



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

FEB 18 2013

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The attached report responds to Senate Report 112-173, which accompanied S. 3254, the National Defense Authorization Act for Fiscal Year 2013 and, at pages 115-116, referenced the Crime Victims' Rights Act (18 U.S.C. § 3771) and stated that DOD Directive 1030.01 (April 13, 2004) does not include the victims' right to be heard during public proceedings and to proceedings free from unreasonable delay. The Senate Report requested that the Secretary of Defense provide a report to the Senate and House of Representatives Committees on Armed Services on the practicability and advisability of extending these additional rights to victims involved in cases tried by courts-martial, and a means for seeking redress for failure to be afforded their rights.

On September 20, 2012, the General Counsel of the Department of Defense tasked the Joint Service Committee (JSC) on Military Justice to review the matters raised by the Senate Report, to review applicable DoD and Service regulations, and to provide recommendations, as appropriate. The JSC Report and its recommendations are at Tab B. My memorandum concurring with the JSC Report and recommendations is at Tab A. I have authorized the JSC to work with the Office of the Under Secretary of Defense for Personnel and Readiness and the Office of the Inspector General of the Department of Defense to conduct a study of jurisdictions that provide remedies for failure to comply with victims' assertion of rights, and to determine best practices for possible further implementation within the military justice system.

In summary, the JSC recommended that:

- (1) The Office of the Under Secretary of Defense for Personnel and Readiness review and update as necessary DoD Directive 1030.01, "Victim and Witness Assistance" and DoD Instruction 1030.2, "Victim and Witness Procedures";
- (2) The following two additional rights of the current Crime Victims' Rights Act that the JSC Report identifies as not currently stated in DOD Directive 1030.01, "Victim and Witness Assistance," be considered for inclusion as part of any update of this DoD Issuance:
 - (a) The victim's right to be heard during public proceedings.
 - (b) The victim's right to be free from unreasonable delay.

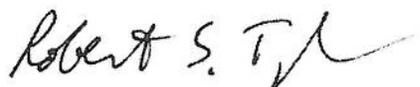


- (3) Upon completion of the USD(P&R) review and any update of DOD Directive 1030.01 and DoD Instruction 1030.02, these Issuances should require the Secretaries of the Military Departments to update their implementing regulations consistent with these DoD Issuances; and
- (4) The JSC be authorized to work with the Office of the Under Secretary of Defense for Personnel and Readiness and the Office of the Department of Defense Inspector General to study other jurisdictions that provide remedies for failure to comply with victims' assertion of rights and to determine the best practices for further military justice implementation.

I concurred with the JSC recommendations and directed that the JSC complete its study of other jurisdictions and provide its recommendations for amendments to the Manual for Courts-Martial and modifications of the military justice system, as appropriate, during its next Annual Review of the Manual for Courts-Martial responsibilities that began January 1, 2013. In addition, the Acting Under Secretary of Defense for Personnel and Readiness has been provided a copy of the JSC Report and my memorandum recommending a review and update of current DOD and Service regulations that address Crime Victims' Rights.

The Department of Defense shares the Committee's interest and support of Crime Victims' Rights throughout the administration of military justice. The measures being taken should enhance that support. A similar letter is being sent to the Chairman of the House of Representatives Committee on Armed Services. Thank you for your support of the men and women of the Armed Services.

Sincerely,



Robert S. Taylor
Acting

Attachments:
As stated

cc:
The Honorable James M. Inhofe
Ranking Member

Tab A



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

FEB 18 2013

GENERAL COUNSEL

MEMORANDUM FOR CHAIR, JOINT SERVICE COMMITTEE ON
MILITARY JUSTICE (JSC)

SUBJECT: JSC Report – Crime Victims’ Rights Act Review and Recommendations

On September 20, 2012, the General Counsel of the Department of Defense directed this JSC review of the Crime Victims’ Rights Act (18 U.S.C. § 3771), in response to a request on pages 115-116 of the Senate Report, which accompanied S. 3254 (National Defense Authorization Act for Fiscal Year 2013), that the Secretary of Defense provide a report to the Senate and House of Representatives Committees on Armed Services regarding the fact that DoD Directive 1030.01 (April 13, 2004) does not include the victim’s rights to be heard during public proceedings and to proceedings free from unreasonable delay. The request asked the Secretary to address the practicability and advisability of extending these additional rights to victims involved in courts-martial, as well as a means for victims to seek redress for failure to be afforded their rights.

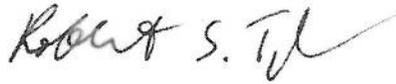
I have reviewed the JSC report, dated December 20, 2012, and concur with the JSC recommendations that:

- (1) OUSD (P&R) review and update as necessary DoD Directive 1030.01, “Victim and Witness Assistance” and DoD Instruction 1030.2, “Victim and Witness Procedures”;
- (2) The following two additional rights of the current Crime Victims’ Rights Act that the JSC Report identifies as not currently stated in DOD Directive 1030.01, “Victim and Witness Assistance,” be considered for inclusion as part of any update of this DoD Issuance:
 - (a) The victim’s right to be heard during public proceedings.
 - (b) The victim’s right to be free from unreasonable delay.
- (3) Upon completion of the USD(P&R) review and any update of DOD Directive 1030.01 and DoD Instruction 1030.02, these Issuances should require that the Secretaries of the Military Departments update their implementing regulations consistent with these DoD Issuances; and



- (4) The JSC be authorized to work with the Office of the Under Secretary of Defense for Personnel and Readiness and the Office of the Department of Defense Inspector General to study other jurisdictions providing remedies for failure to comply with victims' assertion of rights and to determine the best practices for further implementation in the military justice system. Consistent with the procedures of DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," this authorized study should be conducted and concluded as part of the JSC's Annual Review for 2013.

A copy of the JSC Report and this memorandum will be provided to the Acting Under Secretary of Defense for Personnel and Readiness for appropriate consideration. I am providing copies of the JSC Report and this memorandum to the Chairmen of the Senate and House of Representative Committees on Armed Services in order to inform them of the Department's actions taken and those contemplated in response to the Senate Report.



Robert S. Taylor
Acting

cc:
Acting USD(P&R)

Tab B



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

SEP 20 2012

GENERAL COUNSEL

MEMORANDUM FOR CHAIRMAN, JOINT SERVICE COMMITTEE ON
MILITARY JUSTICE

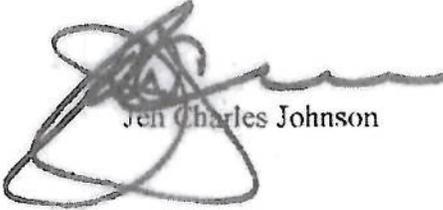
SUBJECT: Joint Service Committee Report – Crime Victims’ Rights Act

Attached is a copy of pages 115-116 of the Senate Armed Services Committee Report (S. 3254, June 4, 2012) concerning the Crime Victims’ Rights Act (18 U.S.C. § 3771). As you can see, the Report notes that DoD Directive 1030.01 (April 13, 2004) does not include the victims’ rights to be heard during public proceedings and to proceedings free from unreasonable delay. The Committee also pointed out that the Directive does not specify a procedure for victims to seek redress for failure to be afforded these rights.

The Committee requested that the Secretary of Defense, by January 7, 2013, provide a report to the Committees on Armed Services of both the Senate and House on the practicability and advisability of extending these additional rights to victims involved in cases tried by courts-martial and a means for seeking redress for failure to be afforded their rights. I ask that the Joint Service Committee on Military Justice conduct this review and prepare a report for my review.

The report should include its review of the existing Service Regulations that implement the Crime Victims’ Rights Act and DoD Directive 1030.01 and any other regulations or manuals deemed appropriate to address the questions the SASC Report presents.

Please provide this report and recommendations to me by December 15, 2012.



Jen Charles Johnson

Attachment:
As stated



Calendar No. 419

112TH CONGRESS }
2d Session

SENATE

{ REPORT
112-173

**NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 2013**

R E P O R T

(TO ACCOMPANY S. 3254)

ON

TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2013 FOR
MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, FOR
MILITARY CONSTRUCTION, AND FOR DEFENSE ACTIVITIES OF
THE DEPARTMENT OF ENERGY, TO PRESCRIBE MILITARY PER-
SONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER
PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE



JUNE 4, 2012 —Ordered to be printed

commended methods through which additional resources and support can be given to the Military Pro Bono Project.

Army's sexual assault and special investigation training

The committee is aware of the efforts that the Department of Defense has made to reduce sexual assaults across our military services. The committee applauds these steps. However, the committee recognizes that more work needs to be done to reduce the occurrence of sexual assaults in the military. The committee is particularly interested in how sexual assault crimes are investigated, prosecuted, and defended.

The committee notes that the Army has established special investigation courses at the Army's Military Police School at Fort Leonard Wood, Missouri, that are dedicated to new investigative and interviewing techniques, such as Forensic Experiential Trauma Interviews. These new techniques can possibly assist in prosecuting these often difficult cases. The committee also notes that the Army has established a robust career-spanning sexual assault training program for Army trial lawyers and military justice practitioners. The steps the Army has taken are commendable.

The committee encourages the Department and the military services to adopt the best practices of the Army model and immediately implement any and all lessons learned that are viable to the Department as a whole or to a particular service.

Assessment of skills and abilities to enhance transition from military service

The committee recognizes the value of using varied approaches to prepare departing service members for transition from military service to the classroom or civilian employment. Members eligible for retirement, for example, may need different tools than younger veterans who volunteered for service after completing high school or after a few semesters of college. For all new veterans, however, providing accurate assessments of skills, aptitudes, and interests and matching them with educational options or with the requirements of potential employers can assist new veterans in choosing successful career options. The committee encourages the Department of Defense, as part of its ongoing effort to improve existing transition assistance programs, to identify and develop methods to assess the inventory of talents and abilities of departing service members to match them with viable career opportunities. Members should have available to them, well before separation or retirement, testing vehicles comparable in purpose to the Armed Services Vocational Aptitude Battery, to align their interests and abilities with the needs of public and private sector employers and appropriate educational pursuits.

Crime Victims' Rights Act

The Crime Victims' Rights Act (18 U.S.C 3771) affords victims of crimes specific enumerated rights, most of which are afforded by Department of Defense Directive 1030.01, April 13, 2004, to victims involved in cases tried by military courts-martial. However, this Directive does not include the victim's rights to be heard during public proceedings and the right to proceedings free from unreasonable

delay. In addition, there is no specified procedure for victims to seek redress for failure to be afforded these rights.

The committee directs the Secretary of Defense to report to the Committees on Armed Services of the Senate and the House of Representatives not later than January 7, 2013, on the practicality and advisability of extending these additional rights to victims involved in cases tried by courts-martial and a means for seeking redress for failure to be afforded their rights.

Department of Defense Inspector General oversight of investigations of sexual assault

In June, 2011, the United States Government Accountability Office (GAO) issued a report entitled: **MILITARY JUSTICE: Oversight and Better Collaboration Needed for Sexual Assault Investigations and Adjudications** (GAO-11-579) in which the GAO recommended that the Department of Defense Inspector General (DOD IG) develop and implement a policy that specifies procedures for conducting sexual assault investigations and establish clear goals, objectives, and performance data for monitoring and evaluating the services' sexual assault investigations and related training. The committee directs that, not later than December 3, 2012, the Secretary of Defense provide the Committees on Armed Services of the Senate and the House of Representatives a report on the DOD IG's implementation of the GAO's recommendations, including an implementation timeline.

Inclusion of synthetic drug compounds in the Uniform Code of Military Justice

The committee recognizes the harmful impact that synthetic-drug abuse poses on good order and discipline in the military. Since 2008, there has been a rise in reported incidents of military personnel disciplined due to the use, distribution, and possession of synthetic-drugs, specifically synthetic cannabinoids, synthetic cathinones, and synthetic psychedelic hallucinogens. As such, the committee directs the Secretary of Defense, in consultation with the Attorney General and specifically the Drug Enforcement Agency (DEA), to report to the Committees on Armed Services of the Senate and the House of Representatives on issues that exist in prosecuting synthetic drug offenses including the utility and impact of listing synthetic-drug compounds as controlled substances in the Uniform Code of Military Justice. The report should, at a minimum, assess all compounds that have been found in DEA domestic investigations. This report is required no later than 60 days after the enactment of this Act.

Joint Professional Military Education special areas of emphasis

The committee is aware that the Chairman of the Joint Chiefs of Staff provides annual guidance to the Joint Professional Military Education (JPME) institutions regarding special areas of emphasis for curriculum development and teaching that span a broad range of topics that are of current and longer-term strategic importance. In 2010, the guidance recommended nine topical areas including Countering Violent Extremism, Net-Centric Information Sharing,



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF:

DAJA-ZD

20 December 2012

MEMORANDUM FOR Office of General Counsel of the Department of Defense, 1600 Defense Pentagon, Washington DC 20301-1600

SUBJECT: Joint Service Committee Response to the Senate Armed Services Committee Directive to Review Department of Defense Directive 1030.01

1. The Senate Armed Services Committee Report (S. 3254, June 4, 2012) directed the Department of Defense to review the Department of Defense Directive (DoDD) 1030.01 on the practicability and advisability of extending additional rights included in the Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771, to victims involved in cases tried by courts-martial and a means for seeking redress for failure to be afforded their rights. As the General Counsel for the Department of Defense, you requested that the Joint Service Committee (JSC) on Military Justice conduct the review and prepare a report for your review.
2. As requested, the JSC reviewed DoDD 1030.01 and all applicable service regulations and instructions. Attached is a copy of the report by the JSC (Enclosure 1).
3. As a result of reviewing the DoDD and all service instructions and regulations regarding victims' rights, the JSC has the following recommendations: (a) update DoDD 1030.01 and DoDI 1030.2 to reflect current law; (b) include the two additional CVRA rights in DoDD 1030.01, the Victim Witness and Assistance Program policy; (c) direct each Service to implement as appropriate in service regulations; and (d) allow the JSC to work with personnel from the Office of the Under Secretary of Defense for Personnel and Readiness and the Office of the Department of Defense Inspector General to study other jurisdictions that provide remedies for failure to comply with victims' assertion of rights and to determine the best practices for possible implementation in the military justice system.
4. The POC is LTC Chris Kennebeck at christopher.a.kennebeck.mil@mail.mil or 571-256-8136.

CHARLES N. PEDE
COL, JA
Chair, Joint Service Committee on
Military Justice

ENCLOSURE 1

I. References.

- A. General Counsel, Department of Defense Ltr, dtd Sep. 20, 2012
- B. Crime Victims' Rights Act (18 U.S.C. 3771)
- C. Department of Defense Directive 1030.01, "Victim and Witness Assistance"
- D. Department of Defense 1030.2, "Victim and Witness Procedures"
- E. DD Form 2701, "Initial Information for Victims and Witnesses of Crime"
- F. DD Form 2702, "Court-Martial Information for Victims and Witnesses of Crime"
- G. DD Form 2703, "Post-Trial Information for Victims and Witnesses of Crime"
- H. DD Form 2704, "Victim/Witness Certification and Election Concerning Inmate Status"
- I. DD Form 2705, "Victim and Witness Notification of Changes in Inmate Status"
- J. Army Regulation 27-10, "Legal Services – Military Justice," Chap. 17
- K. Air Force Instruction 51-201, Chap. 7, "Victim and Witness Assistance"
- L. SECNAVINST 5800.11B, "Victim and Witness Assistance Program"
- M. OPNAVINST 5800.7A, "Victim and Witness Assistance Program"
- N. JAG/COMNAVLEGSVCCOMINST 5800.4A, "Victim and Witness Assistance Program"
- O. MCO P5800.15A (LEGADMINMAN), Chap. 6, "Victim and Witness Assistance Program"
- P. COMDINST M5810.1E, "Military Justice Manual," Chap. 3

II. Introduction

This memorandum contains the recommendations of a review conducted by members of the Joint Service Committee regarding the Crime Victims' Rights Act (CVRA) (18 U.S.C. 3771) in relation to Department of Defense Directive (DoDD) 1030.01. The review was undertaken in response to the Senate Armed Services Committee (SASC) directive to identify the practicability and advisability of extending additional rights under the Crime Victims' Rights Act to victims involved in cases tried by courts-martial and to identify a means for seeking redress for failure to be afforded their rights.

The SASC specifically directed review of DoDD 1030.01 and all service regulations to determine if the following additional rights could be added to the instructions: (1) the victim's right to be heard during public proceedings; and (2) the victim's right to be free from unreasonable delay. These rights are included in the CVRA, but are not included in the DoDD or any of the military services' regulations or instructions. However, certain Military Rules of Evidence (MRE), including MRE 412, 513, and 514, provide a right to be heard for the victim. SASC also requested that the Department of Defense (DoD) determine if there is a means for seeking redress for the failure for victims to receive these rights. As a result of this directive, the General Counsel for DoD requested that the Joint Service Committee (JSC) on Military Justice conduct the review and prepare a report for the General Counsel to review (see Reference A).

After reviewing the DoDD and all service instructions and regulations regarding victims' rights, the JSC makes the following recommendations:

- (1) update DoDD 1030.01 and DoDI 1030.2 to reflect current law;
- (2) include the two additional CVRA rights in DoDD 1030.01, the Victim Witness and Assistance Program policy;
- (3) direct each military service to issue implementing regulations as appropriate; and
- (4) allow the JSC to work with personnel from the Office of the Under Secretary of Defense for Personnel and Readiness and the Office of the Department of Defense Inspector General to study other jurisdictions that provide remedies for failure to comply with victims' assertion of rights and to determine the best practices for further implementation in the military justice system.

III. Background

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

The CVRA was enacted in 2004. It is a statutory bill of rights for victims of crimes committed in violation of federal laws or the laws of the District of Columbia. The CVRA was enacted as part of the Title I of the Justice for All Act of 2004, P.L. 108-405, 118 Stat. 2260 (2004). The rights afforded to victims under this section are similar to bill of rights provisions found in various state laws and is a successor to previous federal victims' rights legislation. The Department of Justice implemented regulations carrying out the various directives within the CVRA on November 17, 2005. Additionally, based on the enactment of CVRA, amendments were made to the Federal Rules of Criminal Procedure, which all became effective on December 1, 2008.

Under the CVRA, a crime victim is defined as "a person directly or proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."¹ According to the CVRA, in the case of a victim who is under the age of 18, incompetent, incapacitated, or dead, "the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative."²

The following rights are afforded to victims of crimes:

- (1) the right to be reasonably protected from the accused;
- (2) the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;
- (3) the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;

¹ 18 U.S.C 3771(e)

² *Id.*

(4) the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;

(5) the reasonable right to confer with the attorney for the Government in the case;

(6) the right to full and timely restitution as provided in law;

(7) the right to proceedings free from unreasonable delay; and

(8) the right to be treated with fairness and respect for the victim's dignity and privacy.³

The SASC directed DoD to review two rights in particular that are not included in the DoDD 1030.01. Specifically, SASC directed review of: (1) the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; and (2) the right to proceedings free from unreasonable delay.

According to the CVRA, in respect to the right to be reasonably heard, the right is a right to participate. However, the right is limited to public proceedings involving release, plea, sentencing or any parole proceeding.⁴ There is no right to be heard on pretrial motions, during trial, or on appeal regarding the merits of the case.⁵ Within the CVRA, there is also no right to participate in plea negotiations between the defendant and the prosecution because the right to be heard only applies to public proceedings, not private meetings.⁶ However, victims are given a right to confer with the Government about plea negotiations, but not in a participatory way as is implied in the right to be heard.⁷ In addition, the right to be heard is only a right to express views and opinions, not to control or decide the outcome of the case.⁸ Finally, the CVRA does not provide a process for how a victim is to communicate views to the court if the right to be heard is invoked, and district courts have interpreted the right in multiple ways, including through oral and written statements.⁹ The Office for Victims of Crime is responsible for oversight and ensuring that the CVRA is implemented within the Department of Justice and that victims are notified of their rights.¹⁰

In reference to the second right – to proceedings free from unreasonable delay – it was not included in previous versions of victims' rights bill.¹¹ Within the CVRA, there is no definition of "unreasonable delay;" although according to the sponsors of the law, the provision does not "curtail the government's need for reasonable time to organize and prosecute its case. . . [n]or is the provision intended to infringe on the defendant's due process right to prepare a defense. . .

³ 18 U.S.C. 3771 (a)(1)-(8)

⁴ 18 U.S.C. 3771(a)(4)

⁵ Charles Doyle, *Crime Victims' Rights Act: A Summary of Legal Analysis of 18 U.S.C. 3771*, Congressional Research Service, Apr. 24, 2012, <http://www.fas.org/sgp/crs/misc/RL33679.pdf>.

⁶ *Id.*

⁷ 18 U.S.C. 3771(c)(1), (b)

⁸ Doyle, *supra* note 5.

⁹ *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005) (CVRA gives victims the right to speak directly to the judge); *Kenna v. District Court*, 435 F.3d 1011 (9th Cir. 2006) (CVRA gives crime victims the right to speak at proceedings); *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005) (an oral statement was not required to satisfy the victim's right to be heard during a bail hearing).

¹⁰ <http://www.ojp.usdoj.gov/ovc.html>

¹¹ 42 U.S.C. 10606

.”¹² However, “the provision should be interpreted so that any decision to continue a criminal case should include reasonable consideration of the rights under this section.”¹³

The CVRA directs the courts and law enforcement officials to ensure that victims are notified of and afforded their rights under the law. According to the authors of the bill, “the provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to victims’ rights in a timely way.”¹⁴ The CVRA states that “the court shall ensure that the crime victim is afforded the rights described in subsection (a)...[and] the reasons for any decision denying relief...shall be clearly stated on the record.”¹⁵ The CVRA provides that the government, victim, or victim’s representative may assert the rights on behalf of the victim.¹⁶ The right can be asserted in the district court in which the defendant is being charged or, if no charges yet exist, then the district court in which the crime occurred.¹⁷ If the right is asserted and the relief sought is denied, then the CVRA provides procedures in the event that a victim is not afforded his or her right under the law.¹⁸ If the right is denied, then the moving party can petition the court of appeals for a writ of mandamus.¹⁹ The courts differ on what the standard for the writ is,²⁰ but the CVRA specifically states “the court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days....”²¹ If the court of appeals denies the relief, then the court must detail the reasons for denial in a written opinion.²²

While the CVRA provides procedures for enforcing victims’ rights, there are limitations to the procedures. The courts cannot grant a new trial as a result of failure to provide a right to a victim of a crime.²³ In addition, if the victim motions to re-open a plea or sentence, the following requirements must be met: (1) the victim must assert the right before or during the proceeding and the right must have been denied, (2) the victim must petition the court of appeals for a writ of mandamus within 14 days, and (3) in the case of a plea, the accused must not have pled to the highest offense charged.²⁴

B. Department of Defense Directive 1030.01, “Victim and Witness Assistance”

There has been a heightened interest in the rights and needs of crime victims within the last decade. As a result, the DoD has developed extensive policy to assign responsibilities and to establish procedures and program standards for providing victim assistance, especially victims of sexual assault. The DoD modeled its policy regarding victim and witness rights after the rights

¹² Doyle, *supra* note 5

¹³ *Id.*

¹⁴ 150 *Cong. Rec.* S4269 (daily ed. April 22, 2004) (remarks of Sen. Feinstein)

¹⁵ 18 U.S.C. 3771(b)

¹⁶ 18 U.S.C. 3771(d)(1)

¹⁷ 18 U.S.C. 3771(d)(3)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Doyle, *supra* note 5

²¹ 18 U.S.C. 3771(d)(3)

²² *Id.*

²³ 18 U.S.C. 3771(d)(5)

²⁴ *Id.*

contained in the Victim Rights and Restitution Act of 1990 (42 U.S.C. 10606 and 42 U.S.C. 10607). The rights under this Act were specifically listed in 42 U.S.C. 10606. DoDD 1030.1 was first promulgated on November 23, 1994. The instruction was enacted in combination with DoDI 1030.2, "Victim and Witness Assistance Procedures," to implement the statutory requirements for victim and witness assistance and to provide guidance for assisting victims and witnesses of crime through the entire military justice process, including from initial contact through investigation, prosecution, and confinement.²⁵ Together, the Directive and Instruction provide policy guidance and specific procedures to be followed for victim and witness assistance in all sectors of the military.²⁶ The Directive and Instruction apply to all of the military services, including the Coast Guard when it is operating as a Service in the Navy.²⁷ DoDD 1030.1 has been updated repeatedly, most recently on April 23, 2007, where the series number changed to DoDD 1030.01.

Under DoDD 1030.01 (Reference C), a victim is defined as "a person who has suffered direct, physical, emotional or pecuniary harm as a result of the commission of a crime included in violation of the Uniform Code of Military Justice or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components."²⁸ Victims include: (1) military members and their families and (2) those DoD civilian employees and contractors, and their family members, stationed outside the continental United States.²⁹ In addition, "when a victim is under 18 years of age, incompetent, incapacitated, or deceased, the term includes the following: a spouse, legal guardian, parent, child, sibling, another family member, or another person designated by the court or Component responsible official or designee."³⁰

DoDD 1030.01 affords the following rights to victims of crimes:

- (1) be treated with fairness and respect for the victim's dignity and privacy;
- (2) be reasonably protected from the accused offender;
- (3) be notified of court proceedings;
- (4) be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial;
- (5) confer with the attorney for the Government in the case;
- (6) receive available restitution; and
- (7) be provided information about conviction, sentencing, imprisonment, and release of the offender.³¹

²⁵ <http://v.wac.defense.gov/dodprograms.aspx>

²⁶ *Id.*

²⁷ *Id.*

²⁸ Department of Defense Directive 1030.01, "Victim and Witness Assistance," Apr. 23, 2007.

²⁹ *Id.*

³⁰ *Id.*

³¹ Department of Defense 1030.01, "Victim and Witness Assistance," para. 4.4, Apr. 23, 2007.

DoDI 1030.2, "Victim and Witness Procedures" (Reference D), provides procedures to implement the rights contained in DoDD 1030.01. The instruction amplifies the rights provided in DoDD 1030.01 and includes an exhaustive list of information and notifications to provide to victims.³² The instruction also indicates that when victims are first identified, basic information should be provided to victims and witnesses, including points of contact, medical and legal services, and the status of the investigation. Victims are provided basic information and notice of their rights through DD Form 2701, "Initial Information for Victims and Witnesses of Crime," which is a brochure given to the victim at the earliest opportunity after identification of the victim (see Reference E). In addition, once the decision to pursue court-martial charges is made, a victim will be given DD Form 2702, "Court-Martial Information for Victims and Witnesses" (see Reference F). This form is used to provide victims with basic information about the court-martial and military justice process and notification rights during the process. In the event of conviction and confinement, victims are provided with DD Form 2703, "Post-Trial Information for Victims and Witnesses," DD Form 2704, "Victim/Witness Certification and Election Concerning Inmate Status," and DD Form 2705, "Victim and Witness Notification of Changes in Inmate Status" (see References G, H, and I respectively). These forms provide information to victims on the offender's sentence, confinement status, clemency and parole hearings, and release from confinement. The number of victims and witnesses who receive these forms is reported to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) on an annual basis.

Unlike the CVRA, neither DoDD 1030.01 nor DoDI 1030.2 provides procedures for enforcement of the rights provided to victims. However, the DoD Inspector General is responsible for overseeing the development of investigative policy and for performing appropriate oversight reviews of the management of the victim and witness assistance program.³³ In addition, USD(P&R) maintains a Victim and Witness Council (VWAC) to provide a forum for the exchange of information and the consideration of victim and witness policies, and liaison with the Office for Victims of Crime.³⁴

DoDD 1030.01 does not provide for the right to be heard or the right to be free from unreasonable delay, which are both included in the CVRA, because, as stated above, the DoD developed its policy based on the Victim Rights and Restitution Act of 1990. However, in 2004, the part of the Victim Rights and Restitution Act that contains the list of rights, 42 U.S.C. 10606, was repealed.³⁵ Currently, DoDD 1030.01 and DoDI 1030.2 both reference the repealed statute. The directive and instruction were also modeled after the second part of the Victim Rights and Restitution Act, 42 U.S.C. 10607, which describes services available to victims and is still current.³⁶

C. Military Services' Instruction and Regulations

³² Department of Defense 1030.2, "Victim and Witness Procedures," Jun. 4, 2004.

³³ Department of Defense 1030.01, "Victim and Witness Assistance," para. 5.2, Apr. 23, 2007.

³⁴ *Id.*, para. 5.1.3.

³⁵ Title 42 – The Public Health and Welfare, § 10606. Repealed. Pub. L. 108-405, title I, § 102(c), Oct. 30, 2004, 118 Stat. 2264.

³⁶ 42 U.S.C. 10607

The DoD provides the overarching policy and guidance regarding victims' rights, which is then implemented through an instruction or regulation within each individual service. The Army Victim/Witness Assistance Program is contained in Chapter 17 of Army Regulation 27-10, "Legal Services – Military Justice" (Reference J). The Air Force implements its Victim and Witness Assistance Program through Chapter 7 of Air Force Instruction 51-201 (Reference K). The Navy Victim and Witness Program policies are contained in SECNAVINST 5800.11B (Reference L), OPNAVINST 5800.7A (Reference M), and JAG/COMNAVLEGSVCCOMINST 5800.4A (Reference N). The Marine Corps implements its Victim and Witness Assistance Program in accordance with SECNAVINST 5800.11B and Chapter 6 of MCO P5800.15A (LEGADMINMAN) (Reference O). Finally, guidelines for the Coast Guard Victim and Witness Program can be found in Chapter 3.M of Commandant Instruction M5810.1E, "Military Justice Manual" (Reference P). All of these instructions and regulations provide for the same rights as are listed in DoDD 1030.01. Each service regulation or instruction references DoDD 1030.01 and DoDI 1030.2, as well as the Victim Rights and Restitution Act of 1990, including the repealed 42 U.S.C. 10606.

As indicated earlier in reference to DoDD 1030.01, none of the service regulations or instructions include the right to be heard or the right to be free from unreasonable delay. However, while the right to be heard is not formally listed under the rights section in any instruction, victims are offered the option of restricted reporting, and when making an unrestricted report they are given multiple opportunities to be heard regarding participation in investigations, charging considerations, pretrial investigations under Article 32, pretrial agreements, right to testify on the merits and in sentencing proceedings, and clemency and parole hearings, as is contemplated by the CVRA. For example, according to the Navy instruction, "[v]ictims have a designated advisory role in decisions involving...to plea-bargain, including to enter into a pretrial agreement. Trial counsel shall ensure victims are aware of their right to act in this advisory capacity. In those cases in which a victim has elected to act in such an advisory capacity, trial counsel shall ensure the victim's views concerning prosecution and plea negotiations are obtained, documented and forwarded to the convening authority prior to the specific decision or disposition."³⁷ Similar provisions are included in the other service regulations as well.³⁸ In addition, victims are notified in DD Form 2702 that they can present evidence in the sentencing phase of the trial, including written statements and testimony,³⁹ and

³⁷ JAG/COMNAVLEGSVCCOMINST 5800.4A, "Victim and Witness Program," para. 7k.(6), Apr. 18, 2011.

³⁸ See MCO P5800.15A (LEGADMINMAN), Chap. 6, "Victim and Witness Assistance Program," para. 6006.8d., Sept. 26, 2011 ("Victims have a statutorily designated advisory role in decisions involving prosecutorial discretion, such as plea-bargaining. Trial counsel shall ensure victims are aware of their right to act in this advisory capacity. In those cases in which a victim has elected to act in such an advisory capacity, trial counsel shall ensure the victim's views concerning prosecution and plea negotiations are obtained and forwarded to the convening authority."); Air Force Instruction 51-201, Chap. 7, "Victim and Witness Assistance," para. 7.12.12.4, Oct. 25, 2012, ("Under ordinary circumstances, consult with the victim and obtain their view concerning: pretrial negotiations, including pre-trial agreement terms."); Army Regulation 27-10, "Legal Services – Military Justice," Chap. 17, para. 17-15, Oct. 3, 2011 ("When appropriate, trial counsel, Victim Witness Liaison, or other Government representative will consult with victims or crime concerning-(4) Negotiations of pretrial agreements and their potential terms."); COMDINST M5810.1E, "Military Justice Manual," Chap. 3, para. 3.M.6, 13 April 2011 ("The victim of a serious offense ordinarily should be consulted by a representative of the convening authority to obtain the victim's views about a decision...[regarding] negotiations for a pretrial negotiation.")

³⁹ See also R.C.M. 1001(b)(4); Department of Defense Instruction 1030.2, "Victim and Witness Procedures," para. 6.3.1.13, Jun. 4, 2004; JAG/COMNAVLEGSVCCOMINST 5800.4A, "Victim and Witness Assistance Program," para. 7k.(6), Apr. 18, 2011; MCO P5800.15A (LEGADMINMAN), Chap. 6, "Victim and Witness Assistance Program," para. 6006.8k., Sept. 26, 2011.

are encouraged to do so. Finally, victims are also notified of parole hearings and may either appear before a board, submit audio or video recordings, or submit written statements to the board, depending on the particular service. All services provide an opportunity for the victim to be heard regarding parole.⁴⁰

In addition, while no formalized right to be free from delay of proceedings is written in any instruction or regulation, there are still multiple ways in which the victim is informed about the scheduling of proceedings. DoDI 1030.2 provides that victims are to receive “[n]otification of the scheduling, including changes and delays, of each investigation pursuant to Article 32, UCMJ, and each court proceeding the victim is entitled to or required to attend.”⁴¹ All of the different service instructions and regulations provide for this as well.⁴² In everyday practice, as much consideration as possible is given to accommodate the victim’s schedule in determining whether proceeding dates are delayed or changed.

Finally, while no instruction or regulation has a procedure for enforcing the rights of victims, responsibility lies with courts, trial counsel, victim advocates, and law enforcement to ensure that victims are aware of and notified of their rights. Victim advocates can help victims assert their rights prior to trial, and trial counsel can speak on behalf of the victim during court proceedings. Multiple service instructions require government counsel to “be proactive in affording rights [to victims] at all stages of a potential case.”⁴³ In addition, each military department is responsible for establishing an interdisciplinary Victim and Witness Assistance Council to develop policy recommendations and facilitate coordination between the DoD’s victim and witness assistance program and its victim advocacy program. For the Department of the Navy, both the Navy and the Marine Corps implement that requirement separately.⁴⁴

IV. Recommendations

As requested, the JSC provides the following recommendations:

A. Update the Department of Defense Directive 1030.01 and Department of Defense Instruction 1030.2 to reflect the current law, and direct Service regulation updates: After review of both DoDD 1030.01 and DoDI 1030.2, it was clear that neither instruction had been updated to accurately reflect that 42 U.S.C. 10606 had been repealed. The statute should be deleted from the reference section in each instruction. In addition, both the directive and instruction should be

⁴⁰ See SECNAVINST 5815.3J, “Department of the Navy Clemency and Parole Systems,” Jun. 12, 2003 (includes Navy, Marine Corps, and Coast Guard); Army Regulation 15-130, “Army Clemency and Parole Board,” Oct. 23, 1998; and Air Force Instruction 31-205, “The Air Force Correction System,” Jul. 6, 2007.

⁴¹ Department of Defense Instruction 1030.2, “Victim and Witness Procedures,” para. 6.3.1.10, Jun. 4, 2004

⁴² COMDINST M5810.1E, “Military Justice Manual,” Chap. 3, para. 3.M.5.c., 13 April 2011; Army Regulation 27-10, “Legal Services – Military Justice,” Chap. 17, para. 17-14a(5), Oct. 3, 2011; Air Force Instruction 51-201, Chap. 7, “Victim and Witness Assistance,” para. 7.12.8.5, Oct. 25, 2012; MCO P5800.15A (LEGADMINMAN), Chap. 6, “Victim and Witness Assistance Program,” para. 6006.8b.(4), Sept. 26, 2011; JAG/COMNAVLEGSVCCOMINST 5800.4A, “Victim and Witness Assistance Program,” para. 7k.(5)(j), Apr. 18, 2011.

⁴³ JAG/COMNAVLEGSVCCOMINST 5800.4A, “Victim and Witness Assistance Program,” para. 7k.(2), Apr. 18, 2011; See also COMDINST M5810.1E, “Military Justice Manual,” Chap. 3, para. 3.M.2.c., 13 April 2011; Army Regulation 27-10, “Legal Services – Military Justice,” Chap. 17, para. 17-8d., Oct. 3, 2011; MCO P5800.15A (LEGADMINMAN), Chap. 6, “Victim and Witness Assistance Program,” para. 6004.3, Sept. 26, 2011; Air Force Instruction 51-201, Chap. 7, “Victim and Witness Assistance,” para. 7.2.3, Oct. 25, 2012.

⁴⁴ Department of Defense 1030.2, “Victim and Witness Procedures,” para. 5.2.5, Jun. 4, 2004.

completely reviewed to confirm accuracy of other laws and resources referenced, including both VWAP and SAPR sexual assault victim policies and programs. Finally, in coordination with the DoD review, each service should review its instruction to ensure accuracy as well.

B. Include the two additional CVRA rights in DoDD 1030.01, the Victim Witness and Assistance Program policy, and implement as appropriate in all military service regulations:

While the DoD Directive and Instruction, as well as all of the service regulations, have procedures in place to allow victims to have the additional rights, it would be appropriate to formally add the rights to all regulations. The rights would have to be adapted to military justice terms, but formally adding the rights to the regulations would avoid undue confusion. The following rights should be added to the regulations:

(1) The right to be reasonably heard at any public proceeding in an Article 32 investigation, court-martial involving a plea, presentencing hearings, and parole.

(2) The right to proceedings free from unreasonable delay.

C. Allow the JSC to work with personnel from USD(P&R) and DoD(IG)) to study other jurisdictions that have relief procedures in place for failure to comply with victim's assertion of rights and determine the best practices for possible implementation in the military justice system:

While the CVRA provides procedures to enforce a victim's rights through a writ of mandamus, the military justice court system is unique. To implement the same procedures within the court-martial process without first deliberately examining the matter could have potential adverse military justice consequences. By taking the time to study how the CVRA enforcement procedures are implemented, along with other jurisdictions implementation of victims' rights, the JSC will help to ensure that if enforcement procedures are appropriate, they are implemented prudently. In addition, the JSC could also ensure that appropriate stakeholders within the military justice system, including military judges and trial practitioners, are involved in developing any policy that could affect the Manual for Courts-Martial. Finally, since USD(P&R) is responsible in developing policy for the overall Victim and Witness Assistance Program and maintaining a Victim Witness and Assistance Counsel, and the DoD(IG) is responsible for developing investigative policy and overseeing reviews of the management of victim and witness assistance programs, those offices would be able to provide the appropriate subject matter expertise on victims' rights.