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**MAKING THE ACCUSED PAY FOR HIS CRIME: A PROPOSAL TO ADD RESTITUTION
AS AN AUTHORIZED PUNISHMENT UNDER RULE FOR COURTS-MARTIAL 1003(B)**

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V. Optional Restitution In Military Courts

Optional, judicially ordered restitution can work in the military system. Before concerning ourselves with the important question of how it would be enforced, let us first discuss what changes the new system would require. The task of amending any section of the Manual for Courts-Martial is daunting. Adding only one small provision to allow for restitution as an *26 authorized punishment under [RCM 1003\(b\)](#) necessitates making changes to many other places in the Manual that reference this section or correspond with it. The following portion of the article suggests amendments to [RCM 1003\(b\)](#), [1107\(d\)\(5\)](#), [1113\(d\)\(3\)](#), as well as proposed military judge's Benchbook instructions and a pre-trial agreement sentencing limitation provision. There are other sections of the Manual for Courts-Martial that would need minor amending that this article does not discuss. ¹³³

A. Amending [RCM 1003\(b\)](#)

I. [RCM 1003\(b\)\(3\)](#)

The natural starting point to begin modifying the existing system to allow for restitution as an authorized punishment is the fine provision of [RCM 1003\(b\)\(3\)](#). It states:

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In order to enforce collection, a fine may be accompanied

by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.¹³⁴

There are two important aspects to the fine provision. First, the provision allows a fine to be adjudged in addition to forfeitures, even at special courts-martial. The only limit is that the fine by itself, or in combination with adjudged forfeitures, cannot exceed the jurisdictional maximum allowed by that type of court-martial.¹³⁵ For instance, at a special court-martial, the fine, combined with the forfeitures cannot exceed the total of two-thirds pay per *27 month for twelve months.¹³⁶ Using our hypothetical character, LCpl Pawn could receive a fine and forfeitures at his special court-martial, but if his base pay were \$1,547.70,¹³⁷ the maximum amount of money he could lose would be \$1,032.00 per month times twelve months,¹³⁸ or \$12,384.00. This total amount can be in the form of a fine, forfeitures alone, or a combination of the two.¹³⁹

Second, the provision provides an enforcement mechanism. It states that an appropriate amount of confinement may be added if the fine is not paid. The amount of confinement, however, cannot exceed the jurisdictional limit of the court. At a general court-martial, LCpl Pawn could receive up to five years confinement for his larceny because he stole non-military property of a value in excess of \$500.¹⁴⁰ However, if his case is being adjudicated at a special court-martial, his maximum confinement exposure, including any fine enforcement mechanism, cannot exceed one year.¹⁴¹ If LCpl Pawn had stolen from the government, and was at a special court-martial, a possible punishment, including the fine enforcement provision might read as follows: reduction to E-1, confinement for six months, forfeitures of two-thirds his base pay per month for six months¹⁴² and a fine of \$2,000, with an additional three months confinement to be added to the sentence if the fine is not paid within three months from the date of trial. Bear in mind that these limitations apply only at special courts-martial. General courts-martial are not limited in the amount of a fine which may be adjudged.¹⁴³

To make [RCM 1003\(b\)\(3\)](#) compatible with the proposed [RCM 1003\(b\)\(3\)\(a\)](#), the language of the present rule needs to be changed slightly. The following is the proposed amendment to the rule, with changes underscored:

(3) *Fine*. Any court-martial may adjudge a fine in lieu of or in addition to restitution and in addition to or in lieu of forfeitures. Special and summary courts-martial may not *28 adjudge any fine or combination of fine, forfeitures, and restitution, in excess of the total amount of forfeitures that may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

In essence, the proposed provision permits an accused to receive all three financial punishments at a court-martial--a fine, restitution and forfeiture of pay.

2. [RCM 1003\(b\)\(3\)\(a\)](#)

The proposed [RCM 1003\(b\)\(3\)\(a\)](#) restitution provision should incorporate both of the important provisions of [RCM 1003\(b\)\(3\)](#), by allowing restitution to be adjudged in addition to or in lieu of forfeitures and a fine, and by carrying a potent enforcement mechanism. The proposed provision would read:

(3)(a) *Restitution*. Any court-martial may adjudge restitution in addition to forfeitures and a fine. Special and summary courts-martial may not adjudge any combination of a fine, forfeitures and restitution in excess of

the total amount of forfeitures that may be adjudged in that case. In order to enforce restitution, a restitution order may be accompanied by a provision in the sentence that, in the event the restitution is not paid, the person ordered to pay the restitution shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the amount of restitution has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made.¹⁴⁴ The Government has the burden to prove, by preponderance of the evidence, the pecuniary loss of the victim, while the accused has the *29 burden to prove his financial situation and that of his dependents by the same standard.¹⁴⁵

There are several important provisions of the proposed rule. First, the rule allows for the possibility of a contingent confinement provision, in the event the restitution is not paid. Second, the rule sets up a preponderance of the evidence standard as the burden of proof applicable in proving damages and financial resources. This is the same standard used in the MVRA¹⁴⁶ and allows for efficient adjudication of both the defendant's financial resources and the victim's damages. Third, the rule requires that the restitution order specifically name the person or persons to whom payment is to be made.¹⁴⁷ Lastly, the rule allows an accused to receive a fine, forfeiture of pay and restitution at any court-martial.¹⁴⁸

3. *RCM 1003(b)(3) Discussion*

The non-binding discussion accompanying [RCM 1003\(b\)\(3\)](#) provides useful guidance in describing when a fine is due, what type of crime warrants a fine, what happens if an accused fails to pay a fine, and the limitation on the convening authority in approving that fine.¹⁴⁹ First, the most important *30 guidance in the discussion is that a “fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States” for the amount.¹⁵⁰ This provision makes the enforcement of the fine possible because once the fine is ordered executed, the individual becomes indebted to the government. This indebtedness is enforceable by the United States through the withholding of income tax returns.¹⁵¹

Second, the section states that a fine should not normally be awarded unless the defendant was unjustly enriched.¹⁵² By using the word “normally,” the drafters gave even more room for interpretation than normally seen in the non-binding discussions. Despite this guidance, courts have ruled that a fine may be adjudged against an accused even when there was no unjust enrichment, and regardless of the crime committed.¹⁵³ There can be no such ambiguity about the appropriateness of ordering restitution in the new provision.

Third, the discussion cross-references [RCM 1113\(d\)\(3\)](#),¹⁵⁴ which addresses the procedural prerequisite for imposition of additional confinement for nonpayment of a fine. If the accused is unable to pay the fine, despite making good faith efforts (e.g., he is indigent) the commander may only *31 impose additional confinement upon determining that there is no other punishment adequate to meet the government's interest in appropriate punishment.¹⁵⁵ There is always the possibility that the contingent confinement may be imposed, but the government must satisfy another procedural prerequisite to do so.

Fourth, the discussion reminds us of [RCM 1107\(d\)\(5\)](#).¹⁵⁶ This rule states that if the “cumulative impact of the fine and forfeitures ... would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged” at a special court-martial, the convening authority may not approve it.¹⁵⁷ This is self-explanatory and makes sense. This rule would also need to be modified if we add restitution as an authorized punishment.

4. *RCM 1003(b)(3)(a) Discussion*

The discussion section of the proposed [RCM 1003\(b\)\(3\)\(a\)](#) restitution provision should follow the format set out for the discussion section of [RCM 1003\(b\)\(3\)](#)¹⁵⁸ with regards to the important points mentioned in the previous section. Having said that, it must do more; it also needs to explain what restitution is and what its parameters are.¹⁵⁹ The proposed discussion section therefore, by necessity, is quite extensive. The following is the proposed discussion section, which follows [RCM 1003\(b\)\(3\)](#)¹⁶⁰ and incorporates many of the provisions of the MVRA:

Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. An imposed punishment of restitution is in the nature of a judgment and, when ordered executed, *32 makes the accused immediately liable to the victim for the entire amount of money specified in the sentence. Restitution payments to the victim should begin immediately after imposition of punishment.¹⁶¹ It is not the purview of the sentencing authority to set up a payment schedule for restitution.

Orders of restitution should take into account the pecuniary loss to each victim that is the direct or proximate consequence of any offense for which the accused has been found guilty, as well as all information relating to the financial situation of the accused. Pecuniary loss to the victim is a broad term which encompasses not only direct loss from real and personal property offenses, based on the value of property at the time it was lost, damaged or destroyed, but also the cost of necessary medical care and related professional services and devices relating to physical and mental health care, including any necessary physical, speech, or occupational therapy for any offense that directly results in bodily harm to the victim. A victim's economic losses may also include, but are not limited to, lost income, to the extent that it can be readily determined, and un-reimbursed travel-related expenses incurred by the victim to attend and participate in proceedings related to the case.¹⁶² In the case of an offense that involves bodily injury resulting in death, the restitution order may include an amount equal to the cost of necessary funeral and related services.¹⁶³

In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim, the representative of the victim's estate, or another family member may assume the victim's rights of *33 restitution under this section, but in no event shall the accused be named as such representative or guardian.¹⁶⁴

Where more than one accused is responsible for the loss to a victim, the accused being sentenced may be ordered to pay either the entire amount of restitution due or an apportioned amount. It may not be appropriate to order restitution for an offense where the number of identifiable victims is so large as to make restitution impracticable, or if determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to such a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

See [RCM 1113\(d\)](#) concerning imposition of confinement when the accused fails to pay restitution. Where the sentence adjudged at a special court-martial includes restitution, see [RCM 1107\(d\)\(5\)](#) for limitations on convening authority action on sentence.

5. *RCM 1003(b)(3)(a) Analysis*

In referring to the Analysis section of the Manual for Courts-Martial, the manual states that the "... Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with

respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation.”¹⁶⁵ What follows is a proposed addition to Appendix 21, Analysis of Rules for Courts-Martial:

Subsection (3)(a) is based on [Title 18 U.S.C. Sections 3663A and 3664](#) (Mandatory Restitution to Victims of Certain Crimes (1996) and Procedure for Issuance and Enforcement of Order of Restitution (1982)); [42 U.S.C. Section 10606](#) (Victims' Rights (1990)); and DoD Dir. 1030.1 (Victim and Witness Assistance (1994)). This new punishment option authorizes courts-martial to award victim restitution as part of the sentence. It is designed to give courts-martial power similar to that of United States district courts to order an *34 accused to pay direct compensation to any person or entity that has suffered direct pecuniary harm as a result of the accused's crimes.¹⁶⁶

The proposed Analysis section provides the rationale for the proposed new punishment. It lists all of the major legislation and the Department of Defense Directive upon which restitution in the military system is based.

B. Amending [RCM 1107\(d\)\(5\)](#)

[Rule for Court-Martial 1107](#)¹⁶⁷ gives lengthy instructions for convening authority action on the sentence adjudicated at trial. If restitution is added as an authorized punishment, [RCM 1107\(d\)\(5\)](#)¹⁶⁸ must be amended because of the third sentence in the proposed restitution provision: “Special and summary courts-martial may not adjudge any combination of a fine and forfeitures or restitution and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case.” [Rule for Court-Martial 1107\(d\)\(5\)](#) is specifically mentioned in the Discussion section of both [RCM 1003\(b\)\(3\)](#)¹⁶⁹ and the proposed [RCM 1003\(b\)\(3\)\(a\)](#).

This section does not need to be rewritten, and no original language need be stricken. It just needs to be changed slightly to incorporate the punishment of restitution into the language. The proposed changes are underscored:

(5) *Limitations on sentence of a special court-martial where a fine or restitution has been adjudged.* A convening authority may not approve in its entirety a sentence adjudged at a special court-martial when, if approved, the cumulative impact of the fine, restitution, and forfeitures (whether the forfeitures are adjudged or by operation of [Article 58b](#)), would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial.¹⁷⁰

This change comports with the proposed restitution clause. It keeps intact the rule that at a special court-martial, an accused can never pay (for a fine or *35 restitution) or lose (for forfeitures) more money than the combined total of two-thirds of his base pay times twelve months.¹⁷¹ Of course, no such rule is necessary for general courts-martial cases as there is no set jurisdictional limit on fines or restitution.¹⁷²

C. Amending [RCM 1113\(d\)\(3\)](#)

[Rule for Court-Martial 1113\(d\)\(3\)](#)¹⁷³ is also specifically mentioned in the discussion following [RCM 1003\(b\)\(3\)](#) and the proposed [RCM 1003\(b\)\(3\)\(a\)](#). This is commonly referred to as the indigency provision. Once again, drastic change is not needed to amend the rule to comport with adding restitution as a punishment option. The proposed changes to the original rule are underscored:

(3) *Confinement in lieu of fine or restitution.* Confinement may not be executed for failure to pay a fine or restitution if the accused demonstrates that the accused has made good faith efforts to pay but cannot

because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.¹⁷⁴

Indigency hearings are uncommon. The fine is usually paid, but if it is not, the fine follows the accused, even if he leaves the military. The government, eventually, recoups the fine by withholding the amount of the fine through garnishment of the individual's tax returns.¹⁷⁵

D. Proposed Military Judge's Benchbook Instructions

The Military Judge's Benchbook (Benchbook)¹⁷⁶ also needs to be modified to incorporate the new restitution punishment. The Benchbook states that although it is not required, it is recommended that the military judge read the definitions of each kind of punishment the accused is facing.¹⁷⁷ There are *36 two sentencing instructions with regard to fines, one for a general court-martial and one for a special court-martial. We would need to modify both of these existing fine instructions if restitution were authorized. Additionally, it would be necessary to incorporate two new restitution instructions.

1. Amending the General and Special Court-Martial Fine Instructions

Both fine instructions need slight modifications to incorporate restitution language. Language must be added to allow members to sentence the accused to a fine, restitution and forfeitures at both types of courts-martial. The following is the original general court-martial fine instruction with the proposed changes underscored:

(FINE--GENERAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of, or in addition to, forfeitures, and/or restitution. A fine is a punishment that is appropriate when the victim of the accused's crime is the United States government. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)¹⁷⁸

The “and/or” language is incorporated to leave open the possibility of a sentence including a fine, payment of restitution and forfeitures at a general court-martial.

The present special court-martial fine provision, once again, need be only slightly modified. The following is the original special court-martial fine instruction with the proposed changes underscored:

*37 (FINE--SPECIAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of, or in addition to, restitution and/or forfeitures. A fine is a punishment that is appropriate when the victim of the accused's crime is the United States government. If you should adjudge a fine, the amount of the fine, along with any forfeitures and/or restitution that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (twelve)(_____) month(s). A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the fine. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other

confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed ___ (month(s)) (year).¹⁷⁹

2. Proposed General and Special Court-Martial Restitution Instructions

The proposed restitution instructions will, necessarily, follow the basic structure of the fine provisions. The following is the proposed general court-martial restitution instruction:

(RESTITUTION--GENERAL COURT-MARTIAL:) MJ: This court may adjudge restitution either in lieu of, or in addition to, forfeitures and/or a fine. Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. Restitution, when ordered executed, makes the accused immediately liable to the victim for the entire amount of *38 money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the restitution is not paid. Such confinement to enforce payment of the restitution would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the restitution. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

Like the previous fine instruction, the proposed restitution instruction allows for the accused to be sentenced to all three monetary punishments at a general court-martial--a fine, restitution and forfeitures.¹⁸⁰

The following is the proposed special court-martial restitution instruction:

(RESTITUTION--SPECIAL COURT-MARTIAL:) MJ: This court may adjudge restitution either in lieu of, or in addition to, forfeitures and/or a fine. Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. If you should adjudge restitution, the amount of the restitution, along with any forfeitures and/or fine that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (twelve)(_____) month(s). Payment of restitution, when ordered executed, makes the accused immediately liable to the victim for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the restitution is not paid. Such confinement to enforce payment of the restitution would be in addition to any other confinement you might *39 adjudge and the fixed period being an equivalent punishment to the restitution. The total of all confinement adjudged, however, may not exceed ___ (month(s))(year).)

Regardless of which court-martial sentences an accused to make restitution, the sentencing worksheet for the members must also be modified to allow the members to annotate their decision and specify to whom restitution payments should be made.¹⁸¹

E. Proposed Pre-Trial Agreement Sentencing Limitation Provision

In most sentencing limitation portions (Part II, or the Appendix) of pre-trial agreements, there is a subsection, after the punitive discharge, confinement and forfeitures subsections, entitled "Other Lawful Punishment." What usually follows "Other Lawful Punishment" are the words "May be approved as adjudged." Rather than having what amounts to a fairly useless sentencing subsection, one option is to put a contingent confinement clause for payment of restitution and fines.¹⁸² For example, the "Other Lawful Punishment" provision might read:

4. Other Lawful Punishment: Any other lawful punishment adjudged, including a fine or restitution, may be approved as adjudged. Contingent confinement imposed as a condition of, or in conjunction with, a fine or restitution, is not affected or limited by any period of confinement limited, suspended or disapproved in paragraph 2, above.

"Paragraph 2," listed in the above proposed sentencing limitation provision, is usually the confinement limitation provision. Including this added language will ensure that there are no misunderstandings between the government and the accused concerning contingent confinement if restitution payments are not made.

*40 VI. Implementing And Enforcing Judicially Awarded Restitution In Military Courts

We have examined how the MVRA is set up and possible changes to the military's jurisprudence to incorporate restitution in courts-martial. The biggest problem, however, still remains--how do we implement and enforce the restitution that is awarded by either a judge or members? As stated previously, ordering restitution is easy, enforcing it is an entirely different matter. First, this section sets out several distinctions between how the federal and military systems might treat restitution. Next, four different possible restitution enforcement mechanisms are discussed. Finally, the section explains how to deal with potential ex post facto concerns associated with implementation of restitution in the military.

The principle weakness in the military system for implementation of restitution is that, unlike the federal system, the military does not have access to state probation officers to enforce the court's restitution order.¹⁸³ This is compounded by the fact that, in most cases, the military loses jurisdiction over a servicemember when they deliver a certificate of discharge to the accused. This usually occurs either at the end of the servicemember's active service at the unit, or at the end of confinement and appellate review.¹⁸⁴

Another problem area that arises in implementing restitution in the military is that sentencing proceedings follow almost immediately after the findings are announced.¹⁸⁵ This may seem odd to some,¹⁸⁶ since in the federal *41 civilian system, sentencing of a defendant can happen weeks or months after the adjudication of guilt. This is significant because it is during this time, in the civilian system, that the probation officer compiles an extensive pre-sentencing report,¹⁸⁷ which includes all possible victim restitution issues. This report is then given to the judge. After delivery of the pre-sentence report, both the government and defense present restitution evidence in court to prove their cases by a preponderance of the evidence to the judge; the government seeks to prove all victim restitution amounts and the defendant seeks to prove his and his dependents' financial situation.¹⁸⁸ Because the military usually has its sentencing hearings immediately following the findings, one could argue that there will not be effective litigation of restitution issues. This, however, is unlikely.

The government already presents to the members or judge, before sentencing, some of the particulars of the accused's financial situation. The members are informed how much time the accused has in the military, what his pay is, how many dependents he has and other data.¹⁸⁹ The only thing left to do is what is currently done in federal civilian courts--the government must prove victim restitution amounts and the accused must prove any financial considerations he has (which is commonly done

in military sentencing proceedings already). One other important point to keep in mind is that military members and judges, unlike their federal counterparts, are intimately familiar with the lifestyles, pay scale, housing arrangements, and other financial considerations of military personnel.

One last difference between the federal civilian system and military courts is that in the federal system the judge awards the punishment, whereas *42 in the military system a judge *or* members award punishment. Given the fact that the military has blue ribbon juries, picked for their experience and judgment, it seems shortsighted to claim that our “lay jury” would not be able to establish appropriate restitution awards. It is not difficult to figure out dollar figures for property damage, medical expenses, or other incidentals subject to restitution.¹⁹⁰ And, as in the federal civilian system, the members have the prosecutor to help point them in the right direction as to an appropriate amount of restitution to be awarded.

There are four main ways to enforce restitution payments: garnishing the accused's pay; having the government pay the restitution by proxy and then recovering the money from the accused; allowing military restitution orders be enforced by the states; and imposing contingent confinement or recalling the accused from appellate leave if restitution is not made.

A. Restitution by Garnishing the Accused's Pay

One way to get restitution money from the accused and to the victim is to garnish the accused's pay. Under this scenario, once the court-martial sentencing authority has ordered restitution, that amount could be immediately¹⁹¹ taken out of the accused's pay by the disbursing or finance office. This is the how [Article 139](#) complaints are processed.¹⁹² Under an [Article 139](#) claim, the convening authority may approve an amount to be taken out of the accused's pay after an investigating board determines that the servicemember was at fault.¹⁹³ [Article 139](#) states, “[t]he order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.”¹⁹⁴ This is powerful language.

If the convening authority can issue a binding order on the disbursing officer to garnish a servicemember's pay based on the investigating officer's recommendation, why can't he have that same power for the payment of restitution? In other words, after the court awards restitution as a punishment, *43 the commanding officer could immediately order the disbursing officer to pay that amount of money to the victim.¹⁹⁵

Of course, [Article 139](#) specifically gives that power to the commanding officer. Perhaps that same authority could be given to the commanding officer (or convening authority) by modifying the previously proposed restitution provision.¹⁹⁶ The original restitution provision would contain the additional, underscored language:

(3)(a) *Restitution*. Any court-martial may adjudge restitution in addition to forfeitures and a fine. Special and summary courts-martial may not adjudge any combination of a fine, forfeitures and restitution in excess of the total amount of forfeitures that may be adjudged in that case. The restitution ordered may be charged against the pay of the accused upon the approval of the convening authority, which approval is conclusive on any disbursing officer for the payment by him to the victim(s) of the restitution ordered. In order to enforce restitution, a restitution order may be accompanied by a provision in the sentence that, in the event the restitution is not paid, the person ordered to pay the restitution shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the amount of restitution has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The Government has the burden to prove, by preponderance of the evidence, the pecuniary loss of the victim, while the accused has the burden to prove his financial situation and that of his dependents by the same standard.

A few important points need to be mentioned. First, the underlined restitution language contains the verb “may,” as opposed to “shall,” as is contained in the [Article 139](#) language. This is to grant leeway to the convening authority as to whether to garnish the accused's pay or set up some other payment plan for *44 restitution. Second, the convening authority's decision to garnish the accused's pay for restitution is final on the disbursing officer. Third, the contingent confinement language is left in to give the sentencing authority as much freedom as possible to construct an appropriate sentence. Finally, the term “convening authority” is used in the proposed punishment, instead of “commanding officer,” as is used in the [Article 139](#) complaint.¹⁹⁷ This is to ensure that the same authority that had the power to refer the case to the court-martial is the one who garnishes the accused's pay. Using the term “commanding officer,” could be taken to mean someone other than a convening authority, such as a company commander.

The weakness in the above system is that the accused may be in a no-pay status or the convening authority may deem him unable to afford the garnishment of pay. For example, if the accused is sentenced to confinement at a general court-martial, he receives no pay after fourteen days from when the sentence was adjudged.¹⁹⁸ The same is true for a sentence received at a special court-martial, except the accused receives one-third of his pay.¹⁹⁹ At either court-martial, a convening authority may decide not to garnish the accused's pay because of monetary commitments the accused has, such as child support payments.

B. Restitution by Proxy

The most important notion in any restitution scheme is to make the victim whole, by securing for the victim the ordered restitution as soon as practicable. It is possible for the military to have a better system than the probation officer and payment plan system that exists in federal district courts, where restitution is burdensome to secure and may take years to complete.²⁰⁰ The military can also have a system that does more than merely garnish the accused's pay. The government can ensure restitution is paid both quickly and easily by instituting a system of “restitution by proxy.” Under this system, the government would pay the victim the restitution ordered, and then the accused reimburses (or becomes indebted to) the government. Unlike district courts, all of the accused who are sentenced in military courts work for the United States government. The government controls their pay.

Restitution by proxy is the best way to ensure timely restitution takes place because this system compensates victims by allowing them to recoup *45 adjudicated pecuniary losses directly from the government. The government pays the victim the amount of restitution the court has awarded and then the accused must reimburse the government the full amount. Restitution by proxy has an obvious advantage for the victim that the civilian system does not--the victim is not forced to wait around for years to collect the restitution money.²⁰¹ It also has a very practical advantage. Under restitution by proxy, the victim is not required to have any interaction with the accused in seeking to collect restitution. Victims will not be required to keep track of where the accused is or what his ability to pay is.

Restitution by proxy also avoids the predicament of the victim not receiving complete restitution because the accused is discharged from the military and the military loses jurisdiction over him. As mentioned previously, the military does not have the luxury of state probation officers to track defendants and ensure restitution is paid, like the civilian system does.

The government is reimbursed by the accused just as it is under a fine in the restitution by proxy system; the accused pays the full amount of restitution to the U.S. Department of Treasury. If the accused does not pay, the Defense Finance and Accounting Service (DFAS) is notified that the accused is indebted to the government. Just like with nonpayment of a fine, the federal government is then free to notify the Internal Revenue Service (IRS), who, in turn, can garnish tax returns from the accused until he has fully reimbursed the government. It is irrelevant, at this point, whether the accused is still serving in the military.

It may take the government time to recoup its money under the restitution by proxy system. But, despite the administrative burden, the government would eventually get its money back. Unlike other well-meaning entitlement programs that pay out huge amounts of money with no reimbursement,²⁰² restitution by proxy results in only a temporary loss of *46 funds. More importantly, the victim is immediately made whole and any inconvenience is borne by the accused, not the victims of crimes committed by servicemembers.

1. Creating New Law for Restitution by Proxy

The conspicuous drawback to restitution by proxy is that there must be a law or regulation allowing the government to pay the restitution and then be reimbursed by the accused. The President, by Presidential Executive Order, may make all of the changes and amendments needed in areas relating to punishment.²⁰³ But Congress must authorize the expenditure of funds; the expenditure of public funds is proper only when specifically authorized by Congress.²⁰⁴ It is doubtful that any commanding officer will want to use precious Operation and Maintenance (O&M) funds to pay for restitution by proxy. Besides, paying restitution may not qualify as an O&M need.²⁰⁵

One solution to this dilemma, therefore, is for Congress to pass a statute authorizing the Secretary of Defense to pay restitution to crime victims upfront and seek reimbursement from the accused afterward. There is a practical model of what this might look like, that already exists--the Transitional Compensation Act (TCA).²⁰⁶ Although this Act is an entitlement program, rather than a reimbursement program, the Act still gives us a working model for what a "restitution by proxy" statute might look like.

It is not necessary to propose a draft for the entire statute here. However, using the TCA as a guide,²⁰⁷ the following is how the proposed law (we will call it 10 U.S.C. Section 10XX) might begin:

*47 § 10XX. Court ordered restitution to victims: payment to victims, reimbursement from accused.

a. Authority to pay restitution. The Secretary of Defense, with respect to the armed forces (other than the Coast Guard when it is not operating as a service in the Navy), and the Secretary of Homeland Security, with respect to the Coast Guard when it is not operating as a service in the Navy, may each establish a program to pay court-martial ordered restitution to victims, in accordance with this section. Upon establishment of such a program, the program shall apply in the case of each such victim described in section (b) for which the court-martial case was under the jurisdiction of the Secretary establishing the program.

b. Victim for which restitution is authorized. This section applies to any person, persons, or entity named in a court-martial sentencing proceeding, as being entitled to restitution from the accused in a court-martial.

c. Payment and reimbursement of restitution. In the case of any individual described in section (b), the Secretary shall pay the full amount of the court ordered restitution. Thereafter, the accused becomes immediately liable to the United States Government for the entire restitution amount. Any sentence that imposes an order of restitution shall be final, notwithstanding any appeal. This statute allows the Secretary of Defense (or Secretary of Homeland Security with respect to the Coast Guard) to set up a program for restitution, just as previously done for the TCA. Section (b) stresses the importance of the sentencing authority specifically naming the recipient of restitution. Section (c) contains two important provisions: the word "shall," which requires the Secretary to pay restitution; and language making the accused immediately liable to the United States for the entire restitution amount.

2. Amending Article 58b, UCMJ

There is a second way to set up restitution by proxy if the possibility of a new statute is unfeasible. If the government cannot pay the victim directly and then get reimbursed by the accused, why not modify [Article 58b, UCMJ *48 \(Article 58b\)](#),²⁰⁸ to allow the government to take money it would have paid to the accused and pay restitution to the victim instead? Of course, if the accused is not sentenced to confinement, garnishing the accused's pay²⁰⁹ might be the easiest course of action. However, if the accused is sentenced to more than six months confinement, or less than six months confinement and a punitive discharge, he forfeits pay and/or allowances to the jurisdictional limit of the court.²¹⁰ These financial penalties are effective fourteen days after announcement of the sentence.²¹¹ This makes it extremely difficult, if not impossible, to garnish the accused's pay to make restitution payments.

Amending [Article 58b](#) is only restitution by proxy in the loosest sense, because what the government is really doing when they do this, is paying the accused while he is confined so that he can pay restitution to the victim. In fact, one could argue that this is not restitution from the accused at all because the government is actually paying the victim with money the accused would never have received while confined. For this reason, amending [Article 58b](#) is not nearly as good an alternative as making a law that allows the government to pay the victim restitution and then recoup all of that money from the accused.²¹²

The biggest obstacle to implementing this proposal is that it appears to be in direct contravention to why [Article 58b](#) was passed in the first place-- Congress did not want the government to pay confined criminals. However, [Article 58b\(b\)](#) provides that the convening authority "may waive any or all of the forfeitures of pay and allowances ... for a period not to exceed six months" if that money is given to the dependents of the accused.²¹³ Thus, Congress already contemplated providing money for the dependents of the accused when it originally passed [Article 58b](#).²¹⁴ It is not a stretch to argue that a waiver for restitution should also be allowed, given that the intent of Congress was to avoid paying the confined criminal, but still provide for dependents. Under either scenario, the accused is not getting paid while confined.²¹⁵ Another drawback to this proposal, however, is that, like restitution by proxy, [*49 amending Article 58b](#) requires congressional action vice merely an executive order.

[Article 58b\(b\)](#) can be amended to allow the convening authority to waive forfeitures of pay and allowances for the payment of restitution awarded by the court. If an accused did not have dependents, there would be no competing interests between victims and dependents. If the accused did have dependents, [Article 58b\(b\)](#) could be modified so that the convening authority could waive forfeitures of pay and allowances for six months for both payment of restitution and for the benefit of the accused's dependents.

In the alternative, modifying [Article 58b\(b\)](#) would allow the convening authority to waive six months of forfeitures for the accused's dependents and six months of forfeitures for the payment of restitution. This provision seems to accord with congressional intent,²¹⁶ considering [Article 58b](#) was passed before the jurisdiction of special courts-martial was extended to a year for both confinement and forfeitures.²¹⁷ [Article 58b\(b\)](#) reads as follows:

(b) In a case involving an accused who has dependents, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the dependents of the accused.

A proposed amendment to [Article 58b\(b\)](#) is [Article 58b\(b\)\(1\)](#). This amendment copies much of the language of [Article 58b\(b\)](#), but allows for the waiver of forfeitures for the benefit of victims:

(b)(1) In a case involving an accused that has been ordered to pay restitution pursuant to a court-martial, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six

months. Any amount of pay or allowances that, *50 except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the victim(s) of the accused for restitution.

These two provisions could actually work together if the accused was sentenced for more than six months at either a special or a general court-martial; the convening authority could waive six months of forfeitures for the family and waive six months of forfeitures for the victim. In addition, to ensure that the government is paid back any monies paid out for victim restitution, the following language should be added at the end of proposed [Article 58b\(b\)\(1\)](#): “The accused is financially liable to the government for any monies paid under this section for victim restitution.” The drawback to these provisions is that they remove any incentive the accused might have to pay restitution, and instead, put the financial onus on the government.

C. Restitution by State Enforcement

Another possible enforcement mechanism for restitution is to mandate that, by law, the restitution order resulting from a court-martial is binding in all states. This would allow either the government or the victim to enforce the restitution order in state court. The particulars of this were addressed in the MVRA section,²¹⁸ however, they will be briefly discussed again. In essence, the restitution order needs to be binding in state court, like a civil judgment, so that both the victim and the government have recourse against the accused.

The MVRA goes as far as to allow the victim to request from the clerk of the court an abstract of judgment that has the force of law and can be used in the state as a judgment lien against the defendant's property.²¹⁹ This judgment is enforceable in the state “in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that [s]tate.”²²⁰ Finally, [section 3664](#) provides that the restitution order, which accompanies the sentence, is a final judgment regardless of the fact that the sentence may be appealed, modified, corrected or adjusted.²²¹

*51 Ensuring that states recognize what the military does is not a novel concept.²²² A conviction from a military court-martial already carries with it the force and effect of a conviction in the state systems.²²³ The same should hold true for restitution orders. The president is allowed to prescribe the maximum punishments for offenses under the UCMJ,²²⁴ but that does not mean that an order of restitution will be recognized in state court. Perhaps relying on the Supremacy Clause of the U.S. Constitution²²⁵ is not enough. To ensure enforcement of military court-martial ordered restitution, title 10 should be amended to incorporate the language similar to the enforcement language of [sections 3664\(m\) and \(o\)](#), of [title 18](#). Proposed language for an amendment to title 10 would read:

Court-martial order of restitution; enforcement and finality. A victim may enforce an order of restitution from a military court-martial in any state. At the request of a victim named in the restitution order, a military judge may issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments in any state court, the abstract of *52 judgment shall be a lien on the property of the defendant located in such state in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that state. Any state may consider the abstract of judgment a final judgment.

This language allows victims to enforce the restitution order at the state level without having to go through procedural prerequisites, like getting the order recognized in the state. It provides a powerful enforcement mechanism by allowing the victim to put a lien on the accused's property if restitution is not paid.

D. Restitution by Threat of Contingent Confinement or Recall From Appellate Leave

There are two other related ways to enforce restitution, neither of which is as powerful as those already discussed. The first way to enforce it is by allowing contingent confinement for nonpayment of restitution, which was briefly addressed above.²²⁶ This sounds like a great way to get the victim paid. It has problems, however. For example, if the accused claims indigency, a hearing must be held to decide if confinement is the only way the government can meet its interest in appropriate punishment.²²⁷ Regardless of the result of the indigency hearing, however, the victim still gets no restitution.

The threat of additional confinement might be enough to convince the accused to either start, or to keep, making restitution payments.²²⁸ However, if the accused would rather serve confinement than pay restitution, nothing can be done, and the victim still does not receive restitution. In addition, an accused who is not confined could arrive at the end of his enlistment contract, at which time the military would lose jurisdiction. At this point, the government loses the ability to collect restitution from the accused absent reporting the issue to DFAS and then to the IRS.

One consistent theme of military justice for commanders is that they do not want the evildoer, who has received a punitive discharge, in their unit any longer than is absolutely necessary. They see him as a threat to good *53 order and discipline. He takes a “boat space” available for a productive servicemember. The commanders want these people gone and on appellate leave (home awaiting their discharge) at the earliest possible opportunity. So, what happens if the accused has not made restitution and the convening authority wants to place him on appellate leave? The convening authority can send the accused home with threats that restitution has to be made or he will be called back off of appellate leave, but this may be a hollow threat that neither party wants to be carried out. In particular, the commander may not want the accused at the unit, either before or after his confinement, because this may hurt the morale and discipline of the unit. In this type of case, contingent confinement may hold little threat for the accused on appellate leave.

Although bringing an accused off appellate leave and back to active duty is an option, practically speaking, it probably will not be utilized. After the accused is gone, the commanding officer has little incentive to bring him back on active duty to make certain he pays restitution. This is due to the cost and time commitment involved in tracking down the accused and getting him to come back. The accused may also disappear, which may result in the government forgetting the issue all together. Restitution delayed may become restitution denied.

E. Eliminating Ex Post Facto Issues

One of the prime concerns in implementing any new legislation is to avoid violating the ex post facto clause of article I, section 9 of the U.S. Constitution. Any proposed amendment to [RCM 1003\(b\)](#) should be forward-looking in its application, thus avoiding any ex post facto concerns.²²⁹ One of the seminal military cases in this area is *United States v. Gorski*,²³⁰ a 1997 Court of Appeals for the Armed Forces case. This case dealt with whether [Article 58b, UCMJ](#), the 1996 amendment regarding automatic forfeiture of pay and allowances for persons confined, violated the ex post facto clause of the U.S. Constitution. Gorski argued that the newly enacted [Article 58b, UCMJ](#), should not apply to him because he committed his offense before enactment of the new law.²³¹ The government disagreed, arguing that because the minimum punishment had never been increased for Gorski, article I, section 9 had not been violated.²³²

*54 The Court ruled that Gorski was correct; the provisions concerning automatic forfeitures, under [Article 58b, UCMJ](#), could not be applied to him if the law was enacted subsequent to his offense.²³³ Most importantly for the present analysis on restitution, the Court of Appeals laid out the law on the prohibition of ex post facto laws for the military. The Court went all the way back to 1798, to cite Justice Chase, U.S. Supreme Court, who gave the following test for determining whether a law violates the ex post facto clause of the U.S. Constitution:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.²³⁴

In implementing restitution, the focus should be on not violating the third prong of Justice Chase's analysis--inflicting a greater punishment than the law affixed to the crime when committed. This is not hard to do. Ex post facto concerns can be avoided by carefully drafting the Executive Order to add restitution as an authorized punishment under [RCM 1003\(b\)](#) for only those offenses committed after the signing of the Executive Order. The Order must not use preferal of charges, arraignment, or adjudication of the sentence as benchmarks of when restitution is applicable.

In our hypothetical case of LCpl Pawn, assume LCpl Pawn committed his larceny on 15 June 2002 and the president signed the Executive Order allowing restitution as an authorized punishment on 16 June 2002. Further assume that charges were preferred against LCpl Pawn on 15 August 2002 and he went to trial from 15 to 17 September 2002. LCpl Pawn would not be subject to the new restitution provision because his criminal conduct took place one day before the Executive Order went into effect. This seems a simple *55 concept to grasp, yet is not always applied in practice.²³⁵ The new law should not only list the date of enactment, but should state clearly that it applies only to offenses committed after the date of enactment. To do otherwise runs the risk of violating the ex post facto clause of the U.S. Constitution.

VII. Comparing the MVRA and Optional Restitution under [RCM 1003\(b\)](#)

This paper has discussed how restitution is set up in the federal civilian system and how it might work in the military system. Table 1 shows how the two systems compare to one another.

Table 1.

	The Mandatory Victims' Restitution Act of 1996	Optional Restitution Under R.C.M. 1003(b)(3)
Predecessor to Current Law	VWPA, Crime Victims' Bill of Rights.	VWAP, Crime Victims' Bill of Rights.
Restitution Mandated by Law?	Yes. For everything listed below.	No.
Who Imposes Restitution and When?	Judge, weeks or months after adjudication of guilt.	Judge or Members, immediately or shortly after adjudication of guilt. Restitution
to Whom?	Victim, others.	Victim.
Restitution for Property Damage, Loss or Destruction?	Yes. For real and personal property. Includes return of taken property.	Yes. For real and personal property.
Restitution for Bodily Injury?	Yes. For necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care,	Yes. May include cost of necessary medical care and related professional services and devices relating to physical and mental

	including nonmedical care and treatment rendered in accordance with a method of healing recognized by law. Also for necessary physical and occupational therapy and rehabilitation. Also, reimburse victim for income lost as a result of offense.	health care, including any necessary physical, speech, or occupational therapy for any offense that directly results in bodily harm to the victim.
Restitution for Death?	Yes. For necessary funeral and related services.	Yes. For necessary funeral and related services.
Restitution for Other Costs?	Yes. For lost income and necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.	Yes. Included, but not limited to, lost income to the extent that it can be readily determined, and un-reimbursed travel-related expenses incurred by the victim to attend and participate in proceedings related to the case.
Joint and Several Liability?	Yes.	Yes.
Burden of Proof	Preponderance of the Evidence.	Preponderance of the Evidence.
When is Restitution Due?	Whenever schedule that judge sets up states.	Due immediately upon sentence. Possibility of garnishment if no restitution by proxy.
Possibility of Restitution by Proxy?	No.	Yes.
Possible Enforcement Mechanisms?	<p>1. Enforced like civil judgment, follows defendant.</p> <p>2. Victim can get judgment lien against defendant's property in state court.</p> <p>3. Judge can revoke probation, hold defendant in contempt, order sale of defendant's property or re-sentence defendant to more punishment</p>	<p>1. Enforced like civil judgment, follows accused.</p> <p>2. Victim can get judgment lien against defendant's property in state court.</p> <p>3. Pay by proxy, take immediately from accused's salary to pay victim.</p> <p>4. Contingent confinement.</p> <p>5. Nonpayment reported to DFAS,</p>

	than he could have originally received.	IRS. 6. Convening authority waives automatic forfeitures to pay to victim. 7. Recall from appellate leave to active duty.
Is Indigency of Defendant or Accused Relevant?	No. Since payments can be stretched out over years.	Yes, but only as it pertains to contingent confinement.

***58 VIII. Conclusion**

Under the present military system, crime victims have a difficult time getting restitution from those who do them harm. Military judges and panels should have the option of ordering an accused to pay restitution. Several changes can be made to incorporate restitution as an authorized punishment under [RCM 1003\(b\)](#) and there are also several ways to enforce restitution. The best way to do this is by creating a law allowing the government to pay restitution by proxy and then seeking reimbursement from the accused later. Setting up a viable restitution enforcement system will not be easy, but it will be worth it.

***59** Let us revisit LCpl Pawn at his court-martial, to illustrate how court ordered restitution, with a potent enforcement mechanism, works. After the members' questions about ordering restitution, the military judge instructs the members that restitution is an authorized punishment under [RCM 1003\(b\)](#) and that they can order restitution. The members then return and order LCpl Pawn to pay restitution. After the court-martial, the military pays Cpl Johnson \$2,000 to reimburse him for the crime committed by his fellow Marine. Now, LCpl Pawn is indebted to the U.S. government for that amount, which he must pay.

It may not be easy to incorporate restitution in the military system, but it should be done. It is time for the military to make the accused fully pay for his crime by including restitution as an authorized punishment under [RCM 1003\(b\)\(3\)](#).

Footnotes

^{a1} The positions and opinions stated in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Marine Corps. Lieutenant Colonel Jones is an active duty Marine Corps judge advocate. Lieutenant Colonel Jones is presently assigned as General and Special Courts-Martial Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary. L.L.M., *Honor Graduate*, 2003, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D. 1992, Brigham Young University; B.A., *Cum Laude*, 1988, Brigham Young University. Previous assignments include Legal Services Support Section, Camp Pendleton, California, 1999-2002 (Officer in Charge, Legal Services Support Team Delta, 2001-2002; Senior Trial Counsel, 2000-2001; Trial Counsel, 1999-2000); Officer in Charge and Senior Defense Counsel. Naval Legal Service Office Detachment, Roosevelt Roads, Puerto Rico, 1996-1999; Legal Services Support Section, Camp Pendleton, California, 1993-1996 (Defense Counsel, 1994-1996; Legal Assistance Attorney, 1993-1994). Member of the bar of the State of Utah; admitted to practice before the Court of Appeals for the Armed Forces and the Supreme Court of the United States.

- 133 For example, minor changes would need to be made to [Articles 19 and 20, UCMJ](#), concerning the sentence limitations on special and summary courts-martial. [UCMJ arts. 19, 20 \(2005\)](#). Likewise, minor changes would need to be made to [RCM 201\(f\)\(2\)\(B\)\(i\)](#) to incorporate the possibility of restitution. MCM, [supra note 2, R.C.M. 201\(f\)\(2\)\(B\)\(i\)](#).
- 134 MCM, [supra note 2, R.C.M. 1003\(b\)\(3\)](#).
- 135 [United States v. Tualla, 52 M.J. 228, 230 \(2000\)](#) (citing [United States v. Harris, 19 M.J. 331, 332 \(CMA 1985\)](#)).
- 136 MCM, [supra note 2, R.C.M. 1003\(b\)\(3\)](#).
- 137 This is the base pay figure for calendar year 2005, for a LCpl with over 2 years service. Forfeitures are rounded off to the nearest whole dollar amount.
- 138 Twelve months is the maximum number of months LCpl Pawn could be sentenced at a special court-martial. *See supra* note 7 and accompanying text.
- 139 [Tualla, 52 M.J. at 230](#).
- 140 [UCMJ art. 121 \(2005\)](#).
- 141 MCM, [supra note 2, R.C.M. 201\(f\)\(2\)\(B\)\(i\), 1003\(b\)\(3\)](#).
- 142 Note that forfeitures are calculated at the reduced rank of the servicemember, regardless of whether the reduction in rank is suspended. *Id.* [R.C.M. 1003\(b\)\(2\)](#).
- 143 *Id.* [R.C.M. 1107\(d\)\(5\)](#).
- 144 The sentencing authority will be at liberty to set up a payment schedule for restitution, whether that authority is a judge or a panel. *See infra* pt. V.D.2.
- 145 As this paper was originally being drafted, in 2003, unbeknownst to the author, the Working Group of the Joint Services Committee was also drafting proposed amendments to [RCM 1003\(b\)](#) to incorporate restitution as an authorized punishment. Major Chris Carlson, U.S. Marine Corps, a member of the Working Group, shared the Navy-Marine Corps' proposed changes, including a proposed Discussion to [RCM 1003\(b\)\(3\)\(a\)](#), Analysis of the Rule and a proposed amendment to [RCM 1113\(d\)](#). The author wishes to credit and thank Major Carlson and the Working Group for allowing the use of their proposed amendments and compare them with his own. Despite any efforts of the Working Group, there has still been no change to the Manual for Courts-Martial.
- 146 [18 U.S.C. § 3664\(e\) \(2000\)](#).
- 147 Unlike district courts, there is no payment schedule set up in the military by the sentencing authority, whether that sentencing authority is a judge or a panel. The general court-martial convening authority, however, may set a deadline for the payment of a fine. [Townsend v. United States, No. 98-03, 1999 CCA LEXIS 26 \(A.F. Ct. Crim. App. Feb. 5, 1999\)](#). The convening authority could also set a deadline for payment of restitution.
- 148 For some cases, imposing a fine, forfeiture of pay and restitution will be appropriate. For example, a case in which an accused has stolen from both the government and another servicemember. The wise prosecutor will look ahead and ensure that cases such as these, which involve substantial monetary amounts, are referred to a general court-martial vice a special court-martial that has a monetary limit.
- 149 The complete Discussion section of [RCM 1003\(b\)\(3\)](#) is as follows:
A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law.
See R.C.M. 1113(d)(3) concerning imposition of confinement when the accused fails to pay a fine.
Where the sentence adjudged at a special court-martial includes a fine, see [R.C.M. 1107\(d\)\(5\)](#) for limitations on convening authority action on sentence.

- MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion.
- 150 *Id.*
- 151 *See, e.g.,* *United States v. Martinsmith*, 41 M.J. 343 (1995).
- 152 MCM, *supra* note 2, R.C.M. 1003(b)(3).
- 153 *See, e.g.,* *United States v. Price*, No. S30012, 2002 CCA LEXIS 265 (A.F. Ct. Crim. App. Oct. 4, 2002); *United States v. Robertson*, 27 M.J. 741 (A.C.M.R. 1988).
- 154 Rule for Court-Martial 1113(d)(3) states:
(3) *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.
MCM, *supra* note 2, R.C.M. 1113(d)(3).
- 155 *Id. See also, United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992).
- 156 MCM, *supra* note 2, R.C.M. 1107(d)(5).
- 157 *Id.*
- 158 *Id.* R.C.M. 1003(b)(3).
- 159 The *Manual for Courts-Martial* states that the drafters of the legislation intended that the “Discussion” sections be considered as treatises, helpful, but without the force of law. *Id.* app. 21, introduction.
- 160 *Id.* R.C.M. 1003(b)(3).
- 161 This language of requiring payments to “begin immediately” is taken from an article entitled “*The Perplexing Problem with Criminal Penalties in Federal Courts*,” (19 REV. LITIG. 167 (2000)) written by the Honorable W. Royal Furgeson, Jr., Catharine M. Goodwin and Stephanie Lynn Zucker. In the article, Judge Furgeson argues that rather than use the words “due immediately,” judges should order restitution payments to “begin immediately.” *Id.* at 188. This, he argues, makes it easier to avoid the fiction that the accused can make immediate and full restitution. *Id.*
- 162 Credit for a few of these concepts belongs to the Joint Services Committee Working Group. *See supra* note 145.
- 163 This part was taken substantially from the MVRA. *See supra* note 5.
- 164 *Id.*
- 165 MCM, *supra* note 2, *Id.* app. 21, introduction.
- 166 *See supra* note 145.
- 167 MCM, *supra* note 2, R.C.M. 1107.
- 168 *Id.* R.C.M. 1107(d)(5).
- 169 *Id.* R.C.M. 1003(b)(3).
- 170 Note that the parentheses and the language “the forfeitures are” within the parentheses are added to clarify that the follow-on language applies to forfeitures only.
- 171 MCM, *supra* note 2, R.C.M. 201(f)(2)(B)(i), 1003(b)(3).
- 172 *Id.* R.C.M. 201(f)(1)(A)(ii).

- 173 *Id.* R.C.M. 1113(d)(3).
- 174 *See supra* note 145.
- 175 *See, e.g., United States v. Martinsmith.* 41 M.J. 343 (1995).
- 176 U.S. DEP'T OF ARMY. PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (16 Sep. 2002) [hereinafter BENCHBOOK].
- 177 *Id.* ¶ 2-5-22. The Benchbook states that the only sentencing instructions concerning punishments that are required under paragraph 2-5-22 are those of [Article 58a](#) and [58b](#), the nature of a punitive discharge, and pretrial confinement credit if applicable. *Id.* Note that this section applies for contested cases. Identical fine provisions are included in paragraph 2-6-10 of the same chapter when members are used for sentencing only. *Id.* ¶ 2-6-10. Interestingly, types of punishments listed for capital cases do not include a fine as an authorized punishment. *Id.* ¶ 8-3-22.
- 178 *Id.* ¶ 2-5-22.
- 179 *Id.*
- 180 Note also that any general court-martial is entitled to award total forfeiture of all pay and allowances whereas at a special court-martial an accused risks only two-thirds forfeitures of his pay per month. MCM, *supra* note 2, R.C.M. 201(f)(1), (2)(B)(i).
- 181 Appendix C, of the Benchbook, contains the sample worksheets for all four possible special and general court-martial scenarios in sections C-1 through C-4. BENCHBOOK, *supra* note 176, app. C. Appendix 11, of the *Manual for Courts-Martial*, contains language to be used in announcing the sentence of a court-martial. MCM, *supra* note 2, app. 11. Section (b)(3) of this appendix would also need to be modified to include payment of restitution as an option under the category "Forfeitures. Etc." *Id.* app. 11, (b)(3).
- 182 The genesis for this idea came from Major Jan A. Aldykiewicz, Judge Advocate, United States Army, who was an instructor at the school when this paper was originally drafted in 2003.
- 183 Whether the military could forge alliances with state probation offices, like the federal civilian system, is a subject beyond the reach of this paper.
- 184 In some cases, the military will continue to exercise jurisdiction over the accused even when the discharge certificate is delivered. This is true for cases of extended confinement where the appellate process has run its course, the accused receives his discharge certificate, and still has confinement time to serve. UCMJ art. (2)(a)(7) (2005).
- 185 [Rule for Court-Martial 1001](#) states that "[a]fter findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence." MCM, *supra* note 2, R.C.M. 1001(a)(1). Although the Rules for Court-Martial do not set a timetable on when the sentencing hearing will take place, it is generally done immediately after the findings are announced. This is probably because, unlike the federal system, where the judge decides the sentence, the same members who decided guilt or innocence decide the punishment to be awarded the accused. It appears to be, therefore, a matter of convenience. Experience has shown that significant general court-martial cases sometimes have a short intervening period between when the findings are announced and the sentencing proceedings. This is usually no more than a few days.
- 186 It may seem odd to the accused and his supporters that the military defense counsel must prepare for a sentencing case at the same time he prepares for the contested case on the merits. This is so because the sentencing case almost always immediately follows the case on the merits. The accused may think, "I thought we were going to win, why do we have to get stuff together for sentencing?"
- 187 18 U.S.C. § 3664(d) (2000).
- 188 *Id.* § 3664(e).
- 189 Although it is common practice to tell the members of the accused's marriage status and dependents, [RCM 1001\(b\)\(1\)](#) states the following with regard to what must come to the members' attention:
(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pre-trial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense

objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue.

MCM, *supra* note 2, R.C.M. 1001(b)(1).

190 The accused is free to present complicated evidence on possible retirement benefits that may be forfeited and the judge is required to instruct on the effect of a punitive discharge on these benefits. *See, e.g., United States v. Boyd*, 55 M.J. 217 (2001); *United States v. Luster*, 55 M.J. 67 (2001). If members (and judge advocates, for that matter) are expected to understand complicated actuary tables, with mathematical formulas, surely they can understand simple calculations involving pecuniary loss to victims.

191 Immediately begun, but taken out over increments if the amount is substantial.

192 *See supra* pt. II.B.2.

193 UCMJ art. 139 (2005).

194 *Id.* art. 139(a).

195 The purpose of this article is not to delve into all of the nuances of the military's pay regulations, but it appears that it does not appear a stretch to assume that the pay regulations could accommodate court-martial judgments of restitution to the same extent they accommodate Article 139 complaints.

196 *See supra* pt. V.A.2.

197 UCMJ art. 139 (2005).

198 UCMJ arts. 57, 58b (2005).

199 *Id.*

200 *See* 18 U.S.C. §§ 3613, 3664 (2000) (monitoring restitution in the federal system).

201 Under the federal civilian system, the judge orders a payment schedule for the defendant and then relies on the probation officer to ensure monies are collected. 18 U.S.C. § 3664(f)(2) (2000). The restitution could take years to pay off under the payment system if the victim is poor or out of work. *See also* Furgeson, *supra* note 161.

202 The Transitional Compensation Program provides a good example. The monies paid out for fiscal years 2004 through fiscal year 2000 are as follows: FY 04, \$677,000.00; FY 03 \$694,000.00; FY 02, \$659,000.00; FY 01, \$497,000.00; and FY 00, \$448,000.00. E-mail from Tracy C. Perl, Program Analyst, Transitional Compensation Program Manager, Manpower and Reserve Affairs, Headquarters, U.S. Marine Corps, to Lieutenant Colonel Dave M. Jones (Nov. 22, 2005, 7:59 a.m. EST) (on file with author). To illustrate how much money a single family is entitled to, consider the case of a military member who gets court-martialed for domestic abuse. Assume that he has three years left on his enlistment and has a wife and three children. That family would be entitled to approximately \$65,000. None of this money is ever reimbursed. The typical restitution case, on the other hand, would probably run from a few hundred to a few thousand dollars, and would be reimbursed.

203 MCM, *supra* note 2, pt. I, ¶ 4; *see also* UCMJ art. 56 (2005); 10 U.S.C. §§ 801-946 (2000).

204 *United States v. MacCollom*, 426 U.S. 317 (1976).

205 Operation and maintenance (O&M) money is an appropriated fund type that is set by the Appropriation Act. The Appropriation Act is the statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes. Operation and maintenance money is used for such items as day-to-day expenses of training exercises, deployments, and operating and maintaining installations. The Purpose Statute states that appropriations must be applied only to the objects for which the appropriations were made. 31 U.S.C. § 1301 (2000). To use O&M money for purposes for which it is not intended may result in an Antideficiency Act (ADA) violation. 31 U.S.C. § 1341 (2000). The ADA mandates administrative and criminal sanctions for unlawful use of appropriated funds. *Id.* Therefore, any money for this kind of program would have to be earmarked in the Appropriation Act for that year.

206 10 U.S.C. § 1059 (2000).

- 207 *Id.*
- 208 UCMJ art. 58b (2005).
- 209 *See supra* pt. VI.A.
- 210 UCMJ art. 58b (2005).
- 211 *Id.*
- 212 This actually looks more like the entitlement philosophy of the Transitional Compensation Act.
- 213 UCMJ art. 58b(b) (2005).
- 214 Article 58b, UCMJ, was passed on 10 February 1996. 10 U.S.C. § 858b (2000).
- 215 In fact, paying the dependents of the accused while he is confined may actually result in the accused eventually receiving that money. Paying restitution would not render the same result, assuming the victim is not a family member.
- 216 Although the jurisdictional limit for special courts-martial was extended for confinement time and forfeitures (as well as fines), the waiver provision of six months was never changed. *See supra* note 7 and accompanying text.
- 217 *Id.*
- 218 *See supra* pt. IV.B.
- 219 18 U.S.C. § 3664(m)(1)(A) (2000).
- 220 *Id.* § 3664(m)(1)(B).
- 221 *Id.* § 3664(o). The section also applies even if the defendant is re-sentenced. *Id.*
- 222 For example, consider how the military reacted when states stopped accepting military powers of attorney. The military began to put the following provision as the preamble of every power of attorney it drafted:
This is a military power of attorney prepared pursuant to Title 10, United States Code, Section 1044b and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. *Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.* J.A. 272, LEGAL ASSISTANCE DEPLOYMENT GUIDE (1994) (emphasis added).
- 223 Each state treats convictions a little differently, however. For example, what is considered a “felony” conviction from a military court varies from state to state. Some states, like Alabama, consider the accused to have a felony conviction if the crime he committed falls under a list of certain “felony” crimes (ALA. CODE § 13A-5-3 (2002)); other states, like California, consider the accused to have a felony conviction if he spent time in the equivalent of a state prison vice a city or county jail (CAL. PENAL CODE § 17 (Deering 2002)); and some states, like Montana, consider the accused to have a felony conviction based on the maximum confinement time he was facing from the charges (MONT. CODE ANN. § 45-1-201 (2002)).
- 224 MCM, *supra* note 2, pt. I, ¶ 4. *See also* UCMJ art. 56 (2005); 10 U.S.C. §§ 801-946 (2000).
- 225 The Supremacy Clause states that the Constitution and federal law is the supreme law of the land, notwithstanding state laws. U.S. CONST. art. VI, cl. 2.
- 226 *See supra* pt. V.A.2.
- 227 MCM, *supra* note 2, R.C.M. 1113(d)(3).
- 228 One issue that has not been addressed is how an accused would pay a victim absent restitution by proxy. One option might be for the accused to give it to his defense attorney, who would then give it to the victim. Another option might be for the Service Secretaries to

designate someone to act as an intermediary for the money; for example, the VWAP Coordinator, someone from Family Advocacy, or someone from disbursing.

229 Even the drafting of the MVRA gave rise to ex post facto concerns. *See, e.g.,* Irene J. Chase, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. CHI. L. REV. 463.

230 *United States v. Gorski*, 47 M.J. 370 (1997).

231 *Id.* at 372.

232 *Id.* at 374.

233 *Id.*

234 *Id.* at 373 (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). *See also*, *Taylor v. Garaffa*, 54 M.J. 645 (2002).

235 *See Gorski*, 47 M.J. at 374. Another, more recent, example of the confusion that can arise from not knowing when to apply new law occurred when the President amended section 819, Article 10 (Article 19, UCMJ), in the National Defense Authorization Act for FY 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999). *See supra* note 7. This amendment increased the jurisdictional maximum punishment of special courts-martial for confinement and forfeitures from six months to one year. This change became effective in military courts on 15 May 2002 but was silent on when commission of the offenses had to be to qualify under the new law. This led to a controversy on how to apply the new law. Some argued that if the accused committed his crime before 15 May 2002 he should face a one-year special court-martial. Others argued it should be based on referral of charges, arraignment, or at adjudication of the sentence. To avoid the prospect of being overruled by the appellate courts, and having to re-try cases, some took the position that the new law would apply only for those cases in which the criminal conduct occurred after 15 May 2002. Subsequently, on 24 May 2002, the Navy finally came out with its position, endorsing the conservative approach--any offense that was committed before 15 May 2002 would be adjudicated under the old system. E-mail from Deputy Assistant Judge Advocate General of the Navy (Criminal Law), to all Navy and Marine Corps Judge Advocates (24 May 2002) (on file with author).

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