

INFORMATIONAL MEMORANDUM

FROM:

TO: Judicial Proceedings Panel

DATE: January 6, 2016

SUBJECT: Selected Proposals from Report of the Military Justice Review Group – Part I: UCMJ Recommendations Relevant to JPP Issues

This memorandum identifies proposals made by the Military Justice Review Group (MJRG) that affect topics analyzed by the JPP. The MJRG was established by the DoD General Counsel at the direction of the Secretary of Defense in October 2013 to conduct a “holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline.”¹ The MJRG issued Part I of its report to Congress on December 22, 2015, which “proposes substantive additions to the UCMJ through 37 new articles, substantive statutory amendments to 68 articles, and includes consolidated draft legislation incorporating all proposed changes.”²

The following MJRG proposals are relevant to the JPP mission and taskings.

SEXUAL ASSAULT

- Article 120 (amendment) Rape and sexual assault generally. The MJRG proposes aligning the definition of “sexual act” in military law with federal civilian law. The current definition of “sexual act” under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. §2246(2)(D)).

The current Article 120 definition of “sexual act” is:

- (a) contact between the penis and the vulva or anus or mouth....; or
- (b) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.³

The new definition of “sexual act” proposed by the MJRG is:

- (a) contact between the penis and the vulva or the penis and the anus...;
- (b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

¹ See MJRG Report, p. 5.

² See MJRG Report p. 5.

³ See UCMJ Article 120(g)(1).

- (c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

The MJRG noted the JPP's ongoing extensive review of Article 120 and deferred on additional consideration or recommendations.⁴

- Article 120a (expand and redesignate as new Article 130) Stalking. The MJRG proposal would expand the current Article 120a to include **cyberstalking**. The proposal also would update current law to include a **definition of "intimate partner"** to cover threats to former spouses and individuals who have been in an intimate relationship with the targeted person.⁵
- Article 120a (redesignation from Article 134) Mails: Deposit of Obscene Matter. The MJRG proposal would migrate the offense of "Mails: depositing or causing to be deposited obscene materials in" from Article 134 (the General article) into an enumerated offense under Article 120a. The offense is a well-recognized concept in criminal law. Accordingly, the offense does not need to rely upon the "terminal element" of Article 134 (that the conduct was prejudicial to good order and discipline or service discrediting) as the basis for its criminality.⁶
- Article 120b (amendment) Rape and Sexual Assault of a Child. The MJRG proposal would amend Article 120b to conform to the definition of "sexual act" in 18 U.S.C. § 2246(2)(A)-(C).⁷

TRAINER-TRAINEE RELATIONSHIPS

- Article 93a (new) Prohibited activities with military recruit or trainee by person in position of special trust. This proposal falls under the Article 93 offense of **maltreatment**, and would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense. This would not preempt the services' authority to issue regulations under Article 92 (Failure to obey order or regulation) addressing matters such as fraternization that involve non-sexual as well as sexual conduct, nor would it preempt charges for rape or

⁴ See MJRG Recommendation 120: Amend the definition of "sexual act" in Article 120(g)(1) to conform it to 18 U.S.C. § 2246(2)(c), pp. 873-74; see also p. 37.

⁵ See MJRG Recommendation 120a: Amend Article 120a to address cyberstalking and threats to intimate partners, and redesignate Article 120a as Article 130, p. 878.

⁶ See MJRG Recommendation 134-94: Migrate the offense of depositing or causing to be deposited obscene materials in the mails (currently under Article 134, the General Article, MCM, Part IV, ¶94), to create a new Article 120a, p. 884.

⁷ See MJRG Recommendation 120b: Amend the definition of "sexual act" in Article 120b(h)(1) to conform it to 18 U.S.C. § 2246(2)(A)-(D), pp. 886-87.

sexual assault under Article 120 that are based upon abuse of one's position in the chain of command to gain access to or coerce another person.⁸

RETALIATION

- Article 132 (new) Retaliation. The MJRG proposal would define retaliation as when a person, **with the intent to retaliate** against any person for reporting or planning to report an offense, or with the **intent to discourage** any person from reporting an offense, wrongfully **takes or threatens to take an adverse personnel action** against the person, or wrongfully **withholds or threatens to withhold a favorable personnel action** with respect to the person. This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).⁹

VICTIMS' RIGHTS

- Article 6b (amendment) Victims' Rights. The MJRG proposes to clarify the relationship between the rights provided to victims under the UCMJ and the **exercise of disposition discretion** under Articles 30 and 34, consistent with a similar provision in the Crime Victims' Rights Act concerning the exercise of prosecutorial discretion. This statute would also conform military law to federal law with respect to the appointment of individuals to assume the rights of deceased, incompetent, or minor victims and would extend recently enacted provisions concerning **defense counsel interviews** of victims of sex-related offenses to cover victims of all UCMJ offenses. Part II of the MJRG Report will consider **rules to implement the rights set forth in Article 6b and other victim provisions** this Report proposes, as well as enhancements to remedial options for violations of these rights. The matters that will be considered in Part II will include, for example: the ability of the victim to be reasonably heard on the plea agreement, pretrial confinement, release, and sentencing (including through an unsworn statement); the victim's input on the disposition of offenses to the convening authority; the right to notice of proceedings and the release or escape of the accused; the right to not be excluded from proceedings absent a required showing; and the right to submit post-trial matters to the convening authority.¹⁰

⁸ See MJRG Recommendation 93a: Enact new Article 93a, pp. 735-38.

⁹ See MJRG Recommendation 132: Enact a new enumerated Article 132 (Retaliation), pp. 980-81; see also p. 38.

¹⁰ See MJRG Recommendations 6b.1-6b.3, pp. 177-80; see also pp. 27-28.

- Article 30a (new) Proceedings conducted before referral. The MJRG proposes to create a new statute, Article 30a, to provide statutory authority for **judicial rulings** on legal issues arising **prior to trial**. The new statute would authorize the President to identify the types of issues appropriate for those proceedings, to establish procedures for such proceedings, and to specify available remedies. The statute would create authority for judicial rulings prior to referral on limited issues that currently must await judicial action until after referral. This authority would permit judicial review of, but not replace, command and convening authority decisions on those matters. Part II of the Report will consider rules to set forth particular issues for pretrial rulings, which could include, for example: review of pretrial confinement actions, requests for mental competency evaluations, requests for depositions, requests for individual military counsel, and ensuring that the **protections afforded to victims under the Military Rules of Evidence are properly enforced** in preliminary hearings.¹¹
- Article 32 (amendment) Preliminary Hearing. The MJRG proposal would focus the preliminary hearing on **an initial determination of probable cause** prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an additional opportunity for the government, the defense, **and victims** to present information relevant to an appropriate disposition of the charges and specifications. The proposal would require the preliminary hearing officer to analyze and organize the information presented in a manner designed to enhance the utility of the hearing to the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities. **The requirement for detailed analysis of this information for use in the disposition process would replace the current requirement for a disposition recommendation.** Consistent with the recently enacted legislation, the preliminary hearing officer will be a judge advocate, **equal to or greater in rank than the most senior counsel**. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.¹²
- Article 34 (amendment) Staff Judge Advocate/Legal Advisor's Advice. The MJRG proposes an amendment to Article 34 that would require **pre-referral judge advocate consultation in all special courts-martial**. Part II of the Report will focus on the rules implementing Article 34, with particular attention to the content of the staff judge advocate's advice **and the responsibility to convey any victim's input in the referral decision**. Part II also will address the content of the staff judge advocate's advice in cases where the staff judge advocate disagrees with the findings of the preliminary hearing officer with respect to probable cause, the form of charges, or jurisdiction.¹³

¹¹ See MJRG Recommendation 30a: Enact a new Article 30a to provide statutory authority for military judges or magistrates to provide timely review, prior to referral of charges, of certain matters currently subject to judicial review only on a delayed basis at trial, p 307; see also pp. 26-27.

¹² See MJRG Recommendation 32: Amend Article 32(a)-(c) by revising the current requirement for a disposition "recommendation" to focus the preliminary hearing officer more directly on providing an analysis of the information that will be useful in fulfilling the statutory responsibilities of: (1) the staff judge advocate, in providing legal determinations and a disposition recommendation to the convening authority under Article 34; and (2) the convening authority, in disposing of the charges and specifications "in the interest of justice and discipline" under Article 30, p. 323; see also p. 29.

¹³ See MJRG Recommendations 34.1-34.3, pp 345-46; see also pp. 25-26.

- Article 54 (amendment) Record of trial. The MJRG proposal regarding Article 54 increases access of **victims of all offenses** to trial records. The statute would (1) require the court reporter, instead of the military judge or the prosecutor, to certify the record of trial; (2) require a complete record of trial in any general or special court-martial if the sentence includes death, dismissal, discharge, or confinement or forfeitures for more than six months; and (3) provide all victims who testify at a court-martial with access to records of trial, eliminating the distinction in the statute that currently provides such access only to victims of sex-related offenses under Article 120.¹⁴

RESTITUTION

- MJRG Recommendation 56.4: Additional study of restitution in courts-martial. Article 6b(a)(6) provides that a victim has the “right to receive restitution as provided in law.” The MJRG did not propose changes to restitution provisions under Article 56, and noted that the **Judicial Proceedings Panel is considering** whether additional options for restitution should be provided in connection with sexual offense proceedings. Noting the limited jurisdiction of courts-martial over personal property and assets, the MJRG noted that it may be necessary to consider options outside the military sentencing process for purposes of developing an effective restitution program. The MJRG Report recommends that development of **any statutory changes regarding restitution take place after the Judicial Proceedings Panel presents its recommendations.**¹⁵

TRANSPARENCY AND INDEPENDENT REVIEW

- Article 140a (new) Case management; data collection and accessibility. The MJRG proposal would establish a new statute, that would require the Secretary of Defense to develop **uniform case management standards and criteria** that also would allow **public access to court-martial dockets, pleadings, and records** in a manner similar to that available in the federal civilian courts. This proposal envisions implementation across the services to ensure ease of access and management of data. In addition to the criticism made by the **Response Systems Panel** regarding the difficulty in gathering and analyzing military justice data, the **Judicial Proceedings Panel** recently recommended that DoD adopt an electronic system similar to that utilized by federal courts to ensure Special Victims’ Counsel and victims have appropriate access to docketing information and case filings.¹⁶
- Article 146 (amendment) The Military Justice Review Panel. This MJRG proposal would enhance the efficiency and effectiveness of the UCMJ by amending Article 146 (Code committee) to establish a blue ribbon panel—the **Military Justice Review Panel**—

¹⁴ See MJRG Recommendations 54.1 – 54.3, pp. 494-98.

¹⁵ MJRG Recommendation 56.4, p. 515.

¹⁶ See MJRG Recommendation 140a, p. 1012-15.

composed of experts in military law and civilian criminal law, to conduct periodic reviews of the military justice system. The Panel would issue its first report **four years** after the effective date of the legislation, **focusing on the implementation of the new legislation. Eight years** after the effective date of the legislation, the Panel would issue its first comprehensive **review of the UCMJ and Manual for Courts-Martial**. Thereafter, the Panel would issue comprehensive reports **every eight years**. Within each eight-year cycle the Panel would issue targeted reports at the midpoint of each cycle, and could issue additional reports on matters referred to the Panel by the Secretary of Defense or Congress. The proposal is based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice. The proposal also relies on the expectation that the Joint Service Committee will continue to conduct its vital role within the executive branch addressing the type of targeted adjustments in law and regulation that are required on a more frequent basis to address specific issues in the law.¹⁷

PROSECUTION STANDARDS

- Article 33 (new) Disposition guidance. The MJRG proposes to clarify the distinction between the **minimum legal requirements for referral of a case to trial by court-martial** under Article 34 (Advice of staff judge advocate and reference for trial) and the separate, prudential issues involving the exercise of disposition discretion by military commanders and convening authorities. This includes a proposal to establish Article 33 (Disposition guidance), which would require the President to direct the Secretary of Defense, in consultation with the Secretary of Homeland Security, to issue non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates and judge advocates should take into account when exercising their duties with respect to disposition of charges in the interest of justice and discipline. These considerations would take into account the guidance in the **Principles of Federal Prosecution** in the **United States Attorneys Manual**, with appropriate modifications to reflect the unique purposes and aspects of military law. A proposed draft of this guidance will be offered in Part II of this Report, to provide a functional decision-making framework for convening authorities, commanders, staff judge advocates and judge advocates to assess the full range of disposition options for alleged offenses under the Code.¹⁸

MILITARY PANEL MEMBERS (JURORS)

- Number of Panel members. The MJRG proposes standardizing the number of members for each type of court-martial through amendments to Article 16 (Courts-martial classified), Article 25a (Number of members in capital cases), and Article 52 (Number of

¹⁷ See MJRG Recommendations 146.1-146.2, pp. 1024 – 31, see also p. 36-37.

¹⁸ See MJRG Recommendations 33.2, pp. 338-39; see also p. 25.

votes required). The MJRG proposes **four members for a special court-martial** (with three votes required for a conviction); **eight members for a non-capital general court-martial** (with six votes required for a conviction); and twelve members for a capital general court-martial (with unanimity on the findings and sentence required for the death penalty).¹⁹

- Panel selection (Article 25 (amendment)). The MJRG would **eliminate the blanket prohibition against detailing enlisted panel members serving in the same unit as the accused** and would permit such members to be detailed under the same conditions applicable to the detailing of officers from the same unit as the accused. Second, the proposal would amend Article 29 (Absent and additional members) to permit the convening authority to authorize alternate panel members, at his or her discretion. Under criteria to be established in the Rules for Courts-Martial in Part II of this Report, the convening authority would have initial **discretion in panel composition to include selection of a panel of all enlisted members**. The proposed criteria also would provide guidance for fulfilling a request by an accused, as under current law, for a panel composed of at least one-third enlisted members or all officers.²⁰

SENTENCING

- Article 53 (amendment) Judicial sentencing. The MJRG proposes, through an amendment to Article 53 (Court to announce action), that **military judges adjudicate the sentence** for each non-capital offense, consistent with the practice in federal proceedings and in the vast majority of states that rely on judges rather than juries to adjudicate noncapital sentences. Judicial sentencing would facilitate the use of parameters and criteria to enhance the potential for greater consistency in military sentencing and provide a better balance between individualized sentences and sentence uniformity. It also would facilitate consideration of a broader range of relevant information in the military sentencing process, and **consideration of victim-impact statements**, including unsworn statements. The judicial sentencing process also would make it easier to employ segmented sentencing, in which any confinement portion of a sentence would be adjudged for each offense, as discussed more fully below. These changes, along with the elimination of instructional issues, have the potential for a considerable reduction in appellate litigation and rehearings in the area of military sentencing.²¹
- Article 53a (new) Plea Agreements. The MJRG proposes to create a new statute, Article 53a (Plea agreements) that would continue those aspects of current practice in which a plea agreement is viewed as an agreement between the accused and the convening authority but that **takes into account proposed sentencing by judge alone and the establishment of sentencing parameters and criteria**. The convening authority would be responsible for entering into an agreement that reflects the interests of the

¹⁹ See MJRG Report p. 30.

²⁰ See MJRG Report p. 30.

²¹ See MJRG Report p. 31.

government in general and the disciplinary interests of the unit in particular. Under the proposal, the **military judge's responsibility** would be to: (1) determine the legality of the plea agreement; (2) adjudge a sentence in accordance with the plea agreement; and, (3) take any other action on the sentence (e.g., make a recommendation on suspension) that is authorized under the rules. The military **judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence.** If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. This proposal also would retain present rules governing lawful terms, including the prohibition on requiring waiver of appellate review.²²

- Article 56 (amendment) Separate sentences for each offense. The MJRG proposal would adopt the practice in federal civilian courts and most state courts of **adjudging a separate sentence for each offense** with respect to confinement and fines. Where appropriate, the military judge would determine a sentence to confinement and a fine for each offense, and when the accused is convicted of multiple offenses, would determine whether terms of confinement should run consecutively or concurrently.²³
- Article 56 (amendment) Replacing broad sentencing authority with sentencing guided by parameters and criteria. Current law authorizes a court-martial to adjudge any punishment, or no punishment at all, subject only to the maximum punishments established under Article 56(a) or by statute, and by any mandatory minimum punishments established by statute. This proposal would replace the current sentencing process with a system based upon published standards developed by a new **Military Sentencing Parameters and Criteria Board.** The Military Sentencing Parameters and Criteria Board would collect and analyze sentencing data to inform determinations of appropriate parameters and criteria for specific offenses. Under the proposal, the Chief Trial Judges of the Services would serve as the voting members of the Military Sentencing Parameters and Criteria Board. **The Board will collect and analyze sentencing data, propose confinement parameters and sentencing criteria** for approval by the President, and **issue other sentencing policy guidance.**²⁴
- Article 56 (amendment) Sunset of mandatory punitive discharge. When sentencing parameters and criteria take effect, this **proposal would sunset the mandatory punitive discharge provisions in Article 56(b).** This would eliminate a current incongruity in the system where designated sex offenses result in mandatory discharge, but there is no equivalent mandatory discharge for other serious crimes such as murder.²⁵

²² See MJRG Recommendation 53a.1: Enact a new Article 53a to provide statutory authority and basic rules for: (1) the construction and negotiation of charge and sentence agreements; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of sentence agreements with respect to the military judge's sentencing authority, p 486; see also pp. 33-34.

²³ See MJRG Recommendation 56.1, page 509; see also p. 31.

²⁴ See MJRG Recommendation 56.2, page 511; see also p. 32.

²⁵ See MJRG Report p. 514.

POST-TRIAL PRACTICE

- Articles 60 through 60c (amendment). The MJRG proposes to simplify post-trial processing of courts-martial in accordance with changes enacted in the NDAA FY 2014. The amendments to Article 60 enacted as part of the NDAA FY 2014 significantly restricted the convening authority's discretion to change the findings and sentence of a court-martial. The proposals in this Report reflect those restrictions by eliminating all redundant or unnecessary paperwork in cases where the recent legislation has removed the convening authority's post-trial discretion. In all general and special courts-martial, the military judge would make an "entry of judgment" incorporating the results of the court-martial and any actions taken by the convening authority within the limited scope permitted by the recent legislation. The proposal also would provide a restricted authority to suspend sentences, which would be in addition to the authority under present law to include suspension as a term in a pretrial agreement. The new authority would be limited to cases where the military judge recommends suspension and the convening authority acts within the scope of the military judge's recommendation.²⁶

APPELLATE PRACTICE

- Article 45 (amendment) Pleas of the accused. The MJRG proposal would establish a harmless error standard for appellate review in guilty plea cases. The recommendation to codify a harmless error review in guilty plea cases is related to proposed changes in appellate review under Article 66(c) which are designed to focus appellate review more precisely on claims of prejudicial error at trial. In that regard, Part II of the Report will recommend related changes to the Manual for Courts-Martial to apply plain error review for matters not properly preserved at trial. The goal would be to require an accused to identify errors in the guilty plea process and bring them to the attention of the trial judge to correct, or face plain-error review on appeal.²⁷
- Article 62 (amendment) Appeal by the United States. The MJRG proposal would permit the government to file interlocutory appeals in general and special courts-martial **regardless of whether a punitive discharge may be adjudged**. It would also clarify that the government may file an interlocutory appeal where the military judge enters a finding of not guilty following the return of a finding of guilty by members. Presently, Article 62 provides a limited basis for government interlocutory appeals.²⁸
- Article 65 (amendment) Disposition of records. Under this MJRG proposal, any sentence that exceeds six months of confinement, includes a punitive discharge, or where the government has previously appealed under Article 62 would be eligible for direct appeal to a Court of Criminal Appeals. This proposal would require the Judge Advocate General to notify the accused of the right to appeal in all such cases and to provide

²⁶ See MJRG Report p. 34.

²⁷ See MJRG Recommendation 45.4: Amend Article 45 to include a new subsection (c) that would codify harmless error review in guilty plea cases, p. 399.

²⁸ See MJRG Recommendations 62.1-62.3, pp. 582-85.

appellate defense counsel with a copy of the record of trial. The appellate defense counsel would then be required to review the record and advise the accused on the merits of filing an appeal. Upon request of the accused, appellate defense counsel would file an appeal on behalf of the accused.²⁹

- Article 66 (amendment) Review by Court of Criminal Appeals. This MJRG proposal would revise the jurisdiction of the service Courts of Criminal Appeals to include all cases in which the accused files an appeal and in which an accused is sentenced to confinement for more than six months, a punitive discharge, or in which the government had filed an interlocutory appeal. It would also transform the automatic appeal of non-capital cases to the service Courts of Criminal Appeals to an appeal of right and eliminate the requirement for the service Courts of Criminal Appeals to review the record of trial in non-capital cases where the appellant has not filed an appeal raising issues for the court's review.³⁰
- Article 67 (amendment) Review by the Court of Appeals for the Armed Forces (CAAF). This MJRG proposal would require appropriate notification to the other Judge Advocates General prior to certification by a Judge Advocate General of an issue for review by the Court of Appeals for the Armed Forces. This change is intended to ensure that each Judge Advocate General has an opportunity to provide meaningful input on the decision to appeal cases that have the potential to impact the law applicable to all the services. The change would not alter the jurisdiction of the Court of Appeals for the Armed Forces over these cases nor would it limit the discretion or authority of a Judge Advocate General to certify issues to the Court of Appeals for the Armed Forces.³¹
- Article 69 (amendments) Review in the Office of the Judge Advocate General. Article 69 provides servicemembers with an opportunity to obtain corrective action in cases that do not qualify for appellate review in a judicial forum before the Courts of Criminal Appeals. Under current law, an accused cannot obtain judicial review of Article 69 decisions unless the case is certified to the Court of Criminal Appeals by the Judge Advocate General. This proposal would provide access to judicial review for servicemembers whose general, special, or summary courts-martial resulted in sentences of confinement for six months or less upon application by the accused. Such access would be at the discretion of the Court of Criminal Appeals following completion of review in the Office of the Judge Advocate General and would run in parallel with the Judge Advocate General's discretionary authority to send such cases to the Court of Criminal Appeals for review.³²

²⁹ See MJRG Recommendation 65.1: Amend Article 65 by requiring that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for an appeal under Article 66, p. 596.

³⁰ See MJRG Recommendations 66.1-66.3, pp. 609-11.

³¹ See MJRG Recommendation 67.1-67.2, pp. 624-26.

³² See MJRG Recommendations 69, p.636.