



Judicial Proceedings Panel
Minutes of September 23, 2016 Public Meeting

AUTHORIZATION: The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) 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 September 23, 2016, from 9:06 a.m. to 4:14 p.m. The focus of this meeting was on victims' appellate rights and proposed legislative changes to the Uniform Code of Military Justice. The Panel heard perspectives from former appellate judges, defense appellate counsel, and government appellate counsel. The topics discussed included the importance of defining the term "victim" in the proposed legislation on victims' appellate rights, victims' right to participate in appellate proceedings, victims' right to notice of appellate matters, and victims' privacy interests during appellate counsel's review of records of trial.

LOCATION: The meeting was held in the Bobby Junker Executive Conference Center, One Liberty Center, 875 North Randolph Street, Arlington, Virginia 22203.

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

PARTICIPANTS

Participating JPP Members:

The Honorable Elizabeth Holtzman, Chair
Mr. Victor Stone
Professor Thomas W. Taylor
Vice Admiral (Retired) Patricia Tracey

Attending JPP Staff:

Captain Tammy Tideswell, U.S. Navy, Staff Director
Mr. Dale Trexler, Chief of Staff
Lieutenant Colonel Glen Hines, U.S. Marine Corps, Staff Attorney
Ms. Julie Carson, Legislative Liaison and Staff Attorney
Ms. Nalini Gupta, Staff Attorney
Ms. Stayce Rozell, Senior Paralegal and Meeting Recorder

Other Participants:

Ms. Maria Fried, Designated Federal Official (DFO)

Honorable James Baker, Former Chief Judge, U.S. Court of Appeals for the Armed Forces
Rear Admiral (Retired), Christian Reismeier, U.S. Navy, Former Chief Judge, U.S. Navy-Marine
Corps Court of Criminal Appeals
Colonel (Retired) William Orr, Jr., U.S. Air Force, Former Chief Judge, U.S. Air Force Court of
Criminal Appeals
Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal
Appeals
Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital & Complex Litigation Branch
Mr. Brian Mizer, U.S. Air Force, Senior Appellate Defense Counsel
Major Lauren Shure, U.S. Air Force, Appellate Defense Counsel
Captain Andrew House, U.S. Navy-Marine Corps, Director, Appellate Defense Division
Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division
Major Anne Hsieh, U.S. Army, Senior Appellate Attorney and Branch Chief
Mr. Roger Bruce, U.S. Air Force, Senior Appellate Government Counsel (via telephone)
Major Meredith Steer, U.S. Air Force, Appellate Government Counsel
Mr. Brian Keller, U.S. Navy-Marine Corps, Supervisory Appellate Counsel
Lieutenant Robert Miller, U.S. Navy, Appellate Government Counsel
Lieutenant Tereza Ohley, U.S. Coast Guard, Appellate Government Counsel

MEETING MINUTES

The DFO opened the public meeting at 9:06 a.m. The Honorable Elizabeth Holtzman provided opening remarks and summarized the agenda for the meeting.

Military Judges' Perspectives on Victims' Appellate Rights

The JPP members first heard from the former Chief Judge of the U.S. Court of Appeals for the Armed Forces, the Honorable James Baker, and from former Chief and Senior appellate judges, Rear Admiral (Retired) Christian Reismeier, Colonel (Retired) William Orr, Jr., and Colonel (Retired) Denise Lind, about their perspectives on victims' appellate rights. The presenters 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. The judges explained that Rule for Courts-Martial (RCM) 1103A governs appellate counsel's review of sealed materials. They noted that the Services have different internal procedures on access to sealed materials.

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. With respect to a victim's standing to appeal an interlocutory writ-denial to the Court of Appeals of the Armed Forces (CAAF), one judge noted that if the Congress wants CAAF to have jurisdiction, the legislation must include an explicit statutory grant of jurisdiction, which the proposed NDAA legislation does not contain.

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 Criminal Court of Appeals (CCA) to provide it.

Service Defense Appellate Divisions' Perspectives on Victims' Appellate Rights

After lunch the Panel heard from Service appellate defense counsel: Lieutenant Colonel Christopher Carrier, Mr. Brian Mizer, Major Lauren Shure, Captain Andrew House, and Lieutenant Commander Michael Meyer who offered their perspectives on victims' appellate rights. The 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 (SVC/VLC) are only detailed for sexual assault victims, and the JPP should be careful about creating an expectation of representation where no right currently exists.

The presenters 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.

Urging the JPP not to impede appellate counsel's access to sealed materials in the record of trial, the presenters explained that RCM 1103A strikes the appropriate balance between protecting the rights of the victims and the due process rights of the appellant. They advised that 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. 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 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. 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.

The presenters generally did not object to victim notice of appellate proceedings. The Air Force counsel noted that the Air Force very recently established a program to provide timely appellate notice to SVCs/VLCs 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, the 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 be provided with an opt-in mechanism after a conviction if they wish to receive notice.

Service Government Appellate Divisions' Perspectives on Victims' Appellate Rights

During their final session of the day, the Panel heard from appellate government counsel: Major Anne Hsieh, Mr. Roger Bruce, Major Meredith Steer, Mr. Brian Keller, Lieutenant Robert Miller, and Lieutenant Teresa Ohley about their perspectives on victims' appellate rights.

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.

A presenter 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; however, the 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/VLCs have been encouraged to file such briefs.

The presenters 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.

A 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.

One of the 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/VLC 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 the Public Access to Court Electronic Records (PACER) federal system. Use of a PACER like system is to be implemented by the military within four years. This would allow public access to all pleadings.

One presenter noted that 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.

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

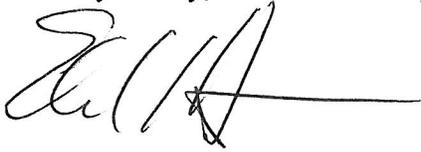
Public Comment

There was no public comment.

The DFO closed the public meeting at 4:14 p.m.

CERTIFICATION

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



Elizabeth Holtzman
Chair
Judicial Proceedings Panel

MATERIALS

Meeting Records:

1. Transcript of September 23, 2016 JPP meeting, prepared by Neal R. Gross and Co., Inc.

Read-Ahead Materials Provided Prior to and at the Public Meeting:

2. Meeting agenda
3. Summaries of presenters' biographies
4. Summary of read ahead materials for JPP Members

Materials Relevant to Victims' Appellate Rights:

5. Outline of victim's appellate rights issues
6. Special Victims' Counsel (SVC) / Victims' Legal Counsel (VLC) Program Managers' proposed amendments to Article 6b and 70 of the Uniform Code of Military Justice (UCMJ)
7. Section 547 of the Senate version of the FY 2017 National Defense Authorization Act (NDAA) (S.2943) to amend Article 6b of the UCMJ
8. Article 6b, UCMJ with proposed language from Section 547 of the Senate version of the FY 2017 NDAA (S.2943)
9. Public comment from Mr. Paul Koffsky, Deputy General Counsel, Department of Defense Office of the General Counsel
10. Public comment from Colonel Mark Jamison, former Director of the Navy-Marine Corps Appellate Government Division
11. Public comment from Dean Lisa Schenck, Professor of Law at the George Washington University School of Law
12. Public comment from Major Tami Mitchell, U.S. Army Judge Advocate General's Corps
13. Public comment from Ms. Meg Garvin, Executive Director of the National Crime Victim Law Institute
14. Public comment from Colonel (Ret) Don Christensen, President of Protect Our Defenders

Public Comment Provided During the Public Meeting:

15. *U.S. v. Kelvin L. O'Shaughnessy*, Order ACM 38732 from the U.S. Air Force Court of Criminal Appeals
16. Samples:
 - DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime
 - DD Form 2704, Victim/Witness Certification and Election Concerning Prisoner Status

- Notice to victim of case submitted for review before the U.S. Army Court of Criminal Appeals (ACCA)
 - Notice to victim of ACCA's scheduled hearing and right to be present for hearing
 - Notice to victim of ACCA's completion of appellate review and decision (1)
 - Notice to victim of ACCA's completion of appellate review and decision (2)
 - Notice to victim of ACCA's completion of appellate review and decision (3)
 - Notice to victim of CAAF's scheduled hearing and right to be present for hearing
 - Notice to victim of CAAF's declination of appellate review
 - Notice to victim of CAAF's completion of appellate review and decision
 - Notice to SVC of victim's rights during appellate review
17. Mr. Gerald Bruce's opening comments during the September 23, 2016 JPP Public Meeting
 18. Major Meredith Steer's additional comments following September 23, 2016 JPP Public Meeting
 19. *United States v. Jason K. Slape*, Government's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Brief in Support with Appendices A – H