



Judicial Proceedings Panel Subcommittee
Minutes of June 25, 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 June 25, 2015, from 8:49 a.m. to 5:13 p.m., focusing on the Executive Order process, Article 120 of the Uniform Code of Military Justice (UCMJ) Statutory Construction, and Subcommittee Panel deliberations on 11 issues.

LOCATION: The meeting was held at Room 850 of the Moynihan Courthouse, United States District Court, 500 Pearl 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. Lisa M. Friel
Ms. Laurie Rose Kepros
Dean Lisa N. Schenck
Professor Lee D. Schinasi
Professor Stephen J. Schulhofer (telephonically for deliberation session)
Brigadier General, U.S. Marine Corps (Retired), James R. Schwenk
Ms. Jill Wine-Banks
Major General, U.S. Air Force (Retired), Margaret H. Woodward

Participating JPP Staff:

Lieutenant Colonel Kyle Green, U.S. Air Force, JPP Staff Director
Lieutenant Colonel Glen Hines, Branch Chief, JPP Subcommittee

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

Other Participants:

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

Presenters:

Mr. Dwight Sullivan, Department of Defense Office of the General Counsel
Brigadier General Charles B. Pede, U.S. Army, Commander/Commandant, The Judge Advocate General's Legal Center & School
Lieutenant Colonel Christopher Kennebeck, U.S. Army, Deputy Staff Judge Advocate, I Corps, Joint Base Lewis-McChord

MEETING MINUTES

The DFO opened the meeting at 8:49 a.m.

The Executive Order Process

The first presenter of the day was Mr. Dwight Sullivan, Department of Defense Office of General Counsel. Mr. Sullivan educated the Subcommittee members about the use of Executive Orders to make changes to the military justice system. Mr. Sullivan gave a quick review of the organization and contents of the Manual for Courts-Martial. He explained what types of modifications can be accomplished with an executive order as opposed to those that require an amendment to the statute. Mr. Sullivan also informed the members about the process for implementing those changes. He then spoke about the level of judicial deference that the courts give to executive orders. Lastly, he reviewed the recent executive order signed by the President amending the Manual for Courts-Martial, including some provisions to carry out recommendations of the Response Systems Panel. Mr. Sullivan answered questions from the Subcommittee members and discussed his opinion on the appropriate mechanisms to use for potential changes to Article 120.

Article 120, UCMJ, Statutory Construction

The Subcommittee heard testimony from two former participants in the drafting of the current version of Article 120, UCMJ, Brigadier General Charles B. Pede and Lieutenant Colonel Christopher Kennebeck. Brigadier General Pede testified that his perspective based upon his experience as the Chair of the Joint Service Committee, and that during this time Lieutenant Colonel Kennebeck was the Executive Secretary of the JSC. They explained that the Joint Service Committee is responsible for the annual review of the UCMJ and the Manual for Courts-Martial. During their tenure, they helped develop the proposal for the 2012 version of Article 120. Brigadier General Pede and Lieutenant Colonel Kennebeck provided background information about the issues that arose from the 2007 statute which led to the revisions in the

2012 version. They answered questions from the Subcommittee members and discussed their opinions on recommendations for potential changes to Article 120.

Discussion and Deliberations on Issues 1-11

The Subcommittee started their deliberations by first reviewing subcommittee members Ms. Kepros and Professor Schulhofer's submitted proposals with recommended changes. The members analyzed each of the 11 issues to determine if they wanted to recommend changes, not recommend changes, or request further information or testimony before making any recommendations in regards to Article 120. The Subcommittee discussed the formation of smaller internal preparatory work groups that would work create a work product to circulate to the full Subcommittee on a particular issue for future use and consideration by the subcommittee, as appropriate. The Chair asked each member to select which issue they would like to focus on and asked the JPP staff to organize the working groups.

The DFO closed the meeting at 5:13 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 June 25, 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 – Article 120 – Chart of Presenters' Recommendations: Issues 1-11
7. Summarized Outline of Presenters' Comments and Recommendations on Issues 1-11
8. *Article 120 Comments and Proposed Amendments*, Colonel (Retired) Timothy Grammel, U.S. Army (Received after the April subcommittee meeting)
9. *Judicial Proceedings Panel Remarks of LTC Alexander N. Pickands*, U.S. Army, Chief, Trial Counsel Assistance Program, Lieutenant Colonel Alexander Pickands, U.S. Army (12 pages).
10. *Recommended Amendments to Article 120*, Major Frank Kostik, U.S. Army
11. *Written Commentary Concerning Article 120, UCMJ*, Major Mary Ellen Payne, U.S. Air Force
12. *Written Comments to Accompany Testimony of 7 May 2015*, Major Mark Rosenow, U.S. Air Force

Materials Provided During the Meeting:

13. Issues 1 – 11
14. Kepros Reorganization of Article 120, Final
15. Kepros Reorganization of Article 120 with markups
16. Professor Schulhofer's memorandum on Article 120
17. PowerPoint Slides, "The Executive Order Process," presented by Mr. Dwight Sullivan
18. PowerPoint Slides, "Article 120 Slides OTJAG, Criminal Law Policy," presented by Lieutenant Colonel Christopher Kennebeck