

JUDICIAL PROCEEDINGS PANEL

REPORT ON
VICTIMS' APPELLATE RIGHTS



June 2017

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

Victims' Appellate Rights

June 2017



JUDICIAL PROCEEDINGS PANEL

**Elizabeth
Holtzman Chair**

June 2, 2017

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The Honorable John McCain
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on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mac Thornberry
Chair, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

The Honorable James Mattis
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

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 victims' appellate rights. This report summarizes the JPP's review of the rights of victims of sexual assault in the military appellate process. Included in the report are four recommendations addressing appellate counsel access to certain sealed materials, victim notice of appellate proceedings, victim standing in post-conviction appellate proceedings, and victim access to the Court of Appeals for the Armed Forces under Article 6b of the Uniform Code of Military Justice.

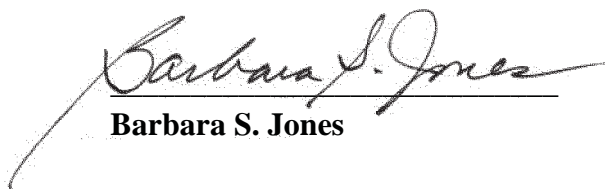
To gather information for this report, the JPP held public meetings to hear from a former chief judge of the Court of Appeals for the Armed Forces, former judges of the Service Courts of Criminal Appeals, military appellate defense and government counsel, special victims' counsel and victims' legal counsel, civilian appellate defense counsel, a policy advisor from the Department of Justice, and attorneys from victims' rights organizations. In addition, the JPP received responses from the Services to a written request for information about appellate practice. The JPP also received numerous public comments addressing legislative proposals on victims' appellate rights. The JPP expresses sincere appreciation to everyone who contributed to this report.

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

Respectfully submitted,



Elizabeth Holtzman, Chair



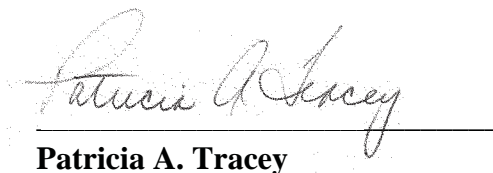
Barbara S. Jones



Victor Stone



Thomas W. Taylor



Patricia A. Tracey

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Executive Summary

Over the past year, the Judicial Proceedings Panel (JPP) examined the rights of victims of sexual assault in the military appellate process and identified four main areas of concern: (1) appellate counsel access to certain sealed materials, including materials not released to counsel at trial; (2) victim notice of appellate proceedings; (3) victim standing in post-conviction appellate proceedings; and (4) victim access to the Court of Appeals for the Armed Forces (CAAF) under Article 6b of the Uniform Code of Military Justice (UCMJ).

As part of its review, the JPP considered two legislative proposals: one submitted by the program managers of the special victims' counsel and victims' legal counsel programs, and one included as Section 547 of S. 2943, the Senate version of the Fiscal Year (FY) 2017 National Defense Authorization Act (NDAA). Both legislative proposals would allow victims to file pleadings as a "real party in interest" during appellate review. The JPP also analyzed a proposed amendment by the Joint Service Committee on Military Justice (JSC) to Rule for Courts-Martial (R.C.M.) 1103A(b)(4)(B), which addresses appellate counsel examination of sealed materials. In addition, the JPP received testimony from appellate judges, practitioners, and experts—including a former chief judge of the CAAF, former judges of the Service Courts of Criminal Appeals (CCAs), military appellate defense and government counsel, civilian appellate defense counsel, a policy advisor from the Department of Justice, and attorneys from victims' rights organizations.

On the basis of testimony received and its own analysis and deliberations, the JPP makes four recommendations.

First, the JPP supports the JSC's proposed amendment to R.C.M. 1103A(b)(4)(B)(i), which would permit appellate counsel examination of sealed materials released to counsel at trial upon a "colorable showing" that examination is reasonably necessary to a proper fulfillment of their responsibilities. However, the JPP finds that in situations in which sealed records are reviewed in camera by a military judge but not released to counsel at trial, both appellate counsel and the person whose records are about to be examined should be afforded notice and an opportunity to be heard. Therefore, the JPP recommends that the JSC revise its proposed amendment to R.C.M. 1103A(b)(4)(B)(ii) to include the following language: "Prior to a decision to permit examination of material described in this subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be examined and to appellate counsel."

Second, the JPP recommends that the Services formalize procedures to provide victims in sexual assault cases (1) with timely notice, unless declined, of significant appellate matters, including but not limited to the date and time of the filing of appellate pleadings and briefs, of any appellate courtroom proceedings, of the date when the case is taken under submission, and of the final decision and any opinion of any appellate court, and (2) with convenient access to any unsealed documents filed in the case, if requested. The JPP believes that such formalized procedures are necessary and appropriate to enable victims to stay apprised of events that may directly affect their rights and interests.

Third, the JPP supports victim standing in post-conviction appellate proceedings, but believes that the legislative proposals it considered are technically flawed. The JPP recommends that Congress revise Section 547(a) of S. 2943 to state:

SEC. 547. APPELLATE STANDING OF VICTIMS UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) APPELLATE REVIEW.—Section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

“(f) APPELLATE REVIEW.—(1) If counsel for the accused or the Government files appellate pleadings under section 866 or 867 of this title (article 66 or 67) calling into question a prior judicial ruling in the case on an issue as to which a victim previously had standing and was heard, during appellate review that same victim may respond in the same manner as a party regarding that same issue, including through a Special Victims’ Counsel under section 1044e of this title.”

Finally, the JPP recommends that Congress amend Article 6b of the UCMJ to grant the CAAF jurisdiction to hear a victim’s appeal if a CCA denies the victim’s petition for a writ of mandamus under Article 6b. The JPP believes that access to the CAAF is important to promote uniformity across the Services and to ensure civilian oversight of decisions affecting victims’ rights.

Summary of JPP Recommendations on Victims' Appellate Rights*

Recommendation 43: The Joint Service Committee on Military Justice revise its proposed amendment to Rule for Courts-Martial (R.C.M.) 1103A(b)(4)(B)(ii) to include the following language: “Prior to a decision to permit examination of material described in this subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be examined and to appellate counsel.”

- The JPP supports the JSC’s proposed amendment to R.C.M. 1103A(b)(4)(B)(i), which would allow appellate counsel to examine sealed materials released to counsel at trial upon a colorable showing that examination is reasonably necessary to a proper fulfillment of their responsibilities.
- The JPP finds that in situations in which sealed materials are reviewed in camera by a military judge but not released to counsel at trial, both appellate counsel and the person whose records are about to be examined should be afforded notice and the opportunity to be heard prior to a decision to permit examination of the sealed materials.

Recommendation 44: The Services formalize procedures to provide victims in sexual assault cases (1) with timely notice, unless declined, of significant appellate matters, including but not limited to the date and time of the filing of appellate pleadings and briefs, of any appellate courtroom proceedings, of the date when the case is taken under submission, and of the final decision and any opinion of any appellate court, and (2) with convenient access to any unsealed documents filed in the case, if requested.

- The JPP finds that the creation of a system similar to the federal Public Access to Court Electronic Records (PACER) system would enable all victims to receive appropriate notice of appellate proceedings. The JPP supports the provision in the Military Justice Act of 2016 that requires the development and implementation of a program for the military justice system dealing with case management, data collection, and data accessibility. However, the JPP recognizes that this program may not take effect until December 2020.

* 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. JPP Recommendations 12–17 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON RESTITUTION AND COMPENSATION FOR MILITARY ADULT SEXUAL ASSAULT CRIMES 5 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf. JPP Recommendations 18–23 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE 5–7 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf. JPP Recommendations 24–36 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON RETALIATION RELATED TO SEXUAL ASSAULT OFFENSES 5–10 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. JPP Recommendations 37–38 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES 5–6 (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf. JPP Recommendations 39–42 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES 3–4 (Apr. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf.

- The JPP finds that even though such a program will be created by the Military Justice Act of 2016, the Services need a more immediate process to address the lack of victim notice of appellate proceedings in the interim.
- The JPP finds that the Army practice of using a dedicated office to contact victims and provide them with status updates about the case on appeal is an exemplary best practice.

Recommendation 45: Congress revise Section 547(a) of S. 2943, the Senate version of the Fiscal Year 2017 National Defense Authorization Act, to state:

SEC. 547. APPELLATE STANDING OF VICTIMS UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) APPELLATE REVIEW.—Section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

“(f) APPELLATE REVIEW.—(1) If counsel for the accused or the Government files appellate pleadings under section 866 or 867 of this title (article 66 or 67) calling into question a prior judicial ruling in the case on an issue as to which a victim previously had standing and was heard, during appellate review that same victim may respond in the same manner as a party regarding that same issue, including through a Special Victims’ Counsel under section 1044e of this title.”

- The JPP supports victim standing in post-conviction appellate proceedings.
- The JPP finds that the original language in Section 547(a) of Senate Bill S. 2943 allowing victims to file appellate pleadings as a “real party in interest” would create confusion and would not clearly provide victims with standing in post-conviction appellate proceedings.

Recommendation 46: Congress amend Article 6b of the Uniform Code of Military Justice to grant the Court of Appeals for the Armed Forces (CAAF) jurisdiction to hear a victim’s appeal if a Service Court of Criminal Appeals denies the victim’s petition for a writ of mandamus under Article 6b.

- The JPP finds that victims’ lack of access to the CAAF under Article 6b prevents civilian oversight of decisions by the Service Courts of Criminal Appeals that affect victims’ rights and creates the potential for lack of uniformity across the Services.
- The JPP finds that recent decisions by the CAAF indicate that Congress must expressly grant jurisdiction to the CAAF to review adverse decisions by the Service Courts of Criminal Appeals regarding victims’ writ petitions.

I. Introduction

Since its inception in 2014, the Judicial Proceedings Panel (JPP) has, as part of its charter, reviewed issues surrounding the rights of victims of sexual assault in the military, including the development of the special victims' counsel (SVC) and victims' legal counsel (VLC) programs. In April 2016, the JPP invited the SVC and VLC program managers to provide an update on the status of their programs. Noting that the SVC and VLC programs have been in existence for more than two years, the program managers pointed out that many cases in which a victim was represented by counsel at trial are now being heard on appeal. SVCs and VLCs thus are now dealing with a new set of questions about the rights of victims of sexual assault at the appellate stage.

The SVC/VLC program managers highlighted four major concerns about the military appellate process. First, they expressed concern that sealed materials not released to counsel at trial are regularly being reviewed by appellate counsel on appeal. Second, they argued that current procedures for notifying victims when major events occur on appeal are insufficient. Third, they noted that victims lack standing in post-conviction appellate proceedings, and thereby are prevented from participating fully in the appellate process. Finally, they observed that victims currently do not have the ability to appeal to the Court of Appeals for the Armed Forces (CAAF) in cases in which a Service Court of Criminal Appeals (CCA) denies a victim's petition for a writ of mandamus under Article 6b of the Uniform Code of Military Justice (UCMJ).

At the request of JPP Chair Elizabeth Holtzman, the SVC/VLC program managers jointly submitted a legislative proposal addressing these concerns about the military appellate process. Among other things, the proposal advocated amending Article 6b of the UCMJ—the military's version of the federal Crime Victims' Rights Act—to allow victims to file appellate pleadings as a “real party in interest” and to require victim notice of appellate matters. The SVC/VLC program managers also submitted proposed amendments to Article 70 of the UCMJ on appellate counsel representation.¹

The JPP analyzed the issues and concerns presented by the SVC/VLC program managers. In addition to reviewing the SVC/VLC program managers' legislative proposal, the JPP considered Section 547 of Senate Bill S. 2943, a provision in the Senate version of the Fiscal Year 2017 National Defense Authorization Act that would have amended Article 6b to provide for victim standing in post-conviction appellate proceedings and victim notice of appellate matters.² At its September and October 2016 public meetings, the JPP heard testimony from appellate judges, practitioners, and experts—including a former chief judge of the CAAF, former judges of the CCAs, military appellate defense and government counsel, civilian appellate defense counsel, a policy advisor from the Department of Justice, and attorneys from victims' rights organizations—about the proposed changes to the appellate process. The JPP also received written comments from the Department of Defense Office of the General Counsel, current and former Service members, and victims' rights organizations.

1 The full draft of the SVC/VLC program managers' legislative proposal is attached as Appendix A.

2 The full draft of Section 547 of Senate Bill S. 2943 is attached as Appendix B. This section was not passed in the final version of the National Defense Authorization Act for Fiscal Year 2017. The Joint Explanatory Statement of the Committee of Conference stated that “the conferees understand that the Judicial Proceedings Panel . . . will receive testimony and address this issue in future public meetings of the JPP. The conferees will reconsider this issue after receipt of the JPP recommendations.” See H.R. REP. NO. 114-840, at 1042–43 (2016) (Conf. Rep.).

The JPP recognizes a number of gaps in the current appellate process that affect victims of sexual assault in the military. This report examines the four areas of concern raised by the SVC/VLC program managers and makes recommendations.



Appellate Counsel Access to Certain Sealed Materials

A. Background and Current Practice

Historically, the military did not have clear procedures on access to sealed materials—including materials sealed under Military Rule of Evidence (M.R.E.) 412, covering the rape shield rule, and 513, covering the psychotherapist-patient privilege. Although military judges routinely sealed documents, the language used in their orders varied by case and by Service. The scope of a trial court’s sealing orders—including the extent to which those orders protected sealed exhibits post-trial, the length of time for which those exhibits would be sealed, and the mechanics of getting lawful access to them post-trial—was uncertain.³

The CAAF and its predecessor court, the Court of Military Appeals (COMA), issued a series of opinions in the 1990s addressing the issue of appellate counsel access to sealed records. In *United States v. Branoff*, the COMA held that the lower court had improperly denied appellate defense counsel access to sealed documents appended to the record that had been previously examined by trial defense counsel. The COMA found that since the trial defense counsel already had access to the sealed documents, “a subsequent order prohibiting additional disclosure to another member of that same defense team cannot realistically be considered proliferation.”⁴

In two later cases, *United States v. Romano* and *United States v. Rivers*, the CAAF addressed a different issue: whether appellate defense counsel should have access to sealed records reviewed in camera by the military judge but not disclosed to counsel at trial.⁵ In both of these cases, the CAAF found that the proper procedure was for the CCA to conduct its own in camera review of the undisclosed documents to determine if disclosure of any additional documents to appellate defense counsel was required. In *Rivers*, the CAAF noted that while the Supreme Court has recognized that “the eye of an advocate may be helpful to a defendant in ferreting out information . . . [it] also has recognized that the defense is not entitled to unrestricted access to government information.”⁶

In 2005, seeking to remove the uncertainty about appellate counsel’s authority to examine sealed materials in the absence of a court order, the President promulgated Rule for Courts-Martial (R.C.M.) 1103A.⁷ Under the current version of R.C.M. 1103A, “[r]eviewing and appellate authorities”—including appellate government counsel and appellate defense counsel—“may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities[.]” “Sealed matters” have in the past included victims’ mental health records

3 *Transcript of JPP Public Meeting* 29–31 (Sept. 23, 2016) (testimony of Rear Admiral (Retired) Christian Reismeier, U.S. Navy, Former Chief Judge of the Department of the Navy).

4 *United States v. Branoff*, 38 M.J. 98, 103 (C.M.A. 1993).

5 See *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997); *United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998).

6 *Rivers*, 49 M.J. at 437 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1966)).

7 See MANUAL FOR COURTS-MARTIAL, UNITED STATES, ANALYSIS OF R.C.M. 1103A (2016) [hereinafter MCM]; see also *United States v. Phillips*, No. 38771 (A.F. Ct. Crim. App. Dec. 15, 2015) (order granting motion to review sealed exhibits and proceedings).

reviewed in camera by a military judge, not released to counsel at trial, and sealed and appended to the record of trial.⁸ R.C.M. 1103A specifies that appellate counsel shall not disclose sealed materials in the absence of prior authorization by the Judge Advocate General or appellate court.⁹

According to the Drafter's Analysis, R.C.M. 1103A was "designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information. The rule favors an approach that relies on the integrity and professional responsibility of those functionaries, and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place."¹⁰

Since the rule's implementation, the CCAs have followed its plain language and have allowed appellate counsel access to the record of trial, including sealed materials not released to counsel at trial. However, the CCAs have implemented different rules and procedures governing exactly how appellate counsel may examine these materials.¹¹

Under Army CCA Rule 30.4, attorneys of record in appellate cases must request permission of the clerk and coordinate review of sealed records with the Office of the Clerk of Court; they cannot photocopy or make alterations to the sealed materials.¹² According to a former Army judge who appeared before the JPP, permission to access sealed materials is routinely granted, and counsel normally review the sealed records in the Clerk of Court's Office.¹³

While the Navy-Marine Corps CCA does not have a rule specifically governing appellate counsel access to sealed materials, Rule 1.3(c) requires that appellate counsel make a request to examine unclassified original records of trial and other official documents with the secretary for the panel of judges to which the case is assigned. The records must be examined in a designated area, and their removal from the court's chambers is discouraged unless considered necessary and approved by the senior judge of the panel, or by his or her designee. Records of trial cannot be logged out for more than one workday.¹⁴

In contrast to the rules of the Army and Navy-Marine Corps CCAs, Rule 23.3(f) of the Air Force CCA requires that counsel submit a motion to the court requesting authorization to review sealed exhibits and showing cause for such a request.¹⁵ A judge then rules on (1) whether the individual seeking access

8 The current version of Military Rule of Evidence 513 requires a military judge to make specific findings by a preponderance of the evidence prior to ordering the production of mental health records for in camera review. If the military judge determines that the records do not meet the requirements for one of the enumerated exceptions to the psychotherapist-patient privilege, the military judge will not order production or disclosure of these records. The records reviewed by the military judge in camera but not disclosed to counsel at trial are still appended to the record of trial, but must be sealed. See MCM, *supra* note 7, MIL. R. EVID. 513(e)(3); see also *transcript of JPP Public Meeting 51–53* (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals).

9 MCM, *supra* note 7, R.C.M. 1103A(b)(4).

10 *Id.* at ANALYSIS OF R.C.M. 1103A.

11 The Coast Guard CCA does not have a specific rule on appellate counsel review of sealed materials in the record of trial.

12 A. Ct. Crim. App. R. 30.4.

13 *Transcript of JPP Public Meeting 55* (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals).

14 N-M. Ct. Crim. App. R. 1.3(c); see also *transcript of JPP Public Meeting 34* (Sept. 23, 2016) (testimony of Rear Admiral (Retired) Christian Reismeier, U.S. Navy, Former Chief Judge of the Department of the Navy).

15 A.F. Ct. Crim. App. R. 23.3(f).

is an appropriate person to request records, and (2) whether the records being requested relate to an offense of which the accused was convicted.¹⁶ A presenter from the Air Force explained that the court usually grants such a motion about one month after appellate counsel files it; the court also issues a protective order prohibiting appellate counsel from disclosing the contents of the records. Counsel's review of the materials takes place in a windowless court space similar to a sensitive compartmented information facility (SCIF) for handling classified information.¹⁷

Air Force appellate government counsel have opposed motions from appellate defense counsel for access to a victim's sealed records in dozens of cases, requesting that the Air Force CCA conduct its own in camera review of the records prior to examination by appellate counsel. However, the Air Force CCA has declined to do so in each case, relying on the plain language of R.C.M. 1103A.¹⁸ As of September 2016, the CAAF also has denied all five petitions filed by Air Force appellate government counsel requesting an order directing the Air Force CCA to conduct an in camera review of a victim's records prior to allowing appellate counsel to view any portions of the records not released to counsel at trial.¹⁹

B. Comparison to Civilian Practice

Unlike the military, state jurisdictions do not provide appellate defense counsel full access to sealed materials not released to counsel at trial, although the exact procedures vary by state. In many states, the appellate court will instead conduct its own in camera review of the contested records to determine if the trial court abused its discretion in refusing to disclose records to the defendant.²⁰

The JPP heard testimony from civilian appellate defense counsel about procedures in their home states of Colorado and New Hampshire. Mr. Jason Middleton explained that appellate counsel in Colorado are able to see only the records that the parties at trial have seen. Therefore, if a trial court conducts an in camera review of sealed records, appellate counsel are not able to access the materials that were not disclosed at trial, but they can ask the appellate court to perform an in camera review to determine

16 *Transcript of JPP Public Meeting* 189 (Nov. 18, 2016) (testimony of Colonel (Retired) William Orr, Jr., U.S. Air Force, Former Chief Judge, U.S. Air Force Court of Criminal Appeals).

17 *Transcript of JPP Public Meeting* 182–83 (Sept. 23, 2016) (testimony of Mr. Brian Mizer, Senior Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Operations Agency).

18 *Id.* at 292–94 (Sept. 23, 2016) (testimony of Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency).

19 *Id.*

20 *See, e.g., People v. Bean*, 560 N.E. 2d 258, 274–75 (Ill. 1990) (rejecting the defendant's argument that his appellate counsel needed access to all of a witness's privileged mental health records, including those not disclosed to the defendant's trial counsel); *People v. James*, 5 P.3d 328 (Col. 2000) (finding that "[t]he propriety of the district court's ruling [denying the defense access to confidential gang files] can be ensured by appellate court review of the sealed record without sacrificing the interest in nondisclosure or denying effective assistance of counsel to appellant"); *In re Christopher G.*, 564 A.2d 619, 625 (Conn. 1989) (finding, after the appellate court conducted its own review of psychiatric records, that the trial court did not abuse its discretion in refusing to disclose the records); *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1209 (Mass. 2005) (finding that if a defendant satisfactorily met the standard triggering in camera review of a victim's records at trial, and the defendant seeks review on appeal, an appellate court should review the judge's in camera decision-making using a deferential abuse of discretion standard); Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 27 (2007).

whether those materials should have been disclosed.²¹ Mr. Chris Johnson described similar procedures for appellate counsel in New Hampshire.²²

C. Proposals and Considerations

At the JPP's April 2016 public meeting, the program managers of the SVC and VLC programs expressed concern that privileged mental health records that were reviewed in camera by the judge, but not released to counsel at trial, were nevertheless being reviewed by appellate counsel on appeal under R.C.M. 1103A. Colonel Andrea deCamara, program manager for the Air Force SVC program, noted multiple instances in which appellate defense counsel had requested review of a victim's sealed privileged mental health records on appeal.²³

Neither the SVC/VLC program managers' legislative proposal nor Section 547 of Senate Bill S. 2943 directly addresses appellate counsel access to sealed materials of all kinds, but the Joint Service Committee on Military Justice (JSC) did release a proposal in November 2016 to amend R.C.M. 1103A. It provides separate procedures for appellate counsel depending on whether they are examining sealed materials reviewed by counsel at trial or sealed materials reviewed in camera by a military judge but not released to counsel at trial. Under section (b)(4)(B)(i) of the proposal, appellate counsel would be allowed to examine sealed materials reviewed by counsel at trial upon a "colorable showing" that examination is reasonably necessary to a proper fulfillment of their responsibilities.²⁴ Members of the JSC Working Group described "colorable showing" as a low threshold.²⁵ Under section (b)(4)(B)(ii) of the proposal, appellate counsel would be allowed to examine sealed materials not released to counsel at trial only if a "reviewing or appellate authority"—defined under the new proposal as including judges of the CCAs and CAAF and their professional staffs—first examines the materials and determines that there is "good cause" for appellate counsel to examine them.²⁶

Presenters appearing before the JPP expressed different views on whether R.C.M. 1103A should be modified to limit appellate counsel access to sealed materials not released to counsel at trial. Mr. Ryan Guilds, counsel at Arnold & Porter LLP who supervises a pro bono initiative to train and support volunteer lawyers representing sexual assault victims, described the detrimental effect on his clients each time a new person viewed their private mental health records. Even though R.C.M. 1103A

21 *Transcript of JPP Public Meeting* 48–49 (Oct. 14, 2016) (testimony of Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender).

22 *Transcript of JPP Public Meeting* 68–70 (Oct. 14, 2016) (testimony of Mr. Chris Johnson, Chief Appellate Defender for the State of New Hampshire).

23 *Transcript of JPP Public Meeting* 168–69 (Apr. 8, 2016) (testimony of Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

24 Manual for Courts-Martial; Proposed Amendments, 81 Fed. Reg. 229 (proposed Nov. 29, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-11-29/pdf/2016-28630.pdf>.

25 *Transcript of JPP Public Meeting* 61 (Mar. 10, 2017) (testimony of Mr. James Martinson, Highly Qualified Expert, Criminal Division (Code 20), Navy Office of the Judge Advocate General); *id.* at 64 (testimony of Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Army Criminal Law Division).

26 Manual for Courts-Martial; Proposed Amendments, 81 Fed. Reg. 229 (proposed Nov. 29, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-11-29/pdf/2016-28630.pdf>. The proposed discussion section for R.C.M. 1103A states that these changes would "maintain consistency" with R.C.M. 701(g)(2), *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997), and *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1997). R.C.M. 701(g)(2) authorizes a military judge to examine evidence in camera, issue protective orders if necessary, and order evidence "sealed and attached to the record of trial as an appellate exhibit," to be "examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge." See MCM, *supra* note 7, R.C.M. 701(g)(2).

prohibits appellate authorities from disclosing sealed materials to their clients without authorization, Mr. Guilds asserted that “none of [his] clients are going to believe that their attacker is not going to look at their records[.] . . . So every time someone else looks at the records, it’s another opportunity for [them] to be revictimized and for [their] privacy to be invaded.”²⁷

Mr. Roger Bruce, senior government appellate counsel for the Air Force, agreed that the current Rules for Courts-Martial do not sufficiently protect a victim’s privacy interests. He recommended revising R.C.M. 1103A to require that CCAs conduct their own in camera review of a victim’s mental health records not released to counsel at trial before they permit appellate counsel to review the records on appeal. Under his proposal, if the CCA determines that the judge did not abuse his or her discretion in refusing to release the records, the CCA would order the records to remain sealed. The accused could seek further appellate review of that decision at the CAAF, and the CAAF also would be required to conduct its own in camera review. If instead the CCA determines that the military judge abused his or her discretion in refusing to release the sealed records at trial, then before releasing the records the CCA would be required to notify the victim, the appellate defense counsel, and the appellate government counsel and provide them with an opportunity to be heard. Mr. Bruce commented, “Such a procedure would provide due process to all [and] an opportunity to be heard.”²⁸

Appellate defense counsel appearing before the JPP expressed grave concerns about restricting appellate counsel examination of sealed records. They emphasized that R.C.M. 1103A adequately “limits access of the record to certain trusted agents within the appellate arena who have a legal and ethical obligation to review the record.”²⁹ Captain Andrew House, Director of the Navy-Marine Corps Appellate Defense Division, explained that military appellate defense counsel are bound by the rules of professional conduct and are not authorized to share, distribute, or discuss sealed materials with any party without official reason. He added that “better awareness of the professional responsibilities and expectations placed on military defense counsel as both attorneys and military officers might help diminish victim concerns on privacy exposure.”³⁰

Appellate defense counsel took the position that the current version of R.C.M. 1103A “strike[s] the necessary balance between protecting the rights of victims and ensuring that appellants’ due process rights are protected.”³¹ They noted that limiting counsel’s access to sealed materials may have significant effects on due process, such as increasing the possibility that erroneous exclusions of exculpatory evidence at trial will not be discovered and corrected on appeal.³² One counsel likened the work of appellate defense counsel to “grad[ing] everyone’s [home]work”—meaning that appellate defense counsel must “scrutinize the evidentiary rulings of the military judge and assess whether

27 *Transcript of JPP Public Meeting* 173 (Oct. 14, 2016) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

28 *Transcript of JPP Public Meeting* 294–95 (Sept. 23, 2016) (testimony of Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency).

29 Letter from Lieutenant Colonel Jeffrey G. Palomino, U.S. Air Force, Chief, Appellate Defense Division, to the Honorable Elizabeth Holtzman, JPP Chair, at 2 (Oct. 14, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/Palomino_PublicComment_20161014.pdf.

30 *Transcript of JPP Public Meeting* 200–01 (Sept. 23, 2016) (testimony of Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division).

31 *Transcript of JPP Public Meeting* 187 (Sept. 23, 2016) (testimony of Mr. Brian Mizer, Senior Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Operations Agency).

32 *See Transcript of JPP Public Meeting* 239 (Sept. 23, 2016) (testimony of Major Lauren Shure, U.S. Air Force, Appellate Defense Counsel).

counsel, both trial and defense, fulfilled their respective constitutional obligations.”³³ In the view of another counsel, “Ensuring that appellate defense counsel has access to the whole record is a vital component of a military justice system that vindicates society’s strong interest in ensuring the reliability of convictions through appellate review.”³⁴

In discussing an amendment to R.C.M. 1103A to require that appellate courts conduct in camera reviews of records prior to allowing appellate counsel examination, several presenters observed that trial and appellate judges in the military, unlike their federal civilian counterparts, are not tenured and are in general less able to benefit from multiple years of judicial experience.³⁵ Often they are on the bench for only a couple of years. Concerns about a judge-centric approach to sealed materials were shared by civilian appellate defense counsel, who told the Panel that the effectiveness of in camera reviews of sealed materials at the appellate stage depends on the experience and background of judges.³⁶

D. JPP Findings and Recommendations

The JPP supports the JSC’s proposed amendment to R.C.M. 1103A(b)(4)(B)(i) regarding appellate counsel examination of sealed materials released to counsel at trial. The JPP agrees that in situations in which sealed materials are released to counsel at trial, appellate counsel should be allowed to examine the sealed materials upon a “colorable showing” that examination is reasonably necessary to a proper fulfillment of their responsibilities. The JPP understands that a “colorable showing” is not a high threshold but would serve to filter out irrelevant requests for records.

However, the JPP finds that in situations in which sealed records are reviewed in camera by a military judge but not released to counsel at trial, both appellate counsel and the person whose records are about to be examined should be afforded notice and an opportunity to be heard. Therefore, the JPP recommends that the JSC revise its proposed amendment to R.C.M. 1103A(b)(4)(B)(ii) to include the following language: “Prior to a decision to permit examination of material described in this subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be examined and to appellate counsel.”

33 *Transcript of JPP Public Meeting* 185–86 (Sept. 23, 2016) (testimony of Mr. Brian Mizer, Senior Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Operations Agency).

34 Letter from Lieutenant Colonel Jeffrey G. Palomino, U.S. Air Force, Chief, Appellate Defense Division, to the Honorable Elizabeth Holtzman, JPP Chair, at 2 (Oct. 14, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/Palomino_PublicComment_20161014.pdf.

35 *Transcript of JPP Public Meeting* 190 (Sept. 23, 2016) (testimony of Mr. Brian Mizer, Senior Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Operations Agency); *id.* at 23–24 (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

36 *Transcript of JPP Public Meeting* 49–50, 171 (Oct. 14, 2016) (testimony of Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender).

III. Victim Notice of Appellate Proceedings

A. Background and Current Practice

Currently, there is no statutory requirement that victims receive notice of appellate proceedings. Article 6b of the UCMJ, which was passed in 2013 as part of the National Defense Authorization Act for Fiscal Year 2014, grants a victim of an offense under the UCMJ the right to reasonable, accurate, and timely notice of certain enumerated proceedings, including an Article 32 preliminary hearing and a court-martial.³⁷ However, the statute does not explicitly grant victims the right to notice of appellate proceedings.³⁸

The Department of Defense (DoD) uses DD Form 2703, “Post-Trial Information for Victims and Witnesses of Crime,” to inform victims and witnesses of crime about the post-trial process and their rights during that process. In March 2016, the DoD revised the form to explain the appellate process; such information had not been provided in previous versions of the form.³⁹ The current form states:

All court-martial convictions are either reviewed by a judge advocate or subject to some form of appellate review. An appeal is when a higher court reviews the decisions made by lower courts to determine if a legal error was made. The post-trial appeal process can take a long time. Depending on the offense, an accused can choose to waive appellate review. A victim has the right to be notified in advance of the date and time of any appellate courtroom hearings, and to be notified of the final decision of any appellate court or judge advocate review.⁴⁰

DD Form 2703 further advises the victim to provide his or her contact information on another form, DD Form 2704, if he or she wants to exercise any post-trial rights.⁴¹

The JPP heard testimony about the Services’ different procedures for providing victims with notice of appellate matters. The Army has created a position within the Clerk of Court’s Office called the

37 Article 6b of the UCMJ provides that victims have the right to notice of any of the following: a public hearing concerning the continuation of confinement prior to trial of the accused, a preliminary hearing under Article 32 of the UCMJ relating to the offense, a court-martial relating to the offense, a public proceeding of the service clemency and parole board relating to the offense, or the release or escape of the accused. *See* 10 U.S.C. § 806b(a) (UCMJ art. 6b(a)).

38 *See Transcript of JPP Public Meeting* 316 (Sept. 23, 2016) (testimony of Mr. Brian Keller, Supervisory Appellate Counsel, Navy-Marine Corps Appellate Government Division).

39 *Transcript of JPP Public Meeting* 45–46 (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals).

40 U.S. DEP’T OF DEF., DD FORM 2703, POST-TRIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Mar. 2016), *available at* <http://www.dtic.mil/whs/directives/forms/eforms/dd2703.pdf>; *see also transcript of JPP Public Meeting* 45–46 (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals).

41 U.S. DEP’T OF DEF., DD FORM 2704, VICTIM/WITNESS CERTIFICATION AND ELECTION CONCERNING PRISONER STATUS (Mar. 2013), *available at* <http://www.dtic.mil/whs/directives/forms/eforms/dd2704.pdf>; *see also transcript of JPP Public Meeting* 47 (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals). DD Form 2703 also refers to DD Form 2704-1, “Victim Election of Post-Trial Rights,” but this form has not yet been issued.

appellate victim liaison (AVL). The AVL obtains the victim's contact information from DD Form 2704, if available, or from the record of trial.⁴² When a case arrives at the Army CCA, the AVL sends a letter to the victim or to his or her counsel explaining the appellate process and asking the victim if he or she wishes to continue receiving notifications about the case. If the victim so elects, the AVL sends letters to the victim advising when oral argument on the case is scheduled and when the Army CCA has completed appellate review. The letters explain what happened in the case and include the opinion of the court. The AVL sends additional letters if the case goes before the CAAF.⁴³

In contrast to the Army, the other Services have procedures for notifying victims about appellate proceedings that are less formal and less centralized. For example, in the Air Force, if a victim is represented by counsel on appeal, an appellate government paralegal forwards appellate briefs and motions to the victim's counsel or another address that the victim designates.⁴⁴

In December 2016, Congress included in the Military Justice Act of 2016 a provision addressing the development and implementation of a program for the military justice system dealing with case management, data collection, and data accessibility. It mandates that the Secretary of Defense "prescribe uniform standards and criteria" to facilitate "access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records."⁴⁵ However, these standards and criteria are not required to take effect until December 2020.

B. Comparison to Civilian Practice

In contrast to Article 6b of the UCMJ, the federal Crime Victims' Rights Act (CVRA) provides that crime victims in federal criminal proceedings have the "right to reasonable, accurate, and timely notice of any public proceeding . . . involving the crime or of any release or escape of the accused."⁴⁶ The CVRA does not differentiate between trial and appellate proceedings.⁴⁷

In order to meet the requirements under the CVRA, the U.S. Department of Justice implemented the automated Victim Notification System (VNS) in 2001. At the inception of a case, a federal investigative agency, such as the Federal Bureau of Investigation or the U.S. Postal Inspection Service, enters victim contact information into VNS. The system is used to provide information to federal victims about events pertaining to their cases, including appellate developments, such as when a criminal case is appealed, the date of oral argument, and the outcome of the appeal.⁴⁸

The federal courts also maintain the Public Access to Court Electronic Records (PACER) system, an electronic public access service that enables users to obtain case and docket information from federal appellate, district, and bankruptcy courts. Registered litigants are separately notified of the electronic

42 *Transcript of JPP Public Meeting* 47–48 (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals).

43 *Id.* at 48–50.

44 *Transcript of JPP Public Meeting* 233 (Nov. 18, 2016) (testimony of Colonel (Retired) William Orr, Jr., U.S. Air Force, Former Chief Judge, U.S. Air Force Court of Criminal Appeals).

45 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5504, 130 Stat. 2000 (2016).

46 18 U.S.C. § 3771 (Crime Victims' Rights Act) (emphasis added).

47 *Transcript of JPP Public Meeting* 37 (Oct. 14, 2016) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

48 *Transcript of JPP Public Meeting* 60–62 (Oct. 14, 2016) (testimony Ms. Ann Vallandingham, Senior Policy Advisor to the Director, Office for Victims of Crime, U.S. Department of Justice).

filing and title of each new document by email. Users can access case file documents immediately after those documents have been electronically filed.⁴⁹

In addition, many states have constitutional provisions, statutes, or policies requiring that victims receive notice of criminal appellate proceedings.⁵⁰ In Colorado, for example, if a person convicted of a crime seeks appellate review, the district attorney or the office of the attorney general, whichever is appropriate, must inform the victim of the status of the case and of the decision of the court.⁵¹ In practice, the attorney general or district attorney is in contact with the victim by phone or mail and keeps the victim as informed as he or she requests.⁵²

C. Proposals and Considerations

At the JPP's April 2016 public meeting, the SVC/VLC program managers explained that victims often are not aware when their cases are reviewed at the appellate level and when major events occur at the appellate stage.⁵³ They proposed amending Article 6b of the UCMJ to specify that victims have "[t]he right to reasonable, accurate, and timely notice and all pleadings filed by all parties in . . . [a] court-martial and any appellate matters, to include post trial review, relating to the offense."⁵⁴ Similarly, Section 547 of Senate Bill S. 2943 would have amended Article 6b to provide victims with notice of "[a] court-martial and any appellate matters, including post-trial review, relating to the offense."⁵⁵

Many presenters appearing before the JPP agreed that victims should receive notice of appellate matters. Ms. Meg Garvin, Executive Director of the National Crime Victim Law Institute, argued that to ensure procedural justice, a victim who has a right at stake must receive notice when that right is implicated in a judicial proceeding. Failure to provide notice to the victim means that "the person with a direct and personal interest in the outcome of a particular decision would be left in the dark."⁵⁶

Mr. Guilds asserted that a victim should receive comprehensive and timely notice of all appellate developments, not just those that directly involve the victim's rights. He noted that "everything matters to rape survivors when it comes to the details of their attacker's criminal prosecution. . . . Issues decided on appeal could potentially result in the release or retrial of the convicted assailant, outcomes that obviously directly impact the victim." Therefore, victims must have "free and unfettered access to information about the criminal process."⁵⁷

49 See Public Access to Court Electronic Records, <https://www.pacer.gov/>.

50 See, e.g., GA. CODE ANN. § 17-17-12(a) (requiring that upon written request of the victim, the prosecuting attorney shall notify the victim (1) if the accused has filed an appeal of his conviction, (2) about the time and place of any appellate court proceedings, and (3) about the result of the motion or appeal).

51 COLO. REV. STAT. § 24-4.1-303(13); see also *transcript of JPP Public Meeting 48* (Oct. 14, 2016) (testimony of Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender).

52 *Transcript of JPP Public Meeting 48* (Oct. 14, 2016) (testimony of Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender).

53 *Transcript of JPP Public Meeting 189* (Apr. 8, 2016) (testimony of Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

54 See Appendix A.

55 See Appendix B.

56 *Transcript of JPP Public Meeting 21–22* (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

57 *Transcript of JPP Public Meeting 38–39* (Oct. 14, 2016) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

Some presenters, however, were troubled by the breadth of the statutory proposals on notice. First, they commented that notice should be required not for “any appellate matters” but only for those appellate actions that could reasonably implicate a victim’s rights, such as matters involving Military Rule of Evidence 412, 513, or 514.⁵⁸ One counsel noted that most appeals do not directly implicate victims’ rights.⁵⁹ Another counsel observed that requiring notice of all appellate matters, even those in which the victim has no legal interest, might be counterproductive for the victim.⁶⁰

Second, presenters pointed out that because trials often include allegations involving multiple victims, the SVC/VLC program managers’ proposal that victims receive “all pleadings filed by all parties” would lead to undesirable consequences.⁶¹ In a public comment, Mr. Paul Koffsky, Deputy General Counsel at the Department of Defense, explained that such a requirement would result in court filings pertaining to rape shield evidence or mental health records of one victim being served on all other victims in the case. This outcome would likely deter some victims from participating in the military justice system.⁶²

In addition, Mr. Koffsky emphasized that under the Military Rules of Evidence and Rules for Courts-Martial, counsel are permitted to make *ex parte* filings under certain circumstances. Were it required that victims receive “all pleadings filed by all parties,” *ex parte* filings that were not served on the opposing party would still be served on any victim in the case.⁶³

Finally, some presenters explained that providing notice to victims would be burdensome in situations in which a victim is not represented by counsel on appeal.⁶⁴ Mr. Koffsky noted that this requirement is likely to be particularly onerous for appellate defense counsel, who are usually the first party to make an appellate filing and would have the responsibility of locating the victim.⁶⁵ Presenters offered suggestions for reducing this burden, such as providing victims with an opt-in mechanism after a conviction if they wish to receive notice of appellate events and requiring that victims keep their contact information up to date.⁶⁶ Presenters also observed that once an online access system is created,

58 *Transcript of JPP Public Meeting* 211–12 (Sept. 23, 2016) (testimony of Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division).

59 *Transcript of JPP Public Meeting* 281–82 (Sept. 23, 2016) (testimony of Major Anne Hsieh, U.S. Army, Senior Appellate Attorney and Branch Chief).

60 *Transcript of JPP Public Meeting* 201 (Sept. 23, 2016) (testimony of Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division).

61 *See Transcript of JPP Public Meeting* 201 (Sept. 23, 2016) (testimony of Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division); *see also* Letter from Mr. Paul S. Koffsky, Deputy General Counsel, Personnel and Healthy Policy, Department of Defense, to the Honorable Elizabeth Holtzman, JPP Chair, at 3 (Apr. 25, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/01_Public_Comment_DoD_OGC_Art_6b_70_20160425.pdf.

62 Letter from Mr. Paul S. Koffsky, Deputy General Counsel, Personnel and Healthy Policy, Department of Defense, to the Honorable Elizabeth Holtzman, JPP Chair, at 3 (Apr. 25, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/01_Public_Comment_DoD_OGC_Art_6b_70_20160425.pdf.

63 *Id.* at 3–4.

64 *Transcript of JPP Public Meeting* 212 (Sept. 23, 2016) (testimony of Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division).

65 Letter from Mr. Paul S. Koffsky, Deputy General Counsel, Personnel and Healthy Policy, Department of Defense, to the Honorable Elizabeth Holtzman, JPP Chair, at 4 (Apr. 25, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/01_Public_Comment_DoD_OGC_Art_6b_70_20160425.pdf.

66 *Transcript of JPP Public Meeting* 212 (Sept. 23, 2016) (testimony of Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division).

as required by the Military Justice Act of 2016, a victim will be able to automatically receive notice when a party files an appellate motion or brief.⁶⁷

D. JPP Findings and Recommendations

The JPP believes that victims must be provided with notice of appellate matters so that they can stay apprised of events that may directly affect their rights and interests.

The JPP supports the provision in the Military Justice Act of 2016 that requires the development and implementation of a program for the military justice system dealing with case management, data collection, and data accessibility. Such a program, if similar to the federal PACER system, would enable all victims to receive appropriate notice of appellate proceedings. This provision may not take effect until December 2020, however, and the JPP believes that the Services must address the lack of victim notice of appellate proceedings in the interim.

Prior to implementation of the statutorily required uniform system, the JPP recommends that the Services formalize procedures to provide victims in sexual assault cases (1) with timely notice, unless declined, of significant appellate matters, including but not limited to the date and time of the filing of appellate pleadings and briefs, of any appellate courtroom proceedings, of the date when the case is taken under submission, and of the final decision and any opinion of any appellate court, and (2) with convenient access to any unsealed documents filed in the case, if requested. The JPP believes that the development of these interim procedures should be left to the Services, each of which is best positioned to devise the exact mechanisms that fit its own unique organizational structure until the standardized DoD system is implemented.

Drawing on information received at its public meetings, the JPP finds that the Army's approach of using an appellate victim liaison to contact victims and provide them with status updates about the case on appeal is an exemplary best practice.

⁶⁷ *Id.* at 218–19; *id.* at 313 (Sept. 23, 2016) (testimony of Mr. Brian Keller, Supervisory Appellate Counsel, Navy-Marine Corps Appellate Government Division).

IV. Victim Standing in Post-Conviction Appellate Proceedings

A. Background and Current Practice

Although Article 6b of the UCMJ does not explicitly grant victims standing in post-conviction appellate proceedings, victims have the ability to be heard on appeal in cases in which courts allow it through the filing of amicus curiae briefs. Rule 26 of the CAAF Rules of Practice and Procedures states that an amicus brief may be filed (1) by an appellate government or defense division of an armed Service other than that in which the case has arisen, (2) by invitation of the court, or (3) by motion for leave to file granted by the court as a matter of discretion. If submitted under the third option, the motion or brief must contain a statement of the movant's interest and explain why the matters asserted are relevant to the disposition of the case.⁶⁸ Similarly, the Army CCA, Air Force CCA, Navy-Marine Corps CCA, and Coast Guard CCA all allow an amicus curiae to file a brief by leave of the court, granted on motion.⁶⁹

Judge James Baker, the former Chief Judge of the CAAF who authored the court's 2013 opinion in *LRM v. Kastenberg*, told the JPP that *Kastenberg* held that victims have standing to protect their M.R.E. 412, 513, or 514 interests in evidentiary hearings at courts-martial.⁷⁰ In *Kastenberg*, the CAAF stated that "there is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege."⁷¹ However, the CAAF did not address appellate standing. Thus, whether and how this proposition applies on appeal has not been settled before the CAAF. Judge Baker further noted that *Kastenberg* was a 3–2 decision, and thus, if the JPP or the Congress desires clarity and constancy on this point, the Congress should expressly and clearly either provide for or not provide for appellate standing in the UCMJ.⁷²

B. Comparison to Civilian Practice

The federal CVRA, like Article 6b of the UCMJ, does not expressly provide victims with the right to participate in post-conviction appellate proceedings. A few federal appellate courts have allowed victims to intervene on direct appeal.⁷³ In *U.S. v. Laraneta*, the Seventh Circuit permitted two victims

68 C.A.A.F. R. 26.

69 A. Ct. Crim. App. R. 15.4; A.F. Ct. Crim. App. R. 15.3; N-M. Ct. Crim. App. R. 15.1(i). The Coast Guard CCA does not have a specific rule on the filing of amicus briefs, but allows an amicus curiae to file a brief under Rule 23(d) of the Courts of Criminal Appeals Rules of Practice and Procedure. *See* Ct. Crim. App. R. 23(d). The Air Force rule specifies that a victim or witness of an offense may request to appear before the Air Force CCA by seeking leave to file as amicus. *See* A.F. Ct. Crim. App. R. 15.3.

70 *Transcript of JPP Public Meeting* 84–85 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

71 *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013).

72 *Transcript of JPP Public Meeting* 86 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

73 *See Transcript of JPP Public Meeting* 42 (Oct. 14, 2016) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

to intervene on appeal to defend the restitution award they received in the district court.⁷⁴ The court contrasted intervention at the district court stage with intervention at the appellate stage:

The complications of intervention are many fewer at the appellate stage, where participation is limited to filing briefs and, at the appellate court's discretion, participating in oral argument, which we permitted in this case. The [CVRA] allows a crime victim whose claim of restitution is denied to seek mandamus in the court of appeals, but makes no provision for participation by a victim who has been successful in the district court.⁷⁵

Noting that the government in this case had declined to defend the victims' restitution award on appeal, the court added: "The case for intervention is most compelling when a person has a direct financial stake in a case and cannot be certain that any party has an interest in defending that stake."⁷⁶

The laws in most states, like federal law, do not expressly grant victims standing to enforce their rights in post-conviction appellate proceedings. In her testimony before the JPP, Ms. Garvin estimated that between seven and ten states have statutes or constitutional provisions granting victims standing to assert their rights in any court with jurisdiction over the criminal matter in question, with victims in at least six states having actually participated on appeal.⁷⁷ Among the states that do provide victims with express legal standing are Arizona, Florida, Indiana, and Texas.⁷⁸ In addition, Maryland has a rule permitting a victim to "participate [in a criminal proceeding] in the same manner as a party regarding the rights of the victim or victim's representative."⁷⁹ The Court of Appeals of Maryland has found that under this rule, if a victim is content with a trial court action, but a party appeals, the victim has the right to participate in the criminal appeal regarding issues that "directly and substantially" affect the victim's rights. This includes participating in oral argument and filing a brief.⁸⁰

C. Proposals and Considerations

The SVC/VLC program managers identified the inability to participate in the appellate process as one of the obstacles that victims face. Colonel Katherine McDonald, Officer-in-Charge of the Victims'

74 *U.S. v. Laraneta*, 700 F.3d 983, 986 (7th Cir. 2012).

75 *Id.*

76 *Id.*

77 *Transcript of JPP Public Meeting* 152–53 (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute); RAND CORPORATION, *SECURING RIGHTS FOR VICTIMS 24* (2009), available at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG930.pdf [hereinafter RAND REPORT].

78 RAND REPORT at 13; *see also* ARIZ. REV. STAT. § 13-4437(A) ("The victim has standing to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding, seeking to enforce any right or to challenge an order denying any right guaranteed to victims. In asserting any right, the victim has the right to be represented by personal counsel at the victim's expense."); FLA. STAT. § 960.001(7) ("The victim of a crime, the victim's parent or guardian if the victim is a minor, and the state attorney, with the consent of the victim or the victim's parent or guardian if the victim is a minor, have standing to assert the rights of a crime victim which are provided by law or [the state constitution]."); IND. CODE § 35-40-2-1 ("A victim has standing to assert the rights established by this article."); TEX. CONST. art. I, § 30 ("A victim or guardian or legal representative of a victim has standing to enforce the rights enumerated in this section but does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.").

79 MD. RULE 8-111(c).

80 *Hoile v. State*, 948 A.2d 30, 41–42 (Md. 2008) (holding that a victim who successfully argued a motion to vacate reconsideration of the defendant's sentence based on the denial of her right to be notified of the reconsideration hearings was entitled to participate on appeal to protect her rights).

Legal Counsel Organization of the U.S. Marine Corps, told the Panel that SVCs and VLCs are “going to stagnate at the trial court level if [they] don’t have access to the appellate level.”⁸¹ Colonel deCamara added that the idea that a victim’s Article 6b rights end at trial is “an arbitrary line in the sand,” particularly since a conviction is not final until all appeals have been exhausted, as R.C.M. 1209 specifies.⁸²

The SVC/VLC program managers proposed language to amend Article 6b of the UCMJ to give victims the right to be reasonably heard at “[a]ny and all appellate matters and hearings arising out of the offense.” Further, the proposed language states, “If counsel for the accused or the Government file appellate pleadings in a matter arising out of the offense, the victim . . . may file pleadings as a real party in interest when a victim’s statutory, regulatory or Constitutional right is implicated.”⁸³ The language in Section 547, which is narrower, would have amended Article 6b to provide that “[i]f counsel for the accused or the Government files appellate pleadings under [Article 66 or 67, UCMJ], the victim . . . may file pleadings as a real party in interest when the victim’s rights under [M.R.E. 412, 513, or 514] are implicated.”⁸⁴

Presenters in favor of a statute allowing victims to file motions and briefs in post-conviction appellate proceedings emphasized that victims must have “their voices meaningfully integrated throughout the entirety of the [criminal justice] process.”⁸⁵ Ms. Garvin argued that any person who meets the three-pronged test of standing—injury, causation, and redressability—should have the right to be heard by a trial and appellate court when that person’s rights are at issue, further insisting that “[c]rafting any artificial list of [when a person has standing] violates the fundamental principle of standing.”⁸⁶ Drawing on lessons from civilian jurisdictions, she maintained that the best course of action is for the military to have an explicit provision granting standing to victims.⁸⁷

Other presenters cautioned against legislative change that would grant victims standing on appeal, noting the “unintended legal and logistical consequences” that would occur from making such “sweeping changes.”⁸⁸ Many counsel raised due process considerations; among their concerns was that granting victims standing on appeal may cause significant delays and increase the chance that a case is overturned because the right to a speedy trial was violated.⁸⁹ Counsel observed that victim standing

81 *Transcript of JPP Public Meeting* 191 (Apr. 8, 2016) (testimony of Colonel Katherine McDonald, U.S. Marine Corps, Officer-in-Charge, Victims’ Legal Counsel Organization).

82 *Transcript of JPP Public Meeting* 194, 126 (Apr. 8, 2016) (testimony of Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims’ Counsel Division); *see also* MCM, *supra* note 7, R.C.M. 1209.

83 Appendix A.

84 Appendix B.

85 *Transcript of JPP Public Meeting* 10 (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

86 *Id.* at 13–15.

87 *Transcript of JPP Public Meeting* 16 (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

88 *Transcript of JPP Public Meeting* 170 (Sept. 23, 2016) (testimony of Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital and Complex Litigation Branch).

89 *See, e.g., Transcript of JPP Public Meeting* 174–75 (Sept. 23, 2016) (testimony of Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital and Complex Litigation Branch); *id.* at 237 (testimony of Major Lauren Shure, U.S. Air Force, Appellate Defense Counsel); *id.* at 297 (testimony of Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency).

may also create the appearance that the appellate process is stacked against the appellant.⁹⁰ One civilian appellate counsel added that victim standing may chill appellants from raising certain types of issues on appeal.⁹¹

Some presenters questioned the need for victim standing in post-conviction appellate proceedings. Colonel (Retired) William Orr, Jr., former Chief Judge of the Air Force Court of Criminal Appeals, noted that most victim concerns are addressed at the trial level or by interlocutory appeal, and a victim's interests post-conviction are normally, but admittedly not always, aligned with the interests of one of the parties.⁹² Similarly, Rear Admiral (Retired) Christian Reismeier, former Chief Judge of the Department of the Navy, contrasted a victim's pressing need to be able to petition the appellate court for a writ of mandamus to prevent a right from being extinguished with a victim's lesser need to participate in post-conviction appellate proceedings, at which the appellate court undertakes a review of the conviction and sentence based on the record.⁹³

Presenters also disagreed on whether amicus briefs offered a sufficient opportunity for victims' voices to be heard. Mr. Bruce argued that amicus briefs were underutilized by victims during the direct appellate review process, citing a case in which the Air Force specifically invited the victim and her counsel to file an amicus brief. The victim declined, instead choosing to litigate the question of her status as a party.⁹⁴ Other counsel countered that amicus briefs are not a sufficient substitute for victim standing for two main reasons. First, amicus briefs are more appropriate for a third party seeking to raise broad policy considerations with the court than for a victim defending his or her individual rights.⁹⁵ Second, courts have discretion to consider amicus briefs.⁹⁶ Colonel deCamara testified that as of April 2016, the CAAF had rejected amicus briefs filed by Air Force SVCs in three separate cases in which a victim's mental health records were at issue, leaving the victims "without any voice whatsoever."⁹⁷

In addition to raising policy questions and considerations, many presenters found some problems in the drafting of the statutory proposals. First, they expressed concern about granting a victim status in appellate proceedings as a "real party in interest." Mr. Bruce explained that "real party in interest" is

90 *See Transcript of JPP Public Meeting 296* (Sept. 23, 2016) (testimony of Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency).

91 *Transcript of JPP Public Meeting 55–56* (Oct. 14, 2016) (testimony of Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender).

92 *Transcript of JPP Public Meeting 40* (Sept. 23, 2016) (testimony of Colonel (Retired) William Orr, Jr., U.S. Air Force, Former Chief Judge, U.S. Air Force Court of Criminal Appeals).

93 *Transcript of JPP Public Meeting 96–97* (Sept. 23, 2016) (testimony of Rear Admiral (Retired) Christian Reismeier, U.S. Navy, Former Chief Judge of the Department of the Navy).

94 *Transcript of JPP Public Meeting 290, 297–98* (Sept. 23, 2016) (testimony of Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency); *see also United States v. O'Shaughnessy*, No. 38732 (A.F. Ct. Crim. App. Jan. 21, 2016) (order denying victim's motion to intervene).

95 *Transcript of JPP Public Meeting 19–20* (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute); *transcript of JPP Public Meeting 209–10* (Sept. 23, 2016) (testimony of Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division).

96 *Transcript of JPP Public Meeting 20* (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

97 *Transcript of JPP Public Meeting 172* (Apr. 8, 2016) (testimony of Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

a term of art used for petitions for extraordinary relief and is inapplicable to direct appellate review.⁹⁸ Judge Baker agreed that the term is confusing, predicting that different judges likely would interpret and apply it in different ways; in his view, the legislation should be explicit in granting victims standing in post-conviction appellate proceedings, if that is its intent.⁹⁹

Other aspects of both proposals that troubled the presenters were their definition of “victim” and the scope of SVC/VLC representation contemplated. The SVC/VLC program managers’ proposal would apply to “any individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under [the UCMJ].” The proposal would further amend Article 70 of the UCMJ to state that “[a]ppellate victims’ counsel shall represent the victim before the [CCA], the [CAAF], or the Supreme Court—(1) when requested by the victim; (2) when the Judge Advocate General has sent the case to the [CCA]; or (3) when any Article 6b right is implicated during trial or in any appellate pleading or matter.”¹⁰⁰

Similarly, Section 547 of Senate Bill S. 2943 would have applied to “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under [the UCMJ] and for which there was a guilty finding that is the subject of appeal under [Article 66 or 67].” Section 547 further states that “[t]he victim’s right to file pleadings as a real party in interest includes the right to do so through counsel, including through a Special Victims’ Counsel.”¹⁰¹

Judge Baker identified a tension in the proposed legislation “as presently drafted and as contemplated”: while the legislation is drafted to apply to all victims, the legislation appears to focus on victims of sexual assault.¹⁰² He questioned why other classes of particularly vulnerable victims—for example, victims of child pornography or victims of hate crimes—should not receive the same rights and protections as victims of sexual assault, such as representation by an SVC.¹⁰³ Rear Admiral Reismeier highlighted another gap in the legislation: while the statutory proposals would apply to all victims, they would not apply to other witnesses who might also have privacy interests or privileges at stake.¹⁰⁴

Mr. Koffsky noted additional problems with the broad application of the SVC/VLC program managers’ proposal to amend Article 70. As drafted, the amendment would provide appellate victims’ counsel to victims of crimes other than sex-related offenses—individuals who were not eligible for SVC representation at the trial level under 10 U.S.C. § 1044e. The proposed language also would require appellate victims’ counsel to represent an individual when any Article 6b right is implicated at trial or on appeal, even if that individual did not desire representation.¹⁰⁵ Appellate defense counsel shared

98 *Transcript of JPP Public Meeting* 295–96 (Sept. 23, 2016) (testimony of Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency).

99 *Transcript of JPP Public Meeting* 145 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

100 *See* Appendix A.

101 *See* Appendix B.

102 *Transcript of JPP Public Meeting* 17 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

103 *Id.* at 17–18.

104 *Transcript of JPP Public Meeting* 83 (Sept. 23, 2016) (testimony of Rear Admiral (Retired) Christian Reismeier, U.S. Navy, Former Chief Judge of the Department of the Navy).

105 Letter from Mr. Paul S. Koffsky, Deputy General Counsel, Personnel and Healthy Policy, Department of Defense, to the Honorable Elizabeth Holtzman, JPP Chair, at 2–3 (Apr. 25, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/01_Public_Comment_DoD_OGC_Art_6b_70_20160425.pdf.

similar concerns about the expansive definition of victim under Section 547, noting that it might create “an expectation of representation” where no right to representation currently exists.¹⁰⁶

D. JPP Findings and Recommendations

The JPP supports victim standing in post-conviction appellate proceedings. The JPP believes that appellate standing for victims is necessary so that a victim can defend his or her previously successful assertion of statutory rights if it is challenged by a party on appeal. The JPP does not believe that amicus briefs are a sufficient substitute for such standing, nor does it believe that the government’s interests will always entirely align with a victim’s interests on appeal. However, the JPP believes that appellate standing for victims should be limited to situations in which (1) the victim was heard at the trial level in relation to a specific issue; and (2) a party challenges a judicial ruling regarding that issue on appeal.

The JPP finds that both legislative proposals it considered regarding victim standing in post-conviction appellate proceedings are technically flawed. Most significantly, the JPP believes that the language in the proposals allowing victims to file appellate pleadings as a “real party in interest” would create confusion and would not clearly provide victims with standing on appeal.

Therefore, the JPP recommends that Congress revise Section 547(a) of S. 2943 to state:

SEC. 547. APPELLATE STANDING OF VICTIMS UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) APPELLATE REVIEW.—Section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

“(f) APPELLATE REVIEW.—(1) If counsel for the accused or the Government files appellate pleadings under section 866 or 867 of this title (article 66 or 67) calling into question a prior judicial ruling in the case on an issue as to which a victim previously had standing and was heard, during appellate review that same victim may respond in the same manner as a party regarding that same issue, including through a Special Victims’ Counsel under section 1044e of this title.”

106 *Transcript of JPP Public Meeting 203* (Sept. 23, 2016) (testimony of Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division).

V.

Victim Access to the Court of Appeals for the Armed Forces under Article 6b of the Uniform Code of Military Justice

A. Background and Current Practice

When Congress enacted Article 6b in 2013, it required that the Secretary of Defense recommend to the President changes to the Manual for Courts-Martial to implement the statute. These were to include “[m]echanisms for the enforcement of [Article 6b] rights.”¹⁰⁷

Before the President had made any such changes, Congress amended Article 6b in 2014 to allow a victim to “petition the Court of Criminal Appeals for a writ of mandamus” if the victim believed that a court-martial ruling violated his or her rights protected by M.R.E. 412 or 513.¹⁰⁸ Congress expanded this enforcement mechanism in 2015.¹⁰⁹ The current version of Article 6b provides a victim with the ability to “petition the Court of Criminal Appeals for a writ of mandamus” if the victim believes that a preliminary hearing ruling or court-martial ruling violated his or her rights afforded by Article 6b or M.R.E. 412, 513, 514, or 615.¹¹⁰ In addition, if a victim “is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such an order.”¹¹¹ Under Article 6b, the petition for writ of mandamus “shall be forwarded directly to the [CCA] . . . and, to the extent practicable, shall have priority over all other proceedings before the court.”¹¹²

While a victim has the ability to seek redress in the CCA, under current case law the victim may not appeal a writ denial by the CCA to the CAAF. In the 2016 case *EV v. United States and Martinez*, a victim petitioned the CCA for a writ of mandamus after a military judge ordered portions of her mental health records released.¹¹³ After the CCA denied the victim’s petition, the victim appealed to the CAAF. The CAAF dismissed the victim’s writ appeal on the grounds of lack of jurisdiction, finding that Article 6b “is a clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals” and that the CAAF “must be guided by the choices Congress has made.”¹¹⁴

In a 2017 case decided by the CAAF, *Randolph v. HV and United States*, an accused appealed the CCA’s grant of a writ of mandamus under Article 6b.¹¹⁵ The CAAF specified the following issue:

107 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701(b)(2)(C), 127 Stat. 672 (2013).

108 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 535, 128 Stat. 3292 (2014).

109 National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726 (2015).

110 10 U.S.C. § 806b(e) (UCMJ art. 6b(e)). M.R.E. 514 relates to the victim advocate-victim privilege and the Department of Defense Safe Helpline staff-victim privilege. See MCM, *supra* note 7, MIL. R. EVID. 514. M.R.E. 615 relates to the exclusion of victims. See MCM, MIL. R. EVID. 615.

111 10 U.S.C. § 806b(e) (UCMJ art. 6b(e)).

112 *Id.*

113 *EV v. United States & Martinez*, 75 M.J. 331, 333 (C.A.A.F. 2016).

114 *Id.* at 334.

115 *Randolph v. HV & United States*, 76 M.J. 27, 29 (C.A.A.F. 2017).

“Whether the United States Court of Appeals for the Armed Forces has jurisdiction over a writ-appeal petition filed by an accused who is seeking review of a court of criminal appeals’ decision rendered pursuant to Article 6b(e), UCMJ.” The CAAF dismissed the petition for lack of jurisdiction, again finding that Congress has limited review of Article 6b petitions to the CCAs. The CAAF wrote, “As Article 6b is meant to confer rights on victims, not the accused, it would violate congressional intent for this Court to review Article 6b cases upon petition by the accused but not the victim.”¹¹⁶

B. Proposals and Considerations

Presenters observed that neither Section 547 nor the SVC/VLC program managers’ legislative proposal would expressly grant the CAAF jurisdiction to hear a victim’s writ appeal.¹¹⁷ However, many urged the Panel to consider recommending such a change. In the view of Mr. Don Christensen, President of Protect Our Defenders, victims’ lack of access to the CAAF “serves as a barrier to meaningful relief and inhibits development of law.”¹¹⁸ Others emphasized the importance of uniformity and civilian oversight in military cases.¹¹⁹ Judge Baker noted that limiting jurisdiction to hear Article 6b petitions to the CCAs increases the risk that different Services will develop different standards or processes, resulting in discrepancies in how victims are treated across the Services. In addition, giving victims the ability to appeal a writ denial to the CAAF would allow civilian oversight of these cases, which is particularly important “in an area where the credibility of the military is at stake and the concerns about sexual assault are so well-founded[.]”¹²⁰ Judge Baker added that the CAAF has tended to read jurisdictional grants literally; therefore, if Congress wants the CAAF to have jurisdiction to hear a writ appeal under Article 6b, Congress should explicitly say so.¹²¹

Some presenters cautioned that permitting victims to appeal writ denials to the CAAF would further slow the resolution of cases, creating delays that would be particularly problematic if an accused was in pre-trial confinement.¹²² In contrast to the federal CVRA, which requires that a federal court of appeals decide a victim’s petition for a writ of mandamus within 72 hours after the petition has been filed, Article 6b places no specific limit on the amount of time allotted to a CCA to decide a victim’s petition.¹²³ Allowing victims to appeal a writ denial to the CAAF would only exacerbate any delay that

116 *Id.* at 30.

117 *See, e.g., Transcript of JPP Public Meeting* 286 (Sept. 23, 2016) (testimony of Major Anne Hsieh, U.S. Army, Senior Appellate Attorney and Branch Chief); *id.* at 211 (testimony of Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division).

118 *Transcript of JPP Public Meeting* 32 (Oct. 14, 2016) (testimony of Mr. Don Christensen, President, Protect Our Defenders).

119 *See Transcript of JPP Public Meeting* 18–19 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces); *transcript of JPP Public Meeting* 18–19 (Oct. 14, 2016) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

120 *Transcript of JPP Public Meeting* 18–19 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

121 *Id.* at 20.

122 *Transcript of JPP Public Meeting* 146 (Sept. 23, 2016) (testimony of Colonel (Retired) Denise Lind, U.S. Army, Former Senior Judge, U.S. Army Court of Criminal Appeals); *see also transcript of JPP Public Meeting* 20 (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

123 *Compare* 10 U.S.C. § 806b(e) (UCMJ art. 6b(e)), *with* 18 U.S.C. § 3771(d)(3) (Crime Victims’ Rights Act). Under the CVRA, the litigants, with the approval of the court, may stipulate to a different time period for consideration. However, the CVRA specifies that “[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.”

might occur. Presenters noted that this problem could be mitigated if Congress included in Article 6b clearly defined timelines for reviews by the CCA and the CAAF.¹²⁴

C. JPP Findings and Recommendations

The JPP is concerned that victims' lack of access to the CAAF under Article 6b of the UCMJ prevents civilian oversight of CCA decisions affecting victims' rights and creates the potential for lack of uniformity across the Services. In light of the CAAF's recent decision in *EV vs. United States and Martinez*,¹²⁵ the JPP recommends that Congress amend Article 6b to grant the CAAF jurisdiction to hear a victim's appeal if a Service CCA denies the victim's petition for a writ of mandamus under Article 6b.

The JPP recognizes that under *Randolph v. HV and United States*,¹²⁶ the CAAF does not have jurisdiction over a writ appeal petition filed by an accused seeking review of a CCA decision rendered pursuant to Article 6b. The JPP has not heard testimony on whether the CAAF should have jurisdiction over an Article 6b writ appeal filed by an accused, or whether granting victims the right to seek review at the CAAF of a CCA decision on an Article 6b petition would also confer such a right on the accused. The JPP considers this to be outside the scope of this report and refrains from making a recommendation on this issue.

124 See, e.g., *Transcript of JPP Public Meeting 23* (Sept. 23, 2016) (testimony of the Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces).

125 *EV v. United States & Martinez*, 75 M.J. 331 (C.A.A.F. 2016).

126 *Randolph v. HV & United States*, 76 M.J. 27 (C.A.A.F. 2017).

APPENDIX A: Special Victims' Counsel / Victims' Legal Counsel Legislative Proposal

SUGGESTED CHANGES TO THE U.C.M.J. REGARDING VICTIM APPELLATE RIGHTS

§ARTICLE 6B. RIGHTS OF THE VICTIM OF AN OFFENSE UNDER THIS CHAPTER

- (a) Rights of a Victim of an Offense Under This Chapter.-A victim of an offense under this chapter has the following rights:
- (1) The right to be reasonably protected from the accused.
 - (2) The right to reasonable, accurate, and timely notice and all pleadings filed by all parties in any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.
 - (C) A court-martial and any appellate matters, to include post trial review, relating to the offense.
 - (D) A public proceeding of the service clemency and parole board relating to the offense.
 - (E) The release or escape of the accused, unless such notice may endanger the safety of any person.
 - (3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.
 - (4) The right to be reasonably heard at any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A sentencing hearing, to include sentence reassessment in accordance with review under Article 66, UCMJ, relating to the offense.
 - (C) A public proceeding of the service clemency and parole board relating to the offense.
 - (D) Any and all appellate matters and hearings arising out of the offense.

(E) Any and all administrative boards and other adverse administrative proceedings, arising out of the offense.

- (5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
- (6) The right to receive restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

.....

(e) Enforcement by Court of Criminal Appeals.-(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32), or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (54), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, and, to the extent practicable, shall have priority over all other proceedings before the court.

(4) If counsel for the accused or the Government file appellate pleadings in a matter arising out of the offense, the victim shall be served notice of the pleadings in accordance with paragraph (a) (2) and may file pleadings as a real party in interest when a victim's statutory, regulatory or Constitutional right is implicated.

(45) Paragraph (1) and (4) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

§ Article 870, UCMJ Appellate Counsel

- (a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, and one or more commissioned officers as appellate victims' counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).
- (b) Appellate Government counsel shall represent the United States before the Court of Military Review or the Court of Military Appeals when directed to do so by the judge Advocate General. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.
- (c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—
 - (1) when requested by the accused;
 - (2) when the United States is represented by counsel; or
 - (3) when the Judge Advocate General has sent the case to the Court of Military Appeals.
- (d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme court by civilian counsel if provided by him.
- (e) Appellate victims' counsel shall represent the victim before the Court of Military Review, the Court of Military Appeals, or the Supreme Court –
 - (1) when requested by the victim;
 - (2) when the Judge Advocate General has sent the case to the Court of Military Appeals; or
 - (3) when any Article 6b right is implicated during trial or in any appellate pleading or matter.
- (ef) Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs.

APPENDIX B: Section 547 of Senate Bill S. 2943

SEC. 547. APPELLATE STANDING OF VICTIMS IN ENFORCING RIGHTS OF VICTIMS UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) VICTIM AS REAL PARTY IN INTEREST DURING APPELLATE REVIEW.—Section 806b of title 10, United States Code (article 6b of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

“(f) VICTIM AS REAL PARTY IN INTEREST DURING APPELLATE REVIEW.—(1) If counsel for the accused or the Government files appellate pleadings under section 866 or 867 of this title (article 66 or 67), the victim of an offense under this chapter may file pleadings as a real party in interest when the victim’s rights under the rules specified in paragraph (2) are implicated. The victim’s right to file pleadings as a real party in interest includes the right to do so through counsel, including through a Special Victims’ Counsel under section 1044e of this title.

“(2) Paragraph (1) applies with respect to the protections afforded by the following:

“(A) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim’s sexual background.

“(B) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

“(C) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

“(3) In this subsection, the term ‘victim of an offense under this chapter’ means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice) and for which there was a guilty finding that is the subject of appeal under section 866 or 867 of this title (article 66 or 67).”.

(b) NOTICE OF APPELLATE AND POST-TRIAL MATTERS.—Subparagraph (C) of subsection (a)(2) of such section (article) is amended to read as follows:

“(C) A court-martial and any appellate matters, including post-trial review, relating to the offense.”.

APPENDIX C: Judicial Proceedings Panel Authorizing Statutes and Charter

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”.

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

1. Committee's Official Designation: The committee shall be known as the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel ("the Judicial Proceedings Panel").
2. Authority: The Secretary of Defense, as required by section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239), as modified by section 1731(b) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66), and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Judicial Proceedings Panel.
3. Objectives and Scope of Activities: The Judicial Proceedings Panel will 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 the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 ("the FY 2012 NDAA") (Public Law 112-81) for the purpose of developing recommendations for improvements to such proceedings.
4. Description of Duties: Section 576(d)(2) directs the Judicial Proceedings Panel to perform the following duties, with additional duties as added by section 1731(b)(1) of the FY 2014 NDAA:
 - 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 UCMJ that were enacted by section 541 of the FY 2012 NDAA.
 - 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 of the Judicial Proceedings Panel 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 UCMJ), and any instances in which prior sexual conduct was determined to be inadmissible.

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

- 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 the assessment conducted by the Response Systems to Adult Sexual Assault Crimes Panel (“the Response Systems Panel”), a Federal advisory committee established pursuant to section 576(a)(1) of the FY 2013 NDAA and in accordance with FACA, of the training level of military defense and trial counsel, 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 the FY 2013 NDAA.
- i. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.
- j. Assess 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 UCMJ), to expressly cover a situation in which a person subject to the UCMJ 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.
- k. Assess the implementation and effect of the Special Victim’s Counsel for victims of sex-related offenses established by the Secretary of Defense on August 14, 2013 and codified in Section 1044e of title 10, United States Code, by the enactment of Section 1716 of the FY 2014 NDAA on December 26, 2013. The panel shall make such recommendations for modifications of section 1044e as the Judicial Proceedings Panel considers appropriate.
- l. Assess 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 UCMJ), as added by section 1705 of the FY 2014 NDAA, which requires at a minimum, that upon a finding of guilt for the offenses of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit such acts, the punishment include dismissal or dishonorable discharge, except as provided for by Article 60 of the UCMJ, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the UCMJ).
- m. Assess the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the UCMJ), 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 UCMJ).

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- iii. Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.
- n. Consider such other matters and materials as the Judicial Proceedings Panel considers appropriate for purposes of the reports.

In conducting reviews and assessments and preparing reports, the Judicial Proceedings Panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies. The Judicial Proceedings Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it considers appropriate to carry out its duties. Upon request by the Chair of the Judicial Proceedings Panel, a department or agency of the Federal Government shall provide information that the Judicial Proceedings Panel considers necessary to carry out its duties.

- 5. Agency or Official to Whom the Committee Reports: The Judicial Proceedings Panel shall provide its first report, including any proposals for legislative or administrative changes it considers appropriate, to the Secretary of Defense through the Department of Defense (DoD) General Counsel (GC), and the Committees on Armed Services of the Senate and the House of Representatives, not later than 180 days after its first meeting. The Judicial Proceedings Panel shall submit subsequent reports during fiscal years 2014 through 2017.
- 6. Support: The DoD, through the DoD Office of General Counsel (DoD OGC), the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Judicial Proceedings Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act") (5 U.S.C. § 552b, as amended), governing federal statutes and regulations, and established DoD policies and procedures. Primary responsibility for such staffing and resourcing may not be assigned to the Sexual Assault Prevention and Response Office.
- 7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately \$4,000,000 and 15 full-time equivalents.
- 8. Designated Federal Officer: The Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with governing DoD policies and procedures.

In addition, the Judicial Proceedings Panel's DFO is required to be in attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the DFO, the Alternate DFO, duly appointed to the Judicial Proceedings Panel according to DoD policies and procedures, shall attend the entire duration of the Judicial Proceedings Panel and any subcommittee meetings.

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

The DFO, or the Alternate DFO, shall approve all of the meetings of the Judicial Proceedings Panel as called by the Chair; shall call all meetings of its subcommittees, in coordination with the Chair; prepare and approve all meeting agendas for the Judicial Proceedings Panel and any subcommittees; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public's interest or required by governing regulations or DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with sections 576(b)(6) and (7) of the FY 2013 NDAA, the Judicial Proceedings Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Judicial Proceedings Panel not later than 60 days after the date of the appointment of all the members of the Judicial Proceedings Panel. The Judicial Proceedings Panel shall meet at a minimum once per year.
10. Duration: The Judicial Proceedings Panel shall remain in effect until terminated, as provided for and as required by section 576(c)(2)(C) of the FY 2013 NDAA; however, the charter is subject to renewal every two years.
11. Termination: According to section 576(c)(2)(C) of the FY 2013 NDAA, the Judicial Proceedings Panel shall terminate on September 30, 2017.
12. Membership and Designation: Pursuant to sections 576(b)(1)(B) and (b)(2), the Judicial Proceedings Panel shall be appointed by the Secretary of Defense and consist of five members, two of whom must have served on the Response Systems Panel.

The members 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 Force, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Judicial Proceedings Panel.

Members shall be appointed for the life of the Judicial Proceedings Panel, subject to annual renewals. Any vacancy on the Judicial Proceedings Panel shall be filled in the same manner as the original appointment. Panel members shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. With the exception of reimbursement of official travel and per diem, Judicial Proceedings Panel members shall serve without compensation.

The DoD GC, according to DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. § 3109 to advise the Judicial Proceedings Panel or its subcommittees; these individuals do not count toward the Judicial Proceedings Panel's total membership nor do they have voting privileges. In addition, these subject matter experts shall not participate in any deliberations dealing with

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Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

the substantive matters before the Judicial Proceedings Panel or its subcommittees nor shall they participate in any voting.

13. Subcommittees: The Department, when necessary and consistent with the Judicial Proceedings Panel's mission and DoD policies and procedures, may establish subcommittees, task groups, or working groups to support the Judicial Proceedings Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

These subcommittees shall not work independently of the Judicial Proceedings Panel and shall report all of their recommendations and advice to the Judicial Proceedings Panel for full deliberation and discussion. Subcommittees have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Judicial Proceedings Panel. No subcommittee or any of its members may update or report directly to the DoD or any Federal officers or employees.

The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Judicial Proceedings Panel. All subcommittee appointments shall be subject to annual renewal. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Those individuals who are full-time or permanent part-time Federal employees shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) as RGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of reimbursement of official travel and per diem, subcommittee members shall serve without compensation.

All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Judicial Proceedings Panel and its subcommittees shall be handled according to section 2, General Records Schedule 26, and appropriate Department of Defense policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).
15. Filing Date: June 24, 2014

APPENDIX D: Judicial Proceedings Panel Member Biographies

THE HONORABLE ELIZABETH HOLTZMAN – CHAIR OF THE JPP

Elizabeth 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.

THE HONORABLE BARBARA S. JONES

Barbara Jones is a partner at the law firm Bracewell LLP. She served as a judge in the U.S. District Court for the Southern District of New York for 16 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, handled 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 40 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 victims' 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 27-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 was most recently the Vice President of Homeland Security and Defense for Hewlett Packard Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various 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. She completed a distinguished 34-year naval career in 2004, retiring as a vice admiral and the most senior woman officer in the history of the U.S. Navy. As chief of the Navy's \$5 billion global education and training enterprise, Admiral Tracey led a successful revolution in training technology to improve the quality, access, effectiveness, and cost of Navy training. She 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 E: Judicial Proceedings Panel Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

Captain Tammy P. Tideswell,
Judge Advocate General's Corps,
U.S. Navy, Staff Director

Lieutenant Colonel Patricia H. Lewis,
Judge Advocate General's Corps,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Ms. Julie Carson, Attorney

Dr. Janice Chayt, Investigator

Dr. Alice Falk, Editor

Ms. Theresa Gallagher, Attorney

Ms. Nalini Gupta, Attorney

Ms. Amanda Hagy, Senior Paralegal

Ms. Laurel Prucha Moran,
Graphic Designer

Ms. Meghan Peters, Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri A. Saunders, Attorney

Ms. Tiffany M. Williams,
Supervising Paralegal

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried,
Associate Deputy General Counsel
(Personnel and Health Policy),
U.S. Department of Defense,
Designated Federal Official

Mr. William Sprance,
Associate Deputy General Counsel
(Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Lieutenant Colonel Jacqueline M. Stingl,
Judge Advocate General's Corps,
U.S. Air Force, Associate Deputy General
Counsel (Personnel and Health Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Senior Associate Deputy General Counsel
(Military Justice and Personnel Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

APPENDIX F: Presenters on Victims' Appellate Rights at Judicial Proceedings Panel Public Meetings

JUDICIAL PROCEEDINGS PANEL PUBLIC MEETINGS	PRESENTERS
<p>April 8, 2016</p> <p>Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA</p>	<ul style="list-style-type: none"> • Colonel Elizabeth Marotta, U.S. Army, Special Victims' Counsel Program Manager • Captain Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Navy Victims' Legal Counsel Program • Colonel Andrea deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division • Colonel Katherine McDonald, U.S. Marine Corps, Officer-in-Charge, Victims' Legal Counsel Organization • Ms. Christa Cothrel, U.S. Coast Guard Special, Victims' Counsel Program Manager
<p>September 23, 2016</p> <p>Public Meeting of the JPP One Liberty Center Arlington, VA</p>	<ul style="list-style-type: none"> • The Honorable James Baker, Former Chief Judge, United States Court of Appeals for the Armed Forces • Rear Admiral Christian Reismeier, U.S. Navy, Retired, Former Chief Judge of the Department of the Navy • Colonel William Orr, Jr., U.S. Air Force, Retired, Former Chief Judge, U.S. Air Force Court of Criminal Appeals • Colonel Denise Lind, U.S. Army, Retired, Former Senior Judge, U.S. Army Court of Criminal Appeals • Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital and Complex Litigation Branch • Mr. Brian Mizer, Senior Appellate Defense Counsel, Appellate Defense Division, Air Force Legal Operations Agency • Major Lauren Shure, U.S. Air Force, Appellate Defense Counsel • Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division • Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division • Major Anne Hsieh, U.S. Army, Senior Appellate Attorney and Branch Chief • Mr. Roger Bruce, Associate Division Chief and Senior Appellate Government Counsel, Air Force Legal Operations Agency • Major Meredith Steer, U.S. Air Force, Appellate Government Counsel • Mr. Brian Keller, Supervisory Appellate Counsel, Navy-Marine Corps Appellate Government Division • Lieutenant Robert Miller, U.S. Navy, Appellate Government Counsel • Lieutenant Commander Tereza Ohley, U.S. Coast Guard, Appellate Government Counsel

JUDICIAL PROCEEDINGS PANEL PUBLIC MEETINGS	PRESENTERS
<p>October 14, 2016</p> <p>Public Meeting of the JPP One Liberty Center Arlington, VA</p>	<ul style="list-style-type: none"> • Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute • Mr. Don Christensen, President, Protect Our Defenders • Mr. Ryan Guilds, Counsel, Arnold & Porter LLP • Mr. Jason Middleton, Supervising Deputy State Public Defender, Appellate Division, Colorado State Public Defender • Ms. Ann Vallandingham, Senior Policy Advisor to the Director, Office for Victims of Crime, U.S. Department of Justice • Mr. Chris Johnson, Chief Appellate Defender for the State of New Hampshire (via telephone)
<p>November 18, 2016</p> <p>Public Meeting of the JPP One Liberty Center Arlington, VA</p>	<ul style="list-style-type: none"> • Colonel William Orr, Jr., U.S. Air Force, Retired, Former Chief Judge, U.S. Air Force Court of Criminal Appeals • Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division • Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Office of the Judge Advocate General, Criminal Law Division • Lieutenant Colonel Angela Wissman, U.S. Marine Corps Reserve, Deputy Officer-in-Charge, Victims' Legal Counsel Organization • Mr. Stephen McCleary, Senior Military Justice Counsel, U.S. Coast Guard
<p>January 6, 2017</p> <p>Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA</p>	<ul style="list-style-type: none"> • Panel deliberations on the Joint Service Committee on Military Justice's Proposed Amendment to Rule for Courts-Martial 1103A

JUDICIAL PROCEEDINGS PANEL PUBLIC MEETINGS	PRESENTERS
<p>February 24, 2017</p> <p>Public Meeting of the JPP Holiday Inn Arlington at Ballston Arlington, VA</p>	<ul style="list-style-type: none"> • Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division • Colonel Jeffrey Palomino, U.S. Air Force, Chief, Appellate Defense Division • Lieutenant Colonel Deanna Daly, U.S. Air Force, Senior Special Victims' Counsel for Appellate and Outreach, Special Victims' Counsel Division • Colonel William Orr, Jr., U.S. Air Force, Retired, Former Chief Judge, U.S. Air Force Court of Criminal Appeals • Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Office of the Judge Advocate General, Criminal Law Division • Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division • Mr. Stephen McCleary, Senior Military Justice Counsel, U.S. Coast Guard
<p>March 10, 2017</p> <p>Public Meeting of the JPP One Liberty Center Arlington, VA</p>	<ul style="list-style-type: none"> • Lieutenant Colonel Mary Catherine Vergona, U.S. Army, Chief, Policy Branch, Office of the Judge Advocate General, Criminal Law Division • Colonel William Orr, Jr., U.S. Air Force, Retired, Former Chief Judge, U.S. Air Force Court of Criminal Appeals • Mr. James Martinson, Highly Qualified Expert, Criminal Division (Code 20), Navy Office of the Judge Advocate General • Mr. Stephen McCleary, Senior Military Justice Counsel, U.S. Coast Guard
<p>April 7, 2017</p> <p>Public Meeting of the JPP One Liberty Center Arlington, VA</p>	<ul style="list-style-type: none"> • Panel deliberations and review of draft report
<p>May 19, 2017</p> <p>Public Meeting of the JPP One Liberty Center Arlington, VA</p>	<ul style="list-style-type: none"> • Panel deliberations and review of draft report

APPENDIX G: Acronyms and Abbreviations

AVL	appellate victim liaison
CAAF	United States Court of Appeals for the Armed Forces
CCA	Court of Criminal Appeals
COMA	United States Court of Military Appeals
CVRA	Crime Victims' Rights Act
DD Form	Department of Defense Form
DoD	Department of Defense
FY	fiscal year
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
JSC	Joint Service Committee on Military Justice
M.R.E.	Military Rule of Evidence
NDAA	National Defense Authorization Act
PACER	Public Access to Court Electronic Records
R.C.M.	Rule for Courts-Martial
SCIF	sensitive compartmented information facility
SVC	special victims' counsel
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
VLC	victims' legal counsel
VNS	Victim Notification System

APPENDIX H: Sources Consulted

1. STATE CONSTITUTIONS

Tex. Const. art. I, § 30

2. LEGISLATIVE SOURCES

a. Enacted Statutes

10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)

10 U.S.C. § 1044e (Special Victims' Counsel for victims of sex-related offenses)

18 U.S.C. § 3771 (Crime Victims' Rights Act)

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013)

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COLO. REV. STAT. § 24-4.1-303(13)

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b. Reports of Congress

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

EV v. United States & Martinez, 75 M.J. 331 (C.A.A.F. 2016)

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United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998)

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c. U.S. Court of Military Appeals

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d. U.S. Air Force Court of Criminal Appeals

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e. State Courts

Commonwealth v. Feliciano, 816 N.E.2d 1205 (Mass. 2005)

Hoile v. State, 948 A.2d 30 (Md. 2008)

In re Christopher G., 564 A.2d 619 (Conn. 1989)

People v. Bean, 560 N.E. 2d 258 (Ill. 1990)

People v. James, 5 P.3d 328 (Col. 2000)

4. RULES AND REGULATIONS

a. Executive Orders

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016), *available at* <http://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>

b. Proposed Amendments

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, PROPOSED AMENDMENT TO THE MANUAL FOR COURTS-MARTIAL (proposed November 29, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-11-29/pdf/2016-28630.pdf>

c. Department of Defense

U.S. DEPARTMENT OF DEFENSE, FORM 2703, POST-TRIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (March 2016)

U.S. DEPARTMENT OF DEFENSE, FORM 2704, VICTIM/WITNESS CERTIFICATION AND ELECTION CONCERNING PRISONER STATUS (March 2013)

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

C.A.A.F. R. 26

e. Service Courts of Criminal Appeals

A. Ct. Crim. App. R. 15.4

A. Ct. Crim. App. R. 30.4
A.F. Ct. Crim. App. R. 15.3
A.F. Ct. Crim. App. R. 23.3(f)
Ct. Crim. App. R. 23(d)
N-M. Ct. Crim. App. R. 1.3(c)
N-M. Ct. Crim. App. R. 15.1(i)

f. State Rules

MD. RULE 8-111(c)

5. MEETINGS

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Letter from Lieutenant Colonel Jeffrey G. Palomino, U.S. Air Force, Chief, Appellate Defense Division, to the Honorable Elizabeth Holtzman, JPP Chair (October 14, 2016), *available at* http://jpp.whs.mil/Public/docs/06-Public_Comment/Palomino_PublicComment_20161014.pdf

9. WEBSITES

Public Access to Court Electronic Records, <https://www.pacer.gov/>

