Judicial Proceedings Panel
Minutes of October 10, 2014 Public Meeting

AUTHORIZATION: The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), 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 in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

EVENT: The JPP held a public meeting on October 10, 2014, from 8:49 a.m. to 4:44 p.m. The Panel deliberated on the current and proposed changes to Article 120 of the Uniform Code of Military Justice (UCMJ), which is the military's punitive statute that addresses rape and sexual assault crimes. In their deliberation, the Panel considered written submissions and materials and testimony received during the Panel's two full-day meetings held in August and September. After deliberations, the meeting focused on victim privacy issues in sexual assault cases. Specifically, the Panel focused on its mandates to review the admission of evidence of a victim's past sexual conduct and a victim's mental health records at pre-trial hearings (also known as Article 32 hearings), and at courts-martial. The Panel heard from military and civilian experts, victim advocacy organizations, and military prosecutors and defense counsel about the use of such evidence in civilian and military criminal proceedings.

LOCATION: The meeting was held at the Holiday Inn Arlington, Glebe and Fairfax Ballrooms, 4610 N. Fairfax Drive, Arlington, VA 22203

MATERIALS: A verbatim transcript and video recording of the meeting, as well as preparatory materials provided to the JPP members prior to and during 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 Members:
The Honorable Elizabeth Holtzman, Chair
The Honorable Barbara Jones
Vice Admiral (Retired) Patricia A. Tracey
Professor Thomas W. Taylor
Mr. Victor Stone

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

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

Presenters:
Mr. William Barto, U.S. Army, Director, Advocacy Training and Programs, Criminal Law Division, Office of the Judge Advocate General
Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development
Ms. Jennifer Long, Director, Æquitas
Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (WA) Prosecuting Attorney's Office
Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
Professor Clifford Fishman, Catholic University School of Law
Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders
Mr. Ryan Guilds, Counsel, Arnold & Porter LLP
Mr. Greg Jacob, Policy Director, Service Women's Action Network
Lieutenant Colonel Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel, Government Trial and Appellate Counsel Division
Commander Jonathan Stephens, U.S. Navy, Senior Trial Counsel, Region Legal Service Office Mid-Atlantic
Major Rebecca DiMuro, U.S. Army, Special Victim Prosecutor, Eighteenth Airborne Corps, Fort Bragg
Major Pete Houtz, U.S. Marine Corps, Regional Trial Counsel, National Capital Region
Commander Steve Reyes, U.S. Navy, Director, Defense Counsel Assistance Program
Major Andrea Hall, U.S. Air Force, Senior Defense Counsel, Joint Base Lewis-McChord
Major Shari Shugart, U.S. Army, Senior Defense Counsel, Schofield Barracks
Major Matthew Powers, U.S. Marine Corps, Senior Defense Counsel, National Capital Region

Public Comment:
None

MEETING MINUTES

The DFO opened the meeting at 8:49 a.m. The Honorable Elizabeth Holtzman provided opening remarks, reviewing the tasks of the JPP and the agenda for the meeting.

Panel Deliberations: Article 120, UCMJ

The Panel began the meeting with deliberations on current and proposed changes to Article 120 of the Uniform Code of Military Justice, which is the military's punitive statute that addresses rape and sexual assault crimes. During the Article 120 deliberations, the Panel considered written materials received on the subject, as well as testimony about Article 120 from numerous military and civilian stakeholders during the JPP full-day meetings on August 7, 2014, and September 19, 2014. The Panel members reviewed and discussed potential issues or concerns with the statute and identified the issues that the JPP members felt warrant further analysis or

study by the Panel. The JPP Chair advised that the Panel would assess and determine how to proceed with its analysis of these issues.

Sexual Assault Victims' Privacy at Article 32 and Court-Martial Proceedings

Following the Article 120 deliberations, the Panel received informational briefings from two military legal experts, Mr. William Barto, U.S. Army, Director, Advocacy Training and Programs, Criminal Law Division, Office of the Judge Advocate General, and Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development. The presenters discussed the use of Military Rules of Evidence (MRE) 412 and 513, which control admission of evidence of past sexual conduct and mental health records, respectively, as applied in court-martial proceedings. Mr. Barto and Colonel Baker reviewed the general prohibitions and procedures for admission of evidence under both rules according to their enumerated exceptions. They discussed common practices, procedures, and appellate decisions regarding MRE 412 and MRE 513, and both presenters responded to JPP member questions.

Victim Privacy in Sexual Assault Prosecutions: Past Sexual Conduct

The Panel next heard presentations by civilian legal experts comparing the rape shield protections afforded victims in civilian courts with those in the military justice system. The presenters for this session were: (1) Ms. Jennifer Long, Director, Æquitas; (2) Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (WA) Prosecuting Attorney's Office; (3) Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender; and (4) Professor Clifford Fishman, Catholic University School of Law. The presenters appraised MRE 412 based on their experience and/or research and offered perspectives about military practice in comparison to other jurisdictions. The presenters discussed relevant decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces, and they responded to questions raised by JPP Members about possible ways to improve MRE 412 or its application.

Victim Privacy in Sexual Assault Prosecutions: Mental Health Records

The Panel then heard presentations by civilian legal experts comparing the admission of victim mental health records in military versus civilian criminal proceedings. The presenters for this session were: (1) Professor Clifford Fishman, Catholic University School of Law; (2) Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (WA) Prosecuting Attorney's Office; (3) Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender; and (4) Ms. Jennifer Long, Director, Æquitas (on behalf of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas). The presenters noted a lack of definitive guidance from the U.S. Supreme Court on the extent or application of a psychotherapist-patient privilege in criminal cases. The presenters responded to JPP member questions and discussed how the privilege is weighed in different jurisdictions against the rights of a criminal defendant. They reviewed possible standards for offers of proof from the defense that would trigger a trial judge's in camera review of a victim's mental health records. The presenters also compared the

extent and application of the psychotherapist-patient privilege to other legal privileges, including marital communications, attorney-client, and parishioner-clergyman privileges.

Victim Advocacy Perspectives on Privacy Issues in Judicial Proceedings

The Panel next heard perspectives about victim privacy issues from victim advocacy organizations and a civilian practitioner who has represented victims of sexual assault and domestic violence in military courts-martial. The presenters for this session were: (1) Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders; (2) Mr. Ryan Guilds, Counsel, Arnold & Porter LLP; and (3) Mr. Greg Jacob, Policy Director, Service Women's Action Network. The presenters described concerns about how the military addresses victim privacy issues in courts-martial and what impact this has on victim participation and willingness to seek mental health treatment. . Mr. Guilds described differences in the application of victim privacy rules during investigations and at courts-martial compared to civilian jurisdictions. The presenters discussed limitations on the access victims' counsel receive to case materials and their involvement in courts-martial proceedings. Regarding MRE 513, the presenters stated that military judges routinely review victims' mental health records in camera, which they believe creates a chilling effect on victim participation in prosecutions and makes victims less willing to seek out mental health treatment. The presenters answered numerous questions from JPP members.

Perspectives of Military Trial Counsel

In the next afternoon session, the Panel heard from senior military prosecutors who described their experiences with the application of MRE 412 and MRE 513 in military criminal proceedings. The presenters for this session were: (1) Lieutenant Colonel Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel, Government Trial and Appellate Counsel Division; (2) Commander Jonathan Stephens, U.S. Navy, Senior Trial Counsel, Region Legal Service Office Mid-Atlantic; (3) Major Rebecca DiMuro, U.S. Army, Special Victim Prosecutor, Eighteenth Airborne Corps; and (4) Major Pete Houtz, U.S. Marine Corps, Regional Trial Counsel, National Capital Region. The presenters agreed that MRE 412 issues should not be litigated at Article 32 hearings, and they indicated a clearer uniform standard is needed for the in camera reviews that are conducted by military judges to review victims' mental health records under MRE 513. In response to JPP members' questions, the presenters discussed their interaction with special victims' counsel (SVCs), how SVCs have changed their interactions with victims in cases, and their experiences in providing SVCs access to case documents. The presenters also indicated that military judges had limited case law guidance and applied varying standards when considering whether to admit evidence under MRE 513 under the constitutionally required exception to the rule.

Perspectives of Military Defense Counsel

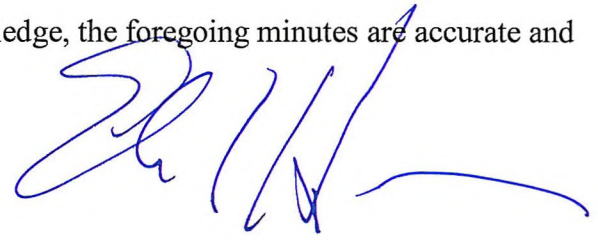
In the meeting's last session, the Panel heard from senior military defense counsel who described their experiences with the application of MRE 412 and MRE 513 in military criminal proceedings. The presenters for this session were: (1) Commander Steve Reyes, U.S. Navy, Director, Defense Counsel Assistance Program; (2) Major Andrea Hall, U.S. Air Force, Senior

Defense Counsel; (3) Major Shari Shugart, U.S. Army, Senior Defense Counsel; and (4) Major Matthew Powers, U.S. Marine Corps, Senior Defense Counsel, National Capital Region. The presenters indicated their general perception was that MRE 412 and MRE 513 issues were appropriately considered and resolved at Article 32 hearings and courts-martial. The presenters indicated MRE 412 evidence is often relevant in Article 32 hearings because the hearings are intended to assess the forum in which a case should be resolved in addition to assessing whether probable cause exists for the preferred charges. However, they noted current uncertainty about the application of the constitutionally required standard for admission of MRE 412 evidence at Article 32 hearings. The presenters also discussed how often MRE 513 issues arise in military court proceedings, and the in camera reviews of MRE 513 evidence that occur when such evidence is at issue. They noted that these reviews are often not conducted in the same way across different jurisdictions and among different military judges.

Having received no requests for public comment to the Panel, the public meeting was closed at 4:44 p.m.

CERTIFICATION

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



Elizabeth Holtzman
Chair
Judicial Proceedings Panel

MATERIALS

Meeting Records:

1. Transcript of October 10, 2014 JPP meeting, prepared by Neal R. Gross and Co., Inc.
2. Video Recording of October 10, 2014 JPP meeting, filmed by Cable Satellite Public Affairs Network (C-SPAN)

Meeting Materials:

3. Public Meeting Table of Contents
4. Meeting Agenda
5. Presenter Biographies

Deliberation Materials:

6. Article 120 – Chart: Issues with Statutory Text

7. Summary of Presenters Comments – Assessment of Statutory Text of Article 120, UCMJ
8. Summary of Presenters Comments – Whether Article 120 should be amended to specifically address abuse of authority offenses
9. Summary of Presenters Comments – Whether Article 120 should be amended to bifurcate penetrative and non-penetrative offenses
10. Excerpt Federal Register Volume 77, Number 205, Part II, MCM Amendments Notice, dated 23 October 2012
11. Representative Frankel's "Red Line" version of Article 120, UCMJ
12. Report of Article 32 Investigation (redacted), United States Coast Guard
13. Article 34 Advice ICO ITC Carlos Resendez (redacted), USCG, dated 31 May 2012

Presentation Materials:

14. Comparison of FREs to MREs for Victim Privacy Provisions
15. PowerPoint Presentation by Mr. William Barto, Army Highly Qualified Expert
16. Clifford S. Fishman, Abstract, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records* (2014)

Read-Ahead Materials:

17. Summary of Meeting Read-Ahead Materials
18. Military Rule of Evidence (M.R.E.) 412 (Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition) and Analysis, MANUAL FOR COURTS-MARTIAL (2012)
19. Federal Rule of Evidence (F.R.E.) 412 (Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition) and Advisory Committee Notes, 28 U.S.C.A.
20. Michael H. Graham, *Rape Shield Statutes: Overview; Fed.R.Evid. 412; Mode of Dress, Statements of Sexual Nature or Intention,* 48 CRIMINAL LAW BULLETIN 378 (2012)
21. Michelle J. Anderson, *From Chastity Requirement to Sexuality and License: Sexual Consent and a New Rape Shield Law,* 70 GEORGE WASHINGTON LAW REVIEW 51 (2002)
22. Michelle J. Anderson, *Time to Reform Rape Shield Statutes,* 19-SUM CRIMINAL JUSTICE 14 (2004)
23. Major Shane R. Reeves, *Time to Fine-Tune Military Rule of Evidence 412,* 196 MILITARY LAW REVIEW 47 (2008)
24. *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011)
25. Military Rule of Evidence (M.R.E.) 513 (Psychotherapist-patient privilege) and Analysis, MANUAL FOR COURTS-MARTIAL (2012)
26. Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 65 OREGON LAW REVIEW 1 (2007)
27. Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions*, ÆQUITAS STRATEGIES (May 2013)
28. National Crime Victim Law Institute (NCVLI), *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, VIOLENCE AGAINST WOMEN BULLETIN (June 2011)
29. Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, 2003-SEP ARMY LAWYER 1 (2003)

Materials submitted during Panel Meeting:

30. Statement by Mr. Ryan Guilds, Counsel, Arnold & Porter LLP
31. Statement by Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and attached one-page victim impact statement