

April 29, 2016

The Honorable Elizabeth Holtzman  
Chair, Judicial Proceedings Panel (JPP)  
One Liberty Center  
875 N. Randolph Street, Suite 150  
Arlington, VA 22203

Dear Madam Chair,

I am writing to express my strong concerns, and provide public comments, regarding the proposed amendments to Articles 70 and 6b of the Uniform Code of Military Justice (UCMJ) that address appellate rights of sexual assault victims. The Sexual Assault Victim Counsel (SVC) program managers collaboratively submitted these proposed amendments to the JPP. Stated succinctly, the proposed amendments, if implemented, go well beyond the original intent of Article 6b and would add requirements to the military justice system that do not exist in either the Federal or State criminal justice systems; such onerous, unwarranted requirements have not been imposed in the civilian sector for good reasons.

These requirements would be burdensome and in all likelihood would result in a legal morass during judicial proceedings (all levels of courts-martial and perhaps including summary courts-martial), administrative hearings, and subsequent case processing procedures. In addition, the proposed amendments seem to authorize legal representation, SVC and appellate victim's counsel, for *all* victims of criminal offenses (whether or not requested) through the court-martial appellate process. Essentially, the proposed language amends Article 6b, a UCMJ provision that is applicable to *all crime victims* and was intended to incorporate into the military justice system many rights provided to federal crime victims pursuant to the Crime Victims' Rights Act (18 U.S.C. § 1771).

I urge the JPP, at a minimum, to hear testimony from the Service TJAGs and the government and defense appellate divisions prior to moving forward with this proposal. The following sets forth some of the potential problems that may result if these amendments are implemented.

1. Article 70 proposed changes: This proposal sets forth a requirement for the Services to appoint appellate counsel for all victims of crimes even in cases when no request is made. This is a potentially burdensome requirement when you consider the sheer number of courts-martial cases reviewed by the Service courts, and the fact that many cases involve multiple victims. For example, one accused may be convicted of numerous specifications, each with different victims of various crimes. Additionally, this proposal seems to expand the SVC statutory authorization pursuant to 10 U.S.C. § 1044e, which limits SVC representation to victims of alleged sex-related offenses who are authorized legal assistance. For example, if imposed as written, this amendment would require the Services to provide "appellate victim's counsel" to a foreign national who is victimized by a pick pocket (i.e., larceny) when the accused's case is sent to the Service court for

review. If an accused writes 100 bad checks to various businesses and individuals, the legislation would require appointment of various conflict-free counsel for each “victim” of the bad check offense. Moreover, if the Article 70 proposal (along with the proposed Article 6b(e)(4)) is implemented, appellate divisions will be required to submit reply briefs to address, and Service courts will be required to consider, matters raised by victims’ appellate counsel.

2. Article 6b(a)(2) proposed changes: The proposed amendments require victims be afforded “[t]he right to . . . *all* pleadings filed by all parties”, including those filed in “*any* appellate matters” (emphasis added). These provisions are overly broad. As a former U.S. Army Court of Criminal Appeals Associate and then Senior Judge (for nearly six years), I participated in reviewing almost 2,000 cases. The majority of appellate issues raised by the appellate divisions in their pleadings did not involve victims’ rights or matters. Many issues raised on appeal related to the jurisdiction of the court-martial, speedy trial, non-victim related evidentiary rulings, unlawful command influence, and discovery questions, in addition to collateral attacks on the conviction, such as claims of ineffective assistance of counsel.

3. Article 6b(a)(4) proposed changes: The proposed amendments require victims be afforded the following:

a. “The right to be reasonably heard at . . . [*a*]ny and *all* appellate matters and *hearings arising out of the offense.*” (emphasis added). Again, this proposed provision is overly broad. Service appellate courts often return cases for post-trial hearings (pursuant to *United States v. DuBay*, 17 U.S.C.MA 147, 37 CMR 411 (1967) (evidentiary hearings)) in order for a military trial judge to address (and obtain further information on the record regarding) various appellate issues such as ineffective assistance of counsel, unlawful command influence, prosecutorial misconduct, and potential attorney ethical violations. Other hearings “arising out of the offense” could include hearings (although rare) conducted by Service Boards for Correction of Military Records, which often times do not occur until many years after the offense. Also, it is likely that if victims have a reasonable right to be heard, they will have a right to travel expenses and possibly to call witnesses.

b. “The right to be reasonably heard at . . . [*a*]ny and *all* administrative boards and other *adverse* administrative *hearings arising out of the offense*” (emphasis added). This proposal provision could require the Services to give all crime victims a reasonable opportunity to be heard at a myriad of boards and hearings. For example, as written it seems that all crime victims would be provided a right to be reasonably heard as part of administrative reduction and separation boards, Rule for Court-Martial (R.C.M.) 303 commander’s inquiries, and possibly other formal or informal investigations pursuant to Service regulations such as Army Regulation 15-6 and line of duty investigations. At a minimum, I recommend that the language in this provision be clarified to describe what is included in the definition of “any and all” boards and adverse hearings.

Furthermore, it is unclear whether this proposed provision is broad enough to include granting victims the opportunity to address commanders conducting nonjudicial Article 15 hearings<sup>1</sup> and summary courts-martial hearing officers.<sup>2</sup> Although it may not be the JPP's intent, Congressional proponents of this provision may urge an expansion to include such hearings. Arguably, a summary courts-martial would fall under Article 6b(a)(2)(C) as a court-martial, but if 6b(a)(4) is expanded to include Article 15 and summary courts-martial hearings, both the accuseds and victims might be adversely impacted.<sup>3</sup> Many cases involving minor criminal offenses (sometimes involving multiple victims) are disposed of by Article 15 punishment or in a summary court-martial proceeding.<sup>4</sup>

The potential issues I have enumerated above represent a few initial thoughts I have on this proposal. Proposed amendments such as these that may involve additional due process implications for alleged offenders, as well as expenditure of extensive military resources, should be vetted with all potential stakeholders prior to forwarding as a recommended proposal from the JPP.

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<sup>1</sup> Pursuant to Article 15, UCMJ, 10 U.S.C. § 815, a commander presides over a hearing after which he may impose minor punishments on soldiers for UCMJ violations, without trying them by court-martial, unless the accused turns down the Article 15 and demands trial by a court-martial. Because Article 15 nonjudicial punishment does not afford the accused all the procedural protections of a court-martial, the accused generally must consent. Under the summarized Article 15 procedure, the accused does not have a right to counsel, and under the formal Article 15 procedure, the accused only has a right to consult with counsel before the Article 15 hearing.

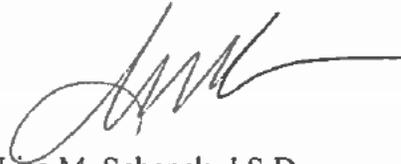
<sup>2</sup> A summary court-martial is a tribunal, authorized by Article 20, UCMJ consisting of one officer presiding who hears the evidence, without a military judge or prosecutor. See R.C.M. 1301. The accused may refuse trial by summary court-martial and demand trial by a higher (special or general) court-martial. Findings of guilt are not considered criminal convictions and the accused is not represented by counsel. See *Middendorf v. Henry*, 425 U.S. 25 (1973).

<sup>3</sup> For example, if a victim decides to "be reasonably heard" an accused may be inclined to demand trial by court-martial to ensure the case is heard before a fair and impartial military judge. The victim will then have to decide whether to testify at the Article 32, UCMJ hearing and will be required to testify at trial. There are also serious risks for the accused in making such a demand as well. In *United States v. Bass*, 11 M.J. 545 (A.C.M.R. 1981), for example, the accused refused nonjudicial punishment and demanded trial by court-martial, a court-martial that found him guilty and sentenced him to 8 years of confinement and a dishonorable discharge, a far more severe punishment than any Article 15 punishment could have been.

<sup>4</sup> In Fiscal Year 2015, there were 148 summary courts-martial and 33,708 Article 15 nonjudicial punishments imposed in the Army. See Uniform Code of Military Justice Committee, Annual Report for the period October 1, 2014 to September 30, 2015, <http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf>.

Thank you for considering this public comment. Please let me know if I may provide any further assistance.

Sincerely,



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