

Witness Perspectives from March 13, 2015 Meeting: 4 Options for Change

- A.** Establishing Restitution as an Authorized Punishment at Courts-Martial

- B.** Directing Court-Martial Forfeitures to Victims

- C.** Amending Article 139 to Include Bodily Harm

- D.** Establishing a DoD Compensation Program

This preliminary draft has not been approved by the Judicial Proceedings Panel

A. Establishing Restitution as an Authorized Punishment at Courts-Martial

Pro-Restitution Observations and Arguments	Anti-Restitution Observations and Arguments
<p>Would allow for direct accountability from the perpetrator, recognizing that as a result of the offense, the victim was personally harmed. This is a separate accountability that is extremely important to some victims. It is separate from the accountability for the accused’s violation of law, which is the reason for sentencing the accused to confinement.¹ The option of seeking restitution allows victims to regain a sense of control.²</p> <p>Restitution could be enforced in a variety of ways, such as garnishing the accused’s pay; having the government pay restitution by proxy, then recover the money from the accused; allow the states to enforce military judges’ restitution orders; and imposing contingent confinement or recalling the accused from appellate leave if he fails to make restitution.³</p> <p>Would allow victims to spend the funds as they choose and to pay for needs that compensation mechanisms typically do not cover (e.g., property loss/damage, home security systems, fence installation, job retraining, a guard dog, self-defense courses).⁴</p>	<p>Restitution is not a meaningful remedy unless payment is reasonably certain.⁵ Because restitution does not attach until a conviction, collection assumes that the victim made a report, charges were preferred and referred, and the accused was not acquitted.⁶ Even once convicted, the lack of standing courts and probation officers would make restitution orders especially difficult to enforce.⁷ While in theory it might be possible to create a probation system, doing so might result in retention of Service members who would otherwise have been discharged.⁸</p> <p>Because sentencing normally immediately follows the guilt phase of the trial, the victim’s losses (and the accused’s resources) would have to be disclosed at the outset of the court-martial. This could open up new avenues of cross-examination and potentially make the difference in a close case.⁹</p> <p>The trial counsel is already overburdened, being responsible for all witnesses’ travel, all evidence, all subpoenas, the accused’s uniform, etc. The responsibility to present restitution evidence at sentencing would be yet one more burden for the trial counsel to carry.¹⁰</p> <p>Because there are no sentencing guidelines, panel members might be inclined to give a shorter sentence to increase the chances of the accused paying</p>

¹ *Transcript of JPP Public Meeting 271-72* (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime (NCVC)).

² *Transcript of JPP Public Meeting 281, 340-41* (testimony of Ms. Bridgette Marie Harwood, Director of Legal Services, NVRDC).

³ Jones Article at 42.

⁴ *Transcript of JPP Public Meeting 268-69* (testimony of Ms. Susan Smith Howley, Director, Public Policy, NCVC); National Crime Victim Law Institute (NCVLI), *Fundamentals of Victims’ Rights: A Victim’s Right to Restitution*, VICTIM LAW BULL., Nov. 2011, at 3.

⁵ *Transcript of JPP Public Meeting 213-14* (testimony of LCDR Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims’ Legal Counsel Program).

⁶ *Transcript of JPP Public Meeting 277* (testimony of Ms. Susan Smith Howley, Director, Public Policy, NCVC).

⁷ *Transcript of JPP Public Meeting 355-56* (testimony of COL Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General); *id.* at 362-63 (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program); *see also* Jones Article at 40-41.

⁸ Army’s Response to RFI 56.

⁹ *Transcript of JPP Public Meeting 203* (testimony of Maj Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); *but see* Jones Article at 40-41.

¹⁰ *Transcript of JPP Public Meeting 203-04* (testimony of Maj Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

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restitution once released. In addition, panel members aren't necessarily educated on victims' reaction to trauma and counterintuitive behaviors.¹¹

The prospect of restitution payments could become fodder for impeachment of the victim by the defense (i.e., financial motive to lie) at trial, especially in light of existing stereotypes about women fabricating sexual assault allegations. Defense efforts to make the victim's financial circumstances an issue at trial might result in a mini-trial, particularly in light of the existing liberal discovery rules.¹²

¹¹ *Transcript of JPP Public Meeting 204-05, 237-38* (testimony of Maj Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); *id.* at 321-22 (testimony of Maj Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division); *but see* Jones Article at 41-42.

¹² *Transcript of JPP Public Meeting 320-21* (testimony of Maj Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division); *see also* Coast Guard's Response to RFI 56.

B. Directing Court-Martial Forfeitures to Victims

Pro-Forfeiture Observations and Arguments	Anti-Forfeiture Observations and Arguments
<p>The convening authority is authorized to direct that the accused's dependents receive money that would otherwise be subject to forfeiture in the following two ways:</p> <ul style="list-style-type: none"> • Under Article 57a, the convening authority may defer forfeitures adjudged at a court-martial, which prevents them from becoming effective 14 days after sentencing. Deferral must be requested by, and is paid to, the accused, who must set up an allotment to his dependent(s). • Under Article 58b, the convening authority may waive automatic forfeitures for up to six months and direct that they be paid to the accused's dependent(s). Waiver can be requested at any time. Either the accused or his dependent(s) can request waiver, or it can be granted on the convening authority's own initiative. <p>In practice, waiver and deferral of forfeitures generally allows the accused's dependents to receive the accused's pay for approximately ten months after conviction.¹³ Waiver of forfeitures is the most frequent form of clemency granted by the convening authority and generally is included in pretrial agreements in cases in which dependents exist.¹⁴</p>	<p>Compensation of the victim with forfeited funds is arguably contrary to the purpose of Article 58b, which is to provide for families, especially children, who are innocent victims of their sponsor's crimes and have no way of providing for themselves. It is money that, in most cases, is used to help the family bounce back from the loss of the primary breadwinner, allowing a short period of time for the accused's spouse to find a job or other means of support. In contrast, a non-dependent victim has not necessarily suffered financially as a result of the crimes and may still be drawing full pay from a military or civilian job.¹⁵</p> <p>In practice, unless the accused voluntarily requests deferral of automatic forfeitures, payments do not begin to be made to dependents until the convening authority takes action several months after trial, and must be diligently pursued by dependents.¹⁶</p> <p>Under Article 58b, payments may not continue for more than six months following the convening authority's action.¹⁷</p> <p>Some victims may be dissatisfied when/if they learn that the forfeited wages do not come directly from the accused.¹⁸</p> <p>The prospect of waiver of forfeitures frequently motivates an accused to enter into a pretrial agreement. Therefore, for Service members with dependents, requiring that forfeited pay be directed to victims rather than dependents could have a negative effect on the willingness of an accused to enter into a PTA.¹⁹</p>

¹³ Services' Responses to RFI 58(a).

¹⁴ Coast Guard's Response to RFI 58(b).

¹⁵ Coast Guard's Response to RFI 58(b).

¹⁶ *Transcript of JPP Public Meeting* 208-11, 253-54 (testimony of LCDR Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program).

¹⁷ *Transcript of JPP Public Meeting* 211, 249-50 (testimony of LCDR Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); *id.* at 312 (testimony of Maj Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel).

¹⁸ *Transcript of JPP Public Meeting* 343-44 (testimony of Ms. Susan Smith Howley, Director, Public Policy, NCVS, and Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program).

¹⁹ Coast Guard's Response to RFI 58(b).

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If the victim is given the opportunity for financial compensation through forfeitures, panel members may assume that the victim has a motive to fabricate. This is especially true if the victim has financial debts of his or her own at the time of the assault, as is often true of victims, who are typically young.²⁰

Currently, adjudged fines and forfeitures are the largest source of revenue of the Armed Forces Retirement Home.²¹ Although the Home received \$28.2 million in FY14 in fines and forfeitures, this source of the Home's income has been steadily declining since FY2009.²² If forfeited wages were diverted to pay victims' compensation, statutes would need to be amended and another source of revenue would be required to support the Armed Forces Retirement Home.

²⁰ Coast Guard's Response to RFI 58(b).

²¹ See ARMED FORCES RETIREMENT HOME, CONGRESSIONAL BUDGET AUTHORIZATION: FISCAL YEAR 2016, at 26, available at https://www.afrh.gov/afrh/docs/AFRH_CBJ_2016.pdf; see also 10 U.S.C. § 2772 (Share of fines and forfeitures to benefit Armed Forces Retirement Home); 24 U.S.C. § 419 (Armed Forces Retirement Home Trust Fund). All three sources were emailed to the Panel with this Outline.

²² ARMED FORCES RETIREMENT HOME, FY14 PERFORMANCE AND ACCOUNTABILITY REPORT 31, available at <https://www.afrh.gov/afrh/about/par/afrhentirepar14.pdf> (emailed to Panel with this Outline).

C. Compensation for Bodily Harm through Article 139

Observations and Arguments (All negative)

The 90-day reporting requirement for Art. 139 claims does not lend itself well to Article 120 cases, where reports are sometimes made much later.²³

If the Article 139 process begins before court-martial proceedings and the commander makes the claim determination, (s)he might be conflicted out from being able to make a preferral or referral decision.²⁴

If the Article 139 process were delayed until after court-martial, an enlisted accused would have begun forfeiting his pay and allowances (or two-thirds of it). This would lead to at least two undesirable second-order effects. First, because the accused would usually automatically be reduced to E-1, any unforfeited pay would be much less. At the same time, this would not be true with respect to officers and warrant officers, hence a large disparate effect depending on the accused's rank before sentencing. Second, victim satisfaction may be harmed since the money would actually be coming from the government rather than directly from the accused.²⁵

Article 139 investigating officers are currently not trained to do sexual assault investigations,²⁶ and they are not lawyers.²⁷

Sexual assault victims may attempt to use an expanded Article 139 to seek payment for long-term care, pain and suffering, and emotional distress. Commanders are not necessarily equipped to handle claims that may equate to complex personal injury suits in civilian jurisdictions.²⁸

In the case of a meritorious claim for a substantial amount of money, deduction from the offender's paychecks would likely be the only source of revenue to satisfy the debt. This would create a tension between the need to maintain good order and discipline by promptly discharging sexual assault offenders, and the need to keep attackers on the payroll in order to ensure victims' compensation.²⁹

Expanding Article 139 could increase the risk of false allegations; the defense may try to allege financial motivations to impeach victims' credibility.³⁰

The accused has very limited due process rights under Article 139; exposing the accused to damages for bodily injury will likely raise constitutional due process concerns.³¹

²³ *Transcript of JPP Public Meeting 311* (testimony of Maj Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel).

²⁴ *Transcript of JPP Public Meeting 200-01* (testimony of Maj Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

²⁵ *Transcript of JPP Public Meeting 200-02* (testimony of Maj Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

²⁶ *Transcript of JPP Public Meeting 200* (testimony of Maj Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

²⁷ *Transcript of JPP Public Meeting 332-33* (testimony of COL Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General).

²⁸ *Transcript of JPP Public Meeting 208-11, 253-54* (testimony of LCDR Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); Air Force's Response to RFI 59(c).

²⁹ Air Force's Response to RFI 59(c).

³⁰ Air Force's Response to RFI 59(c).

D. Establishing a DoD Compensation Program

Pro-DoD CVC Program Observations and Arguments	Anti-DoD CVC Program Observation
<p>A DoD CVC program would have its own uniform eligibility rules, thereby avoiding the varying requirements of the state CVC funds existing in 50+ jurisdictions. Victims would be treated the same, regardless of their status (i.e., military, dependent, civilian), and regardless of the fact that their status may change during the course of the court-martial process.³²</p> <p>A DoD CVC program would not be tethered to the need for a criminal conviction and sentence, any particular accused’s financial situation, or any particular court’s continued jurisdiction. DoD could accommodate issues and complications that often arise in Article 120 cases such as restricted reporting, victims’ delay in reporting, and future losses (e.g., long-term medical / mental health care) as well as cases arising overseas.³³</p> <p>A DoD CVC program would be part of the DoD budget and be subject to the appropriations process by Congress. Structuring the fund in this way would mirror the benefits obtained through litigating cases in civil court in that it would function to provide relief to victims but also hold the military accountable in its efforts to eradicate sexual assault through direct congressional oversight in both the appropriations and the authorization processes. The DoD CVC program could be augmented by any funds obtained through convictions (e.g., fines, forfeiture of pay and allowances) that would be collected and paid to victims.³⁴</p> <p>Many victims have no desire to re-engage with the perpetrator in any way. A DoD CVC program would allow these victims to avoid the kind of re-engagement victims would face when dealing with other compensation or restitution mechanisms (e.g., at a restitution hearing, in the clemency or parole process).³⁵</p> <p>DOJ’s Office on Victims of Crime (OVC) already has a military division.³⁶</p>	<p>While substantial federal resources fund state CVC funds, there currently is no national CVC program, except for victims of international terrorism committed outside the U.S.³⁷</p>

³¹ Army’s Response to RFI 59(c); *see also Transcript of JPP Public Meeting* 92-93 (testimony of Prof. Courtney E. Lollar, University of Kentucky College of Law) (noting constitutional implications of transforming Article 139 from a reimbursement statute to a punishment statute).

³² *Transcript of JPP Public Meeting* 328-30 (testimony of Maj Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

³³ *Transcript of JPP Public Meeting* 300-331 (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program); *id.* at 369-70 (testimony of Ms. Bridgette Marie Harwood, Director of Legal Services, NVRDC); *id.* at 101-02, 114-15 (testimony of Prof. Courtney E. Lollar, University of Kentucky College of Law); *id.* at 111-13 (testimony of Prof. Julie Goldscheid, CUNY Law School).

³⁴ *Written Statement of Service Women’s Action Network (SWAN)* at 2 (unnumbered) (undated).

³⁵ *Transcript of JPP Public Meeting* 58, 119-20 (testimony of Prof. Julie Goldscheid, CUNY Law School).

³⁶ *Transcript of JPP Public Meeting* 300 (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program).

³⁷ NACVCB, “Crime Victim Compensation: Resources for Recovery,” *available at JPP March 13 Meeting and Reference Materials* Tab 14.