



Comment in Support of Proposed Changes to the UCMJ Regarding Victim Appellate Rights

Protect Our Defenders (POD) strongly supports the proposed amendments to Articles 6b and 70 of the Uniform Code of Military Justice (UCMJ), which expand victims' access to information and their rights to participate in proceedings against their assailant, particularly at the appellate level. For many victims of sexual assault and other crimes, one of the hardest parts of the military justice process is being shut out of the proceedings – victims and their Special Victims' Counsel (SVCs) struggle to access critical documents, make their voice heard in the appellate process, or even enforce their own rights and privileges.

Once a conviction is appealed, victims in the military are all but left in the dark, face new invasions of their privacy with fewer protections, and have even less opportunity to be heard at proceedings that may overturn a conviction. Further, despite claims that SVCs at the appellate level would be a drain on resources, similar arguments were made about the founding of the SVC program, and it is our understanding that at least one service branch (the Air Force) already has SVCs operating at the appellate level. Ensuring that victims are able to be both heard and represented at appellate proceedings is key to victim participation and well-being throughout the military justice process.

In addition to the proposed language, POD has the following suggested edits based on our work with victims of sexual assault in the military – including service members, veterans, military dependents, Department of Defense employees, and other civilians – as well as with both military and civilian SVCs:

Access to Records for Victims and Special Victims' Counsel

Among SVCs that contact POD, the most common issue we hear about is limited, inconsistent, and arbitrary access to records. In some cases, SVCs are able to obtain most of the records they need to properly represent their clients—typically when they have a preexisting relationship with trial counsel. More often, SVCs receive some or none of the relevant pleadings and filings in a case, including basic information such as the victim's own statement to law enforcement or a copy of the charges. This lack of information makes it impossible for SVCs to raise issues related to victims' rights, advise their clients, or even explain basic facts to victims of sexual assault and other crimes.

POD strongly supports the proposed right to all pleadings filed by all parties, and we encourage the Panel to take a strong position in favor of victims' discovery rights. We also encourage the Panel to consider that a case may involve multiple victims, and it would be inappropriate for certain documents to be available to all parties—such as, for example, information related to another victim's sexual history or mental health treatment. Discovery rights for victims should ensure that the privacy rights of each victim are protected.

Victims' Right to Be Heard at Administrative and Non-Judicial Proceedings

As POD has previously written to the Panel, victims are not entitled to information concerning the nature or outcome of administrative or non-judicial action taken against their assailant, and such proceedings often occurs in lieu of criminal prosecution. Victims are also often unable to share their experiences or any evidence during these proceedings, leaving commanders with an incomplete picture of the case. Finally, without knowing the outcome of such proceedings, many victims struggle to receive closure and have to live without knowing whether justice was done.

In addition to the proposed expansion of victims' right to be heard at administrative boards and other adverse administrative proceedings arising out of the offense, POD suggests specifying that victims have a right to be reasonably heard at non-judicial punishment proceedings.

Appellate Rights

In theory, victims in the military have certain rights, privileges, and protections during the military justice process. In practice, however, these rights are unenforceable because of the lack of a key mechanism – full interlocutory appeal rights. Currently, if a victim or their SVC feels that a victim's right has been violated, she can file a writ of mandamus with the Court of Criminal Appeals (CCA). However, the writ of mandamus is for extraordinary relief and it has proved ineffective. Subsection (e) of Article 6b must be amended to provide full interlocutory appeal rights for military victims in line with the rights of civilian victims under the Crime Victims' Rights Act. 18 USC 3771(d)(3), so that victims have these rights both in theory and in practice.

In addition, because the current language only specifically authorizes victims to file a writ of mandamus to the CCA, questions over the jurisdiction of higher courts over such writs have been raised in at least one case before the Court of Appeals for the Armed Forces (CAAF) (*EV v LTC Robinson*, Real Party in Interest SGT Martinez, DKT No 16-0398/MC). Subsection (e) of Article 6b should be amended to explicitly allow victims to petition the CAAF, the Supreme Court, and federal district courts, and section 1044e of the U.S. Code should be amended to explicitly allow military Special Victims' Counsel to represent victims within federal district courts.

The suggested edits to Article 70 should also ensure that appellate victims' counsel are able to participate in proceedings before the CAAF, the Supreme Court, and federal district courts, and this language should also ensure that appellate victims' counsel are able to represent victims when any right or privilege contained in a Military Rule of Evidence (MRE), the Rules for Court-Marital, or the UCMJ are at issue – including rights under Article 6b or privileges and protections under Article 32 or MREs 412, 513, 514, and/or 615.

SVC-Specific

Although victims of sexual assault in the military must generally be informed of the availability of SVCs before being interviewed by criminal investigators or trial counsel, the Secretary of Defense may exempt certain circumstances from this requirement. Either Article 6b or section

1044e of the U.S. Code should be further amended to create an affirmative obligation to inform victims of their right to counsel, including both military or civilian SVCs.

I would like to thank the Panel for your continued time and attention to these crucial issues.

Respectfully,

A handwritten signature in black ink that reads "Don m Christensen". The signature is written in a cursive style with a large, sweeping initial "D".

Col. Don Christensen (Ret.)
Former Chief Prosecutor of the United States Air Force
President, Protect Our Defenders