victim's prior sexual behavior."[6] In cases of rape prosecution, "prior sexual activity was probative of consent."[7] A defendant could question the victim "about whether she had had intercourse before, how many times, how old she was when she had intercourse for the first time, and with how many men," even if it was a case of rape where the victim did not know the defendant prior to the attack.[8] Due to this invasive and merciless line of questioning, not only was the

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opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) 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, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—,

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—,

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin . . . .

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. . . .

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent and order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

. . . .

Act of Oct. 28, 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978) (amended 1988, 1994, & 2011).

6. 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann).

7. Capers, *supra* note 4, at 836.

8. *Id.* at 837.

defendant on trial, but the victim was placed on trial, too.[9] The alleged purpose of these questions was "to determine whether she was the type of woman who consents, the type of woman to lie about it, and hence the type of woman who should not be protected by the law."[10] Recognizing that the "evidentiary rules have permitted introduction of evidence about a rape victim's prior sexual conduct,"[11] and that the rules treated the victim as if she were the offender, lawmakers and victim's rights advocates began to question the propriety and usefulness of such a rule.[12] The appropriateness of such evidence was already being questioned by several states that, in turn, decided to update their evidentiary rules to afford some protection to rape victims.[13] Congress sought to follow the states' lead by updating the federal evidentiary rules.[14]

Congressman James Mann acknowledged in the congressional hearing that preceded enactment of F.R.E. 412 that the defendant was permitted wide latitude when inquiring into a rape victim's past sexual behavior.[15] This behavior about which the victim would be questioned had "at best a tenuous connection to the offense for which the defendant [was] being tried."[16] At the same time, questions regarding a defendant's prior sexual history were barred from admission during the trial and any pretrial

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9. *Id.* at 835. Some even argued that it was in fact the victim who was "put on trial," instead of the defendant, through the use of this kind of evidence. *Privacy of Rape Victims: Hearing on H.R. 14,666 and Other Bills Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary H.R.*, 94th Cong. 51 (1976) [hereinafter *Hearing*] (statement of Rep. Harris).

10. Capers, *supra* note 4, at 835. At common law, promiscuity was viewed as relevant and could be used to attack her credibility. *See* Shawn J. Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 487 (1997).

11. 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann).

12. *Id.*

13. *Id.* Michigan, the first state to enact a "rape shield" law, did so in 1974. Comment, *Rape, Sexual Assault and Evidentiary Matters*, 14 GEO. J. GENDER & L. 585, 590 (Helim Kathleen Chun & Lindsey Love, eds., 2013). Several states had already enacted rape shield laws similar to F.R.E. 412 prior to 1978. *See Hearing*, *supra* note 9, at 1 (statement of Rep. Hungate, Chairman, Subcomm. on Criminal Justice) ("The Justice Department reports that some 30 States have already enacted laws similar in thrust to [F.R.E. 412]. Several other States are reported to have such legislation pending.").

14. 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann).

15. *Id.*

16. *Id.*

hearings.[17] Therefore, Rule 412 was designed "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives" by admitting evidence of specific acts from the victim's sexual history "only in clearly and narrowly defined circumstances."[18]

When seeking to enact the bill, Congress had to ensure that the interests of the rape victim, the defendant, and society were all "fairly balance[d]."[19] The victim's private life needed to be protected from "unwarranted public exposure" while at the same time still allowing the defendant to "adequately . . . present a defense by offering relevant and probative evidence."[20] Congress also wanted to protect society's interest in conducting fair trials by not admitting "unduly prejudicial evidence" that would confuse the "issues before the jury."[21]

B. Amendments to Federal Rule of Evidence 412

Since its enactment in 1978, F.R.E. 412 has undergone only a few changes.[22] The first amendment, which occurred in 1988, merely affected

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17. Capers, *supra* note 4, at 838.

18. 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann).

19. *Id.*

20. *Id.*; *see* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process'. . . . [T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.") (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)) (internal quotation marks omitted).

21. *Id.*

22. Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
(1) evidence offered to prove that a victim engaged in other sexual behavior; or
(2) evidence offered to prove a victim's sexual predisposition.
(b) Exceptions.
(1) Criminal Cases. The court may admit the following evidence in a criminal case:
(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of . . . physical evidence;

terminology found within the rule.[23] Prior to 1994, however, Rule 412 included a balancing test in subsection (c)(3), which read:

> If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that *the probative value of such evidence outweighs the danger of unfair prejudice*, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.[24]

In 1994, the rule was amended again, at which point the balancing test found in subsection (c)(3) was eliminated.[25] The use of the balancing test, and its subsequent removal from the rule, appeared to be practically insignificant.[26] This seeming "insignificance" was assumed due to the fact that the advisory committee did not provide any rationale or comment for deleting the balancing test from the rule.[27] Commentators to the rule acknowledged that if the evidence was both narrow enough and crucial enough to be admissible under one of the exceptions found in subsection (b),[28] then "there is little reason to filter it further through a strict

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> (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
> (C) evidence whose exclusion would violate the defendant's constitutional rights.
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> ....
>
> (c) Procedure to Determine Admissibility.
>
> (1) Motion....
>
> (2) Hearing....
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> [(3) This paragraph was removed by the 1994 amendment. *See supra* note 5 for the paragraph as originally enacted.].

FED. R. EVID. 412 (2011) (amended in 1988 & 1994).

23. *Id.* The purpose of the 1988 amendment was to conform terminology relating to sex offenses. Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7046, 102 Stat. 4181.

24. FED. R. EVID. 412(c)(3) (1988) (emphasis added) (amended 1994).

25. Act of Sept. 13, 1994, Pub. L. No. 103-322, 108 Stat. 1919.

26. Shane R. Reeves, *Time to Fine-Tune Military Rule of Evidence 412*, 196 MIL. L. REV. 47, 79 n.180 (2008).

27. *Id.*; *see generally* FED. R. EVID. 412 advisory committee's notes.

28. FED. R. EVID. 412(b)(1) ("The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical

exclusionary balancing test."[29] Although the test was eliminated from the federal rule, Military Rule of Evidence (M.R.E.) 412 retained, and continues to use, this balancing test.[30]

C. *The Beginning of Military Rule of Evidence 412*

Paragraph 153 *b* (2)(b), the precursor to M.R.E. 412, of the 1969 revised edition of the Manual for Courts-Martial allowed "any evidence, otherwise competent, tending to show the unchaste character of the alleged victim" in order to prove "probability of consent by the alleged victim."[31] Evidence of this nature could be introduced at trial even if the victim had not testified.[32] This earlier rule typically discouraged victims from reporting and prosecuting sexual assault cases within the military since it caused embarrassment and humiliation to victims.[33] In addition, the evidence yielded under the rule usually was of minimal probative value and potentially distracting.[34] Given the wide latitude this rule afforded defendants, the military recognized the need for a new rule to offer victims protection from invasive questions during investigations and courts-martial proceedings due to the concededly "large number of sexual assault cases common to the armed forces."[35] Upon seeing the changes taking place with the Federal Rules of Evidence as a whole, the Joint Services Committee

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evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.").

29. STEPHEN A. SALTZBURG, ET AL., FEDERAL RULES OF EVIDENCE MANUAL 412-1, 412-5 (10th ed. 2011).

30. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(c)(3) (2012) [hereinafter MIL. R. EVID. 412(c)(3)]; *see generally* United States v. Banker, 60 M.J. 216 (C.A.A.F. 2004) (upholding the use of M.R.E. 412 to exclude evidence of an alleged victim's motive to fabricate allegations); United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011) (holding that while M.R.E. 412(c)(3) is not facially unconstitutional, it is needlessly confusing); United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011) (finding error when M.R.E. 412 was used to prevent evidence that was constitutionally required).

31. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Para. 153 *b* (2)(b) (rev. ed. 1969).

32. *Id.*

33. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36.

34. *Id.*

35. Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 21, 22 n.66 (1990).

Working Group (Working Group) was formed.[36] The Working Group was tasked with drafting new rules of evidence for the military; however, the scope of the group's task was left undefined.[37] Eventually, the Working Group was told to "adopt each Federal Rule of Evidence verbatim."[38] Although given strict orders of adoption, the Working Group was granted latitude to change the words necessary to allow for application to military procedure, unless a "substantial articulated military necessity for its revision existed."[39]

D. Incorporating Federal Rule of Evidence 412 into Military Practice

Initially, the Working Group believed Rule 412 was unnecessary.[40] At the time, evidence that a rape victim was not chaste or that she engaged in extramarital sexual relations could be admitted in a court-martial proceeding both to establish consent of the victim and to impeach the victim.[41] Although the Working Group recognized that such evidence was irrelevant,[42] the belief was that Federal Rules of Evidence 401[43] and 403[44] made adoption of Rule 412 superfluous.[45] After one member of the

36. *Id.* at 9-10. One representative each from the Army, Navy, Air Force, Coast Guard and Office of the General Counsel of the Department of Defense, and two representatives from the staff of the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) comprised the Joint Services Committee Working Group. *Id.* at 11. "The Marine Corps did not participate at the drafting level." *Id.* (citations omitted).

37. *Id.* at 12-13.

38. *Id.* at 13.

39. *Id.* The belief was that "military evidentiary law should be as similar to civilian law as possible." *Id.* Further, it was believed not only "that the codification [of the Military Rules of Evidence] reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it." *Id.* (emphasis in original).

40. *Id.* at 21.

41. *Id.* at 20.

42. *Id.*

43. FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

44. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

45. Lederer, *supra* note 35, at 21. "Viewed objectively and without concern for individual bias or political implications, Rule 412 was unnecessary. Basic principles of logical

Working Group, however, rejected the idea that Rule 412 was needless, the Working Group chose to adopt the rule.[46]

Due to the unique nature of the military court system, the Working Group needed to modify procedural aspects of F.R.E. 412 to adapt the rule to military practice.[47] In particular, the *in camera* hearing found in F.R.E. 412(c)(2) was substituted for a "closed hearing conducted pursuant to Article 39(a)" of the Uniform Code of Military Justice.[48] Furthermore, unlike F.R.E. 412(c)(1), which requires a motion to be filed "at least [fourteen] days before trial,"[49] M.R.E. 412(c)(1) requires defense counsel to "file a written motion at least five days prior to entering a plea."[50]

Although much evidence is now excluded under the new rule, "the fundamental right of the defense under the fifth amendment of the Constitution of the United States to present relative defense evidence" is still recognized in subsection (b)(1).[51] It was further understood that this rule was "not to be interpreted as a rule of absolute privilege."[52] As originally adopted, M.R.E. 412 omitted the civilian rule's fourteen-day notice requirement due to the military's need for speedy trials.[53] Furthermore, the rule was expanded to include other nonconsensual sexual offenses instead of just rape.[54] The rule, which is "intended to protect human dignity and to ultimately encourage the reporting and prosecution

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relevance coupled with Federal Rule of Evidence 403 should have been sufficient, and a proposal was made not to adopt Rule 412 in favor of a more general statement of the application of the principle of relevancy. Ms. Siemer, [Department of Defense] General Counsel, rejected that position, and the Working Group adopted Rule 412." *Id.*

46. *Id.*

47. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36.

48. *Id.* at A22-37; 10 U.S.C. § 839(a) (2009) ("At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members . . . .").

49. FED. R. EVID. 412(c)(1)(A)-(B).

50. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 4-198, 4-206 (7th ed. 2011). "The original federal version of this provision required 15 days' notice which the military drafters said they rejected because court-martial processing time was so much quicker than the civilian counterpart. The same reasoning applies to the time differential in the amended version." *Id.* at 4-206, n.29.

51. *Id.* at 4-209; *see* MIL. R. EVID. 412(b)(1).

52. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36.

53. Lederer, *supra* note 35, at 21; *see supra* text accompanying note 50.

54. Lederer, *supra* note 35, at 21; *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(e) (2012) [hereinafter MIL. R. EVID. 412(e)].

of sexual offenses," could not justifiably be limited to only the offense of rape within the military context.[55] The expansion of included offenses was designed to exclude evidence that was tangentially related to the offense at issue but that the accused might use for its sexual connotation in an attempt to imply a victim's unchaste character.[56] Allowing evidence of innuendo would circumvent the purpose of the rule, which is to protect the victim's privacy.[57]

While the Working Group was undergoing discussions of Rule 412 for adoption, the Working Group was tasked with redrafting the entire set of evidentiary rules for the military.[58] One of these other rules under consideration by the Working Group was Rule 1102(a),[59] which provides: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence [eighteen] months after the effective date of such amendments, unless action to the contrary is taken by the President."[60] When Congress amends the Federal Rules of Evidence, the armed forces is given time to "review the final form of amendments and to propose any necessary modifications to the President."[61] As mentioned above, Congress eliminated the balancing test from the federal criminal evidentiary rule;[62] however, the Working Group chose to keep the balancing test in the military version of the Rule since "[t]here seem[ed] to be no good reason to delete it."[63]

One reason given for retaining the balancing test in the military version of Rule 412 was to guarantee that military judges would continue to balance the interests of both the victim and the accused.[64] In 2007, M.R.E. 412 was amended to assist practitioners in the application of the balancing test in subdivision (c)(3).[65] The amendment explained that "the evidence must be relevant for one of the purposes highlighted in subdivision (b)"; the probative value must outweigh the danger of unfair prejudice to the victim

55. SALTZBURG, *supra* note 50, at 4-210.

56. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36.

57. *Id.*

58. Lederer, *supra* note 35, at 12.

59. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102(a) (2012).

60. *Id.*

61. SALTZBURG, *supra* note 50, at 11-9.

62. *See supra* Part II.B.

63. Reeves, *supra* note 26, at 64 n.102.

64. *Id.*

65. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-37.

and her privacy; and, although the evidence may be admissible under Rule 412, Rule 403 may still bar its admission.[66] In *United States v. Gaddis*[67] and *United States v. Ellerbrock*,[68] the Court of Appeals for the Armed Forces analyzed Rule 412 under the application set forth in the *Manual for Courts-Martial* analysis to reach its decision in both of these cases.[69] In these two decisions, the court expressed its concern that the balancing test found in M.R.E. 412(c)(3) may infringe upon a defendant's constitutional rights.[70] Although the court did not declare the balancing test facially unconstitutional, it did leave the matter open for discussion.[71]

III. BALANCING INTERESTS IN CIVILIAN AND MILITARY COURTS

A. *Federal Rule of Evidence 412 in Civilian Court:* United States v. Anderson

1. Facts

In *United States v. Anderson*,[72] Anderson was indicted for certain sexual acts concerning S.M., the alleged victim, that occurred in September 2008.[73] Raising a defense of consent, Anderson sought to enter evidence of prior sexual encounters with the alleged victim.[74] He claimed that he and S.M. had over a ten-year history of sexual activity prior to the acts at issue in the criminal proceeding.[75] Two specific pieces of evidence Anderson sought to introduce were: instances of prior sexual activity that occurred at the home of S.M. in 2007 and "evidence of weekly sexual encounters with S.M. in 2003 and 2004 that occurred" in various rooms at the defendant's and

66. *Id.*; *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 403 (2012) [hereinafter MIL. R. EVID. 403] ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

67. United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

68. United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011).

69. *See Gaddis*, 70 M.J. at 251-57; *Ellerbrock*, 70 M.J. at 317-21; *see* MIL. R. EVID. 412 analysis, *supra* note 1, at A22-37.

70. *See* cases cited *supra* notes 67 and 68.

71. *See* cases cited *supra* notes 67 and 68.

72. United States v. Anderson, 467 F. App'x 474 (6th Cir. 2012).

73. *Id.* at 476.

74. *Id.*

75. *Id.*

victim's place of employment.[76] The government conceded that evidence regarding Anderson's prior sexual history with S.M. could be admitted in order to demonstrate consent; however, the government claimed that the defendant did not provide sufficient "specific instances of sexual behavior by the alleged victim as required by [Federal Rule of Evidence] 412(b)(1)(B)" when he alleged that the acts occurred "in various rooms" at their place of employment.[77] Under Rule 403,[78] "[t]he government further argued that the probative value of any previous sexual contact between [the defendant] and S.M. was outweighed by unfair prejudice."[79] Based on these facts, the district court held that both types of evidence were inadmissible.[80]

2. The District Court's Rationale for Excluding the Proffered Evidence

At the final pretrial conference, the district court excluded the evidence regarding Anderson's 2007 encounter with the alleged victim that occurred at her home.[81] The district court found that restricting the evidence to similar acts that occurred in close proximity and time to the same venue was important.[82] The court thought that the alleged acts from 2007 that took place in a private setting—the victim's home—were distinguishable from the indicted offenses, which took place in a public setting—at their place of employment.[83] Therefore, the court barred admission of the evidence regarding the 2007 acts.[84]

After the *in camera* hearing, as required under Rule 412(c)(2), the district court found that the alleged acts from 2003 and 2004 were not relevant for several reasons.[85] The court found that the lapse in time from the previous acts to the current allegations was significant, and that Anderson's testimony was "a good deal less than completely credible."[86] Furthermore,

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76. *Id.* at 478.

77. *Id.* at 476 (internal quotation marks omitted).

78. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice . . . .").

79. *Anderson*, 467 F. App'x at 476.

80. *Id.*

81. *Id.*

82. *Id.* at 478.

83. *Id.*

84. *Id.* at 476.

85. *Id.* at 478.

86. *Id.* The court quoted the following from the trial court's ruling: "I find that the defendant's testimony is a good deal less than completely credible in terms of where and why

the activities alleged were "inadequately specific," and the defendant did not show a pattern sufficient to establish the claim of consent that would cause the defendant to be deprived of any constitutional right, and more specifically, any deprivation of rights under the Sixth Amendment.[87] The only statement the court made about balancing the probative value of the evidence against its unfair prejudice was: "I think that they do not have the necessary probative value to outweigh the danger of unfair prejudice . . . ."[88] The district court did not elaborate on the facts it weighed when making this assessment, but still came to this conclusion.[89] After his conviction, the defendant appealed the district court's decision to exclude the proffered evidence.[90]

3. The Appellate Court's Rationale

The Sixth Circuit Court of Appeals, in reviewing the district court's decision to exclude the defendant's two pieces of evidence,[91] weighed the probative value of the evidence against its prejudicial effect to the alleged victim.[92] As to the incidents that occurred at the home of S.M., the appellate court addressed the issue of a public versus a private venue—an issue on which the district court placed significant weight.[93] Much like the district court, the appellate court also acknowledged that there exists a difference between sexual acts that take place in a private locale versus acts done in public, but said that this difference "does not eliminate, or even substantially reduce, the probative value of such acts in this case."[94] It

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these encounters allegedly occurred, and they are inadequately specific to meet the requirements of the rule." *Id.*

87. *Id.* at 478-79.

88. *Id.* at 478. Although the trial court gave no specific facts, it considered the prejudicial impact that the evidence would have to the privacy interests of S.M., the alleged victim. *Id.* at 479.

89. *Id.* at 478-49.

90. *Id.* at 475.

91. *Id.* at 478. "Anderson sought to introduce two types of evidence: 1) three instances of prior sexual activity with S.M. in 2007 that occurred in her garage and house . . . ; and 2) evidence of weekly sexual encounters with S.M. in 2003 and 2004 that occurred at the Medicine Lodge . . . ." *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 479.

further stated that the probative value of the evidence outweighed the "prejudicial impact" of the defendant's testimony.[95]

Next, the court considered the evidence proffered by the defendant from the 2003 and 2004 acts that occurred at the victim's workplace.[96] The court again performed a balancing test to determine whether the lower court should have admitted the evidence.[97] Specifically, it said that the probative value of the defendant's testimony about the acts that occurred at the workplace would substantially outweigh its prejudicial effect since the evidence, if believed by the fact-finder, would "help explain the otherwise incredulous act of [the defendant] initiating sexual contact with S.M. in her office . . . ."[98] Although the court only explicitly references F.R.E. 403 once,[99] it is clear from the opinion that the court weighed the probative value of the evidence against the prejudicial impact of the same evidence.[100] Since subsection (c)(3) was amended out of F.R.E. 412 by this time, the court could not employ its use, and was therefore required to balance the evidence solely under F.R.E. 403.[101] After conducting this balancing test with both types of evidence, and analyzing the specific issues found within each type of evidence, the appellate court found that the lower court abused its discretion when it excluded the evidence.[102] The appellate court vacated the defendant's conviction as to attempted aggravated sexual abuse of S.M and remanded the case for a new trial.[103]

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95. *Id.*

96. *Id.* at 479-80.

97. *Id.* at 480.

98. *Id.*

99. *Id.* at 478.

100. *Id.* at 479-80; *see* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice. . . .").

101. *See supra* text accompanying note 5. Subsection (c)(3) was amended out of F.R.E. 412 in 1994. *See supra* Part II.B. *United States v. Anderson* was decided in 2012. The lower and appellate courts' use of F.R.E. 403 to decide the admissibility of the proffered evidence shows that F.R.E. 403 is sufficient for balancing the probative value of the evidence against any unfair prejudice, whether such unfair prejudice may be to the victim or the prosecution. *See Anderson*, 467 Fed. App'x at 477-79.

102. *Anderson*, 467 F. App'x at 480.

103. *Id.* at 482.

B. *Military Rule of Evidence 412 in Courts-Martial*

1. *United States v. Banker*

a. Facts

In *United States v. Banker*,[104] Banker initiated and perpetuated a sexual relationship with L.G., his son's fourteen-year-old babysitter.[105] Banker moved during trial to introduce evidence of alleged sexual behavior by L.G. with Banker's son, who was nine years old when L.G. began babysitting for the family.[106] Banker sought to offer the evidence pursuant to M.R.E. 412(b)(1)(C).[107] Banker claimed that L.G. had a motive to fabricate the allegations against him and that exclusion of his son's testimony regarding L.G.'s behavior would violate Banker's constitutional rights.[108] After conducting a closed hearing where both L.G. and Banker's son testified,[109] the military judge found that the evidence was not relevant and, therefore, excluded the evidence.[110]

b. The lower court's rationale

To determine whether the evidence offered by Banker could be admitted at trial, the military judge conducted a closed hearing pursuant to M.R.E. 412(c)(2).[111] During the closed hearing, Banker's son testified about the allegations of sexual behavior by L.G. in order to prove L.G.'s motive to

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104. United States v. Banker, 60 M.J. 216 (C.A.A.F. 2011).

105. *Id.* at 218.

106. *Id.*

107. *Id.*; *see* MIL. R. EVID. 412(b)(1)(C) ("In a proceeding, the following evidence is admissible, if otherwise admissible under these rules: . . . evidence the exclusion of which would violate the constitutional rights of the accused.").

108. *Banker*, 60 M.J. at 218.

109. *Id.*; *see* MIL. R. EVID. 412(c)(2) ("Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard.").

110. *Banker*, 60 M.J. at 218.

111. *Id.*; *see* MIL. R. EVID. 412(c)(2) ("Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. . . . In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.").

fabricate the allegations against Banker.[112] Banker's son, however, did not make allegations against L.G. until eight months after L.G. reported Banker's sexual misconduct to the Air Force Office of Special Investigations.[113] Moreover, the defendant's "argument did not sufficiently articulate how the testimony [of the defendant's son] reasonably established a motive to fabricate."[114] The military judge subsequently found that the evidence was not relevant and excluded it from admission at trial.[115]

c. The Court of Appeals for the Armed Forces compares M.R.E. 412(c)(3) and 403

The appellate court began its analysis by discussing the purpose of M.R.E. 412 and its relation to F.R.E. 412.[116] The court then described the analysis that military judges use to determine whether evidence proffered under the third exception to M.R.E. 412 should be admitted.[117] "Under M.R.E. 412(b)(1)(C), the accused has the right to present evidence that is relevant, material, and favorable to his defense."[118] The military judge must first find that the evidence is relevant pursuant to M.R.E. 401.[119] If the proffered evidence is relevant, then the military judge determines whether it is material.[120] This determination is made by "look[ing] at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue."[121] Once she determines

112. *Banker*, 60 M.J. at 218.

113. *Id.* at 221.

114. *Id.* at 225.

115. *Id.* at 218.

116. *Id.* at 221. Both the federal rule and its military counterpart have the same policy reasons for their enactment, which is to protect a sexual assault victim's privacy. *See generally Hearing, supra* note 9 (testimony from several individuals discussing the need for a rule of evidence prohibiting a certain line of questioning from the defense); 124 CONG. REC. 11,944 (1978) (discussing same); Lederer, *supra* note 35, at 20-21.

117. *Banker*, 60 M.J. at 222; *see* MIL. R. EVID. 412(b)(1)(C) *and infra* text accompanying note 218.

118. *Banker*, 60 M.J. at 222 (citations omitted) (internal quotation marks omitted).

119. *Id.*; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2012) [hereinafter MIL. R. EVID. 401] ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

120. *Banker*, 60 M.J. at 222.

121. *Id.* (internal quotations omitted).

that the evidence is relevant and material, the military judge then applies the balancing test under M.R.E. 412(c)(3).[122] The court stated that the purpose of balancing the evidence under M.R.E. 412(c)(3) is to determine "whether the evidence is favorable to the accused's defense."[123] It then discussed the differences between the balancing tests found in M.R.E. 412(c)(3) and M.R.E. 403.[124]

The court explained that M.R.E. 403 is a rule of inclusion while M.R.E. 412(c)(3) is a rule of exclusion.[125] Under M.R.E. 403, the opponent must show why the evidence is inadmissible since its admissibility is presumed.[126] Under M.R.E. 412(c)(3), however, "the proponent of the evidence [must] demonstrate why the [proffered] evidence is admissible."[127] Moreover, M.R.E. 403 generally applies to both parties to the criminal case, whereas M.R.E. 412(c)(3) applies only to the accused.[128] Although the court emphasized that the prejudice in question in M.R.E. 412(c)(3) is that of the alleged victim, it accepted that the factors found in M.R.E. 403 are to be considered when weighing the proffered evidence under M.R.E. 412(c)(3).[129] Additionally, M.R.E. 403 is concerned with the prejudice that

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122. *Id.*; MIL. R. EVID. 412(c)(3) ("If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the *probative value of such evidence outweighs the danger of unfair prejudice* . . . ." (emphasis added)).

123. *Banker*, 60 M.J. at 222. The court acknowledged that "favorable" is not a word conducive to a specific definition, but found the word "vital" to be synonymous based on Supreme Court precedent and other rulings of the Court of Appeals for the Armed Forces in this area. *Id.*

124. *Id.* at 222-23.

125. *Id.* at 223.

126. *Id.*

127. *Id.*

128. *Id.* The court notes that M.R.E. 412(a), however, applies to both the government and the accused. *Id.* "*Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c): (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." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(a) (2012) [hereinafter MIL. R. EVID. 412(a)].

129. *Banker*, 60 M.J. at 223. In its later opinion, *United States v. Gaddis*, the Court of Appeals for the Armed Forces recognized that it "erroneous[ly] assum[ed] that 'unfair prejudice' in the context of former M.R.E. 412(c)(3) meant something different than 'unfair prejudice' as the term is generally used under the rules of evidence." United States v. Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011).

could affect those who are parties to the case—the government and the accused.[130] The court pointed out that "M.R.E. 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412."[131]

Upon being asked by the military judge why the testimony of Banker's son should be admitted, defense counsel's only theory was that it went to the credibility of L.G. and her motive to fabricate.[132] "The question remained whether [Banker's] proffer was adequate to show support for his theory."[133] Since the military judge found that the evidence was not relevant, it was unnecessary for the judge to then "address the constitutional exception or the application of the balancing test."[134] The appellate court concluded that, without more from defense counsel showing why the evidence was relevant, the military judge did not abuse his discretion when he ruled to exclude the testimony of Banker's son.[135] Banker "did not meet his burden of proving why the M.R.E. 412 prohibition should be lifted."[136]

2. *United States v. Gaddis*

a. Facts

In *United States v. Gaddis*,[137] Gaddis was convicted of various acts of sexual misconduct with his stepdaughter, T.E.[138] T.E. first complained about the acts done by Gaddis when she learned that her mother was taking her to the doctor for a physical.[139] This medical examination was a requirement for T.E. to try out for her school's cheerleading squad.[140] T.E. disclosed Gaddis's sexual misconduct to a friend because she believed the examination "would

130. *Banker*, 60 M.J. at 223. Courts-martial do not hear civil cases; "[t]hey are convened to adjudicate charges of criminal violations of military law." Parisi v. Davidson, 405 U.S. 34, 42 (1972).

131. *Banker*, 60 M.J. at 223 n.3.

132. *Id.* at 224.

133. *Id.*

134. *Id.* at 225.

135. *Id.*

136. *Id.*

137. United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

138. *Id.* at 251.

139. *Id.*

140. *Id.*

show that she had been raped by [Gaddis]."[141] At trial, defense counsel sought to introduce evidence to prove that T.E. had a motive to fabricate the allegations against Gaddis.[142] The defense's theory was "based on reports and e-mails implying that [T.E.] was sexually active."[143]

Defense counsel alleged that T.E. "expressed concern . . . that the physical would reveal if [she] was sexually active."[144] Further, defense counsel alleged that T.E. believed that her mother wanted her to have the examination "after seeing an email containing a rumor that T.E. was sexually active."[145] The government argued that the evidence was inadmissible since "evidence of a victim's prior sexual conduct" is excluded under M.R.E. 412.[146] The defense argued that the evidence was constitutionally required because the defendant has a right to put on a defense, which includes the right "to cross-examine and confront witnesses [against him] if they have . . . motive to misrepresent."[147] The evidence was being offered, defense counsel further argued, not for the truth about T.E. and her alleged consensual sexual activity, but "to impeach [her] credibility."[148] The government, however, argued that defense counsel must "show that some sexual activity occurred" in order for T.E. to have a motive to fabricate.[149]

b. The lower court allows the evidence with limits

The lower court allowed the evidence for impeachment purposes, but placed limits upon defense counsel's use of the evidence.[150] Included in these limits were: the prohibition on referring to the "prior sexual activity of the victim"; the rumors contained in the emails of prior sexual activity; and a description of the emails as "relating to sexual activity."[151] The military judge, however, allowed the parties to "argue permissible inferences from

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*; MIL. R. EVID. 412(c)(3) ("[S]uch evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.").

151. *Gaddis*, 70 M.J. at 251.

this evidence."[152] After his conviction, Gaddis appealed, "argu[ing] that this ruling deprived him of his opportunity to present a meaningful defense" and that M.R.E. 412(c)(3) is facially unconstitutional "because it permits a military judge to exclude evidence that is otherwise constitutionally required."[153]

c. The appellate court reviews the limitations placed on the evidence

The appellate court affirmed the lower court's ruling that limited the use of defense counsel's evidence.[154] It held that "a reasonable panel would not have received a significantly different impression of [the victim]'s credibility had [Gaddis] been permitted to cross-examine her regarding the substance of the e-mails, which only contained unsubstantiated rumors of sexual activity."[155] In addressing Gaddis's argument that M.R.E. 412(c)(3) is facially unconstitutional, the court "decline[d] to adopt such an interpretation" because "M.R.E. 412 cannot limit the introduction of evidence that is required to be admitted by the Constitution."[156] The court explained that, although the test is not unconstitutional on its face, it would be unconstitutional as applied under circumstances in which evidence is excluded by a military judge because the "probative value did not outweigh the danger of unfair prejudice to the alleged victim's privacy" and the exclusion "would violate the constitutional rights of the accused."[157]

In *United States v. Banker*,[158] the court, for the first time, held that the legitimate privacy interests of the victim "was part of the constitutional analysis" under the old M.R.E. 412.[159] The *Gaddis* court acknowledged that

152. *Id.*

153. *Id.* (internal quotation marks omitted).

154. *Id.* at 257.

155. *Id.* (internal quotation marks omitted).

156. *Id.* at 253.

157. *Id.*

158. United States v. Banker, 60 M.J. 216 (C.A.A.F. 2011).

159. *Gaddis*, 70 M.J. at 254; *see Banker*, 60 M.J. at 223. M.R.E. 412(c)(3) was amended in 2007 in response to the holding in *Banker*. *Gaddis*, 70 M.J. at 254 n.1. The *Gaddis* court thought that "this problematic change was entirely unnecessary." *Id.* It thought that the test prior to the 2007 amendment was "eminently workable and suffered from no risk of violating either the Constitution or M.R.E. 412 itself" because military judges have "wide latitude to determine the admissibility of evidence." *Id.* "Applied to the prior version of M.R.E. 412, this latitude encompassed the requirement that the proponent of the evidence

this analysis was based on the court's "erroneous assumption that 'unfair prejudice' in the context of former M.R.E. 412(c)(3) meant something different than 'unfair prejudice' as the term is generally used under the rules of evidence."[160] It further stated that *Banker*'s suggestion that "balancing constitutionally required evidence against the privacy interest of the victim before admitting it is necessary to further the purpose of the rule" is "simply wrong."[161] Evidence of an alleged victim's sexual behavior or predisposition is inadmissible under M.R.E. 412 unless it is constitutionally required.[162] "At best the balancing test under M.R.E. 412(c)(3), as currently written, is a nullity with respect to the constitutionally required exception set out in M.R.E. 412(b)(1)(C) . . . ."[163]

Furthermore, the court explained that a defendant's right to present a defense is not violated by M.R.E. 412 "unless [it is] arbitrary or disproportionate to the purposes [it is] designed to serve."[164] It held that the balancing test in M.R.E. 412(c)(3) is not unconstitutional on its face because the "test is neither arbitrary nor disproportionate to [the] purpose" of protecting "victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses."[165] Although the court held that the rule's balancing test is not facially unconstitutional, it did acknowledge that the structure of the rule is confusing and "the test has the *potential* to lead military judges to exclude constitutionally required evidence."[166] The court,

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demonstrate that the probative value of the evidence outweigh the factors militating against its admission." *Id.*

160. *Gaddis*, 70 M.J. at 254; *see, e.g.*, MIL. R. EVID. 403; *see also supra* note 129 and accompanying text.

161. *Gaddis*, 70 M.J. at 256.

162. *Id.*

163. *Id.*

164. *Id.* at 253 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)) (internal quotation marks omitted).

165. *Id.* at 253-54 (quoting MIL. R. EVID. 412 analysis, at A22-35 (2008)) (internal quotation marks omitted).

166. *Id.* at 254. The appellate court also noted that M.R.E. 412(c)(3) was amended in 2007 to include the language "alleged victim's privacy" for unfair prejudice due to the decision in *United States v. Banker*. *Id.* at 254 n.2. Prior to this change, the rule simply provided that evidence would be admissible if the "probative value of such evidence outweighs the danger of unfair prejudice" without limiting or specifying that only a victim's privacy was to be considered. *Id.* at 245 n.1. The court explained that as "applied to the prior version of M.R.E. 412, [the wide] latitude" military judges have to determine admissibility of evidence "encompassed the requirement that the proponent of the evidence demonstrate that the

however, found that the evidence offered by Gaddis was not constitutionally required and affirmed the lower court's decision.[167]

3. *United States v. Ellerbrock*

a. Facts

In *United States v. Ellerbrock*,[168] Ellerbrock attempted to introduce evidence of a prior extramarital affair of the alleged victim, C.L., to prove her motive to lie about the sexual encounter at issue in the case at bar.[169] Shortly after the deployment of C.L.'s husband, Ellerbrock visited C.L.'s home with three other friends.[170] C.L. testified that she had been drinking and had taken sedatives that evening.[171] Eventually, the three friends left Ellerbrock and C.L. alone in the house.[172] When the three friends later reentered the home, they discovered Ellerbrock engaging in sexual intercourse with C.L.[173] At trial, each of the three friends testified; however, their stories were in conflict regarding whether C.L. was alert or unconscious when the friends found Ellerbrock and C.L. in the bedroom.[174] Whether C.L. consented at the time of the encounter, or whether she was even capable of giving consent, depended on whether C.L. was conscious at that time.[175]

At trial the defense introduced evidence that, at the time of trial, C.L. and her husband had been married for three years.[176] Defense counsel also established that one of the witnesses of the alleged rape, Specialist Jackson,

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probative value of the evidence outweigh the factors militating against its admission. . . . That test was eminently workable and suffered from no risk of violating either the Constitution or M.R.E. 412 itself." *Id.*

167. *Id.* at 257.

168. United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011).

169. *Id.* at 317.

170. *Id.* at 316.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 316-17. Further, the record states that "[w]hen [C.L.] finally spoke with" one of the friends who witnessed Ellerbrock and C.L. in the bedroom and who later testified at trial "the next morning, she said that she remembered having sex with [Ellerbrock] and said something to the effect of, 'I can't believe I did that' and 'I feel horrible.'" *Id.* at 317.

176. *Id.* at 327 (Ryan, J., dissenting).

was a good friend of C.L.'s husband.[177] C.L.'s use of Xanax and alcohol on the night of the encounter with Ellerbrock was also established by the defense.[178] Furthermore, C.L.'s court-martial testimony differed from the sworn statement she initially gave to investigators regarding the alleged sexual assault.[179] Under M.R.E. 412, Ellerbrock sought to introduce evidence of a prior affair engaged in by C.L. in order "to support his theory that [the alleged victim] had a motive to lie about the consensual nature of the sex with him, which was to protect her marriage."[180]

b. The lower court excludes evidence of an earlier affair

In ruling on the motion, the military judge found that the evidence of the extramarital affair was "marginally relevant" to show a motive to lie, and that the evidence of the affair was stale.[181] It occurred about two and a half years prior to the encounter at issue in the case at bar.[182] "[T]he military judge concluded that the probative value of the evidence did not outweigh its dangers to [the alleged victim]'s privacy interests" and "under M.R.E. 403, the dangers of unfair prejudice—waste of time and confusion of the issues—substantially outweighed the probative value of this evidence."[183] Therefore, since the military judge determined that the evidence "was not constitutionally required,"[184] she ruled to exclude the evidence of C.L.'s previous affair from the trial.[185] On appeal to the Army Court of Criminal Appeals, the lower appellate court held "that the military judge did not abuse her discretion in excluding the evidence."[186] Additionally, it found that even if the exclusion by the military judge was an error, "any error was harmless beyond a reasonable doubt, because defense counsel . . . argue[d]

177. *Id.*

178. *Id.*

179. *Id.* "[T]he defense established that [C.L.]'s initial sworn statement to investigators differed from her court-martial testimony in that she had not told investigators that Appellant had anal sex with her in the middle of the night and that she had told him to stop." *Id.* "The defense counsel *was* permitted to cross-examine [C.L.] on the numerous self-evident bases for her motive to fabricate and to argue the same to the members." *Id.*

180. *Id.* at 317 (majority opinion).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

that [C.L.] had a motive to fabricate about [consent] . . . even without evidence of the prior affair."[187]

c. The appellate court reverses the decision

In reviewing the lower court's decision, the Court of Appeals for the Armed Forces explained that evidence that is to be admitted under M.R.E. 412(b)(1)(C)[188] must be admitted "when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice."[189] The court concluded that the evidence of the prior affair was relevant because C.L.'s fear of her husband divorcing her for engaging in another extramarital relationship gave her a motive to lie about the consensual nature of the act with Ellerbrock.[190] It also concluded that the evidence was material because "the existence of a prior affair may have established a greater motive for [C.L.] to lie about whether her sexual encounter with [Ellerbrock] was consensual."[191]

The court next addressed the probative value of the evidence as weighed against its unfair prejudice.[192] Notably, the court did not address the privacy interests of the alleged victim when it discussed the unfair prejudice of the evidence.[193] The court, however, noted that there was "no dispute as to whether the affair occurred."[194] It found the probative value of the evidence to be high since the testimony of the other witnesses was conflicting and "the credibility of [the alleged victim]'s testimony about whether she consented was crucial to [Ellerbrock's] conviction."[195]

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187. *Id.*; *see supra* Part III.D.

188. MIL. R. EVID. 412(b)(1)(C) provides that evidence otherwise inadmissible under M.R.E. 412(a) is admissible if it is "evidence the exclusion of which would violate the constitutional rights of the accused."

189. *Ellerbrock*, 70 M.J. at 318.

190. *Id.* at 319.

191. *Id.* at 320.

192. *Id.* "[T]he probative weight of the evidence must outweigh the privacy interests of the victim." *Id.* at 323 (Baker, J., dissenting). If the probative value is "sufficiently high," the "probative weight will necessarily outweigh any privacy interest of the victim." *Id.* "Such evidence . . . is . . . 'vital' to the accused, and is constitutionally required because the accused has a right to a fair trial and an opportunity to put on a defense." *Id.*

193. *Id.* at 326; *see* MIL. R. EVID. 412(c)(3) ("[A]nd that the probative value of such evidence outweighs the danger of *unfair prejudice to the alleged victim's privacy* . . . ." (emphasis added)).

194. *Ellerbrock*, 70 M.J. at 320 (majority opinion).

195. *Id.*

In his dissent, Judge Baker noted that the theory of admissibility presented by the defense "rested on just the sort of presumption M.R.E. 412 is intended to address."[196] The defense sought to introduce the evidence to show that it was more likely that C.L. would have lied since she had engaged in a previous affair.[197] Judge Baker acknowledged that, without regard to whether a spouse engaged in a previous affair, the "spouse might have a motive to hide a consensual sexual encounter outside the marriage."[198] In light of the evidence presented by the defense, however, Judge Baker explained that it does not necessarily follow that a past affair alone would "make[] it any *more* likely the offending spouse" would lie about a subsequent consensual extramarital sexual encounter.[199] According to Judge Baker, the military judge understood the "broader implications of her ruling" as it would affect subsequent interpretations and applications of M.R.E. 412.[200] If the military judge admitted the evidence at issue in this case, a spouse's entire sexual history during the marriage would be subject to disclosure in a court-martial proceeding as relevant to show bias in subsequent cases where a spouse alleges rape.[201]

C. *Balancing Federal and Military Cases*

In *United States v. Anderson*,[202] the Sixth Circuit Court of Appeals used F.R.E. 403 to weigh the probative value of the proffered evidence against any unfair prejudice—potentially unfair prejudice to the defendant, to society, and to the victim's privacy interests, along with the policy reasons for enacting F.R.E. 412.[203] Although the appellate court determined that the lower court should have admitted evidence of prior sexual acts of the

196. *Id.* at 321 (Baker, J., dissenting).

197. *Id.*

198. *Id.* at 325-26.

199. *Id.* at 326. "One could even argue based on the facts in this case that it made it less likely because [C.L.] reported the [previous] affair herself." *Id.* "Evidence of [C.L.]'s prior affair would have added little or nothing to this motive" to lie. *Id.* at 327-28 (Ryan, J., dissenting). "Additional cross-examination on this topic would not have established a potential motive to lie but merely would have embellished facts already showing that motive." *Id.* at 328 (quoting United States v. Nelson, 39 F.3d 705, 709 (7th Cir. 1994)) (internal quotation marks omitted).

200. *Id.* at 326 (Baker, J., dissenting).

201. *Id.*

202. United States v. Anderson, 467 Fed. App'x 474 (6th Cir. 2012).

203. *See id.* at 479-80.

alleged victim with the defendant under F.R.E. 412(b)(1)(B), the appellate court did not discuss the need to sift the proffered evidence through an additional balancing test.[204] It acknowledged that the evidence might have been prejudicial to the alleged victim; however, the prejudice to the alleged victim was not enough to outweigh the probative value of the evidence.[205]

The Court of Appeals for the Armed Forces, in *United States v. Banker*,[206] specifically held that the privacy interests of the alleged victim must be a consideration when weighing unfair prejudice of proffered evidence against its probative value.[207] The court discussed the use of the language "the accused seeks to offer" found in M.R.E. 412(c)(3).[208] It stated that "[i]t would be illogical if the judge were to evaluate evidence 'offered by the accused' for unfair prejudice to the accused. Rather, in the context of this rape shield statute, the prejudice in question is, in part, that to the privacy interests of the alleged victim."[209]

United States v. Gaddis[210] and *United States v. Ellerbrock*[211] call into question the soundness of the court's ruling in *Banker*.[212] In these subsequent decisions, the court concedes that the balancing test in M.R.E. 412(c)(3) is not facially unconstitutional, but in *Gaddis*, the court implied that the rule should be redrafted to be simpler to apply, or even simpler to understand.[213]

IV. PROPOSAL

M.R.E. 412(c)(3) should be amended to exclude the balancing test—as was done with F.R.E. 412(c)(3)—and M.R.E. 403 should be used to balance the interests at stake. Although the balancing test in M.R.E. 412(c)(3) may not be facially unconstitutional, its potential to cause a military judge to exclude evidence that would otherwise be admissible and to prevent the

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204. *See id.* at 474; *see also supra* Part III.A.

205. *Anderson*, 467 Fed. App'x at 480.

206. United States v. Banker, 60 M.J. 216 (C.A.A.F. 2004).

207. *Id.* at 223.

208. MIL. R. EVID. 412(c)(3) ("If the military judge determines . . . that the evidence that *the accused seeks to offer* is relevant . . . ." (emphasis added)).

209. *Banker*, 60 M.J. at 223.

210. United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

211. United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011).

212. *Gaddis*, 70 M.J. at 250; *Ellerbrock*, 70 M.J. at 315, n.1.

213. *Gaddis*, 70 M.J. at 253.

defendant from presenting a complete defense is too great.[214] Additionally, while the privacy interests of victims of sexual assault are extremely important, such interests do not have greater weight than a defendant's right to a constitutionally proper trial.[215] The privacy interest of victims is an interest that is, and should be, readily protected by the government in sexual assault cases. Instead of conducting two balancing tests—one under M.R.E. 412(c)(3) to determine if evidence should be admitted and the second under M.R.E. 403 to determine whether this evidence should remain excluded—only one balancing test, under M.R.E. 403, is necessary to protect a victim's privacy interests. Moreover, amending the rule would prevent cases from being reversed and remanded due to misuse of a confusing aspect of the rule.

The risk that M.R.E. 412(c)(3) could cause a military judge to exclude evidence that is otherwise admissible places too heavy a burden on a defendant when the defendant's liberty is at stake. The *Gaddis* court contends that the language "to the alleged victim's privacy" in M.R.E. 412(c)(3), which was added with the 2007 amendment, makes the rule both difficult to understand and to apply for military judges.[216] The court states that the "confusing structure" of the rule "has the *potential* to lead military judges to exclude constitutionally required evidence merely because its probative value does not outweigh the danger of prejudice to the alleged victim's privacy."[217] After all, M.R.E. 412 is a rule of exclusion.[218] The defendant is required to show that the proffered evidence, if offered under the constitutionally required exception,[219] is relevant, material, and favorable to his defense.[220] If the military judge finds that the proffered

214. *See id.* at 254; *see also* Part III.B.2.

215. *See* Wallach, *supra* note 10, at 521 ("Rape shield laws are necessary to protect a victim of a sex crime from being victimized in court. However, this in no way means that a defendant, who sits in the courtroom, presumed innocent, should have his constitutional rights diminished."); *see also* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PENN. L. REV. 544, 554-55 (1980) ("Criminal defendants have been guaranteed numerous rights by the fourth, fifth, and sixth amendments, and states may not infringe upon them regardless of general legislative power.").

216. *Gaddis*, 70 M.J. at 253.

217. *Id.* at 254.

218. United States v. Banker, 60 M.J. 216, 223 (C.A.A.F. 2004).

219. *See* MIL. R. EVID. 412(b)(1)(C).

220. *See supra* Part III.B.1.c (discussing how the court determined whether evidence was relevant, material, and favorable to the defendant's defense, and the factors the court

evidence is relevant and material, she determines whether it is favorable to the defense by weighing it under M.R.E. 412(c)(3).[221] Such evidence is inadmissible, however, if the defendant can show that the evidence is relevant and material, but cannot show that the probative value of the proffered evidence outweighs the danger of unfair prejudice.[222]

When balancing the probative value of the proffered evidence against the danger of unfair prejudice under M.R.E. 412(c)(3), military courts are to utilize the factors found in M.R.E. 403.[223] Those factors are: "unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[224] The military judge is to weigh the proffered evidence under M.R.E. 412, using the M.R.E. 403 factors, to determine

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considered); *see also Banker*, 60 M.J. at 222 (quoting United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983)) *and Ellerbrock*, 70 M.J. at 318-19. "After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense." *Banker*, 60 M.J. at 222. Although "[t]he accused has a right to put on testimony relevant to his theory of defense," such a right is not without limits. *Id.* Even if the evidence is relevant under M.R.E. 401, it must be found material, under a multi-factor test, and favorable. *Id.* The factors the judge considers to determine whether relevant evidence is material are "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." *Id.* (quoting United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983)). To then require a balancing test to determine whether the evidence should be admitted would serve no problem if the inquiry were to end there. Under M.R.E. 412(c)(3), the evidence would still be considered excluded unless the accused can show "that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy . . . ." MIL. R. EVID. 412(c)(3). The analysis, however, does not end there. *Banker*, 60 M.J. at 223 n.3. If the military judge determines that the evidence is admissible under M.R.E. 412, the judge may still end up excluding the evidence if she determines under M.R.E. 403 that "[a]lthough relevant" the "probative value [of the evidence] is substantially outweighed by the danger of unfair prejudice." MIL. R. EVID. 403; *see Banker*, 60 M.J. at 223 n.3.

221. *Banker*, 60 M.J. at 222 ("After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense.").

222. *Id.* at 222-23; *see* MIL. R. EVID. 412(c)(3) ("If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is *relevant* for a purpose under subsection (b) and that the *probative value of such evidence outweighs the danger of unfair prejudice* to the alleged victim's privacy, such evidence shall be admissible under this rule . . . ." (emphasis added)).

223. *Banker*, 60 M.J. at 223.

224. *Id.* (quoting MIL. R. EVID. 403).

whether the evidence is admissible.[225] Once the military judge determines the proffered evidence is admissible under M.R.E. 412, she must again weigh the proffered evidence.[226] This second balancing, however, is done pursuant to M.R.E. 403 to determine whether the evidence that was deemed admissible under the factors listed in M.R.E. 403 is now inadmissible under M.R.E. 403 itself.[227] M.R.E. 403, however, requires that the probative value of the relevant evidence be "*substantially* outweighed by the danger of" any of the factors listed in M.R.E. 403, such as unfair prejudice, misleading the members, etc.[228]

In *Gaddis*, the court stated, "M.R.E. 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness."[229] This, technically, is how M.R.E. 412 operates. The problem with viewing only M.R.E. 403 as a rule "address[ing] prejudice to the integrity of the trial process,"[230] while overlooking the fact that M.R.E. 412 does the same thing, fails to appreciate some of the reasons for which M.R.E. 412 was enacted in the first place.[231] Prior to adoption of M.R.E. 412, the defense was often allowed to introduce "evidence of at best minimal probative value with great potential for distraction and [which] incidentally discourage[d] both the reporting and prosecution of many sexual assaults."[232] Furthermore, prior to the adoption of M.R.E. 412 and its federal counterpart, it was not unusual for the trial to turn into a case against the victim to determine whether she was chaste.[233] Such evidence corrupts "the integrity of the trial process" because the victim is now being tried instead of the defendant—the one actually charged with a crime.

The similar applications of the balancing tests in M.R.E. 412(c)(3) and M.R.E. 403 are brought out to underscore the parallelism between those balancing tests. There are two main differences, however, between these two

225. *Id.*

226. *Id.* at 223 n.3.

227. *Id.*

228. *See* MIL. R. EVID. 403 (emphasis added) (including factors such as "unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

229. United States v. Gaddis, 70 M.J. 248, 255 (C.A.A.F. 2011) (quoting United States v. Collier, 67 M.J. 347, 354 (C.A.A.F. 2009)). It is also worth mentioning at this point that "[n]o other crime has its own set of evidentiary rules." Capers, *supra* note 4, at 832.

230. *Gaddis*, 70 M.J. at 255.

231. *See supra* Part II.

232. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36; *see* discussion *supra* Part II.

233. *Id.*; *see supra* text accompanying note 10.

rules.[234] Those differences are the function of each rule and the party to whom each rule applies. M.R.E. 412(c)(3), as stated earlier, is a rule of exclusion and applies only to the accused.[235] The proponent of the evidence—the accused—must show why evidence that is ordinarily inadmissible should be admitted.[236] In contrast, M.R.E. 403 is a rule of inclusion and applies to both parties to the action—the accused and the government.[237]

If the accused has already shown that the proffered evidence offered under the "constitutionally required" exception[238] is relevant and meets the multi-factor "material" test, the evidence should be admissible, subject only to balancing under M.R.E. 403.[239] Upon the defendant showing that the proffered evidence is relevant and material, it should rest on the government to show why the proffered evidence should nevertheless be excluded. The defendant has a right to put on a defense; however, this right is not without limits.[240] This brings us to another danger of the balancing test in M.R.E. 412(c)(3).

The second risk found in the balancing test of M.R.E. 412(c)(3) is that it may prevent a defendant from presenting a complete defense. The Fifth and Sixth Amendments to the Constitution guarantee certain rights to criminal defendants.[241] These rights include the right to a fair trial,[242] the right to confront the witnesses against him, and the right to "have compulsory process for obtaining witnesses in his favor."[243] The accused, however, "is

234. United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004).

235. MIL. R. EVID. 412(c)(3); *see Banker*, 60 M.J. at 223.

236. MIL. R. EVID. 412(c)(3).

237. MIL. R. EVID. 403; *see Banker*, 60 M.J. at 223.

238. MIL. R. EVID. 412(b)(1)(C) ("In a proceeding, the following evidence is admissible, if otherwise admissible under these rules: evidence the exclusion of which would violate the constitutional rights of the accused.").

239. *See supra* text accompanying note 220 for a list of the factors considered when determining whether evidence offered under M.R.E. 412 is material.

240. *Gaddis*, 70 M.J. at 252.

241. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .") *and* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .").

242. U.S. CONST. amend. V.

243. U.S. CONST. amend. VI.

not simply allowed cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . But no evidentiary rule can deny an accused a fair trial or *all* opportunities for effective cross-examination."[244]

When the defendant offers evidence under M.R.E. 412(b)(1)(C), he bears the burden of showing that the evidence is relevant, material, and favorable.[245] The defendant must pass the "relevance" hurdle of M.R.E. 401 by showing that the evidence is relevant because it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[246] This is an admittedly low bar, but one the defendant must clear.[247] Once shown the evidence is relevant, the defendant must then show it is material.[248] To determine "whether the [relevant] evidence is material, the military judge looks at the importance of the issue for which the evidence was offered in relation to the other issues in th[e] case; the extent to which th[e] issue is in dispute; and the nature of the other evidence in the case pertaining to th[e] issue."[249] With M.R.E. 412(c)(3) as it currently is applied, the military judge must then determine whether the relevant and material evidence is favorable to the defendant's case.[250] The author contends that once the defendant has shown that the evidence is not only

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244. *Ellerbrock*, 70 M.J. at 318 (emphasis added) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

245. *Banker*, 60 M.J. at 222; *Ellerbrock*, 70 M.J. at 318-19; *see* discussion *supra* Part II.B.1.

246. MIL. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

247. MIL. R. EVID. 401 only requires "any tendency." *Id.* As long as the evidence has "*any tendency* to make the existence of any fact . . . more probable or less probable . . . ." *Id.* (emphasis added).

248. F.R.E. 401(b) states, "Evidence is relevant if: the fact is of consequence in determining the action." M.R.E. 401 "abandons any reference to 'materiality' in favor of a single standard of 'relevance.'" MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 analysis, at A22-33 (2012). Under M.R.E. 412, instead of using the F.R.E. 401(b) standard for materiality, the court will look at the following three factors: "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." *Banker*, 60 M.J. at 222 (quoting United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983)).

249. *Banker*, 60 M.J. at 222 (quoting United States v. Colon-Angueira, 16 M.J. 20, 26 (C.M.A. 1983)).

250. *Id.*

relevant, but also material under the military's three-part test, he has shown that the proffered evidence is favorable to his defense.

Upon clearing the "relevant and material" hurdles, the burden should fall to the government to show why, under M.R.E. 403, the evidence should be excluded. The government bears the burden of proving that the defendant is guilty beyond a reasonable doubt.[251] Since a criminal defendant is innocent until proven guilty, and if the defendant has shown that he has relevant and material evidence that may aid in his acquittal, the government must be required to show that the probative value of such evidence is substantially outweighed by unfair prejudice.[252]

Often, the alleged victim's prior sexual conduct is irrelevant.[253] One occasion making an alleged victim's prior sexual acts relevant and material is when the alleged victim has a motive to lie.[254] Again, once the defendant shows that such evidence is relevant and material, it should remain the government's task to show why the evidence should still be excluded under M.R.E. 403. Instead, once a defendant shows that the evidence is relevant and material, the defendant must further show that its probative value outweighs any unfair prejudice in order to admit the evidence.[255] Once the evidence is deemed admissible, however, it is still subject to exclusion under M.R.E. 403.[256]

Concern that eliminating the balancing test in M.R.E. 412(c)(3) would cease to protect victims of sexual assault considers only a narrow view of the rule. M.R.E. 412, the "rape shield statute," is in place to protect victims from undue embarrassment while being cross-examined by the defendant;[257] however, the privacy interest of the victim is not a separate interest distinct from the interests of the government. It must be stated that the victim is not

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251. 10 U.S.C. § 851 (2014).

252. MIL. R. EVID. 403.

253. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36.

254. Josh Maggard, Note, *Courting Disaster: Re-Evaluating Rape Shields in Light of* People v. Bryant, 66 OHIO ST. L.J. 1341, 1367 (2005) (discussing that a case in which "a defendant's constitutional right to present a defense outweighs an accuser's privacy interest is a case in which bias, motive to lie, or evidence of fabrication is demonstrable.").

255. MIL. R. EVID. 412(c)(3).

256. *Banker*, 60 M.J. at 223 n.3 ("M.R.E. 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412.").

257. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36 ("Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses.").

a party to the action. A criminal proceeding, whether it is a court-martial proceeding or a civilian criminal case, is between the defendant and the entity representing the People.[258] This is not to say that, because the victim is not a party to the action, the victim's privacy interests are not important or that the court should ignore such privacy interests. The victim should not be responsible for bearing the burden of protecting her interests when she is not the one on trial. The government, however, has a vested interest in protecting the victim's interest—mainly, to place a defendant who is guilty of sexual assault in prison.[259]

Removing the balancing test in subsection (c)(3) may seem to cause a "chilling effect" on reports of sexual assault, but such an amendment will not harm or infringe upon the victim's privacy interest in a more substantial way than if the test remained. M.R.E. 403, if applied properly, would prevent such occurrences. Moreover, a victim's privacy interest does not have greater weight than a defendant's right to a constitutionally proper trial.[260] Victims may feel as though the "rape shield" is not shielding them at all should Congress remove the M.R.E. 412(c)(3) balancing test; and it may cause victims of sexual assault to stop reporting occurrences of this crime. In order to prevent this "chilling effect," the government must take the responsibility to protect the victim's privacy interest at trial. Such responsibility should not be left to an evidentiary rule.

One of the reasons for adopting Rule 412 was to prevent the defense from putting the victim and her chastity, or lack thereof, on trial.[261] Both the government and the victim have an interest in preventing this from happening. The victim's interest is self-dignity. Her sexual history does not need to unnecessarily be on display in open court. The government's interest, however, falls squarely under M.R.E. 403. Putting the victim and her sexual history on trial confuses the issues—chastity is not the issue; sexual assault is the issue. Such evidence misleads the members—the members begin asking if her behavior indicated that she "wanted it" as opposed to asking whether the defendant sexually assaulted the victim. In

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258. Tanford & Bocchino, *supra* note 215, at 576 ("The victim is not the opponent, the [government] is. The victim is only a witness.").

259. MIL. R. EVID. 412 analysis, *supra* note 1, at A22-36 (noting that the prior rule "discourage[d] both the reporting and prosecution of many sexual assaults.").

260. This is a fair inference in that the defendant's rights, when it comes to criminal trials, are explicitly enumerated in the U.S. Constitution. *See* U.S. CONST. amend. V *and* U.S. CONST. amend VI. Unfortunately, however, a victim's privacy interest is not explicit within the body of the Constitution or the Bill of Rights. *See generally* U.S. CONST.

261. *See supra* Part II.

most instances, introducing the victim's sexual history wastes time—time is spent on determining either the veracity of her past or whether she has questionable character traits which do not have any bearing on her credibility. Evidence of her sexual history is also likely to cause undue delay—the issue of her chastity becomes a trial within a trial when such evidence does not have "any tendency to make the existence of [a] fact that is [at issue] more . . . or less probable than it would be without the evidence."[262] The victim is not the one whose chastity must be proven beyond a reasonable doubt. The defendant must show why the victim's sexual history is relevant and material. It should then be up to the government to show why its probative value is substantially outweighed by unfair prejudice.

V. CONCLUSION

Protecting the privacy interests of victims of sexual assault, while of great importance, cannot be held more important than the constitutional rights of a defendant. Eliminating the balancing test in M.R.E. 412(c)(3) only appears to remove some of the protections afforded victims. Protections are still in place in rules such as M.R.E. 401 and 403, as long as the government properly and adequately argues such rules. Arguments of "unfair prejudice" under M.R.E. 403 should include the privacy interests of the victim. The defendant, although he has a right to put on a defense, is limited in how he may defend himself given other policy considerations.[263] Amending M.R.E. 412(c)(3) to eliminate the balancing test in order for practitioners and military judges to better understand and apply the rule does not undermine the interests of the victim. If anything, it may keep decisions from being reversed and remanded due to the misunderstanding and misapplication of the rule. Such reversals would require the victim to go through the ordeal of trial all over again. Instead, the rule should be amended to remove the substantial risks that military judges may exclude evidence that is otherwise admissible and that defendants would be prevented from presenting a complete defense.

Evidence offered by the defendant under M.R.E. 412 must first fall within one of the exceptions found in M.R.E. 412(b)(1).[264] If the evidence falls

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262. MIL. R. EVID. 401.

263. *Gaddis*, 70 M.J. at 252.

264. *See* MIL. R. EVID. 412(b)(1) (including evidence to show someone "other than the accused [is] the source of the semen, injury, or other physical evidence"; "specific instances

within one of the exceptions, the defendant must show that the proffered evidence is relevant and material.[265] Under the author's proposed amendment, the evidence would be found admissible once it is shown to be both relevant and material. At this point, instead of a balancing test under M.R.E. 412 to further determine whether the evidence is admissible, a balancing test under M.R.E. 403 would be conducted. It would be under this balancing test that the government must show that the probative value of the proffered evidence is substantially outweighed, either by unfair prejudice, confusion of the issues, misleading the members, or by one of the other factors found in M.R.E. 403. If the government succeeds in showing that the probative value of the evidence is substantially outweighed, the defendant's proffered evidence should be deemed inadmissible. The court can still consider the victim's privacy interests since such evidence has the potential to unfairly prejudice the members. After all, it is the defendant who is on trial and not the victim.

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of sexual behavior" with the accused to prove consent; and "evidence the exclusion of which would violate the constitutional rights of the accused.").

265. *See supra* text accompanying note 220.