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

[1] 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
SVCs/VLCs/Paralegals – 36
SARCs/VAs/VWAPs – 62
SJAs – 6
Defense Counsel/Defense Paralegals – 47
Investigators – 43
Commanders – 19
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 I

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 supports 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.

JPP Subcommittee Members in Attendance

Three members of the JPP Subcommittee conducted site visits to gather information and analyze relevant issues and facts in preparation for future JPP meetings. The first session started at 8:30 a.m. and concluded at 4:45 p.m. The second session started the following day at 8:30 a.m. and ended at 4:30 p.m.

JPP Staff Members in Attendance
Lieutenant Colonel Glen Hines, U.S. Marine Corps, JPP Attorney Advisor
Mr. Dale Trexler, JPP Chief of Staff
Mrs. Meghan Peters, JPP Attorney Advisor

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

Command In-briefs

The Staff Judge Advocate (SJA) welcomed the Subcommittee members. He provided the members with an overview of the tenant units and distinct Convening Authorities at the installation. He also discussed perspectives on the evolution of the Victims' Counsel Program and other recent changes to the military justice system. He observed that when he left as a SJA in 2010, Article 120 cases comprised approximately 40% of the work. Since his return in 2015, with the increased sensitivity to sexual assault, Article 120 cases now account for as much as 75-85% of the total caseload. When asked about the recent statistical analysis showing a 40% acquittal rate on Article 120 charges, he identified a few possible explanations: "we can't be individual lie detectors," and "we take cases that civilian jurisdictions don't," so credibility issues and other problems with the cases need to be addressed by prosecutors at trial. Finally, he explained that there is deference to the factfinder and he would rather see an acquittal than have people say the system was not taking the complaint seriously.

The Staff Judge Advocate from a different Service welcomed the Subcommittee members and

described the relationship between the various legal offices and commands on base. He also detailed some of the issues related to sexual assault that his counsel confront in the courtroom.

Roundtable with Commanders

The Subcommittee spoke with two field-grade commanders about a variety of topics related to sexual assault in the military.

- Prevention Efforts. The commanders observed a marked increase in reporting and awareness of sexual assault. They also explained that taking immediate, visible action is the most important thing a commander can do once he or she receives a report of sexual assault in order to communicate to the unit that such behavior is not acceptable. They advised that junior and senior non-commissioned officers (NCOs) have daily contact with junior Service members, and the problems arise with young and inexperienced leaders harassing junior enlisted service members. Therefore, training programs should focus on junior NCOs as well as the more Senior NCOs who lead them. Although the training was described as "pretty good," one commander noted it can be "too much," and repeating the same message is ineffective. He also expressed that the metrics for success are undefined, *e.g.*, if there are fewer reports of sexual assault, is that good or bad? Finally, one of the commanders noted the challenges involved in receiving new Service members who may be accustomed to looser norms regarding sexual behavior in civilian society.

- Sexual Assault Case Disposition. One commander observed a significant shift over time in that minor 'touching' cases, which may have been overlooked in the past, are now addressed in the same manner as rape or sexual assault crimes. They both expressed that they would prefer to have discretion to evaluate whether minor misconduct could be handled with administrative action, because once a case is reported to the Sexual Assault Prevention and Response Office (SAPRO), the case disposition consistently results in a court-martial or other Uniform Code of Military Justice (UCMJ) action. The commander (O-6) explained that by default he forwards every sexual assault case to the next general officer in the chain of command to make a disposition decision. He shared that he takes this approach "because I would not want to get it wrong and have someone get away, so I send it forward and let the system sort it out." When asked what, if any, pressure they felt to handle sexual assault cases a certain way, the commanders had different viewpoints. One felt the need to do "something" immediately or face harm to his career; the other felt pressure to be transparent throughout the process, not to send every accused to court-martial. A commander agreed that there is pressure to go to trial if the alleged victim wants to go to trial, regardless of the merits of the case.

A commander also noted that the MCIO takes a long time to complete their investigation, around six (6) months, and in the meantime they must temporarily remove the suspect from his/her position and put him/her in a placeholder job which can amount to a loss of talent before the MCIO factual evaluation has occurred. Sexual assault-related allegations are always sent to the MCIO for investigation.

- Expedited Transfers. Participants agreed that expedited transfers illustrate how the focus in sexual assault cases has shifted overwhelmingly to the interests of the victim and that it can be a good thing but there's "another side of the story." One commander said that in his experience, the transfer requests were fueled by ulterior motives, and were not absolutely

necessary on a large installation, which has a population of 50,000 troops. In many cases, an alleged victim could stay on base and be assured of physical separation from the accused. In this context, he noted, a request to transfer to Hawaii seems a "little suspicious." However, in each instance in which an alleged victim requested to move to another installation, he recommended approval.

- Reprisal. A commander noted that currently, members of his chain of command hesitate to counsel or reprimand a sexual assault victim for poor performance of duties out of fear of being accused of reprisal for reporting a sexual assault, even where the Service member has always been a poor-performer and needs correction. A commander agreed that there is a fear that anything could come across as reprisal.

Roundtable with Trial Counsel

Two senior prosecutors, a department head and three trial counsel participated in the roundtable discussion. The senior prosecutors had significant military justice training and experience; one had tried 80 cases, and the other had tried 100 cases. The other counsel had a range of prior experience as trial counsel at smaller locations, and one was serving as a trial counsel for the first time.

At one base, five trial counsel met with the Subcommittee, including the senior trial counsel. Counsel ranged in experience from first - to - third tour O-3s. Sexual assault cases now make up more than half of their docket.

- Training. The majority of the participants indicated they had received enough training to do their job. They all attended the basic course for judge advocates. They agreed that the basic lawyer certification course was a good course, but added that there is no substitute for actually getting in the courtroom and trying cases.

Senior prosecutors come to the position after serving at least one or two tours in military justice, attending a one-week course to cover recent updates in criminal law, and completing a three week rotation shadowing a civilian Special Victim Unit in a mid-sized district attorney's office. One senior prosecutor noted in recent years an overall increase in the number of trial advocacy courses available to military justice practitioners. Another prosecutor pointed out that while every New Prosecutor Course has a three-day block on sexual assault, course timing also matters – some courses, if attended too late, are not valuable.

- New Article 32 Procedures. The trial counsel stated that under the new procedures, most Article 32 hearings are waived. Prosecutors at both installations had strong feelings regarding the new Article 32 format. According to trial counsel, under the old process, weak cases were given a thorough review and could be "killed" at the Article 32 stage. This is no longer the case. Although a few cases are disposed of through alternate means, the vast majority of cases get referred because the new Article 32 functions as a "rubber-stamp" of the Government's case. Additionally, the default position of victims is to refuse to testify, on the advice of their Victims' Counsel.

- Victims' Counsel (VC) Program. All of the trial counsel had positive views of the VC program. They described the program as beneficial because it allows victims to speak frankly to another attorney about the strengths and weaknesses of a case. This was not the

case beforehand, when prosecutors had to deal with victims directly and had to worry about ethical boundaries. Trial counsel felt that all VCs should have prior military justice experience, because in their experience, junior VCs tend to cause delays and other complications.

Prosecutors indicated they felt some growing pains initially as the VC program was implemented, and still occasionally see inexperienced VCs interfering with the prosecution's efforts. Overall, however, the benefit of having VCs is they effectively limit the amount of impeachment material available to the defense.

- Initial Disposition Withholding Authority. The trial counsel experienced a slight increase in the administrative burden of preparing a case for the O-6 initial disposition authority. However, they view the policy favorably because an O-6 typically has more military justice experience and makes decisions more efficiently than an O-5.

- Pressure on Convening Authorities (CAs). The trial counsel offered anecdotal information about their conviction and acquittal rates. They speculated that the recent high number of acquittals is due to weak cases making it past the usual checks and balances in the system. Moreover, convening authorities are afraid not to refer sexual assault cases to general court-martial. On a related note, they expressed the desire for more discretion in sexual assault cases. Prosecutors prepare long, analytical memoranda about weak cases, but those cases continue to get referred despite the advice provided to Staff Judge Advocates and CAs.

Other Service trial counsel agreed their Commanders send cases to trial thinking, "we just want to give the victim her day in court." One prosecutor commented that this should not be the standard for prosecution. More than one trial counsel opined that they feel compelled to try cases when they know they will lose; they added that, in effect, victims are deciding whether cases go to trial. For some, it feels as if the presumption of innocence is eroding. One attorney noted it would be helpful to implement clear, objective prosecution standards like those used by the U.S. Department of Justice. Trial counsel also noted that defense counsel submit requests for alternate disposition (which involve an acknowledgment of guilt, discharge from Service, and a General or Other than Honorable characterization of service) on behalf of innocent clients, because some service members cannot handle the stress of facing a general court-martial. The current trend is the Government prefers charges in very minor cases, even single-event "touching" cases, with a view towards an alternate disposition, because taking no action is no longer an option.

- Military Rules of Evidence (MRE) 412 and 513. Trial counsel see these issues litigated frequently. However, judges usually deny the defense any MRE 513 material under the revised rule. Another Service's trial counsel opined that the rule is now working as intended to keep mental health records out of the courtroom.

- Relationship with Investigators. Trial counsel expressed some frustration with MCIO investigators, who, in their view, tend to stop investigating a case once they receive a probable cause finding from a prosecutor.

<u>Roundtable with Defense Counsel</u>

Most of the defense counsel who met with the Subcommittee were second- and third-tour O-3s with prior experience as a trial counsel. However, one O-3 had no military justice

experience and found the job extremely overwhelming at first. He would not recommend Judge Advocates become defense counsel without prior experience as trial counsel because this pathway has put him at a disadvantage. Defense Services is short-staffed, according to the participants, which results in inexperienced counsel handling rape cases. Sexual assault cases comprise more than half of their caseload.

The defense counsel participants had prior military justice experience, but they explained that their Service assigns first-tour judge advocates to defense counsel billets. These counsel will shadow more senior counsel at first, but handle serious sexual assault offenses early in their tours. They agreed that while their initial training was good, trying cases was the best way to learn the job.

- New Article 32 Procedures. Defense counsel were dismayed by the new Article 32 hearings and often waive them. One Service commented that one reason not to waive the hearing is to try to preserve potential issues for appeal. Defense counsel commented that the victim commonly refuses to testify, and the narrow scope of the hearing has transformed it into a "rubber-stamp" of the Government's case. One counsel observed that the scope of the new Article 32 is so narrow that some preliminary hearing officers (PHO) refuse to examine the victim's credibility in making a probable cause determination. If the PHO does not find probable cause, then the defense counsel negotiates with the VC to support a request for alternate disposition. Defense counsel now feel the whole system allows for opportunistic, false accusations to make it to trial.

- Victims' Counsel. Defense counsel felt that VCs lack military justice experience, and this causes difficulties. For example, VCs do not understand the array of disciplinary options available and what cases are appropriate for court-martial. One defense counsel noted that the combination of new Article 32 hearings and VC's involvement throughout the process effectively limits trial counsel's ability to assess the complaint as well, causing cases to proceed toward trial when they should not. Defense counsel opined that the VCs now perform services previously handled by Victim Advocates and Victim-Witness Liaisons, but the attorney-client relationship complicates the functions of both the Government and the Defense.

Other defense counsel felt the VCs cause delay in resolving cases, complicate discovery matters and force the defense to litigate more MRE 412 and 513 issues. They described VC's intentionally not turning evidence over to the MCIO or trial counsel so that it would not have to be turned over to the defense in discovery and then having the VC selectively give additional evidence to trial counsel during the trial when it was virtually impossible for the defense to review or investigate it. Many VC-related, novel legal issues, such as this example of a VC's tactics, have not reached the appellate courts for review because the merits of many of the Article 120 cases are so weak that the accused is acquitted regardless. Additionally, the VCs deny defense counsel the opportunity to interview victims before trial. Therefore, while defense counsel understand the reason for the VC program, their views of it in practice are mixed.

- Pressure on CAs. Defense counsel unanimously agreed that there is too much pressure on CAs to refer sexual assault cases to trial, and that this pressure filters down to the lower levels of command. Counsel have noticed they are defending more sexual assault cases at court-martial than ever before. Although they see a lot of acquittals (by panels with enlisted representation), they feel this is symptomatic of the political pressure to refer weak cases

which in the past would have been dismissed or handled with lower-level discipline.

One defense counsel presented a lengthy anecdote in which he discovered exculpatory evidence in a sexual assault case, presented it to the trial counsel, and they jointly lobbied the SJA and senior trial counsel to dismiss the case. However, the SJA declined to do so. The case was eventually dismissed about a week before trial, for an unrelated reason – the victim decided at the last minute that she did not want to participate in the trial process anymore. Defense counsel surmised that the "victim" did so because after making the sexual assault complaint, she was relieved of scrutiny for unrelated misconduct, and also received an expedited transfer. The defense counsel felt that but for her last-minute decision, the case would have gone to trial. One defense counsel also said they cannot arrive at a plea deal without a victim's approval.

- MREs 412 and 513. One Service's defense counsel have never had a judge grant an *in camera* review of MRE 513 material in the last year, even when defense argued the information is (still) constitutionally required. Judges routinely rule the defense has not presented a sufficient factual basis for believing the records contain relevant evidence, sidestepping the issue of whether the Constitution still applies. Defense has not obtained records even when they know the victim is going to Behavioral Health due to the alleged incident and, without access to dedicated defense investigators, it is difficult for them to do sufficient background investigation to articulate the kind of detailed proffer mandated by MRE 513.

The other defense counsels' experiences were similar. They have been "totally shut down" when it comes to requests for MRE 513 records, because judges apply the rule very strictly.

- Defense Resources. One Service's defense counsel expressed strong concerns that they lack the resources necessary to represent their clients. They have one junior enlisted paralegal for ten defense counsel, and no defense investigators. They work seven days a week. Their caseloads include separation boards, nonjudicial punishment actions, and courts-martial. In order to cope, they refer clients to other bases, or request a significant defense delay at the outset of a case just to get up to speed.

The other Service's defense counsel also expressed a need for defense investigators as a matter of due process, particularly since the investigative phase typically takes longer than the pre-trial phase when counsel finally receive a case. On a positive note, the defense counsel now have civilian Highly Qualified Experts (HQEs) as advisors at several bases, who bring with them decades of sexual assault litigation experience.

- Initial Disposition Authority (O-6). None of the defense counsel participants indicated this change had any impact on their practice.

- Other Issues. Although recent reforms severely limited the CA's powers to grant clemency in sexual assault cases, defense counsel explained they still have to submit post-trial clemency requests under stringent timelines in every case or he/she is considered ineffective. This is a cumbersome obligation for busy counsel that yields little benefit for clients, so they would like the post-trial rules revised to align with the new Article 60. One defense counsel spent significant time detailing the discovery issues they experienced with specific trial counsel. They felt that whether it is due to inexperience/immaturity or poor training and supervision, it was fundamentally unfair to make the defense litigate basic discovery issues

and then disclose *Brady* information right before trial, or at times not at all, as in one instance where a prosecutor questioned a victim about an undisclosed allegation of misconduct by the accused. Frequently these cases result in a full acquittal, so the Government's actions are not reviewed by appellate courts; trial judges have not effectively addressed this recurring issue.

Roundtable with Victims' Counsel

There are currently approximately six VCs at the installation – 2 to 3 full-time VCs and 4-5 other part-time VCs. Three VCs participated in the roundtable discussion with Subcommittee members. One had handled 60 cases, and the others had handled roughly 10. None of them had prior military justice experience and all were on their first tour. The other VC had served at least one previous tour and had some military justice experience.

- Training. Each VC attended a one-week certification course. The VCs appeared satisfied with their training, and also felt that having a direct supervisor with extensive military justice experience makes up for their lack of practical knowledge. Some VCs expressed that their entry-level course was likewise sufficient, and suggested follow-on courses would be helpful for more experienced counsel.

- New Article 32 Procedures. One VC expressed positive views of the changes to the Article 32 hearings because they provide military victims with the discretion not to testify, and so they have fewer pretrial statements to be cross-examined on at trial. Both Service VCs indicated they routinely advise their clients against testifying at the Article 32 hearing.

- Client Base. Several VCs spoke about the composition of their client base, noting that more than one-third of their clients are now civilian dependents and this number continues to rise. Less than half of their cases are military-on-military, even though that is the type of case around which the Service's messaging and training are based. One VC posited that the trend is spurred by briefings given by the Family Advocacy Program (FAP) office, during which the military spouses learn that "if they report a rape, they will get the kids and house." He said these cases are reported, and the alleged victim retains a VC, but there is no probable cause in the end. He explained it is not as simple as people fabricating an allegation or not – rather, some may be fabricating but some people genuinely feel that they have been sexually assaulted. The same VC noted that these cases do not often reach an Article 32 hearing. A VC had also seen a case where a Service member had been separated from the Service and then claimed to have been sexually assaulted a year earlier. The allegation was not credible and the VC suspected it may have been a last-ditch effort to try to salvage her career. He also reported that in his experience, trainee abuse cases are rare. One VC provided a document detailing the demographic breakdown of their clients and information on trending issues, which is appended to this report.

- Relationship with the MCIO, Other Counsel and Victim Advocates (VAs). A VC described taking his alleged victim clients to the MCIO within 48 hours to give an initial statement but said the entire MCIO investigation typically lasts 9 to 12 months, and sometimes up to 15 months.

The VCs reported that they have excellent relationships with trial and defense counsel. A VC noted that there has been more push back on the VC program from defense counsel at other installations over issues like their desire to interview the alleged victim. The VCs generally allow trial and defense counsel to interview their clients, but they make that decision on a

case-by-case basis, and always limit the scope of the interview. One reason given for this approach was to avoid the potential for re-victimization. The VCs generally acknowledged that their efforts on behalf of clients may interfere with the military justice process. They noted that the relationship between MCIOs and VCs vary by installation because of differences in resourcing (some installations do not have VCs), and the evolution of who is eligible for a VC. The VCs do not believe that helping the prosecution is part of their job, although they felt prosecutors appreciate the VC's work with the victim because it frees up more of the prosecutor's time.

Separately, one VC noted that victim advocates (VAs) are active duty Service members and are well-positioned to help VCs locate and contact their clients. One VC stated he typically asks the VA to be present during his initial consultation with clients.

- Retaliation and Other Issues with Commanders. None of the VCs had clients who experienced retaliation by their chain of command. They indicated the potential for social retaliation is their client's greatest concern. VCs collectively reported positive experiences with commanders and explained that VCs can leverage commanders' intense fear of being accused of retaliation to negotiate for whatever favorable treatment the victim desires, including expedited transfers. One VC reported that about half of his clients requested an expedited transfer, especially if they could pursue good opportunities for their careers. He also noted a tension between victims not wanting their commanders to know why they had been transferred and a concern that transferring without explanation may cause the new chain of command to assume they are a problem Service member.

- Pressure on CAs in Sexual Assault Cases. Some VCs indicated that CAs weigh a victim's preference heavily in making a disposition decision. They also have the impression that CAs refer weak cases to courts-martial in order to insulate the command from scrutiny.

The other VCs likewise have observed CAs who send "questionable" touching and other cases to trial, especially cases involving "drunken sex" where the victim alleges she "passed out." One case that settled on the eve of trial involved a Service member who executed a drunken pelvic thrust in the course of trying to woo a civilian at a bar. They noted this trend could be jurisdiction-specific. Both groups have seen cases get dismissed before or after the Article 32 stage, so not every single case is referred.

- Other Concerns. Some VCs opined that the pendulum has swung too far in the military justice system, in favor of the victim vice the accused. A VC suggested the military needs to revise its response to sexual assault so that Service members are not incentivized to claim they have been sexually victimized. Some VCs now see trial defense counsel routinely requesting mental health records in every discovery request (no comments were made on the success of these requests).

<u>Roundtable with Sexual Assault Response Coordinators (SARCs), Victim Advocates (VAs)</u>

The Subcommittee heard from SARCs and VAs at the installation.

- Training. The participants felt they were well trained, but said they need training continuously in order to keep up with changes in policy and law.

- Working with VCs. The SARCs and VAs reported having a very positive working

relationship with the VCs. They said that VCs filled a gap in their services because they cannot answer legal questions. VCs are sometimes better positioned to get notice of meetings and discussions. One issue that does arise is that the VC will not allow VAs to be present during private meetings with the client, even when delivering bad news. The VAs feel they should be included in order to support the victim during those times. The participants also discussed the rate of turnover among VCs, which they would remedy by making the VCs civilians. They also recommend situating the VC office with other victim support services in order to facilitate better communication between them and to make it easier for victims to meet with each of the personnel in their support group.

Roundtable with Investigators

The Subcommittee met with several investigators from the MCIO office and a member of the local police department. At another installation, the Subcommittee met with a MCIO, Supervisory Special Agent and two investigators.

- Training and Experience. The Special Agent in Charge had decades of experience, and the other agents, both members of the Special Victim Unit, had extensive time in law enforcement ranging from 4 to over 20 years. All had experience investigating sexual assaults. One Service's MCIO has a mix of civilian and military personnel. The other Service's MCIO agents are all civilians. The MCIO investigators felt satisfied with their entry-level training and opportunities for more advanced training as they progress in their field. The MCIO agents noted that in spite of their training, they find it difficult to adapt to frequent policy changes (sometimes changing on a weekly basis) and onerous investigative requirements. Concern was expressed that, as MCIO agents, they are rarely asked whether the changes are beneficial or actually hinder their work as investigators. There are so many policies in place that there is now a "thousand-page long manual."

- Victims' Counsel. The MCIO agents were unanimous in their opinion that the VC program has impacted their investigations and that it takes much longer to get a victim interview done (weeks) if the victim has a VC. One agent commented that the program is "insulting" because the need for counsel is predicated on the idea that investigators are not professionals. The investigators have difficulty conducting subsequent interviews and obtaining evidence because VCs limit access to their clients and advise them not to turn over their cellphones to investigators. (Cell phones are routinely sought by investigators because they very often contain significant items of evidentiary value, texts between the accused or witnesses and the victim, photographs, etc.). Overall, the agents felt that the VCs lack experience with the military justice system, are not interested in facilitating the investigative or justice process, and do not share their sense of urgency. For example, one agent reported having seen 4 different VC section chiefs within a 15-month period, and that it was very helpful when they finally had one with a lot of military justice experience.

Prior to the start of the VC program, agents were not conducting the interviews to develop evidence of the alleged victim's collateral misconduct like underage drinking or drug use, though this was a common misconception. They reported that almost all alleged victims want VCs when they are offered. One agent noted that with the introduction of VCs, he does not think trial counsel really talk to alleged victims until the case gets to the Article 32 stage. The other agents similarly felt that recent victims' rights legislation has a significant impact on how they do their jobs and lengthens investigations. However, the VCs do not have much of an impact on their investigations unless they represent a victim prior to the initial interview.

- Sexual Contact Cases and Resources. Both Service's MCIOs have experienced a severe strain on resources due to recent policy changes that added sexual contact cases to their investigative purview. One agent observed, "Any touch of a hand, wrist, or back is now a sex crime." He estimated such an investigation could take 15-30 hours and these cases often arise when married couples are separating or divorcing. This makes it difficult to thoroughly investigate more serious sex crimes.

Previous policies placed responsibility for those cases with the Military Police. MCIO investigators also feel they have no discretion to classify a reported sexual contact as a simple assault or to close an investigation, whereas the local police detective explained that civilian authorities have such discretion. Additionally, Service members now tend to report non-sex crimes as sex crimes and increasingly make those reports to a SARC or Victim Advocate as opposed to law enforcement. Agents sense that once the SARCs include a case in their reports to DoD, their case description must match the SARC's, even if the MCIO does not believe a case involves a sexual assault offense.

- Trends in Sexual Assault Cases. MCIO investigators observed an increased number of individuals making reports out of fear that they will get in trouble for not reporting a possible crime. They noted that Service members do not differentiate between unwanted touching (that stops at "no") and a sex crime. Agents feel that they are often forced to investigate allegations that even the victim does not wish to pursue, and that the expedited transfer program is widely misused by both victims and commanders who want to move a 'problem' out of their unit.

- Relationship with Trial and Defense Counsel. Overall, the agents described a productive working relationship with trial counsel, though some agents expressed frustration with the frequency of turnover among prosecutors. One issue the agents frequently confront is that Trial Counsel do not want them to close their cases and then request that the MCIO re-open cases (note: cases are typically closed after 'probable cause' is established). They have a six month deadline for closing cases since May 2016. Agents said they re-open cases at the request of trial counsel, and could not recall receiving the same requests from defense counsel. The MCIO does not provide investigative support to defense counsel. MCIO agents reported working very well with trial counsel from the earliest stages of an investigation. They also work routinely with the Trial Teams, which handle sexual assault cases.

Certification

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

//Signed//

Member, Judicial Proceedings Panel Subcommittee