

From: [Jill Wine-Banks](#)
To: [Hines, Glen R Jr LtCol USMC OSD OGC \(US\)](#)
Cc:

Subject: [Non-DoD Source] Re: Follow-up to last Friday's JPP Public Meeting
Date: Thursday, December 31, 2015 3:58:59 PM

Dear Glen,

Thank you for all your help on this project and thanks to the JPP for the opportunity to have served on this subcommittee and to submit additional comments about the our subcommittee's final report before the JPP decides on whether to adopt all our recommendations.

I was in complete agreement with our subcommittee conclusions until after reading Laurie's dissent and hearing her presentation to the JPP and the discussion that ensued. I now believe that additional discussion (and possibly some testimony or research) is necessary concerning our recommendations in 120 (b) (2) and (3)(A) and (B) to include the phrase "or reasonably should have known." While I can foresee cases where, absent that language, a defendant, particularly an inebriated one, would be acquitted, the discussion raised significant concerns about this being too weak a standard for a criminal conviction and pointed to the general standard being higher in most sex crime laws.

I ask that the JPP give this point particular attention in its review of our report.

Thank you and best wishes for the New Year..

On Fri, Dec 18, 2015 at 10:49 AM, Hines, Glen R Jr LtCol USMC OSD OGC (US)
< Caution- > > wrote:

Subcommittee Members - sending on behalf of Judge Jones:

After further review of the JPP's January and February schedule, it doesn't appear there is time for an additional Subcommittee meeting. The JPP has public meetings scheduled for January 15 and 22, and it must report out to Congress in February. Accordingly, Judge Jones believes the better course is for us to consider the Subcommittee's report and recommendations as complete and leave additional consideration on specific issues to the JPP as part of their deliberations. If Subcommittee members wish to submit additional comments or views on the issues discussed at last Friday's meeting (primarily issues 10 and/or 11, or any other issues), please submit them to the staff, who will circulate them among the other members of the Subcommittee and then provide them to the JPP members as read-ahead materials for their January meeting deliberations. If any member feels strongly that we should hold another telephonic conference to deliberate as a group, please let me know and we will seek to find a workable time to schedule it.

Regarding Issue 10 (Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?), if you recall from Ms. Kepros's commentary and the discussion

during last Friday's presentation to the JPP, the focus was primarily on two sub-issues under Issue 10, voluntary intoxication and the two bills pending in Congress ("Criminal Code Improvement Act of 2015" and "Mens Rea Reform Act of 2015"). The Subcommittee's report recommended no change to the mens rea requirement that the government must prove the accused either knew or reasonably should have known that the victim was incapable of consenting. After some discussion last Friday, there was some debate regarding whether to consider raising the government's burden of proof by removing the "reasonably should have known" language from the statute. I have attached a short memorandum that addresses the two issues of voluntary intoxication and the two Congressional bills pending regarding Title 18 offenses. I have also attached the two Congressional bills for your perspective because I address some of the language in my memorandum. Notwithstanding some of the comments last Friday regarding the availability of voluntary intoxication evidence, my position is voluntary intoxication evidence is relevant under certain circumstances, and the two bills pending in Congress apply only to Title 18 offenses that are silent regarding a mens rea, like the one at issue in the Elonis case. I address these issues in more detail in the attachment. Please feel free to submit comments or opposing views for the JPP's consideration.

Regarding Issue 11, (Should indecent acts be added back into the UCMJ as an enumerated offense?) our staff has distilled your concerns and decisions into the following areas: (1) Should it be enumerated? Your recommendation on this question was no, it should not be an enumerated offense under Article 120; (2) Should it be in Article 134? In your report, you stated you were aware of the pending EO and took no position on it; however (3) if it does go back into 134 as an offense, what should it specifically provide? The Subcommittee did not get to this third question or an answer, but we believe this is the crux of the discussion that took place last Friday, and we feel like this is the primary question for those who are not in favor of the pending EO or making indecent acts a criminal offense anywhere in the UCMJ. On this issue, Kirt Marsh and our staff will prepare a presentation for the JPP to be provided during one of the January meetings. If you have comments or views you would like to be part of the staff's presentation to the JPP in January, please submit them in writing and we will include them in the JPP's read-ahead materials. Specifically, if you are not in favor of indecent acts being an offense anywhere in the UCMJ, please feel free to submit your rationale, etc. And if you have a fall-back position regarding what such an offense would be look like and what types of conduct it should be limited to, please feel free to submit a proposal for the JPP's consideration.

As always, if there are any questions, please contact me at your convenience.

Very Respectfully,

Glen R. Hines, LtCol, USMC
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