



Judicial Proceedings Panel Subcommittee
Minutes of August 27, 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 August 27, 2015, from 9:00 a.m. to 4:48 p.m., to hear from witnesses concerning abuse of authority/coercive sexual offenses under Article 120 of the Uniform Code of Military Justice and to deliberate on several issues relating to Article 120.

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

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 Elizabeth Holtzman (telephonically)
Dean Michelle J. Anderson
Ms. Lisa M. Friel
Ms. Laurie Rose Kepros
Dean Lisa N. Schenck (telephonically)
Professor Stephen J. Schulhofer
Ms. Jill Wine-Banks
Major General, U.S. Air Force (Retired), Margaret H. Woodward

Absent JPP Subcommittee Members:

The Honorable Barbara Jones, Chair
Professor Lee D. Schinasi

Brigadier General, U.S. Marine Corps (Retired), James R. Schwenk

Participating JPP Staff:

Lieutenant Colonel Kyle Green, U.S. Air Force, JPP Staff Director

Lieutenant Colonel Glen Hines, Branch Chief, 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 Mary Ellen Payne, U.S. Air Force

Major Adam King, U.S. Marine Corps

Major Tyler Heimann, U.S. Army

Lieutenant Commander Benjamin Robertson, U.S. Navy

Lieutenant Commander Benedict Gullo, U.S. Coast Guard

Major Ryan Wardle, U.S. Army

Captain Charles Olson, U.S. Marine Corps

Captain Lauren Shure, U.S. Air Force

Lieutenant Paul Hochmuth, U.S. Navy

Colonel Brynn Morgan, U.S. Air Force

Colonel David Mendelson, U.S. Army

Lieutenant Colonel Brett Wilson, U.S. Marine Corps Reserve

Lieutenant Commander Paul Casey, U.S. Coast Guard

MEETING MINUTES

The DFO opened the meeting at 9:00 a.m.

Prosecution Perspectives: Abuse of Power/Coercive Sexual Offenses

The Subcommittee heard testimony from five military prosecutors: (1) Major Mary Ellen Payne, U.S. Air Force, (2) Major Adam King, U.S. Marine Corps, (3) Major Tyler Heimann, U.S. Army, (4) Lieutenant Commander Benjamin Robertson, U.S. Navy, and (5) Lieutenant Commander Benedict Gullo, U.S. Coast Guard. The presenters offered their personal opinions about the trainee/trainer dynamic, and what evidentiary factual patterns would support a prosecution under Article 120, versus Article 92 (orders violation) or Article 93 (maltreatment). The presenters answered the Subcommittee members' questions and discussed their perspectives on whether Article 120 should be amended further to include trainee/trainer relationships during initial training based on the trainer's rank and status, and whether in their respective opinions any trainee has the ability to consent.

Defense Counsel Perspectives: Abuse of Power/Coercive Sexual Offenses

The Subcommittee heard testimony from four military defense counsel: (1) Major Ryan Wardle, U.S. Army, (2) Captain Charles Olson, U.S. Marine Corps, (3) Captain Lauren Shure, U.S. Air

Force, and (4) Lieutenant Paul Hochmuth, U.S. Navy. The presenters offered their personal opinions about the trainee/trainer dynamic. They also discussed evidentiary factual patterns which would support a prosecution under Article 120, versus Article 92 (orders violation) or Article 93 (maltreatment). The presenters answered the Subcommittee members' questions and offered their opinions as to whether Article 120 should be amended further to include specific prohibitions of trainee/trainer relationships during initial training based on the trainers' rank and status. They also discussed whether trainees actually have the ability to consent in a training environment and whether strict liability would be appropriate.

Training Command Staff Judge Advocates' Perspectives: Abuse of Power/Coercive Sexual Offenses

The Subcommittee heard testimony from four command level Staff Judge Advocates: (1) Colonel Brynn Morgan, U.S. Air Force, (2) Colonel David Mendelson, U.S. Army, (3) Lieutenant Colonel Brett Wilson, U.S. Marine Corps Reserves, and Lieutenant Commander Paul Casey, U.S. Coast Guard. The presenters testified as to the changes that their Services' training commands have made in recent years to better educate trainers and trainees. Additionally, the presenters offered their personal opinions about the trainee/trainer dynamic, and the impact that better training and additional safety measures have had on lessening allegations of sexual offenses between trainers and trainees in initial military training environments. The presenters answered the Subcommittee members' questions and discussed their perspectives on whether Article 120 should be amended further to include trainee/trainer relationships during initial training based on the trainers rank and status, and if trainees truly have the ability to consent.

Department of Defense Perspective: Sex Offender Registration

Mr. John Awtrey, Director, Law Enforcement Policy and Support, Department of Defense, explained the military sex offender registration program. Mr. Awtrey educated the Subcommittee on the Department's current registration system and stated that it does not align with, and is not always viewable by, civilian counterpart agencies. He explained the challenges with the current registration system and the changes his office is implementing to align the Department's sex offender registration system with the registration systems of civilian enforcement agencies. Mr. Awtrey answered questions from the Subcommittee members.

Deliberations

During the meeting's final session, the Subcommittee members began their deliberations by reviewing the issues and proposals for recommended changes to Article 120 that were previously discussed. The Subcommittee members specifically analyzed issues 6 and 12-17, and agreed upon the recommendations they will make to the full subcommittee concerning its report to the JPP. Dean Anderson stated that she would prepare a draft proposal and send it to all Subcommittee members for review and edits.

The DFO closed the meeting at 4:48 p.m.

CERTIFICATION

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



Michelle J. Anderson
Acting Chair
Judicial Proceedings Panel Subcommittee

MATERIALS

Meeting Record:

1. Transcript of August 27, 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 Deliberations with Working Group Recommendations
6. LtCol Hines' Email to Members Regarding Old Article 120 "Constructive Force" Instructions
7. Bench book Instruction from Pre-2007 Version of Article 120 on "Constructive Force."
8. U.S. v. Simpson, 55 M.J. 674 (Army Ct. Crim.App. 2001)
9. U.S. v. Simpson, 58 M.J. 368 (C.A.A.F. 2003)(11 pages).
10. Reveille for Congress: A Challenge to Revise Rape Law in the Military, Captain Alexander N. Pickands, 45 Wm. & Mary L. Rev. 2425 (2004)
11. Sexual Abuse of Power, Michal Buchhandler-Raphael, 21 U. Fla. J.L. & Pub. Pol'y 77 (April, 2010)
12. The New Gender Panic: Reflections on Sex Scandals and the Military, Martha Chamallas, 83 Minn. L. Rev. 305 (December, 1998)
13. Consent Obtained by Abuse of Power or Position, Dan Dobbs, et al, Dobbs' Law of Torts (June, 2014)
14. Summary of Presenter Comments, Whether Article 120 Should be Amended to Specifically Address Abuse of Authority Offenses
15. State and Federal Statutes Criminalizing Sexual Acts with Prisoners, Detainees, or Wards

16. Proposed Revision to Model Penal Code, Section 213.2, tentative draft by American Law Institute, April 30, 2014
17. HR 430ih, Protect Our Military Trainees Act
18. Major Ryan Oakley, A Lifetime of Consequences: Registering Convicted Military Sex Offenders, The Reporter (2013)
19. DoD Sex Offender List of Qualifying Offenses (DoDI 1325-07_Encl 2 _Appx 4_RSO)
20. Military Sex Offender Reporting Act of 2015
21. Tab 17. DoD Draft Policy Amendments on Sex Offender Reporting (DTM 15-003_SubCh_LSR)

Materials Provided During the Meeting:

22. List of Issues 1 – 11
23. List of Issues 6, 12-17
24. Text of Article 120 – Rape and Sexual Assault, 2012 Version
25. DA Pamphlet 3-45, dated September 2014, excerpt pages 474 and 477
26. DA Pamphlet 3-45, updated Preface to Article 120 Instructions
27. PowerPoint Slides, “Registered Sex offender (RS) Identification, Notification, Monitoring, and Tracking in DoD” presented by Mr. John Awtrey