

Summary of September 23, 2016 Presenter Testimony

I. Definition of Victim in Proposed Legislation

Military Judges Panel

The military judges emphasized that statutory language must be clear and the statute should specify whether appellate rights apply to all victims or just certain subcategories of victims, such as victims of sexual assault, victims of child pornography, and victims of hate crimes. One judge noted that the statute should protect all holders of privacy interests and privileges; it should not matter whether the individual asserting his or her rights is a victim or an essential witness.

Appellate Defense Counsel Panel

The appellate defense counsel noted problems with the expansive definition of victim included in the statutory proposals. One presenter explained that the statute should specify what types of victims are covered, whether victims of crimes against bodily integrity or victims who deserve special protections. Presenters also noted that Special Victims' Counsel and Victims' Legal Counsel are only detailed for sexual assault victims, and the JPP should be careful about creating an expectation of representation where no right currently exists.

Appellate Government Counsel Panel

The Government appellate counsel presenters did not address the issue of which victims should be covered by the proposed legislation.

II. Victim Privacy Interests During Appellate Counsel Review of Record of Trial

Military Judges Panel

The judges explained that Rule for Courts-Martial (RCM) 1103A governs appellate counsel's review of sealed materials. The Services have different internal procedures on access to sealed materials. In the Army, for example, attorneys of record in appellate cases request permission for review from the clerk, which is routinely granted. Attorneys must review records in the clerk's office.

Some judges noted that victims' privacy concerns may be resolved by amending RCM 1103A to require an *in camera* review by the Service Courts of Criminal Appeals (CCA) judges prior to disclosure to appellate counsel. One judge noted that this would be a more efficient approach than allowing victims to file pleadings. Another judge commented that there may be due process implications of restricting appellate counsel's access to sealed materials.

Appellate Defense Counsel Panel

The presenters from the Service appellate defense counsel divisions further explained the Services' different procedures for obtaining access to sealed materials under RCM 1103A. Under the procedures of the Air Force CCA, appellate counsel must file a motion to view sealed exhibits. The court issues a protective order prohibiting appellate counsel from disclosing the contents of the records. Review of the materials takes place in a windowless court space. Under the procedures of the Navy-Marine Corps CCA, appellate defense counsel must contact the clerk

of court to review sealed records; if counsel wants to make copies of these records, counsel must file a motion with the court and must destroy the copies when case processing is complete.

Appellate defense counsel presenters urged the JPP not to impede appellate counsel's access to sealed materials in the record of trial. They explained that RCM 1103A strikes the appropriate balance between protecting the rights of the victims and the due process rights of the appellant, and any attempt to restrict appellate defense counsel's access to materials could lead to possible *Brady* violations and the erosion of public confidence in the system. One presenter noted that military appellate defense counsel must have full access to the record of trial because their responsibilities are broader than those of federal public defenders in light of their obligation to raise ineffective assistance of counsel claims on direct appeal and the safeguards rooted in the historical distrust of military tribunals. Presenters also emphasized the need for robust appellate review since military trial judges are not tenured and may not be very experienced. One counsel noted victims should be better informed of the professional responsibilities of defense counsel so that they do not presume that access to sealed materials is either easy or improper.

Appellate Government Counsel Panel

The Government appellate counsel commented that the current rules are not sufficient to protect a victim's privacy interests. They asserted that this issue could be successfully resolved by changing RCM 1103A to require CCAs to first conduct an *in camera* review of a victim's medical and mental health records before permitting appellate counsel to review the records.

One presenter noted that Government counsel have often filed motions to oppose defense requests to review privileged records, adding that it would be helpful to have victims' counsel available to focus on protecting those privacy interests.

III. Victim Standing on Appeal

Military Judges Panel

The judges had different views on whether victims should be granted standing on appeal. One judge expressed that giving victims appellate rights does not inherently affect the due process rights of the appellant, and allowing victims to submit briefs would result in judges being more informed. He noted, however, that it may appear uneven and unfair if the victim participates at oral argument, and commented that one way to counteract this perception of unfairness would be to give the appellant additional time.

Another judge noted that there are diminishing returns to giving victims standing on appeal post-conviction because the CCAs are bound by the record of trial. He emphasized that the Service CCAs are different from civilian courts of appeals because the CCAs make their own factual determination after reading the entire record of trial. He noted that the JPP must consider the delays that would result if victims are allowed to file pleadings.

The judges noted a concern about the use of the term "real party in interest" in Section 547, commenting that this term would lead to confusion. If Congress intends to grant victims standing, the statutory provision should explicitly do so.

Additionally, the judges from the Air Force and Army noted that victims currently can participate in appellate proceedings by filing amicus briefs, and added that sometimes the interests of the victim post-conviction are aligned with the interests of one of the parties.

Appellate Defense Counsel Panel

Appellate defense presenters generally did not object to giving victims standing on appeal; however, they noted that victim standing must be linked to meaningful victim interests that are acknowledged in the trial courts, such as the privacy interests afforded by Military Rules of Evidence 412, 513, and 514 and other rights afforded by Article 6b, UCMJ. Presenters also commented that appellants' rights include the right to timely appellate review, and cautioned that the expansion of victims' appellate rights must not cause significant delays in the appellate process. One presenter recommended that the responsibility for the delay caused by the assertion of victims' rights should be attributed to the Government.

One presenter commented that it is an established principle long-protected by CAAF that people have a right to be heard in the military justice system, and it is unnecessary to make sweeping statutory changes to protect these rights.

Appellate Government Counsel Panel

A Government appellate counsel suggested that one way to provide military victims with standing at the appellate level would be to amend Article 6b to mirror the language in the Crime Victims' Rights Act, which applies to federal appellate courts.

The Government counsel expressed concern that the potential delays caused by victim participation on direct appeal could undermine an accused's due process right of timely appellate review. The counsel cautioned that the added delay could cause convictions and sentences to be overturned.

Several counsel noted that there is an underutilized opportunity for victims to be heard during the direct appellate review process by filing amicus briefs. One counsel added that the rules of both CAAF and the CCAs currently permit victims to file amicus briefs and SVCs have been encouraged to file such briefs.

IV. Victim Standing at the Court of Appeals of the Armed Forces (CAAF)

Military Judges Panel

One judge emphasized that the JPP should consider the importance of uniformity: if victims can only petition for mandamus at the Service CCAs, and cannot appeal to CAAF, the Service CCAs may apply different standards. Furthermore, the judge noted the importance of having civilian participation and oversight in the military justice process. However, the judge noted that if the Congress wants CAAF to have jurisdiction, the legislation must include an explicit statutory grant of jurisdiction, which Section 547 does not contain.

Appellate Defense Counsel Panel

One defense counsel noted that victims should be granted standing at CAAF, but agreed that the language of Section 547 does not explicitly grant such standing.

Appellate Government Counsel Panel

The Government counsel noted that in the case *E.V. v. U.S. and Martinez*, CAAF found that it does not have jurisdiction to review Article 6b interlocutory appeals by victims because Congress has not expressly granted such jurisdiction. The Government appellate counsel commented that Section 547 as presently drafted would not grant CAAF jurisdiction to review victim petitions on interlocutory or direct appeal. They cautioned that simply designating a victim as a “real party in interest” would not confer jurisdiction or standing.

One counsel stated that since CAAF has statutory authority to review virtually all other CCA decisions, there is no good reason why it should not also have authority to review a victim’s interlocutory appeal of a CCA decision under Article 6b.

V. Victim Notice of Appellate Pleadings

Military Judges Panel

The former Army judge explained that the Army created an appellate victim liaison within the Clerk of Courts Office, which obtains information about the victim’s location and contacts the victim, or the victim’s counsel, when the case arrives at the appellate court and when there are other major appellate matters. The judges from the other Services noted that to the extent that the victim is provided notice of appellate proceedings, it is not the function of the CCA to provide it.

Appellate Defense Counsel Panel

Presenters generally did not object to victim notice of appellate proceedings. The presenter from the Air Force noted that the Air Force very recently established a program to provide timely appellate notice to SVCs of filings made on direct appeal.

Some presenters, however, noted concerns with the breadth of the statutory proposals on notice. First, they explained that notice should not be required for all appellate pleadings, but instead should be limited to notice of any appellate proceedings that could reasonably implicate victims’ rights. Second, they noted that trials often include multiple victims, and commented that the provisions on notice should be appropriately tailored so that all matters relating to one victim are not provided to all victims. Finally, presenters explained that providing notice to victims would be burdensome in situations where a victim is not represented by counsel on appeal. One presenter recommended that in these situations, the Government should have the responsibility of providing notice to victims. Another presenter recommended that victims without counsel should be provided with an opt-in mechanism after a conviction if they wish to receive notice.

Appellate Government Counsel Panel

One Government counsel asserted that providing notice to victims of appellate matters that implicate their rights is important, though she expressed concern about providing notice of all appellate matters because: 1) in practice, most of the appeals she sees do not actually directly affect victims’ rights; and 2) notice is currently hand-served, and the additional burden of adding service to victims of all appellate matters would exceed the resources currently available. She added that cases with a range of types of victims or multiple victims would further complicate the process of providing notice.

In the event that notice becomes required for victims, the counsel noted that she was aware of a proposal that would establish an SVC appellate office to receive automatic notice, similar to the current process for serving the Defense Appellate Division. She noted that this would help ease the additional burden on the Government.

Several of the Government counsel also noted that the issue of victim notice is likely to be resolved if the Military Justice Act (MJA) is enacted in the FY 2017 National Defense Authorization Act. The MJA includes a provision that will require a publicly available electronic system similar to PACER to be implemented by the military within four years. This would allow public access to all pleadings.

One Government appellate counsel noted that the Article 66 powers allow the CCAs to independently identify issues that are not raised by the appellant on appeal and to grant relief as warranted. In these cases, if an issue raised by the court involves a victim's rights and is not included in any Government or defense pleading, there is a question of how a victim would receive notice for an opportunity to be heard before appellate relief was granted. This too may be an issue that is solved by the enactment of the MJA which will only allow CCAs to review errors that are raised by parties.