



Judicial Proceedings Panel Subcommittee  
Minutes of May 7, 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 May 7, 2015, from 9:10 a.m. to 4:56 p.m., focusing on Article 120 of the UCMJ from a training perspective and trial, defense, appellate, and civilian counsels' perspectives concerning the definitions and elements of Article 120.

**LOCATION:** The meeting was held at Courtroom 506 of the Thurgood Marshall United States Courthouse, 40 Centre Street, New York, New York, 10007.

**MATERIALS:** A verbatim 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. Materials received by the Panel are available on the JPP website: <http://jpp.whs.mil>.

## PARTICIPANTS

### Participating JPP Subcommittee Members:

The Honorable Barbara Jones, Chair  
The Honorable Elizabeth Holtzman  
Dean Michelle J. Anderson  
Ms. Laurie Rose Kepros  
Professor Lee D. Schinasi  
Professor Stephen J. Schulhofer  
Brigadier General, U.S. Marine Corps (Retired), James R. Schwenk  
Ms. Jill Wine-Banks  
Major General, U.S. Air Force (Retired), Margaret H. Woodward

### Absent JPP Subcommittee Members:

Ms. Lisa M. Friel  
Dean Lisa N. Schenck

Participating JPP Staff:

Lieutenant Colonel Kyle Green, U.S. Air Force, JPP Staff Director  
Lieutenant Colonel Kelly McGovern, U.S. Army, JPP Deputy Director  
Mr. Dale Trexler, JPP Chief of Staff  
Lieutenant Colonel Glen Hines, Branch Chief, JPP Subcommittee  
Mr. Doug Nelson, Staff Attorney, JPP Subcommittee  
Ms. Sharon Zahn, Senior Paralegal and Meeting Recorder

Other Participants:

Mr. William Sprance, Department of Defense Office of the General Counsel, Designated Federal Official (DFO)

Presenters:

Major Aimee Bateman, U.S. Army, The Judge Advocate General's Legal Center & School  
Lieutenant Colonel Christopher Thielemann, U.S. Marine Corps, Regional Trial Counsel  
Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program  
Major Mark Rosenow, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination  
Lieutenant Commander Stuart Kirkby, U.S. Navy, Staff Attorney, Navy-Marine Corps Appellate Review Activity  
Colonel Terri Zimmermann, U.S. Marine Corps, Chief Reserve Defense Counsel of the Marine Corps  
Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel  
Major Frank Kostik, U.S. Army, Senior Defense Counsel  
Lieutenant Commander Richard Federico, U.S. Navy, Senior Defense Counsel  
Colonel Mark Jamison, U.S. Marine Corps, Director, Navy-Marine Corps Appellate Government Division  
Major John Stephens, U.S. Marine Corps, Navy-Marine Corps Appellate Defense Division  
Major Mary Ellen Payne, U.S. Air Force, Government Appellate Division  
Major Thomas Smith, U.S. Air Force, Defense Appellate Division  
Captain Jihan Walker, U.S. Army, Government Appellate Division  
Mr. John Wilkinson, Attorney Advisor, AEquitas  
Mr. Zachary Spilman, Attorney at Law  
Colonel (Retired) Don Christensen, U.S. Air Force, President, Protect Our Defenders

**MEETING MINUTES**

The DFO opened the meeting at 9:10 a.m.

Article 120 from a Training Perspective

The first presenter of the day was Major Aimee Bateman, U.S. Army, Associate Professor, Criminal Law Department, The Judge Advocate General's Legal Center & School. Major Bateman provided testimony on the methods she uses when teaching trial counsel, defense counsel, and military judges on the three latest versions of Article 120 of the UCMJ. Major Bateman stated that her students range from newly commissioned, inexperienced attorneys to highly experienced litigators. She shared several issues and concerns that students have brought

forward and explained the differences in the three versions of the statute that affect charging, prosecuting and defending allegations of rape, sexual assault, and other sex-related offenses by members of the military. Major Bateman answered questions from the Subcommittee members and discussed her opinion on recommendations for potential changes to Article 120.

#### Trial Counsel Perspectives on Article 120 (Issues 1-11)

The Subcommittee heard testimony from four trial counsel: (1) Lieutenant Colonel Christopher Thielemann, U.S. Marine Corps, (2) Lieutenant Colonel Alex Pickands, U.S. Army, (3) Major Mark Rosenow, U.S. Air Force, and (4) Lieutenant Commander Stuart Kirkby, U.S. Navy. The presenters offered their personal perspectives about the 2007 and 2012 amendments to Article 120 and the current issues arising when charging and prosecuting military sexual assault cases. The presenters answered the Subcommittee members' questions and discussed their perspectives on whether Article 120 should be amended further. Their perspectives ranged from recommending that no changes be made to the current language at this time, while others suggested specific amendments and the procedures for making the recommended changes. The presenters expressed their views on possible changes to current statutory definitions, to include: consent, mistake of fact, incapable of consenting, bodily harm, fear, force, sexual act, sexual contact, and indecent acts.

#### Defense Counsel Perspectives on Article 120 (Issues 1-11)

The Subcommittee heard testimony from four defense counsel: (1) Colonel Terri Zimmermann, U.S. Marine Corps, (2) Lieutenant Colonel Julie Pitvorec, U.S. Air Force, (3) Major Frank Kostik, U.S. Army, and (4) Lieutenant Commander Richard Federico, U.S. Navy. The presenters offered their personal perspectives about the 2007 and 2012 amendments to Article 120 and the current issues arising when defending military members accused of sexual assault crimes. The presenters answered the Subcommittee members' questions and discussed their perspectives on whether Article 120 should be amended further. Their perspectives ranged from recommending that no changes be made to the current language at this time to proposing specific amendments and the procedures for making the recommended changes. The presenters expressed their views on possible changes to current statutory definitions, to include: consent, mistake of fact, incapable of consenting, bodily harm, fear, force, sexual act, sexual contact, and indecent acts.

#### Appellate Counsel Perspectives on Article 120 (Issues 1-11)

The Subcommittee heard testimony from five appellate counsel: (1) Colonel Mark Jamison, U.S. Marine Corps, (2) Major John Stephens, U.S. Marine Corps, (3) Major Mary Ellen Payne, U.S. Air Force, (4) Major Thomas Smith, U.S. Air Force, and (5) Captain Jihan Walker, U.S. Army. The presenters offered their personal perspectives about the 2007 and 2012 amendments to Article 120 and the current issues arising at the appellate level when advising trial or defense counsel on military sexual assault cases. The presenters answered the Subcommittee members' questions and discussed their perspectives on whether Article 120 should be amended further. Their perspectives ranged from recommending that no changes be made to the current language at this time to proposing specific amendments and the procedures for making the recommended

changes. The presenters expressed their views on possible changes to current statutory definitions, to include: consent, mistake of fact, incapable of consenting, bodily harm, fear, force, sexual act, sexual contact, and indecent acts.

#### Civilian Counsel Perspectives on Article 120 (Issues 1-11)

The Subcommittee heard testimony from three civilian counsel: (1) Mr. John Wilkinson, Attorney Advisor, AEquitas, (2) Mr. Zachary Spilman, Attorney at Law, and (3) Colonel (Retired) Don Christensen, President, Protect Our Defenders. The presenters offered their personal perspectives about the 2007 and 2012 amendments to Article 120 and the current issues arising in military sexual assault cases.

The Subcommittee first heard from Mr. John Wilkinson, Attorney Advisor, AEquitas. Mr. Wilkinson spoke about the definition of consent, incapable of consent, and mistake of fact as to consent, and he recommended that the statutory definition of “incapable of consent” be clarified. In addition, he offered examples of several state statutes as sample language to consider. He stated that he does not believe that the Code is the problem, but rather the implementation of the Code. In addition, Mr. Wilkinson stated that AEquitas has several research groups that can provide the Subcommittee with data if needed.

The Subcommittee then heard from Mr. Zachary Spilman, Attorney at Law. Mr. Spilman spoke to each of the 11 issues currently before the Subcommittee. Mr. Spilman expressed concerns with the current statutory definition of “incapable of consent,” the defense of consent, and the defense of mistake of fact as to consent, and stressed that training is a vital part to understanding the law. He stated that although the statute is not perfect, the President needs to take actions on pending guidance currently before him for signature. He asked that the Subcommittee’s Report focus not on changing the language of the statute, but on the need for executive action to implement the statute.

Colonel, U.S. Air Force (Retired), Don Christensen, President, Protect our Defenders also participated on the panel. Mr. Christensen stated that he believes that Article 120 is working as intended by Congress, and that it puts military members on notice of what conduct is proscribed. He recommended that changes not be made and that time be given to allow the experience of practice and the guidance of the appellate courts to refine the application of the current version of Article 120. He stressed that what the system needs now is for the President to sign the executive order to establish model specifications and definitions and the elements of the offenses. Lastly, he asked that the Subcommittee recommend to Congress that the Department of Defense be required to establish military justice tracks to ensure that the military justice system has prosecutors, defense counsel and military judges that are steeped in training acquired through history and experience.

The presenters then answered the Subcommittee members’ questions and discussed their perspectives on whether Article 120 should be amended further.

The DFO closed the meeting at 4:56 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 May 7, 2015 JPP Subcommittee meeting, prepared by Neal R. Gross and Co., Inc.

#### Meeting Materials:

2. Subcommittee Meeting Table of Contents
3. Meeting Agenda
4. Presenter Biographies

#### Read Ahead Materials:

5. Summary of Meeting Materials
6. *Article 120 Comments and Proposed Amendments*, Colonel (Retired) Timothy Grammel, U.S. Army (Received after the April subcommittee meeting)
7. *Emerging Issues: Consent and Mistake of Fact as to Consent Defenses to Adult Sexual Assault Offenses Under the Uniform Code of Military Justice*, Zachary Spilman, Lexis (Nov 26, 2014)
8. *Rape and Sexual Assault in the Legal System*, Carol E. Tracy, Terry L. Fromson, Women's Law Project, Jennifer Gentile Long, Charlene Whitman, AEquitas (2013)
9. Federal Adult Sex Crimes Statutes: 18 U.S.C. §§ 2241 (Aggravated Sexual Abuse), 2242 (Sexual Abuse), 2244 (Abusive Sexual Contact), 2246 (Definitions)
10. California Sex Crimes Code
11. Colorado Sex Crimes Code
12. New Jersey Sex Crimes Code
13. New York Sex Crimes Code

Materials Provided During the Meeting:

14. PowerPoint Slides, "Article 120 (and 120a, 120b, 120c)," presented by Major Aimee Bateman
15. PowerPoint Slides, "Sex Crimes Comparison," presented by Major Aimee Bateman