



Judicial Proceedings Panel
Minutes of November 14, 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 amended 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 November 14, 2014, from 8:42 a.m. to 4:19 p.m. The meeting's focus was to receive information and perspectives about the military Services' Special Victims' Counsel (SVC) programs.

LOCATION: The meeting was held at the Holiday Inn Arlington, 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, during and after the meeting, are incorporated herein by reference and listed individually below. Materials received by the Panel are available on the JPP website: <http://jpp.whs.mil>.

PARTICIPANTS

Participating JPP Members:

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

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:

Lieutenant Colonel Ryan Oakley, Deputy Director, Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness
Ms. Meg Garvin, Executive Director, National Crime Victims' Law Institute (NCVLI)
Mr. Michael Andrews, Project Director and Managing Attorney, District of Columbia Crime Victims' Resource Center
Colonel James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program

Colonel Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims Legal Counsel Organization
Captain Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel
Lieutenant Colonel Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division
Commander Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel
Commander Colleen Shook, U.S. Navy, Officer in Charge, Victims' Legal Program Mid-Atlantic
Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel
Major Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel, National Capital Region
Captain Jessie Sommer, U.S. Army, Chief, 82d Airborne Division Legal Assistance Office and Division Special Victims' Counsel
Captain Aaron Kirk, U.S. Air Force, Special Victims' Counsel, Air Force Legal Operations Agency
Mr. Victor Stone, JPP member
Mr. James W. Boerner, Special Agent, Army Criminal Investigative Command (CID)
Mr. Mark Walker, Special Agent, IOC to the SAPR Office, Air Force Office of Special Investigations (AFOSI)
Mr. Mike DeFamio, Supervisory Special Agent, U.S. Navy Criminal Investigative Service (NCIS)
Major William Babor, U.S. Air Force, Senior Defense Counsel
Lieutenant Commander Nate Gross, U.S. Navy, Senior Defense Counsel
Major Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel
Captain Sarah Robbins, U.S. Army, Trial Defense Counsel
Lieutenant Colonel Scott Hutmacher, U.S. Army, Special Victim Prosecutor
Lieutenant Commander Philip J. Hamon, U.S. Navy, Senior Trial Counsel, Region Legal Service Office
Major Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel, Legal Support Section West
Captain Brent Jones, U.S. Air Force, Senior Trial Counsel, Air Force Legal Operations Agency
Lieutenant Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel

Public Comment:

None

MEETING MINUTES

The DFO opened the meeting and the JPP public meeting began at 8:42. The Honorable Elizabeth Holtzman provided opening remarks, reviewed the tasks of the JPP, and the agenda for the meeting.

Informational Brief – Victim Counsel and Victim Access to Information

The JPP members received informational briefings from three presenters: (1) Lieutenant Colonel Ryan Oakley, Deputy Director, Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness, (2) Ms. Meg Garvin, Executive Director, National Crime Victims' Law Institute, and (3) Mr. Michael Andrews, Project Director and Managing Attorney, District of Columbia Crime Victims' Resource Center. Lieutenant Colonel Oakley provided information about sharing best practices among the SVC Programs. He distinguished the role of his DoD office from the supervisory roles of the chiefs of the SVC programs within each of the Services. Each of the presenters spoke about the importance of timely notice to victims, the need for access to case information, assessing client satisfaction as a method of evaluating the SVC programs, and the goals of the SVC training programs. The presenters also discussed this issue of standing for victims and the challenges of the military's case docketing systems compared to the PACER case management system that is used for cases in Federal courts.

Service Perspectives on Special Victims' Counsel Programs

The JPP members heard from each of the Services' SVC Program Managers: (1) Colonel James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program, (2) Colonel Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization, (3) Captain Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel, (4) Lieutenant Colonel Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division. The presenters discussed: the organization and structure of their Services' SVC programs, current training and certification requirements for SVCs, the goals and intent of SVCs in the military justice process, metrics being utilized to assess the SVC program, current statistics, trends, victim feedback and the results of Service-level assessments. Lastly, the presenters discussed current issues SVCs encounter during the trial process and provided recommendations to address the challenges SVCs face in their representation of clients.

Perspectives from Special Victims' Counsel

The Panel heard from individual SVCs who shared their experiences and perspectives about the SVC programs. The presenters for this session were: (1) Commander Colleen Shook, U.S. Navy, Officer in Charge, Victims' Legal Program Mid-Atlantic, (2) Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel, (3) Major Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel, National Capital Region, (4) Captain Jesse Sommer, U.S. Army, Chief, 82nd Airborne Division Legal Assistance Office and Division Special Victims' Counsel, and (5) Captain Aaron Kirk, U.S. Air Force, Special Victims' Counsel, Air Force Legal Operations Agency. The presenters discussed different issues they faced in their service as SVCs. The primary challenge faced by SVCs within all Services is their ability to represent their clients within the military justice system. Captain Sommer stated that there is no standardized protocol for SVCs to make an appearance in court; the process is dependent on the military judge assigned to a case. Major Tilney added that his ability to receive information from trial counsel and defense counsel is based on his personal relationships with the other counsel involved in a case because there are no rules that establish guidance for an SVC's access to information. The JPP members also heard testimony that some judges are receptive to

an SVC's presence in court, while other judges are not. The SVCs all agreed that military judges did not consult with them for case docketing decisions. Multiple presenters said their ability to represent their client should be dependent on rules, not personal relationships. The SVCs stated that they resolve issues involving the victim's collateral misconduct with testimonial immunity for the victim in court or the victim may receive an adverse administrative action out of court. The JPP members asked the SVCs questions about the timeframe for the SVC's first meeting with new clients, instances when SVCs had to deny service to a victim, and how SVCs resolved conflicts when their other (non-SVC) duties interfered with victim representation.

Trip Report: Special Victims' Counsel Course at The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia from August 18-22, 2014

The meeting's afternoon session began with a trip report from JPP member Victor Stone. He attended the week-long Army Special Victims' Counsel Training Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, in August 2014, and he provided perspectives on the course and his impressions about the issues military victim counsel experience in their duties.

Military Criminal Investigation Organization Perspectives on SVC Programs

The JPP members next heard from senior criminal investigators from the Army, Air Force and Navy. The presenters for this session were: (1) Mr. James W. Boerner, Special Agent, Army Criminal Investigative Command (CID), (2) Mr. Mark Walker, Special Agent, IOC to the SAPR Office, Air Force Office of Special Investigations (AFOSI), and (3) Mr. Mike DeFamio, Supervisory Special Agent, U.S. Navy Criminal Investigative Service (NCIS). The investigators provided their perspectives on the SVC programs based on their personal experiences with SVCs. Mr. Boerner emphasized that agents are required to inform victims of sexual assault about the availability of SVCs prior to an interview being conducted. He stated that SVCs are very helpful in explaining the legal process to victims and keeping them informed. Mr. Boerner's key criticism was a need for more timely response of SVCs to assist victims during interviews, allowing investigators to timely take action to gather evidence, such as pretext communications, which can be crucial in sexual assault cases. He expressed that there is a need for experienced SVCs who understand the type of evidence investigators and prosecutors need in adult sexual assault cases. Mr. Walker emphasized the importance in building relationships between SVCs and investigators to facilitate effective communications. Mr. DeFamio noted that the SVC program allows the victim to come forward initially and present key details regarding the "who" and "what" that allows an investigation to be initiated but then allows the victim several days to process what happened before taking a full statement. The presenters said they are very receptive to SVCs and see them as an integral part of the process. The JPP members asked the investigators what the biggest challenges are to investigations when a victim is represented by an SVC. Mr. Boerner indicated that conflicts usually arise relating to collateral misconduct because the SVC may advise clients not to talk to investigators. Mr. Walker stated that there may be delays in getting victim statements. Mr. DeFamio agreed with his colleagues and noted the potential for SVCs to "coach" a victim prior to an investigative interview.

Defense Counsel Perspectives on SVC Programs

The JPP members heard from senior defense counsel who provided perspectives on their Services' respective SVC programs and the effect on their defense practice. The presenters for this session were: (1) Major William Babor, U.S. Air Force, Senior Defense Counsel, (2) Lieutenant Commander Nate Gross, U.S. Navy, Senior Defense Counsel, (3) Major Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel, and (4) Captain Sarah Robbins, U.S. Army, Trial Defense Counsel. All of the presenters said the SVCs they work with are professional and their experiences have generally been positive. One concern, however, was the relative inexperience of the judge advocates assigned to serve as SVCs. Some of the Services do not have regulations that mandate previous military justice (criminal) experience before a judge advocate is assigned as an SVC. This can negatively influence the court-martial process, because inexperienced SVCs do not understand the trial discovery or pretrial agreement negotiation process and may interfere with defense efforts to interview a victim and resolve a case short of trial. Some defense counsel felt the SVC has too much influence in pretrial agreement negotiations. When Panel members asked how the process can be improved, the presenters recommended: (1) assigning more experienced attorneys to be SVCs, (2) providing better training for the SVCs so they can understand their role in the process and how an SVC can create *Brady* issues in a case by inserting themselves too far into the investigation and court-martial process, and (3) changing the military justice system to provide greater rights and protections to military accused, such as requiring panel verdicts to be unanimous, similar to civilian systems; removing control of panel member selection from the convening authority; and giving military prosecutors more control and discretion to decide charges and enter into pretrial agreements.

Trial Counsel Perspectives on SVC Programs

In the meeting's last session, the Panel heard from trial counsel who provided perspectives on their Services' SVC programs and how their prosecution practice has been affected. The presenters for this session were: (1) Lieutenant Colonel Scott Hutmacher, U.S. Army, Special Victim Prosecutor, (2) Lieutenant Commander Philip J. Hamon, U.S. Navy, Senior Trial Counsel, Region Legal Service Office, (3) Major Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel, Legal Support Section West, (4) Major Brent Jones, U.S. Air Force, Senior Trial Counsel, Air Force Legal Operations Agency, and (5) Lieutenant Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel. Most presenters said they have had positive experiences with SVCs and that SVCs have not hindered their practice. Some noted positive aspects of the SVC program, including that SVCs can explain the court-martial process to the victim, including the pretrial negotiation process and the immunity process for the victim's collateral misconduct, and that it is easier for an attorney other than the trial counsel to inform the victim of his/her rights and explain the court-martial process. Concerns expressed included: (1) some SVCs are inexperienced, (2) the Manual for Courts-Martial lacks guidance regarding the role of SVCs in courts-martial, which has frustrated military judges who apply ad hoc requirements for working with SVCs in courts-martial, and (3) SVCs can slow down investigations and/or the court-martial process. When JPP members asked about transparency and what court-pleadings are provided to victims, the trial counsel observed the military has no PACER or ECF system like those used in many civilian courts. Pleadings are often disseminated based on local, and sometimes case-specific, practices. Although not required by the rules, most

trial counsel provide SVCs with MRE 412 and 513 pleadings. Trial counsel would welcome a system like PACERT or ECF in the military justice system.

Having received no requests for public comment to the Panel, the public meeting was closed at 4:19 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 November 14, 2014 JPP meeting, prepared by Neal R. Gross and Co., Inc.
2. Video Recording of November 14, 2014 JPP meeting, filmed by Joint Staff Media Center

Meeting Materials:

3. Public Meeting Table of Contents
4. Meeting Agenda
5. Presenter Biographies
6. JPP Trip Report from Mr. Victor Stone - Army SVC Course, Aug 18-22, 2014
7. FY14 NDAA Revisions to Article 32, UCMJ (*prepared by JPP Staff, Nov 7, 2014*)
8. NDAA Provisions Regarding Sexual Assault in the Military (*prepared by JPP Staff, Nov 13, 2014*)

Requests for Information Pertaining to Special Victim Counsel and Access to Information:

9. DoD and the Services' Narrative Responses to JPP RFI Set # 1: Questions 13 - 18 Pertaining to Victim's Access to Information
10. DOD and the Services' Narrative Responses to JPP RFI Set # 1: Questions 19 - 44 Pertaining to Special Victims' Counsel Programs

Read-Ahead Materials Pertaining to Special Victim Counsel and Access to Information:

11. Summary of Meeting Read-Ahead Materials

12. Secretary of Defense Memorandum: Sexual Assault Prevention and Response (Aug 14, 2013)
13. FY14 NDAA Section 1716 – Designation and Availability of Special Victims’ Counsel
14. Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (Apr 4, 2014)
15. Air Force Special Victims’ Counsel Program Victim Impact Survey (Mar 2013)
16. RSP Report Extract: Summary of the SVC Program-Related Recommendations, pgs. 104-106 (Jun 27, 2014)
17. FY14 NDAA Section 1701 – Extension of Crime Victims’ Rights to Victims of Offenses Under the Uniform Code of Military Justice
18. Summary of the Crime Victim Rights-Related Recommendations from the RSP Report, pgs. 134-137 (Jun 27, 2014)
19. *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013)
20. U.S. DOJ, Office of Legal Counsel Opinion Re: “The Availability of Crime Victims’ Rights Under the Crime Victim Rights Act of 2004,” (Dec 17, 2010)
21. Army TJAG Policy Memorandum 14-09, Disclosure of Information to Crime Victims (Oct 1, 2014)
22. Victim Services Subcommittee of the RSP Preparatory Session Minutes from the Dec 10, 2013 visit to Fort Hood Army Installation
23. Victim Services Subcommittee of the Response Systems Panel Preparatory Session Minutes from the Dec 13, 2013 visit to Joint Base San Antonio – Lackland

Supplemental Statements Provided After the October 10, 2014 Public Meeting:

24. Statements addressing both MRE 412 and 513 from:
 - a. Mr. Paul Koffsky, DOD Deputy General Counsel (Oct 16, 2014)
 - i. Executive Order 13669 (Jun 13, 2014), Amendments to the MCM
 - b. Commander Steve Reyes, U.S. Navy, Director, Defense Counsel Assistance Program (Oct 24, 2014)
 - c. Major Andrea Hall, U.S. Air Force, Senior Defense Counsel (Oct 24, 2014)
25. Statements addressing MRE 412 and Executive Order 13669 from:
 - a. Ms. Nancy Parrish, Protect our Defenders (POD) to President Obama (Sept 25, 2013)
 - b. POD Summary Concerns Re: MRE 412 Executive Order (Jul 28, 2014)
 - c. Ms. Miranda Peterson, POD, and Mr. Ryan Guilds, Arnold and Porter (Oct 24, 2014)
26. Statements addressing MRE 513 from:
 - a. Mr. William Barto, Army Highly Qualified Expert, Attorney Advisor (Oct 23, 2014)
 - b. Ms. Viktoria Kristianson, Attorney Advisor, AEquitas (Oct 10, 2014)