



Judicial Proceedings Panel
Minutes of September 19, 2014 Public Meeting

AUTHORIZATION: The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), is a federal advisory committee established pursuant to Section 576(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, as modified by section 1731(b) of the NDAA for FY 2014, and in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

EVENT: The JPP held a public meeting on September 19, 2014, from 8:51 a.m. to 4:11 p.m., focusing on the recent and proposed changes by Congress to the rape and sexual assault provisions (Article 120) of the Uniform Code of Military Justice (UCMJ), which applies to active duty members of the Military Services and Reserve and National Guard Service members when in active duty status. Civilian legal experts presented their assessments of Article 120, military justice practitioners described the impact on trial practice of recent and proposed changes to Article 120, and the Chiefs of Criminal Law from each of the Services provided the military policy perspective on Article 120.

LOCATION: The meeting was held at Holiday Inn, Glebe and Fairfax Ballrooms, 4610 N. Fairfax Drive, Arlington, VA 22203

MATERIALS: A verbatim transcript and video recording of the meeting, as well as preparatory materials provided to the JPP members prior to or during the meeting, are incorporated herein by reference and listed individually below. Materials received by the JPP are available on its website: <http://jpp.whs.mil>.

PARTICIPANTS

Participating JPP Members:

The Honorable Elizabeth Holtzman, Chair
Vice Admiral (Retired) Patricia A. Tracey
Professor Thomas W. Taylor
Mr. Victor Stone

Absent JPP Members:

The Honorable Barbara Jones

Participating JPP Staff:

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

Other Participants:

Mr. William Sprance, Office of the General Counsel, Department of Defense, Designated Federal Official (DFO)

Presenters:

Professor Victor Hansen, New England Law Boston (by telephone)
Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program
Mr. E.J. O'Brien, Highly Qualified Expert, U.S. Army Trial Defense Services
Mr. Ronald White, former Highly Qualified Expert, U.S. Army Trial Defense Services
Professor Rachel VanLandingham, Southwestern Law School
Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program
Lieutenant Colonel Chris Thielemann, U.S. Marine Corps, Regional Trial Counsel
Lieutenant Commander Ryan Stormer, U.S. Navy, Trial Counsel Assistance Program
Major Mark Rosenow, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination
Colonel Terri Zimmermann, U.S. Marine Corps, Officer-in-Charge (Reserve), Defense Services Organization
Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel
Commander Jason Jones, U.S. Navy, Defense Service Office, Bremerton, WA
Major Frank Kostik, U.S. Army, Senior Defense Counsel
Congresswoman Jackie Speier, 14th Congressional District of California (D)
Congresswoman Lois Frankel, 22nd Congressional District of Florida (D)
Ms. Elisha Morrow
Captain Steven Andersen, U.S. Coast Guard, Commanding Officer, Legal Services Command
Colonel Polly Kenny, U.S. Air Force, Staff Judge Advocate, Joint Base San Antonio-Randolph, TX
Lieutenant Colonel James Varley, U.S. Army, Government Appellate Division
Lieutenant Colonel Michael Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command, Quantico, VA
Major Melanie Mann, U.S. Marine Corps, Military Justice Officer, MCAS Miramar, CA
Colonel Mike Lewis, U.S. Air Force, Chief, Military Justice Division
Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development
Captain Robert Crow, U.S. Navy, Director, Criminal Law Division
Lieutenant Colonel John Kiel, U.S. Army, Criminal Law Division, Office of The Judge Advocate General
Captain (Retired) Stephen McCleary, U.S. Coast Guard, former Chief of Military Justice

Public Comment:

Mr. Greg Jacob, Policy Director, Service Women's Action Network (SWAN) (*written comment*)

MEETING MINUTES

The DFO opened the meeting at 8:51 a.m. The Honorable Elizabeth Holtzman provided opening remarks and discussed the meeting agenda.

Assessing Article 120 of the UCMJ

The first session was devoted to an assessment of Article 120 of the Uniform Code of Military Justice (UCMJ), which addresses rape and sexual assault. Congress significantly amended Article 120 in 2007, and then again in 2012 in order to correct provisions in the 2007 statute that were found to be unconstitutional. The JPP heard perspectives from five military justice experts about the current version of Article 120: (1) Ms. Teresa Scalzo, U.S. Navy Trial Counsel Assistance Program; (2) Mr. E.J. O'Brien, U.S. Army Trial Defense Services; (3) Mr. Ronald White, formerly of the U.S. Army Trial Defense Services; (4) Professor Rachel VanLandingham, Southwestern Law School; and (5) Professor Victor Hansen, New England Law School in Boston (via teleconference).

The presenters discussed issues and uncertainties with the current statutory language and compared Article 120 to rape and sexual assault laws in other jurisdictions. All identified issues with the language of the current statute, but only Professor VanLandingham believed statutory change was appropriate. The others indicated that stability in the interpretation or use of the statute is necessary at this time and that additional guidance through Executive Order or regulation could resolve some uncertainties; therefore, they advised against further statutory changes. One exception noted was the definition of sexual contact, which does not include a touching by an object, such as a stethoscope or other article. The presenters observed that this definition differs from the definition of sexual act, which specifically includes penetration by an object, and the resulting omission of sexual contact offenses committed by use of or with objects would have to be corrected by statutory amendment rather than clarification through an Executive Order.

Prosecution and Defense of Article 120 Offenses

The JPP heard testimony from eight current and former military prosecutors and defense counsel about how rape and sexual assault prosecutions are currently conducted and practical issues they are encountering with the current version of Article 120. The presenters for this session were: (1) Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program; (2) Lieutenant Colonel Chris Thielemann, U.S. Marine Corps, Regional Trial Counsel; (3) Lieutenant Commander Ryan Stormer, U.S. Navy, Trial Counsel Assistance Program; (4) Major Mark Rosenow, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination; (5) Colonel Terri Zimmermann, U.S. Marine Corps, Officer-in-Charge (Reserve), Defense Services Organization; (6) Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel; (7) Commander Jason Jones, U.S. Navy, Defense Service Office, Bremerton, Washington; and (8) Major Frank Kostik, U.S. Army, Senior Defense Counsel.

A primary concern identified by the presenters was the need for clear definitions concerning what constitutes "impairment" and "incapacity to consent." The presenters agreed with testimony provided in the previous session that the definition of sexual contact under the current version of Article 120 omits offenses committed by use of an object. The presenters also discussed whether a strict liability standard under Article 120 should be adopted that would apply to sexual relationships between trainers and trainees during basic training. The presenters provided perspectives on how such cases are currently prosecuted and expressed a range of

opinions on whether Article 120 should be amended, noting that they were providing personal opinions and not those of their respective Services.

Congressional and Victim Input Regarding the Potential Changes to Article 120 of the UCMJ

Following a break for lunch, Congresswoman Jackie Speier (D-14th CA) and Congresswoman Lois Frankel (D-22nd FL) discussed their views about whether the definition of rape in Article 120 should be amended to include relationships involving a Service member who abuses his or her power within the chain of command. Representative Speier described meeting with trainees and sexual assault survivors at Lackland Air Force Base; this visit led her in 2013 to introduce the Protect Our Military Trainees Act, which would make sexual acts or sexual contact with trainees a strict liability sexual assault offense for military instructors. Representative Frankel was accompanied by a constituent from her district, Ms. Elisha Morrow, who described her experience as a U.S. Coast Guard trainee when she and other trainees were sexually harassed and assaulted by their instructor at basic training. While not proposing a strict liability offense, Representative Frankel recommended amending Article 120's rape provision to include instances in which an individual abuses his or her position of authority to commit a sexual act. She further recommended defining "position of authority" as "superior in rank to the other person." The presenters provided the rationale for their individual proposals and the JPP members asked questions about how sexual assault offenses in the training environment or between superiors and their subordinates could and should be addressed.

Prosecuting Abuse of Power Offenses under the UCMJ

The next session featured military legal experts and practitioners who explained how abuse-of-power offenses are currently prosecuted under the UCMJ. The JPP heard from: (1) Captain Steven Andersen, U.S. Coast Guard, Commanding Officer, Legal Services Command; (2) Colonel Polly Kenny, U.S. Air Force, Staff Judge Advocate, Joint Base San Antonio-Randolph, Texas; (3) Lieutenant Colonel James Varley, U.S. Army, Government Appellate Division; (4) Lieutenant Colonel Michael Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command, Quantico, Virginia; (5) Lieutenant Commander Ryan Stormer, U.S. Navy, Trial Counsel Assistance Program; and (6) Major Melanie Mann, U.S. Marine Corps, Military Justice Officer, Marine Corps Air Station Miramar, California. The presenters provided their personal views about whether additional criminalization of such relationships as sexual assault under Article 120 would improve case prosecutions or reduce the incidence of such offenses.

Service Perspectives on Prosecution of Article 120 Offenses

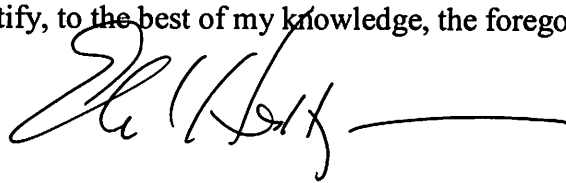
The last session of the day focused on policy perspectives regarding Article 120 from the chiefs of criminal law and military justice from the Services. Presenters included: (1) Colonel Mike Lewis, U.S. Air Force, Chief, Military Justice Division; (2) Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development; (3) Captain Robert Crow, U.S. Navy Director, Criminal Law Division; (4) Lieutenant Colonel John Kiel, U.S. Army, Criminal Law Division, Office of the Judge Advocate General; (5) Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program; and (6) Captain (Ret) Stephen McCleary, U.S. Coast Guard, former Chief of Military Justice. The

presenters, many of whom serve as voting members on the Joint Service Committee, discussed their Service perspectives on the amendments to Article 120 made in 2007 and 2012. The presenters largely contended that wholesale statutory changes to Article 120 were not necessary, and they noted the confusion and practical difficulties that would result from amending Article 120 once again. They contended that most uncertainties in the statute could instead be clarified through rules adopted via Executive Order or guidance incorporated into the Military Judges Benchbook. They discussed the development and status of implementing guidance for the current version of Article 120.

Having received no requests for public comment to the JPP, the public meeting was closed at 4:21 p.m.

CERTIFICATION

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



Elizabeth Holtzman
Chair
Judicial Proceedings Panel

MATERIALS

Meeting Records:

1. Transcript of September 19, 2014 JPP meeting, prepared by Neal R. Gross and Co., Inc.
2. Video Recording of September 19, 2014 JPP meeting, filmed by Joint Staff Media Center

Meeting Materials:

3. Public Meeting Table of Contents
4. September 19, 2014, Meeting Agenda
5. Presenter Biographies
6. Mr. Edward J. O'Brien, *The Article 120 Implementation Challenge: Avoiding Unintended Consequences and Unjust Outcomes (2014)*
7. Public Comment – Service Women’s Action Network , Article 120 and Affirmative Consent
8. “Red Line” Version of Article 120, UCMJ (received from Representative Frankel)
9. Report of Article 32 Investigation, U.S. Coast Guard (received from Ms. Morrow)

Reference Materials:

10. Professor Stephen Schulhofer's Comments on Article 120
11. Colonel Gary Jackson's Comments on Article 120
12. Mr. Dwight Sullivan – JPP PR Rules on Represented Victim Communication
13. Mr. Dwight Sullivan – Bill of Rights' Application to Courts-Martial
14. Excerpts – Service Fraternalization Policies
15. Excerpt – *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice (2004)*

Read-Ahead Materials:

16. Summary of Meeting Read-Ahead Materials
17. Paragraph 45, Manual for Courts-Martial (2012), *Article 120, UCMJ, Maximum Punishments*
18. Professor Victor Hansen, MILITARY CRIMES AND DEFENSE TREATISE, Excerpt on Article 120, UCMJ (2013)
19. Mr. Ronald White, *The Redemptive Role of "Justification or Excuse" in Article 120(a) (2011), We Don't Need a New Statute; We Need New Implementation*
20. Bachman & Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, J. OF CRIM. LAW AND CRIMINOLOGY (1993)
21. Major Ryan Oakley, *A Lifetime of Consequences: Registering Convicted Military Sex Offenders*, THE REPORTER (2013)
22. U.S. Dep't of Defense, *Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training* (MAY 2014)
23. Excerpt – *Proposed Revision to Model Penal Code, Section 213.2*, tentative draft by American Law Institute, April 30, 2014
24. Buchhandler-Raphael, *Sexual Abuse of Power*, U. OF FLORIDA J. OF L. & PUBLIC POL. (2010)