

The Honorable Elizabeth Holtzman, Chair
The Judicial Proceedings Panel
One Liberty Center
875 N. Randolph St., Suite 150
Arlington, VA 22203

RE: Prepared Statement of Professor Njeri Mathis Rutledge, South Texas College of Law

Madame Chair and Panel Members:

Thank you for giving me the privilege of sharing my views on this important matter, and for including me in a panel of such distinguished colleagues. I find it inspiring that the Judicial Proceedings Panel, the Department of Defense, and Congress are looking at progressive ways to enhance the perception of fairness towards adult sexual assault victims in the military. The amendments to the Uniform Code of Military Justice and the inclusion of Special Victims' Counsel has set a high standard that I hope will one day be emulated by the civilian justice system.

Crime impacts victims physically, emotionally and economically. Sexual violence is a unique crime which frequently focuses on subordination and misplaced shame; consequently, victims of sexual violence are very unique from other crime victims. In the civilian world, sexual and domestic violence crimes have been historically under-reported and under-prosecuted. It's important to consider the needs of adult sexual assault victims both within and outside the context of domestic violence.

Needs of Adult Sexual Assault Victims

Financial resources play an important role in assisting victims of sexual violence. Notably, survivor needs are not always directly related to finances. Rather they encompass other broader concepts involving safety, validation, community support, and dignity. The immediate financial needs of sexual violence survivors include funds for medical and dental expenses, mental health counseling and lost wages. For civilians, state Crime Victim Compensation funds can be a good resource for these needs. In addition to Crime Victim Compensation funds, military survivors of sexual violence

have a number of additional resources available including medical benefits, behavioral health benefits and the ability to be transferred or reassigned. Following retirement, military sexual violence survivors also have access to benefits from the Veteran Affairs Department, which has been increasing its focus on military sexual trauma. When the issue of compensation and restitution arises for victims of sexual violence, it is more likely to arise in situations involving sexual violence within domestic violence or civilian victims who may not enjoy the full benefits of military victims.

For domestic violence victims who experience sexual violence, the goal of safety and ending abuse requires financial resources. In addition to the need for medical treatment, mental health counseling and lost wages, domestic violence victims frequently have other expenses. Those expenses are generally related to relocation, dependent care and legal fees. For civilian victims, relocation expenses from state Crime Victim Compensation funds vary by state. Approximately half of the states provide relocation expenses with varying benefit amounts. Transitional benefits offered by the military system are a progressive way to help domestic violence sexual assault victims; however transitional benefits take time to be disbursed. A dependent spouse will frequently lose financial support, housing, and medical benefits if her husband is convicted by court-martial, as the result of mandatory forfeitures resulting from confinement or punitive discharge. A deferment, if granted, may ameliorate this impact; but, it is up to *the accused* to request a deferment during the clemency process. Moreover, a request for waiver of forfeiture is under the discretion of the convening authority. It is also unclear whether a dependent spouse who is sexually assaulted by another soldier would be eligible for VA benefits following termination of military service and discharge. Consequently, the various benefits available to military victims do not fully address the needs of all adult victims of military sexual assault.

To address some of the financial obstacles of adult sexual assault victims, the Panel has requested information from the various service divisions in essentially four areas: 1) Crime Victim Compensation funds; 2) expanding restitution in court martials; 3) expanding Article 139 to include bodily injury; and 4) allowing establishing a presumption in favor of allocating forfeited pay and allowances to crime victims with no

requirement that the accused request such an allocation. I respectfully submit my views on each of those areas.

State Crime Victim Compensation Funds

State Crime Victim Compensation (“CVC”) funds can be an important resource that is available to both military and civilian victims. It helps compensate for out of pocket expenses associated with crime. It does not include property damage. One of the responsibilities of the Special Victims’ Counsel is to educate victims of military sexual assault about civilian resources like CVC Funds. While CVC funds are available to address needs involving medical expenses, mental health counseling, and lost wages it is a benefit that has been traditionally underutilized by adult sexual assault and domestic violence victims. Based on my research and according to the most recent data available from the Office for Victims of Crime, sexual assault and domestic violence victims also tend to underutilize crime victim compensation funds, but regularly take advantage of other victim assistance programs. In 2012, approximately 141,000 claims were filed for crime victim compensation funds. Of that number only 13,157 involved sexual assault victims and approximately 33,057 involved domestic violence victims. The numbers continue to be low compared to the 1,683,750 domestic violence victims and 205,963 adult sexual assault victims who were served through various victim assistance programs that same year.

In 2012, over 66,000 CVC claims were denied. Two primary reasons for denial of CVC claims are based on a victim’s alleged failure to cooperate or a victim’s alleged contributory misconduct. Unfortunately, individual state CVC boards are left with discretion in defining those terms. Some states require victims to report the crime to the police, provide information to prosecutors, and testify to be eligible for CVC funds. California recently adopted legislation to amend the reporting requirements for victims of military sexual assault in Section 13956(4) of its Government Code. It is unclear whether other states will take the same enlightened approach as California. While state CVC funds can be a resource, it is far from a guaranteed source of financial assistance for sexual assault victims both in and outside the context of domestic violence.

Restitution in Court Martial Proceedings

Restitution has been an important aspect of the civilian criminal justice system for hundreds of years. In earlier years, restitution was limited to property crimes, similar to how Article 139 of the UCMJ is limited today. The federal court system has recognized that victims' rights are an important component of justice. In practical terms, restitution has proven to be a very difficult remedy to enforce in the civilian justice system. The number of indigent criminal defendants is probably one of the primary reasons restitution orders have been unsuccessful. Indigency can be an issue in both the military and civilian systems; however, that reality does not justify abandoning the concept of restitution. Moreover, the benefits and wages available suggests that restitution is likely to be more effective within the military system than the civilian system. I was surprised to learn that the primary vehicle for requesting restitution in the military system is through pretrial agreements. Restitution is also possible through post-trial mitigation, parole or clemency hearings, but is not an authorized punishment that may be adjudged by a court-martial. The materials provided included an insightful article published by the Naval Law Review written by the Honorable Lieutenant Colonel David Jones. I agree with Lieutenant Jones' argument that courts-martial should be vested with authority to order restitution in military sentencing.

There appears to be little justification to allowing a court to recommend restitution to a convening authority, but not empowering the court to award restitution as punishment. Several concerns were raised by the different service branches regarding this proposal. Restitution should not be viewed as a form of unjust enrichment or an opportunity to discredit a victim. Rather, it is an effort to restore a victim financially for financial losses experienced. Another common theme that was raised focused on restitution being unnecessary for military victims since a military victim would still have access to medical care, psychological care and even VA benefits after discharge. It is correct to assume that restitution requests for military sexual assault victims will likely be minimal in light of the benefits they already have. Those military benefits do not, however, address the problem of civilians who are victimized by

military members. The ability of a military judge to determine whether restitution should be awarded will increase confidence in the system and the perception of fairness.

Expanding Article 139 of the UCMJ to Include Bodily Injury

Article 139 of the Uniform Code of Military Justice allows a remedy for property crimes outside of the traditional judicial process. Allowing a commander to investigate and order restitution outside of a rigid judicial process is very innovative. When restitution was first ordered in the civilian justice system it was limited to property damage as well. Eventually the criminal justice system took the next logical step of including bodily harm. The overarching objection from the service branches to expanding Article 139 was the increase in workload and complexity of the cases. There was also a concern expressed that the potential for financial gain may motivate false allegations. It bears emphasizing that restitution and compensation for victims is not about unjust enrichment. Any amount awarded would need to be verifiable (similar to the property claims) and limited to the amount of loss caused by the conduct. There have been no proposals made for Article 139 to include punitive damages or replace the civil court system. A cap on awards and language limiting bodily injury claims to sexual assault victims will hopefully mitigate some of the concerns raised. Because of the number of benefits available to military victims, a civilian victim would be most likely to institute an Article 139 proceeding for a loss related to bodily injury.

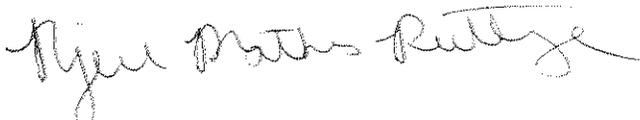
One important concern raised is whether expansion of Article 139 could complicate the prosecution of sexual assault cases. This concern will likely require additional research. Sexual assault cases are difficult to prosecute whether in the civilian or military system. A separate procedure to compensate sexual assault victims would be ill advised if it could negatively impact the prosecution. This could be addressed by allowing any previously ordered Article 139 restitution to be deducted from any subsequent restitution adjudged by the court-martial, or by abating the execution of any Article 139 findings until completion of the court-martial process when such process is initiated during the investigation.

Forfeited Wages

The final question raised by the Panel, related to using forfeited pay and allowances for crime victims. This proposal appeared to be met with more intense opposition from the various service branches. It is my understanding that currently, a waiver of forfeited pay and allowances would benefit dependents of the convicted service member. Concerns have been expressed that allocating pay and allowances to victims (whether a portion or in whole) would deprive dependents who need the support. Since waiver is not an absolute right but up to the discretion of the convening authority, the convening authority should have enough information and evidence to determine whether or not providing all or a portion of forfeited wages to a crime victim is warranted. Expanding the convening authorities' options to include considering the victim is a bold step towards victims' rights. Transferring forfeited pay and allowances would avoid the concerns raised about enforcing restitution from indigent defendants. From the perspective of victims, it would also increase the sense of fairness and justice. The decision to grant a waiver would still be up to the convening authority to determine on a case-by-case basis what would advance justice. Concern was raised by some of the service branches that waiver would harm dependents who are innocent victims. It is important to remember that a dependent spouse or child is not the only "innocent victim" in a sexual assault case. All stakeholders should at least be considered when decisions regarding waiver are made.

Thank you again for this opportunity. I look forward to answering your questions.

Respectfully submitted,



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