

POSSIBLE CHANGES IF RESTITUTION WERE MADE AN AUTHORIZED COURT-MARTIAL PUNISHMENT
Prepared by JPP Staff for Use at September 18, 2015 Public Meeting

During August deliberations, the Panel requested a summary of information about what changes to the Rules for Courts-Martial (R.C.M.) and/or UCMJ may be necessary or advisable if the Panel recommends that restitution be added as an authorized court-martial punishment. Testimony and information presented to the JPP identified eight areas for consideration – issues and proposed solutions/responses are indicated:

1. Modification of court-martial jurisdiction under R.C.M. 201.

Current Rules & Practice: “[T]he jurisdiction of courts-martial is entirely penal or disciplinary.” R.C.M. 201. “A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property.” R.C.M. 201 disc.

Proposed Change: Provision of an exception to R.C.M. 201, to the extent that restitution constitutes a civil judgment.¹

2. Discovery/disclosure of restitution information from victim.

Current Rules & Practice: Court-martial rules require pretrial discovery of evidence and information to be presented in findings and sentencing. The government must provide written material and the names of witnesses they intend to present as sentencing evidence, but the Rules do not specify a particular number of days before the court-martial. *See* R.C.M. 701(a)(5); R.C.M. 703(c). Currently, sentencing proceedings begin immediately after findings are announced.

Possible Changes/Issues:

- a. Introduction of a delay during the court-martial (preferably after findings but as early as possible before sentencing)² to allow for:
 - the government to present evidence (e.g., receipts) of victim’s financial losses/expenses (i.e., property damage/losses, cost of medical and mental health services; lost income; child care, transportation, and other expenses incurred during investigation and prosecution; purchase of security items – e.g., cell phone, guard dog, security system, fencing, self-defense classes);³
 - the defense to present evidence of the accused’s and dependents’ financial situation (i.e., complete listing of all assets owned or controlled by the accused, the accused’s financial needs and earning ability and that of the accused’s dependents);⁴ and
 - the military judge (or panel members) to resolve any disputes as to the above evidence.
- b. Must determine what to do with the accused during the delay (e.g., send back to unit, place on excess leave, etc.).

¹ *See, e.g., Transcript of JPP Public Meeting 307* (Mar. 13, 2015) (testimony of Maj Richard M. Cloninger, USMC, Regional VLC).

² *See, e.g., Transcript of JPP Public Meeting 273-74* (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, National Center for Victims of Crime (NCVC)).

³ *See* 18 U.S.C. § 3663A(b) (Mandatory Victim Restitution Act).

⁴ *See* 18 U.S.C. § 3664(d)(3) (Procedure for issuance and enforcement of order of restitution).

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3. Authority to adjudge restitution.

Current Rules & Practice: If an accused elects to be tried by a panel of members, the panel also determines the accused's sentence if the accused is convicted. Thereafter, the convening authority takes action on (i.e., approves, reduces, or disapproves) the adjudged sentence.

Possible Changes/Issues:

- a. Incorporate restitution as an authorized punishment to be considered by the sentencing authority in the court-martial.
- b. Vest restitution authority with the military judge even in cases in which a panel of members determines the sentence.⁵
- c. Separate the restitution determination from the rest of sentencing so that it remains an independent decision that is not affected by the sentencing authority's determinations as to the other forms of punishment.⁶
- d. What authority, if any, should the convening authority have in regards to adjudged restitution?

4. Standardized guidance for military judges to advise on restitution.

Current Rules & Practice: Since restitution is not currently an authorized punishment, there is currently no guidance to assist the sentencing authority in determining: (a) whether restitution is appropriate (if it is optional); and (b) if so, how much should be awarded.

Possible Change: Draft Benchbook instructions to be used by military judges to properly advise the sentencing authority as to whether and how much restitution to award and to guard against disparate outcomes.⁷

5. Prioritizing restitution versus deferred or waived forfeitures.

Current Rules & Practice: Under Article 57, the convening authority may defer adjudged forfeitures on application by an accused until the date the sentence is approved by the convening authority. Under Article 58b, the convening authority may waive up to 6 months of automatic forfeitures and direct that the amounts be paid to the accused's dependents.

Possible Change: Establish hierarchy of payments for restitution and forfeitures. For example, Article 58b could be amended to allow the convening authority to waive forfeitures for an additional six months for payment of restitution, following existing six-month waiver for benefit of accused's dependents; see 6(d), below.⁸

⁵ See, e.g., *Transcript of JPP Public Meeting 237-38* (Mar. 13, 2015) (testimony of Maj Mark D. Sameit, USMC, Officer In Charge, Trial Counsel Assistance Program); *id.* at 321-23 (testimony of Maj Mary Ellen Payne, USAF, Government Trial and Appellate Counsel Division).

⁶ See *Transcript of JPP Public Meeting 238-39* (Mar. 13, 2015) (testimony of LCDR Patrick K. Korody, USN, Supervising Attorney, VLC Program).

⁷ See, e.g., *Transcript of JPP Public Meeting 99-100, 107-09* (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

⁸ See LtCol David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment under Rule for Courts-Martial 1003(B)*, 52 NAVAL L. REV. 1, 49-50 (2005).

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6. Determining how restitution would be paid.

Current Rules & Practice: Since restitution is not currently an authorized punishment, there is currently no guidance regarding who would be responsible for determining the accused's payment schedule/plan (i.e., frequency, amounts, manner of payment, tracking of payments, etc.).

Possible Change: Designate authority to determine payment schedule/plan.⁹

7. Providing an enforcement mechanism for restitution.

Current Rules & Practice: The military justice system does not have standing courts, presentence investigations, and probation officers that are used to determine and enforce restitution in civilian criminal justice systems.

Possible Changes:¹⁰

- a. Promulgate an R.C.M. giving a designated commander authority to order disbursing officer to garnish the accused's pay in the amount of restitution ordered following conviction.
- b. Promulgate an R.C.M. authorizing additional confinement if an accused fails to pay restitution (R.C.M. 1003(b)(3) currently provides a similar enforcement mechanism for fines, stating that a sentence may include a provisions for an additional fixed period of confinement in the event that a fine is not paid).
- c. Enact a statute authorizing the Secretary of Defense to pay restitution to victims upfront and seek reimbursement from the accused afterwards.
- d. Amend Article 58b to allow the government to take the money it would have paid the accused and pay restitution to the victim instead.
- e. Amend federal restitution statute to allow a victim who has been awarded restitution at a court-martial to get a judgment lien against the accused in state court.

8. Provision for recoupment of restitution for sentences set aside on appeal.

Current Rules & Practice: When a court-martial sentence is set aside on appeal, an accused is entitled to restoration of all rights, privileges, and property of which the accused was deprived when the sentence was executed. R.C.M. 1208(d).

Proposed Change: Amend R.C.M. 1208(d) (or discussion) to explain application to restitution (i.e., whether/how payments already made would be returned).¹¹

⁹ See, e.g., *Transcript of JPP Public Meeting* 273-74, 276 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, NCVC).

¹⁰ For discussion of the possible enforcement mechanisms listed below, see Jones, *supra* note 8, at 42-52.

¹¹ See *Transcript of JPP Public Meeting* 110 (June 18, 2015) (testimony of Ms. Jennifer Riley, Assistant Counsel, DFAS).