

Response Systems Panel
Role of the Commander Subcommittee
Minutes of November 13, 2013 Meeting

The Response Systems to Adult Sexual Assault Crimes Panel (RSP) is a federal advisory committee within the Department of Defense (DoD) operating pursuant to the National Defense Authorization Act for Fiscal Year 2013, Section 576(a), the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and other appropriate federal regulations. The Role of the Commander (RoC) Subcommittee of the RSP held a meeting on November 13, 2013, to conduct a review of pending and anticipated legislation concerning sexual assault prevention and response, particularly proposed provisions affecting the disposition authority currently exercised by commanders. The meeting began at 9:40 a.m. and concluded at 12:17 p.m. The transcript of the November 13, 2013 proceedings will be appended and is incorporated herein by reference.

Participating RoC Subcommittee Members:

The Honorable Barbara S. Jones, Chair
Vice Admiral (ret.) James Houck (by phone)
The Honorable Elizabeth Holtzman
Professor Elizabeth Hillman (by phone)
General (ret.) Carter Ham
Colonel Lisa Turner (by phone)
Major General (ret.) John Altenburg
Ms. Joye Frost
Professor Geoffrey Corn (by phone)

Other Participants:

Colonel Patricia Ham, Director
Lieutenant Colonel Kyle Green, Branch Chief
Ms. Shannon Green, RSP Staff Member

Presenters:

Brigadier General Charles Pede, Chief Judge, Army Court of Criminal Appeals
The Honorable Claire McCaskill, U.S. Senator for the State of Missouri

Others Present:

Ms. Maria Fried, Designated Federal Officer
Mr. Jason Rauch, Military Legislative Assistant, Office of Sen. McCaskill
Ms. Ana Marie Rebori, Press Assistant, Office of Sen. McCaskill

After the meeting was opened, Lieutenant Colonel Green began with some brief administrative remarks. As the first presenter, RSP Legislative Analyst Shannon Green provided a review of developments in the current legislative cycle relating to the work of the RoC Subcommittee. Ms. Green answered questions from Subcommittee Members about details of various provisions that have been offered as amendments to the National Defense Authorization Act (NDAA). These include limitations on the discretion of the convening authority under Article 60 of the Uniform Code of Military Justice (UCMJ) with respect to court-martial findings and sentences as well as the requirement that service members convicted of certain sex-related offenses receive a mandatory punitive discharge or dismissal. Members also raised questions about possible unintended consequences of the proposed amendments (e.g., on pretrial negotiations) and whether such consequences had been considered by the drafters.

Next, General Pede provided a comprehensive overview of the Army's understanding of the likely mechanical application, should it become law, of the latest version of the Military Justice Improvement Act (MJIA), which Senator Kirsten Gillibrand intends to introduce as an amendment to the NDAA. General Pede initially noted that his intention was not to pass judgment upon any of the bill's provisions and that he was appearing before the Subcommittee not in his current position as Chief Judge of the Army Court of Criminal Appeals but as the former Chief of the Criminal Law Division of the Office of The Judge Advocate General of the Army.

During his presentation, General Pede frequently referred to a number of visual aids that were also distributed as handouts to the Members. Using Exhibit A, he first explained how a typical Army case moves through the court-martial process, then described several recently-established variations that occur in sexual-assault cases. General Pede then turned to Exhibit D, a general human resources model for the Army that provides a broader context for its Criminal Law Division. Next, using Exhibit B, General Pede provided a general overview of the changes that would take place if the MJIA were implemented. He explained that the MJIA would bifurcate offenses into two groups as enumerated in Exhibit C and that the new O-6 disposition authority would be responsible for certain "serious" offenses, leaving the remaining -- or "excepted" -- "military" offenses to the commander. General Pede also walked the Members through the structure of the MJIA, which was distributed as Document 1, explaining the impact of each provision as previously described in more detail during his presentation.

Following his presentation, General Pede fielded multiple questions from Members of the Subcommittee. The first set of questions highlighted the uncertainty created by the MJIA in cases in which the accused refuses trial by summary court-martial or non-judicial punishment (NJP). Next, General Ham asked whether existing manpower could implement the MJIA. In response, General Pede mentioned various structural questions raised by the proposal, noting, in

particular, that the Army would need 35-50 senior judge advocates with “significant criminal law experience” as required by the MJIA in order to try the “serious” offenses for which the new disposition authority would be responsible. The next area of inquiry, raised by Representative Holtzman, concerned the impact of the MJIA on pretrial negotiations; General Pede explained various complications and ambiguities created by the proposal in this area. As a broader question, Professor Hillman wondered whether the Army had considered the British experience in dealing with such complications during the implementation of the Armed Forces Act of 2006 in the U.K. General Pede responded that the British experience was of limited relevance because the bifurcation set forth in the MJIA was not comparable to the 2006 change in the U.K.

The mechanical application of the MJIA was then discussed in further detail, sparked by specific questions posed by various Members as well as Colonel Ham. In response to the questions, General Pede represented: that the Army currently has approximately 20-25 senior judge advocates with “significant criminal law experience”; that it takes 24 years to grow an experienced O-6 that could serve as a disposition authority under the MJIA; that an accused charged with a “serious” offense covered by the MJIA presumably could still be convicted of an “excepted” offense as a lesser-included offense, although the bill does not explicitly say so; and that the MJIA does not specify who has authority to negotiate pretrial agreements in cases in which both “serious” and “excepted” offenses have been charged.

In addition, General Pede noted which provisions of Article 22, UCMJ (concerning general courts-martial) and Article 23, UCMJ (concerning summary courts-martial), distributed respectively as Documents 2 and 3, would be deleted by the provisions of the MJIA that restrict the individuals who may convene courts-martial. Referring to Document 4, which is the maximum punishment chart included in the Manual for Courts-Martial as Appendix 12, General Pede also directed the Members’ attention to the various Article 134 offenses that carry offenses of less than one year and that therefore are excepted from the MJIA. Finally, General Pede confirmed Judge Jones’s understanding that, under the MJIA, the convening authority would be responsible for detailing defense counsel as well as trial counsel, the military judge, and panel members, which is not currently the case.

Toward the end of General Pede’s presentation, the Subcommittee was joined by Senator McCaskill, who soon thereafter provided remarks about the MJIA from her perspective in the Senate and in light of her past experience with sexual assault cases. Senator McCaskill made various observations about perceived shortcomings of the proposal, including the apparent disconnect between its proponents’ stated goal of increasing sexual assault reporting and the lack of data to support such an increase in Allied countries that have removed disposition authority from commanders.

The senator then took questions from the panel, beginning with Professor Hillman's query as to why so many victims and victims' advocates have emphasized removal of convening authority from commanders as a desired reform. In response, Senator McCaskill pointed out that many of the cases in which commanders mishandled victims' cases occurred long before the DoD's recent attention and reforms and that some victims who oppose removing convening authority from commanders have been pressured into silence. Another question, posed by Representative Holtzman, concerned Senator McCaskill's perception of the practical consequences of enactment of the MJIA. In response, the senator expressed concern about speedy trial issues and, at the same time, emphasized that if the bill does not become law, the RSP will have more time to weigh in with recommendations. Next, in answering a question from General Ham about other proposals about which there was more agreement in the Senate, Senator McCaskill alerted the Members to amendments to Article 32, UCMJ, that soon would be proposed. In this regard, Vice Admiral Houck suggested that when such Article 32, UCMJ, proposals were debated in the Senate, the perspective of defense counsel and the accused be considered along with the prosecution viewpoint.

After a brief administrative discussion among the Members, the meeting ended at 12:17 p.m.

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



Barbara S. Jones

Chair

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Attachments:

1. BG Pede - Document 1 S.1197.pdf
2. BG Pede - Document 2 Article 22 UCMJ.pdf
3. BG Pede - Document 3 Article 23 UCMJ.pdf
4. BG Pede - Document 4 Maximum Punishment Chart.pdf
5. BG Pede - Exhibit A MJ Flow Chart.pdf
6. BG Pede - Exhibit B S.1197 Disposition Matrix.pdf
7. BG Pede - Exhibit C Offenses Requiring Disposition by JA O-6.pdf
8. BG Pede - Exhibit D Army Resources and Relationships.pdf