

# Staff summary of reading materials for JPP members in preparation for the December 12, 2014 Public Meeting

## **A. Supplemental Written Materials Provided by November Public Meeting Presenters**

### **1. Remarks to the JPP from Lieutenant Colonel Ryan Oakley (Nov 14, 2014), Deputy Director, Office of Legal Policy (OUSD (Personnel and Readiness)) (3 pages)**

*Provides a written copy of Lt Col Oakley's remarks to the JPP during the November 14, 2014 Public Meeting concerning the Special Victims' Counsel Program and victim access to information.*

- DoD Instruction 1030.02, *Victim and Witness Assistance*, is currently under revision and will incorporate the UCMJ Article 6b rights and SVC-related provisions of the FY14 NDAA.
- By statute, the designation, certification, and training of victims' counsel are coordinated at the Service level, not by DoD.
- The SVC programs have enhanced victim support services.

### **2. DoD Directive Number 5400.11, DoD Privacy Program, dated Oct 29, 2014 (17 pages)**

*The directive, provided by Lt Col Oakley, provides guidance on applicability of the Privacy Act to a victim's requests for information in a military criminal case.*

### **3. DoD Directive 5400.07, DoD Freedom of Information Act (FOIA) Program, Current through January 2, 2015 (6 pages)**

*The directive, provided by Lt Col Oakley, provides guidance on applicability of the Freedom of Information Act to a victim's requests for information in a military criminal case.*

### **4. Suggested Changes to Rules for SVC Practice (4 pages)**

*The Panel invited SVCs who participated in the November 14, 2014 Public Meeting to provide recommended changes to the rules of practice for SVCs before courts-martial. In response, Lieutenant Colonel Andrea M. deCamara, Program Manager for the Air Force SVC Program, proposed changes to the Rules for Courts-Martial and Military Rules of Evidence.*

- Amend the RCM to specifically include SVCs in pretrial conferences.
- Ensure service of all pleadings on victim's counsel.
- Allow victims to present matters during the sentencing phase of trial in an unsworn statement, in writing, or through counsel, and include recommendations on punishment.
- Revise MRE 615 [*Excluding Witnesses*] to implement the Article 6b right not to be excluded from proceedings.
- Add a rule for enforcement of Article 6b rights and appellate review.

### **5. U.S. Marine Corps Practice Advisory 4-14, Disclosure of Information to Crime Victims (2 pages)**

*The Staff Judge Advocate to the Commandant for the Marine Corps recently published guidance to Marine Corps prosecutors to facilitate a victim's access to information in criminal cases, including:*

- Statements and evidence produced by the victim in the trial counsel's possession.
- The date, time, and location of any pretrial confinement hearings.
- A copy of the charges pertaining to the victim.

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- The date, time, and location of Article 32 proceedings.
- A transcript of the victim's testimony at a preliminary hearing (summarized).
- Docketing requests and scheduling orders for motions and trial sessions.
- Motions affecting the victim's participation in trial, privileged or private information, possessory rights in any property, or the right to be heard.
- Notice of defense counsel requests to interview the victim.
- Notice of pretrial agreement negotiations, an opportunity to be heard, and a copy of the proposed and final terms of the agreement.

### **B. Other Materials on SVC Program Implementation**

#### **6. Summary Chart containing current Special Victim Counsel Program Data**

*The chart, prepared by the JPP Staff using RFI responses, provides a summary comparison of Services policies and practices for key aspects of their SVC programs, including program organization, training of SVCs, and the scope of legal services provided to victims.*

#### **7. *H.C. v. Bridges*, ARMY MISC 20140793**

*On December 1, 2014, the U.S. Army Court of Criminal Appeals (ACCA) denied a writ petition from an Army SVC and client seeking a trial continuance based on the SVC's unavailability for the scheduled trial date.*

- The military judge found no authority or good cause for the SVC to seek a continuance (noting there was no MRE 412 or 513 issue to be litigated at trial).
- Military judges have broad discretion in making docketing decisions under the UCMJ and Rules for Courts-Martial.
- The ACCA found the Army Rules for Practice do not mandate personal inclusion of SVCs in all docketing discussions, although SVC availability may be an appropriate consideration and may be raised through trial counsel.
- A victim's eligibility for legal assistance, as implemented by the Army SVC Program, does not expand a victim's standing in courts-martial proceedings, particularly as it relates to continuances of the trial.

#### **8. Excerpt from Senator K. Gillibrand's Statement regarding the Military Justice Improvement Act relating to the SVC Program (3 pages)**

*Sen. Gillibrand lists several critiques of the current SVC program in a recent statement advocating passage of the Military Justice Improvement Act.*

### **C. Other Reference Materials on Victim Access to Information**

#### **9. Comparison Chart: Article 46, before and after enactment of the FY14 NDAA**

*Article 46 states that both trial and defense counsel shall have "equal access to the evidence." This chart, prepared by the JPP Staff, highlights the law and recent updates to it. This statute, and CAAF's interpretation of it, are relied upon by defense counsel who argue that SVCs unfairly impede defense access to witnesses and evidence.*

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### 10. Rule for Court-Martial 801 (3 pages)

*This rule outlines the responsibilities of the military judge in conducting court-martial proceedings. LRM v. Kastenbergs cites this rule in holding that military judges have authority to limit a SVC's exercise of victim's right to be heard through counsel.*

### **D. Proposed Changes to the Manual for Courts-Martial that impact Sexual Assault Prosecutions**

#### **11. Joint Service Committee Proposed EO Amendments to the Manual for Courts-Martial related to the Prosecution of Sexual Assault (23 pages):**

- Provides a victim with notice of and a right to be heard at pretrial confinement reviews and pretrial hearings regarding potential release of the accused from confinement.
- Creates a new rule (R.C.M. 1001A) concerning a victim's right to be heard during presentencing proceedings (right to be heard = the right to testify under oath).
- States that MREs 412 (*sexual behavior or predisposition*), 513 (*psychotherapist-patient privilege*), and 514 (*victim advocate-victim privilege*) apply at Article 32 preliminary hearings, but prohibits applying the "constitutionally required" exceptions to those MREs at Article 32 hearings.
- Similar to trial judges, requires Article 32 preliminary hearing officers to exclude evidence and conduct closed hearings as required by evidentiary rules.
- Changes the Article 32 standard of proof to "probable cause," and requires a judge advocate to perform the hearing whenever possible.
- Eliminates the ability of the preliminary hearing officer to call witnesses *sua sponte* and gives the convening authority final say over witness production.
- Prohibits convening authorities from granting clemency for offenses under Articles 120, 120b, and 125 and prevents them from disapproving any portion of an adjudged sentence of more than six months or a punitive discharge, except in a few narrow circumstances (e.g., with prosecutor recommendation)
- Removes special court-martial jurisdiction to try offenses under Art. 120(a), 120(b), 120b(a), and 120b(b), and Art. 125, and attempts of same under Art. 80. These offenses can only be referred to trial by general court-martial.