



Judicial Proceedings Panel
Minutes of June 16, 2017 Public Meeting

AUTHORIZATION: The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP or Panel) 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 section 546 of the NDAA for FY 2015, 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 June 16, 2017, from 9:02 a.m. to 3:52 p.m. The Panel deliberated on the JPP Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases, the JPP Report on Sexual Assault Investigations in the Military, and the JPP Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015.

LOCATION: The meeting was held at One Liberty Center, Suite 150, 875 North Randolph Street, Arlington, Virginia 22203.

MATERIALS: A verbatim transcript of the meeting, as well as preparatory materials provided to the JPP members prior to and during the meeting, are incorporated herein by reference and listed individually below. The meeting transcript and 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 S. Jones
Mr. Victor Stone
Professor Thomas W. Taylor
Vice Admiral Patricia A. Tracey, U.S. Navy, Retired

Attending JPP Staff

Captain Tammy Tideswell, JAGC, U.S. Navy, Staff Director
Lieutenant Colonel Patricia Lewis, U.S. Army, Deputy Staff Director
Mr. Dale Trexler, Chief of Staff
Ms. Julie Carson, Legislative Liaison and Staff Attorney
Dr. Janice Chayt, Investigator
Dr. Alice Falk, Editor
Ms. Theresa Gallagher, Staff Attorney
Ms. Amanda Hagy, Senior Paralegal
Ms. Meghan Peters, Staff Attorney
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Staff Attorney

Other Participants

Ms. Maria Fried, Designated Federal Official (DFO)

MEETING MINUTES

The DFO opened the public meeting at 9:02 a.m. The Honorable Elizabeth Holtzman provided opening remarks and summarized the agenda for the meeting.

Panel Deliberations on the JPP Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases

During the first session of the public meeting Ms. Terri Saunders, JPP Staff Attorney, presented a summary of the JPP Subcommittee Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases for the Panel. She noted that the report was based on information obtained by the Subcommittee members during military installation site visits conducted in the summer of 2016. Ms. Saunders advised the Panel that its options with respect to the JPP Subcommittee's report were to adopt the Subcommittee's report and recommendations with or without modification as the JPP Report; adopt portions of the Subcommittee report and recommendations with or without modification; receive the information from the Subcommittee and do nothing with the report; or, reject the Subcommittee's report.

Ms. Saunders noted that the Subcommittee made nine recommendations to the JPP, many of which suggested further action by the Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault (DAC-IPAD). The Panel then deliberated on the nine Subcommittee recommendations.

With respect to JPP Subcommittee Recommendation 1, which was for the DAC-IPAD to continue to review the new Article 32 preliminary hearing process and to look at whether preliminary hearing officers should be military judges or very senior judge advocates with military justice experience, VADM Tracey suggested that the recommendation should be directed to the Secretary of Defense as well as the DAC-IPAD. The Panel unanimously agreed on this modification. After debate on other language in the recommendation, two additional modifications were agreed to and the Panel unanimously approved the recommendation as amended.

The Panel then considered Recommendation 2, which proposed that Article 33 disposition guidance for convening authorities require, as the standard for referral of charges to court-martial, that the charges are supported by a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt, in addition to the other considerations provided in the guidelines. The Panel voted to modify the language in order to recommend nonbinding case disposition guidance rather than a standard for referral of charges. The Panel also voted to strike the last sentence in the recommendation.

Next, the Panel discussed proposed Recommendation 3, that the DAC-IPAD conduct site visits to determine whether convening authorities and staff judge advocates are making effective use of the newly promulgated Article 33 disposition guidance and to assess the effect it has had on the

number of sexual assault cases referred to court-martial and acquittal rates. After including the modification that the recommendation be directed to the Secretary of Defense as well as the DAC-IPAD, this recommendation was approved by the Panel by a four to one vote with Mr. Stone opposed.

Recommendation 4 was for the Secretary of Defense and the DAC-IPAD to review whether Article 34 of the UCMJ should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority be provided to the defense upon referral of charges—with the exception of exculpatory information. After deliberation on the issue, this recommendation was approved by the Panel with four votes in favor and Mr. Stone abstaining.

The Panel next discussed Recommendation 5, which proposed that Congress repeal the statutory provisions requiring non-referral decisions in some sexual assault cases to be reviewed by a higher level general or flag officer convening authority or the Service Secretary. The Panel voted to change this recommendation and instead to recommend that Congress modify the language of the statutory provisions and the Secretary of Defense look at ways to address the perception of pressure on convening authorities that has been generated by the implementation of the statutory provisions requiring the higher level review. The Panel agreed there was consensus on the recommendation but decided to wait to vote until the new language was prepared by the JPP staff to officially approve.

Recommendation 6 proposed that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the Subcommittee during military installation site visits. This recommendation was amended by the Panel to be directed to the Secretary of Defense as well as the DAC-IPAD. After deliberating, the Panel voted to adopt the recommendation with a modification in the language by four votes in favor of the recommendation and Mr. Stone abstaining.

Recommendation 7, that the Secretary of Defense ensure that special victims' counsel and victims' legal counsel receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial was considered next by the Panel. After deliberating and making some modifications to the language, the Panel adopted the recommendation by unanimous vote.

The Panel next deliberated on Recommendation 8, that DoD SAPRO ensure that sexual assault training conducted by the Military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol. After discussion and agreement on added supporting language for the recommendation, the Panel voted to adopt the recommendation with four votes in favor and Mr. Stone abstaining.

Recommendation 9, that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to require that victims, when possible, be transferred to another unit on the same installation or on a nearby installation, was the last recommendation to be discussed. After deliberating on the issue, the Panel asked the JPP

staff to prepare revised language for the members to review incorporating a balancing test that would take into consideration the needs of the victim as well as removing other language. After the Panel finished deliberations on the nine recommendations, Mr. Stone suggested that the title to the report be changed to convey a more neutral tone such as “Additional Concerns about the Administration of Justice.” The Panel decided to take under consideration a change to the name of the report and to address it later in the day.

Panel Discussion on JPP Report on Sexual Assault Investigations in the Military

For the second session, Ms. Peters, JPP Staff Attorney, presented the Panel with a revised executive summary and recommendations from the JPP Report on Sexual Assault Investigations in the Military that incorporated the Panel’s previous deliberations from the May 19, 2017, JPP public meeting. Ms. Peters explained that all of the recommendations were voted on and approved by the Panel at the May meeting subject to the agreed upon edits now reflected in the executive summary and recommendations.

Ms. Peters noted that subsequent to the May meeting, Mr. Stone provided a number of additional changes which she then reviewed with the Panel. Mr. Stone noted that he wasn’t ready to vote on the report at the last meeting because he didn’t feel there was a basis for the JPP to make the recommendations to the DAC-IPAD. In his edits, Mr. Stone proposed changing the recommendations into “suggested” topics for review by the DAC-IPAD and made numerous wording edits throughout the recommendations and supporting bullets. The Panel accepted some wording changes, but voted against the other proposed revisions to the recommendations, supporting bullets, and executive summary.

With respect to Recommendation 50, which deals with impediments to MCIOs obtaining tangible evidence in sexual assault investigations, the Panel agreed to review new supporting bullets to be drafted by Mr. Stone after the meeting based on the Panel’s deliberations on the issue.

The Panel voted to adopt the JPP Report on Sexual Assault Investigations in the Military subject to a discussion and vote on Mr. Stone’s proposed bullets for Recommendation 50. The vote was four in favor of the report with Mr. Stone abstaining until his bullets are reviewed.

Panel Review of Revised Language for the Recommendations in the Barriers to the Fair Administration of Military Justice in Sexual Assault Cases Report

As requested by the Panel members during the earlier session, Ms. Saunders provided the Panel with revised language for Recommendations 5 and 9 of the Barriers to the Fair Administration of Military Justice in Sexual Assault Cases report. The Panel reviewed the suggested revisions and voted to approve recommendation 9, with additional edits. The Panel discussed and agreed upon additional edits to recommendation 5 and decided the members would review an updated version of the revisions once made and also to consider proposals for the title of the report.

Panel Deliberations on JPP Report on Fiscal Year 2015 Statistical Data Regarding Military Adjudication of Sexual Assault Offenses

Ms. Peters and Ms. Rozell, JPP Senior Paralegal, assisted the Panel's review of the draft JPP Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015. Ms. Peters explained that after deliberating on three recommendations related to data at the May JPP meeting, the Panel voted to accept the recommendations subject to the revisions agreed upon during deliberations. She noted that the full report, in addition to the updated recommendations, was provided today for the Panel's review and deliberation.

With respect to Recommendation 52, that the Secretary of Defense and the military Services use a standardized, document-based collection model for collecting and analyzing case adjudication data in order to implement Article 140a, UCMJ, the Panel deliberated, agreed on edits, and approved the revised recommendation, without objection.

Next the Panel discussed Recommendation 53, that the Article 140a, UCMJ, data collection system be designed so as to become the exclusive source of sexual assault case adjudication data for DoD's annual report to Congress on DoD's sexual assault prevention and response initiatives. After discussing other data collecting functions within DoD and the Services and making clarifying edits to the recommendation, it was approved by the Panel, as revised, without objection.

Lastly, the Panel discussed Recommendation 54, which suggested the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces consider continuing to analyze adult-victim sexual assault court-martial data on an annual basis as the JPP has done, and consider analyzing several patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data. After discussing the recommendation, it was unanimously approved.

New Title to the Barriers to the Fair Administration of Military Justice in Sexual Assault Cases Report

The Panel revisited the issue of revising the title for the Barriers to the Fair Administration of Military Justice in Sexual Assault Cases Report. After discussion, the Panel agreed on the following title: "Report on Concerns About the Fair Administration of Military Justice," by a vote of four to one with Mr. Stone opposed.

Public Comment

The Panel received one public comment from Mr. Don Christensen, President of Protect Our Defenders. Mr. Christensen spoke in opposition to some of the findings of the JPP Subcommittee including those related to Article 32 reforms and expedited transfers. He also expressed his support for requiring unanimous verdicts in courts-martial.

The DFO closed the public meeting at 3:52 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 June 16, 2017 JPP meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

2. Meeting agenda
3. Table of contents and summary of read ahead materials for JPP members
4. JPP Deliberation Outline for the JPP Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases
5. JPP SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (May 2017)
6. *United States v. Boyce*, No. 16-0546/AF (C.A.A.F. May 22, 2017)
7. Draft Executive Summary and Recommendations for the JPP Report on Sexual Assault Investigations in the Military
8. Draft JPP Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015
9. JPP Tasks by Topic with Related Recommendations and Implementation Status
10. JPP Final Report Discussion Outline
11. Written Statement of Mr. Don Christensen, President of Protect Our Defenders to the JPP (June 15, 2017)
12. Draft Revised Recommendations 5 and 9 from the Barriers to the Fair Administration of Military Justice in Sexual Assault Cases Report