Judicial Proceedings Panel Subcommittee
Minutes of April 9, 2015 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 Subcommittee has been tasked to support the JPP by assisting with the Secretary's objectives for an independent review of the judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by section 541 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Public Law 112-81).

EVENT: The JPP Subcommittee held a meeting on April 9, 2015 from 9:30 a.m. to 4:53 p.m., focusing on the evolution of Article 120 of the UCMJ and pending Model Penal Code developments. In addition, retired military judges offered their perspectives to the Subcommittee members regarding changes to the current version of Article 120.

LOCATION: The meeting was held at One Liberty Center, 875 N. Randolph St., Suite 105, Arlington, VA 22203.

MATERIALS: A verbatim transcript of the meeting, as well as materials provided to the JPP Subcommittee 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 Subcommittee Members:
The Honorable Elizabeth Holtzman, Acting Chair
Dean Michelle J. Anderson
Ms. Lisa M. Friel
Ms. Laurie R. Kepros
Associate Dean Lisa N. Schenck
Professor Lee D. Schinasi
Professor Stephen J. Schulhofer
Brigadier General (Retired) James R. Schwenk
Ms. Jill Wine-Banks
Major General (Retired) Margaret H. Woodward

Absent JPP Subcommittee Members:
Judge Barbara Jones, Chair

Participating JPP Staff:
Lieutenant Colonel Kyle Green, U.S. Air Force, JPP Staff Director
Lieutenant Colonel Kelly McGovern, U.S. Army, JPP Deputy Director
Lieutenant Colonel Glen Hines, Branch Chief, JPP Subcommittee
Ms. Sharon Zahn, Senior Paralegal and Meeting Recorder

Other Participants:
Ms. Maria Fried, Office of the General Counsel, Department of Defense, Designated Federal Official (DFO)

Presenters:
Mr. Dwight Sullivan, Department of Defense, Office of General Counsel
Professor Stephen Schulhofer, New York University School of Law
Colonel (Retired) Tim Grammel, U.S. Army, former Military Judge
Colonel (Retired) William Orr, U.S. Air Force, former Military Judge
Lieutenant Colonel (Retired) Quincy Ward, U.S. Marine Corps, former Military Judge
Commander (Retired) John Maksym, U.S. Navy, former Military Judge

MEETING MINUTES

The DFO opened the meeting at 9:30 a.m. The Honorable Elizabeth Holtzman and the Subcommittee members introduced themselves to each other. Ms. Holtzman then provided opening remarks and explained the focus of the Subcommittee. Lieutenant Colonel Green explained the JPP Staff's supporting role for the Subcommittee, in addition to explaining the mandated requirements of the JPP and the Subcommittee.

Overview of Military Justice System and Methods for Amendments and Evolution of Article 120 of the UCMJ

Mr. Dwight Sullivan, Associate Deputy General Counsel for Military Justice at the Department of Defense, provided an overview briefing on the three iterations of Article 120 of the UCMJ and procedures for resolving allegations of misconduct through courts-martial, nonjudicial punishment, and other administrative procedures. He reviewed legislative changes that have been made to the UCMJ that have changed courts-martial processes for resolving allegations of rape, sexual assault, and other sex-related offenses by members of the military. Mr. Sullivan also answered questions from the Subcommittee members.

Model Penal Code Developments/Members' Discussion Session

Mr. Stephen Schulhofer, a Subcommittee member and a law professor at New York University School of Law, explained the draft sexual assault provisions of the Model Penal Code (MPC). Professor Schulhofer noted that the draft, which is now under consideration by the American Law Institute, represents the first revision of the MPC's sexual assault provisions since they were

adopted in 1962. Professor Schulhofer explained features of the draft MPC provisions and provided his assessment of how they compare to Article 120 of the UCMJ. Professor Schulhofer also fielded questions from the other Subcommittee members.

Military Judges' Perspectives on Article 120 (Issues 1-11)

The Subcommittee heard testimony from four former military judges: (1) Colonel (Retired) Tim Grammel, U.S. Army, (2) Colonel (Retired) William Orr, U.S. Air Force, (3) Lieutenant Colonel (Retired) Quincy Ward, U.S. Marine Corps, (4) Commander (Retired) John Maksym, U.S. Navy. The military judges offered their personal opinions about the 2007 and 2012 amendments to Article 120 and current issues arising in military sexual assault cases. The presenters answered the Subcommittee members' questions and discussed their perspectives on whether Article 120 should be amended further.

The DFO closed the meeting at 4:53 p.m.

CERTIFICATION

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

Elizabeth Holtzman
Acting Chair
Judicial Proceedings Panel Subcommittee

MATERIALS
Meeting Record:

1. Transcript of April 10, 2015 JPP meeting, prepared by Neal R. Gross and Co., Inc.

Meeting Materials:

2. Public Meeting Table of Contents
3. Meeting Agenda
4. Presenter Biographies
5. Issues for Subcommittee Consideration Outline

Read Ahead Materials:

6. Summary of Meeting Materials
7. Article 120, UCMJ – Subcommittee Issues for Subcommittee Consideration
8. Article 120, UCMJ – Version 2012

9. Benchbook Instructions – Article 120, UCMJ
10. *Analysis of Crimes and Defenses 2012 UCMJ Article 120, Effective 28 June 2012*, Professor Jim Clark
11. *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, George Washington Law School Public Law and Legal Theory Paper No. 2014-26, Dean Lisa Schenck
12. *The Redemptive Role of "Justification or Excuse" in Article 120(a) (2011), We Don't Need a New Statute; We Need New Implementation*, Ronald White
13. *The Article 120 Implementation Challenge: Avoiding Unintended Consequences and Unjust Outcomes*, Mr. Edward J. O'Brien, dated September 19, 2014
14. *Model Penal Code Article 213: Rape and Related Offenses, Prospectus for a Project of Revision*, Professor Stephen J. Schulhofer, dated May 14, 2012
15. Model Penal Code, Article 213, Proposed Sections 213.0 to 213.7, The American Law Institute, tentative draft, dated 2014
16. Comparison of Article 120, UCMJ and Section 213 of the Proposed Model Penal Code, prepared by the JPP staff, dated August 6, 2014
17. Comments on Article 120, UCMJ, by Professor Stephen J. Schulhofer, New York University School of Law, dated August 8, 2014
18. Comments on Article 120, UCMJ, by Colonel Gary M. Jackson, United States Air Force, dated August 11, 2014
19. United States v. Schloff, U.S. Army Court of Criminal Appeals, dated December 16, 2014
20. United States v. Torres, U.S. Navy-Marine Corps Court of Criminal Appeals, dated August 28, 2014
21. United States v. Wylie, U.S. Navy-Marine Corps Court of Criminal Appeals, dated November 30, 2012
22. Article 120, UCMJ – Issues with Statutory Text

Materials Provided During the Meeting:

23. Judicial Proceedings Panel Staff listing
24. PowerPoint Slides, "Military Justice and Legislation," presented by Mr. Dwight Sullivan
25. PowerPoint Slides, "Evolution of Article 120," presented by Mr. Dwight Sullivan
26. *Model Penal Code Article 213: Proposed Sections 213.0 TO 213.11,* Professor Stephen J. Schulhofer, dated Aril 1, 2015