

JUDICIAL PROCEEDINGS PANEL

REPORT ON
RESTITUTION AND
COMPENSATION
FOR MILITARY ADULT
SEXUAL ASSAULT CRIMES



February 2016

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*Report of the Judicial Proceedings
Since Fiscal Year 2012 Amendments Panel*

**Restitution and Compensation for
Military Adult Sexual Assault Crimes**

February 2016



JUDICIAL PROCEEDINGS PANEL

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Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit this report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) on additional duties assigned to the JPP in section 1731 of the National Defense Authorization Act for Fiscal Year 2014. This report summarizes the JPP's assessments regarding the adequacy of the provision of compensation and restitution for victims of sexual assault crimes committed by military Service personnel. Included in this report are six recommendations to help simplify and accelerate the financial recovery of victims from sexual assault crimes committed by Service members.

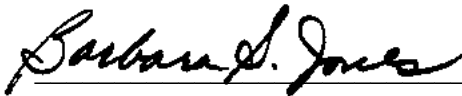
To gather information for this report, the JPP held public meetings to hear from civilian and military experts and practitioners. We also researched publicly available information and reviewed information from the Department of Defense, the Military Services, and victim advocacy organizations. The JPP expresses sincere appreciation to everyone who contributed to this report.

The JPP looks forward to continuing our review of military judicial proceedings for sexual assault crimes and addressing other topics in future reports.

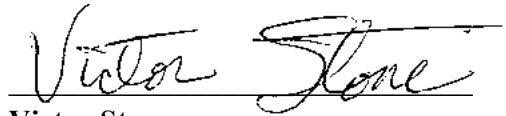
Respectfully submitted,



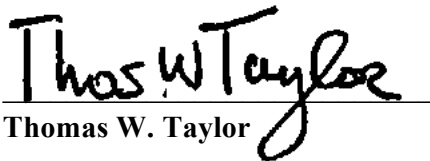
Honorable Elizabeth Holtzman, Chair



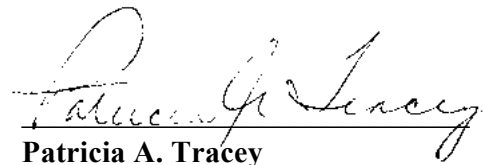
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Executive Summary

RESTITUTION AND COMPENSTATION FOR VICTIMS OF ADULT SEXUAL ASSAULT CRIMES

Victims of sexual assault can be saddled with serious and long-term expenses incurred as a result of the crime. The expenses run the gamut from forensic testing to long-term mental health care, from a broken or lost cell phone to relocation. Fortunately, for victims who are active duty Service members or dependents of active duty Service members, these expenses are generally covered entirely by health insurance or DoD programs and services. However, a civilian assaulted by a Service member is left to his or her own devices. As a last resort, a civilian victim may access a state crime victims compensation program, but the amount recovered and the entitlement to funds vary from state to state and many programs do not adequately serve victims of sexual assault committed by Service members.

In the Fiscal Year 2014 National Defense Authorization Act (NDAA), Congress tasked the JPP to review mechanisms for providing compensation and restitution to victims of sexual assault crimes committed by Service members. Specifically, Congress required the JPP to examine (1) requiring convicted Service members to provide restitution to victims, (2) expanding Article 139 of the UCMJ, and (3) providing incarcerated Service members' forfeited wages to victims. The JPP heard from civilian and military experts and practitioners; reviewed information received from DoD, the military Services, and victim advocacy organizations; and reviewed publicly available information to complete its assessment and arrive at its recommendations.

The JPP carefully considered the three options tasked by Congress for expanding compensation and restitution. This report explains why the JPP believes they should not be adopted and why DoD can best serve the financial needs of sexual assault victims by establishing a new, uniform DoD compensation program that provides benefits without regard to the location of the offense or the victim's state of residence. The JPP recommends this new program be made available to victims, regardless of military status, who were assaulted after October 2005, when DoD's restricted reporting requirement became available. While claimants should be required to provide sufficient documentation that the crime occurred and that they experienced out-of-pocket financial losses as a result, there should be no requirement for claimants to have reported the crime to law enforcement. The program should cover out-of-pocket losses of the following types: medical and mental health expenses, both past and future; lost income; travel/relocation expenses; and personal property loss/damage. This report provides the JPP's detailed recommendations on funding of the program, eligibility of claimants, methodology for calculating awards, and proof and due process requirements.

The JPP hopes that this review and these recommendations will help simplify and accelerate the financial recovery of victims from sexual assault crimes committed by Service members.

Summary of JPP Recommendations on Restitution and Compensation*

Recommendation 12: The Department of Defense establish a new, uniform program that provides compensation for unreimbursed out-of-pocket expenses of victims of sexual assault crimes committed by Service members.

- All victims of sexual assault crimes committed by military members should have convenient access to a compensation system that is fair and efficient, providing uniform benefits regardless of the location of the offense or the victim's state of residence.
- Coverage for the financial needs of sexual assault victims may depend on the status of the victim; active duty Service members and dependents of active duty Service members receive medical care and other benefits through DoD. Civilian victims who do not receive DoD-provided care or benefits are relegated to state compensation programs that vary in their requirements and policies.
- A DoD compensation program for sexual assault victims should cover out-of-pocket losses of the following types: medical and mental health expenses, both past and future; lost income; travel expenses; relocation costs; and damage to, or loss of, personal property.
- The Department of Defense should structure its new program to replicate the best practices of state crime victim compensation programs, some of which are described in part V of this report.
- Congress tasked the JPP to review compensation and restitution for crimes committed under the UCMJ; therefore, it was beyond the Panel's scope to consider whether a DoD program should extend coverage to additional circumstances, such as cases where a victim is sexually assaulted on a military installation by a person not subject to the UCMJ.

Recommendation 13: Congress not amend the Uniform Code of Military Justice to add restitution as an authorized punishment that may be adjudged at courts-martial.

- Numerous changes to the Uniform Code of Military Justice and *Manual for Courts-Martial* would be required to incorporate restitution as an authorized punishment, and instituting them would risk unintended consequences with potentially far-reaching effects on broader processes of military justice.
- The number of cases in which restitution would be desired, appropriate, and actually obtained is relatively small, and the financial needs of these victims would be equally well or better served by establishing a new uniform DoD compensation program.

* JPP Recommendations 1–11 are included in the JUDICIAL PROCEEDINGS PANEL INITIAL REPORT 11 (Feb. 2015), available at http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf.

Recommendation 14: The military Services provide recurring training to trial practitioners and victim assistance personnel on the availability and use of restitution in pretrial agreements between the government and the accused.

- Under current rules for courts-martial, restitution may be considered in pretrial negotiations, but this option is rarely used in practice.

Recommendation 15: The President enact the Department of Defense's recently proposed executive order to modify Rule for Courts-Martial 705(d)(3) to provide victims the right to be heard before a convening authority enters into a pretrial agreement.

- Whether to include restitution in a pretrial agreement is within the discretion of the convening authority. Army policy requires convening authorities to consider whether to include restitution in a pretrial agreement before signing it, and the other Services should consider adopting the same policy.
- There is currently no requirement in any of the military Services that a victim or victim's counsel provide input regarding a pretrial agreement, and victims are sometimes not advised of a pretrial agreement until after it has been signed.

Recommendation 16: Congress not amend the Uniform Code of Military Justice to direct that the forfeited wages of incarcerated members of the Armed Forces be used to pay compensation to victims of sexual assault crimes committed by Service members.

- Modifying the law regarding distribution of forfeitures could curtail important benefits to current recipients of funds from courts-martial forfeitures, which include the Armed Forces Retirement Home and dependents of convicted Service members.
- Modifying forfeitures could unnecessarily complicate or impede operation of a uniform DoD compensation program.

Recommendation 17: Congress not amend Article 139 of the Uniform Code of Military Justice to include bodily harm among the injuries meriting compensation for redress.

- Assessing physical or mental injuries would often require more complex investigations than those currently conducted under Article 139 for property losses.
- Commander-directed Article 139 investigations into physical or mental injuries for bodily injury claims could compete or even conflict with criminal investigations of sexual assault reports.
- The broader financial needs of sexual assault victims would be better served through a uniform DoD compensation program.

Introduction

A. BACKGROUND AND CONGRESSIONAL TASKING

Congress directed the Judicial Proceedings Panel (JPP) “to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice [UCMJ] involving adult sexual assault and related offenses” since 2012, when Article 120 of the UCMJ was amended, “for the purpose of developing recommendations for improvements to such proceedings.”¹ The Secretary of Defense appointed five members to the JPP in June 2014, and this Panel held its first meeting in August 2014. The JPP submitted its first report in February 2015 addressing the following topics:

- the implementation and effects of the 2012 amendments to Article 120 of the UCMJ;
- the implementation and effects of special victims’ counsel programs by DoD and the military Services;
- victim privacy issues in military sexual assault cases; and
- the rights and needs of sexual assault victims to receive case information and participate in the military judicial process.²

This follow-on report focuses on the availability of restitution and compensation for victims of Article 120 offenses. Section 1735 of the National Defense Authorization Act for Fiscal Year 2014 tasked the JPP to “conduct [a]n assessment of the adequacy of the provision of compensation and restitution for victims of offenses under [the UCMJ], and develop recommendations on expanding such compensation and restitution.”³ In particular, Section 1735 directed the JPP to consider the following three options for expanding compensation and restitution:

- (i) providing the forfeited wages of incarcerated Service members to victims of offenses as compensation;
- (ii) including bodily harm among the injuries meriting compensation for redress under Article 139 of the UCMJ (Redress of injuries to property); and
- (iii) requiring restitution by Service members to victims of their offenses upon the direction of a court-martial.⁴

1 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 [hereinafter FY13 NDAA], § 576(a)(2), 126 Stat. 1632 (2013).

2 See JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT (Feb. 2015) [hereinafter JPP INITIAL REPORT], available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf.

3 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1735(b)(1)(D), 127 Stat. 672 (2013).

4 FY14 NDAA, *supra* note 3, at § 1735(b)(1)(D).

These issues were the focus of the JPP’s public meetings in March and June 2015, where the Panel heard testimony from 28 witnesses. The JPP also requested and analyzed information from the DoD, the military Services, and victim advocacy organizations. In addition, the JPP reviewed publicly available information and conducted legal research and analysis of relevant topics, in accordance with the Federal Advisory Committee Act of 1972.⁵ The information received and considered by the JPP is available on its website (<http://jpp.whs.mil>). The JPP is grateful to all presenters and to others who provided information and assistance as part of this review and assessment.

Although not specifically expressed, the JPP’s overarching mandate is to assess military judicial proceedings in cases of adult sexual assault.⁶ Therefore, the Panel’s assessment and recommendations focus on the availability and utility of restitution and compensation for victims of adult sexual assault crimes under the UCMJ.⁷

B. FINANCIAL NEEDS AND CHALLENGES OF SEXUAL ASSAULT VICTIMS

Studies indicate that victims of sexual assault regard financial assistance as critical to their recovery.⁸ In the words of one scholar on sexual violence, restoring their financial losses resulting from abuse “can make a decided difference in victims’ abilities to recover.”⁹

However, victims are often deterred from seeking reimbursement by significant barriers.¹⁰ One problem is that sexual assault, in comparison with other forms of violent crime, is chronically underreported.¹¹ Victims frequently fear reprisal, especially when they previously knew their offender (as is often the case).¹² Moreover, those victims who do not file a report to the police, or disclose the assault to a health care or other professional, generally are not eligible for state crime victim compensation funds; see part V(D)(3) and (4), below.

The most substantial expenses for sexual assault victims usually are related to health care.¹³ Victims may require treatment for physical injury as well as psychological trauma, which frequently includes

5 5 U.S.C. App. 2 (2012); *see also* 41 C.F.R. § 102-3.50(a).

6 *See* FY13 NDAA, *supra* note 1, at § 576(a)(2).

7 *Transcript of JPP Public Meeting 7* (Mar. 13, 2015) (introductory remarks of JPP Acting Chair). All transcripts of JPP public meetings are available on the JPP’s website at <http://jpp.whs.mil/>.

8 *Transcript of JPP Public Meeting 51* (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law); Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 226 & n.298 (2004).

9 Goldscheid, *supra* note 8, at 228.

10 *See, e.g.*, 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, 244, 263 (2011); *Transcript of JPP Public Meeting 119–20* (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law).

11 REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 59 (June 2014) [hereinafter RSP REPORT], available at http://responsesystemspanel.whs.mil/public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf; *see also Transcript of JPP Public Meeting 148* (Mar. 13, 2015) (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board) (stating that approximately 40% of sexual assault victims served by NVRDC do not report incident to law enforcement).

12 RSP REPORT, *supra* note 11, at 59–60.

13 *Transcript of JPP Public Meeting 54* (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law).

post-traumatic stress, depression, and abuse of alcohol or drugs.¹⁴ These conditions, in addition to the shorter-term shock, grief, and sense of loss that are commonly associated with violent crime, often require counseling.¹⁵ Medical or mental health care sometimes must continue for an extended period—for example, when the victim contracts a sexually transmitted infection or experiences post-traumatic stress disorder (PTSD).¹⁶ Sexual assault victims who have sought and received treatment incur medical costs that have been estimated to average more than \$2,000 per incident,¹⁷ and those who lack insurance are often unable to pay for needed services.¹⁸

Victims may also be saddled with other serious and long-term expenses. Sometimes they must take leave without pay while coping with the psychological trauma following a sexual assault, and many lose their jobs altogether¹⁹—especially in cases in which the perpetrator is a co-worker.²⁰ When lost productivity and pain and suffering are included, the total cost to a survivor of a single sexual assault offense may range between \$87,000 and \$110,000.²¹

When a spouse or partner is the offender, victims often incur many additional costs. Because they frequently find it necessary to relocate,²² they may have to provide new security and utility deposits, as well as to move or purchase furniture and other household goods.²³ Such costs may be considerable,

14 *Transcript of JPP Public Meeting 54* (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law); *id.* at 62 (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law); *id.* at 153 (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board); U.S. Dep’t of Veterans Affairs, “Military Sexual Trauma” (Oct. 2014) [hereinafter VA MST Fact Sheet], available at http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf; *The Relationships Between Military Sexual Assault, Post-Traumatic Stress Disorder and Suicide, and on Department of Defense and Department of Veterans Affairs Medical Treatment and Management of Victims of Sexual Trauma*, Hearing Before the Senate Armed Services Personnel Subcommittee, 113th Cong. 1, 55 (2014) [hereinafter SASC Testimony] (testimony of Dr. Margret E. Bell, Director for Education and Training, National Military Sexual Trauma Support Team, Department of Veterans Affairs); *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 1* (submitted Mar. 11, 2015). All written statements submitted to the JPP on this topic can be found on its website at <http://jpp.whs.mil/index.php/staff-2/topic-comprest>.

15 Goldscheid, *supra* note 8, at 173.

16 SASC Testimony, *supra* note 14, at 60 (testimony of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs).

17 *Written Statement of Professor Julie Goldscheid, CUNY School of Law, to JPP 1 & n.2* (Mar. 18, 2015) (citing recent studies by Centers for Disease Control and the White House Council on Women and Girls); *Transcript of JPP Public Meeting 54*, 86 (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law).

18 Rutledge, *supra* note 10, at 254.

19 *Transcript of JPP Public Meeting 55* (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law); *Written Statement of Professor Julie Goldscheid, CUNY School of Law, to JPP 2* (Mar. 18, 2015).

20 *Transcript of JPP Public Meeting 153* (Mar. 13, 2015) (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board).

21 *Written Statement of Professor Julie Goldscheid, CUNY School of Law, to JPP 1 & n.3* (Mar. 18, 2015); *Transcript of JPP Public Meeting 54*, 86 (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law); *id.* at 156 (testimony of Ms. Lindsey Silverberg, Outreach and Advocacy Supervisor, Network for Victim Recovery of DC (NVRDC)).

22 *Transcript of JPP Public Meeting 62* (Mar. 13, 2015) (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law); *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 2*; Rutledge, *supra* note 10, at 223; see also *Transcript of JPP Public Meeting 139* (Mar. 13, 2015) (testimony of Ms. Laura Banks Reed, Director, D.C. Superior Court Crime Victims Compensation Program) (“If the sexual assault occurs in the victim’s home, it becomes a crime scene. That is not a place that they want to return to and in some instances even can return to.”).

23 Rutledge, *supra* note 10, at 227–28.

since victims who leave their home often take only the bare essentials with them.²⁴ These victims suddenly find themselves bearing sole and immediate responsibility for meeting their own basic needs, as well as those of their children.²⁵ In addition, they often face significant legal fees in connection with divorce and/or child custody proceedings.²⁶

If the spouse or partner perpetrator is a Service member who is prosecuted and convicted at court-martial, dependent victims frequently lose financial support, housing, and medical benefits.²⁷ For more information on the financial consequences a court-martial conviction has on the accused and his or her dependents, see part III(B), below.

More generally, as explained throughout this report, the status of victims of sexual assault offenses committed by Service members affects their access to financial assistance. The JPP identified three main categories of victims in sexual assaults committed by military personnel: active duty Service members, dependents of an active duty Service member, and civilians. Each category has unique gaps in coverage for their financial losses, as summarized in the chart below.

24 *Id.* at 228 n.31.

25 *Id.* at 228.

26 *Id.*

27 *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 2.*

Chart: Victims' Financial Needs Resulting from Sexual Assault Crimes

	Coverage for ACTIVE DUTY Victims	Coverage for DEPENDENT Victims	Coverage for CIVILIAN Victims
MEDICAL/MENTAL HEALTH CARE (e.g., SAFE exam, ²⁸ testing for sexually transmitted infections (STIs), prophylactic medications, psychotherapy, psychiatric medications, treatment for drug/alcohol abuse)	Total (TRICARE ²⁹)	Total (TRICARE)	Emergency care only ^{*/**}
FUTURE MEDICAL/MENTAL HEALTH CARE (e.g., treatment for late-onset PTSD)	Possible; [*] see part V(A), below (TRICARE; VA)	Possible; [*] see part V(A), below (TRICARE)	None [*]
LOST INCOME	Total (Service pay)	Partial ^{**} (TCAD, ³⁰ court-martial forfeitures)	None ^{**}
TRAVEL/RELOCATION COSTS (e.g., transportation of victim, moving expenses, security deposit, attendance at court-martial and other hearings)	Possible ^{**} (DoD expedited transfer)	Possible ^{**} (DoD personal safety move)	None ^{**} (except for attendance at judicial proceedings)
PERSONAL PROPERTY LOSS/DAMAGE (e.g., cell phones, computers, clothing)	Possible (Article 139; PCA ³¹)	Possible (Article 139; PCA if DoD employee)	Possible (Article 139; PCA if DoD employee)
PAIN AND SUFFERING	None	None	Possible (lawsuit against Service member in civilian court)

* compensation may be available from private health insurer

** compensation may be available from state crime victim compensation (CVC) program

28 Sexual assault forensic examination; see part V(A)(1), *infra*.

29 TRICARE health care program; see part V(A), *infra*.

30 Transitional Compensation for Abused Dependents; see part V(C), *infra*.

31 Military Personnel and Civilian Employees Claims Act; see part IV(C), *infra*.



Provisions of Restitution to Victims of Offenses Committed by Service Members

A. BACKGROUND

1. Theories of Restitution and Its Distinction from Compensation

Black's Law Dictionary defines restitution as reimbursement for a crime victim's out-of-pocket expenses, "paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."³² Whereas restitution is a court-ordered punishment paid by an individual convicted of a crime, compensation is paid by the government, irrespective of a conviction.³³ Restitution and compensation "share a dual role of reimbursing victims for verifiable expenses."³⁴ But as the nexus between the payment and the crime becomes more attenuated, "compensation" becomes the more accurate term.³⁵

Civilian courts have traditionally used restitution as a remedy for property crimes "to financially restore a person economically damaged by another's actions, thereby preventing the unintended beneficiary from being unjustly enriched at the aggrieved party's expense."³⁶ The military justice system has taken the same approach.³⁷

A restitution expert told the JPP that restitution "is not principally a punishment, it's not a substitute or an alternative to a fine or incarceration. Its goal is to compensate the victim."³⁸ She elaborated, quoting a statement found in several U.S. Courts of Appeals opinions: "It is essentially a civil remedy created by Congress and incorporated in criminal proceedings for reasons of economy and

32 National Crime Victim Law Institute (NCVLI), *Fundamentals of Victims' Rights: A Victim's Right to Restitution*, VICTIM LAW BULL., Nov. 2011, at 1 & n.1 (quoting Black's Law Dictionary); Coast Guard's Response to JPP Request for Information 53 (Nov. 6, 2014) (same); see also Rutledge, *supra* note 10, at 256.

33 See, e.g., *Transcript of JPP Public Meeting* 106 (Mar. 13, 2015) (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law); *id.* at 202 (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer in Charge, Trial Counsel Assistance Program); Rutledge, *supra* note 10, at 256–57.

34 *Transcript of JPP Public Meeting* 7 (Mar. 13, 2015) (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law).

35 *Transcript of JPP Public Meeting* 76 (Mar. 13, 2015) (testimony of Professor Courtney E. Lollar, University of Kentucky College of Law); Courtney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 100–01 & n.19 (2014).

36 Lollar, *supra* note 35, at 100; *Transcript of JPP Public Meeting* 75 (Mar. 13, 2015) (testimony of Professor Courtney E. Lollar, University of Kentucky College of Law) (noting that restitution historically has been conceptualized as disgorgement of unlawful gain).

37 *Transcript of JPP Public Meeting* 76–77, 92 (Mar. 13, 2015) (testimony of Professor Courtney E. Lollar, University of Kentucky College of Law).

38 *Transcript of JPP Public Meeting* 270 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime).

practicality.”³⁹ In other words, restitution spares the victim of a crime the time and expense of hiring an attorney to bring a separate civil suit for damages.⁴⁰

Rather than being a form of punitive damages directed at the offender, another expert explained to the JPP, restitution seeks to reimburse a victim for expenses paid out of pocket.⁴¹ A U.S. Court of Appeals decision noted that the “primary and overarching goal” of restitution in federal court is “to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being.”⁴² Whether restitution is viewed as punitive or as a civil remedy is highly significant in the context of military justice, as explained in part II(B)(1), below (discussing Rule for Courts-Martial 201).

2. Restitution in Civilian Courts

Restitution is available as a court-ordered remedy in every state.⁴³ Although their specific wording varies, most state restitution statutes allow for the recovery of a broad range of losses.⁴⁴ Many cover unusual expenses such as the purchase of a guard dog, the installation of a fence, or enrollment in self-defense courses.⁴⁵

Restitution is also available as a court-ordered remedy in the federal court system. Under the Mandatory Victim Restitution Act (MVRA), federal judges must award restitution for crimes of violence as well as property crimes.⁴⁶ Addressing a broad range of losses,⁴⁷ it is ordered as part of the sentencing proceedings. When a case falls within the scope of the MVRA, the court orders the probation officer to obtain and incorporate in the presentence report “information sufficient for the court to exercise its discretion in fashioning a restitution order,” including, “to the extent practicable, a complete accounting of the losses to each victim.”⁴⁸ Victims may also choose to provide their own

39 *Transcript of JPP Public Meeting 270* (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime); e.g., *United States v. Caruth*, 418 F.3d 900, 904 (8th Cir. 2005).

40 *Transcript of JPP Public Meeting 270* (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime).

41 *Transcript of JPP Public Meeting 65* (Mar. 13, 2015) (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law) (noting that restitution is “not intended to be a form of punitive damages”); *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 4* (describing restitution as “an effort to restore a victim financially for financial losses experienced”).

42 NCVLI, *supra* note 32, at 2 (quoting *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004)).

43 *Transcript of JPP Public Meeting 270* (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime); see also NCVLI, *supra* note 32, at 2 & n.2 (collecting state restitution statutes). In Texas and Michigan, restitution is now a constitutional right. Rutledge, *supra* note 10, at 258 & n.315.

44 NCVLI, *supra* note 32, at 3.

45 NCVLI, *supra* note 32, at 3 & n.3 (collecting cases).

46 18 U.S.C. § 3663A(c)(1)(A); *Transcript of JPP Public Meeting 270* (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime).

47 These include the cost of necessary medical and related professional services, the cost of necessary physical and occupational therapy and rehabilitation, and “lost income and necessary child care, transportation, and other expenses incurred during [the victim’s] participation in the investigation or prosecution of the offense or attendance at court proceedings related to the offense.” 18 U.S.C. § 3663A(b).

48 18 U.S.C. § 3664(a), (e). The defendant must also file an affidavit “fully describing [his or her] financial resources,” “including a complete listing of all assets owned or controlled” at the time of arrest. 18 U.S.C. § 3664(d)(3).

statement of losses.⁴⁹ The burden of demonstrating the amount of a victim's loss is on the government, and any disputes are resolved by the court, using a "preponderance of the evidence" standard.⁵⁰

This mandatory restitution system does not take into account the defendant's circumstances.⁵¹ In the words of one scholar, the judge must order the defendant to pay whatever is determined to be the "full amount" of restitution, even if the defendant "has no income or ability to pay, and it takes her the remainder of her life to do so."⁵² Owing to this "lack of relationship between the amount ordered and its corresponding collectability," only 5% of restitution owed to non-government victims is now being collected.⁵³ In practice, restitution generally remains unpaid, and victims are left wanting.⁵⁴ As a result, one restitution expert told the JPP, victim satisfaction has decreased: "[R]ather than feeling like the system is more responsive to them now because their views are being taken into consideration, they're feeling like they're being promised something that is not realistic."⁵⁵

To enforce restitution, federal judges "have authority to revoke probation or supervised release and impose a prison sentence if the offender 'willfully' refuses to pay restitution or fails to make 'sufficient bona fide efforts legally to acquire the resources' to pay off the fine."⁵⁶ Convicted civilian defendants regularly suffer such revocation.⁵⁷ If a defendant knowingly fails to pay restitution, he or she may be subject to any sentence that might originally have been imposed.⁵⁸

The Crime Victims' Rights Act (CVRA), enacted in 2004, provides victims "the right to full and timely restitution as provided in law" and requires courts to ensure that victims are afforded this right.⁵⁹ In 2013, Congress enacted Article 6b of the UCMJ, making clear that the CVRA applies to crime victims in the military justice process, including the "right to receive restitution as provided in law."⁶⁰

49 18 U.S.C. § 3664(d)(2)(A)(vi).

50 18 U.S.C. § 3664(e).

51 The judge must order the defendant to pay restitution "to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A).

52 Lollar, *supra* note 35, at 127.

53 Lollar, *supra* note 35, at 126 n.124 (quoting Mary Beth Buchanan, Director, Executive Office of U.S. Attorneys, U.S. Dep't of Justice); *Transcript of JPP Public Meeting* 69–70 (Mar. 13, 2015) (testimony of Professor Cortney E. Lollar, University of Kentucky College of Law) (noting that criminal debt from unpaid restitution fees rose from \$6 billion to \$64 billion in the first 14 years of mandatory restitution).

54 *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 4* (suggesting defendants' indigence is "one of the primary reasons restitution orders have been unsuccessful"); Lollar, *supra* note 35, at 124–25 (noting difficulty of finding employment, as well as maintaining current employment, following a criminal conviction).

55 *Transcript of JPP Public Meeting* 70 (Mar. 13, 2015) (testimony of Professor Cortney E. Lollar, University of Kentucky College of Law); accord Lollar, *supra* note 35, at 126 n.124 ("The result of so much unpaid restitution is that many victims end up feeling more disempowered and disillusioned with the criminal justice system than they would if they were given a realistic sense of how restitution works in practice.").

56 Lollar, *supra* note 35, at 124 & n.111 (quoting *Bearden v. Georgia*, 461 U.S. 660, 672 (1983)); see also 18 U.S.C. § 3664(m) (providing for enforcement of restitution orders).

57 Lollar, *supra* note 35, at 124 & n.111.

58 18 U.S.C. § 3614(a).

59 18 U.S.C. § 3771(a)(6), (b)(1).

60 FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

Nevertheless, military judges have no current authority to order restitution as a court-martial punishment.⁶¹ In the military justice system, restitution is available only in the limited ways described below.

B. RESTITUTION MECHANISMS UNDER THE UCMJ AND THEIR CURRENT AVAILABILITY TO SEXUAL ASSAULT VICTIMS

1. Restitution in Pretrial Agreements

Rule for Courts-Martial (R.C.M.) 201 provides that “[t]he jurisdiction of courts-martial is entirely penal or disciplinary.”⁶² However, under R.C.M. 705(c)(2)(C), trial counsel—as prosecutors are called in the military justice system—may seek, as a term of a pretrial agreement (PTA), the accused’s “promise to provide restitution.”⁶³ According to one expert, incorporating an agreement in a PTA is the best way under the present system for a victim to get restitution, particularly when its payment is required before trial.⁶⁴ Should the accused fail to pay restitution in accordance with the PTA, he or she would receive the sentence as adjudged, because the government would no longer be bound to the agreed-to cap.⁶⁵ Scholarship reviewed by the JPP indicates that military appellate courts have consistently enforced restitution provisions in PTAs.⁶⁶

The Services do not currently track the use of restitution in PTAs: the Navy, Marine Corps, and Coast Guard reported to the JPP that they were not aware of its employment in any recent Article 120 case,⁶⁷

61 See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) [hereinafter MCM], Rule for Courts-Martial [hereinafter R.C.M.] 1003(b). Rule 1003 allows the following authorized punishments: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, a punitive separation, and death. *Id.*

62 MCM, *supra* note 61, R.C.M. 201(a)(1). The drafters’ discussion of this provision adds: “A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property.” Accordingly, one JPP presenter testified before the JPP, military judges arguably lack authority to order restitution as part of a pretrial agreement. *Transcript of JPP Public Meeting* 307 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

63 *Transcript of JPP Public Meeting* 19–21 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice); see also *Transcript of JPP Public Meeting* 111–12 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

64 Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment under Rule for Courts-Martial 1003(B)*, 52 NAVAL L. REV. 1, 5 (2005). If the PTA does not require restitution to be paid until after trial, additional confinement is triggered by failure to pay. *Id.* at 6. But to enforce such a position, the convening authority must hold a vacation hearing, assuming that enforcement is still possible (i.e., that the accused is still confined and that the suspension period has not passed). *Id.* According to one expert, the convening authority may be reluctant to hold such a time-consuming hearing, especially when the accused has paid most of the amount prescribed. *Id.*

65 *Transcript of JPP Public Meeting* 112 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

66 Jones, *supra* note 64, at 5; see, e.g., *United States v. Williams*, 60 M.J. 360, 363 (C.A.A.F. 2004) (holding that parties’ disagreement as to whether PTA required restitution be paid before or after trial can provide basis for government’s withdrawal from PTA).

67 Services’ Responses to JPP Request for Information 54(f)(ii) (Nov. 6, 2014). The Army and Air Force reported that they do not track the use of restitution provisions in PTAs.

and all noted that it was most common in cases involving larceny, wrongful appropriation, or fraud.⁶⁸ Indeed, in practice, restitution is rarely sought for sexual assault victims during pretrial negotiations.⁶⁹

At the same time, sexual assault victims are made aware that it is available. DD Form 2701, *Initial Information for Victims and Witnesses of Crime*—the short form issued by military criminal investigative organizations (MCIOs) to victims—notifies them that restitution “can be used as a condition of a pre-trial agreement to plead guilty to an offense.”⁷⁰ The officer-in-charge of the Marine Corps Trial Counsel Assistance Program told the JPP that his Service provides annual training to victim assistance personnel and trial counsel on seeking restitution during pretrial negotiations.⁷¹

Whether a PTA will include a provision requiring restitution ultimately remains within the discretion of the convening authority.⁷² In the Army, the convening authority is required to consider whether to include restitution in a PTA before signing it.⁷³ But there is currently no requirement in any of the military Services to seek input from a victim or victim’s counsel regarding a PTA.⁷⁴ According to one practitioner, victims are sometimes not advised of a PTA until after the PTA has been signed.⁷⁵

Recently, DoD proposed an executive order that would add a provision to the Rules for Courts-Martial requiring that before entering into a PTA, the victim be provided an opportunity to express views concerning the PTA terms and conditions, and that the convening authority consider the victim’s views.⁷⁶ Currently, such information may be provided by victims’ legal counsel, including special victims’ counsel (SVCs).⁷⁷ If a victim lacks representation (as may be particularly likely for

68 Services’ Responses to JPP Request for Information 54(f)(ii) (Nov. 6, 2014). For samples of restitution language as used in PTAs, see the Services’ Responses to JPP Request for Information 54(f)(ii)(c) (Nov. 6, 2014).

69 See *Transcript of JPP Public Meeting* 233 (Mar. 13, 2015) (testimony of Mr. Charles A. Cosgrove, Chief, Programs Branch, Criminal Law Division, Office of The Judge Advocate General, U.S. Army); *id.* (testimony of senior trial counsel and SVCs that they had never sought restitution for a sexual assault victim as part of a PTA). One SVC observed that in general, PTAs are used less often in military courts than in the civilian system. *Transcript of JPP Public Meeting* 234–35 (Mar. 13, 2015) (testimony of Captain Joseph B. Ahlers, U.S. Air Force, Special Victims’ Counsel).

70 *Transcript of JPP Public Meeting* 193–94 (Mar. 13, 2015) (testimony of Mr. Charles A. Cosgrove, Chief, Programs Branch, Criminal Law Division, Office of The Judge Advocate General, U.S. Army). See U.S. DEP’T OF DEFENSE, DD FORM 2701, INITIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Aug. 2013), contained in DoD’s Response to JPP Request for Information 60(a) (Nov. 6, 2014). In the Army, these forms are routinely furnished again by victim assistance personnel. *Id.* (testifying that victim witness liaisons—i.e., paralegals or judge advocates designated to assist victims of crime during court-martial—are instructed to distribute Form 2701 “early and often”).

71 *Transcript of JPP Public Meeting* 198–99 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); see also *id.* at 234 (testifying that Marine Corps victim witness liaisons—i.e., paralegals or judge advocates designated to assist victims of crime during the court-martial—use Form 2701 to brief victims on seeking restitution during pretrial negotiations).

72 *Transcript of JPP Public Meeting* 305 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

73 U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 17-16(c) (Oct. 3, 2011), available at http://www.apd.army.mil/pdffiles/r27_10.pdf.

74 *Transcript of JPP Public Meeting* 43 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice).

75 *Transcript of JPP Public Meeting* 306 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

76 80 Fed. Reg. 63,204, 63,205 (Oct. 19, 2015) (proposing new R.C.M. 705(d)(3) (Victim consultation)), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-10-19/pdf/2015-26485.pdf>; see also *Transcript of JPP Public Meeting* 38–42 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice).

77 According to one practitioner, however, SVCs lack sufficient guidance on the amount of restitution warranted for proper

civilians), the trial counsel is responsible for soliciting such views and conveying them to the convening authority.⁷⁸

This proposed executive order follows the June 2014 Response Systems to Adult Sexual Assault Crimes Panel (RSP) recommendation that the *Manual for Courts-Martial* be modified and appropriate regulations implemented to provide victims the right to be heard before the convening authority proposes or responds to a PTA offer.⁷⁹ The JPP urges adoption of this proposal.

2. Restitution in Post-Trial Clemency and Parole

Under Article 60 of the UCMJ, convening authorities have the power to grant clemency to convicted Service members—that is, to modify court-martial findings and to reduce a court-martial sentence in whole or in part.⁸⁰ After conviction and sentencing, the military judge may recommend that the convening authority disapprove or suspend some portion of punishment imposed if the accused makes restitution to the victim within a certain period.⁸¹ DD Form 2701 informs victims that restitution “can be used . . . as a condition of clemency.”⁸² However, it does not explain that for restitution to become such a condition, the accused must request it and the convening authority must approve it.⁸³

In addition, each military Service administers a system of parole.⁸⁴ The authority of the Services’ clemency and parole boards to grant clemency to an accused who is in confinement is distinct from that of a convening authority after trial but before the convicted Service member is confined.⁸⁵ DoD policy requires that clemency and parole boards “shall consider making restitution to the victim a condition of granting” clemency and parole.⁸⁶

compensation of the victim for his or her losses. *Transcript of JPP Public Meeting* 306–07 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel). As directed by the FY14 NDAA, the military Services created SVC programs in 2013 for the purpose of providing legal assistance to military victims of sexual assault. Victims’ counsel within the Navy and Marine Corps are known as victims’ legal counsel (VLC), but for the purposes of this report, “SVC” will be used for victims’ counsel across the Services.

78 *Transcript of JPP Public Meeting* 38–42 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice). Trial counsel sometimes conveys the victim’s views on the PTA through the staff judge advocate rather than directly to the convening authority. *Id.* at 44. This route can be taken even when the victim is represented by an SVC. See Services’ Responses to RSP Request for Information 68 (Nov. 21, 2013).

79 RSP REPORT, *supra* note 11, at 29.

80 10 U.S.C. § 860 (UCMJ art. 60).

81 Jones, *supra* note 64, at 7 & n.33 (collecting case examples); see also *United States v. Delagarza*, No. 20080891 (A. Ct. Crim. App. 2010) (memorandum opinion) (reviewing ineffective assistance of counsel claim where military judge had recommended that convening authority approve only 12 of 18 months of adjudged confinement if accused paid full restitution).

82 See DoD’s Response to Request for Information 60(a) (Nov. 6, 2014).

83 See Jones, *supra* note 64, at 8.

84 10 U.S.C. § 952.

85 For more information, see Paula B. McCarron, *After the Gavel Falls: An Introduction to the Department of Defense Clemency and Parole Process*, 27 FED. SENT’G REP. 173, 173 (Feb. 2015).

86 U.S. DEP’T OF DEF., DIR. 1030.1, VICTIM AND WITNESS ASSISTANCE pt. 4.5 (Apr. 23, 2004), *quoted in* Jones, *supra* note 64, at 17 & n.87.

The Services do not currently track how often restitution is imposed through clemency or parole processes or how consistently it is paid.⁸⁷ The Marine Corps reported that it is unaware of any Article 120 case in which restitution was included as a condition of parole.⁸⁸

C. STAKEHOLDER PERSPECTIVES

Presenters' testimony and written materials submitted to the JPP made the following observations and arguments that *favor* establishing restitution as an authorized punishment at courts-martial:

- Restitution makes the perpetrator directly accountable to the victim and ensures that the perpetrator will recognize that the offense caused personal harm.⁸⁹ This accountability is extremely important to some victims; it is separate from the accused's accountability for violating the law, which is the reason for sentencing the accused to confinement.⁹⁰ The option of seeking restitution enables victims to regain a sense of control.⁹¹
- Restitution could be enforced in a variety of ways, such as garnishing the accused's pay; having the government pay restitution by proxy, then recover the money from the accused over time; allowing the states to enforce military judges' restitution orders; and imposing contingent confinement or recalling the accused from appellate leave if he or she fails to make restitution.⁹² Of these suggested ways of enforcing restitution, the National Center for Victims of Crime endorses restitution by proxy, noting that it would provide immediate relief to the victim.⁹³
- Restitution allows victims to spend funds as they choose and to pay for needs that compensation mechanisms typically do not cover (e.g., property loss or damage, purchase of home security systems, fence installation, job retraining, a guard dog, self-defense courses).⁹⁴

87 Services' Responses to JPP Request for Information 54(f)(ii)(a) (Nov. 6, 2014).

88 Marine Corps' Response to JPP Request for Information 54(f)(ii)(a) (Nov. 6, 2014).

89 *Transcript of JPP Public Meeting* 271–72 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime); *Transcript of JPP Public Meeting* 103 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

90 *Transcript of JPP Public Meeting* 271–72 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime).

91 *Transcript of JPP Public Meeting* 281, 340–41 (Mar. 13, 2015) (testimony of Ms. Bridgette Marie Harwood, Director of Legal Services, Network for Victim Recovery of DC (NVRDC)).

92 Jones, *supra* note 64, at 42. If sentenced to a punitive discharge or dismissal, a Service member may be required to take appellate leave after the convening authority's action during appellate review of his or her sentence. *See* 10 U.S.C. § 876a (UCMJ art. 76a).

93 *Transcript of JPP Public Meeting* 275, 347–49 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime); *see also* *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP* 5 (opining that “[t]he ability of a military judge to determine whether restitution should be awarded w[ould] increase confidence in the system and the perception of fairness”). For more on the advantages of the restitution-by-proxy proposal, and how it might be implemented, *see* Jones, *supra* note 64, at 44–50.

94 *Transcript of JPP Public Meeting* 268–69 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime); NCVLI, *supra* note 32, at 3.

- Restitution would also give the sentencing authority more flexibility, adding an additional “tool” to the “toolkit” from which he or she has to choose the most appropriate punishment for the individual accused.⁹⁵

Other presenters’ testimony and written materials submitted to the JPP made observations and arguments weighing *against* establishing restitution as an authorized punishment at courts-martial. These included the following:

- In sexual assault cases, the victim is less likely to report, charges are less likely to be filed, and the defendant is less likely to be convicted.⁹⁶ Therefore, restitution is not a reliable remedy for sexual assault victims.⁹⁷
- Enforcement of restitution orders requires standing courts and probation officers, neither of which currently exists in the military justice system..⁹⁸
- Restitution is not a meaningful remedy unless payment is reasonably certain.⁹⁹ But a conviction generally tends to raise barriers to payment—and when the same system that is responsible for trying the accused (and punishing that individual, if guilty) is also his or her employer, the likelihood of payment is reduced even more.¹⁰⁰ Indeed, the accused’s ability to pay might be affected, for example, by any automatic or adjudged forfeitures,¹⁰¹ or by the accused’s discharge or expiration of term of service while in confinement, resulting in both cases in pay being discontinued.¹⁰²
- Even after being awarded, restitution might conceivably have to be rescinded if a conviction were set aside, in which case the accused would be entitled to restoration of all property of which the sentence had deprived him or her.¹⁰³

95 *Transcript of JPP Public Meeting* 103, 106–07 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

96 *Transcript of JPP Public Meeting* 277 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime); *accord* Goldscheid, *supra* note 8, at 179–80.

97 Goldscheid, *supra* note 8, at 179–80 (noting that sexual assault cases are “notorious” for their underreporting, under-prosecution, and low conviction rates).

98 *Transcript of JPP Public Meeting* 355–56 (Mar. 13, 2015) (testimony of Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General); *id.* at 362–63 (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program); *see also* Jones, *supra* note 64, at 40–41.

99 *Transcript of JPP Public Meeting* 213–14 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims’ Legal Counsel Program); *see also* Rutledge, *supra* note 10, at 256 (referring to lack of offender resources as “[t]he perennial issue for restitution”); Goldscheid, *supra* note 8, at 180.

100 *See Transcript of JPP Public Meeting* 119–20 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

101 *See* part III(A), *infra*.

102 *Transcript of JPP Public Meeting* 102–03 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe); *id.* at 105, 125–26 (testimony of Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service (DFAS)).

103 *Transcript of JPP Public Meeting* 109–10 (June 18, 2015) (testimony of Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service (DFAS)); *see also* MCM, *supra* note 61, R.C.M. 1208(b) (“[A]ll rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved by any competent authority shall be restored unless a new trial, other trial, or rehearing is ordered and such executed part is included in a sentence imposed at the new trial, other trial, or rehearing.”).

- Because sentencing normally immediately follows the guilt phase of the trial, the victim's losses (and the accused's resources) would have to be disclosed at the outset of the court-martial. Such disclosures could open up new avenues of cross-examination that in a close case might be decisive.¹⁰⁴ Moreover, because there is no presentencing report in the military justice system, it might be difficult to gather the appropriate evidence pertaining to restitution in advance of findings.¹⁰⁵
- The trial counsel—responsible for all witnesses' travel, all evidence, all subpoenas, even the accused's uniform—is already overburdened. The responsibility to present restitution evidence at sentencing would add to this excessive load.¹⁰⁶
- Because there are no sentencing guidelines, sentencing authorities—particularly panel members—would have very little guidance regarding whether restitution should be awarded and, if awarded, how much. The result would be a lack of uniformity.¹⁰⁷ Panel members might be inclined to give a shorter sentence to increase the probability that the accused would pay restitution once released. In addition, panel members might not be educated on how victims react to trauma (and thus might not know that seemingly counterintuitive behaviors are quite common).¹⁰⁸
- The prospect of restitution payments could become fodder for the defense to impeach the victim at trial (i.e., as providing a financial motive to lie), especially in light of existing stereotypes about women's readiness to fabricate sexual assault allegations.¹⁰⁹ Defense efforts to make the victim's financial circumstances an issue might result in a trial within the trial, given the existing liberal rules of discovery.¹¹⁰

104 *Transcript of JPP Public Meeting* 203 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); *but see* Jones, *supra* note 64, at 40–41.

105 *Transcript of JPP Public Meeting* 100–02, 106–07, 116–18 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe) (describing typical process in claims cases); *but see* *Transcript of JPP Public Meeting* 240–41 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); Jones, *supra* note 64, at 41.

106 *Transcript of JPP Public Meeting* 203–04 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

107 *Transcript of JPP Public Meeting* 99–100, 106–07 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

108 *Transcript of JPP Public Meeting* 204–05, 237–38 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); *id.* at 321–22 (testimony of Major Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division); *but see* Jones, *supra* note 64, at 41–42.

109 *Transcript of JPP Public Meeting* 320–21 (Mar. 13, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division); *id.* at 301 (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program); *see also* Coast Guard's Response to JPP Request for Information 56 (Nov. 6, 2014).

110 *Transcript of JPP Public Meeting* 320–21 (Mar. 13, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force, Government Trial and Appellate Counsel Division); *see also* Coast Guard's Response to JPP Request for Information 56 (Nov. 6, 2014).

D. JPP ASSESSMENT AND RECOMMENDATIONS REGARDING RESTITUTION

The Panel recommends that Congress not amend the UCMJ to add restitution as an authorized punishment that may be adjudged at courts-martial. However, the Panel makes the following observations based on its review:

- The focus of currently available restitution mechanisms in the military justice system—that is, the power of the convening authority and parole board to grant the accused’s request to pay the victim’s expenses—is on the accused’s ability to negotiate a more favorable sentence, not on making the victim whole.
- In general, the powers of military judges have expanded over time. Initially their responsibilities were relatively limited, but military judges now have authorities similar to those of other federal judges. At the same time, the ability of convening authorities to override the findings and sentence of a court-martial has diminished. Allowing military judges to grant and enforce restitution to sexual assault victims would another step in this gradual evolution.
- As described above, there are a variety of mechanisms for enforcing restitution. The structure used by federal courts to enforce restitution, which allows victim input, could be adopted in the Rules for Courts-Martial.
- Many victims and victims’ advocates strongly urged the Panel to recommend that restitution be made available to victims of sexual assault committed by Service members. Much testimony emphasized the psychological value to victims that comes from making the perpetrator, rather than DoD or another government entity, directly accountable. According to this testimony, restitution enables victims to regain a sense of control over their lives. In addition, unlike other remedies, restitution allows victims to spend the compensation that they receive as they choose.

In concluding that courts-martial sentencing procedures should not be modified to incorporate restitution, the Panel considered the substantial changes to the current system that would be required and the relatively few cases in which restitution would be needed. Numerous changes to the UCMJ and *Manual for Courts-Martial* (MCM) would be necessary or advisable in order to add restitution as an authorized punishment at courts-martial:

- R.C.M. 201 would require modification to provide for an exception to the nature of courts-martial jurisdiction, which is now “entirely penal or disciplinary” (R.C.M. 201(a)(1)).
- R.C.M. 701(a)(5) and R.C.M. 703(c), which require pretrial discovery of evidence and information to be presented in findings and sentencing, would require modification to introduce a delay so that the government and defense could each present restitution evidence and the military judge could resolve any disputes regarding such evidence.
- If sentencing procedures are delayed to allow for discovery or disclosure of restitution information from victims, guidance for what to do with the accused (i.e., send back to unit, place on excess leave, etc.) and the panel members during the delay must be developed.
- The authority to determine and impose restitution would need to be assigned. Restitution could be incorporated as an authorized punishment to be considered by the sentencing authority in the court-martial, or the authority could be vested in the military judge in all cases (even those in which a panel of members determines the sentence). The act of setting restitution

could also be separated from sentencing, enabling it to remain an independent decision not affected by the sentencing authority's determinations regarding the other forms of punishment.

- Military judges would require guidance to assist the sentencing authority in determining (a) whether restitution is appropriate (if it is optional) and, (b) if so, how much should be awarded.
- Article 60 would require amendment to establish what authority the convening authority would have with regard to adjudged restitution.
- The UCMJ would require amendment to establish a hierarchy of payments for restitution and forfeitures. For example, Article 58b could be amended to allow the convening authority to waive forfeitures for an additional six months for payment of restitution, following the existing six-month waiver that is available for the benefit of the accused's dependents.
- Guidance providing rules and responsibilities for determining an accused's payment schedule and plan would need to be developed.
- Restitution would require an enforcement mechanism to ensure payment. The Panel considered different options:
 - promulgate an R.C.M. giving a designated commander the authority to order the disbursing officer to garnish the accused's pay in the amount of restitution ordered;
 - promulgate an R.C.M. authorizing additional confinement if the accused fails to pay restitution;
 - enact a statute to authorize the Secretary of Defense to pay restitution to victims up front and seek reimbursement from the accused afterward;
 - amend Article 58b to allow the government to take pay and allowances from the accused and pay restitution to the victim instead; or
 - amend the federal restitution statute to allow a victim who has been awarded restitution at a court-martial to get a judgment lien against the accused in state court.
- R.C.M. 1208(d) would require amendment to explain whether (and if so, how) restitution payments already made would be returned in the event a sentence were set aside.

The Panel concludes that making these substantial changes for the limited purpose of accommodating the addition of restitution as an authorized punishment would risk unintended consequences, several of which might have far-reaching effects on broader processes of military justice. Given the relatively small number of cases in which restitution would be desired, appropriate, and actually obtained, the Panel does not believe such risk to be warranted. Moreover, the Panel believes problems that might be addressed by making restitution an authorized punishment could be solved equally well or better by establishing a new uniform DoD compensation program, as recommended in part V(H), below.

Even without adding it as an authorized punishment at courts-martial, restitution remains a possibility in pretrial agreements between the government and the accused. The Panel concludes that this option, which is currently available but rarely exploited, could help address victims' financial losses.

In order to encourage the use of restitution in pretrial agreements, the Panel recommends the following:

- The Army, Air Force, Navy, and Coast Guard should consider following the lead of the Marine Corps, which has begun to provide annual training to trial counsel and victim assistance personnel on seeking restitution during pretrial negotiations. The Services should also consider providing such training to SVCs.
- The President should enact DoD's proposed executive order to modify the *Manual for Courts-Martial* and provide victims the right to be heard before the convening authority enters into a PTA.

The Panel also recommends that the Services begin tracking cases in which restitution is included as a condition of parole.

III. Directing Court-Martial Forfeitures to Victims

A. MECHANICS OF WAIVED AND DEFERRED FORFEITURES UNDER THE CURRENT UCMJ

The UCMJ currently includes two articles that allow a convening authority to direct that the accused's dependents receive money that would otherwise be subject to forfeiture. Under Article 57, the convening authority may defer forfeitures adjudged at a court-martial, which otherwise become effective 14 days after sentencing. Deferral must be requested by the accused, who receives the money subject to forfeiture and must transfer it to his or her dependent(s).¹¹¹

Under Article 58b, the convening authority may waive automatic forfeitures (imposed when the sentence includes a punitive discharge or confinement for more than six months) for up to six months and direct that the amounts be paid to the accused's dependent(s). The waiver can be requested at any time. Either the accused or the accused's dependent(s) can request the waiver, or it can be granted on the convening authority's own initiative.¹¹²

In practice, waiver and deferral of forfeitures generally enable the accused's dependents to receive the accused's pay for about 10 months after conviction.¹¹³ Waiver of forfeitures is the most common form of clemency granted by the convening authority; it generally is included in pretrial agreements in cases in which there are dependents.¹¹⁴

B. STAKEHOLDER PERSPECTIVES

Presenter testimony and written materials submitted to the JPP made the following observations and arguments, all of which weighed *against* directing court-martial forfeitures to victims:

- Compensating the victim with forfeited funds is arguably contrary to the purpose of Article 58b, which is to provide for families, especially children, who are innocent victims of their sponsor's crimes and have no way of providing for themselves. It is money that, in most cases, is used to help the family bounce back from the loss of the primary or sole breadwinner, covering expenses for a short period during which the accused's spouse can find a job or other means of support. In contrast, a victim who is not the accused's dependent has not necessarily suffered financially as a result of the crimes, may still be drawing full pay from a military or civilian job, and may have other sources of compensation.¹¹⁵

111 10 U.S.C. § 957; *see also Transcript of JPP Public Meeting 137–38* (June 18, 2015) (testimony of Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service (DFAS)).

112 10 U.S.C. § 958b; *see also Transcript of JPP Public Meeting 137–38* (June 18, 2015) (testimony of Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service (DFAS)).

113 Services' Responses to JPP Request for Information 58(a) (Nov. 6, 2014).

114 Coast Guard's Response to JPP Request for Information 58(b) (Nov. 6, 2014).

115 Coast Guard's Response to JPP Request for Information 58(b) (Nov. 6, 2014).

- In practice, unless the accused voluntarily requests deferral of automatic forfeitures, payments do not begin to be made to dependents until the convening authority takes action several months after trial, and these waived forfeitures must be diligently pursued by dependents.¹¹⁶ In dependent victim cases, the accused may decide against requesting deferral, in order to prevent his or her dependents from receiving any assistance until the convening authority acts or until Transitional Compensation for Abused Dependents (TCAD; see part V(C)) takes effect.¹¹⁷
- Under Article 58b, payments may not continue for more than six months following the convening authority's action.¹¹⁸
- In the event that the accused's term of service expires, dependents stop receiving forfeited pay, because there is no longer any pay to forfeit.¹¹⁹
- Some victims might be dissatisfied to learn that the money does not come directly from the accused.¹²⁰
- The prospect of waiver of forfeitures frequently motivates an accused to enter into a pretrial agreement. For Service members with dependents, requiring that forfeited pay be directed to victims rather than dependents could reduce an accused's willingness to enter into a PTA.¹²¹
- If the victim is given the opportunity to receive financial compensation through forfeitures, panel members may see it as a motive for the victim to lie. They are particularly likely to make this assumption if the victim has financial debts of his or her own at the time of the assault—as is often the case, since victims are typically young.¹²²
- Currently, fines and forfeitures adjudged against enlisted personnel and warrant officers are the largest source of revenue for the Armed Forces Retirement Home.¹²³ Although the Home received \$28.2 million in FY14 in fines and forfeitures, this source of the Home's income has been steadily declining since FY09.¹²⁴

116 *Transcript of JPP Public Meeting* 208–11, 253–54 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program).

117 *Transcript of JPP Public Meeting* 254 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program).

118 *Transcript of JPP Public Meeting* 211, 249–50 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); *id.* at 312 (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel).

119 *Transcript of JPP Public Meeting* 105–06, 110–11 (June 18, 2015) (testimony of Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service (DFAS)).

120 *Transcript of JPP Public Meeting* 343–44 (Mar. 13, 2015) (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime, and Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program).

121 Coast Guard's Response to JPP Request for Information 58(b) (Nov. 6, 2014).

122 Coast Guard's Response to JPP Request for Information 58(b) (Nov. 6, 2014).

123 See ARMED FORCES RETIREMENT HOME, CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2016, at 26, *available at* https://www.afrh.gov/sites/default/files/AFRH_CBJ_2016.pdf; *see also* 10 U.S.C. § 2772 (Share of fines and forfeitures to benefit Armed Forces Retirement Home); 24 U.S.C. § 419 (Armed Forces Retirement Home Trust Fund).

124 ARMED FORCES RETIREMENT HOME, FY14 PERFORMANCE AND ACCOUNTABILITY REPORT 31, *available at* <https://www.afrh.gov/sites/default/files/PAR/afrhentirepar14.pdf>.

C. JPP ASSESSMENT AND RECOMMENDATIONS REGARDING FORFEITURES

The Panel does not recommend that the forfeited wages of incarcerated members of the Armed Forces be directed to pay compensation to victims of sexual assault crimes committed by Service members. The Panel recognizes the perspective expressed by some presenters that some victims might experience personal satisfaction if they could view the accused as the source of their compensation. However, the Panel is concerned that the value of directing forfeited wages to victims would be outweighed by the potential harm that could result from the disruption of benefits to current recipients of funds from courts-martial forfeitures, including the residents of the Armed Forces Retirement Homes and the dependents of incarcerated Service members.

In addition, such a change might unnecessarily complicate and impede operation of the new uniform DoD compensation system recommended by the Panel, which is intended to provide compensation for out-of-pocket costs. Under the proposed compensation program described in part V(H) below, adjudicators would take into account any alternative source of compensation that victims might receive that could be used to cover their losses—such as forfeited wages of the accused that are directed to a victim.

IV. Article 139 of the UCMJ: Redress of Injuries to Property

A. BACKGROUND

Article 139 permits claims to be filed against Service members who wrongfully take or willfully damage or destroy the property of others.¹²⁵ Crime victims—whether military or civilian—can obtain reimbursement for up to \$10,000 in out-of-pocket expenses resulting from property loss or damage.¹²⁶

Article 139 claimants must file a report with the offender’s commander within 90 days of the incident.¹²⁷ Within four working days of receiving the claim, an investigating officer or board is appointed to investigate it.¹²⁸ If the offender’s commander finds in favor of the victim—using the standard of a preponderance of the evidence—he or she orders the finance office to garnish the offender’s wages and pay the victim directly.¹²⁹

For FY12–FY14, the Services reported the following annual average number of Article 139 claims for property damage:

Military Service	Article 139 Claims
Army	68
Air Force	2
Navy	0
Marine Corps	0
Coast Guard	0

None of these claims arose from an Article 120 case.¹³⁰

125 Colonel R. Peter Masterton, U.S. Army, *Claims Office Management*, 2011-SEP Army Law. 48, 54 (Sept. 2011). See 10 U.S.C. § 939 (UCMJ art. 139).

126 *Transcript of JPP Public Meeting 12* (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice); Jones, *supra* note 64, at 10–11.

127 *Transcript of JPP Public Meeting 12* (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice); Jones, *supra* note 64, at 10–11.

128 *Transcript of JPP Public Meeting 12* (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice); Jones, *supra* note 64, at 10–11.

129 *Transcript of JPP Public Meeting 12* (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice); Jones, *supra* note 64, at 10–11; Masterton, *supra* note 125, at 54. The article also provides: “If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.” 10 U.S.C. § 939(b) (UCMJ art. 139(b)).

130 Services’ Responses to JPP Request for Information 59(b) (Nov. 6, 2014); see also *Transcript of JPP Public Meeting 290–91* (Mar. 13, 2015) (testimony of Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General) (describing Article 139 claims paid following 2009 Fort Hood shootings).

When asked about the relatively low number of Article 139 claims in most Services, a JPP presenter noted that neither commanders nor victims are well-informed about the process. He added that some Services have begun to improve Article 139 education and training.¹³¹ In particular, the Marine Corps now provides annual training to victim-witness liaisons, trial counsel, commanders, and other support personnel on options for victim restitution.¹³²

B. SCOPE AND LIMITATIONS

Article 139 expressly excludes bodily injury.¹³³ In the words of one expert, Article 139 “contemplates only willful property damage or theft of tangible property, nothing more.”¹³⁴

Military justice practitioners voiced concern to the JPP that ongoing criminal investigations might be hindered if the Article 139 process were expanded to cover bodily injury claims, since Article 139 investigating officers also are empowered to summon and question witnesses and to receive depositions and other documentary evidence.¹³⁵ A civilian scholar wrote to the JPP that additional research would be appropriate to examine the question of whether expanding Article 139 might complicate the already-difficult prosecution of sexual assault cases.¹³⁶ For specific arguments presented to the JPP against amending Article 139 to include bodily harm, see part D, below.

A scholarly article reviewed by the JPP noted that funds would generally be available elsewhere to satisfy a bodily injury styled as an Article 139 claim, because the offender usually is still being paid while the investigation is under way.¹³⁷ However, the JPP heard testimony that payment would not always be assured. A practitioner told the JPP that the Article 139 process sometimes does not conclude until after the accused is released from active duty, at which time his or her wages can no longer be garnished.¹³⁸ Likewise, a victim would not receive any money if the offender is in a “no-pay” status (e.g., is on excess leave or appellate leave, or has an unauthorized absence).¹³⁹

131 *Transcript of JPP Public Meeting* 13–14, 18 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice). In particular, the Marine Corps now provides annual training on Article 139 claims. *Transcript of JPP Public Meeting* 198 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

132 *Transcript of JPP Public Meeting* 198 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

133 Jones, *supra* note 64, at 11; Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 222 MIL. L. REV. 211, 225 (Winter 2014).

134 Jones, *supra* note 64, at 11.

135 *Transcript of JPP Public Meeting* 12–15 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice); *id.* at 311 (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel); *see also* Coast Guard’s Response to JPP Request for Information 59(c) (Nov. 6, 2014).

136 *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP* 5.

137 Jones, *supra* note 64, at 10–11.

138 *Transcript of JPP Public Meeting* 310–11 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

139 *Transcript of JPP Public Meeting* 310–11 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

C. ALTERNATIVE MEANS TO SEEK COMPENSATION FOR PERSONAL PROPERTY DAMAGE OR LOSS: THE MILITARY PERSONNEL AND CIVILIAN EMPLOYEES CLAIMS ACT (PCA)

The Military Personnel and Civilian Employees Claims Act (PCA) enables victims who are Service members or DoD employees to file claims against the government for damage to or loss of personal property as a consequence of service, including seizure of evidence.¹⁴⁰ Victims can be compensated for lost items such as cell phones, computers, and clothing¹⁴¹—and, in some cases, for being temporarily deprived of such items.¹⁴²

These compensated losses mainly occur during government-sponsored shipments.¹⁴³ Sexual assault victims can seek compensation from the government under the PCA for loss of personal property seized as evidence,¹⁴⁴ but they cannot file a PCA claim against an offender for the damage or harm he or she has caused.¹⁴⁵ The Army and Air Force currently use this mechanism to compensate for seized evidence more often than does the Marine Corps, which only recently has begun to train its trial counsel on this application of the act.¹⁴⁶

D. STAKEHOLDER PERSPECTIVES

Presenters' testimony and written materials submitted to the JPP made the following observations and arguments, all of which weighed *against* amending Article 139 to include bodily harm:

- Article 139's (or the Services') 90-day reporting requirement is not congruent with Article 120 cases, where reports are sometimes made much later.¹⁴⁷

140 *E.g.*, U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 11-5(k) (Feb. 8, 2008). The PCA does not permit payments to civilian victims who are not DoD employees. 31 U.S.C. § 3721; *Written Statement of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice, to JPP* para. 4 (Mar. 20, 2015) (clarifying prior testimony at public meeting regarding Military Claims Act).

141 *Transcript of JPP Public Meeting* 218, 248 (Mar. 13, 2015) (testimony of Captain Joseph B. Ahlers, U.S. Air Force, Special Victims' Counsel); *id.* at 257 (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program).

142 *E.g.*, U.S. DEP'T OF ARMY REG. 27-20, CLAIMS para. 11-5(k) (Feb. 8, 2008) ("Deprivation of property held as evidence may be considered a payable loss when, after taking all circumstances into consideration, the approval authority determines that the temporary loss of the property will work a grave hardship on a claimant who is a victim of a crime.").

143 Masterton, *supra* note 125, at 50.

144 *See* U.S. DEP'T OF ARMY REG. 27-20, CLAIMS para. 11-5 (Claims payable) (Feb. 8, 2008).

145 31 U.S.C. § 3721; *Transcript of JPP Public Meeting* 248–49 (Mar. 13, 2015) (testimony of Captain Joseph B. Ahlers, U.S. Air Force, Special Victims' Counsel).

146 *Transcript of JPP Public Meeting* 246–47 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

147 *Transcript of JPP Public Meeting* 199–200 (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); *id.* at 311 (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel); *id.* at 331 (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program).

- If the Article 139 process begins before court-martial proceedings, the act of making the claim determination may preclude the commander from making a preferral or referral decision:¹⁴⁸ under the Rules for Courts-Martial, an “accuser” is disqualified from convening the accused’s court-martial or from referring charges to it.¹⁴⁹
- If the Article 139 process were delayed until after court-martial, an enlisted accused would already have begun forfeiting allowances and pay, resulting in at least two undesirable second-order effects. First, the unforfeited pay available would be much less, because the accused is often reduced in rank. At the same time, because officers and warrant officers would not suffer a similar automatic reduction, the accused’s rank before sentencing would strongly influence the outcome, with large disparities between different ranks. Second, the victim might experience less satisfaction, since the money would actually be coming from the government rather than directly from the accused.¹⁵⁰
- Article 139 investigating officers are currently not trained to investigate sexual assault,¹⁵¹ and they are not lawyers.¹⁵² The present system is relatively efficient and quick.¹⁵³
- Sexual assault victims might use an expanded Article 139 to seek payment for long-term care, pain and suffering, and emotional distress. Commanders are not necessarily equipped to handle claims that may resemble complex personal injury suits in civilian jurisdictions.¹⁵⁴
- In a meritorious claim for a substantial amount of money, deduction from the offender’s paychecks would likely be the only way to satisfy the debt. This method of payment would create tension between the need to maintain good order and discipline by promptly discharging sexual assault offenders and the need to keep attackers on the payroll in order to ensure that victims could be compensated.¹⁵⁵
- Expanding Article 139 would increase the risk of false allegations, and the defense would likely point to financial motivations to impeach victims’ credibility.¹⁵⁶

148 *Transcript of JPP Public Meeting 200–01* (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program); Jones, *supra* note 64, at 12.

149 MCM, *supra* note 61, R.C.M. 504(c)(1), 601(c).

150 *Transcript of JPP Public Meeting 200–02* (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

151 *Transcript of JPP Public Meeting 200* (Mar. 13, 2015) (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

152 *Transcript of JPP Public Meeting 332–33* (Mar. 13, 2015) (testimony of Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General).

153 *Transcript of JPP Public Meeting 332–33* (Mar. 13, 2015) (testimony of Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General).

154 *Transcript of JPP Public Meeting 208–11, 253–54* (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims’ Legal Counsel Program); Air Force’s Response to JPP Request for Information 59(c) (Nov. 6, 2014).

155 Air Force’s Response to JPP Request for Information 59(c) (Nov. 6, 2014).

156 Air Force’s Response to JPP Request for Information 59(c) (Nov. 6, 2014); *but see Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 5* (noting that “[a]ny amount awarded would need to be verifiable (similar to [] property claims) and limited to the amount of loss caused by the conduct”).

- As the accused currently has very limited due process rights under Article 139, exposing him or her to damages not just for property damage, which is fairly easy to ascertain, but also for bodily injury could raise constitutional due process concerns.¹⁵⁷

E. JPP ASSESSMENT AND RECOMMENDATIONS REGARDING ARTICLE 139

The Panel recommends against amending Article 139 to include claims for “bodily injury.” Asking Article 139 investigators to assess physical and mental injury and distress would add an unfair and unreasonable burden, since their primary task of reimbursing property loss involves little discretion. In addition, the Panel is concerned that an investigation of an Article 139 claim for bodily harm could compete or even conflict with any criminal investigation into a sexual assault report. Moreover, the Panel believes that the recommended uniform DoD compensation program, as described in part V(H), below, would be a better vehicle than Article 139 for recovery of property losses resulting from sexual assault.

However, the Panel also recommends that the Army, Air Force, Navy, and Coast Guard follow the Marine Corps’ lead in enhancing education and training on the Article 139 process, to make better use of this efficient mechanism for investigation and inquiry that is focused on property loss.

¹⁵⁷ Army’s Response to JPP Request for Information 59(c) (Nov. 6, 2014); *see also Transcript of JPP Public Meeting 92–93* (Mar. 13, 2015) (testimony of Professor Cortney E. Lollar, University of Kentucky College of Law) (noting constitutional implications of transforming Article 139 from a reimbursement statute to a punishment statute).



Means for Providing Care and Compensation to Sexual Assault Victims

A. DOD HEALTH CARE

Health insurance for active duty Service members and their dependents is provided through DoD's TRICARE health care program. These individuals are enrolled without charge, and they pay nothing out of pocket for covered health care services from a provider within network or, if they have obtained a referral and prior authorization, out of network.¹⁵⁸

1. Emergency Care

All sexual assault victims who go to the emergency room of a military treatment facility, whatever their TRICARE coverage or eligibility, receive care that “meets or exceeds” the recommendations set forth in the Department of Justice (DoJ) National Protocol on Sexual Assault Medical Forensic Examination Programs.¹⁵⁹ In carrying out the DoJ National Protocol, DoD responds to all cases of sexual assault as “priority care emergencies,” regardless of the victim's demeanor and of evidence of physical injuries.¹⁶⁰ Among the components of this priority care are:

- prompt transportation to, and evaluation at, the exam site;
- complete physical assessment, examination, and treatment of injuries, including immediate emergency interventions;
- availability of a sexual assault forensic examination (SAFE exam); and
- consultation regarding “further health care options,” including testing for sexually transmitted infections (STIs), prophylactic medications and treatments (including emergency contraception), and behavioral health services.¹⁶¹

158 U.S. Dep't of Def., Defense Health Agency, “TRICARE Choices in the United States: At a Glance” 5 (Aug. 2015), at http://www.tricare.mil/~media/Files/TRICARE/Publications/BrochuresFlyers/Choices_Glance_BR.pdf.

159 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); *see also* U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS: ADULTS/ADOLESCENTS (Apr. 2013), *available at* <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>; U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Jan. 20, 2015) [hereinafter DoDD 6495.01], ¶ 4; U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (July 7, 2015) [hereinafter DoDI 6495.02] encl. 7, ¶¶ c, e.

160 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); DoDD 6495.01], ¶ 4.

161 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); DoDD 6495.01, ¶ 4; DoDI 6495.02 encl. 7, ¶¶ c, e.

DoD policy further requires that the emergency care provided be gender-responsive, culturally and linguistically appropriate, and victim-focused.¹⁶²

2. Additional Care

The type and extent of non-emergency care available depends on the victim's status.¹⁶³ A victim requiring additional health care services who is not an active duty Service member or dependent is referred to civilian providers.¹⁶⁴ DoD providers must offer to assess all sexual assault victims for risk of pregnancy, exposure to STIs, and behavioral health issues, but any testing or services deemed appropriate after this initial consultation does not qualify as emergency care.¹⁶⁵

Active duty Service members and their dependents are eligible for additional services that, if deemed medically necessary, are covered under the statutorily defined benefits of TRICARE health insurance.¹⁶⁶ These benefits include behavioral health medications and two psychotherapy sessions per week.¹⁶⁷

Within 60 days of losing TRICARE eligibility, former active duty Service members and their dependents may choose to pay to continue coverage similar to the TRICARE Standard option.¹⁶⁸ Active duty Service members may purchase temporary coverage for up to 18 months, and dependents for up to 36 months.¹⁶⁹ As of October 2015, premiums are \$1,300 per quarter for individuals and \$2,925 per quarter for families.¹⁷⁰

3. Transition to Veterans Affairs (VA)

DoD collaborates with VA program offices to ensure that military sexual trauma (MST)-specific content is part of the mandatory outprocessing (i.e., Transition Assistance Program) completed by

162 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); DoDD 6495.01, ¶ 4, Glossary; DoDI 6495.02 encl. 7, ¶ c.

163 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense).

164 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); *id.* at 47–48 (testimony of Ms. Mary Kaye Justis, Director, TRICARE Health Plan).

165 *See Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); *id.* at 53–55 (testimony of Ms. Mary Kaye Justis, Director, TRICARE Health Plan); DoDD 6495.01, ¶ 4; DoDI 6495.02 encl. 7, ¶¶ c, e.

166 *Transcript of JPP Public Meeting 15* (June 18, 2015) (testimony of Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense); *id.* at 51 (testimony of Ms. Mary Kaye Justis, Director, TRICARE Health Plan). Retirees are also eligible for TRICARE health care services. *Id.* For eligibility of National Guard and Reserve Component members, see DoDD 6495.01, ¶ 2.a(2).

167 *Transcript of JPP Public Meeting 49–50* (June 18, 2015) (testimony of Ms. Mary Kaye Justis, Director, TRICARE Health Plan); U.S. Dep't of Def., Defense Health Agency, "Psychotherapy," at <http://www.tricare.mil/CoveredServices/IsItCovered/Psychotherapy.aspx>.

168 U.S. Dep't of Def., Defense Health Agency, "Continued Health Care Benefit Program," at <http://www.tricare.mil/chcbp>.

169 *Transcript of JPP Public Meeting 50–51* (June 18, 2015) (testimony of Ms. Mary Kaye Justis, Director, TRICARE Health Plan); *see also* U.S. Dep't of Defense, Defense Health Agency, "Continued Health Care Benefit Program," at <http://www.tricare.mil/chcbp>. For more information, see Humana Military, "Continued Health Care Benefit Program" (Oct. 2015), at <http://go.usa.gov/2P5F>.

170 Humana Military, "Continued Health Care Benefit Program" (Oct. 2015), at <http://go.usa.gov/2P5F>.

all Service members.¹⁷¹ Each Service’s Sexual Assault Prevention and Response program distributes information about the VA’s services to DoD sexual assault response coordinators (SARCs), other staff, and Service members.¹⁷² Information about the VA’s MST-related health care services is also supplied by DoD’s Safe Helpline, which provides live, one-on-one crisis support and offers intervention services, emotional support, and information.¹⁷³

For Service members already receiving mental health care, a joint DoD/VA program called “inTransition” ensures continuity as they move from DoD to VA health care systems or providers.¹⁷⁴ To make transition of care seamless, personal coaches maintain regular contact by telephone with Service members, helping them to locate community resources, support groups, and crisis intervention services; a call center is available at all times.¹⁷⁵ These personal coaches focus entirely on helping Service members to maintain continuity of care: they do not deliver behavioral health care to Service members or manage cases.¹⁷⁶

Working with the VA, DoD recently introduced a new course to increase Service members’ awareness of MST before they return to civilian life.¹⁷⁷ During the separation health assessment, VA health care providers inform these individuals of the VA benefits that are available for MST-related disabilities, emphasizing the importance of reporting any MST incident while in service and of retaining materials (e.g., treatment records) that could later be used to help support a disability claim.¹⁷⁸

171 SASC Testimony, *supra* note 14, at 58 (Joint Statement of Dr. Margret E. Bell, Director for Education and Training National Military Sexual Trauma Support Team, Department of Veterans Affairs, and Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs). MST is a term used by the VA but not by DoD. *Transcript of JPP Public Meeting* 18 (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration).

172 SASC Testimony, *supra* note 14, at 58 (Joint Statement of Dr. Margret E. Bell, Director for Education and Training National Military Sexual Trauma Support Team, Department of Veterans Affairs, and Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs).

173 SASC Testimony, *supra* note 14, at 88–89 (written answers of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, and Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs, to question submitted by Senator Kirsten E. Gillibrand (D-NY)).

174 SASC Testimony, *supra* note 14, at 88–89 (written answer of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, to question submitted by Senator Kirsten E. Gillibrand (D-NY)).

175 SASC Testimony, *supra* note 14, at 88–90 (written answers of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, and Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, to questions submitted by Senator Kirsten E. Gillibrand (D-NY)). For more specific information as to how DoD and the VA ensure continuity of care for Service members distinguished by type of separation (e.g., retirement, medical discharge, etc.), see *id.* at 105–06 (written answer of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, to question submitted by Senator Lindsey Graham (R-SC)).

176 SASC Testimony, *supra* note 14, at 65 (written answers of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, Dr. Nathan W. Galbreath, Senior Executive Advisor, Department of Defense Sexual Assault Prevention and Response Office, and Ms. Jacqueline Garrick, Director, Department of Defense Suicide Prevention Office).

177 *Transcript of JPP Public Meeting* 23, 95–96 (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); *id.* at 97–98 (testimony of Dr. Cara J. Krulewicz, Director, Women’s Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense).

178 *Transcript of JPP Public Meeting* 23, 64–65 (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); see also U.S. Dep’t of Veterans Affairs, “Information for Servicemembers about Military Sexual Trauma” (Dec. 2014) [hereinafter VA MST Separation Handout], available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/05-Comp_Rest/20150618/21_VA_MST_Separation_Handout.pdf.

B. VA HEALTH CARE AND COMPENSATION

VA health care is available to former active duty Service members as well as former members of the National Guard and Reserves.¹⁷⁹ Veterans of all three types are also all eligible to apply for VA compensation benefits.¹⁸⁰ However, veterans who received an adverse discharge (other-than-honorable, bad-conduct, or dishonorable) may not have access to VA health care and may not be eligible to apply for VA benefits.¹⁸¹

1. VA Health Care

According to the National Director of Program Policy Implementation of the Veterans Health Administration, in the VA's national screening program, every veteran who is seen for health care is asked whether he or she has experienced MST.¹⁸² The VA created the program because many victims were reluctant to volunteer information without being asked.¹⁸³ Each veteran who discloses a past incident of assault is given information on MST-related services at the VA and on how to access care.¹⁸⁴

The explicit policy of the Veterans Health Administration is “to provide Veterans and eligible individuals who report having experienced MST with free care for all physical and mental health conditions determined by their VA provider to be related to the experiences of MST.”¹⁸⁵ This free care for physical and mental health conditions related to MST includes pharmaceutical, inpatient,

179 *Transcript of JPP Public Meeting 40* (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration).

180 *Transcript of JPP Public Meeting 40* (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration).

181 *Transcript of JPP Public Meeting 42* (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration). For more information, see Major John W. Brooker, U.S. Army, et al., *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, App. H (Winter 2014).

182 *Transcript of JPP Public Meeting 19–20* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Fact Sheet, *supra* note 14. MST is statutorily defined as “[p]sychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training.” 38 U.S.C. § 1720D(a)(1); *accord Transcript of JPP Public Meeting 18, 20* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Fact Sheet, *supra* note 14. In accordance with the VA’s interpretation of the definition, MST can arise from sexual harassment, including threatening or offensive remarks about a person’s body or sexual activities, or threatening or unwanted sexual advances. VA MST Fact Sheet, *supra* note 14; *Transcript of JPP Public Meeting 19* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Separation Handout 1, *supra* note 178.

183 *Transcript of JPP Public Meeting 18, 20* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Fact Sheet, *supra* note 14; *see also* RSP REPORT, *supra* note 11, at 59 (noting that compared to reporting rates for other forms of violent crime, victims of sexual assault chronically underreport).

184 *Transcript of JPP Public Meeting 20* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); SASC Testimony, *supra* note 14, at 83–84 (written answers of Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs, to questions submitted by Senator Kirsten E. Gillibrand (D-NY)) (describing other ways in which VA informs veterans of availability of MST-related services).

185 U.S. DEP’T OF VETERANS AFFAIRS, VHA DIR. 2010-033, MILITARY SEXUAL TRAUMA (MST) PROGRAMMING para. 2a (July 14, 2010), *quoted in* Brooker, et al., *supra* note 181, at 101.

and residential mental and physical treatment, whatever the patient’s income or length of service.¹⁸⁶ It is provided regardless of veterans’ eligibility for VA benefits (i.e., monthly compensation)—that is, whether or not they are able to meet any of the three requirements described in section B(2), below.¹⁸⁷ Notably, veterans need not have reported an incident of sexual assault (or harassment) while on active duty to receive free treatment at the VA for MST-related conditions.¹⁸⁸

Every VA health care facility offers MST-related services and has providers knowledgeable about treatment of MST symptoms.¹⁸⁹ Available services include:

- formal psychological assessment and evaluation;
- psychiatric treatment; and
- individual and group psychotherapy.¹⁹⁰

Veterans may specify the desired gender of their provider.¹⁹¹ For MST-related PTSD, which is the most common MST-related condition (as described below), all VA health care facilities provide cognitive processing therapy and prolonged exposure, two approaches for treating PTSD that are widely considered to be effective.¹⁹² Every VA health care facility also has an MST coordinator, who serves as a point of contact for MST-related issues and helps veterans locate and access MST services and

186 *Transcript of JPP Public Meeting 20–21* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Fact Sheet, *supra* note 14; U.S. Dep’t of Veterans Affairs, “Quick Facts About VA’s Health Care Services for Military Sexual Trauma (MST)” (Apr. 2015) [hereinafter VA Quick Facts on MST Services], *available at* http://www.mentalhealth.va.gov/docs/VAHCS_MST_April2015.pdf. The VA interprets the statutory definition of MST very broadly. *See* Brooker, *supra* note 181, at 101–02 (noting that certain former Service members lacking veteran status may be eligible for VA healthcare for MST-related conditions).

187 *Transcript of JPP Public Meeting 21*, 37–38, 43–44, 78–79 (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Fact Sheet, *supra* note 14.

188 *Transcript of JPP Public Meeting 21* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Fact Sheet, *supra* note 14. In many cases, as explained below, veterans who have experienced MST can also receive benefits even though they did not report the sexual assault while on active duty.

189 VA MST Separation Handout, *supra* note 178; VA Quick Facts on MST Services, *supra* note 186.

190 VA Quick Facts on MST Services, *supra* note 186.

191 *Transcript of JPP Public Meeting 76–77* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); VA MST Separation Handout, *supra* note 178.

192 *Transcript of JPP Public Meeting 20* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); SASC Testimony, *supra* note 14, at 55–56 (testimony of Dr. Margret E. Bell, Director for Education and Training National Military Sexual Trauma Support Team, Department of Veterans Affairs); *id.* at 104–05 (written answers of Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs, to questions submitted by Senator Lindsey Graham (R-SC)). The VA also has residential and inpatient mental health programs available to veterans in need of more intensive treatment and support. VA MST Separation Handout, *supra* note 178, at 3; VA Quick Facts on MST Services, *supra* note 186.

programs provided by the VA.¹⁹³ In fiscal year 2013, the VA provided MST-related health care to 93,439 veterans.¹⁹⁴

2. VA Disability Compensation

VA disability compensation—that is, a monthly benefit check—is available to those veterans who have experienced MST whose claims satisfy clearly defined criteria: (1) they have a current physical or mental condition that is disabling; (2) they experienced MST during their military service; and (3) a link exists between the current disability and the MST.¹⁹⁵ However, veterans who seek compensation benefits need not wait for the outcome of their claim before receiving medical or mental health treatment, as described above, for any disability or condition that requires it.¹⁹⁶

The disability associated with MST for which the VA most frequently provides benefits is PTSD.¹⁹⁷ In PTSD cases, in order to find that MST occurred, the VA looks for “markers”—that is, indirect or circumstantial evidence contemporaneous with the alleged incident of sexual assault (or harassment).¹⁹⁸ Examples of markers include a worsening of duty performance; a request for transfer to another unit; seeking health care (physical or mental); testing for pregnancy or STIs; statements from family members, fellow Service members, clergy, or counselors; and even diary entries.¹⁹⁹

If at least one marker is found, the claim proceeds to a VA mental health professional who determines whether, in his or her professional opinion, the marker or markers—together with the claimant’s statement and physical examination—show a service-connected compensable injury.²⁰⁰ An adjudicator

193 *Transcript of JPP Public Meeting 20* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); MST VA Fact Sheet, *supra* note 14. For more information on the responsibilities of MST coordinators, see SASC Testimony, *supra* note 14, at 81–82 (written answers of Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs, to questions submitted by Senator Kirsten E. Gillibrand (D-NY)).

194 SASC Testimony, *supra* note 14, at 56 (Joint Statement of Margret E. Bell, Ph.D., Director for Education and Training National Military Sexual Trauma Support Team, Department of Veterans Affairs, and Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women’s Mental Health, and Military Sexual Trauma, Department of Veterans Affairs).

195 *Transcript of JPP Public Meeting 21–22* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); *id.* at 61 (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); VA MST Separation Handout, *supra* note 178, at 2.

196 *Transcript of JPP Public Meeting 37–39* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration, and Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); *id.* at 43–44 (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration) (noting that veterans can receive VA health care without ever having to apply for VA compensation benefits).

197 *Transcript of JPP Public Meeting 22* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); *id.* at 61–62 (noting that over 90% of MST benefits claims are based on PTSD).

198 *Transcript of JPP Public Meeting 22* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); *id.* at 31–32, 82–83 (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); *id.* at 34–35 (testimony of Ms. Diana M. Williard, Quality Assurance Officer, Compensation Service, Veterans Benefits Administration).

199 *Transcript of JPP Public Meeting 22* (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration); *id.* at 35 (testimony of Ms. Diana M. Williard, Quality Assurance Officer, Compensation Service, Veterans Benefits Administration); VA MST Separation Handout, *supra* note 178, at 2.

200 *Transcript of JPP Public Meeting 32, 82* (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy

ultimately denies or approves the claim and, if it is approved, assigns a percentage rating based on the severity of the disability.²⁰¹

VA presenters told the JPP that in order to improve the grant rate for MST-related PTSD claims, in 2011 VA health care providers and claim adjudicators began receiving extensive training on how to identify markers.²⁰² Within six months of launching this training, the grant rate for such benefits claims increased from 34% to 55%.²⁰³ Since 2011, the annual grant rate for MST-related PTSD claims has remained within five percentage points of the grant rate for combat-related PTSD claims.²⁰⁴ Currently, the VA is conducting a de novo review of claims denied before December 2011 to determine whether adjudicators who had not been retrained overlooked existing markers of service-connected MST-related PTSD.²⁰⁵

For claims seeking benefits for mental disabilities and conditions other than PTSD that are related to MST, including depression and anxiety, the VA does not use markers to determine eligibility.²⁰⁶ Instead, it requires direct evidence that the injury or disability began or worsened during the veteran's service.²⁰⁷ The Ruth Moore Act of 2015 proposes to ease the burden of proof for claimants seeking disability compensation for MST-related conditions.²⁰⁸ The House version of the bill was passed in July 2015; the Senate version was referred to its Committee on Veterans' Affairs in March 2015.²⁰⁹

Staff, Veterans Benefits Administration).

- 201 U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE THE CONSISTENCY OF DISABILITY CLAIM DECISIONS* 18 (June 2014) [hereinafter GAO REPORT] (providing visual overview of process for adjudicating MST-related claims).
- 202 *Transcript of JPP Public Meeting* 33 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); *id.* at 23 (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration). For details of this training, see GAO REPORT, *supra* note 201, at 10–11, and *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs*, 112th Cong. 1, 37–38 (2012) (testimony of Mr. Thomas Murphy, Director, Compensation and Pension Service, Department of Veterans Affairs).
- 203 *Transcript of JPP Public Meeting* 33 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); SASC Testimony, *supra* note 14, at 91 (written answer of Dr. Karen S. Guice, Principal Deputy Assistant Secretary of Defense for Health Affairs, and Dr. Susan J. McCutcheon, National Mental Health Director, Family Services, Women's Mental Health, and Military Sexual Trauma, Department of Veterans Affairs, to question submitted by Senator Kirsten E. Gillibrand (D-NY)); *see also* GAO REPORT, *supra* note 201, at 13–14.
- 204 *Transcript of JPP Public Meeting* 33 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); *id.* at 23 (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration).
- 205 *Transcript of JPP Public Meeting* 88–89 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); U.S. Dep't of Veterans Affairs, "Disability Compensation for Conditions Related to Military Sexual Trauma (MST)" (Apr. 2015), *available at* <http://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf>. For more information, see GAO REPORT, *supra* note 201, at 12, 19–21 (finding that, and explaining why, many veterans eligible for de novo review are not resubmitting claims).
- 206 *Transcript of JPP Public Meeting* 61–62 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration).
- 207 *Transcript of JPP Public Meeting* 62 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration); VA MST Separation Handout, *supra* note 178, at 2. For more information, see GAO REPORT, *supra* note 201, at 23–24.
- 208 *See* H.R. 1607, 114th Cong., Ruth Moore Act of 2015 (2015); S. 865, 114th Cong., Ruth Moore Act of 2015 (2015).
- 209 Congress.gov, "H.R. 1607—Ruth Moore Act of 2015," *at* <https://www.congress.gov/bill/114th-congress/house-bill/1607>; Congress.gov, "S. 865—Ruth Moore Act of 2015," *at* <https://www.congress.gov/bill/114th-congress/senate-bill/865/related-bills>.

From the initial filing to determination of benefits, the average MST claim takes nearly 300 days to process, although some go through in as few as 125 days.²¹⁰ A veteran remains eligible to receive VA medical or mental health treatment for any MST-related disability irrespective of whether he or she filed or received benefits for a claim.²¹¹

If a claim is denied, the claimant has one year to appeal.²¹² At any time after an appeal is denied or withdrawn, a claimant can reopen his or her claim by producing new and material evidence.²¹³ Given new evidence, there is no limit to the number of times that the claim can be reopened.²¹⁴

C. TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS (TCAD)

1. Background

Transitional Compensation for Abused Dependents (TCAD) is intended to help ease physically or sexually abused dependents' unexpected transition from military to civilian life.²¹⁵ The program provides support for up to 36 months in cases in which the dependents' sponsor separated from the military—either administratively or punitively—because of the abuse.²¹⁶ TCAD payments are fixed amounts; they increase slightly each December and are currently \$1,254 to the spouse and \$311 per child per month.²¹⁷

TCAD does not require a showing of economic harm—it is directed toward dependents, not victims—and is not paid by the accused.²¹⁸ Thus, TCAD is interim support for victims of domestic abuse, not

210 *Transcript of JPP Public Meeting* 32, 92 (June 18, 2015) (testimony of Ms. Diana M. Williard, Quality Assurance Officer, Compensation Service, Veterans Benefits Administration).

211 *Transcript of JPP Public Meeting* 37–39 (June 18, 2015) (testimony of Dr. Stacey Pollack, National Director of Program Policy Implementation, Veterans Health Administration, and Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration).

212 *Transcript of JPP Public Meeting* 86 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration) (describing appeals process in detail).

213 *Transcript of JPP Public Meeting* 87 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration).

214 *Transcript of JPP Public Meeting* 87 (June 18, 2015) (testimony of Ms. Stephanie Li, Chief, Regulations and Policy Staff, Veterans Benefits Administration).

215 U.S. DEP'T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS para. 3.1 (Jan. 16, 1997), available at <http://www.cac.mil/docs/DODI-1342.24.pdf>; Army's Response to JPP Request for Information 54(a) (Nov. 6, 2014).

216 U.S. DEP'T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS para. 6.2.1 (Jan. 16, 1997); see also Jones, *supra* note 64, at 13 (citing 10 U.S.C. § 1059).

217 U.S. DEP'T OF DEF., FINANCIAL MANAGEMENT REG. 7000.14-R, vol. 7B, ch. 60, at 8–9 (Feb. 2015), available at http://comptroller.defense.gov/Portals/45/documents/fmr/Combined_Volume1-15.pdf.

218 *Transcript of JPP Public Meeting* 223 (Mar. 13, 2015) (testimony of Captain Joseph B. Ahlers, U.S. Air Force, Special Victims' Counsel); *id.* at 253 (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); *id.* at 307–08 (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel); Jones, *supra* note 64, at 13.

a restitution scheme.²¹⁹ The duration of compensation depends on the amount of time left on the accused's service contract.²²⁰ Typically, TCAD payments last for 12 to 24 months.²²¹

The JPP received information from the Army and the Marine Corps on TCAD training. In those two Services, victim witness liaisons (i.e., paralegals or judge advocates designated to assist victims of crime during the court-martial) are trained on TCAD annually.²²²

2. Limitations

Presenters' testimony and written materials submitted to the JPP identified various obstacles to and weaknesses of TCAD:

- TCAD is not triggered unless and until the offender is convicted at court-martial or administratively separated for a qualifying domestic abuse offense. Article 15 nonjudicial punishment does not trigger TCAD.²²³
- TCAD is subject to various requirements, including that the dependent spouse may not reside with the accused and did not participate in the abuse.²²⁴
- In practice, according to several practitioners who testified before the JPP, dependents must diligently pursue TCAD, and it takes several months for them to receive the first payment.²²⁵ This delay is significant, since early compensation is what matters most to victims, particularly in domestic cases.²²⁶
- According to one expert, the availability of TCAD “undoubtedly makes it easier for [trial counsel] to convince reluctant spouses to testify against their abusers” but “does nothing . . . to alleviate the economic impact felt by the majority of victims harmed by military members’

219 Jones, *supra* note 64, at 13.

220 U.S. DEP'T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS para. 6.2.1 (Jan. 16, 1997); *see also Transcript of JPP Public Meeting* 30–31 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice).

221 *Transcript of JPP Public Meeting* 308–09 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel).

222 *Transcript of JPP Public Meeting* 191–92 (Mar. 13, 2015) (testimony of Mr. Charles A. Cosgrove, Chief, Programs Branch, Criminal Law Division, Office of The Judge Advocate General, U.S. Army); *id.* at 198 (testimony of Major Mark D. Sameit, U.S. Marine Corps, Officer In Charge, Trial Counsel Assistance Program).

223 *Transcript of JPP Public Meeting* 308 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel); *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims' Compensation Program, to JPP 1* (submitted Mar. 11, 2015). Article 15 of the UCMJ allows commanders to impose disciplinary punishments for minor offenses without a court-martial.

224 *Transcript of JPP Public Meeting* 30–31 (Mar. 13, 2015) (testimony of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice).

225 *Transcript of JPP Public Meeting* 208–09 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); *id.* at 309 (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel); *see also Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 2.*

226 *Transcript of JPP Public Meeting* 309–10 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims' Legal Counsel).

criminal behavior.”²²⁷ One SVC testified before the Panel that in practice, dependent victims often remain “in a complex bind of whether to report the crime [and] be cut off from the offending service member, or simply stay silent.”²²⁸

D. STATE CRIME VICTIM COMPENSATION (CVC) PROGRAMS

1. Background

State crime victim compensation (CVC) programs provide financial assistance to victims, including military victims, for crimes that occur in a state’s jurisdiction.²²⁹ All 50 states, as well as Puerto Rico and the U.S. Virgin Islands, operate them.²³⁰ Forty-two programs, including those of D.C. and Puerto Rico, are funded primarily from state criminal court fees and fines, and 11 programs are funded primarily by legislative appropriations from general revenue.²³¹ In all states, the rest of the funding—about \$150 million per year—comes from federal sources such as the Crime Victims Fund established by the Victims of Crime Act of 1984 (VOCA).²³² The Crime Victims Fund also funds the International Terrorism Victim Expense Reimbursement Program (ITVERP), the sole federal CVC program, which provides compensation to U.S. victims of acts of international terrorism.²³³

²²⁷ Jones, *supra* note 64, at 13.

²²⁸ *Transcript of JPP Public Meeting* 223 (Mar. 13, 2015) (testimony of Captain Joseph B. Ahlers, U.S. Air Force, Special Victims’ Counsel) (adding, “[t]hat is a choice no victim should have to make”).

²²⁹ National Association of Crime Victim Compensation Boards (NACVCB), “Compensation for Crime Victims” [hereinafter NACVCB Brochure], available at <http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/000000000120/BrochureCVC1.pdf>; NACVCB, “Crime Victim Compensation: Resources for Recovery” [hereinafter NACVCB, “Resources for Recovery”], available at <http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/000000000243/Fact%20sheet2014.doc>; see also *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program, to JPP* 1 (submitted Mar. 11, 2015).

²³⁰ NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229; *Transcript of JPP Public Meeting* 127–28 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

²³¹ NACVCB, “Compensation Funding Sources,” available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/05-Comp_Rest/20150918/08_NACVCB_CompFundingSources_Info.pdf (detailing funding of each program).

²³² *Id.*; *Transcript of JPP Public Meeting* 128, 135 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); see also *id.* at 137 (testimony of Ms. Laura Banks Reed, Director, D.C. Superior Court Crime Victims Compensation Program); *id.* at 146 (testimony of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program); *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program, to JPP* (submitted Mar. 11, 2015). Like the state funding of CVC programs, federal funding mostly comes from offender fines and penalties. Goldscheid, *supra* note 8, at 187; *Written Statement of Mr. Dan Eddy, Executive Director, NACVCB, to JPP* 3 (June 18, 2015). Consequently, the funding level of CVC programs varies from year to year depending on the amount of fines collected from defendants. *Id.* For more information about how funding is calculated annually, see 66 Fed. Reg. 27158–65; U.S. Dep’t of Justice, Office for Victims of Crime, “OVC Fact Sheet,” at <http://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html>.

²³³ *Transcript of JPP Public Meeting* 128 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); Judicial Proceedings Panel, “JPP Staff Minutes of 2015 VOCA National Training Conference” 3 (Aug. 24–27, 2015) [hereinafter “JPP Staff VOCA Conference Minutes”], at http://jpp.whs.mil/Public/docs/03_Topic-Areas/05-Comp_Rest/20150918/02_Minutes_Compensation_Conference.pdf.

State CVC programs are considered payers of last resort, in that they cover certain expenses not paid for by insurance or another program,²³⁴ or by restitution (if collected).²³⁵ As one scholar observed, “for a victim whose offender is never captured, is never convicted, or is unable to pay, CVC funds may be that victim’s only source of compensation.”²³⁶

CVC programs have limited public resources and are generally designed to be safety nets to help victims get through the initial trauma of a crime; they are not intended to provide long-term aid.²³⁷ All U.S. CVC programs—including all state programs and ITVERP, the sole federal program—cover both medical and mental health care as well as lost wages.²³⁸ But property loss or damage usually is not covered, except for medically necessary devices like eyeglasses.²³⁹

Currently, compensation for pain and suffering is available in only one state, Tennessee, which awards up to \$3,000 (as determined by claim adjudicators).²⁴⁰ Although Rhode Island’s CVC program initially offered up to \$25,000 to address pain and suffering, that benefit was discontinued after about two decades, because it led to a severe claim backlog and bankrupted the program.²⁴¹ Delaware’s compensation for pain and suffering was similarly suspended after that program, too, failed.²⁴² Compensation for pain and suffering is not available from ITVERP.²⁴³

Hawaii’s program takes a unique approach to pain and suffering: it offers \$800 to recognize the claimant’s victimization.²⁴⁴ This “acknowledgment award” is “symbolic in nature” and “not intended to quantify physical and/or emotional losses suffered as the result of a crime.”²⁴⁵

234 NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229; *see also* *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program, to JPP 1* (submitted Mar. 11, 2015); Goldscheid, *supra* note 8, at 190.

235 *Transcript of JPP Public Meeting* 187–90 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

236 Rutledge, *supra* note 10, at 259–60.

237 *Transcript of JPP Public Meeting* 182–83 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

238 *Transcript of JPP Public Meeting* 202 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 3.

239 NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229; *see also* *Transcript of JPP Public Meeting* 180 (Mar. 13, 2015) (testimony of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program).

240 *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 4* (June 18, 2015).

241 *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 3* (June 18, 2015); *Transcript of JPP Public Meeting* 184–85 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, NACVCB).

242 *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 3* (June 18, 2015).

243 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 3.

244 *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 3–4* (June 18, 2015).

245 State of Hawaii Crime Victim Compensation Commission, “Benefits,” at <http://dps.hawaii.gov/cvcc/benefits/>.

Coverage among the various state CVC programs varies significantly.²⁴⁶ Overall caps range from \$100,000 in Nevada to \$6,000 in Puerto Rico, while New York has no limit on compensation for medical costs.²⁴⁷ The most common maximum reimbursable amount is \$25,000.²⁴⁸ About one-third to one-half of state CVC programs cover some expenses for relocation or emergency shelter.²⁴⁹ As described below, statutory requirements vary from state to state, as does the extent to which programs enforce them in practice.

In addition to CVC programs, which provide funds, local public agencies and community-based organizations across the country receive VOCA grants to deliver various services—such as crisis intervention, emergency shelter and transportation, and criminal justice advocacy—directly to victims.²⁵⁰ In 2014, these organizations helped 201,113 adult victims of sexual assault.²⁵¹ VOCA organizations also give victims information on how to seek CVC funds through the state CVC programs.²⁵²

In fiscal year 2015, states will receive about four times as much VOCA victim assistance funding as they received in fiscal year 2014.²⁵³ None of this increase will go to state CVC programs, however.²⁵⁴

2. Program Administration

To receive CVC funds, a victim must apply for them. This means that the victim must be notified of the existence of the program, must navigate the application process, must follow its procedures, and must follow up with necessary documentation.²⁵⁵ State CVC programs are operated by small staffs and depend heavily on police, prosecutors, and victim service agencies to inform victims of their availability and how to apply.²⁵⁶ Moreover, CVC programs currently are barred from using more than 5% of their

246 See NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229.

247 NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229.

248 NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229.

249 *Transcript of JPP Public Meeting* 167, 174–75 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 2*; see also *id.* at 139, 176–77 (testimony of Ms. Laura Banks Reed, Director, D.C. Superior Court Crime Victims Compensation Program) (noting that D.C. program also pays for security systems, lock changes, and bars on windows); *id.* at 145 (testimony of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program); Rutledge, *supra* note 10, at 232–33 (describing relatively generous relocation assistance available in Texas, Florida, and Alaska); see also Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 3 (noting that several managers of state CVC programs that cover relocation expenses characterized this coverage as very costly and challenging to administer).

250 U.S. Dep’t of Justice, Office for Victims of Crime, “Victims of Crime Act: Rebuilding Lives Through Assistance and Compensation,” at http://www.ovc.gov/images/VOCA_Chart.jpg; see also *Transcript of JPP Public Meeting* 128, 135 (Mar. 13, 2015) (testimony of Ms. Kathy Nelson, Victim and Witness Assistance Program (VWAP) Coordinator, Peterson Air Force Base, U.S. Air Force) (describing victim assistance services available in Colorado Springs, Colorado).

251 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 1.

252 U.S. Dep’t of Justice, Office for Victims of Crime, “Victims of Crime Act: Rebuilding Lives through Assistance and Compensation,” at http://www.ovc.gov/images/VOCA_Chart.jpg.

253 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 1.

254 *Id.*

255 *Transcript of JPP Public Meeting* 313–14 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

256 NACVCB Brochure, *supra* note 229; NACVCB, “Resources for Recovery,” *supra* note 229; *Transcript of JPP Public*

federal funding on administrative costs and training.²⁵⁷ Owing to such restrictions on staffing and administrative support, state CVC programs are generally both underpublicized and overworked, and they often have extensive backlogs.²⁵⁸

Most state CVC programs are operated by individuals trained in victim services, who work closely with their counterparts in other programs.²⁵⁹ About one-fourth of state CVC programs are operated by boards whose members are appointed by the governor;²⁶⁰ according to one practitioner, some of these appointed administrators lack sufficient training.²⁶¹ One compensation expert testified before the JPP that because of the significant discretion given to CVC program administrators, the results of claims can be somewhat arbitrary.²⁶²

3. Requirements for Compensation

State CVC funds are subject to various program requirements and limitations, two of which are especially noteworthy. First, in most states, victims must report the crime promptly to law enforcement—in many jurisdictions, as quickly as within 48 to 72 hours.²⁶³ Second, victims generally must agree to cooperate with law enforcement—that is, report the crime to police, provide information

Meeting 182–83 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

257 42 U.S.C. § 10602(a)(3).

258 *Transcript of JPP Public Meeting* 113–14 (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law); Rutledge, *supra* note 10, at 240; Goldscheid, *supra* note 8, at 189.

259 *Transcript of JPP Public Meeting* 164 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

260 *Transcript of JPP Public Meeting* 185–86 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

261 *Transcript of JPP Public Meeting* 185–86 (Mar. 13, 2015) (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board).

262 *Transcript of JPP Public Meeting* 63, 80 (Mar. 13, 2015) (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law); *see also* Rutledge, *supra* note 10, at 242, 271 (asserting that consideration of victims' contributory misconduct "is merely an invitation for CVC employees to impose their subjective feelings about cases and victims").

263 NACVCB Brochure, *supra* note 229; NACVCB, "Resources for Recovery," *supra* note 229; NACVCB, "Basic Program Information," available at <http://www.nacvcb.org/index.asp?sid=7>; *Transcript of JPP Public Meeting* 172–74 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *id.* at 63 (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law); *id.* at 150–51 (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board). *But see Transcript of JPP Public Meeting* 175, 211–12 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards) (noting that California, Texas, Ohio, and other large states have no reporting deadline); *Written Statement of Mr. Dan Eddy, Executive Director, NACVCB, to JPP* 1 (June 18, 2015) (same).

to prosecutors, and testify against the accused (if necessary).²⁶⁴ Nationally, in 2012 nearly half of all CVC claims were denied, most for failing to satisfy one or both of these requirements.²⁶⁵

Other CVC program requirements and limitations include:

- filing deadlines: victims generally must file a claim within one or two years of the incident;²⁶⁶
- behavior restrictions: victims must not have engaged in contributory misconduct—that is, unlawful conduct that the claim adjudicator determines caused the sexual assault (sometimes called the “innocent victim” requirement);²⁶⁷
- total benefit caps (most often \$25,000) and sub caps (particularly for mental health counseling, which exist in about half the jurisdictions and can be as low as \$1,000);²⁶⁸
- exclusions of certain procedures (e.g., abortion, tattoo removal) and of more progressive therapies (e.g., massage therapy, acupuncture, mindfulness and meditation);²⁶⁹ and
- exclusions based on location: although victims can sometimes seek compensation from foreign CVC programs, about half of the U.S. state CVC programs do not compensate residents when they are victimized by crimes committed abroad.²⁷⁰

²⁶⁴ *Transcript of JPP Public Meeting 63* (Mar. 13, 2015) (testimony of Professor Njeri Mathis Rutledge, South Texas College of Law); *id.* at 150 (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board); Rutledge, *supra* note 10, at 244. While California amended its statute in 2014 to eliminate its reporting requirement for victims of military sexual assault, it remains to be seen whether other states will follow its lead. *See* 2014 Cal. Legis. Serv. 506 (A.B. 2545) (2014) (amending CAL. GOV'T CODE § 13956); NACVCB Brochure, *supra* note 229; *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 3*; *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 1* (June 18, 2015). *But see id.* at 2 (noting that in many cases, even where the offender is prosecuted, the victim already has been paid by time of trial).

²⁶⁵ *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 3*; *see also* Rutledge, *supra* note 10, at 244 & n.182 (citing 2003 study finding that 53% of CVC administrators attributed reporting and cooperation requirements as depressing claims in underserved groups).

²⁶⁶ NACVCB Brochure, *supra* note 229; NACVCB, “Basic Program Information,” *supra* note 263.

²⁶⁷ NACVCB Brochure, *supra* note 229; *Transcript of JPP Public Meeting 151–52* (Mar. 13, 2015) (testimony of Ms. Nikki Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board); *id.* at 162–63 (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *Transcript of JPP Public Meeting 212–13* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); NACVCB, “Contributory Conduct Requires Causal Connection, Kansas Court Rules” (provided to JPP June 22, 2015) (summarizing and quoting *Fisher v. Ks. Crime Victims Comp. Bd.*, 124 P.3d 74 (Ks. 2005)), at http://jpp.whs.mil/Public/docs/03_Topic-Areas/05-Comp_Rest/20150618/19_NACVCB_Kansas_Contrib_Conduct_Case_Synopsis.pdf.

²⁶⁸ NACVCB Brochure, *supra* note 229; NACVCB, “Basic Program Information,” *supra* note 263; NACVCB, “Resources for Recovery,” *supra* note 229; *Transcript of JPP Public Meeting 182* (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *id.* at 152–53 (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board).

²⁶⁹ *Transcript of JPP Public Meeting 152–53* (Mar. 13, 2015) (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board); *see also* Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 1 (noting that VOCA is silent as to compensation for abortions and that state statutes are controlling).

²⁷⁰ NACVCB, “Resources for Recovery,” *supra* note 229; *Transcript of JPP Public Meeting 298* (Mar. 13, 2015) (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program); Dickerson, *supra* note 133, at

The eligibility rules vary from state to state, as does the extent to which they are enforced in practice. In particular, the cooperation requirement and contributory misconduct restriction are differently interpreted and applied across the CVC programs.²⁷¹

4. CVC Compensation in Sexual Assault Cases

Nationally, sexual assault victims often do not pursue CVC funds.²⁷² In 2012, for example, less than 10% of the approximately 141,000 CVC claims were filed by sexual assault victims.²⁷³ This total, 13,157, is especially low in light of the number of sexual assault victims—nearly 206,000, or more than 15 times as many—who were served by victim assistance programs across the country in that same year.²⁷⁴ More recently, the total compensation awarded to sexual assault victims nationally has also fallen, from \$18 million in fiscal year 2013 to \$12.7 million in fiscal year 2014.²⁷⁵

State CVC program managers attribute recent declines in claim filings and compensation awarded to an apparent increase in the proportion of victims with health insurance.²⁷⁶ As a result so-called collateral sources of compensation such as coverage provided by the Affordable Care Act and Medicaid expansion, fewer victims are incurring out-of-pocket costs for medical care and counseling.²⁷⁷ Meanwhile, violent crime continues to decline, reinforcing the trend toward a decrease in claim filings.²⁷⁸

Generally speaking, state CVC programs enforce their eligibility rules less strictly in sexual assault cases. For example, many CVC programs have begun showing more flexibility in applying the reporting requirement to sexual assault claimants.²⁷⁹ They sometimes allow for exceptions to their reporting requirements for good cause shown,²⁸⁰ and some programs with strict reporting requirements

240; *Transcript of JPP Public Meeting 221* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 2.

271 Rutledge, *supra* note 10, at 241–44. Rather than completely deny compensation in contributory conduct cases, some state CVC programs—for example, the Illinois program—reduce awards by certain percentages (e.g., 25 or 50%). Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 5. The percentages are tied to the degree of the victim’s responsibility for his or her injury, as determined by claim adjudicators. *Id.*

272 *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 3.*

273 *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 3*; see U.S. Dep’t of Justice, Office for Victims of Crime, “2012 Victims of Crime Act Performance Report,” at http://ojp.gov/ovc/grants/vocanpr_vc12.html.

274 *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 3.*

275 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 4.

276 *Id.* at 3.

277 *Id.*

278 *Id.*

279 *Transcript of JPP Public Meeting 174* (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *Transcript of JPP Public Meeting 211–12* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, NACVCB); see also *Written Statement of Mr. Dan Eddy, Executive Director, NACVCB, to JPP 1* (June 18, 2015) (noting that 32 states provide compensation to sexual assault victims for testing of STIs, prophylactic medications, and/or counseling, regardless of whether they ever reported).

280 NACVCB, “Basic Program Information,” *supra* note 263; see also *Transcript of JPP Public Meeting 151* (Mar. 13, 2015) (testimony of Ms. Nikki S. Charles, Co-Executive Director, Network for Victim Recovery of DC (NVRDC), and former Administrator of Victim Services, Maryland Criminal Injuries Compensation Board).

routinely waive them in sexual assault cases.²⁸¹ In California, legislation that is expected to pass in late 2015 would prohibit denial of compensation based solely on a sexual assault victim’s failure to report to the police.²⁸²

In some jurisdictions, eligibility or compensation itself has been linked to obtaining a sexual assault forensic examination (SAFE exam). For example, in New York State and Washington, D.C., obtaining a SAFE exam satisfies the reporting requirement.²⁸³ In Texas, in accordance with a statute that became effective in September 2015, a victim who submits to a SAFE exam automatically receives compensation for treatment received at the time of the exam, regardless of whether he or she reported the sexual assault.²⁸⁴

As defined by the federal Violence Against Women Act (VAWA),²⁸⁵ however, a SAFE exam does not necessarily include all medical testing and treatment that a victim might need following a sexual assault.²⁸⁶ Most jurisdictions include testing for sexually transmitted infections (STIs) and pregnancy as part of a SAFE exam, but in many jurisdictions, SAFE exams do not include HIV prophylaxis, STI treatment, or emergency contraception.²⁸⁷ Victims may be required to pay for the costs of these other tests and treatments up front, and then apply for reimbursement through their state’s CVC program.²⁸⁸

While a state CVC program must “promote[] victim cooperation with the reasonable requests of law enforcement authorities” in order to receive VOCA funding,²⁸⁹ VOCA leaves the interpretation of this cooperation requirement to the state programs, and thus their approaches to it vary.²⁹⁰ Many CVC

281 *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 1* (June 18, 2015); *see also* Rutledge, *supra* note 10, at 271 & n.444 (noting that some programs allow consideration of testimony in support of a civil protection order to suffice) (citing CVC programs of California, Illinois, and Delaware); Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 6 (noting that under Texas statute, effective September 2015, civil protective order can substitute for police report); *id.* at 3 (noting that some state programs, such as Hawaii’s, apply a blanket waiver to their reporting requirement in sexual assault cases); *id.* at 5 (noting that CVC programs in Maine and Missouri often waive reporting requirement in sexual assault cases).

282 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 6. The California legislation would permit that state’s CVC program to consider, as a substitute for a police report, medical records documenting injuries consistent with the allegations, mental health records, or documentation that the victim received a SANE exam. *Id.*

283 *Transcript of JPP Public Meeting 131* (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *id.* at 137 (testimony of Ms. Laura Banks Reed, Director, D.C. Superior Court Crime Victims Compensation Program); *see also* Rutledge, *supra* note 10, at n.444 (noting that California CVC board may consider medical or mental health records in absence of police report).

284 2015 Tex. Sess. Law. Serv. 924 (West); *see also Transcript of JPP Public Meeting 131*, 146 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, and Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program); *Transcript of JPP Public Meeting 207* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, NACVCB).

285 VAWA established as a condition for federal funding of women’s services and programs that sexual assault victims be provided with access to a SAFE exam. 42 U.S.C. § 3796gg-4(a)(1). To be VAWA-compliant, grantees must not (1) charge victims for exams or (2) require victims to cooperate with law enforcement or participate in the criminal justice system. 42 U.S.C. § 3796gg-4(d)(1). About two-thirds of the states use CVC funds to pay for at least some SAFE exams, and more than one-third use only CVC funds to pay for SAFE exams. Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 4.

286 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 4.

287 *Id.* at 4, 6.

288 *Id.* at 4.

289 42 U.S.C. § 10602(b)(2).

290 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 1.

programs are showing increasing flexibility.²⁹¹ For example, 30 CVC programs provide compensation for SAFE exams to all sexual assault victims without regard to cooperation (or reporting).²⁹² Most of these programs also automatically pay for related services that are immediately needed, such as prophylactic medications and testing for STIs.²⁹³ In addition, some CVC programs routinely waive the cooperation requirement in sexual assault cases.²⁹⁴

The September 2015 Texas statute that guarantees compensation for medical treatment at the time of a SAFE exam regardless of reporting also applies whether or not the victim cooperates with law enforcement.²⁹⁵ But victims in need of follow-up care (and/or lost wages) must provide assistance.²⁹⁶ In the absence of a SAFE exam, to be eligible for CVC funds in Texas sexual assault victims must demonstrate “substantial” cooperation with law enforcement; merely reporting anonymously to the police, for example, is insufficient.²⁹⁷

Legislation similar to the Texas statute already exists in Georgia and is pending in Louisiana. An alternative approach was adopted in Connecticut, where a law enacted in 2012 allows a sexual assault victim to satisfy the reporting requirement by providing information about the incident to any of a number of specified professionals (e.g., medical, mental health, social work) aside from the police.²⁹⁸

Finally, CVC programs generally do not consider contributory misconduct on the part of the victim in sexual assault cases, either as part of their explicit guidelines or as a matter of standard practice.²⁹⁹ In several states—including Hawaii, Louisiana, Pennsylvania, and Utah—such consideration is prohibited.³⁰⁰

291 *Transcript of JPP Public Meeting* 213–14 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *Written Statement of Mr. Dan Eddy, Executive Director, NACVCB, to JPP* 1–2 (June 18, 2015) (noting that 32 states provide compensation to sexual assault victims for STI testing, prophylactic medications and/or counseling, regardless of whether they satisfy the state’s cooperation requirement); Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 5; *id.* at 6 (noting that the pending California legislation would prohibit that state’s CVC program from finding lack of cooperation based solely on a sexual assault victim’s delay in reporting the crime).

292 *Transcript of JPP Public Meeting* 134 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

293 *Transcript of JPP Public Meeting* 135 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

294 *Transcript of JPP Public Meeting* 176–77 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 5.

295 2015 Tex. Sess. Law. Serv. 924 (West); *see also* *Transcript of JPP Public Meeting* 131, 146 (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, and Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program).

296 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 6.

297 *Id.*

298 *Id.*

299 *Transcript of JPP Public Meeting* 177–78, 203–06 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *Written Statement of Mr. Dan Eddy, Executive Director, NACVCB, to JPP* 2 (June 18, 2015).

300 Judicial Proceedings Panel, “JPP Staff VOCA Conference Minutes,” *supra* note 233, at 5.

5. State CVC Programs as a Compensation Mechanism for Victims of Sexual Assault Offenses Committed by Service Members

Nationwide, the proportion of state CVC claimants seeking compensation for crimes committed by Service members is unknown, but it is likely relatively small.³⁰¹ In Texas, which includes several major military installations, only about 50 (less than 0.2%) of the more than 25,000 CVC claims filed in the state each year involve crimes committed by Service members.³⁰² According to the director of the Texas CVC program, the most common crime underlying these claims involved domestic violence.³⁰³

Victims in the military learn of CVC resources through DD Form 2701, *Initial Information for Victims and Witnesses of Crime*, which tells them that “[i]f you do not have insurance to pay the cost of your medical or counseling bills, or related expenses, the state Crime Victim Compensation office may be able to assist.”³⁰⁴ The back of this pamphlet contains blank lines where victim assistance personnel may fill in contact information for CVC programs available in the victim’s area.³⁰⁵ Except for the Coast Guard, the Services regularly provide training to those responsible for advising victims about state or local CVC programs, such as victim witness liaisons.³⁰⁶ Training is also conducted by the National Association of Crime Victim Compensation Boards as well as by individual CVC programs.³⁰⁷

An additional hurdle faced by some military victims in seeking CVC compensation is that an MCIO investigation report, not a restricted report, may be required to satisfy a given CVC program’s reporting requirement.³⁰⁸ Moreover, even when sufficient documentation exists, Service member victims must rely on cooperation from commands or MCIOs to assist them in providing it, a process that sometimes takes months.³⁰⁹ In 2014, however, California amended its statute to eliminate its reporting requirement for victims of military sexual assault, and other states may follow its lead.³¹⁰

301 *Transcript of JPP Public Meeting 166* (Mar. 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards); *Transcript of JPP Public Meeting 215–16* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, NACVCB).

302 *Transcript of JPP Public Meeting 166* (Mar. 13, 2015) (testimony of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program).

303 *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program, to JPP* (submitted Mar. 11, 2015).

304 See DoD’s Response to JPP Request for Information 60(a) (Nov. 6, 2014).

305 DoD’s Response to JPP Request for Information 60(a) (Nov. 6, 2014); *Transcript of JPP Public Meeting 193* (Mar. 13, 2015) (testimony of Mr. Charles A. Cosgrove, Chief, Programs Branch, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

306 Services’ Responses to JPP Request for Information 60 (Nov. 6, 2014).

307 *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program, to JPP 1* (submitted Mar. 11, 2015).

308 *Transcript of JPP Public Meeting 206–09* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

309 *Transcript of JPP Public Meeting 313–14* (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel); *Transcript of JPP Public Meeting 216* (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

310 See 2014 Cal. Legis. Serv. 506 (A.B. 2545) (2014) (amending CAL. GOV’T CODE § 13956); NACVCB Brochure, supra note 229; *Written Statement of Professor Njeri Mathis Rutledge, South Texas College of Law, to JPP 3*; *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP 1* (June 18, 2015); see also *Transcript of JPP Public Meeting 128* (March 13, 2015) (testimony of Mr. Dan Eddy, Executive Director, NACVCB) (noting that California was first state to establish CVC program, in 1965).

The Services do not currently track compensation received by sexual assault victims from state CVC programs.³¹¹ But victims of offenses committed by Service members clearly are not uniformly compensated across the country, since compensation amounts, rules, and procedures vary from state to state.³¹² This variation presents a challenge to SVCs and Victim and Witness Assistance Program (VWAP) personnel attempting to provide accurate and complete advice to Service member victims who may be eligible for CVC funds in a given state.³¹³

E. TORT REMEDIES

Just as a sexual assault victim may sue a civilian for civil damages, including pain and suffering, a sexual assault victim may sue a Service member in civilian court.³¹⁴ Sexual assault suits in any jurisdiction are rare, however, because they face obvious obstacles and challenges, ranging from the cost of legal representation and the limited resources of most defendants to the uncertainty of civil damages and the stress inherent in discovery, particularly depositions, in sexual assault cases.³¹⁵ Furthermore, the frequency with which Service members transfer duty locations and move to other jurisdictions makes litigation against Service members particularly problematic.³¹⁶

In addition, unlike a civil action against a civilian,³¹⁷ suits in sexual assault cases against a Service member generally may not seek redress from the perpetrator's employer. While the Federal Tort Claims Act (FTCA)³¹⁸ and the Military Claims Act (MCA)³¹⁹ each permit payment of certain claims for death, injury, or property loss caused by negligent or wrongful acts of military personnel, both require the

311 Services' Responses to JPP Requests for Information 54(e), 60(d) (Nov. 6, 2014).

312 *E.g.*, Dickerson, *supra* note 133, at 240; *Transcript of JPP Public Meeting* 209–10 (Mar. 13, 2015) (testimony of Lieutenant Commander Patrick K. Korody, U.S. Navy, Supervising Attorney, Victims' Legal Counsel Program); *id.* at 269 (testimony of Ms. Susan Smith Howley, Director, Public Policy, National Center for Victims of Crime).

313 *Transcript of JPP Public Meeting* 220–21 (Mar. 13, 2015) (testimony of Captain Joseph B. Ahlers, U.S. Air Force, Special Victims' Counsel); *id.* at 223–24 (calling for creation of “an information nucleus that SVCs and VWAPs can look to for assistance in navigating not only a potential DOD restitution program, but also the state and federal-based [CVC] programs”).

314 Dickerson, *supra* note 133, at 219; *Transcript of JPP Public Meeting* 192–93 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

315 *See* Dickerson, *supra* note 133, at 219, 239; Rutledge, *supra* note 10, at 260–62; *Written Statement of Professor Julie Goldscheid, CUNY School of Law, to JPP 2* (Mar. 18, 2015); Goldscheid, *supra* note 8, at 222–23.

316 *See Transcript of JPP Public Meeting* 192–93, 197 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

317 *Transcript of JPP Public Meeting* 87–88 (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law); *Written Statement of Professor Julie Goldscheid, CUNY School of Law, to JPP 1* (Mar. 18, 2015).

318 28 U.S.C. §§ 2671–2680. The FTCA permits payment of claims to civilians for death, injury, or property loss caused by negligent or wrongful acts of military personnel who are acting within the scope of employment. Masterton, *supra* note 125, at 52; *Transcript of JPP Public Meeting* 101 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

319 10 U.S.C. § 2733. The MCA permits payment of claims arising outside the United States from death, injury, or property loss caused by negligence or wrongful acts of military personnel or civilian employees acting within the scope of employment. *Id.*; *see also Written Statement of Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice, to JPP* para. 4 (Mar. 20, 2015) (clarifying prior testimony at public meeting regarding Military Claims Act); *see also generally* Masterton, *supra* note 125, at 50–53; *Transcript of JPP Public Meeting* 101 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

negligent or wrongful act to have been committed within the scope of employment.³²⁰ Thus both statutes effectively bar sexual assault claims.³²¹

Moreover, the Feres³²² doctrine prohibits claims against the U.S. government for “injury that occurs while the complaining party is in active-duty status, on a military base, or engaged in a military mission.”³²³ The Feres doctrine remains controversial, but recent efforts to enact legislation to lessen its effect have been unsuccessful.³²⁴

Finally, the Foreign Claims Act (FCA) permits payment of claims to foreign nationals for death, injury, or property loss caused by negligent or wrongful acts of military personnel outside the United States.³²⁵ Claims are evaluated under the law of the foreign country in which they arise.³²⁶ Although the negligent or wrongful acts need not have been committed within the scope of a Service member’s duties,³²⁷ the FCA is of no help to victims who are U.S. citizens, as its purpose is to maintain good relations with foreign countries in which U.S. Service members are stationed.³²⁸

F. PERSPECTIVES ON ESTABLISHING A UNIFORM DOD COMPENSATION PROGRAM

One option suggested by presenters’ testimony and written materials submitted to the JPP is to establish a uniform DoD crime victim compensation program. Presenters’ testimony and written materials offered the following observations and arguments in *favor* of establishing such a program:

- A DoD CVC program would have its own uniform eligibility rules, thereby avoiding the varying requirements in the 50+ jurisdictions of the state CVC programs. Victims would be

320 Dickerson, *supra* note 133, at 226; *Transcript of JPP Public Meeting* 101 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

321 Dickerson, *supra* note 133, at 226; *Transcript of JPP Public Meeting* 101 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

322 *Feres v. United States*, 340 U.S. 135 (1950), *cited in* Dickerson, *supra* note 133, at 226.

323 Dickerson, *supra* note 133, at 218 (internal quotation marks omitted); *see also* *Transcript of JPP Public Meeting* 191–93 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

324 Masterton, *supra* note 125, at 52; *Written Statement of Service Women’s Action Network (SWAN) to JPP* (submitted Mar. 11, 2015).

325 10 U.S.C. § 2734; *see also* Masterton, *supra* note 125, at 56; *Transcript of JPP Public Meeting* 113–14, 171, 218–20 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe). For information on the Military Personnel and Civilian Employees Claims Act (PCA), *see* part IV(C), *supra*.

326 10 U.S.C. § 2734; *see also* Masterton, *supra* note 125, at 56; *Transcript of JPP Public Meeting* 113–14, 171, 196–99 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

327 10 U.S.C. § 2734; *see also* Masterton, *supra* note 125, at 56; *Transcript of JPP Public Meeting* 113–16, 171 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe) (detailing FCA claims process).

328 R. Peter Masterton, *Unique Aspects of Article 139 Claims Overseas*, 2015-SEP Army Law. 33, 33 (Sept. 2015); *Transcript of JPP Public Meeting* 114 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

treated the same, regardless of their status (military, dependent, or civilian), and regardless of any possible changes in their status during the course of the court-martial process.³²⁹

- A DoD CVC program would not be tethered to the need for a criminal conviction and sentence, the offender’s financial situation, or a court’s continued jurisdiction.³³⁰ DoD could accommodate many of the 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 or mental health care), as well as cases arising overseas.³³¹
- A DoD CVC program would be part of the DoD budget and be subject to Congress’s appropriations process. The benefits of structuring the fund in this way would mirror those gained through litigating cases in civil court: it would function to provide relief to victims while also holding the military accountable in its efforts to eradicate sexual assault, because Congress would directly oversee both the program’s appropriations and its authorization. The DoD CVC program could be augmented by any funds obtained through convictions (e.g., fines, forfeiture of pay and allowances), which would be collected and paid to victims.³³²
- Many victims have no desire for any further dealings with the perpetrator. A DoD CVC program would enable these victims to avoid the kind of reengagement required by other compensation or restitution mechanisms (e.g., at a restitution hearing, in the clemency or parole process).³³³

Presenters’ testimony and written materials submitted to the JPP made the following observations and arguments weighing *against* establishing a uniform DoD crime victim compensation program:

- While substantial federal resources fund state CVC programs, there currently is no national CVC program except for ITVERP, the federal CVC program for victims of international terrorism.³³⁴
- One JPP presenter opined that a centralized compensation board “would not be conducive to a proper claims investigation,” which generally needs to be done at the local level.³³⁵
- One JPP presenter raised the apparent inequity in guaranteeing compensation to eligible victims who happened to be victimized by a Service member while excluding victims of

329 *Transcript of JPP Public Meeting* 328–30 (Mar. 13, 2015) (testimony of Major Richard M. Cloninger, U.S. Marine Corps, Regional Victims’ Legal Counsel).

330 *Transcript of JPP Public Meeting* 101–02, 114–15 (Mar. 13, 2015) (testimony of Professor Cortney E. Lollar, University of Kentucky College of Law); *id.* at 111–13 (testimony of Professor Julie Goldscheid, CUNY School of Law).

331 *Transcript of JPP Public Meeting* 300–31 (Mar. 13, 2015) (testimony of Ms. Teresa P. Scalzo, Deputy Director, U.S. Navy Trial Counsel Assistance Program); *id.* at 369–70 (testimony of Ms. Bridgette Marie Harwood, Director of Legal Services, Network for Victim Recovery of DC (NVRDC)).

332 *Written Statement of Greg Jacobs, Policy Director, Service Women’s Action Network (SWAN) to JPP* (submitted Mar. 11, 2015).

333 *Transcript of JPP Public Meeting* 58, 119–20 (Mar. 13, 2015) (testimony of Professor Julie Goldscheid, CUNY School of Law).

334 NACVCB, “Resources for Recovery,” *supra* note 229.

335 *Transcript of JPP Public Meeting* 172–73 (June 18, 2015) (testimony of Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe).

identical crimes committed under similar circumstances merely because the offender was not a Service member.³³⁶

- One JPP presenter cautioned against establishing a uniform program that might provide incentives for false reporting, particularly if payments are made regardless of actual loss and regardless of any report to law enforcement.³³⁷

G. BEST PRACTICES IN ESTABLISHING NATIONAL COMPENSATION PROGRAMS

In considering the advantages and disadvantages of a uniform compensation program for victims of sexual assault offenses committed by Service members, the JPP remains mindful of the following fundamental issues that must be addressed when designing, implementing, and administering compensation programs intended to serve as alternatives to the tort system for innocent victims, whether of crime or of catastrophe:

- **Funding:** How much will the program cost,³³⁸ and what will be the sources of its funding?³³⁹ Is there a cap on the aggregate amount of funds appropriated?³⁴⁰ The answers to these questions help determine how all other issues are resolved.³⁴¹
- **Eligibility:** Who is eligible to receive compensation?³⁴² How direct need a claimant's injuries be to be compensable?³⁴³
- **Methodology:** How is the amount of compensation calculated for each victim? Does the methodology, for example, allow for varying amounts based on tort concepts such as pain and

336 *Transcript of JPP Public Meeting* 180–81 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards) (noting that similar criticisms have been lodged against the large alternative compensation programs).

337 *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP* 4 (June 18, 2015).

338 *Transcript of JPP Public Meeting* 140–41 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP). Mr. Feinberg has served as special master or administrator appointed by the President to design and execute the compensation funds assisting victims of numerous recent mass crimes and disasters, including the attacks of September 11, 2001, the 2007 Virginia Tech shootings, the 2010 BP Deepwater Horizon oil spill, and the 2013 Boston Marathon bombing. *See also* *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP* 3 (June 18, 2015).

339 *Transcript of JPP Public Meeting* 140–41 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP); *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP* 3 (June 18, 2015); *see also* Linda S. Mullenix, *Designing Compensatory Funds: In Search of First Principles*, 3 STAN. J. COMPLEX. LITIG. 1, 8 (Winter 2015) (describing different funding sources of several recent alternative compensation programs).

340 *Transcript of JPP Public Meeting* 140–41 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP).

341 *Transcript of JPP Public Meeting* 140–41 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP).

342 *Transcript of JPP Public Meeting* 142 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP); *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP* 4 (June 18, 2015).

343 Kenneth R. Feinberg, *Unconventional Responses to Unique Catastrophes*, 45 AKRON L. REV. 575, 578–79 (2011–12).

suffering and emotional distress? Or is it a simpler methodology allowing flat amounts for certain defined eligible injuries, regardless of the extent of lost wages, pain and suffering, and so on?³⁴⁴ The chosen methodology must be transparent,³⁴⁵ and it should not take into account supplemental compensation that victims may or may not receive from other sources.³⁴⁶

- **Proof Requirements:** What documentation or other corroboration must claimants produce to demonstrate that they are entitled to compensation?³⁴⁷ Is there a jurisdictional deadline for submission of such proof, and, if so, when is it?³⁴⁸ Like the methodology, the proof requirements must be transparent.³⁴⁹
- **Due Process:**³⁵⁰
 - Is the claimant entitled to a hearing? If so, how formal is it (e.g., is it transcribed)? Must the claimant appear and, if so, must the claimant’s testimony be under oath?
 - What burden of proof must the claimant satisfy?
 - What procedures govern assertion of the claim?
 - Who adjudicates the claim?
 - May, or must, the claimant be represented by counsel?
 - Is an adversarial party permitted to oppose the claim?
 - If the claim is denied, does the claimant have the right to appeal? If so, who hears the appeal?
 - If the claim is granted, does the claimant, by accepting compensation, thereby waive the right to file a lawsuit?

344 *Transcript of JPP Public Meeting* 142–43, 163–65 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP); Feinberg, *supra* note 343, at 579; *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP* 3 (June 18, 2015).

345 *Transcript of JPP Public Meeting* 142 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP); *see, e.g.*, The One Fund Boston 2013, “Final Protocol” 1–2 (May 2013) (prioritizing among various categories of eligible claimants), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/05-Comp_Rest/20150618/17_OneFund_Boston_Protocol.pdf.

346 *Transcript of JPP Public Meeting* 160–62 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP) (emphasizing benefits, in terms of avoiding costs, inefficiency, and divisiveness, of “standalone” compensation programs that are independent of other sources of compensation).

347 *Transcript of JPP Public Meeting* 143–44 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP); *id.* at 179–80 (testimony of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards).

348 *Transcript of JPP Public Meeting* 166–67 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP).

349 *Transcript of JPP Public Meeting* 143 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP).

350 *Transcript of JPP Public Meeting* 144–48 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP); *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards, to JPP* 4 (June 18, 2015).

H. JPP ASSESSMENT AND RECOMMENDATIONS REGARDING A UNIFORM DOD COMPENSATION PROGRAM

Soldiers, Sailors, Airmen, and Marines are employees of DoD who have been trained and assigned to missions and locations around the world, and DoD bears significant responsibility for the actions of Service members. DoD bears particular responsibility for victims who are Service members, given that the military is a closed system in which victims often cannot easily avoid interactions with those who assaulted them.

Moreover, there appear to be significant gaps in financial coverage for dependent and civilian victims of sexual assault offenses committed by Service members. Victims of crimes committed by those who are subject to the UCMJ should not be relegated to a patchwork of state systems with varied eligibility requirements, some of which seemingly ignore best practices in the handling of sexual assault cases. Instead, all victims of sexual assault crimes committed by military members should have convenient access to a fair and efficient compensation system, providing uniform benefits regardless of the location of the offense or the victim's state of residence.

For these reasons, the Panel concludes that some victims of sexual assault crimes committed by Service members currently lack adequate access to compensation. Accordingly, the Panel recommends that DoD establish and administer a uniform compensation program for such victims.³⁵¹ Consistent with its mandate, the Panel's recommendation is restricted to cases of sexual assault. The Panel makes no recommendation as to whether victims of other crimes should have access to DoD compensation funds.

The Panel's determination that a distinct DoD program should be created arose from its recognition not only of deficiencies in some state CVC programs but also of the lack of uniformity in state programs' approaches to coverage and eligibility. Indeed, as described below, the Panel's recommendations regarding the scope of coverage and eligibility rules for a DoD compensation program largely reflect the best practices of the state CVC programs. Generally, where the Panel's recommendations depart from the states' usual approach, such variations are intended to conform to existing policies specific to DoD (e.g., the restricted reporting option).

The Panel makes the following recommendations regarding the fundamental issues that structure every crime victim compensation program:

- **Funding.**
 - **Cost of the program.** The cost of a DoD compensation program would depend on which types of crime victims are eligible. The Panel's recommendation regarding a DoD program is restricted to sexual assault cases, but the cost remains difficult to estimate since it is impossible to predict how many victims would file claims.

³⁵¹ Members of the Coast Guard are employees of the Department of Homeland Security rather than DoD, but the recommended DoD compensation program should be available to victims of sexual assault crimes committed by Coast Guard personnel. Given the Coast Guard's small size, separate administration of its own compensation program would be inefficient and unnecessary. DoD does not bear the same level of responsibility for members of the Coast Guard as it does for members of the other Services, but sexual assault crimes committed by Coast Guard personnel are UCMJ offenses whose victims are entitled to expect equal, uniform adjudication of their claims for compensation.

In fiscal year 2014, the Services reported 6,660 total reports of sexual assault, of which 776 were reports by civilians.³⁵² In 2012, the most recent year available, state CVC programs paid an average of \$1,220 per claim to victims in sexual assault cases.³⁵³ If all civilian victims in 2014 received the state CVC average payment of \$1,220, the total program cost would be about \$950,000.

Currently, the most common maximum amount of compensation available in state CVC programs is \$25,000. If the DoD program adopts this \$25,000 cap and received claims from all civilian victims in 2014, the maximum annual compensation that the program might be expected to award would be \$19.4 million.

These are rough estimates based on the Panel’s general conclusion that civilian victims are saddled with far greater out-of-pocket expenses than Service member and dependent victims, and are therefore most likely to apply for compensation. The estimates do not take into account potential claims from Service members and dependents, and they do not include the costs of administering the program. On the other hand, they also do not take into account the likely continuation of the trend of increasing collateral sources of compensation resulting from a growth in health care coverage under the Affordable Care Act and Medicaid.

- **Sources of funding.** The Panel defers to DoD and Congress to identify sources of funding for the program.
- **Cap on compensation.** The Panel recommends that Congress adopt \$25,000 as the overall maximum amount in losses that a DoD compensation program may reimburse, consistent with the plurality of state CVC programs. However, Congress should periodically review the appropriateness of this cap and make adjustments as necessary to account for changes in health care costs and other factors.
- **Eligibility.**
 - The Panel recommends that a DoD compensation program should be made available to all victims of sexual assault crimes committed by Service members regardless of the military status of those victims, including Service members, dependents, civilian DoD employees, and civilians without any DoD affiliation. Like the state CVC programs, the DoD program should be available to victims of crimes that do not result in a conviction, including crimes initially charged but later “pleaded down” to lesser offenses such as simple assault and those in which charges result in acquittal. Even where the government cannot prove beyond a reasonable doubt that the accused sexually assaulted the victim, the victim may still be able to prove by a preponderance of the evidence—the standard of proof that would apply in civil proceedings—that he or she was sexually assaulted by a Service member and is therefore entitled to compensation.

352 U.S. DEP’T OF DEF., SAPRO, REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, encl. 5 (2014); U.S. DEP’T OF DEF., SAPRO, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, encls. 1–3 (Apr. 15, 2014).

353 U.S. Dep’t of Justice, Office for Victims of Crime, “2012 Victims of Crime Act Performance Report” (June 4, 2013), available at http://ojp.gov/ovc/grants/vocanpr_vc12.html.

- The Panel remains mindful of DoD’s restricted reporting option, which since October 2005 has allowed victims to report a sexual assault and receive support and health care without triggering an investigation or informing the victim’s chain of command of his or her identity.³⁵⁴ The Panel recommends that a DoD compensation program should not require that claimants cooperate with law enforcement. Victims who choose DoD’s restricted reporting option should be eligible for compensation in the same way as victims who choose to file an unrestricted report.
- The Panel further recommends that a DoD program not impose a rule requiring the claimant to have reported the sexual assault within any particular period of time after the incident. Reporting time requirements exist in most state CVC programs, but these programs—unlike the program that the Panel is proposing for DoD—cover many varied types of crimes. The Panel’s recommendation reflects the growing trend among the states to waive reporting time requirements in sexual assault cases or to allow a SAFE exam to substitute for a report.
- **Methodology.** A DoD compensation program for sexual assault victims should cover out-of-pocket losses of the following types: medical and mental health expenses, both past and future; lost income; travel expenses; relocation costs; and personal property damage or loss.

The Panel considered whether compensation should be awarded for pain and suffering, and it recommends that the program should be limited (at least initially) to out-of-pocket losses, consistent with the current practice of all state CVC programs except Tennessee and Hawaii. Because it is particularly difficult to assess the impact of a sexual assault crime in monetary terms, this question may be revisited in the future to assess the adequacy of compensation based on easily measured out-of-pocket losses.³⁵⁵

Like state CVC programs, a DoD compensation program should be a compensation source of last resort. Thus, if a victim of a sexual assault committed by a Service member first applies for compensation from a state CVC program, the victim’s eligibility for DoD compensation should be reduced by the amount of his or her state CVC program payment. Likewise, a victim’s eligibility should be reduced by any amounts received from other collateral sources such as health insurance.

Any payments made under Article 139 for a claim of property loss resulting from a sexual assault offense also qualify as a collateral source that would reduce a victim’s eligibility for DoD compensation funds. However, failure to file an Article 139 claim for property loss resulting from a sexual assault offense should not disqualify a victim from seeking compensation from the recommended DoD compensation program.

- **Proof Requirements.**
 - Nature of evidence required. Claimants should be required to submit sufficient documentation that the sexual assault occurred and that they experienced out-of-pocket financial losses as a result. Consistent with DoD’s restricted reporting option, however, this

³⁵⁴ See RSP REPORT, *supra* note 11, at 64, 100–01.

³⁵⁵ The Panel highlights, for future consideration, Hawaii’s “acknowledgment award,” which is symbolic in nature and not intended to quantify physical or emotional harm.

may simply be medical records: a police report should not be required. Documentation should otherwise be similar to that required by state CVC programs.

- **Jurisdictional deadline.** The Panel recommends that a DoD program consider claims for incidents that have occurred since October 2005, which is when DoD adopted its restricted reporting option. Using this date as a starting point for eligibility ensures access for military and dependent victims who chose not to cooperate with law enforcement but did confidentially report the incident. This date also strikes a balance between providing compensation to the greatest possible number of victims and ensuring adequate documentation of claims.

Victims whose claims arose prior to initiation of the new DoD program should have two years after the program is implemented to file their claims. For incidents that occur after the program is implemented, victims should have one year to file a claim. Congress or DoD should periodically reexamine these filing limitations to ensure that they are appropriate.

- **Due Process.** The Panel makes the following recommendations, which are consistent with the prevailing approach taken by state CVC programs:
 - A DoD compensation program should provide claimants the opportunity to request a hearing regarding their compensation claim, but claimants should not be required to appear.
 - DoD claim adjudicators should apply the civil standard of proof—preponderance of the evidence—to determine whether to award compensation and to determine compensation amounts.
 - While deferring to DoD regarding the most appropriate adjudication structure and personnel, the Panel suggests that DoD consider the relevant competence and experience of the Services' claims offices in adjudicating tort claims filed under the Foreign Claims Act by non-U.S. victims against Service members stationed overseas.
 - A DoD program should allow, but not require, claimants to be represented by legal counsel, including SVCs. The Services should train victim assistance personnel on informing victims about the DoD program, advising victims of their potential eligibility for compensation, and assisting them in applying for such compensation.
 - A DoD program should provide a mechanism for claimants to appeal claim adjudicator decisions. The JPP defers to DoD on how to structure this mechanism.
 - Claimants who receive compensation from a DoD program should not be required to waive their right to file a lawsuit (e.g., under the Federal Tort Claims Act). However, claimants who receive compensation for property losses from the DoD program should be informed that they may not subsequently seek compensation for the same losses through another federal mechanism such as Article 139 of the UCMJ or the Military Personnel and Civilian Employees Claims Act (PCA).

APPENDIX A: Judicial Proceedings Panel Authorizing Statutes

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible.

- (F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
 - (G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
 - (H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.
 - (I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.
 - (J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.
- (3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.
- (e) AUTHORITY OF PANELS.—
- (1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.
 - (2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.
- (f) PERSONNEL MATTERS.—
- (1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.
 - (2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.
 - (3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

- (1) **ADDITIONAL ASSESSMENTS SPECIFIED.**—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “judicial proceedings panel”, shall conduct the following:
- (A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one’s position in the chain of command of the other person to gain access to or coerce the other person.
 - (B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.
 - (C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).
 - (D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
 - (i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
 - (ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).
 - (iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.
- (2) **SUBMISSION OF RESULTS.**—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

- (a) **ADDITIONAL DUTIES IMPOSED.**—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “judicial proceedings panel”, shall perform the following additional duties:
- (1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.
 - (2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—
 - (A) users of and personnel staffing the Department of Defense Safe Helpline; and
 - (B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.
- (b) **SUBMISSION OF RESULTS.**—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

- (f) **DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL** – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually” thereafter” after “reports”.

APPENDIX B: Judicial Proceedings Panel Members

HONORABLE ELIZABETH HOLTZMAN – JPP CHAIR

Ms. Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at the law firm Zuckerman Spaeder LLP. She served as a judge in the U.S. District Court for the Southern District of New York for sixteen years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering, and terrorism. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent forty years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victim and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a twenty-seven-year career in the Pentagon, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey is the Vice President of Homeland Security and Defense for HP Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various government agencies, including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. In 2006, after thirty-four years in the U.S. Navy, she retired as the first female vice admiral. As Chief of the Navy's \$5 billion global education and training enterprise, she led a successful revolution in training technology to improve the quality, access, and effectiveness of Navy training while lowering its cost. Admiral Tracey graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a fellowship with the Chief of Naval Operations' Strategic Studies Group.

APPENDIX C: Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

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

Lieutenant Colonel Kelly McGovern,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Mr. Roger Capretta, Supervising Paralegal
(June 2014 - July 2015)

Ms. Julie Carson, Attorney and
Legislative Analyst

Ms. Janice Chayt, Investigator

Ms. Alice Falk, Editor

Ms. Nalini Gupta, Attorney

Lieutenant Colonel Glen Hines,
U.S. Marine Corps, Attorney

Mr. Kirtland Marsh, Attorney

Ms. Laurel Prucha Moran, Graphic Designer

Mr. Douglas Nelson, Attorney
(June 2014 - October 2015)

Mr. Matt Osborn, Attorney
(August 2014 - October 2015)

Ms. Meghan Peters, Attorney

Ms. Terri Saunders, Attorney

Ms. Meghan Tokash, Attorney
(December 2014 - October 2015)

Ms. Stayce Rozell, Senior Paralegal

Ms. Tiffany Williams, Supervising Paralegal

Ms. Sharon Zahn, Senior Paralegal

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried, Designated Federal Official

Mr. William Sprance,
Alternate Designated Federal Official

Major Jacqueline M. Stingl,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Alternate Designated Federal Official

APPENDIX D: Judicial Proceedings Panel Public Meetings Addressing Victim Restitution and Compensation

JPP PUBLIC MEETING	PRESENTERS AND DELIBERATIONS on Compensation and Restitution
<p>March 13, 2015</p> <p>Public Meeting of the JPP at the U.S. District Court for the District of Columbia, Washington, D.C.</p>	<ul style="list-style-type: none"> • Colonel John G. Baker, U.S. Marine Corps, Chair, Joint Service Committee on Military Justice • Professor Julie Goldscheid, CUNY Law School • 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, NVRDC, 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

JPP PUBLIC MEETING	PRESENTERS AND DELIBERATIONS on Compensation and Restitution
<p>April 10, 2015</p> <p>Public Meeting of the JPP at the U.S. District Court for the District of Columbia, Washington, D.C.</p>	<ul style="list-style-type: none"> • Panel deliberations (no speakers)
<p>June 18, 2015</p> <p>Public Meeting of the JPP at the The George Washington University Law School, Washington, D.C.</p>	<ul style="list-style-type: none"> • Ms. Mary Kaye Justis, Director, TRICARE Health Plan • Dr. Cara J. Krulewitch, CNM, Ph.D., FACNM, Director, Women’s Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense • Dr. Stacey Pollack, Ph.D., National Director of Program Policy Implementation, Veterans Health Administration • Ms. Diana M. Williard, Quality Assurance Officer, Compensation Service, Veterans Benefits Administration • Ms. Stephanie Li, Chief, Regulations and Policy Staff, Compensation Service, Veterans Benefits Administration • Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe • Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service • Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP [by telephone] • Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards
<p>August 6, 2015</p> <p>Public Meeting of the JPP at the The George Washington University Law School, Washington, D.C.</p>	<ul style="list-style-type: none"> • Panel deliberations (no speakers)

JPP PUBLIC MEETING	PRESENTERS AND DELIBERATIONS on Compensation and Restitution
<p>September 18, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> Panel deliberations (no speakers)
<p>October 9, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> Panel deliberations (no speakers)
<p>December 11, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> Panel deliberations & review of draft report (no speakers)
<p>January 22, 2016</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> Panel deliberations & report approval (no speakers)

APPENDIX E: Acronyms and Abbreviations

CAAF:	United States Court of Appeals for the Armed Services	NCVLI:	National Crime Victim Law Institute
CVC:	Crime Victim Compensation	NDAA:	National Defense Appropriations Act
CVRA:	Crime Victims' Rights Act	NVRDC:	Network for Victim Recovery of DC
DD Form:	Department of Defense Form	OVC:	Office for Victims of Crime
DFAS:	Defense Finance and Accounting Service	PCA:	Personnel and Civilian Employees Claims Act
DoD:	Department of Defense	PTA:	pretrial agreement
DoDD:	Department of Defense Directive	PTSD:	post-traumatic stress disorder
DoDI:	Department of Defense Instruction	RCM:	Rules for Courts-Martial
FCA:	Foreign Claims Act	RSP:	Response Systems to Adult Sexual Assault Crimes Panel
FTCA:	Federal Tort Claims Act	SAFE:	sexual assault forensic exam
FY:	fiscal year	SAPR:	Sexual Assault Prevention and Response
GAO:	Government Accountability Office	SAPRO:	Sexual Assault Prevention and Response Office
ITVERP:	International Terrorism Victim Expense Reimbursement Program	SARC:	sexual assault response coordinator
JPP:	Judicial Proceedings Panel	SASC:	Senate Armed Services Committee
MCA:	Military Claims Act	STI:	sexually transmitted infection
MCIO:	military criminal investigative organization	SVC:	special victims' counsel
MCM:	Manual for Courts-Martial	SWAN:	Service Women's Action Network
MST:	military sexual trauma	TCAD:	Transitional Compensation for Abused Dependents
MVRA:	Mandatory Victim Restitution Act		
NACVCB:	National Association of Crime Victim Compensation Boards		

UCMJ: Uniform Code of Military Justice
USC: United States Code
VA: Veterans Affairs
VAWA: Violence Against Women Act
VLC: victim legal counsel
VOCA: Victims of Crime Act of 1984
VWAP: Victim Witness Assistance Program
WPA: Whistleblower Protection Act

APPENDIX F: Sources Consulted

1. LEGISLATIVE SOURCES

a. Enacted Federal Statutes

- 5 U.S.C. App. 2 (Federal Advisory Committee Act)
- 10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)
- 10 U.S.C. § 2733 (Military Claims Act)
- 10 U.S.C. § 2734 (Foreign Claims Act)
- 10 U.S.C. § 2772 (Share of fines and forfeitures to benefit Armed Forces Retirement Home)
- 18 U.S.C. § 3614 (Resentencing upon failure to pay a fine or restitution)
- 18 U.S.C. § 3663A (Mandatory Victim Restitution Act)
- 18 U.S.C. § 3664 (Procedure for issuance and enforcement of order of restitution)
- 18 U.S.C. § 3771 (Crime Victims' Rights Act)
- 24 U.S.C. § 419 (Armed Forces Retirement Home Trust Fund)
- 28 U.S.C. §§ 2671-2680 (Federal Tort Claims Act)
- 31 U.S.C. § 3721 (Military Personnel and Civilian Employees Claims Act)
- 38 U.S.C. § 1720D (Counseling and treatment for sexual trauma)
- 42 U.S.C. § 3796 (Violence Against Women Act)
- 42 U.S.C. § 10602 (Victims of Crime Act)
- Federal Advisory Committee Management, 41 C.F.R. § 102-3.50 (2011)
- Victims of Crime Act Victim Compensation Grant Program, 66 Fed. Reg. 95, 27158-65 (May 16, 2001)
- National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013)
- National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

b. Proposed Federal Statutes

- H.R. 1607, 114th Cong., Ruth Moore Act of 2015 (2015)
- S. 865, 114th Cong., Ruth Moore Act of 2015 (2015)

c. Enacted State Statutes

- 2014 Cal. Legis. Serv. 506 (A.B. 2545) (2014) (amending CAL. GOV'T CODE § 13956)
- 2015 Tex. Sess. Law. Serv. 924 (West)

2. JUDICIAL DECISIONS

a. U.S. Court of Appeals

United States v. Caruth, 418 F.3d 900 (8th Cir. 2005)

b. U.S. Court of Appeals for the Armed Forces

United States v. Williams, 60 M.J. 360 (C.A.A.F. 2004)

c. U.S. Army Court of Criminal Appeals

United States v. Delagarza, No. 20080891 (A. Ct. Crim. App. 2010) (unpublished)

3. RULES AND REGULATIONS

a. Executive Orders

Manual for Courts-Martial; Proposed Amendments , 80 Fed. Reg. 63,204 (Oct. 19, 2015), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-10-19/pdf/2015-26485.pdf>

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf

b. Department of Veterans Affairs

U.S. DEP'T OF VETERANS AFFAIRS, VHA DIR. 2010-033, MILITARY SEXUAL TRAUMA (MST) PROGRAMMING (July 14, 2010)

c. Department of Defense

U.S. DEP'T OF DEFENSE, DIRECTIVE 1030.1, VICTIM AND WITNESS ASSISTANCE (Apr. 23, 2004)

U.S. DEP'T OF DEFENSE, INSTRUCTIVE 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS (Jan. 16, 1997), *available at* <http://www.cac.mil/docs/DODI-1342.24.pdf>

U.S. DEP'T OF DEFENSE, DD FORM 2701, INITIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Aug. 2013), *available at* <http://www.dtic.mil/whs/directives/forms/eforms/dd2701.pdf>

U.S. DEP'T OF DEFENSE, DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Jan. 20, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>

U.S. DEP'T OF DEFENSE, INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (July 7, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>

U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG. 7000.14-R, vol. 7B (Feb. 2015), *available at* http://comptroller.defense.gov/Portals/45/documents/fmr/Combined_Volume1-15.pdf

d. Services

U.S. DEP'T OF ARMY, REGULATION 27-10, MILITARY JUSTICE (Oct. 3, 2011), *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf

U.S. DEP'T OF ARMY, REGULATION 27-20, CLAIMS (Feb. 8, 2008), *available at* http://www.apd.army.mil/pdffiles/r27_20.pdf

4. MEETING AND HEARINGS

a. Public Meetings of the Judicial Proceedings Panel

Transcript of JPP Public Meeting (Mar. 13, 2015)

Transcript of JPP Public Meeting (June 18, 2015)

b. Congress

Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs, 112th Cong. 1 (2012)

The Relationships Between Military Sexual Assault, Post-Traumatic Stress Disorder and Suicide, and on Department of Defense and Department of Veterans Affairs Medical Treatment and Management of Victims of Sexual Trauma, Hearing Before the Senate Armed Services Personnel Subcommittee, 113th Cong. 1 (2014)

5. OFFICIAL POLICY STATEMENTS

U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS: ADULTS/ADOLESCENTS (Apr. 2013), *available at* <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>

6. OFFICIAL REPORTS

a. DoD Agencies

ARMED FORCES RETIREMENT HOME, CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2016, *available at* https://www.afrh.gov/afrh/docs/AFRH_CBJ_2016.pdf

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