

## **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 F**

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

Four members of the JPP Subcommittee participated in site visits to gather information, conduct research, and analyze relevant issues and facts in preparation for future JPP meetings. On the first day, the site visit started at 8:30 a.m. and concluded at 4:30 p.m. On the second day, the site visit started at 8:30 a.m. and concluded at 5:15 p.m.

### Participating JPP Staff Members

Ms. Nalini Gupta, JPP Attorney Advisor  
Ms. Terri Saunders, 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

A senior officer from the command welcomed the participants. He provided the members with an overview of the base population and the base's relationship to the community. He briefly discussed sexual assault issues and informed the members that no registered sex offenders reside on the installation.

At the Academy, the members met with the Academy Superintendent, as well as the Commandant of Students and Staff Judge Advocate (SJA). The Superintendent discussed ways the Academy is trying to combat sexual assault in the context of the unique environment of a Service Academy. The Superintendent informed the members that they have targeted training in this arena to high-risk populations – such as the athletic department – and have succeeded in

reducing the percentage of sexual assaults from this department. The Superintendent discussed the diversity of the student population and their attempts to teach personal boundaries and respect.

### Roundtable with Trial Counsel

Over the course of the two-day site visit, the Subcommittee spoke with seven trial counsel stationed in and around the area. The group consisted primarily of junior base-level trial counsel, but also included a senior prosecutor and a counsel with extensive previous experience prosecuting and defending sexual assault cases. Trial counsel estimated that 55-60% of their cases come within Article 120.

- Training and Experience. Everyone in the group attended their Service's basic lawyer training at their respective JAG schools. Additionally, several attorneys had attended trial advocacy courses and advanced sexual assault training for criminal investigators. Overall, the counsel felt that the training they had received was very good and helped make up for their lack of experience. One counsel observed that with all of the recent changes any "institutional knowledge is gone." Another counsel noted that their Service's defense counsel and VCs were more experienced than trial counsel and that often the most experienced counsel within a base legal office were pulled to fill these positions. With the exception of the two counsel mentioned above, most of the attorneys did not have very much experience trying sexual assault cases, but noted that a more experienced senior counsel sat with them on all sexual assault cases. Some counsel noted that having a dedicated sex crimes prosecutor was working very well at their base. However, several other counsel noted that senior counsel were difficult to coordinate with prior to trial, due to their busy litigation schedules, and that they come in only several days before trial; therefore, almost all of the trial preparation is done by junior counsel. Several counsel noted that in their Service, many attorneys do not try cases after their second or third assignment unless they are selected to continue as a senior trial or defense counsel. They noted a disincentive to volunteer for these senior trial and defense counsel positions as those positions require travel well in excess of 200 days per year. Therefore, a lot of attorneys cease trying cases just as they become more experienced litigators.

- Initial Disposition Withholding Policy. Counsel universally stated that this change in policy has had very little impact in the prosecution of sexual assault cases.

- Investigations. Many trial counsel noted that military investigators often do not investigate important leads and provide incomplete reports of investigation. Trial counsel stated that once an investigation is closed, investigators are extremely reluctant to reopen the investigation to follow up on a lead, as it may adversely affect their ability to meet the established time deadline metric for completing their investigation. Counsel said this was a problem both during the pendency of the case if they decided that there was more investigation that needed to be done, as well as during a trial. Trial counsel stated that they felt that some of these problems were a result of the military criminal investigative organization (MCIO) being understaffed and having too many cases to investigate at one time, a problem that is exacerbated when the cases are sexual assaults as they are more involved and time-consuming.

- Victims' Counsel (VC) Program. Trial counsel generally held positive views of the VC program and noted that victims were generally very happy to have their own counsel. They observed that sometimes victims wanted VCs before proceeding with the investigation but, if none were readily available, physical evidence may deteriorate before the victim would provide it. Trial counsel felt it was helpful to have another attorney explain the legal system to the victim and "hold the victim's hand" through the process; however, several counsel expressed the view that the VC often interfered with their relationship with the victim. Some trial counsel stated the VCs sometimes interfered with their ability to interview the victim or go over testimony with the victim prior to trial. They expressed that it would be much more helpful to them to be able to just pick up the phone and talk to the victim if they have a question or want to go over the victim's testimony, rather than having to go through the VC, who may not be available to coordinate interviews based on their own court schedules, or who may advise their client to not agree to another interview with trial counsel. This sometimes results in the trial counsel and victim both being unprepared during trial. Trial counsel stated that VCs routinely appear on Military Rule of Evidence (MRE) 412 issues and almost always are there to help the government; however, occasionally, the VC will take a position that is antagonistic to the prosecution, such as when the government believes the MRE 412 evidence will make their case stronger but the victim opposes the presentation of any additional information concerning his/her sexual history.

- Military Rules of Evidence. Some of the participants had concerns about the recent modification to Military Rules of Evidence 513 that removed the "constitutionally required" exception. They noted that the issue of whether the exceptions to MRE 513 must be read in light of the Constitution is currently pending before the appellate courts, and counsel are awaiting guidance from the courts.

- Sexual Assault Case Disposition. On both days, the trial counsel expressed concern that with all of the recent changes to law and policy, such as the introduction of the VC program and the changes to the Article 32, UCMJ procedure, the due process rights of the accused may be harmed. One trial counsel expressed concern that the pendulum had swung too far and that the new policies are "hurting the rights of the accused without better results for victims." Trial counsel noted there was a perceived pressure on commanders and judge advocates to refer cases to court-martial that should not be referred because of weak evidence, victim credibility issues, and other reasons. Because of the low standard of probable cause at the Article 32 preliminary hearing and increased scrutiny of the military's handling of sexual assault cases, several trial counsel expressed their view that commanders were under pressure, or at least perceived pressure, to refer even weak cases to court-martial. They expressed that once the probable cause standard was met, many commanders felt it was easier to send the case to trial, regardless of the recommendations of the Article 32 officer or the strength of the evidence, rather than face questions from leadership above them about why they did not refer the case. They noted that the military is referring cases that civilian prosecutors would never take to trial. Several trial counsel expressed concern that referring these weak cases to trial resulted in more acquittals, which can be difficult for the victim in the case, and may also dissuade other victims from reporting their assaults or pursuing them through the military justice system. One trial counsel explained how victims can be traumatized after they deal with long delays prior to trial and still do not get a guilty verdict in the end. Some counsel suggested a higher standard for referring cases to trial,

such as probability of obtaining a conviction, rather than simply meeting the threshold of probable cause.

One trial counsel observed that there is a perception among panels that incapacitation is “black and white” and that one drink means the victim could not consent. He also expressed concern that panel members think the fact a case has made it to court-martial means it has already been thoroughly vetted despite the fact that the new Article 32 process provides little opportunity for meaningful evaluation of the evidence. Another trial counsel stated that there is no longer a mechanism to filter out what should not go to trial, commenting that “Article 32 used to be a gateway and the [Preliminary Hearing Officers (“PHOs”)] could say the case shouldn’t go to trial. Now, [PHOs] feel they are not free to suggest [that the case not] go.” Yet another trial counsel observed that commanders feel they will face less scrutiny if they push the cases forward so they will go forward whenever the Article 32 PHO finds probable cause.

Finally, one trial counsel noted that Article 120 cases can no longer be plea bargained like other types of cases. On the one hand, the accused will not want to enter a guilty plea and become a registered sexual offender for an unwanted over-the-clothes buttocks touch at a dance club. On the other, pretrial agreements are closely scrutinized and pleading the case to a non-sex offense is very difficult in practice.

- New Article 32 Procedures. Trial counsel noted that victims often elect to not testify at Article 32 hearings and are therefore unprepared at trial when they face difficult questioning for the first time. However, trial counsel did indicate that some victims still choose to testify at Article 32 hearings, despite not being required to do so. One trial counsel suggested that testifying at the Article 32 gives victims an opportunity to practice, fill holes in the case, and helps victims better understand the process. Several counsel also recommended that the Article 32 hearing be closed, to protect victims, or that the military go to a grand jury system. At the Academy, in particular, trial counsel noted there were high levels of media interest and local news reporting in Article 120 cases.

- Forensic Evidence. Several trial counsel expressed frustrations about the lengthy turnaround time for forensic evidence going to the lab. They stated that it takes six months to get the results of DNA testing unless they prefer charges. If they prefer charges, then the testing gets expedited to approximately a month, but then they have had to make a decision to prefer charges before they knew what their evidence will be. Some noted they felt they had no choice but to prefer charges in cases where they did not feel they had sufficient evidence in order to increase the priority level of DNA or other forensic evidence, such as digital evidence, at the labs.

- Scheduling. Some counsel expressed that one of their biggest challenges was scheduling Article 32 hearings and courts-martial, given the number of people now involved in these processes (including trial counsel and senior trial counsel, defense counsel and senior defense counsel, VCs, and judges). They noted that a lot of time was spent doing tasks related to courtroom administration rather than preparing for trial as the judge who flies in to do the trial does not bring any staff and there is no court clerk in the courtroom during a trial. Trial counsel felt it would help their ability to try their cases more effectively if they were freed up to just

concentrate on doing so. Some counsel recommended creating permanent federal judge positions for courts-martial as a means of improving this problem.

### Roundtable with Defense Counsel

The Subcommittee members spoke with six defense counsel and one defense paralegal. They described half their caseload as Article 120 cases.

- Training and Experience. The defense counsel generally felt that they received very good training. Like their trial counsel counterparts, junior defense counsel often utilize more experienced senior counsel when litigating sexual assault cases. Defense counsel noted they typically have a tighter-knit community than trial counsel and that defense counsel frequently share motions, tips, and lessons learned on their cases. They also expressed frustration that the Defense Counsel Assistance Program (DCAP) is not staffed as well as the Trial Counsel Assistance Program (TCAP).

One defense counsel noted that the training of trial counsel varies by installation; at her previous base, trial counsel received robust training, including mock exercises and “murder boards.” However, at other bases, trial counsel receive less training, leading them to sometimes make simple errors during trial.

- Resources. Defense counsel universally noted the difficulty of gathering evidence for use by the defense in trial. They reported that they did not have their own investigators and that the military investigative organizations would not investigate on their behalf. They stated that their requests to have an investigator appointed to the defense have been denied in almost every case. One defense counsel described an experience he had when he was trial counsel of being told by the senior trial counsel and department head to oppose all defense requests for investigation, especially if it involved looking into the victim’s background. Without investigators, defense counsel stated that they must investigate on their own and they simply do not have the time or resources to do so adequately. By conducting their own investigation, there is also a risk that they will become a witness in the case. They also stated that they felt that MCIO investigators sometimes feel pressure not to do any investigation that might hurt the prosecutor’s case – including investigating the victim – as that might discourage the victim from continuing with the prosecution. A concern was expressed that some MCIO investigators are not trying to find out what happened, but are just trying to find enough evidence to have probable cause.

Defense counsel also remarked that they often have inexperienced paralegals assigned to their offices but they believe that other Service paralegals receive more training. Troublingly, defense counsel often rely upon these paralegals to act as investigators despite the paralegals lacking any training or experience in interviewing witnesses. Defense counsel asserted that the accused cannot defend himself/herself without access to adequate information and investigation.

- Expedited Transfers. Defense counsel at the Academy brought up the difficulty at the Academy of effectively separating the alleged victim and the accused during the pendency of an investigation and/or prosecution. They said they cannot just transfer a victim to another base, as can be done on other installations. The Academy can and does move the accused to a particular

area of one dorm that they said has come to be known as the “rapist colony,” a problem in itself. Further, moving the accused to a particular dorm does not eliminate the victim and accused from running into each other because there is only one dining hall and one academic building.

- Reports of Investigation. Several defense counsel noted that VCs often receive the report of investigation before they do. This contributes to defense counsel’s feeling that the deck is stacked against their clients. They also noted problems with some agents in the MCIO who refused to investigate the victim’s claims. One defense counsel reported his perception when he worked as trial counsel that it seemed like the “MCIO’s mission is to get to probable cause, not determine what happened.” He has had MCIO agents ask him “what do I need to get PC?”

- New Article 32 Procedures. Modifications to the Article 32 process have dramatically changed defense practices. Some defense counsel waive the Article 32 preliminary hearing as they believe that there is no real benefit to their client; however, a number of defense counsel stated they continue to litigate Article 32 hearings, including requesting numerous witnesses, as they have in the past. There seems to be a lot of variety in practice across installations. For example, in some places, the hearing has been almost completely eliminated in favor of a paper review process despite the ongoing relevancy of credibility evidence at an Article 32 hearing. One defense counsel referred to Article 32 as a “speed bump,” noting that even when the PHO finds no probable cause, the prosecution would still recommend going forward to court-martial. Another defense counsel expressed a preference for the prior system where the line officer presiding at the Article 32 proceeding “had no dog in the fight.” In contrast, in the new system, the PHOs are junior officers who do not want to recommend against trying a case because of political pressure.

- Sexual Assault Case Disposition. Defense counsel echoed trial counsel complaints that commanders and judge advocates face perceived pressure to refer even very weak or non-meritorious cases to trial, even when the Article 32 preliminary hearing officer recommends against referral. They stated that whatever the victim wants will be supported, despite the evidence in the case; they also voiced concerns that too much weight is given to the victim’s wishes rather than a fair assessment of the strength of the case. Many of the defense counsel expressed the opinion that the choice in any case seems to be either do nothing or go to court-martial, even for very low-level offenses. They felt that commanders and SJAs often will not entertain appropriate alternate dispositions, administrative discharges, or pretrial agreements in sexual assault cases in the current politicized climate for fear of being seen as “soft on sexual assault.” They also stated that no deal will get approved unless the victim agrees with it and they felt that soliciting a victim’s input was appropriate but that a victim should not have such approval power. When the weaknesses of the case become apparent on the eve of trial, the cases are sometimes resolved with dispositions such as adultery pleas. Importantly, defense counsel observed that the oversight/prosecutorial discretion that is lacking in Article 120 cases remains intact for other types of charges. With regard to allegations of lower level sexual assaults such as the grabbing of someone’s buttocks at the Academy, defense counsel said that they would like to see an alternative to the court process and that they thought that another Service may have such a process in place at their Academy.

- VC Program. Defense counsel also noted that with the addition of the VC, the accused often feels outnumbered in court as the VC's position is often aligned with that of the prosecutor. Two defense counsel recounted a trial in which the VC was handing the **SVP** notes to assist the **SVP** in his redirect of the victim. They described situations where the VC would hide exculpatory information about the victim within the "work product privilege" and then selectively provide inculpatory information to the prosecutor.

- Military Rules of Evidence. Defense counsel noted that the recent change removing the "constitutionally required" exception from Military Rule of Evidence (MRE) 513 has made it much more difficult for defense counsel to get mental health records of the victim. Defense counsel have difficulty even meeting the threshold required to have the evidence reviewed *in camera* by the military judge and, consequently, they cannot get the sealed records into the court file for purposes of appellate review. This issue of whether the exceptions to MRE 513 must be read in light of the Constitution has been met with mixed interpretations by the trial judges and is currently pending before the appellate courts; counsel are awaiting these decisions. Defense counsel did not note a significant difference in MRE 412 litigation and noted that MRE 412 arises in almost every sexual assault court-martial.

- Military Justice Track. When asked how they would improve the system, some defense counsel suggested: 1) having a judiciary track for judge advocates because judges are currently rotating off the bench at three years; 2) requiring SJAs to have defense experience; and 3) having a military justice track that is not solely focused on prosecution experience but rather requires experience on both sides of a criminal case. They observed that people abandon work in military justice rather than developing expertise because they are thinking about the negative impacts on their military career.

#### Roundtable with Victims' Counsel (VC)

The Subcommittee spoke with three VCs and one Victims' Paralegal. The VCs stated that their Service is going to have two VCs and one paralegal at each base where VCs are located. The other Service's VC said that the VCs have no paralegal and over twice the number of victims as the average base of the other Service; the VC noted that VCs really need a paralegal to be able to handle all these victims effectively. The VCs felt that they received very good training. While VCs of one Service operate under an independent chain of command, in another Service, the VCs still work for the SJA. The VCs felt this could potentially have a chilling effect on the VC as he or she may fear arguing too vehemently against government interests. Additionally, VCs felt that their term as VC was too short – often lasting only six months to a year in contrast with a two-year VC assignment for counsel in another Service or a three-year assignment for their paralegal. This turnover makes it difficult for victims to develop relationships with the VC as the VC may change several times in the course of litigation, requiring the victim to bring multiple VCs up to speed on case issues and his/her ongoing needs. They did note, however, that the experience level of VCs has dramatically improved. In one Service, VCs are required to have litigation experience prior to assuming the role of VC and then they take a 1.5 week course at the JAG school. One VC commented that the job is "so much bigger than military justice, that's a small piece." He also expressed that many of the Article 120 allegations are "touching" cases and few make it to court because victims do not want to participate. He voiced that

sometimes there is touching before the victim says “no” but by that point, because it was unwanted, it is already a sexual assault. The VCs generally approve of the new Article 32 procedures which do not require the victim to testify, but some did note that the new Article 32 hearings are just a “rubber-stamp” and the changes have had negative consequences on the accused. One VC called Article 32 proceedings a “waste of time” in their current form. Another noted that the wishes of the victim usually dictate whether the case goes forward or not, regardless of the Article 32 process. Multiple VCs acknowledged that their roles impede the rapport between the victim and trial counsel but felt that was appropriate given their duty to the victim and ethics. One VC said he would like to see investigators work more as a team with the prosecutors in terms of how the investigation should proceed; he thought that would be better for the case and better for the victim.

### Roundtable with Investigators

The Subcommittee spoke with seven investigators from the MCIOs. The investigators noted they received excellent training in the sex crimes investigators course and that this training helped them confront their biases against the victim. One investigator stated 60-80% of his caseload are Article 120 cases. Investigators stated they often feel overwhelmed by the frequent policy changes they are required to review and suggested that videotaped training or video teleconference sessions would be more beneficial than simply reading written policies as they are implemented.

- VC Program. While the investigators agreed that VCs were beneficial to victims, they also felt that VCs hindered their ability to conduct their investigations. MCIO agents noted that they are now required to notify a victim of his or her right to a VC before being interviewed. Therefore, depending on how quickly it takes for the VC to approve the victim’s participation in the interview, the investigators fear that valuable evidence may be lost. The delay in response from VCs can vary from days to months. If inconsistencies in the victim’s statement come up during the course of the investigation, the investigators must continuously go through the VC to ask to clarify the points with the victim. The investigators stated that the VC would typically ask for the investigators’ questions to be sent in writing in advance of any interview with the victim, and often would not allow the investigators to speak to the victim more than once or would not respond to the investigators’ requests. They thought that better education for the VCs on how some of the things they do in an effort to protect their victims can actually hurt them and their cases would be useful and they expressed the opinion that as more trial counsel become VCs, this would help this problem. They gave the example of a VC telling a victim that she does not have to give the prosecutor damaging text messages and then the victim getting confronted with them at trial because the accused had them.

- Victim Interviews. The investigators noted that they cannot be confrontational when interviewing the victim and that they often have to accept what the victim says “at face value” without any additional investigation as it is very difficult to re-interview the victim and requires higher headquarters approval. According to MCIO policy, without headquarters approval, they cannot confront the victim and it is not the job of the investigators to expose when a victim is lying; rather, they rely on the court system to sort true and false allegations.

- Perceived Pressure. Investigators noted they also perceive pressure to fully investigate even minor cases as serious Article 120 offenses, such as unwanted kissing, based on the political environment and pressure from Congress. Time spent on these minor cases also means fewer resources are available to investigate more egregious allegations. One investigator noted more incidents of reporting, including alleged victim service members reporting sexual assault in response to sanctions for their own misconduct, *e.g.*, a curfew violation. According to that investigator, 8/10 cases are not legitimate and seem to be arising because of the benefits to sexual assault victims including the ability to be transferred elsewhere and receiving VA benefits later even if the case is unfounded. Another investigator opined that 80% of the cases have a strong foundation but acknowledged that the other 10-20% probably did not happen or may technically meet the legal definition but are not behaviors that the public would think of as sexual assault. One investigator reported that even if a case is unfounded it is flagged in the system and will prevent the accused from being promoted.

- Resources. MCIO agents feel they lack adequate resources and often spend a lot of time completing administrative tasks, rather than investigating cases. They felt that more administrative help would alleviate this burden. MCIO agents also noted that their organization has a dual mission of criminal investigation and counter intelligence and it is considered more desirable to be in counter intelligence. An agent may go from a counter intelligence role at one assignment to a criminal investigative role at another assignment, which may lead to a lack of specialized experience among agents. Some of the investigators suggested that it would be helpful to have a system like a civilian grand jury that gave them administrative subpoena power and also involved secrecy of the proceedings.

- Relationships with Counsel. All investigators noted they have a good relationship with the judge advocate office and JAGs are typically involved in sexual assault cases very early in the investigation.

#### Roundtable with Sexual Assault Response Coordinators (SARCs), Victim Advocates (VAs), and Victim Witness Assistance Program (VWAP) Personnel

The Subcommittee spoke with eight individuals in victim assistance roles. VAs and SARCs receive extensive training: SARCs in one Service receive 80 hours of training and SARCs in the other Service receive training at a 10-day course. SARCs and VAs have heard the rumor that even one drink of alcohol means a victim cannot consent to sex, and they stated they do not teach this and try to dispel this rumor when they hear it.

- Relationship with VCs. The SARCs and VAs stated they have a good working relationship with VCs and were universally supportive of the VC program, noting that the program has made it easier on them to not have to explain the legal process.

- Policies and Culture of the Academy. SARCs and VAs at the Academy noted that in previous years, many of the sexual assault cases arose from the athletic department; however, after targeted training for athletes, this number has gone down. The SARCs and VAs at the Academy also noted that the policies on alcohol and consensual sex are very strict.

Roundtable with Staff Judge Advocates

The Subcommittee spoke with one Staff Judge Advocate. The Staff Judge Advocate made a couple of suggestions for improving the courts-martial process, including (1) ending the jury's ability to question the victim during court-martial, and (2) closing the Article 32 hearings to the public.

Certification

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

//signed//

Member, Judicial Proceedings Panel Subcommittee