

SUBCOMMITTEE OF  
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON  
MILITARY DEFENSE COUNSEL  
RESOURCES AND EXPERIENCE  
IN SEXUAL ASSAULT CASES



*December 2016*

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# SUBCOMMITTEE TO THE JUDICIAL PROCEEDINGS PANEL

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December 8, 2016

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of military defense counsel resources and experience in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

  
Barbara S. Jones  
Subcommittee Chair

# Executive Summary

## SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses.

This report summarizes site visit information and the Subcommittee’s subsequent research, and makes findings regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military.

On the basis of the information gathered, the Subcommittee makes the following recommendations:

*Recommendation 1:* The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

*Recommendation 2:* The Subcommittee recommends that the military Services immediately review Service defense organizations’ staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.

*Recommendation 3:* The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.

*Recommendation 4:* The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

# Military Defense Counsel Resources and Experience in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses. Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military’s handling of sexual assault litigation from the men and women who are investigating, litigating, and supporting those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims’ counsel/victims’ legal counsel (SVC/VLC), paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

On the basis of the information received during these site visits, the Subcommittee determined that on several issues, it would have to undertake further research before reporting to the JPP. This report summarizes site visit information and subsequent research regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military. In producing this report, the JPP Subcommittee used information gathered from site visits, information previously presented to the JPP at a public hearing, information derived from the Report of the Response Systems to Adult Sexual Assault Crimes Panel of June 2014, and existing statutory resources.

## I. INADEQUATE STAFFING AND RESOURCES FOR MILITARY DEFENSE COUNSEL

**A. Site Visit Information.** Most of the defense counsel who participated in the Subcommittee’s site visits reported that they are seriously understaffed and under resourced. These accounts were corroborated by comments from prosecutors interviewed during these site visits. At many installations, counsel stressed that a lack of attorneys, paralegals, investigators, experts, and basic resources hinders their ability to handle their caseload, more than half of which, they stated, is composed of sexual assault cases. At one installation, for example, an office at a large military installation with ten defense counsel had only one paralegal.

The most urgent and frequently raised issue regarding defense resources was a persistent lack of defense investigators. Defense counsel explained that in the current system, the Military Criminal Investigative Organizations (MCIOs) will not investigate leads at their request. Even if they were to do so, the information obtained would not be protected by attorney-client or work product privileges (as it would be for independent investigators assigned to work on a traditional criminal defense team). Some defense and trial counsel also expressed concern that MCIO investigators are often unwilling to follow up on investigative leads, thereby affecting the thoroughness of the investigation. And because, as MCIO investigators told the Subcommittee, they are required to be “non-confrontational” in their interactions with victims, potential problems in a victim’s statement (e.g., inconsistencies with other evidence) may not be thoroughly explored.

Defense counsel also noted that as a result of recent statutory changes to the Article 32 pretrial hearing process, fewer witnesses, including the victim, testify at the Article 32 hearing and less evidence is presented, making it more difficult for defense counsel to ascertain pertinent information about the government's case. The combination of this recent change in Article 32 practice and the lack of defense investigators has left defense counsel unable to investigate their cases in what they see as an appropriately effective manner.

The Navy is currently the only Service that employs defense investigators—eight of them worldwide. The other Services lack any independent budget to fund defense investigators, and defense counsel stated that they have to request funding for an investigator from the convening authority or military judge in each case in which they deem an investigator necessary.<sup>1</sup> Defense counsel and prosecutors agreed that these requests are routinely denied. Defense counsel consistently told Subcommittee members during the site visits that they rely on junior paralegals, who are not trained investigators, to help investigate these cases by finding and interviewing potential witnesses. As a result, these paralegals are also less available to carry out those job functions for which they have in fact been trained. Defense counsel mentioned that they do, on occasion, ask their clients to personally hire investigators and experts if the government denies their requests.

Defense counsel noted that their ability to investigate their clients' cases is limited by their demanding trial schedules and by the ethical need to avoid a conflict of interest caused by becoming a potential witness in the case—a problem that may arise if the lawyer is the only person present to conduct a witness interview. If, for example, a witness makes a statement during an interview but then testifies inconsistently at trial, the lawyer would be the only possible witness available to impeach the discrepant testimony. The practical consequence of this situation is that the lawyer becomes a witness in his or her own case, and therefore a substitute, conflict-free counsel would have to be appointed, leading to greater expense, added complication, and likely delay in the trial process, in addition to the possible negative effect on the case of replacing the original defense counsel with a new lawyer unfamiliar with the case. At the same time, if such exculpatory, impeaching testimony is unavailable to the accused, he or she may be denied the constitutional protections of confrontation, the right to present a defense, the right to receive a fair trial, and the right to due process of law. In civilian practice, this problem is largely avoided through the use of professional defense investigators who can conduct the interviews and then testify about them in court as necessary. Feedback from Navy defense counsel about the recent addition of defense investigators was very positive, and they felt it alleviated the problems noted above.

**B. Other Sources of Information Regarding Defense Investigators.** The Response Systems to Adult Sexual Assault Crimes Panel (RSP) reviewed the issue of defense investigators in its June 2014 report. The RSP found that defense requests for independent investigators made to the convening authority or military judge are routinely denied, noting that “military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources.”<sup>2</sup> The RSP received information from a number of civilian public defenders and found that “many public defender offices have investigators on their staffs and consider them critical.”<sup>3</sup> In fact, the former president of the National Association of Criminal Defense Lawyers told a subcommittee of the RSP, “I don’t know a lawyer in the country that does sex offenses without an investigator, except in

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1 *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter MCM], Rules for Courts-Martial [hereinafter R.C.M.] 703(d).

2 REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 153 (June 2014) [hereinafter RSP REPORT], available at [http://responsesystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf).

3 *Id.* at 153.

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the military. Really, there is no such thing.”<sup>4</sup> The RSP noted that these investigators aid defense counsel in locating and interviewing potential witnesses, finding experts, and identifying services to assist the defense in complying with court-ordered treatment. Their work enables defense counsel to prepare for trial and gives attorneys “a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients.”<sup>5</sup> The RSP concluded their review of this topic by making the following recommendation:

**RSP Recommendation 81:** The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.<sup>6</sup>

As reported during the site visits, only the Navy has implemented this RSP recommendation: it has hired eight “defense litigation support specialists,” more commonly known as defense investigators.<sup>7</sup> These defense investigators are civilians with prior law enforcement or defense experience. The Navy’s Director of the Defense Counsel Assistance Program (DCAP) told the JPP that they have made it possible for defense counsel to focus on preparing for trial and getting needed training.<sup>8</sup> He added, however, that the Navy could use more than eight defense investigators.<sup>9</sup>

Also of significance regarding this issue are recent congressional changes that have dramatically altered the Article 32 process, changing it in practice from a pretrial investigation into a preliminary hearing and removing the requirement that a victim appear and testify at the hearing.<sup>10</sup> Prior to this statutory change, the Article 32 allowed for a “thorough and impartial investigation” of the case in which an investigating officer investigated the “truth and form of the charges.”<sup>11</sup> Sexual assault victims were

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4 *Transcript of RSP Comparative Systems Subcommittee Meeting 230* (Jan. 7, 2014) (Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers).

5 *Supra* note 2 at 153, quoting Charles D. Stimson, “Sexual Assault in the Military: Understanding the Problem and How to Fix It” 18–19 (Nov. 6, 2013); *Transcript of RSP Public Meeting 380–81* (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia) (“But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for a while. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client’s guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things—sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word ‘victim.’ When we talk about pre-trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren’t victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it’s legal or on the field, done in order to have a decent—not only a decent, but a zealous defense.”).

6 *Supra* note 2 at 153.

7 *Transcript of JPP Public Meeting 208* (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

8 *Transcript of JPP Public Meeting 208–09* (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

9 *Transcript of JPP Public Meeting 213* (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

10 National Defense Authorization Act for Fiscal Year 2014 [hereinafter FY 14 NDAA], Pub. L. 113-66, 127 Stat. 672 (2013) § 1702(a); National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3292 (2014) § 531(g) makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

11 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(a) and (e).

frequently required to appear and testify at the Article 32 investigation and were subject to cross-examination by the defense counsel.<sup>12</sup> One of the stated purposes of this Article 32 investigation was to “serve as a means of discovery.”<sup>13</sup> Under the new process, the Article 32 preliminary hearing is limited to determining primarily whether there is probable cause to believe that an offense has been committed and that the accused committed the offense.<sup>14</sup> Victims are no longer required to testify at the Article 32 hearing,<sup>15</sup> and frequently do not, and it is no longer one of the stated purposes of the hearing that it serve as a means of discovery. Both trial and defense counsel interviewed during installation site visits referred to the new Article 32 process as a “paper drill,” often with no witnesses being called to testify and only documentary evidence submitted. Counsel expressed the view that because of these changes to the Article 32 process, it is more vital than ever to provide additional investigative resources for defense counsel.

All of the military Services’ chief defense counsel discussed the necessity of having defense investigators to relieve defense counsel and paralegals from the burden of having to conduct their own investigations. The Army Chief of Trial Defense Services noted that an informal survey of defense counsel making requests for defense investigators found that only one in twelve requests was approved in sexual assault cases.<sup>16</sup> One witness told the JPP that the law requires defense counsel to adequately investigate the facts of the case; otherwise, he or she could be found to be ineffective.<sup>17</sup> Several witnesses expressed their view that the refusal to provide defense investigators amounts to depriving the defendants of due process.<sup>18</sup> The Court of Appeals for the Armed Forces has not yet ruled on this specific issue<sup>19</sup> but has discussed an analogous resource, a mitigation specialist for a defendant in a capital case, stating that “[c]ompulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds through the Sixth Amendment, Article 46, UCMJ, 10 U.S.C. § 846 (2000), and Rule for Courts-Martial (R.C.M.) 703(d).”<sup>20</sup>

Some counsel noted during site visits that there is a high acquittal rate in military courts-martial for sexual assault cases—a statistic that may, on its surface, seem to undercut the need for additional resources for defense counsel. However, the ultimate result of a trial, whether conviction or acquittal,

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12 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(g)(2)(A) and (h)(1)(A).

13 MCM, *supra* note 1, discussion to R.C.M. 405(a).

14 FY 14 NDAA § 1702(a).

15 *Id.*

16 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

17 *Transcript of JPP Public Meeting* 197 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). The Supreme Court of the United States held that ineffective assistance of counsel requires the defendant to show that (1) counsel’s performance was deficient, meaning it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). *See Also* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARD 4-4.1 (Am. Bar Ass’n, 3d ed. 1993) on Duty to Investigate.

18 *Transcript of JPP Public Meeting* 242–43 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division).

19 *Transcript of JPP Public Meeting* 246–47 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

20 *See United States v. Kreutzer*, 61 M.J. 293, 305-06 (C.A.A.F. 2005).

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is not the sole measure of whether a process was fair and indeed complied with the due process protections of the Constitution.

**C. Other Sources of Information Regarding Additional Office Staffing and Resources.** In its June 2014 report to Congress, the RSP recommended that military defense organizations be provided adequate funding resources and personnel.<sup>21</sup> In doing so, the RSP found that “maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system.”<sup>22</sup>

At the May 13, 2016, public meeting of the JPP, the Army Chief of Trial Defense Services identified his biggest challenge as not having enough defense counsel, explaining that the number of defense counsel billets has gone down since the RSP met and he can’t fill the ones he has.<sup>23</sup> A Marine Corps witness told the JPP that “there’s a perception of a disparity in resources. And, with all due respect, I’d like to say it’s more than a perception, it’s a reality.” She explained that in the Marine Corps, the prosecution has four highly qualified experts (HQEs), while the defense has only two.<sup>24</sup>

**D. Subcommittee Assessment and Recommendations.** Civilian public defense organizations and private defense counsel routinely rely on defense investigators to locate and interview witnesses, as well as to take other investigative steps. Their assistance enables defense counsel to properly prepare their cases and represent their clients to the best of their ability. According to information from Navy defense counsel, the addition of the eight defense investigators has been tremendously beneficial.

Given the introduction of the SVC/VLC into the MCIO victim interview process, as well as the unwillingness of MCIOs to follow up on leads from defense or trial counsel, the addition of independent defense investigators is more crucial now than it has ever been. The Subcommittee notes that the approval and funding authority for defense investigator requests is the convening authority who referred the charges to court-martial and who may have a vested interest in the outcome of the case. These requests, it should be noted, are denied more than 90% of the time.

Furthermore, as they are no longer able to cross-examine the victim at the current Article 32 hearing and have lost access to the witness testimony and other evidence formerly received at the Article 32 hearing, defense counsel are at significantly greater disadvantage than they were prior to the changes to the Article 32 process. This alteration in procedure makes adding independent defense investigators essential to the fair administration of justice.

The Subcommittee makes the following recommendations:

***Recommendation 1:*** The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense

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21 *Supra note 2* at 38 (RSP Recommendation 82 reads: “The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.”).

22 *Supra note 2* at 38.

23 *Transcript of JPP Public Meeting 215* (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services)

24 *Transcript of JPP Public Meeting 196* (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). HQEs are highly qualified civilian attorneys employed by all Services, except the Air Force, to support litigation and the training of counsel. They serve in limited term appointments.

investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

*Recommendation 2:* The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.

## II. DEFENSE REQUESTS FOR EXPERTS

**A. Site Visit Information.** Defense counsel and others also complained about lack of access to and funding for expert consultants, which puts the defense at an extreme disadvantage. Defense counsel noted that they have trouble getting qualified experts. In the military, defense counsel do not have their own source of funding for witnesses and experts, but must instead request funding from the convening authority. The response to these requests is frequently outright denial or provision of an inadequate substitute for the expert requested. Defense counsel described situations in which they requested a particular expert and were instead provided someone who was deemed to be an “adequate substitute.” The “adequate substitute” often lacked the specific knowledge required (for example, an expert in suggestibility in children might be replaced by a child psychologist who was a generalist). Moreover, if approval for an expert is given, it is often granted not at the outset of the case but rather on the eve of trial, when the expert is much less helpful to developing a theory of defense or assisting with preparation of the defense case. Even if defense counsel are successful in getting a qualified expert, the process of requesting the expert forces them to reveal their case or trial strategy to the government. Defense counsel do not see trial counsel receiving comparable treatment from the convening authority; instead, trial counsel can identify and recruit experts to join the prosecution at will, and readily consult with their experts before the defense receives expert assistance. Several prosecutors on the Subcommittee's site visits concurred that this is a systemic problem.

**B. Other Sources of Information.** Article 46 of the Uniform Code of Military Justice (UCMJ) states that “trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]”<sup>25</sup> Under the Rules for Courts-Martial, in every branch of Service and in every case, defense counsel must request funding from the convening authority, prior to referral of charges, for each specific expert witness or consultant needed. This request must include a complete statement of reasons why the expert is necessary and the estimated cost of employing the expert.<sup>26</sup> If the request is denied by the convening authority, after referral of charges, the request may be renewed before a military judge, who determines whether the expert's testimony is “relevant and necessary” and whether the government has provided or will provide an “adequate substitute.”<sup>27</sup> This request before the military judge happens much later in the process, often close to trial, leaving inadequate time for the expert to fully assist the defense counsel in the preparation of the case.

25 10 U.S.C. § 846 (UCMJ, art. 46).

26 R.C.M. 703(d).

27 *Id.*

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In applying Article 46 of the UCMJ to the issue of designation of expert consultants, the Court of Appeals for the Armed Forces has held that an “adequate substitute” must have qualifications “reasonably similar” to those of the government’s expert.<sup>28</sup>

In comparing military defense organizations and civilian public defenders, the RSP found that some public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.<sup>29</sup> The RSP also found that federal public defenders have specific funding to pay for defense experts.<sup>30</sup> The RSP noted that federal discovery rules generally require civilian defense counsel to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel, who must request their witnesses from the convening authority, through trial counsel.<sup>31</sup> Civilian defense counsel also employ confidential consulting experts whose identities usually remain wholly unknown to the prosecution unless the defense elects to endorse the expert as a trial witness or otherwise injects their expertise into the litigation. This type of consulting expert is essential for defense counsel to receive a candid assessment of the evidence without fear that their investigation will develop inculpatory evidence that will be shared with and used by the government in prosecuting their client.

The Supreme Court of the United States has recognized a constitutional right to expert assistance for defendants with regard to both trial defense and sentencing defense, using the example of a mental health expert: “Without a psychiatrist’s assistance, the defendant cannot offer a well-informed expert’s opposing view, and thereby loses a significant opportunity to raise in the jurors’ minds questions about the State’s proof of an aggravating factor.”<sup>32</sup>

**C. Subcommittee Assessment and Recommendation.** Defense counsel in military organizations, like their civilian counterparts, should have separate sources of funding to employ defense experts, without having to request approval and thereby prematurely divulge their defense strategy to the government.

There is also a tension between what the defense attorney must be able to articulate to the convening authority about the expert’s likely assistance and the lawyer’s need to actually learn from the expert. In this regard, the relative inexperience of military defense counsel can be a particular problem: if they do not already have deep knowledge of the field, they cannot fully explain or clearly articulate why they need the expert or persuasively explain the potential prejudice to their client. Moreover, they should not have to disclose their thinking.

**Recommendation 3:** The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.

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28 *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). The court went on to state, “The absence of such parity opens the military justice system to abuse, because the Government in general, and—as this case demonstrates—the trial counsel in particular, may play key roles in securing defense experts.” The appellant’s brief in this case analogizes this arrangement to “permitting a Major League baseball manager to choose the opposing pitcher in the final game of the World Series.”

29 *Supra* note 2 at 163.

30 *Id.*

31 *Id.*

32 *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985).

### III. DEFENSE COUNSEL STAFFING AND EXPERIENCE LEVELS

**A. Site Visit Information.** The Subcommittee received information from defense counsel that the training they receive is generally adequate. However, there is disparity not only in the experience levels required among the Services but also between Service-level requirements and the actual experience of defense counsel in the field. While the Navy and Air Force require prior litigation experience of attorneys being assigned to defense counsel positions, in the Army and Marine Corps first-tour judge advocates with no experience in military justice or in the civilian criminal justice system are allowed to serve as defense counsel. Though participants acknowledged that such placements are not common, the few who had them found the experience overwhelming and discomfoting. Several junior counsel recounted that in the first or second contested trial of their careers, they served as second chair in a rape case; one counsel then served as lead counsel in his third trial, also involving sexual assault charges. All of these counsel recommended against assigning brand-new attorneys to defense counsel positions. The likelihood that junior counsel will represent clients in serious and complex cases early in their careers is high, because—as participants uniformly reported—sexual assault cases make up most of their caseload. Defense counsel at multiple installations related that the recent addition of HQEs to trial defense services organizations has been very helpful in mitigating the experience gap, but noted that it is unclear whether the funding for these civilian career litigators will continue. In addition, HQEs hold term positions, not permanent ones.

**B. Other Sources of Information.** The RSP reviewed experience levels of defense counsel as part of its June 2014 report to Congress. The following table from that report<sup>33</sup> summarizes experience and training requirements for defense counsel in each of the Services.

*RSP Report Chart on Service Standards for Defense Counsel Experience and Training*

Organization	Experience	Training
U.S. Army Defense Counsel	<ul style="list-style-type: none"> <li>Majority of defense counsel have prior courtroom experience. No specific minimum experience required.</li> <li>Experience sitting “second chair” until supervisor deems fit to try cases as first chair.</li> </ul>	<ul style="list-style-type: none"> <li>Graduate of the Judge Advocate Officer Basic Course.</li> <li>Defense Counsel “101.”</li> <li>Advanced Trial Advocacy Courses.</li> </ul>
U.S. Air Force Defense Counsel	<ul style="list-style-type: none"> <li>The Air Force is unique in that defense counsel are selected in a very competitive, best-qualified standard by the Air Force Judge Advocate General.</li> <li>Most defense counsel arrive with 2 to 5 years of experience working in a base legal office, which includes time as a trial counsel in courts-martial.</li> <li>New defense counsel normally have between 8 and 10 courts-martial trials before starting as a defense counsel.</li> </ul>	<ul style="list-style-type: none"> <li>Specialized courses provided by the Air Force Judge Advocate General’s School.</li> <li>On-the-job training.</li> <li>Group training remains a challenge because of geographic diversity of counsel and length of tours.</li> <li>Out of the 19 Senior Defense Counsel regions, only 3 (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.</li> </ul>

33 *Supra note 2* at 159–60 (slightly modified).

Organization	Experience	Training
U.S. Navy Defense Counsel	<ul style="list-style-type: none"> <li>• Following their first 24-month tour handling administrative separations and other non-judicial issues, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.<sup>34</sup></li> <li>• Military Justice Litigation Career Track officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.</li> </ul>	<ul style="list-style-type: none"> <li>• Once selected, counsel receive additional training, including a basic trial advocacy course focusing on courtroom advocacy.</li> <li>• Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts on forensics and psychology and very experienced civilian defense counsel.</li> </ul>
U.S. Marine Corps Defense Counsel	<ul style="list-style-type: none"> <li>• The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than 3 years of experience as an attorney.</li> <li>• They typically serve 18 months as defense counsel before moving to another assignment.</li> <li>• The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.</li> </ul>	<ul style="list-style-type: none"> <li>• Defense counsel training requirements are set forth in Marine Corps policy. Defense counsel have a basic certification under Article 27(b), the basic lawyer course at the Naval Justice School. And then, at some point, maybe not before they start their official job, but at some point early in their tour, we try to send them to our new defense counsel orientation class which is sponsored by the Naval Justice School.<sup>35</sup></li> </ul>
U.S. Coast Guard Defense Counsel	<ul style="list-style-type: none"> <li>• By memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of Uniform Code of Military Justice (UCMJ) crimes.</li> <li>• In return, four Coast Guard judge advocates are detailed to work at various Navy DSOs on 2-year rotations, which provides another significant source of trial experience to Coast Guard judge advocates.</li> </ul>	<ul style="list-style-type: none"> <li>• Coast Guard Defense Counsel attend Navy defense training.</li> </ul>

Noting the disparities between the Services regarding defense counsel experience and tour lengths, the RSP made the following recommendation:

**RSP Recommendation 86:** The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as lead defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a

34 *Transcript of JPP Public Meeting 205–06* (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program, that all senior defense counsel and many other defense counsel in the Navy are qualified in military justice litigation).

35 *See also Transcript of JPP Public Meeting 186–87* (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel.<sup>36</sup>

According to presentations by the Service trial defense chiefs during the JPP’s May 2016 public meeting, little has changed in defense counsel experience levels since the RSP Report was issued in June 2014.<sup>37</sup>

In the Army, about 20% of attorneys assigned to a defense counsel position have no prior experience.<sup>38</sup> While every attempt is made to avoid assigning a brand-new defense counsel to a sexual assault case, the realities of Trial Defense Services (TDS) staffing sometimes force the assignment of inexperienced attorneys to these cases, though they are able to consult with more senior defense counsel.<sup>39</sup> Underscoring the point, a witness testifying before the JPP in May noted that the accused’s counsel in a given sexual assault case may have less trial experience than the victim’s counsel.<sup>40</sup>

In the Marine Corps, the “vast majority” of defense counsel are serving in their first tour and are often brand-new attorneys right out of law school.<sup>41</sup> Compounding the problem, Marine Corps attorneys serve as defense counsel for only 12 to 14 months before moving to another position.<sup>42</sup> Marine Corps Defense Services attempts to make up for this lack of experience through training (having new defense counsel sit as second chair in several courts-martial before serving as lead defense counsel) and through supervision by more experienced defense counsel.<sup>43</sup>

**C. National Defense Authorization Act for Fiscal Year 2017.** There is currently a provision in the National Defense Authorization Act for Fiscal Year 2017 (FY 17 NDAA), pending presidential signature, which would require the Services to ensure that trial and defense counsel detailed to a court-martial “have sufficient experience and knowledge to effectively prosecute or defend the case” and

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36 RSP REPORT 39, 160–61.

37 *Transcript of JPP Public Meeting* 163–248 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; and CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

38 *Transcript of JPP Public Meeting* 165 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

39 *Transcript of JPP Public Meeting* 165–66 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services) (“[I]deally, you would not want to assign counsel to a sexual assault or any complex case until they’ve completed at least our DC 101 training . . . and served as a lead counsel on one or more less complex cases or at least a second chair on a more complex case. However, the realities of TDS manning and caseload often weigh against such a deliberative developmental process. In those instances where, out of necessity, defense counsel with less than ideal training and experience are assigned to defend sexual assault cases [they receive] guidance and input of their supervisor, the senior defense counsel.”).

40 *Transcript of JPP Public Meeting* 216 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

41 *Transcript of JPP Public Meeting* 185 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

42 *Transcript of JPP Public Meeting* 189 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

43 *Transcript of JPP Public Meeting* 186–88 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

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require the Services to have a professional development process to ensure effective prosecution and defense in all courts-martial.<sup>44</sup> Under this provision, the Services must use a system of skill identifiers or experience designators for “identifying judge advocates with skill and experience in military justice proceedings” to provide oversight of less experienced counsel.<sup>45</sup> The Services would also be required to carry out a five-year pilot program to “assess the feasibility and advisability of establishing a deliberate professional developmental process for judge advocates . . . that leads to judge advocates with military justice expertise serving as military justice practitioners capable of prosecuting and defending complex cases in military courts-martial.”<sup>46</sup>

**D. Subcommittee Assessment and Recommendation.** Most sexual assault cases that go to trial are fully litigated, complicated, difficult cases, and they often involve Military Rule of Evidence (MRE) 412 or MRE 513 motions.<sup>47</sup> Since these cases are less likely than others to be plea-bargained, lawyers have a critical need to draw on trial court advocacy skills; and junior lawyers often have not yet had an opportunity to develop these skills in less serious cases. As reported by several defense counsel during Subcommittee site visits, sometimes defense counsel with little trial experience are called on to defend a Service member accused of serious sexual assault crimes.

If convicted of a sexual assault offense, the accused faces a sentence that could include a punitive discharge and months or years of confinement as well as lifetime collateral sanctions related to the sex offense registry and evolving state, local, and international policies.<sup>48</sup> The consequences for the accused of having inexperienced defense counsel could be catastrophic and life changing.

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44 S. 2943, National Defense Authorization Act for Fiscal Year 2017, Report 114-840 (Conf. Rep.) §542, Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.

45 *Id.*

46 *Id.*

47 MCM, Military Rules of Evidence [hereinafter MRE] 412 (updated June 2016) is titled “Sex offense cases: The victim’s sexual behavior or predisposition” and is the military’s so-called rape shield law. MRE 513 is the psychotherapist-patient privilege rule.

48 *See generally*, ABA NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, *available at* <http://www.abacollateralconsequences.org/agreement/?from=/map/>; in February 2016, President Obama signed “International Megan’s Law” mandating a new passport mark and control process for individuals convicted of sex crimes. Numerous foreign countries, including Mexico and the Philippines, have already begun denying entry to U.S. citizens who have been convicted of sex crimes. The maximum punishments for sexual assault offenses specified in UCMJ, Appendix 12, are as follows:

Rape	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Sexual Assault	Dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances
Forcible Sodomy (Article 125, MCM)	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Aggravated Sexual Contact	Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances
Abusive Sexual Contact	Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances

**Recommendation 4:** The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

#### IV. CONCLUSION

There have been numerous changes to law and policy in the arena of military sexual assault litigation in recent years that have serious implications for the quality of defense afforded to those accused of sexual assault. These include the introduction of special victims' counsel/victims' legal counsel for sexual assault victims, development of a Special Victim Investigation and Prosecution capability, and introduction of a less robust Article 32, UCMJ, process that no longer serves as a discovery vehicle for defense counsel. Many of these changes were instituted with the worthy goal of benefiting victims of sexual assault, but it is important that the military justice system continue to respect the rights of the accused. In order to maintain balance in the military justice system, (1) Service defense organizations must be adequately funded and staffed, as is reportedly not the case in all of the Services; (2) defense counsel must have access to an independent funding source for expert witnesses and consultants; and (3) those serving as defense counsel in sexual assault cases must be experienced attorneys.

# ENCLOSURE

## Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	Naval Station Norfolk, VA <sup>49</sup> <b>Joint Base Langley-Eustis, VA</b>	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	<b>Fort Carson, CO</b> Peterson Air Force Base, CO Schriever Air Force Base, CO <b>U.S. Air Force Academy, CO</b>	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	<b>Fort Bragg, NC</b> <b>Camp Lejeune, NC</b>	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	<b>Naval Station San Diego, CA</b> Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA <b>Camp Pendleton, CA</b>	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA <b>Joint Base Andrews, MD</b> <b>U.S. Naval Academy, MD</b> Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea <b>Camp Humphreys, South Korea</b> Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea <b>Camp Butler, Japan</b> Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

<sup>49</sup> Installations in bold type are the actual meeting locations for the site visits.

