



DEPARTMENT OF DEFENSE
OFFICE OF THE GENERAL COUNSEL

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WASHINGTON, DC 20301-1600

April 25, 2016

The Honorable Elizabeth Holtzman
Chair
Judicial Proceedings Panel
One Liberty Center
Suite 150
875 North Randolph Street
Arlington, VA 22203

Dear Representative Holtzman:

I am writing in response to your public notice of April 13, 2016, inviting comments concerning proposed revisions to Articles 6b and 70 of the Uniform Code of Military Justice (UCMJ). Thank you for your outreach and for providing the Department of Defense with an opportunity to present views concerning these significant legislative proposals.

Introduction

The Department has grave concerns regarding the proposed amendments. As discussed in greater detail below, the amendments would fundamentally alter the current adversarial nature of the military justice system in a manner without precedent in the Federal or State criminal justice systems. The amendments would also greatly expand the statutory entitlement to Special Victims' Counsel (SVC) representation at government expense, including to foreign nationals and victims of myriad non-sexual offenses, including property crimes. Such an expansion would create an enormous personnel challenge for the Military Services and would risk diverting SVCs and Victims' Legal Counsel (VLCs) from representation of their current client base. The amendments would also produce harmful unintended consequences, such as making highly sensitive information about one alleged victim available to other alleged victims. Portions of the proposed amendments would become superfluous if the proposed Military Justice Act of 2016 were to be enacted into law; other portions could be better addressed through rules and regulations than through statutory changes. Additionally, the proposed amendments are, in places, technically flawed.

Legislation making such fundamental changes to our current system would likely also produce many other second- and third-order effects that are not immediately apparent. For that reason, if the JPP believes that the proposed amendments merit consideration at all, such consideration should occur only after they have been subjected to a thorough study which would explore all of the potential consequences of such legislation, thus allowing an informed decision as to whether the benefits that the amendments would achieve outweigh their substantial negative consequences.



The amendments substantially depart from the Federal civilian criminal justice system model

Congress has generally provided that, absent reason to diverge from the Federal model, the military justice system should mirror the Federal civilian criminal justice system. *See* UCMJ art. 36(a), 10 U.S.C. § 836(a). Additionally, when Congress enacted Article 6b in the National Defense Authorization Act for Fiscal Year 2014, it modeled that provision after the Crime Victims' Rights Act that applies in United States District Courts, 18 U.S.C. § 3771, with appropriate revisions to reflect differences between civilian and military practice. *See* Nat'l Def. Auth. Act for Fiscal Year 2014 (NDAA for FY14), Pub. L. No. 113-66, tit. XVII, § 1701, 127 Stat. 672, 950 (2013); *see also* H.R. REP. NO. 113-103 (2013) ("The articulated rights and procedures are similar, but not identical to those set forth in section 3771 of title 18, United States Code."). The proposed amendments to Article 6b would result in major departures from the careful balance of the interests of the prosecution, defense, and alleged victims that Congress crafted in 18 U.S.C. § 3771. These departures include: (1) a statutory right for victims' access to court filings that is superior to that of either the prosecution or the defense and that would preclude those parties from making *ex parte* submissions even when they are otherwise appropriate; (2) a right to be heard in administrative proceedings even when the respondent whose interests are directly at stake has no such right; and (3) the victim's ability to participate in appellate proceedings as a matter of right with the guarantee of representation by appellate counsel at government expense. The Department is unaware of any comparable provisions in effect in either the Federal or State criminal justice systems. These provisions would be an experiment that would fundamentally alter the military's current adversarial system, which mirrors those in Federal and State civilian criminal justice systems. As explained below, that experiment would produce undesirable results.

The amendments would provide rights, including to appellate SVC representation, to many individuals who Congress has not determined are eligible for representation by SVCs at trial

The proposed amendments are not limited to providing additional protections to those who are currently eligible for representation by the Military Services' SVC and VLC programs. Rather, they would provide rights far beyond the sexual assault context.

Statutory eligibility for SVC representation is limited based on both status and subject matter. Only individuals who are eligible for legal assistance plus DoD civilian employees fall within the statutory eligibility for SVC representation. 10 U.S.C. § 1044e. Additionally, only alleged victims of certain sex-related offenses under the UCMJ fall within the statutory eligibility. (As a policy matter, however, consistent with the Secretary of the Navy's broad authority to administer the Department of the Navy, 10 U.S.C. § 5013, the Marine Corps makes VLCs available to eligible alleged victims of any UCMJ offense.) The new statutory rights that the proposed amendments would create, on the other hand, would apply to all victims of all offenses. So, for example, the Judge Advocates General would be required to appoint appellate counsel to represent any victim of any offense who requests such a counsel – including foreign nationals, which could lead to serious diplomatic issues as well as professional difficulties for the appellate counsel, particularly when such foreign nationals do not speak English. Additionally, the proposed legislation provides that "[a]ppellate victims' counsel shall represent the victim" even without the victim's request for representation "when the Judge Advocate General has sent the case to the Court of Military Appeals [sic]" or "when any Article 6b right is implicated

during trial or in any appellate pleading or matter.” Thus, appellate victims’ counsel would be compelled to represent some individuals whom they have never met and who may not even desire representation. Statutorily requiring such representation of unknown or even unwilling clients would raise serious professional responsibility issues.

The proposed amendments would provide appellate victims’ counsel to many individuals who had no ability to be represented by trial-level SVCs or VLCs. After all, most courts-martial are for alleged offenses other than sex crimes. Providing such appellate representation would result in an enormous personnel drain for the Military Services’ judge advocate organizations and, in practice, would likely require the Services to curtail the scope of representation currently provided to SVCs’ clients at the trial level, as well as other legal services (such as legal assistance) that judge advocates currently provide.

Requiring “all pleadings filed by all parties” to be served on all victims would result in several undesirable consequences

In assessing the effects of any proposed UCMJ amendment, it is important to keep in mind that the bulk of the rules governing the military justice system are adopted by the President in the Manual for Courts-Martial pursuant to authority delegated by Congress. Any UCMJ provision inconsistent with a Presidentially prescribed rule – including Military Rules of Evidence and Rules for Courts-Martial – would preempt that rule.

It is also important to remember that – unlike in most civilian justice systems – the military justice system encourages the trial of all known offenses allegedly committed by an accused at a single court-martial. *See, e.g.*, Rule for Courts-Martial (R.C.M.) 601(e)(2) (discussion). Thus, it is common for a court-martial to involve multiple victims. If Article 6b(a)(2) were to be amended as suggested, all pleadings regarding Victim A would have to be served on Victims B, C, and D. Thus, court filings involving rape shield evidence concerning Victim A or mental health records of Victim A would be required to be served on Victims B, C, and D. Knowing that such filings will be served on other alleged victims could (and likely would) deter some victims from choosing to be involved in the military justice system.

Additionally, the President has adopted rules allowing prosecutors and defense counsel to make *ex parte* filings in some situations. For example, Military Rule of Evidence 505(k)(2)(B) permits a military judge to accept an *ex parte* proffer by a trial counsel to protect classified information from disclosure. *See also* Mil. R. Evid. 506(l)(3)(B). Yet, the amended Article 6b(a)(2) would preempt any inconsistent Military Rule of Evidence, meaning that such an *ex parte* showing would have to be served on the victim. This could result in a disincentive to prosecute a case involving classified information – the very result that Military Rule of Evidence 505 (like its model, the Classified Information Procedures Act, 18 U.S.C. app. III.) was designed to minimize. So an unintended consequence of the proposed amendments could be to make it more difficult to prosecute a court-martial case involving classified information.

Defense counsel are also permitted to make *ex parte* filings in some instances. *See, e.g.*, R.C.M. 701(g)(2) (allowing military judges to receive *ex parte* requests for protective and modifying orders). Yet if the proposed amendment were to be adopted, such *ex parte* filings

would have to be served on all of the victims in the case even though they would not be served on the prosecutor.

Additionally, the amended Article 6b(a)(2) would require appellate counsel to serve all of their filings on every victim. There is no similar requirement in Federal civilian criminal appellate practice – or the appellate practice of any jurisdiction of which the Department is aware. Such a responsibility will prove particularly onerous in application because the defense is usually the first party to make an appellate filing. Thus, appellate defense counsel will somehow have to track down the location of every victim in every case. Additionally, some victims may be put off by receiving correspondence from the offender’s counsel, yet the appellate defense counsel would have no alternative but to initiate such contact. The necessity to locate and serve every victim in the case will also inevitably prolong the appellate process, which itself has adverse collateral consequences. For example, service members remain on active duty (though generally in an unpaid status) while their cases are on appeal. This creates both serious financial liabilities for the United States – such as paying the medical bills of service members on appellate leave and their families – and diminishes the number of service members who are actually available to perform military duties. *See generally* Colonel Ralph F. Miller, USMC, *The Lost Battalion*, MARINE CORPS GAZETTE, Jan. 2007, at 53. Exacerbating such effects would be another collateral consequence of adopting the proposed amendments.

Giving the victim the right to be heard at all appellate proceedings is undesirable

Detailed rules carefully govern who may be heard before an appellate court and how they may be heard. Such rules can be far more restrictive than at the trial level. For example, there is no general right to proceed *pro se* at the appellate level. *See generally* *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152 (2000); *see also* *United States v. Forrest*, 53 M.J. 249 (C.A.A.F. 2000) (mem.) (“it further appears that appellant has no right to proceed *pro se* in this Court”). Those wishing to be heard by appellate courts generally must do so through counsel. Filings as of right are generally limited to parties, while others must ask the relevant appellate court for leave to appear as an *amicus curiae*. *See, e.g.*, C.A.A.F. R. 26(a). The proposed amendment would override all of those rules by providing victims a right to be heard on “[a]ny and all appellate matters and hearings arising out of the offense.” Would this statute give the victim the right to be heard orally before an appellate court? Would it give the victim the right to make a *pro se* submission? The proposed amendment does not clarify those important points. Regardless of how those questions are answered, such a right to be heard – which will implicate the accused’s right to respond – would further prolong the appellate process, exacerbating the negative consequences discussed in the previous section.

Additionally, it is important to bear in mind that military justice proceedings can – and sometimes do – reach the Supreme Court. *See, e.g.*, *United States v. Denedo*, 556 U.S. 904 (2009). By adopting the proposed amendment, Congress would purportedly be telling the Supreme Court that a victim in any military justice case it is hearing, or in which it is considering a petition for writ of *certiorari*, has “[t]he right to be reasonably heard.” As both a substantive matter and a matter of separation of powers, it would be undesirable for Congress to attempt to direct the Supreme Court in this manner. Nor would it be apparent why the victim of an offense

tried by the military justice system should have such a right before the Supreme Court, but the victim of an offense tried in civilian Federal or State courts should not.

The proposed amendments would give victims the right to be heard at proceedings in which the service member whose interests are directly at issue has no right to personal appearance

In the military, some administrative proceedings that directly affect a service member's interests – including, in some Military Services, clemency and parole board proceedings – provide no right to a personal appearance by that service member. The proposed amendment creating Article 6b(a)(4)(E) would give alleged victims a right to be heard at such proceedings even when the service member whose liberty or property interests are directly at stake has no right to personal appearance. Such a rule would subject such administrative proceedings to potential due process challenges by the affected service member. Alternatively, the Military Services may feel compelled to give the affected service member a right to appear personally if the alleged victim's right to be heard is construed to include the right to a personal appearance, thereby introducing additional delay into the entire administrative system.

In addition to such substantive concerns, it would be undesirable to include within the UCMJ a provision affecting such administrative proceedings.

The proposed amendments to Article 70 are technically flawed

The proposed amendments to Article 70 use names of the military appellate courts that were statutorily changed in 1994. See Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

Other, more preferable, means are available to address the proposed amendments' goals

Proposing such fundamental changes to the military justice system should be avoided if other less drastic means are available to achieve the same results. In fact, the proposed amendments' apparent objectives can be accomplished without risking the collateral negative consequences that these proposed amendments as drafted would create.

The proposed amendment to Article 6b concerning victims' access to court filings appears to be designed to address challenges that some SVCs/VLCs experienced in the early stages of those programs' existence. All of the Military Services have now taken steps to address those concerns. For example, the 2015 edition of the Uniform Rules of Practice for U.S. Navy-Marine Corps Trial Judiciary includes detailed guidance for the service of documents and information on victims' counsel. Those rules are supplemented by additional guidance provided by practice advisories issued to both Navy and Marine Corps judge advocates. The current version of the Uniform Rules of Practice Before Air Force Courts-Martial provides similar guidance for service of documents and information on victims' counsel in Air Force military justice proceedings. Through an October 1, 2014 policy memorandum, The Judge Advocate General of the Army provided guidance to Army staff judge advocates and prosecutors concerning the information they must provide to victims of alleged offenses and their counsel. Accordingly, the Services have already taken steps to ensure that victims and their counsel have access to relevant military justice documents. Additionally, the Department and the

Administration have proposed legislation that would provide greater access to court-martial filings. Section 1104 of the proposed Military Justice Act of 2016, which the Department transmitted to Congress on December 28, 2015, includes a requirement to apply the best civilian practices to facilitate public “access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.” That proposed legislation is now being considered by Congress. Section 1104 of the Department’s proposed bill appears *in haec verba* as section 7004 of the House Armed Services Committee (HASC) Military Personnel Subcommittee’s mark of the proposed National Defense Authorization Act for Fiscal Year 2017 (NDAA for FY17). That provision is a far better means to enhance victims’ access to relevant filings than the proposed amendments, which would create the significant adverse collateral consequences discussed above.

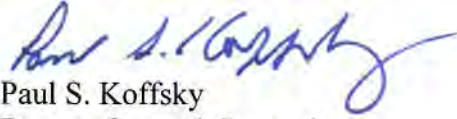
In a similar vein, the proposed amendments provide for victim involvement in sentence reassessment, which is a function that military appellate courts perform when some, but not all, findings of guilty are set aside on appeal and the sentence must be adjusted as a result. *See generally United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). Such reassessment is largely the result of the military’s unitary system of sentencing, in which a single sentence is adjudged for all of the offenses of which an accused is convicted. *See generally Jackson v. Taylor*, 353 U.S. 569, 570 n.1 (1957). The proposed Military Justice Act of 2016 would eliminate unitary sentencing in the military and instead adopt segmented sentencing, in which a separate period of confinement would be adjudged for each offense resulting in a finding of guilty. That reform is included as section 6701 of the HASC Military Personnel Subcommittee’s mark of the NDAA for FY17. This reform would eliminate the need for sentence reassessment concerning confinement, though sentence reassessment would still occur in some cases regarding either an adjudged punitive discharge (which would still be largely mandatory if the accused were convicted of a penetrative sexual assault) or a reduction in grade. Enacting the proposed Military Justice Act of 2016 – which would largely eliminate the need for sentence reassessment – would be a better means to address any problems with the current military appellate system.

Conclusion

Thank you again for the opportunity to address defects in the proposed amendments to Articles 6b and 70. I hope the above discussion demonstrates that the proposals should not be adopted in their present form. If the JPP believes that the proposals warrant further study, I respectfully suggest that the Department be given a sufficient period to examine the proposals in the depth that is warranted by their magnitude. While I have identified several negative collateral consequences above, the fundamental changes that the proposed amendments would enact may result in numerous additional collateral consequences that would require more in-depth study to identify. Alternatively – and preferably – the Department believes that the goals of the proposed amendments can be achieved through regulatory changes and pending legislative proposals that have already been thoroughly vetted initially by the Military Justice Review Group and then through DoD-wide coordination and inter-agency review before the Department formally forwarded them to Congress for further consideration.

Please let me know if I can provide any additional information that would be helpful to the Judicial Proceedings Panel as it considers the proposed amendments.

Sincerely,



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cc:

The Honorable Barbara Jones
Vice Admiral Patricia A. Tracey, USN (Ret.)
Professor Thomas W. Taylor
Mr. Victor Stone