Additional Comments Following Friday's Panel from Major Meredith Steer:

During the Appellate Government Divisions' Perspective, I believe VADM(R) Tracey asked whether "permitting victims to file would burden the government." I would like to offer some thoughts on this question. First, in the Air Force Appellate Government Division, we have encouraged the SVCs to file *amicus* briefs on behalf of their clients. As explained by Mr. Bruce, over the last year, our Division took on a fight to encourage the Air Force Court of Criminal Appeals to reconsider its interpretation of RCM 1103A. Our position is that when a trial judge conducts an *in camera* review of private/privileged material (most often mental health records of a victim pursuant to MRE 513), but then concludes the records contain irrelevant information and declines to release those records to the trial parties, that Appellate Defense Counsel should not be looking at the records. Our position is that the Appellate Judges should first conduct their own *in camera* review of the records. Certainly, it does not burden Appellate Government to permit a victim to be heard on the issue of breaking the seal of his or her mental health records. Although, experience has shown that *amicus* briefs are usually accepted by Appellate courts when they offer a different viewpoint or new information. Our Government briefs thoroughly covered and presented the legal interests of the victim (especially with regard to sealed reords), so if a court declined to accept an *amicus* brief from a victim, it is most likely because the Government has already advanced the arguments later offered by a victim. Properly drafted *amicus* briefs from victims have been accepted by both military appellate courts.

From a larger, macro perspective, we have concerns that permitting a victim (and as Section 547 is drafted, this is any victim of a crime) to file as a real party in interest would burden the Government. Particularly since, as currently drafted, I see ambiguity in what matters can be appealed under Section 547 that would likely lead to its own appellate litigation. Certainly, we see the very broad, third party-like appellate rights proposed by the service SVCs draft Article 6b as creating a potential burden. While the general concept of such broad protections is commendable, the ripple effects and potential adverse consequences have not been given appropriate consideration. Second and third order effects should be considered, and such broad and unprecedented changes should be taken cautiously and deliberately in a manner conducive to change that will not jeopardize courts-martial convictions and sentences. For example, we echo the valid issue of timeliness in post-trial review expressed by the Military Judge and Appellate Defense panelists. Timeliness in post-trial processing receives far greater scrutiny in the military than the federal criminal justice system. (See US v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)). If a third party is given the ability to file appellate pleadings, any delay caused by the third party victim will be attributed to the Government. This is a current issue at the trial level with the involvement of SVCs—SVC unavailability and delay is considered a Government delay. Lack of timeliness has jurisdictional implications. It also can result in violating an Appellant's due process rights or prejudice to an Appellant, which means that the reviewing courts can provide relief in the form of setting aside convictions, reducing confinement time, setting aside punitive discharges, or other relief.

As discussed by the various panelists and panel members, our efforts to protect sealed records have been met with the plain language of RCM 1103A. Mr. Bruce presented our

proposed change to the rule. Mr. Mizer, of the Air Force Appellate Defense Division, suggested a different proposal: that Appellate Government counsel should not be permitted to review sealed matters and just the Appellate Defense counsel would have access to sealed records. Such a proposal does not provide a victim with the protection that we believe they seek. It is also wholly unworkable from the perspective that it would potentially create an avenue for *ex parte* communication with the appellate judges. Moreover, due process is not just a right of the Accused.

Finally, the representative from the Coast Guard during the Government Appellate panel raised a concern that the proposed language of Section 547 will actually undercut the current protections of Article 6b and a victim's right to interlocutory appeal. We agree with her concern. By granting some sort of unprecedented party status and "remedy" on direct appeal, Section 547 will undermine and potentially defeat a victim's ability to pursue an interlocutory appeal presently authorized by Article 6b.

In closing, I appreciate the opportunity to provide my personal perspective and opinions as a practicing appellate government counsel, understanding that I may not be aware of all of the facts and moving pieces that could make the official position of the Air Force very different from mine. We want to protect victims and ensure that they are heard. We applaud the advances that have been made in doing so through the SVC programs. We are currently working through the process as it relates to issues on appeal and are wary of creating more problems than those we are trying to solve. We caution that making a change in the appellate process can impact cases for years and in the worst, but very possible case, a conviction for a rapist could be set aside without a possibility of retrial. This is an area of the law where careful consideration and study is necessary. Thank you.