

Recent Developments in Military Justice

by R. Peter Masterton



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This is an exciting time for military justice practitioners. Public scrutiny and major changes in the law have made this a dynamic area of practice. Two different organizations were recently formed to conduct an independent review of military justice. The Judicial Proceedings Panel, whose formation was mandated by Congress in 2014, has focused on military sexual assault laws and procedures. The Military Justice Review Group, formed by the secretary of defense in 2013, conducted a more wide-ranging review of the Uniform Code of Military Justice (UCMJ).

Judicial Proceedings Panel

In June 2014 the secretary of defense established the Judicial Proceedings Panel at the direction of the U.S. Congress. The secretary tasked the panel to conduct an independent review of military sexual assault laws and procedures. The panel began holding public meetings in 2014, examining a wide array of topics related to its mission. The panel is made up of five distinguished legal experts: Elizabeth Holtzman, a former congresswoman from New York; Barbara Jones, a former judge in the U.S. District Court for the Southern District of New York; Victor Stone, a victim's attorney at the Maryland Crime Victims' Resource Center; Thomas W. Taylor, a professor at Duke University's Sanford School of Public Policy; and retired Vice Adm. Patricia A. Tracey.

The panel issued a report on Feb. 1 on restitution and compensation for military adult sexual assault crimes. Among other things, the panel proposed creation of a new Department of Defense compensation program for crime victims. The panel recommended that the new program be made available to victims who were assaulted after October 2005, when restricted reporting became available. The panel also recommended modification of the Rules for Courts-Martial to provide victims the right to be heard by the convening authority (the senior military officer who sends cases to trial) before he or she approves a pretrial agreement. In addition, the panel recommended additional training be provided to military lawyers and victim assistance personnel on the use of restitution in pretrial agreements.

On Feb. 4, the panel issued a report on Article 120 of the UCMJ,¹ the military statute defining rape and

sexual assault. In this area, the panel was assisted by a subcommittee composed of distinguished members of the legal community, including law school deans, former senior judge advocates, and experts in criminal and sex assault law. The panel's report, which was based largely on the subcommittee's work, included a number of changes to military law.

The panel determined that the current definition of "consent" under Article 120 is "confusing" and "retains vestiges of outdated rape laws." The panel recommended that the definition be changed to clarify that a lack of resistance by a victim does not, in itself, constitute consent. The panel recommended that the president amend the *Manual for Courts-Martial* to specifically allow consent to be raised either as an attack on the government's proof of an offense or as part of a clearly delineated mistake of fact defense. The panel recommended that Article 120 should contain guidance explaining that a totality of the circumstances test applies when determining whether a victim was "incapable of consenting." The panel recommended that the term "bodily harm" in Article 120 be clarified by replacing it with the language "without the consent of the other person." The panel also recommended that the definitions of the terms "sexual act" and "sexual contact" be clarified, modifying the definition of sexual act so that penetration and contact are addressed in separate subsections and recommending that the definition of sexual contact include the use of an object. In addition, the panel recommended a new subsection of Article 120 be created to address sexual assault and abusive sexual contact when an accused has abused a position of authority.

On Feb. 11, the committee issued a report on retaliation related to sexual assault offenses. The panel expressed concern about the lack of data in this area and issued a number of recommendations to improve the military policies for reporting retaliation against sex assault victims. The panel recommended that, while victims should be provided multiple channels for reporting retaliation, that the sexual assault response coordinators serve as a single point of contact within each branch of the military to collect and monitor these reports. The panel recommended implementation of a standardized form to report retaliation and a

means of tracking retaliation complaints beyond the installation level. In addition, the panel recommended that commanders take further action to address retaliation in their ranks.

The panel continues to hold public hearings examining military sexual assault laws and procedures. Additional information can be found at the panel's website: <http://jpp.whs.mil>.

Military Justice Review Group

In October 2013, at the behest of senior leaders from all of the military services, the secretary of defense formed the Military Justice Review Group. The group was led by the former Chief Judge Andrew S. Effron of the United States Court of Appeals for the Armed Forces. Each branch of the military detailed a number of talented judge advocates to the group, which was tasked with a wide-ranging review of the UCMJ, the basic statute that defines military criminal offenses and procedures. The group was also tasked with considering the recommendations of the Judicial Proceedings Panel, which are discussed above.

On Dec. 28, 2015, the recommendations of the Military Justice Review Group were formally forwarded to Congress. The recommendations, which include a proposed act revising the UCMJ, constitute the most comprehensive revision of military criminal law since 1983. The recommendations included 37 additions to the UCMJ and significant amendments to 68 other current provisions in the code. The Review Group's entire report, including the recommendations forwarded to Congress, is available at www.dod.gov/dodgc/mjrg.html.

The recommendations would create a new article of the UCMJ authorizing military judges to handle specified legal issues prior to referral. Currently, a military judge can only call court into session and issue rulings after a case has been referred to trial.² The new provision would enable the judge to handle specific issues earlier in the proceedings, such as search authorizations, requests for mental competency evaluations, requests for individual military defense counsel, requests for depositions and subpoenas, review of pretrial confinement determinations, and enforcing victims' rights in pretrial proceedings.

The recommendations would establish a military judge-alone special court-martial with confinement limited to a maximum of six months and no punitive discharge. This is a significant change to current practice, which gives the accused a right to a jury trial (trial by military members) at all special courts-martial.³

The recommendations would require the secretary of defense to issue "nonbinding 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 and specifications in the interest of justice and discipline." The analysis issued by the Military Justice Review Group explains that this guidance would "draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law." No such guidance currently exists.

The recommendations would expand the authority to issue military subpoenas. For example, it would amend Article 46 of the UCMJ⁴ to authorize an "investigative subpoena" to be issued before referral of charges if a general court-martial convening authority has authorized a trial counsel to do so.

The recommendations would standardize the number of jurors (military members) in a court-martial. The current version of the

UCMJ requires at least five jurors in a general court-martial and at least three jurors in a special court-martial, but allows for more jurors to be detailed to the case.⁵ The proposal would change these numbers by requiring the military judge to impanel eight jurors in a general court-martial and four jurors in a special court-martial. Any additional jurors would be excused at that point, although the recommendation allows alternate members to be impaneled as well. The recommendations would also change the voting percentage to convict in noncapital cases to 75 percent. Currently, a two-thirds vote is required for a conviction.⁶

The recommendations require "learned" defense counsel in capital trials. The proposed act would amend Article 27 of the UCMJ⁷ to add language requiring that "[t]o the greatest extent practicable, in any capital case, at least one defense counsel shall ... be learned in the law applicable to such cases." The proposal would authorize hiring civilian counsel to fill this role, if necessary. The analysis issued by the Military Justice Review Group explains that this language reflects the "standard applicable in capital cases tried in the Article III courts and before military commissions."

The recommendations would significantly change current military sentencing procedures by requiring the military judge to adjudge all sentences. Under current procedures, if the accused is tried by a jury, the jury determines the sentence.⁸ The recommendation would completely revise Article 56 of the UCMJ⁹ to give military judges the authority to impose sentences in noncapital cases using specified sentencing "parameters" and "criteria." The parameters would be a "delineated sentencing range for an offense that is appropriate for a

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typical violation of the offense” based on the severity of the offense, the federal sentencing guidelines, and military-specific sentencing categories. Judges could impose a sentence outside a parameter based upon specific findings warranting a deviation. A special board would be formed to create the parameters. Criteria are “factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.” The recommendations would also require the military judge to sentence the accused separately for each offense he or she is convicted of. Under current practice, the accused receives a single sentence for all offenses of which he or she is convicted.¹⁰

The recommendations contain substantial revisions to the punitive articles of the UCMJ. Many of the punitive articles would be renumbered to more closely group related offenses. Many offenses currently contained in Article 134 (the catch-all provision prohibiting conduct that is prejudicial to good order and discipline or service discrediting)¹¹ would be moved to other portions of the UCMJ. These offenses would be given specific statutory definitions, rather than simply being defined by the president in the *Manual for Courts-Martial*. For example, the offense of false swearing would be moved from Article 134 and added to Article 107¹² (currently the provision prohibiting false official statements). The new offense of false swearing in Article 107 would no longer contain the terminal element of Article 134 (prejudice to good order and discipline or service discrediting conduct).

The recommendations would also create some completely new

offenses. The new offenses include Article 93a, prohibited activities with military recruits and trainees; Article 121a, fraudulent use of credit and debit cards; Article 123, offense concerning government computers; and Article 132, retaliation.

Conclusion

Many of the recommendations mentioned above were included in drafts of the Fiscal Year 2017 National Defense Authorization Act. While the act was still under consideration at the time this article was drafted, many of the above proposals may become law in the near future. These proposals have the potential to significantly change the landscape of military justice practice. ☉

Endnotes

¹10 U.S.C. § 920 (2015).

²10 U.S.C. § 839 (2015).

³10 U.S.C. § 829(c) (2015).

⁴10 U.S.C. § 846 (2015).

⁵10 U.S.C. § 829 (2015).

⁶10 U.S.C. § 852(a)(2) (2015).

⁷10 U.S.C. § 827 (2015).

⁸See 10 U.S.C. §§ 851(a) and 856 (2015).

⁹10 U.S.C. § 856 (2015).

¹⁰*Id.* Rule 1006, MANUAL FOR COURTS-MARTIAL: UNITED STATES, U.S. DEP’T OF DEFENSE (2015).

¹¹10 U.S.C. § 934 (2015).

¹²10 U.S.C. § 907 (2015).

Immigration Law continued from page 12

Immigration Court Is Needed, N.Y. TIMES, (July 12, 2011), www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed.

¹¹Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, BENDER’S IMMGR. BULL. (Jan. 1, 2008), naij-usa.org/wp-content/uploads/2014/06/Urgent-Priority_1-1-08.pdf (citing authorities delegated to the director of the executive office for immigration review and the chief immigration judge, 72 Fed. Reg. 53,673, 53,673 (Sept. 20, 2007)); see also Dana Leigh Marks, *Mischaracterization of Immigration Judges by the United States Department of Justice*, NAT’L ASS’N IMMIGR. JUDGES (May 15, 2016), naij-usa.org/wp-content/uploads/2016/05/NAIJ-position-paper-May-2016-classification-of-IJs.pdf.

¹²*Id.*, see also Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).

¹³Stephen Dinan, *Illegal Immigrant Detention Centers Rife With Abuses, U.S. Civil Rights Commission Report Finds*, WASH. TIMES (Sept. 17, 2015), www.washingtontimes.com/news/2015/sep/17/illegal-immigrant-detention-centers-rife-abuses-us.

¹⁴For non-mandatory custody aliens, immigration judges may continue to detain or release on bond of not less than \$1,500. INA § 236(a). Immigration judges do not have authority to consider or review DHS parole decisions. 8 C.F.R. §§ 1003.19 and 1236.1.

¹⁵*Latest Immigration Court Numbers, as of January 2013: Immigration Court Backlog Continues to Inch Upward in*

January, TRAC IMMGR. (January 2013), trac.syr.edu/immigration/reports/308/#backlog.

¹⁶*Fiscal Year 2017 Commerce, Justice, Science Funding Bill Released*, U.S. HOUSE OF REPRESENTATIVES COMM. ON APPROPRIATIONS (May 17, 2016), appropriations.house.gov/news/documentsingle.aspx?DocumentID=394535.

¹⁷Tovin Lapan, *Computer Problems Lead to Immigration Court Hassles, Scrutiny on Resources*, GOV’T TECH. (May 14, 2014), www.govtech.com/public-safety/Computer-Problems-Lead-to-Immigration-Court-Hassles-Scrutiny-on-Resources.html.

¹⁸See 8 C.F.R. § 1292.3 (2007); Professional Conduct for Practitioners: Rules and Procedures, 65 Fed. Reg. 39,513, 39,522 (June 27, 2000) (“Many commenters expressed their concern that the proposed rule applies only to private practitioners and not to ... service trial attorneys.”); see also Marks, *An Urgent Priority*, *supra* n.11.

¹⁹*Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, APPLESEED (2012), www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.