



Judicial Proceedings Panel Subcommittee  
Minutes of January 5, 2017 Subcommittee 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.

At the Secretary of Defense's direction, the JPP Subcommittee (the Subcommittee) has been established under the JPP. The JPP tasked the Subcommittee to conduct site visits at various military installations throughout the United States and Asia for the purpose of gathering information on the military's handling of sexual assault litigation from the men and women who are actually investigating, litigating, and supporting these cases. In an effort to provide an accurate assessment of the results from the site visits, the Subcommittee requested additional information to fully inform its recommendations to the JPP.

**EVENT:** The Subcommittee held a meeting on January 5, 2017, from 9:10 a.m. to 4:06 p.m. to deliberate on and finalize its report on Sexual Assault Investigations in the Military and heard from Service ethics officials and prosecutors regarding the ethical and legal standards for prosecutors charging sexual assault cases under Articles 120 and 125 of the Uniform Code of Military Justice (UCMJ).

**LOCATION:** The meeting was held at the Judicial Proceedings Panel Office, 875 North Randolph Street, Suite 150, Arlington, Virginia, 22203.

**MATERIALS:** A transcript of the meeting, as well as preparatory materials provided to the JPP Subcommittee members prior to, during and after the meeting, are incorporated herein by reference and listed individually below.

### **PARTICIPANTS**

Participating JPP Subcommittee Members:

The Honorable Barbara Jones, Chair  
Ms. Lisa Friel  
The Honorable Elizabeth Holtzman  
Ms. Laurie Kepros  
Dean Lisa Schenck  
Brigadier General (Retired) James Schwenk, U.S. Marine Corps  
Ms. Jill Wine-Banks

Participating JPP Staff:

Captain Tammy Tideswell, U.S. Navy, JPP Staff Director  
Ms. Meghan Peters, Staff Attorney  
Ms. Terri Saunders, Staff Attorney



Other Participants:

Ms. Maria Fried, Designated Federal Official (DFO)  
Special Agent Diane Kelley, Department of Defense, Office of Inspector General  
Mr. Steven Knight, Department of Defense, Office of Inspector General  
Major Emilee Elbert, U.S. Army, Deputy Chief, Trial Counsel Assistance Program  
Colonel William R. Kern, U.S. Army, Professional Responsibility Branch  
Commander Cassie Kitchen, U.S. Coast Guard, Chief, Military Justice and Command Advice  
Commander Michael Luken, U.S. Navy, Director, Trial Counsel Assistance Program  
Lieutenant Colonel Nicholas Martz, U.S. Marine Corps, Military Justice Branch Head  
Colonel Katherine Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel  
Division  
Colonel (Retired) Kathryn Stone, U.S. Army, Attorney Advisor, Professional Responsibility  
Branch Head

**MEETING MINUTES**

Ms. Fried opened the meeting at 9:10 a.m.

Deliberations on Sexual Assault Investigations in the Military Report

The Subcommittee members discussed the draft report and spoke with an official from the Department of Defense Office of Inspector General regarding their draft policy on sexual assault investigations and investigative assistance to the Military Criminal Investigative Organizations. The Subcommittee members determined additional deliberation was needed in order to finalize the report and agreed to delay presentation of the report to the JPP. The members agreed to a teleconference to conduct further deliberations.

Presentation by Service Ethics Officials and Prosecutors

The Subcommittee spoke with ethics officials and senior prosecutors from all of the Services regarding ethical standards and prosecutorial standards in charging, advising convening authorities, referral of charges, and prosecution of sexual assault cases in the military. The Subcommittee and presenters discussed that in the military justice system, unlike in civilian criminal justice systems, prosecutorial discretion is vested in convening authorities. They also discussed the Services' rules of professional conduct for lawyers, as well as the American Bar Association's Criminal Justice Standards and a new provision in the fiscal year 2017 National Defense Authorization Act which directs the establishment of formalized prosecutorial standards in the Services for convening authorities and prosecutors. The Service representatives discussed the low standard of probable cause for referral of charges to a court-martial and whether additional considerations should be taken into account – and how they should be taken into account – in advising the convening authority as to the appropriate disposition of a case. They discussed the standards set forth in Rules for Court-Martial 306 in the Manual for Courts-Martial, which lists a number of considerations for the convening authority in determining the appropriate disposition of a case.

Ms. Friel discussed her experience as a civilian prosecutor and advised that if a prosecutor does not think they will prevail, ethically they should not take the case to trial. However, she stated that in sexual assault cases, which are typically more difficult to prove, she would often take

cases to trial if she felt the interests of justice required it, even if she was doubtful that she would prevail at trial. Several of the Service prosecutors concurred that they use and advocate a similar standard.

The meeting closed at 4:06 p.m.

### CERTIFICATION

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



Barbara Jones  
Chair  
Judicial Proceedings Panel Subcommittee

### MATERIALS

#### Meeting Record

1. Transcript of January 5, 2017 JPP Subcommittee meeting, prepared by Neal R. Gross and Co., Inc.

#### Meeting Materials

2. Comparison of Disposition Guidance and Pretrial Advice in the FY 2017 National Defense Authorization Act and Current Uniform Code of Military Justice
3. U.S. Attorneys' Manual – Relevant Sections on Initiating and Declining Prosecution
4. American Bar Association Criminal Justice Standards for the Prosecution Function – Relevant Sections on Charging Decisions
5. Rules of Professional Conduct – Comparative Chart
6. Military Services' Sexual Assault Court-Martial Data for FY 2016
7. Select Statistics Showing FY 2012-2014 Court-Martial Conviction Data from the JPP's April 2016 Report on Statistical Data
8. Select Statistics Showing Civilian Conviction Data from the JPP's April 2016 Report on Statistical Data
9. Meeting Agenda
10. Summaries of Presenters' Biographies
11. Subcommittee Report to the Judicial Proceedings Panel on Sexual Assault Investigations in the Military (Draft)
12. Public Comment from Mr. Glenn Fine, Acting Inspector General, Department of Defense, dated December 26, 2016