

## **Judicial Proceedings Panel Subcommittee Site Visits**

In order to assess the effects of numerous changes in law and policy on the investigation, prosecution, and defense of sexual assault offenses in the military, the Judicial Proceedings Panel (JPP) tasked the JPP Subcommittee with conducting site visits to military installations to talk to the men and women who work in the military justice system.

From July through September 2016, members of the JPP Subcommittee visited military installations throughout the United States and Asia. They spoke to more than 280 individuals representing 25 military installations and all of the Services, including prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, commanders, investigators, and sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the JPP Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have affected the military justice system.

To ensure anonymity, the JPP Subcommittee Site Visit Reports do not identify the branch of Service, installation, command, or name of participating individuals.

The following chart outlines the installations visited and the members of the Judicial Proceedings Panel Subcommittee who conducted the site visits.

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

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	<b>Naval Station Norfolk, VA<sup>1</sup></b> <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	Naval Station San Diego, CA <b>Marine Corps Recruiting Depot San Diego, CA</b> 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

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<sup>1</sup> Installations in bold type are the actual meeting locations for the site visits.

**JPP Subcommittee Site Visit**  
**Tabulation of Interviews Conducted**

**Overall Total Interviewed – 284**

Trial Counsel – 56	Defense Counsel/Defense Paralegals – 47
SVCs/VLCs/Paralegals – 36	Investigators – 43
SARCs/VAs/VWAPs – 62	Commanders – 19
SJAs – 6	Others – 15

1. Site Visit A

Trial Counsel – 6 (2 were senior trial counsel/special victim prosecutors)  
Defense Counsel – 6 (1 was a senior defense counsel)  
SVC/VLC/Paralegal – 2 and 1 paralegal  
MCIO Investigators – 2  
SARCs/VAs/VWAPs – 10  
Commanders – 1

Total Interviewed – 28

2. Site Visit B

Trial Counsel – 2 (1 was a senior trial counsel/special victim prosecutor)  
Defense Counsel – 2 (1 was a senior defense counsel)  
SVC/VLC – 3 (1 was a supervisor)  
MCIO Investigators – 3  
SARCs/VAs/VWAPs – 3  
Commanders – 1  
Company Grade Officers – 2

Total Interviewed – 16

3. Site Visit C

Trial Counsel – 3 (1 was a senior trial counsel/special victim prosecutor)  
Defense Counsel – 5  
SVC/VLC – 3  
MCIO Investigators – 5  
SARCs/VAs/VWAPs – 4  
Commanders – 1

Total Interviewed – 21

#### 4. Site Visit D

Trial Counsel – 2  
Defense Counsel – 2 (both were senior defense counsel)  
SVC/VLC – 4 (1 was a senior SVC/VLC)  
MCIO Investigators – 3  
SARCs/VAs/VWAPs – 5  
Commanders – 1

Total Interviewed – 17

#### 5. Site Visit E

Trial Counsel – 4  
Defense Counsel – 3  
SVC/VLC – 3  
MCIO Investigators – 3  
SARCs/VAs/VWAPs – 4  
Commanders – 1  
SJAs – 1

Total Interviewed – 19

#### 6. Site Visit F

Trial Counsel – 7 (2 were senior trial counsel/special victim prosecutors)  
Defense Counsel – 6 and 1 paralegal  
SVC/VLC/Paralegal – 3 and 1 paralegal  
MCIO Investigators – 7  
SARCs/VAs/VWAPs – 8  
Commanders – 3  
SJAs – 2 SJAs and 10 judge advocates

Total Interviewed – 48

#### 7. Site Visit G

Trial Counsel – 7 (3 were senior trial counsel/special victim prosecutors)  
Defense Counsel – 4 (1 was a senior defense counsel)  
SVC/VLC – 4  
MCIO Investigators – 5  
SARCs/VAs/VWAPs – 8  
Commanders – 1

Total Interviewed – 29

## 8. Site Visit H

Trial Counsel – 7 (1 was a senior trial counsel/special victim prosecutor)

Defense Counsel – 4 (1 was a senior defense counsel)

SVC/VLC – 4

MCIO Investigators – 4

SARCs/VAs/VWAPs – 12

Commanders – 1

Total Interviewed – 32

## 9. Site Visit I

Trial Counsel – 11 (3 were senior trial counsel/special victim prosecutors)

Defense Counsel – 9 (most had prior experience)

SVC/VLC – 4

MCIO Investigators – 6 and 1 civilian PD detective

SARCs/VAs/VWAPs – 5

Commanders – 2

SJAs – 2

Total Interviewed – 40

## 10. Site Visit J

Trial Counsel – 7 (3 were senior trial counsel/special victim prosecutors)

Defense Counsel – 5 (1 was a senior defense counsel)

SVC/VLC – 3 and 1 paralegal

MCIO Investigators – 4

SARCs/VAs/VWAPs – 3

Commanders – 7

SJAs – 1

Military Judges – 3 former military judges

Total Interviewed – 34

## **Judicial Proceedings Panel Subcommittee Site Visit C**

The Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) is a federal advisory committee established pursuant to Section 576(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, as amended by Section 1731(b) of the NDAA for FY 2014 and Section 546 of the NDAA for FY 2015, and in accordance with the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and governing federal regulations.

At the Secretary of Defense's (the Secretary's) direction, the JPP Subcommittee (the Subcommittee) was established under the JPP. The Subcommittee is to support the JPP by assisting with the Secretary's objectives for an independent review of the judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses since the amendments made to the UCMJ by Section 541 of the NDAA for FY 2012.

### Participating JPP Subcommittee Members

Three members of the JPP Subcommittee conducted a site visit to gather information, conduct research, and analyze relevant issues and facts in preparation for future JPP meetings. The site visit started at 8:30 a.m. and concluded at 5:15 p.m.

### Participating JPP Staff Members

LTC Patricia Lewis, JPP Deputy Director  
Ms. Julie Carson, JPP Attorney Advisor  
Ms. Nalini Gupta, JPP Attorney Advisor  
Ms. Stayce Rozell, JPP Senior Paralegal and Session Recorder

Participants are not listed by name as all discussions were conducted in a non-attribution environment. The information below contains opinions expressed by the presenters and does not represent the views of the Department of Defense or the Services.

### Command Brief

The Subcommittee received a short command brief. The presenter believed that the Service had a sufficient number of attorneys and estimated that each attorney handled approximately 10-20 cases, adding that most of the cases are quite complex. He/she noted that there are a lot of sexual assault cases, although he/she could not say whether they were the majority of cases.

### Roundtable with Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs)

The Subcommittee met with two SARCs, one Uniformed VAs (UVAs), and one civilian VA.

Caseload. The civilian VA explained that he/she works full-time as a VA; therefore, he/she is generally able to handle the caseload. The UVA, however, noted that his/her work as a UVA is a collateral duty, and he/she did not have enough time to spend with clients. He/she recommended changing the position of UVA to be full-time. At one installation, 20% of FY15 cases involved male victims, but in FY16 it was down to 15% male victims.

Relationship with Victims' Counsel (VCs). The roundtable participants were asked about the division of responsibilities between SARCs and VCs. They noted that SARCs are a resource for commanders and work to ensure that commanders are following policy. VCs focus on victims' rights. The participants commented on the high amount of turnover of VCs: some victims in the region had already been assigned three different VCs. Some victims feel like the VC is not sensitive to their feelings and may be pushy and ignore what the victim wants in a case. They added that the rotation and culture of mobility in the military often cause delay and degradation of cases.

Delays in Processing Cases. The roundtable participants commented that one of the biggest reasons for delays in sexual assault cases is the amount of processing time for evidence at the U.S. Army Criminal Investigation Laboratory (USACIL), which is the only lab for the entire Department of Defense. The participants also noted that the entire system is backlogged because of the large number of minor contact cases (*e.g.* "butt grab cases"). The MCIO is required to put in the same amount of investigative work for contact offenses as they do for penetrative offenses (*e.g.*, resources and time). The participants recommended that the system be changed so that lower level crimes are processed differently from higher level crimes so that all cases can be resolved more quickly. The long delay on minor cases (for example, one year or more on a "butt grab case") leads Service members to feel that "nothing happens" in response to the report. Previously, police investigators investigated the misdemeanor-level Article 120 cases and could bring them to a Commander's attention for non-judicial punishment (NJP) or another sanction action right away, but now all reports go to the MCIO and must be assessed through a formal prosecution evaluation process.

### **Roundtable with Victims' Counsel**

The Subcommittee spoke with three VCs.

Training. The VCs told the Subcommittee that they are required to go to the Special Victims' Counsel Course held by either the Army or the Air Force. VCs are supposed to attend the course before being detailed; however, in practice, this does not always happen. The VCs noted that an emerging pattern in the Service is that VCs serve as defense counsel prior to their tour as VC. Although a tour is three years in one location, the billet lengths can be much shorter, *e.g.*, 18-24 months as defense counsel or 12 months as a VC. Officially, the VC billet is supposed to be 18 months long but the Service is flexible about this to accommodate efficiencies in turnover.

Caseload. The vast majority of their clients (80-90%) are sexual assault victims. However, in certain circumstances, the VC Program Manager may authorize a VC to represent a victim of a non-sexual assault offense. The VCs told the Subcommittee that they have occasionally represented clients who have experienced sexual harassment. One VC reported that he/she has

approximately 50 cases and relies on the paralegal to conduct weekly welfare checks of the clients. That VC said things “would be not good” without the paralegal’s help.

Transfer of Cases. The VCs noted that they are not able to conclude representation of most of their cases before they transfer to a new position. One VC stated that the previous VC spent about a month transferring at least 30 cases to him/her; during that time, he/she and the previous VC met with victims in all open cases to discuss their concerns and build relationships. These transfer meetings were conducted face-to-face or over the telephone. Another VC reported that he/she will be keeping all of his/her cases going to trial after he/she transfers to a new position as trial counsel and will not begin prosecuting sexual assault and domestic violence cases until the VC cases are resolved to avoid a conflict of interest. One VC reported there can be long gaps between the MCIO interview and other case events so there is usually sufficient time to facilitate a transfer from one VC to another.

Article 32 Preliminary Hearings. The VCs explained that they have not seen any Article 32 preliminary hearings waived; however, most of the hearings under the new rules revolve around paper. Most of the VCs had only one or two clients who testified at the Article 32 hearings and it did not go well so they do not see any purpose to having them testify in the government’s process. The situation where the victim will testify at the Article 32 raises the biggest potential delay related to VC involvement because the hearing must be scheduled around their availability. VCs noted that members of the public do not normally attend Article 32 hearings (in part because of the restricted access to the bases). The new “limited scope” at Article 32 hearings has basically eliminated the hearing as a discovery process. This change has been hard for defense counsel who have a limited ability to obtain investigators.

Military Rule of Evidence (MRE) 513. In light of the recent changes to MRE 513, the VCs are now making the argument that the scope of the constitutionally required exception must be interpreted and applied in a more limited fashion. One VC reported being trained that the revision in MRE 513 means the “constitutionally required” exception no longer applies. The VCs commented that judges are often hesitant to do *in camera* reviews of mental health records under the new MRE 513 standard.

Case Dispositions. VCs noted that the cases they see proceeding to Article 32 hearings and courts-martial are generally cases where there is some corroborating evidence. The VCs had heard of some instances where the convening authorities had referred cases even when the trial counsel had not recommended moving forward or the Article 32 Preliminary Hearing Officer (PHO) had recommended against referral. The VCs noted that victims’ wishes are often taken into account by the convening authority when determining whether to refer the case.

A VC recommended more training for the convening authorities. He/she described a case where the convening authority wanted to move quickly for good order and discipline and thought he could handle the matter himself and do his own investigation. The VC told the commander not to interview the victim without him/her but later found out that they put the victim in a meeting without the VC. The commander asked for a second sworn statement without the VC present and deleted text messages. Because the convening authority is not an attorney, there was no ethical violation. He had good intentions but did not understand the system the way attorneys do.

Adjustment Disorders. Some VCs expressed concern that their clients were being diagnosed with an adjustment disorder, rather than with a disability. As a result, these clients are processed through an administrative separation board and lose retirement benefits.

Expedited Transfers. Because they were stationed in a desirable location, VCs reported that it is rare for victims to request expedited transfers. Rather, they seek transfer to a different unit or section within the installation. More people seek transfers from less desirable locations.

### **Roundtable with Investigators**

The Subcommittee spoke with five investigators.

Division of responsibility between the MCIOs and police investigators. In the Services, the police investigators generally investigate lower-level crimes. All sexual assault offenses are referred to the MCIO. Prior to 2014, police investigators investigated non-penetrative sexual cases. The investigators generally did not agree with the post-2014 change requiring the MCIO to investigate all sexual assault cases. They believe that police investigators get good experience from investigating non-penetrative cases. Furthermore, the change in policy has led to significant delays in the investigative process, as the MCIO is required to use the same investigative protocol for both contact and penetrative cases. The investigators recommended that the policy be changed again to allow police investigators to investigate minor contact cases.

Relationship with VCs. The investigators commented that their relationships with VCs are personality-driven. They noted that the presence of VCs sometimes results in delays in investigations. Furthermore, as a result of the VC program, the MCIO now has less direct interaction with victims.

Expedited Transfers. The investigators were concerned that certain services afforded to victims, such as expedited transfers, may encourage false reporting. The investigators further stated that they did not believe that expedited transfers are always effective; often, victims stop cooperating after receiving an expedited transfer.

Sexual Assault Agents. Only agents specifically assigned to work sexual assault cases are allowed to investigate sexual assault offenses. As a result, sexual assault agents have very large caseloads and get no variety in the types of cases they handle. The MCIO agents recommended that all criminal agents should be allowed to work all crimes, since all agents have training in handling sexual assault offenses.

Lack of Discretion. The investigators no longer have any discretion to determine which cases to investigate. The MCIO is required to investigate all reported sexual assault allegations, even when the victim does not want to cooperate. After the MCIO concludes its investigation, trial counsel must produce a memo which outlines the strengths and weaknesses of the case for the Staff Judge Advocate (SJA). Even if a case is unfounded, the commander must sign a report form. The only situation in which the MCIO does not need to fully investigate a case is when a victim does not articulate a crime – these cases are considered “close only cases”; however, the command must still produce a report for these cases. The investigators recommended that the

MCIO should have more discretion over whether to decline a case and that the MCIO should not be required to conduct a full investigation for cases in which the victim does not want to participate.

### **Roundtable with Trial Counsel**

The subcommittee met with one senior trial counsel and two trial counsel.

Lack of Discretion. The trial counsel noted that SJAs and commanders sometimes send weak cases to Article 32 preliminary hearings and courts-martial against the trial counsel's recommendation. Trial counsel commented that it takes a lot of work to decline a case. Referral in these cases might occur because the victim wants to proceed to trial and because the (non-lawyer) commanders feel pressure and are afraid that decisions to not refer cases will be scrutinized. A trial counsel reported: "We take cases no prosecutor would take." One SJA would simply ask "Does the victim want to go forward?" One trial counsel made a couple of recommendations to address the problem with over-referral: 1) require that the SJA have senior trial experience; 2) remove the SJA from the process of referral and have the convening authority receive the recommendation directly from the trial counsel; or 3) remove the convening authority from the process of referral altogether.

One trial counsel expressed that there has been an increase in reporting which is generally good. The training that Service members are getting is wrong, however, and it has created a problem where people mistakenly believe they were sexually assaulted. Even if the case ends in an acquittal, the innocent accused may have his name dragged through the mud for a year. In one case, even when the victim clarified that a consensual act had occurred, it took a year to clear up and, in the meantime, the accused was pulled out of a specialized unit and lost a year of his career.

Article 120. A trial counsel with experience under prior versions of Article 120 opined that the law was simpler to apply pre-2008, informed by a body of case law. He/she stated that more technical changes to Article 120 would not be helpful at this point.

Article 32 Preliminary Hearings. The trial counsel commented that they sometimes encourage victims to testify at Article 32 proceedings to give the victim practice and strengthen the case, but this is case dependent. The trial counsel believed that, given the limited scope of the new Article 32 proceedings, it is possible for them to protect the victim by objecting during cross-examination. In general, the trial counsel liked the changes to the Article 32 preliminary hearings, but noted that the proceedings now often just revolve around paper. They have rarely seen Article 32 proceedings waived. Since the Article 32 preliminary hearings no longer serve as a tool for discovery for defense counsel, trial counsel provide discovery at the time of referral, and defense counsel submit additional discovery requests after the Article 32 proceedings. One trial counsel opined that having the victim testify at the Article 32 gives a better sense of what really happened. He/she has never seen a situation where the victim regretted testifying at the Article 32 hearing. More often, they are empowered. Trial counsel must sell the VC on why it is good for the victim to testify at the Article 32 hearing though.

Selection of Preliminary Hearing Officers (PHO) and Judges. The trial counsel discussed the new formalized system for appointing PHOs. They commented that the new formal system is much improved from the old system, where trial counsel had informally selected PHOs and it was often very difficult to find someone to serve as PHO. The new system also takes the task off the plate of trial counsel. Because cases without probable cause have been sent to Article 32 to give victims “a day in court,” trial counsel has to hope that the PHO will make the right decision. The trial counsel also noted an experience gap for some military judges and recommended that attorneys should have more trial experience before becoming judges. One trial counsel acknowledged that becoming a “judge is not career-enhancing.”

Relationship with VCs. The trial counsel noted that VCs have played a valuable role in shielding victims from defense counsel. They also commented that VCs prevent trial counsel from having unfettered access to the victim. Trial counsel felt their relationships with local VCs had been successful and described an open dialogue. They have heard the relationship has been more difficult in other installations.

Defense Investigators. The trial counsel noted that defense counsel can submit requests for investigation through the trial counsel, or, alternatively, can make a request for private investigators to the judge *ex parte*. However, these requests are rarely granted.

Expedited Transfer. The trial counsel believed that the requests for expedited transfer that they have seen are usually legitimate. They have not had a lot of victims who stopped participating in the case as a result of expedited transfer.

MCIO. The trial counsel reported that their relationship with the MCIO has improved over the past years. Trial counsel often work with the MCIO from the beginning of a sexual assault report. The MCIO does not work for the defense.

Experience of Counsel. The trial counsel recommended that junior judge advocates serve as trial counsel before becoming defense counsel. Otherwise, defense counsel do not appreciate the workings of the military justice system. They believe that trial and defense counsel generally have similar levels of experience. They also described a system on both the trial and defense sides in which the senior counsel determines which counsel should be assigned to a case. Civilian counsel are often retained by the accused in serious felony cases.

Pretrial Agreements. The trial counsel noted that they do not usually have pretrial agreements (PTAs) for Article 120 offenses, mainly because the cases are often defensible and the stakes are so high for defendants. However, sometimes penetrative offenses are pled down to contact offenses. The convening authority must approve a PTA. Trial counsel do not recommend a PTA without the victim’s approval. Because the convening authority must approve the PTA, the question remains “what does the victim want?”

### **Roundtable with Defense Counsel**

The subcommittee met with four defense counsel.

Defense Investigators. Defense counsel felt strongly that they had extremely limited resources as compared to trial counsel. They have had very limited success in getting trial counsel to request the MCIO to conduct investigations on defense counsel's behalf, or in getting the convening authority to grant independent investigators to the defense. Trial counsel routinely object to their requests for investigators. The Senior Defense Counsel could only think of one case involving the death of a child where a defense investigator was granted. Moreover, when SJAs see judges denying defense requests, convening authorities are emboldened to continue denying defense requests themselves.

Consequently, defense counsel frequently have to conduct witness interviews themselves despite the risk of becoming a witness in the case and the fact they lack any formal investigative training. The defense counsel also noted that if the MCIO investigates a lead per defense counsel's request, the MCIO shares all information with trial counsel before sharing the information with defense counsel. Additionally, defense counsel reported that their case is driven by confidential and privileged information so laying those facts out to the government to access necessary investigation violates their duties.

Defense counsel also frequently lack the time to do the complete investigations themselves. One defense counsel described the military culture as pushing cases to trial as soon as possible because of the emphasis on "readiness" and moving on. Consequently, motions to continue are unlikely to be granted. Moreover, because of the structure of military litigation, defense counsel must simultaneously prepare the merits and sentencing trials.

Defense Experts. Defense counsel have rarely, if ever, been able to get psychosexual or risk recidivism evaluations for the accused, a practice that is commonplace in the civilian sector. Defense counsel also have trouble getting qualified experts. They described situations where they requested a particular expert, and instead of receiving the person whom they requested, they were given an expert who was deemed to be an "adequate substitute." The "adequate substitute" often lacked the knowledge required for the specific area (for example, an expert in suggestibility being replaced with a general child psychologist). Moreover, if they can get approval for an expert, it does not happen 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. In addition, if an expert has done preliminary work on the case to help defense counsel try to substantiate to the court the need for an expert, when the judge ultimately denies the expert request, the expert (who may have volunteered 10 to 12 free hours of case work) becomes disinclined to engage with defense counsel in future cases. Defense counsel do not see trial counsel receiving comparable treatment from the convening authority with respect to experts. Rather, trial counsel appear to receive all the experts they seek.

Experience of Counsel. Defense counsel noted a large discrepancy in the experience of trial and defense counsel. In particular, they described a lack of experience at the level of Senior Defense Counsel (SDC). The typical rotation for defense counsel is only 18 months and SDCs are often detailed to a new position right as they start to gain substantial defense experience. Even when they have litigation experience, it is often gapped and was not necessarily developed in a defense billet. One of the most senior defense counsel in one region had two years of experience.

Defense counsel contrasted their lack of experience with the significant experience on the side of trial counsel, who use teams composed of experienced counsel to try sexual assault cases.

Another complication is that, to preserve the attorney-client relationship, cases cannot be indiscriminately reassigned so attorneys are cut off from being assigned new cases at approximately 12 to 14 months into their billet so they can try to complete all their cases before they are reassigned.

One defense counsel reported that eight months into his/her first defense counsel billet, his/her third contested trial (and first General Court-martial) was a sexual assault trial and he/she was the lead counsel. His/her first two contested trials were not sexual assault cases so he/she had no sexual assault experience prior to first-chairing the case. That sexual assault trial was the first contested trial ever for the other, even more junior defense counsel. "There was nobody in the back of the room for advice. No expert, no investigator, and two clerks in our office [of ten defense counsel] so we did all the administrative work too."

Highly Qualified Experts (HQEs) are available, but are not designed to meet an enduring requirement and are not civil service positions. Without the HQEs, given the brevity of defense counsel billets there is no institutional knowledge among defense counsel.

Article 32 Preliminary Hearings. Defense counsel referred to the new Article 32 hearings as a "rubber stamp," commenting that the proceedings do nothing to vet the cases that should be referred to general courts-martial. They noted that there are cases where the PHO does not find probable cause, yet the case is still referred to trial (this often occurs if the victim wants to move forward to trial). Defense counsel also commented that trial counsel sometimes schedule the Article 32 proceeding soon after defense counsel receive the charge sheet; therefore, defense counsel have little time to prepare and schedule witnesses for the preliminary hearing. In one case, defense counsel entered on a Wednesday and the government set the case for Article 32 hearing that Friday, forcing defense counsel to use his request for a 30 day continuance. If the Article 32 hearing were not continued, defense counsel would be forced to arraignment before receiving any evidence in the case. Trial counsel will have had the case for 6-7 months but defense counsel is not entitled to discovery until five days before the Article 32 hearing. Then, it is only approximately one month between arraignment and motions hearing and then another one month until trial. Prosecutors will insist any negotiations around a PTA occur before the Article 32 hearing.

There are no witnesses in 90% of the Article 32 hearings and the PHOs do not allow defense counsel to call witnesses. It is a "waste of time." Consequently, the military acquittal rate is much higher than in civilian jurisdictions.

Military Rules of Evidence 412 and 513. Defense counsel have had very limited success in getting *in camera* reviews of mental health records under the new MRE 513 standard. They also noted that trial counsel have tried to expand the scope of MRE 412 to cover non-sexual behaviors, such as whether a victim is in a relationship.

VC Program. Defense counsel commented that their relationships with VCs are case and personality dependent, adding that there have been some cases where the VC would not let defense counsel speak with the victim at all.

Jury Trials. Defense counsel noted many shortcomings of the military jury system: juries do not have to be unanimous, juries often consist of fewer than 12 members, juries are not randomly selected, and it is not an absolute disqualification if a jury member knows the accused. Judges have said “let’s not bust quorum” and, despite receiving equivalent answers from two prospective members, the judge will release one member and not the other if the size of the panel is in peril.

Overall Impressions. In general, defense counsel commented that their clients believe the deck is stacked against them. They stated that the recent changes to military justice have led to disproportionate empowerment of the victim in relation to his/her role in the system, and further added that a victim in military justice proceedings has many rights but no corresponding obligations (such as *Brady/Giglio* obligations). In one case, the VC saw the case was not going well and provided new inculpatory information to trial counsel during the court-martial. Although this meant the information was being disclosed to defense counsel midtrial, the judge gave the defense 15 minutes to review the new information and refused to limit the admissibility of the new evidence.

#### Certification

I hereby certify, to the best of my knowledge, that the foregoing is accurate and complete.

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Member, Judicial Proceedings Panel Subcommittee