



Judicial Proceedings Panel
Minutes of March 13, 2015 Public Meeting

AUTHORIZATION: The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP or Panel), is a federal advisory committee established pursuant to Section 576(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, as amended by section 1731(b) of the NDAA for FY 2014 and section 546 of the NDAA for FY 2015, and in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

EVENT: The JPP held a public meeting on March 13, 2015, from 9:00 a.m. to 4:36 p.m. The March meeting focused on compensation and restitution for sexual assault victims. The meeting opened with an overview of restitution and compensation in military judicial proceedings. Next, academic scholars provided information about the economic needs of sexual assault victims and some of the barriers victims face when seeking compensation. Then, the Director of the National Association of State Crime Victim Compensation (CVC) Programs and representatives from some of the state CVC programs discussed the history, purpose, and use of state compensation funds by victims of sexual assault involving military personnel.

After lunch, military Service representatives briefed the JPP on how victims currently obtain restitution or compensation for crimes under the Uniform Code of Military Justice (UCMJ). During the final session of the day, individuals from civilian advocacy organizations and military practitioners provided perspectives on the restitution and compensation for sexual assault victims.

LOCATION: The meeting was held at the U.S. District Court for the District of Columbia, Courtroom #20, 6th floor, 333 Constitution Avenue, NW, Washington, D.C. 20001.

MATERIALS: A verbatim transcript of the meeting and preparatory materials provided to the JPP members prior to, during, and after the meeting are incorporated herein by reference and listed individually below. Materials received by members of the Panel are available on the JPP website: <http://jpp.whs.mil>.

PARTICIPANTS

Participating JPP Members:

The Honorable Barbara Jones, Acting Chair
The Honorable Elizabeth Holtzman (by telephone)
Professor Thomas W. Taylor
Mr. Victor Stone

Absent JPP Members:

Vice Admiral (Retired) Patricia A. Tracey

Participating JPP Staff:

Lieutenant Colonel Kyle Green, U.S. Air Force, JPP Staff Director

Other Participants:

Ms. Maria Fried, Office of the General Counsel, Department of Defense, Designated Federal Official (DFO)

Presenters:

Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice

Professor Julie Goldscheid, CUNY School of Law

Professor Njeri Mathis Rutledge, South Texas College of Law

Professor Cortney E. Lollar, University of Kentucky College of Law

Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards

Ms. Laura Banks Reed, Director, D.C. Superior Court Crime Victims Compensation Program

Mr. Gene McCleskey, Director, Texas Crime Victims' Compensation Program

Ms. Lindsey E. Silverberg, Advocacy and Outreach Supervisor, Network for Victim Recovery of DC (NVRDC)

Ms. Nikki S. Charles, Co-Executive Director, NVRDC, and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board

Mr. Charles A. Cosgrove, Chief, Programs Branch, Criminal Law Division, Office of The Judge Advocate General, U.S. Army

Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program

Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program

Ms. Kathy Nelson, Victim Witness Assistance Program, U.S. Air Force (by telephone)

Captain Joseph B. Ahlers, U.S. Air Force, Special Victims' Counsel

Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime

Ms. Bridgette Marie Harwood, Director of Legal Services, NVRDC

Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General

Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program

Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel

Major Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency

Public Comment:

None

MEETING MINUTES

The DFO opened the public meeting at 9:00 a.m. The Honorable Barbara Jones provided opening remarks and reviewed the tasks of the JPP and the agenda for the meeting.

DoD Overview of Restitution and Compensation in Military Judicial Proceedings

Colonel John G. Baker, Chair, Joint Service Committee on Military Justice (JSC) provided an overview of DoD's framework for claims, restitution and compensation available to victims of crimes committed by military members. He explained Article 139 provides an expedited claim process for a commander to conduct an investigation to determine the dollar amount of property damage or loss and direct that the offender pay the victim. Colonel Baker informed the JPP members that Article 139 has not been used in recent years in the Marine Corps. He noted that the Marine Corps will be educating commanders and Service members about the process and benefits of using Article 139 for property claims. Mr. Taylor asked whether the JSC had previously considered expanding the scope of Article 139 beyond property crimes and adding coverage for expenses related to "bodily harm." Colonel Baker asked for time to research the history and agreed to submit a response after the meeting.

When explaining restitution in the military, Colonel Baker informed the JPP members that a pretrial agreement between a convening authority and an accused may include a provision requiring the accused to pay restitution to the victim. In response to a question from Judge Jones, Colonel Baker clarified that a military judge cannot impose restitution as a punishment in sentencing. He also explained that concepts unique to the military include the deferment or waiver of the forfeiture of wages and the convening authority's ability to direct the offender's dependents receive those funds.

Colonel Baker also informed the Panel about the compensation available to victims who are active duty military, victims who are dependents of the accused, and those who are civilian victims with no connection to the military. He also stated that victim witness liaisons (VWLs), special victim's counsel (SVCs), and victim's legal counsel (VLCs) are trained to understand crime victim compensation (CVC) program processes and are responsible for educating and informing victims about state CVC programs and military compensation mechanisms.

Economic Needs of Sexual Assault Victims and Barriers to Compensation

Three academic scholars spoke to the JPP members about the economic needs of sexual assault victims and some of the barriers to their compensation. Professor Julie Goldscheid testified that the ability to recover from economic loss is critical and key to a victim's recovery. She explained that medical costs have been estimated at over \$2,000 per victim for those who have sought and received treatment, and that other estimates place the cost to a survivor of sexual assault at up to \$110,000, which includes medical expenses, loss of productivity, and pain and suffering. Professor Goldscheid also referred to a study that found one-half of sexual assault victims lost their jobs, lost work hours, or had to take leave in the aftermath of a sexual assault.

Professor Njeri Mathis Rutledge told the Panel that, contrary to one of the Service's request for information responses, there can never be justice without considering the needs of the victim.

She pointed out some of the misconceptions about what restitution and compensation are meant to accomplish. She explained that the role of restitution and compensation is to reimburse victims for verifiable expenses. Professor Rutledge said that the compensation process is not intended to provide punitive damages or damages for pain and suffering, which are best sought in civil court. Professor Rutledge said she supported improving opportunities for sexual assault victims to obtain restitution through courts-martial, allowing convening authorities the option to consider victims when waiving forfeitures of pay and allowances, and expanding Article 139 to include "bodily harm."

Professor Lollar noted that her interest in restitution and compensation issues stemmed from her experience as a public defender in the state and federal systems. She shared the view that military courts should be vested with the discretionary authority to order restitution as part of a sentence. Professor Lollar offered three specific points for the Panel to consider. First, noting that restitution is mandatory in the federal system, she told the Panel that the Mandatory Victims Restitution Act does not permit consideration of a defendant's ability to pay restitution and there has been a significant increase in unpaid restitution fees in the federal system which negatively impacts the victim. Second, Professor Lollar suggested restitution be based on a substantial nexus between the crime and actual losses. She said restitution becomes more of a punitive remedy, with problematic constitutional implications, if it is imposed for abstract or indefinite losses or for losses that are beyond the offense of conviction. Third, Professor Lollar told the JPP members that "restitution" is actually a misnomer that has created doctrinal confusion. She explained that "victim compensation" or "moral compensation" would be more accurate terms.

Responding to JPP member questions, Professor Rutledge said that a multitude of programs should be available to make victims whole, so that different victims can choose processes that best support their needs. Professor Goldscheid told the Panel that publicity and administrative support must be considered in developing and fielding a compensation system. Finally, Professor Lollar said that victim compensation should be based on specific, set amounts that are not contingent on the resources of individual defendants.

State Compensation Programs: History, Purposes, and Use by Military/Dependent Victims

Representatives from the National Association of CVC Boards and several state CVC programs spoke about the history, purpose, and use of state compensation funds by crime victims who were Service members or dependents of Service members. Mr. Dan Eddy, Executive Director of the National Association of CVC Boards, opened the session by observing that all 50 states have compensation programs. He explained that most funding for the CVC programs comes from state funding sources, such as criminal fees and fines. The federal government contributes to the state CVC programs through the federal Victims of Crime Act (VOCA); there is no compensation system for crime victims involved in federal court cases, other than the International Terrorism Expense Reimbursement Program for victims of terrorist acts committed overseas. Therefore, victims of federal crimes utilize the state compensation systems.

Mr. Eddy said that state CVC programs receive very few claims from military victims because of the extensive resources available through the military. He said lack of knowledge about state CVC programs leads to underutilization. He told the Panel members that about 50 percent of

funds awarded go toward medical bills, 10 percent to counseling, 20 percent to lost wages, and 10 percent to funeral and burial expenses. Mr. Eddy also discussed claim timing requirements and how they have evolved for the benefit of the victim over the last 25 years. He said this has been beneficial, as many victims may not report crimes promptly. Finally, Mr. Eddy noted that while many state CVC programs cover relocation expenses, few cover property loss or damage, and no programs currently cover pain and suffering.

Ms. Laura Banks Reed, Director of the D.C. Superior Court CVC Program, followed up on Mr. Eddy's comments about reporting requirements by noting that the D.C. statute has three exceptions to the requirement that crimes must be reported to the police. Claims from sexual assault crimes are an exception under the D.C. statute. Ms. Reed explained that in a sexual assault case, a sexual assault exam or a civil protection order can satisfy the reporting requirement. She added that no application in her program has been denied as untimely in the past 18 years. Ms. Reed emphasized the importance that compensation programs be closely partnered with other service providers. She stated that temporary emergency shelter and moving expenses are common expenses that her program covers. Ms. Reed noted that the D.C. program's maximum payment is \$25,000 and that the average payment is between \$3,000 and \$4,000.

Mr. Gene McCleskey, Director of the Texas CVC Program, informed the Panel he was a retired Marine Corps officer who had held special court-martial convening authority. Mr. McCleskey shared a case example where his office worked with a military SVC assisting a civilian victim in a case involving an active-duty military suspect. The victim was stationed overseas and was a Texas resident. Together, his office and the SVC coordinated assistance for the victim through the Texas CVC program. He said that the victim would not have known about the program without the SVC's help and would not have known to apply, noting that SVCs play an important role in assisting their clients in seeking compensation from state CVC programs. Mr. McCleskey told the Panel that the Texas CVC program had paid transitional and relocation expenses for dependents where the military member was court-martialed or administratively discharged when the dependents were not eligible for transitional or relocation expenses from the military. Mr. McCleskey observed that the military's transitional assistance program have a support gap that he felt the Panel should explore.

Ms. Nikki Charles, Co-Executive Director of NVRDC and former Administrator of Victim Services for the Maryland Criminal Injuries Compensation Board first described the comprehensive advocacy and legal assistance that NVRDC offers to survivors of crime in the District of Columbia, noting that the NVRDC runs a 24-hour sexual assault crisis response project for the city. She stated that compensation from state CVC programs are often the only tangible benefit a victim of crime can receive after being victimized. She added that compensation programs are tremendously underutilized, in part due to statutes that may require victim cooperation, claim timelines, and/or lack of any criminal action on the part of the victim. Ms. Charles strongly recommended that the Panel consider these barriers may preclude sexual assault survivors from receiving compensation from state CVC programs.

Ms. Lindsey Silverberg, NVRDC's Advocacy and Outreach Supervisor, highlighted the shortfalls of restitution and compensation programs. In her opinion, the restrictions on these

programs tend to make victims feel re-victimized and has affected victim cooperation. As NVRDC's military liaison, Ms. Silverberg stated that she had reached several Memorandums of Understanding with local installations, in addition to training military members on community resources. Noting that some state CVC programs accept forensic examinations in lieu of a police report or protective order, Ms. Silverberg emphasized that crimes are often under-reported or not reported. She proposed that by providing alternatives – or even going further and accepting a signed statement from a Sexual Assault Response Coordinator (SARC) in the case of a restricted report – victims could gain access to State compensation funds and get on the road to recovery. Lastly, Ms. Silverberg opined that the military is uniquely set up to handle and execute an impactful compensation program, adding that the JPP has a profound opportunity to recommend thoughtful eligibility requirements that do not re-victimize or blame the survivor.

How Victims Can Obtain Restitution or Compensation for Crimes under the UCMJ

The JPP members next heard from military Service representatives on how victims currently obtain restitution or compensation for crimes under the UCMJ. The presenters during this session shared an overview of the various Services' victim assistance programs, addressing pretrial agreements, Transitional Compensation, Article 139, and victims' access to state CVC programs. They stated that Victim Witness Assistance Program (VWAP) personnel and SVCs/VLCs are available to walk victims through the military justice process, ensuring that their needs are met and their questions are answered. They explained that the SVCs/VLCs work with trial counsel and the defense counsel when advocating for victims. In addition, the presenters described training on victim compensation and restitution and the Victim Advocate's role in the court-martial process.

With respect to Article 139, the presenters addressed conflicts between the Article 139 process and the military justice process. In particular, they noted that an Article 139 claim triggers an independent investigation by someone that is not trained to investigate sexual assault crimes, and that the process may jeopardize the preferral and referral process, as the commander may be conflicted out, in addition to potentially jeopardizing the criminal investigation of an alleged offense. The presenters agreed that there are a lot of barriers to using the Article 139 process as a compensation and restitution statute.

The presenters next discussed the issues relating to restitution. The military Service representatives explained that the forfeiture of the accused's pay and allowances may be part of the adjudged sentence or automatically triggered as part of the sentence. They explained that those forfeitures may be deferred and/or waived by the convening authority, and those funds may be directed to the accused's dependents. One of the speakers distinguished between the forfeiture of officers' pay and forfeiture of enlisted members' pay, noting that the amount of restitution may vary significantly depending on the rank of the accused, as opposed to the nature of the offense or the dependent's needs.

The presenters also addressed victim satisfaction in relation to victim status, explaining that medical coverage, loss of wages, Veterans' Affairs benefits, relocation coverage, and continued care are all based on the status of the victim. They agreed that adding discretionary restitution as an authorized punishment at court-martial sentencing would be problematic in that victims would have to provide evidence, and be subjected to cross-examination, to justify restitution. They

warned that court-martial panel members may use restitution to a victim as a reason to give a lower sentence to the accused, and that panel members' limited knowledge about victimization issues would complicate their efforts at assessing appropriate restitution amounts.

Major Patrick Korody, a Supervising Navy VLC, added that he was not skeptical about panel members' ability to make a determination on restitution, but opined that they are not the right people to make the decision, adding that military judges can enforce restitution as long as it is not part of the sentencing process.

Perspectives on Compensation and Restitution for Sexual Assault Victims

During the final session, JPP members heard from civilian advocates and military practitioners who provided perspectives on the need and availability of compensation and restitution for sexual assault victims. The first witness, Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime, stated that there are gaps in the current system between what is available through the military and through the state CVC programs, and that the gaps depend on whether the victim is active-duty, retired, civilian, reservist, or a dependent. She observed that the benefits available may not match the victim's needs. Ms. Howley opined that victims of crime should be eligible for the same compensatory response regardless of their service status or the vagaries of the CVC program in the state where they are stationed at the time of the crime. She explained court orders for restitution and the enforcement of those orders while the offender is under supervision. She stated that restitution is not a principle of punishment and that it is not a substitute or alternative to a fine or incarceration; the goal of restitution, Ms. Howley clarified, is to compensate the victim. She explained state and federal mandates on ordering restitution, adding that this was an extremely important source of support for state CVC programs. She stated that restitution is important to crime victims, in that it can cover a wider range of damages than state CVC programs and that it represents direct accountability from the perpetrator. Finally, Ms. Howley opined that victims' losses should be quantified far earlier than sentencing so that they can be considered when determining the seriousness of the offense at the time of charging, as well as in negotiating a plea.

Ms. Bridgette Harwood, NVRDC's Director of Legal Services, noted that survivors live with a constant reminder of their assault due to its financial impact. Ms. Harwood suggested that Article 139 claims should be expanded available to sexual assault victims who suffer bodily injury. She emphasized the importance of the availability of different options to the victim. She also opined that the military should make forfeited pay and allowances available to all victims and not just dependents of the accused. She added that there are exemptions in the TRICARE military health care program, such that certain medical procedures are not always covered, such as the highly recommended Eye Movement Desensitization and Reprocessing (EMDR) treatment for post-traumatic stress. Ms. Harwood recommended that the JPP consider the long-term effects that sexual assault trauma has on victims and that victims may not fully understand the extent of their injuries or losses until months or years later.

Colonel Michael Milligan, U.S. Army, Chief, Criminal Law Division, recommended against expanding Article 139 and suggested that the military provides the information needed for victims to obtain the compensation they need. Colonel Mulligan described the support the Army

provided to hundreds of victims involved in the Fort Hood, TX, shooting. He detailed the services that were provided by the military and the state programs following the incident, such as for civilian contractors that had lost wages, medical bills, and mental health needs. He described the travel arrangements provided to victims and family members to cover the cost and ensure they could attend the court-martial. He noted that some victim services were not obtained due to the lack of education on the available programs for victims.

Ms. Teresa Scalzo, Deputy Director of the U.S. Navy's Trial Counsel Assistance Program, addressed the impact of victims' status on the types of services needed and stated that there are gaps in coverage. Ms. Scalzo identified five categories of coverage: (1) expenses covered by state CVC programs, (2) expenses covered by state CVC programs but where there are conditions on eligibility and coverage, (3) expenses of overseas victims, (4) losses not otherwise covered by state CVC programs, and (5) costs incurred due to the court-martial process.

Major Richard Cloninger, U.S. Marine Corps Regional VLC, pointed out some of the issues that remain unclear concerning restitution. For example, restitution would be problematic if considered a civil remedy because military judges are forbidden from adjudging civil remedies under Rule for Courts-Martial (R.C.M.) 201. Major Cloninger noted that it was also unclear whether military judges have the authority to order restitution based on a pretrial agreement, in that R.C.M. 201 does not address forms of restitution as a result of criminal conduct. Major Cloninger opined that Article 139 should be amended to include bodily harm, adding that it could even include other types of damage such as lost wages and loss of household support.

Major Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel, addressed the challenges for trial practitioners when implementing a program in the military for victim restitution. She voiced her concerns as to effects that victim restitution could have on pending cases in terms of discovery issues and efforts by the defense to show that the prospect of financial compensation might motivate the victim to fabricate at trial. Major Payne also questioned whether court-martial panels would be the best qualified to adjudge restitution, noting that many panel members lack prior court-martial experience and opining that they generally lack the breadth of experience necessary to be able to make an informed decision on restitution.

During discussion with the Panel, some of the presenters supported the idea of an independent DoD CVC program. Those presenters pointed out the benefits of a military compensation program would be that the DoD CVC program would not have to be tied to a criminal conviction and sentence, the accused's financial situation, or any particular court's continued jurisdiction. They noted that such a program could possibly accommodate issues and complications that often arise in Article 120 cases, such as restricted reporting, victims' delay in reporting, and future losses (e.g., long-term medical / mental health care) as well as cases arising overseas.

Having received no requests for public comment to the JPP, the DFO closed the public meeting at 4:36 p.m.

CERTIFICATION

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



Barbara Jones
Acting Chair
Judicial Proceedings Panel

MATERIALS

Meeting Records:

1. Transcript of March 13, 2015 JPP meeting, prepared by Neal R. Gross and Co., Inc.

Meeting Materials:

2. Public Meeting Table of Contents
3. Meeting Agenda
4. Summary of Presenter Biographies
5. Presentations and Written Submissions by the Presenters
6. Written Public Comment from Service Women's Action Network

Read-Ahead Materials Provided to Members in Advance of Meeting:

7. Summary of reading materials provided to JPP Members
8. Summary charts comparing compensation, restitution, and other forms of relief for crime victims in the states, federal and military systems
9. Military Services' Responses to JPP Request for Information #53-60
10. National Crime Victims Law Institute (NCVLI), *Fundamentals of Victims' Rights: A Victim's Right to Restitution*, Victim Law Bull. (Nov. 2011)
11. Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment under Rule of Courts-Martial 1003(B)*, 52 Naval L. Rev. 1 (2005)
12. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. (2014)
13. 18 U.S.C. § 3663A (Mandatory restitution)
14. 18 U.S.C. § 3664 (Procedure)
15. *United States v. Williams*, 60 M.J. 360 (C.A.A.F. 2004)
16. *United States v. Delagarza*, No. ARMY 20080891 (A. Ct. Crim. App. Aug. 23, 2010)
17. Article 57a of the UCMJ (Defer Adjudged Forfeiture)
18. Article 58b of the UCMJ (Waiver of Automatic Forfeitures)

19. National Association of Crime Victim Compensation Boards (NACVCB), *Compensation for Crime Victims*
20. U.S. Dep't of Justice, Office for Victims of Crime, "About OVC: Crime Victims Fund" and "Victims of Crime Act: Rebuilding Lives through Assistance and Compensation"
21. Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth – The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 Duke J. Gender L. & Pol'y 223 (2011)
22. Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 Tul. L. Rev. 167 (2004)
23. California Assembly Bill No. 2545
24. 10 U.S.C. § 1059 (Transitional compensation)
25. DoD Instruction 1342.24, *Transitional Compensation for Abused Dependents* (Jan. 16, 1997)
26. Article 139 of the UCMJ
27. Army Regulation 27-20, Chapter 9 (Feb. 8, 2008)
28. Navy JAG Instruction 5800.7F, Chapter IV (June 26, 2012)
29. Air Force Instruction 51-502, Chapter 6 (Mar. 1, 1997)
30. Coast Guard COMDNOTE 5890 (Mar. 3, 1993)
31. Public Comment Email from Lieutenant Colonel Melanie Mann with draft proposal on how Article 120, UCMJ might be amended (February 12, 2015)
32. Annual Report on Sexual Assault Harassment and Violence at the Military Service Academies (February 2015) cover page with link to full report (<http://jpp.whs.mil/index.php/staff-2/2014-06-11-20-29-59>)
33. Federal Register Notice, Vol. 80, No. 23, Wednesday, February 4, 2015, Notices, Manual for Courts-Martial; Proposed Amendments
34. Public Comment Email from Bryan P. Frazier, no subject, dated February 4, 2015