

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL ON  
MILITARY SEXUAL ASSAULT

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PUBLIC MEETING

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FRIDAY  
OCTOBER 10, 2014

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The Panel met in the Glebe and  
Fairfax Ballrooms, Holiday Inn Arlington at  
Ballston, 4610 Fairfax Drive, Arlington,  
Virginia, at 8:45 a.m., The Hon. Elizabeth  
Holtzman, Chair, presiding.

PRESENT

HON. ELIZABETH HOLTZMAN, Chair  
HON. BARBARA S. JONES  
VICTOR STONE  
THOMAS W. TAYLOR  
VADM(R) PATRICIA TRACEY

ALSO PRESENT

MARIA FRIED, Designated Federal Official  
WILLIAM BARTO, Army Highly Qualified Expert,  
Attorney Advisor  
COL JOHN BAKER, U.S. Marine Corps, Deputy  
Director, Judge Advocate Division,  
Military Justice & Community  
Development

CLIFFORD FISHMAN, Catholic University School  
of Law  
LAURIE ROSE KEPROS, Director of Sexual  
Litigation, Office of (Colorado) State  
Public Defender  
JENNIFER LONG, Director, AEquitas  
PATRICIA POWERS, Senior Deputy Prosecuting  
Attorney, Yakima County (Washington)  
Prosecuting Attorney's Office  
MIRANDA PETERSEN, Program & Policy Director,  
Protect Our Defenders  
RYAN GUILDS, Counsel, Arnold & Porter LLP  
GREG JACOB, Policy Director, Service Women's  
Action Network  
LT COL BRIAN THOMPSON, U.S. Air Force, Chief  
Senior Trial Counsel, Government Trial  
and Appellate Counsel Division  
CDR JONATHAN STEPHENS, U.S. Navy, Senior  
Trial Counsel, Region Legal Service  
Office Mid-Atlantic  
MAJ REBECCA DIMURO, U.S. Army, Special  
Victim Prosecutor, Eighteenth Airborne  
Corps  
MAJ PETER HOUTZ, U.S. Marine Corps, Regional  
Trial Counsel, National Capital Region  
CDR STEVE REYES, U.S. Navy, Director,  
Defense Counsel Assistance Program  
MAJ ANDREA HALL, U.S. Air Force, Senior  
Defense Counsel, Joint Base Lewis-  
McChord  
MAJ SHARI SHUGART, U.S. Army, Senior Defense  
Counsel, Schofield Barracks  
MAJ MATTHEW POWERS, U.S. Marine Corps,  
Senior Defense Counsel, National  
Capital Region  
LT COL KYLE W. GREEN, U.S. Air Force, Staff  
Director

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P-R-O-C-E-E-D-I-N-G-S

8:49 a.m.

CHAIR HOLTZMAN: Good morning, everyone. I'd like to welcome everyone to the third hearing of the Judicial Proceedings Panel. All five Members of the Panel are present today, and today's meeting is being recorded and streamed live by C-SPAN. In addition, the recording of this meeting will be available in C-SPAN's video library. A link will also be posted on the JPP's website.

The Judicial Proceedings Panel was created by Congress in the National Defense Authorization Act of 2013. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendment to Article 120 of the UCMJ in 2012.

To start this morning, the Panel will begin deliberating on what we've heard

1 and learned about Article 120. The Panel has  
2 three tasks pertaining to our review of  
3 Article 120, three tasks at a minimum.

4 First, we must assess and make  
5 recommendations for the improvement to the  
6 current version of Article 120 which was  
7 enacted by Congress in 2012. Second, we must  
8 assess the likely consequences of amending  
9 Article 120 in situations in which sexual acts  
10 occur as a result of access or coercion by a  
11 Service member abusing his or her position in  
12 the chain of command. Third, the Response  
13 Systems Panel recommended we consider whether  
14 to recommend legislation to amend Article 120  
15 to separate penetrative and contact offenses  
16 into distinct punitive articles under the  
17 UCMJ.

18 The Panel received numerous  
19 documents and held two days of public meetings  
20 to hear a variety of views on these issues. I  
21 don't expect today's deliberation will  
22 conclude our review of Article 120 issues, but

1 it will allow panel members to discuss their  
2 perspectives on the information we have  
3 received, and help identify the way forward.  
4 Following our deliberative session, we will  
5 begin our examination of other Panel taskings  
6 that require us to consider privacy issues for  
7 victims of sexual assault crimes.

8 We will begin our review of the  
9 use of evidence from prior sexual conduct of  
10 an alleged victim in Article 32 proceedings  
11 and courts-martial, which is addressed by  
12 Military Rule of Evidence 412. We will also  
13 examine the use of a victim's mental health  
14 records by defense during preliminary hearings  
15 and courts-martial, which is addressed by  
16 Military Rule of Evidence 513.

17 Today we will first hear from  
18 experts within DOD who will explain the rules  
19 and their use in military criminal  
20 proceedings. Next we will hear from civilian  
21 and academic experts who will help us compare  
22 the military rules and practices to other

1 civilian jurisdictions. We will then hear  
2 about trial practices from military  
3 prosecutors and defense counsel, and finally  
4 we will hear from those who work with and  
5 advocate for victims about privacy issues in  
6 Military Judicial Proceedings.

7 I anticipate we will hear more  
8 about these issues in future meetings,  
9 including next month's meeting, which will  
10 focus on the Special Victim's Counsel programs  
11 that have been implemented by each of the  
12 military services.

13 Each public meeting of the  
14 Judicial Proceedings Panel includes time to  
15 receive comments and input from the public.  
16 The Panel did not receive any requests from  
17 the public to appear at today's meeting. All  
18 materials from today's meeting, however, and  
19 previous meetings are available on the JPP's  
20 website at [jpp.whs.mil](http://jpp.whs.mil).

21 Thank you very much for your  
22 attention, and I believe we are ready to begin

1 our deliberation discussion of Article 120.  
2 Okay. Panel members, I outlined the kind of  
3 large issues we have to look at with regard to  
4 120, and I think maybe we should just start by  
5 having each of the Panel members, since we're  
6 not allowed to discuss any of this, except in  
7 a public meeting, express where they think the  
8 Panel should come out, where their own ---  
9 what their own position is with regard to the  
10 present status of 120.

11 Should it be amended, and if so,  
12 to what extent? Do we need further  
13 information? So, we'll just proceed in that  
14 way, if that's acceptable to the Panel  
15 members. Maybe start with you, Judge Jones,  
16 since you're sitting to my right.

17 JUDGE JONES: Well, I'd like to  
18 just make the general comment that I think  
19 it's almost an understatement to say that ---  
20 oh, sorry, thank you. I'd just like to  
21 start with the general comment that this is,  
22 obviously, a very difficult task. It's a very

1 interesting and intricate statute. We've heard  
2 a lot of testimony that it should be left  
3 alone in order to give the judges time to  
4 write on it, to create some common law here.  
5 And I think, generally speaking, that makes  
6 sense to me. There aren't a lot of cases out  
7 there yet with this new version of Article  
8 120.

9 My own personal experience is that  
10 if a judge gets the legal instructions right  
11 when they're instructing in this case the  
12 panel, that you can make the statute  
13 understandable and avoid error.

14 I'm not certain exactly how  
15 difficult the statute is yet. I haven't --- I  
16 don't have an opinion on how difficult it is  
17 yet for the practitioners, the defense, and  
18 for, particularly, the prosecutors in terms of  
19 charging. We've heard examples that they are  
20 frustrated with it. But, again, I think at  
21 the end of the day, essentially, the statute  
22 needs more time. There needs to be more

1     appellate comment and development of the case  
2     law. So, overall that's my general comment.

3             With respect to particular parts  
4     of it, it may be that there are small things  
5     that we might tackle. And I'm not going to  
6     suggest any one of them right now. I think  
7     maybe those will come up, perhaps when we go  
8     through the various sections. But generally  
9     speaking, I would not at this moment want to  
10    take any heavy hand to try to either rewrite  
11    significant portions of the statute, or  
12    bifurcate it for that matter.

13            I saw testimony from one of our  
14    presenters that basically said all right, so  
15    you have to flip through the statute, but you  
16    can do it, with respect to the difference  
17    between, essentially, the 120 rape charges and  
18    the lesser charges in it. And, again,  
19    overhauling it, in terms of bifurcating, I  
20    think, again, may just cause more confusion  
21    than it's possibly worth. So, those are my  
22    general comments.

1 CHAIR HOLTZMAN: Mr. Taylor.

2 MR. TAYLOR: Thank you very much,  
3 Madam Chair. Having listened carefully to the  
4 testimony and read the materials that we've  
5 been presented thus far, and balancing that  
6 against my own interest both in law and public  
7 policy, I'm coming out at this point about the  
8 same place that Judge Jones did.

9 It's a very difficult thing to  
10 interpret a statute that is relatively new,  
11 unless you have cases. And it's very hard for  
12 us to assess the implementation of the statute  
13 until we have enough evidence of how the cases  
14 are working out in order to give us some  
15 actual evidence or basis for making  
16 recommended changes.

17 I've been impressed by the number  
18 of people who have identified relatively small  
19 changes that they thought would improve the  
20 statute. And my own bias is that if those  
21 changes can be accomplished through Executive  
22 Order, or through changes to the Benchbook

1 Instructions that judges use, then that's  
2 probably a more efficient way of making  
3 changes, on the one hand.

4 On the other hand, I was  
5 disheartened in our last session to hear the  
6 length of time that it has taken, to this  
7 point, to implement some of the changes that  
8 are already in the works regarding this ---  
9 not only this statute, but other statutes as  
10 they make their way through the inter-agency  
11 process, so I think that one good thing that  
12 could come from this review is some more  
13 pressure and emphasis on making the system  
14 work faster to get changes to the field that  
15 need to be made.

16 As to the specifics, I also agree  
17 with Judge Jones that there are small things,  
18 as I went through and listened to the various  
19 testimony that's been given, that would seem  
20 to improve the overall tenor of where we  
21 stand. I don't think that rewriting the law at  
22 this point is one of those.

1           I was told by someone who is a  
2 true expert, teaches this subject, that if you  
3 can understand Article 120, you can understand  
4 any criminal penalty anywhere in the U.S. Code  
5 or the UCMJ. And also, it seems to me, that  
6 yes, if you bifurcated the statute you might  
7 have some simplicity, but not that much. It  
8 just means that you maybe turn fewer pages to  
9 get to the same kinds of outcomes, so I don't  
10 think we should shy away from the statute just  
11 because it takes some time to really  
12 understand it, and become familiar with it.

13           On the larger issue, I guess I'm  
14 also interested in understanding more clearly  
15 than I do now how it is that we can move  
16 things through the system, as I said earlier,  
17 with much greater speed to help the people in  
18 the field who feel like they need  
19 clarification on some of the tough issues, get  
20 that kind of clarification instead of waiting  
21 for the inevitable number of --- large number  
22 of cases that would work their way through the

1 system to the appellate level. Thank you.

2 CHAIR HOLTZMAN: Admiral Tracey.

3 VADM(R) TRACEY: I'd echo most of  
4 what my colleagues have to say, with the  
5 additional point of view that a court-martial  
6 convening authority could probably benefit  
7 from stability around Article 120, and an  
8 opportunity for clarity around the case law as  
9 part of the line officer's role in this  
10 important task.

11 I would also --- I was struck by  
12 the number of people who spoke to us about the  
13 need for some definitional clarity, and the  
14 opportunities that exist to achieve that with  
15 recourse other than rewriting the statute  
16 itself. I think I would just echo what my  
17 colleagues have said.

18 CHAIR HOLTZMAN: Mr. Stone.

19 MR. STONE: Thank you, Madam  
20 Chairwoman. Like my colleagues on this Panel,  
21 we've heard a lot of people who've been able  
22 to work with the statute and haven't been

1 totally frustrated by it. And in one of my  
2 prior positions, I was constantly reminded by  
3 my colleagues not to sacrifice the good for  
4 the perfect. And I feel that what at least  
5 I've heard so far is that what we have is  
6 workable, it's good. And, yes, there's many  
7 ways that you could make it perfect, but you  
8 have to be careful that that doesn't turn out  
9 to work out badly.

10                   It seems to me that the focus that  
11 I'm trying to keep is that we look at  
12 repetitive problem issues that come up, and  
13 not just anecdotes of situations that have  
14 turned out badly because there's no statute  
15 that can be implemented perfectly.

16                   So, I'm trying to keep track of  
17 what I think are recurring problems, and see  
18 if we can provide, as was mentioned, a few --  
19 whether they're definitions or sharpened terms  
20 here or there within, more or less, the scope  
21 of what we have, because at least most of the  
22 testimony I've heard is that it does work. We

1 would just like to try and make it work either  
2 a little bit better, or a little bit more  
3 efficiently. So, that's my impression so far.  
4 Thank you.

5 CHAIR HOLTZMAN: Thank you very  
6 much. I can give you some of my impressions  
7 which are a little bit different, in the sense  
8 that I agree that, if we can, we should try to  
9 improve the statute in the small ways that  
10 were suggested. For example, defining  
11 incapacitated and other small issues such as  
12 that. I don't think we have enough  
13 information at this point to exactly recommend  
14 what should --- how the change should take  
15 place, but I do think that those would be  
16 useful changes.

17 I'm agnostic, actually, about the  
18 question of whether those changes should be  
19 made by Executive Order, or by Congress, given  
20 the amount of attention focused on the issue  
21 of sexual assault in the military. I think  
22 that, as opposed to the normal course of

1 events, that it's likely that Congress could  
2 act with amazing speed on these issues, so I'm  
3 not necessarily saying that the Executive  
4 route would be faster and more efficient, so  
5 I think we should think about that.

6 I also am very troubled about the  
7 statute itself, because to me, and I'm glad  
8 that people can make it work, but I don't know  
9 what it means to make it work. We will not  
10 know how many acquittals took place because of  
11 the badly worded statute, because acquittal is  
12 an acquittal. We're not going to get appellate  
13 review of those cases, and we're just stuck.  
14 And to me, two of the issues trying to read  
15 the statute keep cropping up.

16 One is the fact that you have to  
17 show bodily harm. Well, when you tell a normal  
18 person who understands the English language  
19 that you've got to show bodily harm, that  
20 suggests that there's got to be some kind of  
21 bodily harm. But if you read the definition,  
22 bodily harm is an offensive touching, no

1 matter how slight.

2 Well, wait a minute. What does  
3 this all mean? I mean, you take the normal  
4 usage of the English language, bodily harm,  
5 you think something serious, and then you have  
6 an offensive touching no matter how slight.  
7 How does that get reconciled? How do panel  
8 members deal with that? What happens in the  
9 real world under those circumstances?

10 The issue of consent. I know we've  
11 heard from the professor at NYU about the  
12 ambiguity of that term. And we want to just  
13 look at the statute, well, you know, it says  
14 --- I have it in front of me somewhere, free  
15 and willing --- it says something about free  
16 and willing consent, consent freely and  
17 willingly given. But then if you read all the  
18 way down it suggests that you can infer  
19 consent from passive conduct.

20 Those seem to be pretty  
21 inconsistent terms. And what particularly  
22 concerned me, I wasn't really actually focused

1 on this issue initially, but when I began to  
2 read the materials on 412, the question of  
3 consent becomes very important. And it may be  
4 that further clarity with regard to consent  
5 would help alleviate some of the issues under  
6 412. I hadn't actually understood the  
7 connection before.

8 I generally agree with the premise  
9 that it's a good idea to have, as Judge Jones  
10 and others articulated, some stability with  
11 regard to the interpretation of the statute  
12 that has been changed three times in such a  
13 short period of time. I accept that premise,  
14 but I don't necessarily accept the premise  
15 that this is a workable statute.

16 And particularly given the fact,  
17 and I don't know --- excuse me, I shouldn't  
18 say fact -- particularly given the suggestion  
19 that we were given at the last hearing that  
20 this statute is used to train soldiers, and  
21 sailors, and recruits. I mean, if it's taking  
22 practiced professional lawyers so much time

1 and effort to understand the statute, how can  
2 we be training people effectively under an  
3 ambiguous, difficult statute?

4 So, these are the concerns that I  
5 have. And maybe it means we just leave things  
6 --- many things alone, but at least from the  
7 point of view of training, if this is being  
8 used as a training tool, this statute, I would  
9 have a lot of concerns.

10 So, I'm going to suggest possibly  
11 that we as a follow-up move, our next step  
12 should be to take a look at some of the areas,  
13 and I think the staff made a very good chart  
14 for us. Some of the issues, specific issues on  
15 Article 120 and see what we want to do about  
16 each one of them, if that's okay with the  
17 Panel members. Any objection to that, or  
18 further comment? Okay. Should we start with  
19 the first one that the staff put on our chart?  
20 Do we all have this chart in front of us? Mr.  
21 Stone, do you? All right, good.

22 Good. Okay. The first is drug or

1       intoxicant administration, and it's Code  
2       Section 120(a)(5). Does everyone have the  
3       statute in front of him or her so we can go  
4       forward? I can't seem to find mine over here.  
5       It was in the folder. I don't see it there.  
6       Oh, here it is, sorry. Okay, everyone's got  
7       the statute.

8                       Article 120(a)(5). And the  
9       question here, or the issue is, "Provision of  
10      Article 120 does not require intoxicants be  
11      administered intentionally, or for the purpose  
12      of impairing capacity." I think that was  
13      suggested by Professor Shulhof -- Shulhofer,  
14      sorry. I didn't mean to misstate his name.

15                      I don't know how the Panel feels  
16      about that. Does anyone have a comment to make  
17      on that point? I think he was the only one who  
18      recommended that. I don't think we got any  
19      recommendations from military personnel or the  
20      Services, Judge Jones.

21                      JUDGE JONES: I was just going to  
22      ask, because I wasn't here last time, did

1 anyone comment that this was a problem, or how  
2 big a problem is it? I don't know how many  
3 such cases there are, or if there have been  
4 such cases, is there a problem with the way --  
5 --- and I'm only asking because I wasn't here,  
6 but also because I don't know whether this is  
7 really an issue.

8 Obviously, you wouldn't convict  
9 someone under this unless there was cause and  
10 effect, and intent. That seems obvious just  
11 from the reading of the statute.

12 MR. TAYLOR: That was my  
13 impression, was well, this is one of those  
14 that I did not think needed any change,  
15 because it seems to me that if a person who is  
16 accused of a violation of this says he did it  
17 by accident, then that will be that person's  
18 responsibility to raise. So, I think this is  
19 pretty clear on its face to me, at least.

20 JUDGE JONES: I mean, it's not as  
21 explicit as you might like, so I certainly  
22 understand Professor Schulhofer's comment. But

1 I agree with you, I don't think this is ---  
2 this one needs to be tinkered with, unless I  
3 heard a lot of evidence that, you know, in  
4 such cases, you know, they were not being able  
5 to charge, to actually charge them.

6 CHAIR HOLTZMAN: Anybody else have  
7 a comment? Any other comment with regard to  
8 this? Yes, Admiral.

9 VADM(R) TRACEY: Just the same. I  
10 have not heard more than one person actually  
11 bring this up.

12 CHAIR HOLTZMAN: So, is the  
13 consensus --- that's my reaction, as well. I  
14 didn't --- nobody indicated that it was a  
15 problem in the Services. I mean, it's true the  
16 statute may not be as clear as possible. I  
17 don't know, Kyle, is there some way of  
18 assessing whether this --- aside from the  
19 testimony that we had, is there any other way  
20 of assessing whether this issue is something  
21 that needs to be addressed?

22 LT COL GREEN: Ma'am, we could

1 follow-up with a more detailed request to the  
2 Services to ask for cases, if there are any  
3 indicating this. I mean, we could follow that.

4 CHAIR HOLTZMAN: How does the Panel  
5 feel about that?

6 JUDGE JONES: I think that's a good  
7 idea ---

8 CHAIR HOLTZMAN: Okay.

9 JUDGE JONES: --- before we check  
10 it off.

11 CHAIR HOLTZMAN: Yes. Thank you. I  
12 think that's a good approach. Okay. The  
13 second issue is sexual assault by causing  
14 harm. This involves Code Section 120 --- well,  
15 you can see them. And the issue is: does  
16 bodily harm mean sexual intercourse,  
17 intercourse without consent, or a sexual act  
18 contact with an additional offensive touching  
19 beyond that of penetration or sexual contact?  
20 I'm not sure I even understand that point.  
21 We've had people on both sides of this issue.  
22 Anybody have any comment on the Panel?

1                   MR. TAYLOR: Well, I'll take a stab  
2                   at this. It seems to me that this is one that  
3                   does need clarification. And, again, to your  
4                   comments, Madam Chairman, how it's clarified  
5                   is a separate conversation, but it's troubling  
6                   to me that people would think that there had  
7                   to be bodily harm, in addition to the actual  
8                   sexual penetration, in order to be guilty of  
9                   this offense.

10                  CHAIR HOLTZMAN: Any other  
11                  comments? Well, as I said earlier, the term  
12                  bodily harm as it's defined is something that  
13                  I find puzzling, and possibly too ambiguous.  
14                  Judge Jones, do you have a comment that you  
15                  wanted to make about that?

16                  JUDGE JONES: I was just looking  
17                  for the definition of bodily harm.

18                  CHAIR HOLTZMAN: Yes, it's on ---

19                  JUDGE JONES: Any offensive  
20                  touching of another, however slight, including  
21                  any non-consensual sexual act, or non-  
22                  consensual sexual contact. Well, I would have

1 to spend some time thinking all this through.

2 I think it's confusing, I certainly agree.

3 CHAIR HOLTZMAN: I mean, the  
4 terminology --- it could be defined, I think,  
5 for the Panel members.

6 JUDGE JONES: Right.

7 CHAIR HOLTZMAN: But your initial  
8 impression, if you have to find bodily harm,  
9 is that you're going to look for something  
10 that's harmful, really harmful.

11 JUDGE JONES: It sort of connotes  
12 force.

13 CHAIR HOLTZMAN: Yes, it connotes  
14 force, exactly. And it connotes some other  
15 kind of harm, aside from the sexual  
16 penetration.

17 JUDGE JONES: Act itself, right.

18 CHAIR HOLTZMAN: Or the sexual act.  
19 And that's the problem with it, that it's not  
20 clear. So, the difficulty with that, though,  
21 I would just point out, Professor, is that  
22 this may be taking on a biggie. It might not

1 mean more than one of these little fixes that  
2 we were urged to take on. How do the other  
3 Panel members feel? Should we take a further  
4 look at this question of bodily harm? Admiral?

5 VADM(R) TRACEY: I think that would  
6 make sense, yes.

7 CHAIR HOLTZMAN: Mr. Stone, sir?

8 MR. STONE: I don't know that this  
9 needs to be at the top of our list. I don't  
10 think that this was the most important problem  
11 that the prosecution of these cases has  
12 raised, so I don't mind having it on the list,  
13 but I think it's not quite at the top.

14 CHAIR HOLTZMAN: Good point. I  
15 think --- so, we'll leave that on our  
16 checklist, and then figure out how we're going  
17 to approach all these issues that we still  
18 need to deal with.

19 Okay. Definition of incapable of  
20 consenting. The definition of incapable of  
21 consenting is ambiguous and unclear. And we  
22 received seven requests to clarify, and no

1 specific objection to clarification of this  
2 point. How do we feel about that? Should we  
3 try to clarify this? Let's put it this way,  
4 any objection to clarifying this?

5 MR. TAYLOR: I think we should  
6 clarify it. I thought the testimony was  
7 compelling from the witnesses who did comment  
8 on this, that this is something that it's not  
9 well spelled out, and people are going to  
10 other parts of the Code to try to find  
11 definitions for capacity, if you recall. And  
12 this seems to be something that needs a better  
13 understanding out there.

14 CHAIR HOLTZMAN: Kyle --- anybody  
15 else have any point or question or --- Mr.  
16 Stone?

17 MR. STONE: Just that I think that  
18 in doing that we ought to tie that with what  
19 we do with use of consent throughout the  
20 statute. It seems to me incapable of consent  
21 and what consent means are related, and we  
22 ought to try and do those together. You know,

1 change one with an eye on the other at the  
2 exact same time because they do interrelate so  
3 much.

4 JUDGE JONES: And this --- I mean,  
5 this may be one where it would certainly be  
6 nice to clarify through instructions, as  
7 opposed to trying to have to go back for an  
8 amendment. I mean, I think I would lean that  
9 way.

10 I haven't read all the law that  
11 has come out under any of the previous 120s,  
12 but I'd just like to think about this in terms  
13 of what a judge would instruct even with the  
14 statute as it's written. Just a thought, as  
15 opposed to trying to reword it.

16 VADM(R) TRACEY: To your concern  
17 with regard to how the statute is used for  
18 training, this would be one of the key issues  
19 that would need to be clear in training to  
20 young soldiers.

21 CHAIR HOLTZMAN: So, I guess one of  
22 the points that we are to bear in mind as we

1 try to suggest any changes is the extent to  
2 which the clarification would help in terms of  
3 training, as well as in terms of prosecution.

4 JUDGE JONES: You know, that's a  
5 really interesting idea about --- because the  
6 notion that people are being, you know,  
7 trained on this, our military, I would like to  
8 see how the --- you know, some of the  
9 statements that are made in this training. Are  
10 there some training materials? I mean, if  
11 we're having trouble figuring this out, I'd be  
12 very interested to see --- I don't mean an  
13 extensive search with every piece of training  
14 material, but maybe some samples of how this  
15 is actually being portrayed, you know, to new  
16 recruits, or whoever is receiving the training  
17 along the way.

18 LT COL GREEN: Judge Jones, the  
19 definition of sexual assault and the DOD SAPR  
20 programs have standardized the use of these  
21 terms. And each of the Services has created  
22 standardized training on many of these

1 concepts, so ---

2 JUDGE JONES: So, maybe you can  
3 give us a representative sample.

4 LT COL GREEN: Yes, ma'am. The  
5 ability of a person to consent is a key part  
6 of training in most of those, and we can pull  
7 that together for the Panel.

8 JUDGE JONES: I would like to see  
9 it. Thank you.

10 CHAIR HOLTZMAN: Yes. There was  
11 only one witness who raised the issue of  
12 training, but that really resonated with me  
13 because, as I said in my own comments, if I'm  
14 having difficulty, or others are, I've been  
15 practicing law for a long time. That could  
16 create a problem.

17 I'd also like to ask, Kyle, I  
18 agree that we should take a look at the  
19 question of incapable of consenting, because  
20 we've been asked by a number of people to  
21 clarify it. Does this also include the issue  
22 of capacity, Kyle, because that was a second

1 issue that was raised? And I don't see the  
2 capacity point raised in our materials.

3 LT COL GREEN: I guess, within the  
4 capacity to what, ma'am?

5 CHAIR HOLTZMAN: We were only asked  
6 to --- wasn't that one of the two points that  
7 we were asked to take a look at, was the  
8 definition of the --- or clarify with the  
9 definition of the term capacity. Maybe that's  
10 ---

11 LT COL GREEN: I think that's  
12 incorporated here, ma'am.

13 CHAIR HOLTZMAN: Okay.

14 LT COL GREEN: I think that  
15 capacity to consent and incapable to consent,  
16 I think those were issues that were raised by  
17 presenters somewhat interchangeably.

18 CHAIR HOLTZMAN: Okay. So, that  
19 that's not a separate issue that we --- that  
20 would be included in this review.

21 LT COL GREEN: I believe so, ma'am.

22 CHAIR HOLTZMAN: Okay, good. Thank

1       you.

2                       Okay. Definition of wrongful  
3       action is the fourth one. Threatening wrongful  
4       action is too narrow or ambiguous. We've been  
5       asked to amend, clarify, and we've been told  
6       not to amend. Same numbers on both sides, so  
7       what do we think? Any Panel members on this  
8       point? I think that this had to do, if I'm  
9       not wrong, with the issue that was raised  
10      about whether we needed the statutes on abuse  
11      of authority. Is that correct, Kyle?

12                     LT COL GREEN: That's correct.

13                     CHAIR HOLTZMAN: Because this  
14      provision would theoretically cover  
15      threatening wrongful action. This provision  
16      would theoretically cover those cases.

17                     LT COL GREEN: Yes, ma'am. It would  
18      cover the threatening with wrongful action.  
19      The previous version of the statute included  
20      within in the term of threat the offer of a  
21      benefit, or the lack of wrongful action, so  
22      that --- this is a more narrow definition of

1       only the threat of a negative action. So,  
2       those other aspects of potential abuse of  
3       authority are not necessarily included,  
4       although the Military Judge's Benchbook has  
5       used the terminology from the 2007 version  
6       within the term of threat.

7                   CHAIR HOLTZMAN: So, the judges  
8       have decided that going back to the amended --  
9       -- to the unamended statute.

10                   LT COL GREEN: Well, it does  
11       include a broader definition.

12                   JUDGE JONES: So, they include more  
13       under wrongful action. Is that ---

14                   CHAIR HOLTZMAN: But could that be  
15       challenged, Kyle?

16                   LT COL GREEN: I don't know. I'm  
17       not sure from the Services what the status on  
18       that, or if it has been. But, I mean, as a  
19       practitioner it came to my mind when I saw  
20       that.

21                   CHAIR HOLTZMAN: Well, I think the  
22       point here, if I can try to narrow the focus

1 for us, is that we had two suggestions for ---  
2 by members of Congress, very forceful  
3 suggestions to deal with statutory --- to  
4 support statutory changes that would enhance  
5 the ability to prosecute abuse of force ---  
6 abuse of status. In other words, someone,  
7 whether it's a trainer abusing a recruit, or  
8 someone up the chain of command abusing  
9 somebody below that, that this provision could  
10 be used. We were --- the provisions were ---  
11 the statutory provisions were suggested to  
12 deal with those problems.

13 If the existing statute is  
14 sufficient, then those two statutory  
15 suggestions would be unnecessary. From my  
16 point of view, it took me a long time to get  
17 an answer to that question as to whether the  
18 statute could be used in those circumstances.  
19 Some of you may remember people couldn't  
20 remember whether the statute had ever been  
21 used, some said it couldn't be used, and so  
22 forth.

1                   So, I'm just concerned that even  
2                   though the language may be there, it's not  
3                   being used in an effective way. And my own  
4                   view would be in looking at the two statutory  
5                   suggestions that were made, that we get a  
6                   little bit more information, if we can, or  
7                   take a closer look at this provision of the  
8                   law. And, particularly, if the judges are  
9                   interpreting it in a way that's broader than  
10                  the existing language. So, how do the --- any  
11                  other members of the Panel want to comment?

12                  JUDGE JONES: Oh, I think we should  
13                  definitely look into this more and pay  
14                  attention to it. I mean, I was struck by the  
15                  comment that I read from the last meeting that  
16                  there are other violations, criminal  
17                  violations other than 120 that are being used,  
18                  and I gather effectively, in situations where  
19                  there's an abuse of power. And I guess one is  
20                  called, and you'll have to forgive me,  
21                  maltreatment, and they're just generally  
22                  orders violations. So one thing I think we

1 ought to look at too is, is there enough in  
2 the arsenal of possible charges out there  
3 already, while at the same time figuring out  
4 whether this particular statute can't cover  
5 what we're --- this abuse of power because of  
6 the wrongful action language in there. And I  
7 don't know the answer to that as I sit here,  
8 but I will definitely look at all of the other  
9 possibilities that we have just in terms of  
10 seeing, again, how important it is to put this  
11 into 120, and maybe analyze whether a strict  
12 liability offense, as is being suggested,  
13 should be put in 120.

14 I mean, those are all issues that  
15 come to my mind. I think they're important,  
16 and I think this is something that we  
17 definitely, obviously, should continue to look  
18 at. I'm not prepared to come to any  
19 conclusions today.

20 CHAIR HOLTZMAN: Mr. Taylor.

21 MR. TAYLOR: Yes. I agree that all  
22 of these actions are intertwined in a very

1 interesting way, and I think the essential  
2 evil that we're trying to get at in part is  
3 anything that takes place in the training  
4 environment that suggests that some activity  
5 on the part of a trainee will benefit or not  
6 that individual as tied to some sort of  
7 reaction they have to overtures by someone  
8 who's in charge of them. I think that's what  
9 we've got to get at, and be sure that there  
10 are enough different ways to doing that so  
11 that no one escapes responsibility and  
12 accountability for that kind of action.

13 CHAIR HOLTZMAN: Admiral, did you  
14 want to comment about this?

15 VADM(R) TRACEY: I think that's a  
16 special case. I do think that the fundamental  
17 issue of just abusing positional authority is  
18 part of what's being asked for us to address  
19 here, and I think that that does deserve  
20 further examination by us to be sure we're  
21 satisfied we've got the tools.

22 CHAIR HOLTZMAN: Thank you. Mr.

1 Stone, sir.

2 MR. STONE: I agree that if this is  
3 being read more narrowly than the predecessor  
4 version, I can't believe that's what Congress  
5 intended and so maybe it was inartfully  
6 drafted, or sometimes in the conference  
7 committee and things people put together words  
8 without realizing that they have consequences  
9 in the case law, and I think that that's  
10 something that, yes, we have to look at. And,  
11 again, since the --- what's on our little  
12 chart, the next one, components of fear, deals  
13 with exactly the same definition, we ought to  
14 deal with this and the question of whether  
15 fear has to be objective as well as subjective  
16 at the same time. Again, let's --- my  
17 inclination is to view those two together so  
18 that --- so they work together since they're  
19 in one definition when we look at it. But,  
20 yes, I agree that that's important to focus  
21 on, and maybe see if we can sharpen the  
22 definition, and thereby solve a lot of

1 problems we're hearing that result from that  
2 definition.

3 CHAIR HOLTZMAN: I agree with the  
4 comments that have been made. I think that  
5 this should be on our list.

6 Anybody have any other comment  
7 about the next item, components of fear, 120  
8 (g)(7)? Mr. Stone has suggested that we look  
9 at that. Anybody disagree?

10 MR. TAYLOR: I do not. I do not  
11 disagree. I thought Dean Schenck made a very  
12 powerful case for making the change there.

13 CHAIR HOLTZMAN: Okay. Without  
14 objection we're putting it on the list. Okay.  
15 And I guess the --- well, I wouldn't say it's  
16 the final one because we've still got a few  
17 more to go through.

18 Use of consent throughout the  
19 statute. Congressional intent regarding  
20 consent is unclear. We've gotten three  
21 requests, or three suggestions to clarify, and  
22 two not to clarify. And I would just point out

1 that changing the meaning of consent could be  
2 more than a --- what one would call a minor  
3 fix to the statute.

4 VADM(R) TRACEY: To Mr. Stone's  
5 point, I don't believe we can work effectively  
6 on the definition of incapable of consenting  
7 without addressing the use of consent. I think  
8 that these are intertwined issues.

9 CHAIR HOLTZMAN: Anybody have any  
10 other comment?

11 JUDGE JONES: No, I just agree with  
12 that. I think it's right, we have to look at  
13 consent everywhere it is in the statute.

14 CHAIR HOLTZMAN: Well, I'm  
15 concerned about the term of consent, not only  
16 because of the issue that's raised about the  
17 need to define incapable of consenting, but  
18 also because of what I see as a concern about  
19 the clarity of the term itself, because there  
20 is a suggestion on the one hand in the statute  
21 on consent that it's kind of an affirmative  
22 consent that's needed. If you look at (a)

1 consent needs a freely given agreement,  
2 agreement, and then somehow the lack of  
3 consent under (c) may be inferred based on the  
4 circumstances. All the surrounding  
5 circumstances are to be considered, including  
6 whether a person did not resist or cease to  
7 resist, suggesting that resistance alone is  
8 the factor. So, to me, this is an ambiguous  
9 consent, but I am a little humble about  
10 dealing with it just in the sense that this  
11 could have major repercussions about the  
12 statute. But that doesn't mean that we  
13 shouldn't take a look at it, from my point ---  
14 I mean, from the point of view. So, I agree  
15 with the other comments that were made, so  
16 that's on our list.

17 We haven't reduced our workload  
18 too much so far. Okay.

19 JUDGE JONES: Well, I will make the  
20 comment, though, that when you read consent  
21 here it wouldn't surprise me at the end of the  
22 day we decided there isn't any better way to

1 say all these things. But I agree that we have  
2 to keep looking at everything.

3 CHAIR HOLTZMAN: That's right.  
4 Okay. Next, turn the page over, definition of  
5 force. "Force is too narrowly defined." That  
6 was a suggestion made by Professor Schulhofer.  
7 How does the Panel feel about that? Anybody  
8 have a comment?

9 Force is 120(g)(5). The term force  
10 means the use of a weapon, the use of such  
11 physical strength or violence sufficient to  
12 overcome restraint or injure a person, or  
13 inflicting physical harm sufficient to coerce  
14 or compel submission.

15 JUDGE JONES: Can anybody tell me  
16 more specifically what the professor's  
17 criticism was? That reads fine to me. Maybe  
18 the --- did he say it should be more, or ---

19 MR. TAYLOR: Well, one of the ---  
20 if I may, one of the things that I found  
21 persuasive was actually by Dean Schenck. Dean  
22 Schenck, about this particular point, said it

1 was too narrowly defined because it should  
2 also include suggesting possession of a  
3 dangerous weapon, instead of just using a  
4 dangerous weapon.

5 JUDGE JONES: I remember that now.  
6 Well, that --- yes.

7 MR. TAYLOR: So, for me that was  
8 enough to tip this into the scale of something  
9 that needed a further look.

10 JUDGE JONES: Yes.

11 CHAIR HOLTZMAN: Well, normally I  
12 would agree with that, but I don't know how  
13 that interplays with point number 7, which is  
14 threatening or placing that other person in  
15 fear. But maybe --- but I'm not objecting to  
16 taking a look at this. Admiral, do you have  
17 any thoughts?

18 VADM(R) TRACEY: I don't have  
19 objection to that.

20 CHAIR HOLTZMAN: No objection,  
21 okay. So, that's also on our checklist.

22 Next item, accused perception of

1 victim behavior condition. The issue here is,  
2 "Charging should not be based on the accused  
3 perception of victim's behavior or condition.  
4 Amend the statute." Dean Schenck and Colonel  
5 Jackson.

6 Kyle, do you remember --- can you  
7 flesh this point out for the Panel, please,  
8 unless somebody has a comment off the top.

9 MR. TAYLOR: I'll be glad to  
10 comment on it because, again, I think Dean  
11 Schenck made a really good point. Among other  
12 things, she said that the statutory provision  
13 only requires the government to prove that the  
14 accused knows or reasonably should know the  
15 victim's state of consciousness. Even if the  
16 victim testifies about her capacity to consent  
17 or ability to resist, the government must  
18 prove the accused's knowledge, or at least  
19 that the accused should have known. And her  
20 recommended change would look more toward the  
21 actual knowledge, or the additional --- in  
22 other words, the additional element should be

1 deleted in her opinion.

2 CHAIR HOLTZMAN: And where would  
3 that deletion take place?

4 JUDGE JONES: She is not suggesting  
5 you take out the element that the accused has  
6 to have knowledge, or should --- I think  
7 reasonably should know. I'm sorry. I'm just  
8 not sure what --- I think that's essential,  
9 myself. But this is a good example of, we have  
10 to go back and get into the reasonable and  
11 figure out --- really analyze these, and have  
12 another deliberation.

13 CHAIR HOLTZMAN: Yes. I think her  
14 point --- if you look at (b)(2), the sentence  
15 says that the accused has to know, the person  
16 knows or reasonably should know. I think her  
17 point is you don't need to prove that the  
18 person actually knew, but just that the person  
19 reasonably --- the defendant reasonably should  
20 have known. But that imposes an objective  
21 standard, and maybe that's fair or not fair.

22 I would --- before making any

1 change to this, I would like to know somewhat  
2 --- a bit more.

3 JUDGE JONES: Yes, me too. I mean,  
4 it is in the alternative, so you have both  
5 options there for a panel to decide. But yes,  
6 I think we should look at it.

7 CHAIR HOLTZMAN: Any other points?  
8 Mr. Stone? You're okay with looking at it.  
9 Okay.

10 "Consent and mistake of fact as to  
11 consent as affirmative defenses. Current  
12 version of Article 120 removed affirmative  
13 defenses of consent and mistake of fact which  
14 were previously expressly available. Unclear  
15 if defenses are still available."

16 Here we have, "Amend statute to  
17 clarify Congressional intent on consent. Amend  
18 statute to expressly provide for mistake of  
19 fact defense. Executive Order could clarify  
20 consent. Judge Benchbook currently instructs  
21 on both."

22 Kyle, did we actually have anybody

1 suggesting a change on this, because it's not  
2 indicated on the sheet?

3 LT COL GREEN: Major Kostik last  
4 month recommended that consent and mistake of  
5 fact as to consent be added back into the  
6 statute. They were removed from the 2007  
7 version, and he pointed out that among trial  
8 counsel that it's confusing as to whether the  
9 mistake of fact applies. So, his  
10 recommendation was to add it back in.

11 CHAIR HOLTZMAN: And we wouldn't --  
12 - you wouldn't have to go to Congress to do  
13 this? Oh, apparently an Executive Order could  
14 clarify it.

15 Well, anyway, I mean, I actually  
16 think this is important and it ought to be  
17 clarified.

18 JUDGE JONES: This one I think is  
19 easy to be put on the agenda for action. I  
20 mean, that's just my reaction. I think these  
21 two defenses should --- it should be clear  
22 that they exist and that they can be used. I

1 don't know, at least to me.

2 MR. STONE: A question that I had,  
3 I thought the materials that we got, the  
4 mistake of fact mostly involved situations  
5 where you had a victim who was under age, and  
6 I presume that really is not going to happen  
7 much in the military, that they're going to be  
8 14, or 15, or 16 and look like they're 18.  
9 Wasn't that the situation that kept coming up  
10 in the materials for mistake of fact, or is  
11 there another situation in the military --  
12 that's unique to the military that is  
13 repetitive?

14 LT COL GREEN: I'd have to go  
15 through and think about that. I mean, mistake  
16 of fact is a general defense under our Rules  
17 for Courts-Martial, so I mean, in terms of the  
18 carnal knowledge situation, I mean, you could  
19 have a civilian victim, so that is a crime  
20 that does occur. I mean, it's not limited to  
21 military on military, of course, so --- but  
22 more generally, there are the crimes. I just

1 have to think through.

2 CHAIR HOLTZMAN: But, also, if you  
3 have --- given the lack of clarity about the  
4 term of consent, you could have someone  
5 claiming well, she didn't say no, or as some  
6 people have said no really means yes. So, I  
7 think that, you know, I think big issues are  
8 raised when you --- by the quote, unquote,  
9 mistake of fact claim, so I certainly have no  
10 problem taking a look at it, but I think  
11 that's, I think, one of the big issues that  
12 comes in as a result of allowing someone to  
13 raise that mistake of fact defense.

14 MR. TAYLOR: Yes. I think the  
15 testimony that we had, in fact, was precisely  
16 as you recalled, and that is mistake of fact  
17 as to consent is the key issue. So, I think  
18 this is all bound up with that whole question  
19 of consent.

20 CHAIR HOLTZMAN: Right. Because if  
21 you have a very good definition of consent,  
22 then I don't know that --- I mean, mistake of

1 fact I think would shrink as a defense.

2 MR. STONE: Yes, I agree, we  
3 absolutely want to focus on that question as  
4 to whether we want to go in the direction of  
5 California where we heard they said yes means  
6 yes. It doesn't mean no, and no does not mean  
7 yes. And that gets to this mistake of fact  
8 thing. Oh, she was protesting but I really  
9 thought that she was protesting too much and  
10 it meant yes.

11 I think that both for training and  
12 for prosecution purposes, I think it would  
13 help if people knew what was going on. And I  
14 think that's a consent issue, not so much a  
15 mistake of fact issue. I don't understand ---  
16 well, I don't think it's good to keep that in  
17 the mistake of fact category that when a  
18 person says no or yes, they might not mean it.  
19 I mean, I think we're encouraging the problem,  
20 and not helping to solve it.

21 JUDGE JONES: Well, wouldn't you  
22 always permit a defendant to say, I thought

1 she consented, and let a jury decide? Can you  
2 really remove a mistake of fact, the intent?  
3 I mean, I see it as a knowledge and intent  
4 element. But, I mean, this is exactly what ---  
5 I agree we should define consent. No two ways  
6 about it, but I would be very reluctant to  
7 remove that defense.

8 CHAIR HOLTZMAN: I agree with that,  
9 but I think the defense becomes much narrower,  
10 much narrower if the definition of consent is  
11 clear and broad -- or the definition of  
12 consent is narrow, then the defense becomes  
13 narrow. And I think this also, as I said in my  
14 opening remarks, I hadn't really thought of  
15 that before, but I think this also becomes  
16 part of the problem with 413, I mean 412,  
17 because if consent becomes yes, then prior  
18 sexual conduct becomes less and less relevant.  
19 And so what's coming in under 412 might not  
20 come in so readily as it is today. Just a  
21 point that I'm --- that occurred to me, and we  
22 could take a look at that on --- I would

1 suggest as we look at 412, that that's  
2 something we bear in mind.

3 Okay, so that's something that,  
4 obviously, needs to be reviewed. Okay, that's  
5 on our checklist.

6 Now, indecent act --- oh, I'm  
7 sorry, I missed something. Definition of  
8 sexual contact and sexual act, 120(g)(2). "The  
9 definition of sexual contact is too narrow  
10 since it does not include touching  
11 accomplished by object, and overbroad because  
12 it includes any touching." And we received  
13 three recommendations to change, and I'm not  
14 sure that we -- aside from the general  
15 objection to making any changes, received any  
16 objections to making these changes. How do  
17 members of the Panel feel about this? Mr.  
18 Stone, I'm going to start with you.

19 MR. STONE: Okay. Yes, I definitely  
20 thought they --- that the testimony was that  
21 there's just a hole in the statute because it  
22 doesn't deal with objects and we, therefore,

1 should definitely start with --- that's the  
2 easiest item to fix, something that it seems  
3 everybody agrees is missing and got dropped.

4 I think a very hard question is  
5 presented. I know it's troubled me with any  
6 touching and through the clothing, because I  
7 think that people get smacked on the back, or  
8 smacked on the rear end in what's meant to be  
9 a positive way as sometime a team spirit  
10 thing. They give them an attaboy and it may be  
11 offensive, but I don't know that it belongs in  
12 the definition of sexual contact.

13 CHAIR HOLTZMAN: Anybody else want  
14 to make a comment on that? I agree with Mr.  
15 Stone. I think it should be on our list to  
16 take a look at. And I think, by the way, that  
17 one of the things we have to look at, I think  
18 the suggestion was made that the definition to  
19 include an object could not be done except by  
20 statute, but we could take a good look at  
21 that.

22 And as I said earlier, I think

1 that recommendations for statutory changes  
2 wouldn't necessarily have to take forever  
3 given the present concern over this whole  
4 subject. Okay, so we're adding that, without  
5 objection we're going to add to that list.

6 Okay, indecent acts. "Latest  
7 version of Article 120 deleted indecent acts  
8 from the statute." We got two suggestions for  
9 change. How do people feel? Any comment about  
10 this from Panel members?

11 MR. TAYLOR: Well, it seems to me  
12 that it still should be an offense, whether it  
13 should be an offense under 120 or under  
14 Article 134, which is where it was  
15 historically ---- is up for grabs, in my  
16 opinion. But I definitely think it should be  
17 an offense.

18 JUDGE JONES: Is it still in 134?

19 MR. TAYLOR: It was taken out of  
20 134, apparently, and again, the two presenters  
21 said they weren't sure why. They thought  
22 perhaps it was an oversight, so I don't know.

1                   CHAIR HOLTZMAN: An oversight by  
2 Congress? Shocking.

3                   MR. TAYLOR: I know it would be  
4 unusual.

5                   CHAIR HOLTZMAN: Any other comment  
6 from members of the Panel, worth taking a look  
7 at, further look at? Admiral, you have a  
8 thought about this?

9                   VADM(R) TRACEY: I think I agree  
10 with that, the question of whether it belongs  
11 in 120 or 134 I think is okay.

12                  CHAIR HOLTZMAN: Let's see. Well,  
13 recommendations against wholesale changes we  
14 --- I guess we can look at that as part of our  
15 general examination of these separate points.  
16 I guess we're up to Article 120, abuse of  
17 authority and bifurcation. Kyle, are we within  
18 our time frame?

19                  LT COL GREEN: Yes, ma'am. We have  
20 about 12, 13 minutes left in our ---

21                  CHAIR HOLTZMAN: Okay, thanks. Here  
22 we had two suggestions, as the Panel members

1 will remember, of changes on the abuse of  
2 authority statute by --- abuse of authority by  
3 both Representative Speier and Representative  
4 Frankel. Representative Speier is having a  
5 much smaller or narrower focus, and  
6 Representative Frankel having a much larger  
7 focus, broader focus.

8           We received four recommendations  
9 for change, and one, two, eight  
10 recommendations against change. I should just  
11 say that in our examination of threatening  
12 wrongful action, these issues will come up,  
13 but I also would like to point out that if we  
14 supported either one of the statutes, or  
15 supported either one of the statutes with  
16 change, with recommendations for change, there  
17 might be some chance that this could move  
18 quickly through Congress. So, I don't --- I  
19 ask the Panel members how you feel about  
20 proceeding on this point.

21           I mean, these issues will be  
22 covered, I think, by the threatening --- a

1 review of threatening wrongful action, but we  
2 could separate them out and just look at these  
3 two statutes alone.

4 VADM(R) TRACEY: Well I think we'll  
5 end up doing both, but I would like to look at  
6 the statutes themselves as part of it.

7 CHAIR HOLTZMAN: Anybody else?

8 MR. STONE: I totally agree with  
9 you, but I'd like to at least try and change  
10 it in a (g)(7) definition of threatening or  
11 placing the other person in fear. I think that  
12 would be maybe taking care of this problem at  
13 the same time we take care of the other  
14 problem, and that would be a great way, it  
15 seems to me, to address the abuse of  
16 authority, which is a version of the unlawful  
17 force, it seems to me, that's being --- that  
18 someone is mentally worried about.

19 CHAIR HOLTZMAN: Okay. So, let me  
20 see if I can parse that out. You are saying we  
21 should take a look at this --- I mean, you  
22 agree with the suggestion that was made, that

1 we should look at the statutes as well as the  
2 underlying issue about wrongful use of force.

3 MR. STONE: Yes. Yes. Yes, but  
4 first trying to take care of it when we're ---  
5 if we're going to fine tune that definition,  
6 see if we can take care of it right there, as  
7 opposed to requiring a completely separate  
8 abuse of authority provision. It seems to me,  
9 I would try and stay within ---

10 JUDGE JONES: Yes, or just analyze  
11 this and find out whether this statute  
12 actually is capable of taking care of it, as  
13 written. I'm not sure. I think I saw some  
14 testimony that people felt they could  
15 prosecute abuse of authority situations under  
16 the statute. I don't know whether that was  
17 right or wrong, so I'm just saying we should  
18 first decide whether this can handle it. And  
19 maybe it can, but we want it to be clear, and  
20 then take it from there.

21 CHAIR HOLTZMAN: Okay. One of the  
22 things that I'm going to suggest unless

1 somebody has a different point of view, that  
2 because these statutes are --- at least  
3 Representative Speier's statute may be under  
4 consideration by Congress, that of the issues  
5 we address, perhaps we start off with this  
6 wrongful use of force so that we could be  
7 relevant in terms of the consideration of that  
8 statute. Is that acceptable to members of the  
9 Panel?

10 VADM(R) TRACEY: Great idea.

11 CHAIR HOLTZMAN: Don't go too far.  
12 Okay. Now we have bifurcation.

13 LT COL GREEN: Ms. Holtzman, can I  
14 just ---

15 CHAIR HOLTZMAN: Yes, sir?

16 LT COL GREEN: One point on that in  
17 terms of the Panel's look is --- and I just  
18 want to make sure that we're clear, looking at  
19 it under the definition of threat and under  
20 (g)(7), Representative Speier's proposal  
21 actually creates strict liability, so it does  
22 not tie it to threat. It's merely a class. If

1     you're a trainer and have a sexual act or  
2     sexual contact with a trainee, that's an  
3     offense. I guess, what is the Panel's  
4     perspective on that, or is that something to  
5     still consider, or is the Panel more looking  
6     at this as ---

7                     MR. TAYLOR: If I may?

8                     CHAIR HOLTZMAN: Yes.

9                     MR. TAYLOR: I think we should keep  
10    on the table this idea of strict liability,  
11    because as I said in one of my earlier  
12    comments, I think that this is one of the  
13    places that coercive power is most likely to  
14    be used in a way that is absolutely contrary  
15    to all of our values, so I think this is an  
16    important point. And when the Services were  
17    asked to comment on this kind of issue, you  
18    may recall we got a report, I think it was  
19    last time, from the Services that had reviewed  
20    this and concluded that they had adequate  
21    regulations to deal with this problem pretty  
22    much on the strict liability issue, because it

1 involved a violation of regulations. And then  
2 the question became whether the violation of  
3 these Service regulations was adequate to  
4 really address the problem.

5 CHAIR HOLTZMAN: Well, I think the  
6 other issue that came up was this could be  
7 prosecuted under non-120 provisions, but those  
8 don't carry the same consequences, penal  
9 consequences as conviction under 120, because  
10 then you get denominated a sexual offender,  
11 and then you have to be registered in a state,  
12 so the consequences are much more serious. And  
13 I think --- and it's a very clear point, so to  
14 go to the point that Judge Jones made, if we  
15 take a look at all of this together, we can  
16 determine whether we support the idea of  
17 strict liability for this very limited period  
18 of time. It may be important even if we do  
19 have --- revise the existing statute just to  
20 make this very clear as kind of a training  
21 point as you were saying, Admiral. This might  
22 be training for those non-commissioned

1 officers who are in this position, very clear  
2 and they don't have to parse any long statute.  
3 It would just be right out there, so there  
4 would be a --- I mean, a good reason to take  
5 a look at that statute.

6 I might also point out --- Kyle, I  
7 could be wrong here, and please correct me,  
8 that the --- we didn't get any objection to  
9 the strict liability except that -- to  
10 Representative Speier's statute from what we  
11 heard, except that his representative to the  
12 Joint Services Committee said that he was  
13 opposed to the --- not to the initial 30-day  
14 period of time that the statute would operate,  
15 but the second 30-day period. Is that correct?

16 MR. STONE: Yes. The time  
17 limitation was definitely what they were  
18 focused on.

19 LT COL GREEN: But I do think a  
20 number of Service representatives spoke to  
21 their ability to prosecute these types of  
22 offenses under strict liability under non-120

1 frame work, so you're right, ma'am, there was  
2 issues with the specific time frame, but also  
3 just generally, whether strict liability  
4 offenses belonged under the 120 umbrella.

5 JUDGE JONES: There was one case  
6 that had a result of two years of confinement  
7 under the orders, I think the orders as  
8 opposed to 120. Is that the max?

9 LT COL GREEN: It is for a  
10 violation of general order under Article 92  
11 and the different frameworks that they have.  
12 And they are looking --- I know that the Joint  
13 Service Committee talked about potentially  
14 increasing the potential liability under those  
15 offenses, so there are different options  
16 there. But that was a point talked about by  
17 different ---

18 JUDGE JONES: Yes, and an important  
19 issue what attaches with a 120 conviction in  
20 terms of the sex registry. It's a huge issue.

21 CHAIR HOLTZMAN: Yes. But, to me,  
22 if I just may make one point, it seems to me

1 that if we're going to label somebody as a sex  
2 offender for slapping someone on the rear end  
3 through clothing, then how do you exempt  
4 someone who's taken use of his or her  
5 authority to abuse a young recruit? So, I  
6 mean, there needs to be some --- in my view,  
7 some proportionality here on these offenses.  
8 But I think we don't have to debate the  
9 substance of this, or the merits of this. I  
10 think --- are we all agreed that we want to  
11 take a look at this?

12 VADM(R) TRACEY: Yes.

13 JUDGE JONES: Yes.

14 MR. TAYLOR: Yes.

15 CHAIR HOLTZMAN: Okay, great. Now,  
16 of course, the really tough point arises.  
17 Kyle, do you have suggestions for how we  
18 should approach getting the information we  
19 need and going forward on this? Oh, I'm sorry,  
20 we have one more.

21 LT COL GREEN: The bifurcation  
22 issue, ma'am.

1                   CHAIR HOLTZMAN: Wait a minute. Oh,  
2                   yes, right. Sorry, bifurcation.

3                   We received --- this is should  
4                   penetration offenses be bifurcated from non-  
5                   penetrating offenses? We got one suggestion  
6                   for amendment of the statute, and three  
7                   against amendment. How do we feel about  
8                   proceeding on this? And do Panel members have  
9                   a view? Mr. Taylor?

10                  MR. TAYLOR: Sure. I don't think it  
11                  should be amended. I think it's going to be  
12                  complicated whether they're in one statute or  
13                  two, and once you parsed your way through it,  
14                  then you understand it. Obviously, it needs to  
15                  be presented, as Staff Director said, in a way  
16                  that's more readily understandable to recruits  
17                  than it is to lawyers who are schooled in  
18                  this. But I would not recommend it at this  
19                  point.

20                  CHAIR HOLTZMAN: Any other?

21                  MR. STONE: I agree with that, and  
22                  I think that if you run --- there's all kinds

1 of potential problems if you start to  
2 bifurcate them, is attempted rape where the  
3 person gets interrupted before there's  
4 penetration, which statute is that one in? If  
5 Congress decided to put them together, I think  
6 we should accept that framework and try and  
7 work with what we've got in this case. They  
8 could have done it differently, but I don't  
9 see this as something that there's a  
10 compelling need to change. And it seems to me  
11 we've got other things we need to work on.

12 JUDGE JONES: I agree with that.

13 VADM(R) TRACEY: As well.

14 CHAIR HOLTZMAN: Okay. So, that's  
15 not on our list. Well I guess we made good  
16 progress, we took two items off our list, and  
17 we have a pretty full plate otherwise.

18 Colonel Green, do you have  
19 suggestions about how we're going to proceed?  
20 I guess --- well, what we'll do now since  
21 we've almost consumed all of our time for  
22 deliberation, is that we will suggest to Panel

1 members how we'll proceed on these points, and  
2 we'll just proceed, and right now we'll  
3 continue with the hearing before us. Maybe  
4 we'll take a five-minute break, and commence  
5 in five minutes with the Panel members ---  
6 with the witnesses who have come to testify.  
7 Thanks very much.

8 (Whereupon, the above-entitled  
9 matter went off the record at 9:59 a.m., and  
10 resumed at 10:13 a.m.)

11 CHAIR HOLTZMAN: Okay. Good  
12 morning again. We are now ready, sorry to be  
13 a few minutes late, to deal with a panel that  
14 is going to focus on Military Rules of  
15 Evidence 412 and 415 in Court-Martial  
16 Proceedings.

17 We have three -- well, I see two  
18 witnesses before us, Colonel John Baker, U.S.  
19 Marine Corps, Deputy Director, Judge Advocate  
20 and Mr. William Barto, Army Highly Qualified  
21 Expert, Attorney Advisor.

22 Welcome to both of you. And I

1 understand we will start with you, Colonel  
2 Baker. Thank you for your presence.

3 COL BAKER: Thank you, ma'am.  
4 Good morning. As you noted, I am Colonel John  
5 Baker, the Deputy Director of the Judge  
6 Advocate Division for Military Justice and  
7 Community Development.

8 Mr. Barto and I are here today to  
9 discuss M.R.E. 412 and 513 issues, and how  
10 they're litigated at Article 32 hearings and  
11 during Article 39(a) sessions at  
12 courts-martial.

13 To give my comments some  
14 perspective, I will note that I have litigated  
15 M.R.E. 412 and 513 issues as a trial and as a  
16 defense counsel. I have ruled on them as a  
17 military judge. I have taught classes to  
18 subordinate trial and defense counsel on how  
19 to litigate these issues in court and, most  
20 recently, I have been dealing with M.R.E. 412  
21 and 513 as a policymaker as a member of the  
22 Joint Services Committee, where we recently

1 recommended a revision to Rule for  
2 Courts-Martial 405 that would apply the  
3 protections of M.R.E. 412 and 513 at Article  
4 32 hearings but would eliminate the  
5 constitutionally required exception at these  
6 preliminary hearings.

7 The JSC has also recommended  
8 changes to M.R.E. 412 and 513 to clarify that  
9 a victim's right to be reasonably heard at a  
10 M.R.E. 412 or 513 hearing includes the right  
11 to be heard through counsel.

12 With this background, I would like  
13 to offer a couple of observations and one  
14 anecdote, before I turn the mike over to Mr.  
15 Barto, who will walk you through the  
16 procedural rules.

17 First, I will walk through as a  
18 general proposition that when the procedural  
19 rules are properly applied, that both M.R.E.  
20 412 and 513 strike the balance between  
21 protecting a victim's privacy interest and  
22 providing the factfinder relevant evidence

1 needed to determine the fact or innocence of  
2 an accused.

3 Second, over the course of my  
4 career, I have seen an increase in 412  
5 litigation and an even larger increase in  
6 M.R.E. 513 litigation. And I have also  
7 observed an increased concern for protecting  
8 the privacy rights of victims.

9 Third, when examining these rules,  
10 please take into account the important new  
11 role that victim's legal counsel or special  
12 victim's counsel play in protecting a victim's  
13 privacy rights. In the Marine Corps, our  
14 victim legal counsel provide our victims a  
15 significantly improved right to be heard at  
16 Article 32 hearings and Article 39(a) sessions  
17 on M.R.E. 412 and 513.

18 To be honest, I was surprised this  
19 morning when I looked at the agenda of  
20 speakers and didn't see someone from the  
21 victim legal counsel or a special victim  
22 counsel to address this issue.

1 I will close with this anecdote.

2 CHAIR HOLTZMAN: If I may, we are  
3 going to be hearing from special victim's  
4 counsel, is it the next session?

5 LT COL GREEN: The next one. Yes,  
6 ma'am.

7 CHAIR HOLTZMAN: The whole day is  
8 special victim's counsel. So your mind should  
9 be at ease on that, sir.

10 COL BAKER: I will close with this  
11 anecdote. I served as a military judge in  
12 Okinawa, Japan from 2001 to 2014, in the very  
13 early days of M.R.E. 513 litigation and I can  
14 still remember my first closed M.R.E. 513  
15 hearing and my first in-camera review of a  
16 victim's treatment record.

17 The case was a hotly contested  
18 sexual assault allegation and the defense had  
19 proffered that the victim had made numerous  
20 inconsistent statements regarding the alleged  
21 assault. I approached this hearing thinking  
22 that it would be like any other motion session

1 that I presided over. I was wrong about that.  
2 The victim was notified about the hearing and  
3 she appeared and she made a pretty compelling  
4 argument that I not review her records.

5 The defense counsel, who was  
6 representing a young marine, made an even more  
7 convincing argument that the records could  
8 contain material that were constitutionally  
9 required and at the conclusion of the session,  
10 I ordered the trial counsel to produce the  
11 treatment records under seal for me to review  
12 in-camera. When the records arrived and I  
13 began to review them, I think this was the  
14 first time that I really had appreciated how  
15 personal and private the communications are  
16 between the victim and her treatment provider.

17 During the course of my review I  
18 did discover a piece of critical information  
19 that I felt needed to be disclosed to the  
20 accused and eventually to the factfinder.  
21 As I balanced these competing interests of  
22 these two young active duty Marines, I really

1 became mindful of the discretion that I had as  
2 a military judge and that I needed to have, in  
3 order to make the proper decision.

4 And so with that, I will turn the  
5 microphone over to Mr. Barto. And I look  
6 forward to answering any questions that you  
7 have.

8 MR. BARTO: Thank you, Colonel  
9 Baker. Madam Chair, members of the panel,  
10 good morning.

11 It is a privilege to speak with  
12 you this morning about the Military Rules of  
13 Evidence that apply the Rape Shield Rule and  
14 the psychotherapist privilege. My particular  
15 emphasis is going to be on the various ways in  
16 which the system safeguards victim privacy at  
17 pretrial hearings and during the  
18 court-martial. I speak to you much as Colonel  
19 Baker does, as someone who has served in  
20 almost every position in the military justice  
21 system. I have been a prosecutor, defense  
22 counsel, law professor, policy official, staff

1 judge advocate and a military judge at both  
2 the trial and appellate levels. I also speak  
3 to you as someone who has worked outside the  
4 military system, having spent the last five  
5 years with the federal judiciary as a senior  
6 attorney and court executive. So, I am very  
7 confident and comfortable when I echo Colonel  
8 Baker and say that the military justice system  
9 effectively provides due process for those  
10 accused of crime, while safeguarding privacy  
11 interests of victims of crime, particularly  
12 concerning their previous sexual behavior,  
13 their sexual predispositions and  
14 communications with psychotherapists.

15 But I want to begin this portion  
16 of our time together by an introductory note.  
17 It is important to remember that when dealing  
18 with the Military Rules of Evidence, we are  
19 dealing with a body of law that is created by  
20 Executive Order. The President has been  
21 authorized by Congress in 10 U.S.C 836 to  
22 promulgate rules of evidence, and this is the

1 language of the statute, so far as he  
2 considers practicable applying the principles  
3 of law and the rules of evidence recognized in  
4 the trial of criminal cases in the United  
5 States District Courts. As such, you will  
6 notice a fair similarity as we consider these  
7 two provisions with those in the Federal Rules  
8 of Evidence and many State and Commonwealth  
9 standards as well.

10 Now, if I could have the first  
11 substantive slide, please. Military Rule of  
12 Evidence 412 implements a Rape Shield Rule in  
13 the military justice system. It is a rule of  
14 relevance and it excludes as irrelevant two  
15 broad categories of evidence: evidence that  
16 is offered to prove that a victim engaged in  
17 other sexual behavior than that charged and  
18 evidence offered to provide a victim's sexual  
19 predisposition, that is, her dress, speech, or  
20 lifestyle.

21 Now, it is important to note that  
22 this is, as I mentioned, a rule of relevance.

1 It is not a rule of privilege and as such,  
2 there are three exceptions borrowed from the  
3 federal rule that you may find very familiar.  
4 The first is that the military judge may admit  
5 into evidence that evidence of specific  
6 instances of sexual behavior by a victim that  
7 are offered to demonstrate that another  
8 person, a person other than the accused, was  
9 the source of semen, injury, or other physical  
10 evidence. This exception is, quite frankly,  
11 far less encountered today than when I first  
12 began practicing due to the advent of  
13 sophisticated forensic examining and DNA  
14 evaluation as well.

15 The second exception is that a  
16 military judge may admit evidence of specific  
17 instances of sexual behavior by the victim  
18 with the accused that is offered as the Madam  
19 Chair noted earlier, to prove consent by the  
20 alleged victim in the case. This exception is  
21 criticized in the literature on the basis that  
22 consent at some past point does not mean

1 consent today. It remains a part of federal  
2 and military jurisprudence but some States and  
3 Commonwealths have limited the application of  
4 this provision almost with a statute of  
5 limitations that the sexual activity with the  
6 accused must be within a certain period of  
7 time in relation to the charged offense, like  
8 one year or less in some state systems.

9           And finally, the last exception  
10 and the exception about which there is the  
11 greatest amount of litigation. This is the  
12 exception that would allow evidence, in the  
13 words of the rule, the exclusion of which  
14 would violate the constitutional rights of the  
15 accused. What does that mean? The rule does  
16 not define what that means for the  
17 practitioner. But in my experience, evidence  
18 of this sort usually falls into one of several  
19 readily recognizable categories.

20           For example, evidence of previous  
21 sexual behavior that establishes a bias,  
22 prejudice or motive to fabricate on the part

1 of the alleged victim in the case. Similarly,  
2 this exception is used in military practice to  
3 admit evidence of demonstrably false  
4 allegations of prior sexual behavior by the  
5 alleged victim or sexual behavior or  
6 predisposition that is so distinctive and so  
7 similar to the sexual offense at issue that it  
8 explains or provides context for the instant  
9 allegations.

10           Interestingly, many states codify  
11 these commonly encountered circumstances in  
12 their own rules of evidence for criminal  
13 cases. But in military practice, these are  
14 adjudicated on an ad hoc basis by the military  
15 judge upon request by defense counsel in a  
16 given case.

17           We will return to some issues that  
18 are encountered by practitioners and judges in  
19 this exception a little bit later in the  
20 presentation.

21           Before I turn to the procedural  
22 requirements, it is helpful to look at what

1 this rule of evidence is intended to do. And  
2 as Madam Chair could probably recite from  
3 memory, as the drafter's analysis points out,  
4 this rule aims to safeguard the victim against  
5 an invasion of privacy, potential  
6 embarrassment, and sexual stereotyping that is  
7 associated with the public disclosure of  
8 intimate sexual details and the infusion of  
9 sexual innuendo into the fact-finding process.

10 The analysis goes on to say by  
11 affording victim protection in most instances  
12 this rule also encourages victims of sexual  
13 offenses to institute and continue to  
14 participate in legal proceedings against  
15 alleged offenders and under circumstances  
16 without which the victim might be tempted to  
17 not go forward with her allegations.

18 If I could have the next slide,  
19 please.

20 The procedural requirements under  
21 Military Rule of Evidence 412 are very similar  
22 to those in the Federal Rule of Evidence. I

1 won't read the slide to you but I will point  
2 out two differences in military practice.

3           Whereas the Federal Rules of  
4 Evidence allow a 14-day period in which the  
5 typically defense counsel must submit a  
6 written motion giving notice of an intent to  
7 use one of these exceptions to admit evidence  
8 of prior sexual behavior, the military justice  
9 system typically applies a much shorter  
10 deadline. The defense counsel need only file  
11 such a motion five days before the entry of  
12 pleas, as opposed to 14. This is because of  
13 the slightly more rapid pace of military trial  
14 work than federal or state criminal trials.

15           Like the federal system, it also  
16 requires, this rule requires that the victim  
17 be notified by defense counsel or the  
18 government of an intent to use prior sexual  
19 behavior or sexual disposition of evidence and  
20 allows notification to be provided to the  
21 victim's representative or counsel.

22           When a military judge receives a

1 motion like this indicating an intent by a  
2 party to use evidence of prior sexual behavior  
3 or sexual predisposition, that judge must hold  
4 a closed hearing, a hearing that is closed to  
5 the public. The federal rule refers to it as  
6 an in-camera proceeding. It basically means  
7 the same thing, although it is typically held  
8 in the courtroom but without the public  
9 present. Only the parties and necessary court  
10 staff are present. The jurors are never  
11 present for this hearing and the military  
12 judge must act to seal the pleadings, any  
13 evidence that is received during a hearing and  
14 the transcript of the hearing and prevent its  
15 review, unless ordered by the court itself.  
16 Usually, military judges enter an order that  
17 allows the exhibit to be opened by the  
18 reviewing court but not necessarily the  
19 convening authority or other counsel during  
20 the post-trial process. And any order issued  
21 by the military judge must, under this rule,  
22 specify exactly what evidence is going to be

1 offered permissibly and which areas may be  
2 explored on direct and cross-examination.

3 I have summarized the judicial  
4 decision-making under military rule of  
5 evidence 412 in this graphic. The first --  
6 this chart depicts and I chose the particular  
7 perspective of a defense counsel seeking to  
8 admit evidence of prior sexual behavior or  
9 sexual predisposition under this rule. And  
10 there are at least four hurdles that must be  
11 jumped by the defense counsel in order to  
12 obtain the admission of such evidence. The  
13 first is they must demonstrate evidence of the  
14 victim's sexual behavior or sexual  
15 predisposition. If not, the ordinary rules of  
16 evidence govern the case. That is not much of  
17 a hurdle and we proceed quite frequently to  
18 whether one of the three exceptions apply.

19 Is the evidence relevant to one of  
20 the three exceptions that provide for  
21 admissibility in this circumstance? That is,  
22 other source evidence, previous consent, or is

1 the evidence constitutionally required. And  
2 if the evidence fits into one of those three  
3 categories, then the military judge must  
4 perform a balancing test that may not be  
5 familiar to those of you who have practiced in  
6 federal jurisdictions but may be familiar to  
7 those of you who have practiced in state  
8 jurisdictions.

9 This first balancing test requires  
10 the military judge to examine the evidence  
11 that is tendered by the defense and determine  
12 whether the value of this evidence, the  
13 probative value outweighs the danger of unfair  
14 prejudice to the victim's privacy interest.  
15 Madam Chair may recognize this provision from  
16 a civil context in Federal Rule of Evidence  
17 412, but the President, in 2007, added this  
18 layer of protection for victims' privacy to  
19 Military Rule of Evidence 412 and military  
20 judges do this threshold analysis of  
21 comparison of the value of the evidence sought  
22 to be admitted against the danger of unfair

1 prejudice to the victim's privacy interest.  
2 And the judge can proceed only if she finds  
3 that the probative value outweighs the danger  
4 of unfair prejudice to the victim.

5           The next step is familiar to any  
6 litigator and it is found in Military Rule of  
7 Evidence 403, which is identical to Federal  
8 Rule of Evidence 403. To be admissible, the  
9 probative value must not be substantially  
10 outweighed by the danger of any of the factors  
11 identified in Military Rule of Evidence 403:  
12 confusion of the issues, undue delay, waste of  
13 time, or confusion of the jurors in this case.

14           The circumstance that is  
15 frequently used by judges to exclude evidence  
16 in these circumstances, the mini-trial, the  
17 trial within a trial over the victim's sexual  
18 behavior or predisposition.

19           If and only if the defense meets  
20 these four hurdles, relevance, exception,  
21 probative value, and 403 analysis, may the  
22 military judge admit the evidence at trial.

1                   I would like to make a bit of an  
2                   observation here concerning a practical  
3                   difficulty in the case law and in practice  
4                   right now for military justice practitioners  
5                   that involves this decisionmaking process.  
6                   And I direct the Panel's attention to the  
7                   unique balancing test that was added by the  
8                   President in 2007, in which they compare, the  
9                   military judge and practitioners compare the  
10                  probative value of the evidence sought to be  
11                  introduced with the danger of unfair prejudice  
12                  to the victim's privacy.

13                  The Court of Appeals for the Armed  
14                  Forces has recently, in a line of cases in  
15                  their progeny, cast doubt as to the  
16                  constitutionality of this provision as applied  
17                  in a criminal setting. The Court of Appeals  
18                  has, in a rather expansive dicta, said that  
19                  notwithstanding the plain text of the Military  
20                  Rule of Evidence which requires the judge to  
21                  do this balancing test, that the privacy  
22                  interest of a victim, the danger of unfair

1 prejudice to a victim's privacy interest will  
2 never trump the introduction of evidence that  
3 is material to the defense and favorable to  
4 the defense at trial. That is, the  
5 constitutional right to present a defense will  
6 always trump the victim's privacy interest.

7 This case, United States versus  
8 Gaddis is found in Volume 70 of the Military  
9 Justice Reporter, beginning, I believe, at  
10 page 248. And the court, although divided in  
11 that opinion, is united in its skepticism  
12 towards the applicability of this provision  
13 and whether the victim's privacy interest is  
14 ever relevant to the determination of the  
15 admissibility of evidence in a court-martial  
16 setting.

17 I do not speak for the Judge  
18 Advocate General in my next observation but I  
19 don't believe that that result is either  
20 necessary or appropriate under the Military  
21 Rules of Evidence but I do believe, and this  
22 is based on anecdotal evidence reported by

1 military judges and practitioners that it has  
2 created a great deal of uncertainty about what  
3 the state of the law is concerning the  
4 Military Rule of Evidence 412 and whether the  
5 victim's privacy interest and the danger of  
6 unfair prejudice, not just prejudice but the  
7 danger of unfair prejudice to the victim may  
8 ever be considered by a military judge.

9           This puts judges in a bit of a  
10 conundrum because if they follow the law as  
11 promulgated by the President, then they risk  
12 an ad hoc evaluation of their decision by the  
13 Court of Appeals and their action being deemed  
14 unconstitutional. The incentive might be for,  
15 perhaps, an inexperienced judge, not to  
16 mention the fact that she is considering the  
17 privacy interest but reached the same outcome  
18 anyway or to disregard the Military Rule of  
19 Evidence and obey the dicta in the Court of  
20 Appeals decision. None of these options are  
21 desirable.

22           I would suggest that it may be,

1 and I am going back on the record here, that  
2 it may be profitable for your panel to explore  
3 other state and commonwealth jurisdictions in  
4 which that balancing test has been  
5 successfully incorporated in their criminal  
6 jurisprudence without constitutional objection  
7 because I believe that balancing test is  
8 important to protecting the victim's privacy  
9 interest in guarding against unfair prejudice.  
10 Remember, that is the only thing we are  
11 looking for in this case, in the case of  
12 evidence that might be minimally probative.

13 The next slide I would like to  
14 consider is the psychotherapist privilege  
15 under Military Rule of Evidence 513 but I  
16 would like to pause and give Colonel Baker an  
17 opportunity or any Panel members the chance to  
18 ask any questions about Military Rule of  
19 Evidence 412 or any of my observations.

20 COL BAKER: I would like to echo  
21 something that Mr. Barto talked about. Our  
22 courts-martial, our cases usually come up in

1 relatively small places, where the population  
2 is relatively small. And I think there is,  
3 the reason why we have kind of the added,  
4 where we borrowed the civil part of 412 from  
5 the F.R.E. into the Military Rules of Evidence  
6 is to account for the fact that in our small  
7 environments, getting prior sexual behavior  
8 out on the record into that community really  
9 does have a danger of affecting a victim's  
10 privacy. And so that is why I think that the  
11 balancing test is there and that we do need,  
12 I think it is important that we provide our  
13 practitioners a little more guidance in this  
14 area.

15 MR. BARTO: Thank you, Colonel  
16 Baker and I would agree with that.

17 The twin purposes of the military  
18 justice system, as described in the preamble  
19 to the Manual for Courts-Martial, for example,  
20 are not only justice but also discipline and  
21 good order and discipline within the Armed  
22 Forces. And I think the unique nature of

1 military communities and service may justify  
2 the consideration of victim privacy interests  
3 which, perhaps in a federal setting or  
4 elsewhere, might be constitutionally suspect.

5 But in connection with the  
6 psychotherapist privilege, this is an area --  
7 yes, Madam Chair?

8 CHAIR HOLTZMAN: You failed to  
9 provide us an opportunity to ask questions on  
10 412.

11 MR. BARTO: Thank you, ma'am.

12 CHAIR HOLTZMAN: And I don't want  
13 to let that slip. Maybe you will retract it.

14 Does any member of the panel have  
15 any questions on 412? Mr. Taylor.

16 MR. TAYLOR: Thank you both for  
17 your testimony. Mr. Barto, you said that in  
18 describing the judicial decisionmaking process  
19 under M.R.E. 412, that even if the proposed  
20 evidence to be offered passes the 412  
21 scrutiny, that then there is still this 403  
22 examination that takes place. Do you know of

1 cases where it passes, the evidence passes  
2 scrutiny under 412 but is excluded under 403  
3 and can you comment on that?

4 MR. BARTO: The Military Rule of  
5 Evidence expressly requires military judges to  
6 analyze otherwise admissible evidence under  
7 Military Rule of Evidence 403. The last  
8 sentence, I believe, of Military Rule of  
9 Evidence 412(c)(3), I believe, expressly  
10 requires that. So, it happens in every case.

11 I think the most common scenario I  
12 can recollect from my own time as a military  
13 judge and even my reference to Gaddis, it  
14 doesn't necessarily result in the exclusion of  
15 an entire incident of prior sexual behavior or  
16 sexual predisposition on the part of the  
17 victim. But what it frequently results in is  
18 a narrowing of the evidence tendered, a  
19 narrowing of the scope of permissible  
20 cross-examination, perhaps. And in Gaddis,  
21 that is what the military judge did. She  
22 narrowed the scope of cross-examination to

1 prevent the defense from going too far afield  
2 into the victim's previous sexual behavior.

3 So, Gaddis provides one example  
4 but I would be happy to provide additional  
5 examples from the case law in a written  
6 submission after my testimony. But I hope  
7 that addresses, at least initially, your  
8 question.

9 MR. TAYLOR: Thank you.

10 COL BAKER: Sir, I could offer I  
11 have seen it apply, the 403 balancing tests  
12 apply when there is going to be some sort of  
13 delay, where while the evidence may come over  
14 the hurdle of unfair prejudice to the victim's  
15 privacy right but it is still going to take a  
16 while to get the evidence and the evidence, it  
17 is just not worth delaying the trial to get  
18 that evidence into court, particularly, as I  
19 said, I was a judge in Japan and we had  
20 frequently, I have witnesses that would have  
21 to come out there.

22 JUDGE JONES: That is evidence

1 that would not have been under just a 403  
2 analysis.

3 COL BAKER: Right. Yes, ma'am.

4 MR. BARTO: In fact, in a  
5 particularly troubling aspect of the  
6 concurring opinion in Gaddis, former Chief  
7 Judge Effron proposes a methodology where  
8 Military Rule of Evidence 403 would even be  
9 overcome by material evidence that is  
10 favorable to the defense. He would propose  
11 that that constitutional imperative to present  
12 a defense would even prevent the operation of  
13 403. And there is really no logical  
14 constraints on the reasoning of that case.  
15 Why stop there? Why not allow hearsay? Why  
16 not do away with authentication? And I paint  
17 that as a worst case scenario by the former  
18 law professor, and you can't avoid the  
19 slippery slope argument, I don't think the  
20 court meant what it said in Gaddis, and yet it  
21 is creating a certain amount of anxiety and  
22 uncertainty among practitioners as to how not

1       only 412 but 403 apply in this new universe.

2                   CHAIR HOLTZMAN:  Do you have any  
3       other questions?

4                   MR. TAYLOR:  No thank you.

5                   CHAIR HOLTZMAN:  Mr. Stone.

6                   MR. STONE:  I know that I am --  
7       let me start by saying I am speaking from  
8       public record, what I have read in the  
9       newspapers, but from what I read in the  
10      newspapers about the case at the Naval Academy  
11      involving the cadets there, I was not under  
12      the impression that the military judge in that  
13      case bothered with any of your four hurdles.  
14      I didn't see anything about an in-camera  
15      hearing.  I didn't hear -- the only exception  
16      that the judge relied no, I understand, was  
17      that it was the Constitution required it  
18      without explaining how the Constitution  
19      required it.  And when, as I understand it,  
20      the prosecution tried to resort and there was  
21      victim's counsel in that case, to the specific  
22      appellate court over that judge.  They did not

1 take the case and then there were petitions  
2 filed with the Court of Appeals for the Armed  
3 Forces and they did not take the case.

4 So, basically, your telling me  
5 about the four hurdles doesn't sound like it  
6 is being followed. And I would like to know  
7 if you have some comment on that or if you can  
8 tell us, as a panel, how we can get and review  
9 the record in that case as a very public  
10 example that upset an awful lot of people.

11 MR. BARTO: This is one case in  
12 which the Army is happy to defer to the Naval  
13 Services to provide an answer as to how that  
14 court-martial process worked.

15 (Laughter.)

16 MR. BARTO: But I would give  
17 Colonel Baker time to prepare by saying that  
18 bad cases make bad law. And every day  
19 throughout the world, military judges are  
20 routinely applying the provisions of Military  
21 Rule of Evidence 412 and 513 without media  
22 attention and with solicitous concern for both

1 the due process rights of the accused and the  
2 privacy interest of the victim.

3 And with that, I will turn it to  
4 Colonel Baker to discuss the particular  
5 instance in the Naval Academy case.

6 COL BAKER: Sir, I have not  
7 reviewed the record of that case and my  
8 knowledge of that is like you, based upon what  
9 I have read in the newspapers. So, I can't  
10 provide you a comment on whether the rules  
11 were or were not followed in that case.

12 Certainly, our procedural rules do  
13 require the judges to make a very difficult  
14 decision. And that very difficult decision is  
15 to balance the privacy interests of the victim  
16 with the rights of the accused.

17 I am confident that, as Bill said,  
18 across the globe this happens properly a lot.  
19 Are there cases where it doesn't? Yes, but I  
20 don't think it is because there is a problem  
21 with the rules. It may be a problem with the  
22 folks that are applying the rules. And I am

1 not trying to say that the judge in that case  
2 improperly applied the rules. I mean I just  
3 don't know enough about the case to comment on  
4 whether they were properly applied or not. I  
5 will just note that the judge that presided  
6 over that case, I believe, was the Chief Trial  
7 Judge of the Navy Marine Corps Trial Judiciary  
8 and is a very well-respected jurist and I  
9 would assume that he did properly apply the  
10 rules.

11 So, that is kind of the best I can  
12 do, sir. Is there -- I think that M.R.E. 412  
13 and M.R.E. 513 do properly provide  
14 practitioners the ability to apply it with  
15 some clarity, as we discussed in the added  
16 prong to the probative value outweighing the  
17 danger of unfair prejudice.

18 MR. STONE: Correct me if I am  
19 wrong. Let's turn to those rules just for a  
20 second because you opened your testimony  
21 talking about what I thought is a proposed  
22 rule to allow victims a right to be heard

1 through counsel.

2 I guess I don't understand  
3 currently what the point is of having a closed  
4 hearing if it is not currently the practice  
5 that victims can be heard through counsel.  
6 The victims are the people with the privacy  
7 interest during that hearing. The prosecution  
8 may care about it but they have a broader  
9 concern, which is to get a case to trial, and  
10 they are not going to have to live with the  
11 adverse publicity about their sex lives that  
12 the victim will. And if there is going to be  
13 a hearing, we certainly don't expect the  
14 victim to be representing themselves. So, why  
15 is it that the military needs to propose a  
16 rule that victims be heard through counsel?  
17 Why isn't that already a matter that is  
18 accepted across the board?

19 COL BAKER: The victims always had  
20 a right to be reasonably heard in these  
21 proceedings. The purpose of the Joint  
22 Services Committee proposing that we clarify

1 that that right occurs through counsel, well,  
2 there has, frankly, been some question about  
3 it. And the case of Kastenberg went to the  
4 Court of Appeals for Armed Forces and we  
5 wanted to assure that there was no question  
6 about whether the victim's right to be  
7 reasonably heard at a 412 or a 513 hearing  
8 included the right to be heard through  
9 counsel.

10 I guess I don't see why -- that  
11 providing clarity, to me, is a good thing.

12 MR. STONE: Yes, I think it is a  
13 good thing. I guess what I am pointing out is  
14 the fact that you have to provide that clarity  
15 is evidence that there is an awful lot of  
16 military judges who are not allowing victims  
17 to be heard through their counsel and they are  
18 expecting young military recruits to speak for  
19 themselves on legal issues and not to be heard  
20 through the counsel which the Services are  
21 providing to argue on their behalf about their  
22 privacy. And I just think that that is long

1 overdue, frankly, but I think there is an  
2 indication that there is something wrong.

3 MR. BARTO: If I could jump in on  
4 behalf of the Army, Mr. Stone, in the current  
5 Military Rule of Evidence, which mirrors the  
6 Federal Rule of Evidence in this regard, the  
7 victim must be afforded a reasonable  
8 opportunity to attend and be heard. So, there  
9 is, as Colonel Baker noted, a fundamental  
10 right for the victim to be present and be  
11 heard.

12 What is recent is the advent of  
13 special victim counsel or victim's legal  
14 counsel which have been now provided by  
15 Congress through statute in the National  
16 Defense Authorization Act, I believe of 2013,  
17 that now creates a specific attorney position  
18 to advocate on behalf of victims.

19 The Joint Service Committee change  
20 that is being contemplated is in response to  
21 this new phenomenon of special victim counsel  
22 or victim's legal counsel, that are now part

1 of the legal landscape and which need to be  
2 accounted for in the rule.

3 Assuming that judges everywhere  
4 are not respecting victim rights, in the face  
5 of a clear mandate from the Commander in Chief  
6 that they do so, that is just not supported by  
7 my own experience and I would venture to speak  
8 in Colonel Baker's as well.

9 MR. STONE: I guess my response to  
10 that is that victims' right to counsel have  
11 not only been around for decades but they were  
12 enshrined into federal law, governing every  
13 federal court in 2004 in the Crime Victims'  
14 Rights Act. So, all you are telling me is  
15 that recently Congress made victim's counsel  
16 freely available to victims but counsel has  
17 been available to victims for ten years. And  
18 it is long overdue that military judges didn't  
19 expect the victim, who has counsel, to have to  
20 get up and make the claim about privacy him or  
21 herself and not through counsel.

22 CHAIR HOLTZMAN: Any other

1 questions?

2 JUDGE JONES: I was just going to  
3 say it is true that the federal Victims'  
4 Rights Act talks about counsel but the reality  
5 is most victims do not have counsel in the  
6 civilian world or any other world because they  
7 can't afford them. It is a relatively new  
8 phenomenon, both in the states -- and so it  
9 doesn't surprise me that it is also now a new  
10 phenomenon and a good one in the military.  
11 And actually in the military, you get counsel  
12 automatically, if you want it, and you don't  
13 pay for it. So, it has gone beyond most of  
14 the programs that exist in the civilian world.

15 I was interested in how Article  
16 32s are working now because I think, Colonel  
17 Baker, you started to talk a little bit about  
18 -- did you say something about eliminating the  
19 constitutional aspects of the rule? I am  
20 interested in that, too. And that is two  
21 different questions, I recognize.

22 COL BAKER: I will start with the

1 second one, first, because it is easiest.

2 The proposal that is currently  
3 before -- that is out for public comment from  
4 the Joint Services Committee, is to  
5 specifically exclude the constitutional  
6 exceptions at Article 32 hearings for both  
7 412, 513, and 514.

8 So, at an Article 32 preliminary  
9 hearing, the first two exceptions would apply  
10 and the third exception would not.

11 Does that answer your question on  
12 that issue, ma'am? And the Staff can get you  
13 a copy of the proposed EO. It is on the web.

14 JUDGE JONES: What would be the  
15 practical impact of taking away the third  
16 exception?

17 COL BAKER: The practical impact  
18 of taking away the third exception would be  
19 kind of the debate in an Article 32 hearing  
20 about such things that Bill talked about.

21 MR. BARTO: Bias, motive to  
22 fabricate prior false allegations. Things

1 that typically are raised under the  
2 constitutionally required prong would not be  
3 deemed relevant at a preliminary hearing,  
4 whose only real purpose is now to determine  
5 probable cause whether the accused should be  
6 court-martialed for a particular offense.

7 COL BAKER: But in the first two  
8 exceptions, could provide information to the  
9 preliminary hearing officer that could make it  
10 that there wouldn't be probable cause, if  
11 there was valid evidence that somebody else  
12 was the other source of the exception.

13 So, really, removing that  
14 exception also kind of reflects the  
15 fundamental changed Article 32 hearings, which  
16 narrowed the limit and the scope of the  
17 hearing and have made it so it is not a  
18 discovery tool.

19 And your other questions, ma'am,  
20 was how are 32 hearings -- is the question how  
21 is 412 being applied at 32 hearings now?

22 JUDGE JONES: Yes. I mean were

1 there always 412 hearings at Articles 32s or  
2 at least were there always supposed to be?

3 COL BAKER: There always were  
4 supposed to be. Certainly, I think that  
5 anecdotally, I can state that they weren't  
6 always done right.

7 I talked last evening with Colonel  
8 Joyce, who runs our victim legal counsel  
9 organization and her counsel are actively  
10 involved in filing, they are not calling them  
11 motions because it is at a preliminary hearing  
12 but they are actively involved in litigating  
13 412 issues at Article 32 hearings.

14 So we certainly are applying them  
15 better, I think, frankly, better than we have  
16 in the past.

17 MR. BARTO: The other change,  
18 Judge Jones, is that judge advocates are now  
19 serving as Article 32 officers. A military  
20 attorney is now presiding over the preliminary  
21 investigation/preliminary hearing, as we  
22 transition terminology and purpose. And the

1 presence of an attorney in the room that is  
2 sensitive to these issues makes the system  
3 better able to protect victim rights while  
4 reaching this probable cause determination as  
5 well.

6 JUDGE JONES: And I think I  
7 understand this now because if you eliminate  
8 the constitutional analysis, you are really  
9 eliminating those types of evidentiary rulings  
10 that you may need to make, if it goes to  
11 trial, or would but it would not be relevant  
12 to just a look at the facts and a probable  
13 cause determination. Is that the idea?

14 VADM (R) TRACEY: You may have  
15 answered this already. You opened your  
16 remarks, Colonel, by saying that these two  
17 rules of evidence, when the procedural rules  
18 are properly applied, work well, words to that  
19 effect. Are there some repeated issues with  
20 regard to the proper application of procedural  
21 rules? Perhaps they have been addressed by  
22 these Article 32 changes.

1 COL BAKER: One of them kind of,  
2 historically, frankly, have not been very good  
3 at applying them at Article 32 hearings.

4 A lot of it, because of the wide  
5 open nature of an Article 32 proceeding that  
6 has really focused on discovery, so with a  
7 judge advocate presiding over an Article 32  
8 hearing and a counsel representing the victim,  
9 I think that you have a much better chance at  
10 an Article 32 hearing that the procedures are  
11 followed properly.

12 At an Article 32(a) session, with  
13 the military judge, I think that those have  
14 traditionally been done well. Are there  
15 exceptions, as Mr. Stone brought up? Yes. I  
16 mean I can't say that we have done it right  
17 every time but I think that in the vast  
18 majority of cases, courts-martial tried across  
19 the globe, our military judges do a fantastic  
20 job of balancing the interest of the victim  
21 against the interest of the accused.

22 MR. BARTO: Admiral Tracey, if I

1       could gently tug the presentation toward the  
2       Military Rule of Evidence 513 as well and the  
3       psychotherapist privilege, I would candidly  
4       tell you that this is a challenging area for  
5       investigators, for counsel, and for military  
6       judges. And this is, given the Supreme  
7       Court's decision in Jaffee v. Redmond several  
8       years ago and the advent of this Military Rule  
9       of Evidence, there is no federal rule of  
10      evidence, for example, describing a  
11      psychotherapist privilege.

12                 So, this is a relatively new rule  
13      and proper sensitivity to the psychological  
14      counseling records of victims is something  
15      that everybody is learning as we move forward  
16      from investigators, who in the past might have  
17      just gone to the hospital and obtained those  
18      records, from counsel who might review them  
19      before submitting them to the military judge,  
20      to the judge, who didn't have guidance in the  
21      past but now has a relatively strictly  
22      constructed rule of evidence. All three of

1 the participants in the process are learning.  
2 And it is getting better but it places premium  
3 on the ability of military judges to monitor  
4 the progress of that learning and to intervene  
5 with protective orders, when appropriate, to  
6 safeguard victim privacy concerning her  
7 psychological or mental health counseling  
8 records.

9 For example, much like Judge  
10 Baker, after this rule was enacted, I found  
11 myself, as a trial judge, reviewing the health  
12 counseling records of a child victim of sexual  
13 abuse. And not only was it psychology, it was  
14 pediatric psychology. And not only was it  
15 pediatric psychology, the person writing the  
16 notes was a master of social work as well.  
17 How they got time to do all these degrees, I  
18 don't know, but I, as a lay person, more or  
19 less, am attempting to screen psychological  
20 counseling records in my chambers on the road  
21 without expert assistance and the like.

22 I know now that I could have

1 appointed an expert to assist me in reviewing  
2 those records and making sense of the medical  
3 and sociological notations that were in the  
4 record. But I think we, as a community, need  
5 to realize that judges' discretion is key and  
6 judges are not omnipotent and omniscient in  
7 the sense that they may need to enlist the  
8 help of mental health professionals to screen  
9 this as well, going forward in the future. If  
10 we were to be properly sensitive to protecting  
11 the right of the privacy interests of the  
12 victim and ensuring that potentially  
13 exculpatory information is released to the  
14 defense counsel.

15 CHAIR HOLTZMAN: I would like to  
16 go back to 412. First of all, Mr. Barto, you  
17 talked about the relevance of sexual  
18 predisposition of the victim. Why is that a  
19 standard?

20 COL BAKER: Ma'am, it is the  
21 standard that was taken from the Federal Rule  
22 of Evidence, I believe.

1                   CHAIR HOLTZMAN: I didn't read  
2 that in the Federal. Would you point out  
3 where it says predisposition?

4                   COL BAKER: I would have to  
5 investigate that and look at where that  
6 language came from, briefly.

7                   CHAIR HOLTZMAN: Let me just  
8 suggest it is not in the Federal Rule. The  
9 Federal Rule exactly was to, having been the  
10 author, to eliminate the idea of  
11 predisposition and the logical fallacy that if  
12 a woman ever said yes or said yes five times,  
13 or said yes 50 times, she might say no the  
14 next time. That was the whole point of that  
15 statute.

16                   So, I find myself troubled, to say  
17 the least, at the use of the term  
18 predisposition of sexual behavior as a  
19 standard for anything under 412. And I would  
20 urge you, sir, to reconsider your use of that  
21 terminology.

22                   COL BAKER: But it is an explicit

1 exception. I mean, so that --

2 MR. BARTO: It is excluded.

3 Evidence of predisposition is excluded.

4 CHAIR HOLTZMAN: Right. You were  
5 saying, as I heard you, maybe I misunderstood  
6 what you were saying, that that could be  
7 introduced.

8 MR. BARTO: That is not what I  
9 intended to communicate to you, ma'am.

10 CHAIR HOLTZMAN: Then I apologize.

11 MR. BARTO: The Military Rule of  
12 Evidence excludes as irrelevant evidence  
13 offered to prove a victim's sexual  
14 predisposition.

15 CHAIR HOLTZMAN: That is what I  
16 knew that the rules were and I am glad to see  
17 that we are on the same ground on that.

18 MR. BARTO: The same.

19 CHAIR HOLTZMAN: Okay. Now, the  
20 second point you make is about how well the  
21 rule is working. And I must say that I found  
22 myself quite astonished, I will just use that

1 adjective, at the decision of the Court of  
2 Appeals for the Armed Forces in the case of  
3 U.S. versus Ellerbrock. And if that is the  
4 position of the Court of Appeals, then I don't  
5 know how we can more clearly state what 412  
6 and the Military Rule of Evidence was designed  
7 to accomplished because I think the court  
8 misunderstood that.

9 I mean going back to the point I  
10 just raised before. In this case, since I am  
11 sure you are familiar with it --

12 MR. BARTO: Yes, in fact  
13 Ellerbrock almost got us a different judge  
14 writing the opinion about the same issue.

15 CHAIR HOLTZMAN: Right. And here  
16 we go again, as I see it, where the court, I  
17 thought the dissent actually made a very good  
18 point, both dissents were much more persuasive  
19 to me, but basically the court said that since  
20 she -- I mean basically, that she didn't want  
21 her marriage to end and that showed that she  
22 had a motive to fabricate. And going -- so,

1 if you have done fabrication before, then that  
2 seems to me to be relevant. But just because,  
3 and even assuming that that in fact was the  
4 case she didn't want her marriage to end, I  
5 don't know that that shows she had a motive to  
6 lie about a rape.

7 So, I am very concerned about how  
8 the courts are interpreting this and  
9 particularly because I think if we go back to  
10 the underlying purpose of 412 and going again  
11 to this constitutional point that you have  
12 raised, that the reason it is quote unquote  
13 favorable to a defendant to raise the prior  
14 sexual history of the victim is because that  
15 is a huge, what I would call, smear tactic.  
16 And that is, I mean, not just prejudicial to  
17 the victim but prejudicial to the truth  
18 finding and fact finding ability of the juries  
19 or of the court because it is so prejudicial,  
20 given the stereotypes and the cultural  
21 attitudes that we have in this society.

22 So, I am just wondering, you are

1 asking us to look at that specific issue about  
2 how other states handle this but I am  
3 wondering what we have to do to get judges in  
4 the military to understand that just because  
5 a woman has said yes before doesn't mean she  
6 is going to say yes again. And is this a  
7 training issue? Is it the statute isn't clear  
8 enough?

9 MR. BARTO: Interestingly, ma'am,  
10 the Court of Appeals for the Armed Forces is  
11 a five-judge panel of civilian jurists  
12 appointed from civilian life, specifically  
13 excluded, until recently, from the military  
14 ranks, in order to provide oversight to the  
15 military justice system. I cannot defend and,  
16 in fact, brought it to your attention, that  
17 Gaddis and Ellerbrock represent a real  
18 curiosity at best, and perplexity at worse to  
19 the practitioner in the field. Because the  
20 plain language of 412, as Judge Effron says in  
21 his concurrence in Gaddis, until the rule is  
22 changed, it remains in effect, subject to our

1 obligation to interpret the rules in  
2 accordance with the Constitution and  
3 applicable legislation.

4 In the absence of any meaningful  
5 justification for the court's actions in  
6 Gaddis and Ellerbrock, that puts practitioners  
7 and judges alike in a very difficult  
8 explanation [sic] and I don't think many of us  
9 would jump to the defense of what you just  
10 described in Gaddis and Ellerbrock. It is  
11 inexplicable to this practitioner and I don't  
12 speak for the Judge Advocate General in that  
13 characterization.

14 CHAIR HOLTZMAN: I can't speak to  
15 Gaddis because I haven't read that case but I  
16 can speak to Ellerbrock and I just find  
17 myself, perplexing isn't the word I would use  
18 about it, I think it violates the  
19 understanding of the statute. And here we  
20 are, this is, Federal Rules of Evidence was in  
21 '76 or late '70s and here we are almost 40  
22 years later and the same cultural prejudices

1 are infecting the court decisions here.

2 And particularly, if you take the  
3 Gaddis decision that anything that is  
4 favorable to the defendant has to come in as  
5 a Constitutional matter, well, smear is  
6 favorable to the defendant. It totally guts  
7 412. If that is the concurrence and if that  
8 is what the military judge is going to follow,  
9 what is left of 412?

10 MR. BARTO: There are those who  
11 make the contrary argument. But I would point  
12 out in Ellerbrock that the trial judge, the  
13 uniformed judge in that case got it right by  
14 your criteria and by most observers. So, it  
15 was the superior court to the military justice  
16 system that produces the result that is so  
17 difficult to understand here today.

18 CHAIR HOLTZMAN: Well, what  
19 suggestions do you have for this panel,  
20 assuming that my colleagues agree with that?  
21 I can't speak for them. I am surprised to  
22 find myself in the majority on any issue but

1 I am glad to be in the majority on this.

2 But in any case, what suggestions  
3 do you have for the Panel to deal with this  
4 problem?

5 MR. BARTO: As I was preparing for  
6 testifying today and I was reviewing the Rape  
7 Shield provisions of the 50 states and the  
8 various commonwealths and territories, I was  
9 struck by the variety of ways in which victim  
10 privacy was incorporated into their criminal  
11 evidentiary codes, without raising  
12 constitutional issues of the sort that the  
13 Court of Appeals for the Armed Forces attached  
14 such significance to.

15 All I can suggest is to reiterate  
16 my earlier suggestion that oftentimes it is  
17 the symphony of voices in a state or a  
18 commonwealth or apply the best of those  
19 statutes in a recommended revision to the  
20 rules of evidence. It might clarify.

21 For example, the thing that occurs  
22 to me, and this is not a proposal of the Judge

1 Advocate General, but as a former policy  
2 official and law professor, I think one of the  
3 fundamental flaws of the Court of Appeals  
4 decision in Gaddis and Ellerbrock, is that  
5 that view, the conclusion that evidence is  
6 constitutionally required to be admitted as a  
7 static decision. But I think a more coherent  
8 way of viewing it is that is a category into  
9 which a defense counsel is attempting to fit  
10 evidence. But until the probative value of  
11 that evidence is examined, until the danger of  
12 unfair prejudice to the victim's privacy  
13 interest and until the danger of undue delay,  
14 substantial confusion to the members, waste of  
15 time, and all those other things are  
16 considered, the question of whether that other  
17 sexual behavior and sexual predisposition  
18 could ever be relevant is a dynamic decision  
19 and it is not finished until we get to the  
20 last step of that diagram that I provided for  
21 you.

22 You can't start with the

1 conclusion. And that is what the CAAF, Court  
2 of Appeals for the Armed Forces appears to be  
3 doing in Gaddis and Ellerbrock. Perhaps some  
4 more dynamic description up-front in Military  
5 Rule of Evidence 412 as to what the drafters  
6 are intending by evidence that is  
7 constitutionally required to be admitted would  
8 help clarify for military judges. So, that is  
9 the ongoing determination that is being made.

10 CHAIR HOLTZMAN: Let me ask one  
11 final question about this. Would it clarify  
12 matters if the definition of consent were  
13 changed?

14 MR. BARTO: I think that would  
15 have the most effect upon the second exception  
16 in the Military Rule of Evidence 412, the  
17 previous interactions with the accused in a  
18 given case. But I cannot foresee how that  
19 would specifically directly affect the other  
20 types of evidence of a, commonly introduced  
21 under this exception, the constitutionally  
22 required exception.

1           I can think that a narrowing of  
2 consent -- for example, there is this class of  
3 cases in the state law and beginning in  
4 military law, in which the previous sexual  
5 behavior is so distinctive that it  
6 communicates to the accused, either because he  
7 saw it or because he knows of it, that somehow  
8 the victim has given her consent to this same  
9 sort of activity in this instance. By  
10 narrowing the definition of consent, I think  
11 we would exclude a large majority of those  
12 cases from ever getting past the initial  
13 threshold with the military judge because the  
14 consent that is at issue is the consent to  
15 this particular military service member and  
16 this particular setting and circumstance, not  
17 what a person chose to do six months ago with  
18 other individual or individuals.

19           So, I can see how it would narrow  
20 or would ease the judge's burden and clarify  
21 the practitioner's lot in certain  
22 circumstances.

1                   CHAIR HOLTZMAN: It would also  
2 help in terms of the quote unquote  
3 constitutional analysis that is taking place  
4 because of the crime.

5                   MR. BARTO: Yes.

6                   CHAIR HOLTZMAN: Okay, thanks. Do  
7 you want to do -- I think we took all of your  
8 time on 412. Do you still have something you  
9 wanted to say to us on 513?

10                  MR. BARTO: I have said what I  
11 intended to say about 513 in that it is  
12 important that the judge know when the judge  
13 doesn't know and seek expert assistance. I  
14 think that is something we can do better in  
15 the future. We have the regulatory authority  
16 to do so in practice. It is not often done.

17                  But I notice Mr. Stone wanted to  
18 say something.

19                  MR. STONE: Yes, on 513, I thought  
20 the point of the proposal which President  
21 Clinton authorized in 1999 in 513 was that  
22 kind of psychological counseling evidence did

1 not automatically get to the judge in every  
2 case to do what he felt like doing. And my  
3 understanding is that is exactly what is  
4 happening and I think it undercuts the 513,  
5 just like you were discussing how the 412 rule  
6 is undercut.

7           As I understand it, the practice  
8 has been that military judges tell the  
9 prosecutor to go get the military hospital  
10 records of the people in question and they get  
11 them. And then the judge decides in-camera  
12 without any recognition that the rule is  
13 intended to make that a very narrow exception  
14 in a small number of cases and not the  
15 standard operating procedure. And that the  
16 military hospitals, because they are in the  
17 chain of command, turn these records over and  
18 unlike private hospitals, they are not  
19 requiring HIPAA releases from the patient.  
20 And in fact again, to go back to it, in the  
21 Naval Academy case, the records of counseling  
22 on the Navy base were ordered and just showed

1 up.

2 And so, I would like your comment  
3 as to whether or not -- I can tell you that my  
4 feeling is that that rule has also been  
5 completely undercut because it is not the  
6 business of the military judge to decide in  
7 every case in his discretion whether those  
8 records come in but only a very narrow view  
9 kinds of cases.

10 COL BAKER: Sir, I certainly would  
11 agree with -- well, there has been since we  
12 developed 513, there certainly has been an  
13 increase in the number of cases with which 513  
14 has been litigated. When these cases first  
15 began, I don't know if there was a lack of  
16 awareness that these records existed or that  
17 more people are getting counseling. It may be  
18 a combination of the two.

19 In my experience, this is a  
20 bifurcated process or almost a trifurcated  
21 process. First, a motion has to be filed.  
22 Second, the judge holds a closed hearing. And

1 not until the closed hearing is done is the  
2 trial counsel ordered to go get the records.

3 So, if there are cases where the  
4 judge is ordering those ahead of time, I can  
5 assure you that is not the practice. The  
6 rules lay out the process. The rule lays out  
7 the process that they hold the hearing and  
8 then to make a determination whether the judge  
9 is going to review the records in-camera. It  
10 is not an automatic. So, I can only speak for  
11 the cases which I know about but in those  
12 cases, our judges are properly providing, are  
13 properly applying M.R.E. 513. It is not a  
14 rubber stamp or an automatic.

15 MR. STONE: But now that the  
16 military Services have sexual assault  
17 counseling, I think it has become uniform that  
18 the sexual assault counselors tell the victims  
19 that they can get psychological counseling if  
20 they feel they have been raped and where to  
21 get it.

22 So, it is now the rule, rather

1 than the exception that the defense counsel  
2 are going to expect that there are  
3 psychological counseling records.

4 COL BAKER: Yes, sir, that is in  
5 fact true. Our victims are getting more  
6 counseling than they have before.

7 There is a requirement, our trial  
8 counsel have an obligation to provide Brady  
9 materials. And so part of their due diligence  
10 is to find out if, upon request from the  
11 defense, if there has been records to find out  
12 if the records exist. If there is a motion  
13 filed, the victim is notified. The victim is  
14 provided counsel. And at a closed hearing,  
15 the judge is -- the parties talked about  
16 whether those records should be provided to  
17 the judge in-camera.

18 The records aren't provided before  
19 the hearing. That is not the way the rules  
20 are written. So, if there are cases where  
21 that is happening, not applying the rules  
22 properly, again, the advent of the victim

1 legal counsel, the special victim's counsel,  
2 provides the victim another tool to protect  
3 his or her privacy rights.

4 I mean it is hard for me to talk  
5 to you about cases where the procedures aren't  
6 followed because, in my experience, the  
7 procedures have been followed.

8 MR. STONE: Well, I guess what you  
9 just described to me is not a procedure that  
10 I find acceptable. The Supreme Court said in  
11 the Jaffee decision that Brady is not a reason  
12 to invade somebody's psychological counseling  
13 records, which you just articulated, and if  
14 the records are routinely being obtained as if  
15 they are prosecution records from military  
16 hospitals on base, then you ought to change  
17 your procedures and recommend that people see  
18 psychological counselors off base. Because  
19 those records should not be released for, as  
20 you just outlined, reasons like Brady.

21 COL BAKER: Sir, there is a series  
22 of cases that talk about a requirement for

1 prosecutors to provide Brady material. And I  
2 want to make sure that I am clear.

3 What I am not saying is that the  
4 trial counsel upon a request from the defense,  
5 goes and gets the files and starts looking  
6 through them. That is not what is happening.  
7 But what is happening is if there is a request  
8 and there is a motion filed, the judge makes  
9 a determination whether or not the judge makes  
10 an in-camera review of those records.

11 So, and they are applying M.R.E.  
12 513 as written. And the judge has to weigh  
13 the balancing of the privacy interests of the  
14 victim and the due process rights of the  
15 accused.

16 MR. STONE: Yes, and I am  
17 suggesting they are doing exactly what we just  
18 heard in the 412 context. They are using the  
19 quote constitutional exception to order those  
20 records in every case. That's all. And,  
21 therefore, they have completely undercut the  
22 rule, as we have just heard with 412.



1 Taylor but I believe it has changed.

2 With the advent of HIPAA and the  
3 increased awareness of victim privacy  
4 interests, my understanding is that it is no  
5 longer Army policy. But I will verify that  
6 and provide that information to the panel. I  
7 will.

8 CHAIR HOLTZMAN: Judge Jones?

9 JUDGE JONES: No, thank you.

10 CHAIR HOLTZMAN: Admiral Tracey?

11 VADM (R) TRACEY: I'm good.

12 CHAIR HOLTZMAN: Thank you very  
13 much, Colonel Baker and Mr. Barto. We very  
14 much appreciate your informing the committee  
15 of the facts that you have. Thanks for your  
16 testimony this morning.

17 Okay, we will go to our next  
18 panel, which is Victim Privacy in Sexual  
19 Assault Cases: Past Sexual Conduct.

20 Can I call to the table, please,  
21 Ms. Jennifer Long, Ms. Patricia Powers, Ms.  
22 Kepros, and Professor Fishman, please?

1                   Are all the panel members, is Ms.  
2 Long here? Would you take your seat please,  
3 so we can commence? Thank you.

4                   Could we have -- if anybody is  
5 having conversation in the back, would they  
6 mind leaving the room so we can commence with  
7 the second panel, please? Thank you very  
8 much.

9                   Our first witness will be Ms.  
10 Jennifer Long, who is the Director of  
11 AEquitas. Ms. Long.

12                   MS. LONG: Thank you.

13                   CHAIR HOLTZMAN: Welcome to the  
14 panel.

15                   MS. LONG: Thank you for having  
16 me.

17                   I have some prepared remarks but  
18 obviously, at any time, please stop me. I was  
19 trying to direct them to information I thought  
20 would be most useful to the Panel but, of  
21 course, please interrupt at any point.

22                   Just for some background, --

1                   CHAIR HOLTZMAN: How long is your  
2 statement, do you think? Because if you like  
3 to --

4                   MS. LONG: About ten minutes.

5                   CHAIR HOLTZMAN: Could you  
6 summarize it so we could get to a five-minute  
7 statement and then we could have time for  
8 questions? And we will definitely look at the  
9 long statement. Thank you.

10                  MS. LONG: Absolutely.

11 Absolutely.

12                  So, I just wanted to introduce  
13 myself. I am the Director of AEquitas and  
14 AEquitas is a training and technical  
15 assistance organization for prosecutors and  
16 other allied professionals. We create  
17 publications. We have TA. And all former  
18 staff were, prior to coming to AEquitas,  
19 practicing specialized prosecutors in  
20 gender-based violence and specifically sexual  
21 assaults.

22                  And so my remarks today are based

1 on not only my experience on the ground but  
2 more than ten years of experience in giving TA  
3 not only to prosecutors in the U.S., military  
4 and civilian, but abroad.

5 And as this panel is, obviously,  
6 well aware, in fact obviously there are  
7 authors here of the Federal Rule, so you don't  
8 need me to give you a long history of Rape  
9 Shield. As you know, the first Rape Shield  
10 Rule was in Michigan and it was followed  
11 throughout the course of history by all of the  
12 jurisdictions to some extent.

13 As might have been testified to  
14 before, and I apologize for coming in in the  
15 midst of the previous panel, there are  
16 different ways to categorize the rules. The  
17 way I am going to talk about them today is a  
18 way that is not original. It was categorized  
19 by my colleague, Dean Michelle Anderson, who  
20 I believed had planned to be here today but  
21 could not be.

22 In essence, there are legislative

1 exclusions and a great example of that,  
2 obviously, the military rules or the federal  
3 rules. Many of those and those exclusions  
4 differ only in the conduct that is prohibited.  
5 Some, like the federal rules or the military  
6 rules are brief but fairly in the type of  
7 conduct that could be prohibited. They don't  
8 necessarily spell out every course. And much  
9 of the determination of what material is  
10 admitted or excluded comes out in the court  
11 decisions.

12           Some statutes have specific  
13 exceptions for constitutionally required  
14 material. But as has been pointed out by my  
15 colleague and others, it is, I don't want to  
16 say a meaningless distinction but it is sort  
17 of redundant because the law requires that no  
18 statute be constitutional [sic]. So, whether  
19 or not a law has it in there, it comes up.

20           Then there are statutes that are  
21 very broad and permit judicial discretion.  
22 And they seem to differ only, again, the court

1 decisions really outlay what comes in and what  
2 doesn't.

3 And then finally, the evidentiary  
4 purpose. Some prior sexual history comes in  
5 related to whether or not the victim consented  
6 but not for credibility purposes and other  
7 jurisdictions differ in that.

8 And the reason I put this all out  
9 is because in many ways the civilian  
10 jurisdictions do not differ from the military,  
11 in that the decisions on what sort of  
12 information comes in, activity comes in is  
13 based upon lay person, perhaps legal scholars  
14 and very well learned, well-educated judges  
15 and prosecutors but not necessarily experts in  
16 sexual assault, rape and sexual assault.

17 And I think that the research and  
18 the studies that have come out over the last  
19 ten years, not necessarily legal research and  
20 studies but the actual social studies, the  
21 understanding of prevalence and incidence of  
22 sexual assault and the way these crimes are

1     perpetrated, frankly, makes us wonder if  
2     relying on past decisions and people's  
3     interpretation of whether or not a victim's  
4     sexual history is relevant is the right course  
5     of action because there is no proof in any of  
6     the legal jurisprudence that there is a  
7     sustainable analysis that is based on the real  
8     research.  Rather, you could look at a  
9     decision from 1912 and perhaps a more recent  
10    decision and see the same sort of bias that  
11    comes in.

12                   And I think you pointed it out  
13    before, unfortunately, although relevance was  
14    one of the reasons put forth, the irrelevance  
15    of prior sexual history was a reason put forth  
16    in the reasons for 412 in Rape Shield.  
17    Unfortunately, it was overshadowed and, in  
18    some cases, maybe subsumed by the arguments  
19    about public policy and privacy, which are  
20    extremely important.  And I don't mean to  
21    demean or minimize any interest in protecting  
22    victim privacy but I think it is more accurate

1 to say that the information that is routinely  
2 admitted in these courtrooms, and it is not  
3 just military, it is across the country, is  
4 completely irrelevant to consent or  
5 credibility. And as a byproduct of that,  
6 there is enormous humiliation and  
7 embarrassment but even more grave, there is  
8 enormous injustice. And a lot of this is  
9 fueled by this belief in what might be  
10 relevant. But unfortunately, that belief is  
11 just the belief of individuals based on maybe  
12 their own experience, maybe their own quote  
13 unquote common sense but it is not based in  
14 research.

15 And so, going forward, and I could  
16 give many examples, but I would just say if  
17 you look at the law on marital rape, there is  
18 no marital rape exemption anymore. I mean  
19 certainly there are some jurisdictions that  
20 keep a vestige but we know that spouses can  
21 rape spouses.

22 There is no exemption if you are

1 in a long-term intimate partner relationship.  
2 You can still be raped. And if you are a  
3 prostituted woman, you can still be raped.  
4 But if you look at the analysis under rape  
5 shield, at each point the decisions under that  
6 law are going to undercut the very protections  
7 that are given to victims. And again, I would  
8 agree with Dean Michelle Anderson when she  
9 says that the legal case decisions, what we  
10 see, they don't represent what is happening on  
11 the ground. They represent what defendants or  
12 defense attorneys appeal, perhaps acquittals,  
13 in some cases the Rape Shield issue won't even  
14 come up. But we never see the cases that the  
15 prosecution loses. We never see cases of  
16 acquittal. And we never see cases where the  
17 prosecution, themselves, either introduces the  
18 evidence or won't take a case because of a  
19 prior sexual history.

20 So, my recommendation going  
21 forward would be to really step away from the  
22 legal analysis because I don't think it has

1 gotten it right and look more towards the  
2 social science and let that inform the rules  
3 of evidence and the way that they are  
4 interpreted going forward.

5 JUDGE JONES: I just wanted to say  
6 that I mean I understand what your criticism  
7 is and I don't know that it has anything to do  
8 with how the law is stated. It has to do with  
9 the judge by judge by judge bias or lack of  
10 bias. Because you don't have -- or do you  
11 have a recommendation as to the law?

12 MS. LONG: Again, this is not -- I  
13 want to give credit to Michelle Anderson  
14 because this is not original. But I mean I  
15 think in terms of the exceptions for injury,  
16 semen, that specific exception makes sense.

17 With respect to the other  
18 exceptions, simply have an exception for prior  
19 sexual activity with the defendant in and of  
20 itself without tight constraints about this  
21 moment in time, I think in that way, the law  
22 needs to be revised.

1                   And with respect to the  
2                   constitutional exceptions, perhaps some of it,  
3                   and I mean I think you rightly point out, a  
4                   lot of -- and this is really the case with a  
5                   lot of the problems with rape and sexual  
6                   assault prosecution right now, it is not  
7                   necessarily the law that is bad. It is the  
8                   implementation of the laws. Nevertheless,  
9                   there is guidance in the Manual for  
10                  Court-Martial [sic] or other commentary that  
11                  you can give or be more specific in the law to  
12                  make it clear what is relevant and what isn't  
13                  relevant.

14                  Because, unfortunately, while we  
15                  want discretion, because you can't think of  
16                  every possible relevant experience, right now  
17                  the guidance, because all one can do is look  
18                  back, is to look at how other cases have been  
19                  decided and just use them as a basis for bad  
20                  decisions.

21                  I don't know if that answered your  
22                  question. I hope it did.

1 JUDGE JONES: Sure.

2 CHAIR HOLTZMAN: Okay, let's go to  
3 the next witness. I'm sure there will be  
4 plenty of questions for you. Ms. Powers.  
5 Thank you.

6 MS. POWERS: Thank you, Madam  
7 Chair and members of the Panel. I am Patricia  
8 Powers. I am a senior deputy prosecuting  
9 attorney from Yakima County in Washington  
10 State. I am very excited to have this  
11 opportunity to discuss in a brief fashion this  
12 morning work that I am passionate about.

13 I have had the privilege of being  
14 a prosecutor, primarily in the area of sexual  
15 assault cases with some domestic violence, as  
16 well as related homicides for 25 years now.  
17 And in that process, I have tried a great  
18 number of cases to juries. I also have been  
19 privileged to work directly with victims of  
20 rape and to learn from them in portraying for  
21 the jury the reality of this crime.

22 I have a few comments this morning

1 but I would like to just very briefly give you  
2 some context in that regard. When a predator  
3 selects, if you will, a victim of sexual  
4 assault, the focus is on a victim who is  
5 accessible. There is no one more accessible  
6 than a victim who is in a relationship or a  
7 victim who may be an acquaintance or a victim  
8 who may be someone who is in a close social  
9 circumstance with the offender. Accessibility  
10 is a given.

11 We all know that non-stranger rape  
12 is a vastly under-reported crime and we will  
13 be talking as we go along as to why that is  
14 and how that is impacted by your consideration  
15 of the rape shield statute.

16 The second component of offender  
17 selection is vulnerability. An offender's  
18 understanding, whether it is gut level or  
19 through intelligence, what a victim's  
20 vulnerability is. This vulnerability may be  
21 coming from a broken relationship. It could  
22 be substance use or abuse. It could be a

1       myriad of factors. It could be a victim and  
2       we are seeing more and more that many victims  
3       have been victims as children or as  
4       adolescents and this information is known to  
5       the offender.

6                 The third component, which engages  
7       all of us in this room is the offender's  
8       conception of a victim's credibility. You  
9       were drinking. Do you really think someone is  
10      going to believe you? You have used drugs.  
11      You have had relationships with a great many  
12      people. Is it any wonder that this particular  
13      crime, we are talking about sexual assault and  
14      rape, is vastly underreported and also, as a  
15      consequence of that, this is a crime also that  
16      is ripe [sic] with repeat offenders. So, that  
17      is the crisis that we are confronted with.

18                In brief, we know that Rape Shield  
19      is essentially designed for two reasons.  
20      First and foremost is to protect the privacy  
21      of the victim. Privacy is an acute concern of  
22      victims. Many victims, if not the lion's

1 share of victims, do not report a sexual  
2 assault for fear that their privacy is going  
3 to be lost in the process. And we will talk  
4 more about that when we talk about mental  
5 health records. That is a major concern.

6 But the second component is also  
7 important to this panel, as well as to the  
8 rest of us in our communities both within and  
9 outside of the military. And that is, rape  
10 shield is also necessary to protect the  
11 fact-finding, to protect the integrity of  
12 fact-finding. We want fair and impartial  
13 decisions. And to get to that point, there  
14 need to be rules of evidence that allow for  
15 fairness in the presentation of evidence.

16 As with many rules of evidence,  
17 the concern, and I have seen this in many  
18 trials that I have conducted are with the  
19 exceptions. The exceptions invite, many  
20 times, unfortunately, the presentation of  
21 evidence that the inadmissibility provision is  
22 designed to exclude. It comes in through the

1 exceptions. Not always are motions even  
2 brought in a pretrial proceeding to invade  
3 rape shield, if you will, but it comes in  
4 invidiously during the presentation of  
5 evidence in the trial. That is why the  
6 drafting and the language, as Ms. Long also  
7 indicated, is of critical importance to all of  
8 us.

9           Knowing that we are restricted by  
10 time, I want to comment briefly on Exception  
11 B and Exception C, history. A victim's  
12 history with an offender, if there has been a  
13 relationship, should not automatically be  
14 allowed to be presented to a jury or to a  
15 panel or to a factfinder. That history is  
16 often irrelevant to what the present conduct  
17 complained of is. Whatever has happened  
18 previously in a relationship does not bear  
19 upon the decisions that are made during this  
20 moment in time that we are talking about the  
21 rape. There may have been, at some point, a  
22 previous consensual relationship. That fact,

1 in and of itself, does not and cannot mitigate  
2 from the lack of consent in the crime that we  
3 are confronted with.

4 Another thing that is interesting  
5 about that going back to offenders selecting  
6 victims who are accessible, knowing their  
7 vulnerabilities, and suspecting that there may  
8 not be credibility, I have heard many  
9 offenders testify at trial, and I have also  
10 heard victims testify that she thought she  
11 knew that person. They were in a relationship  
12 and she thought she knew him. She did not see  
13 this rape coming. And this person, at that  
14 moment in time, is a stranger to her,  
15 regardless of that relationship. The history  
16 should not automatically be considered as  
17 probative of the issue of consent.

18 Secondly, with regard to the  
19 balancing, and we are about fairness. And I  
20 know there is no one present who would not  
21 want for there to be scrupulous fairness to  
22 the accused as well as to victims, and I

1 understand that, but oftentimes when we engage  
2 in a consideration of balancing and if a  
3 victim, for example, has had some behavior  
4 involving drinking, some behavior involving  
5 dancing, some behavior involving relationships  
6 with a number of different people,  
7 unfortunately, the balancing is going to give  
8 more force and more emphasis to the admission  
9 of that kind of behavior, which is actually  
10 the sexual predisposition evidence that we are  
11 seeking to control by that exclusion.

12           These are only brief comments but  
13 I want all of us to be aware that it is in the  
14 exceptions where the litigation is going to  
15 arise and we are not always going to be in the  
16 position to bring the motions pretrial but we  
17 are going to hear them woven into the fabric  
18 of the testimony at trial. One of our goals  
19 is to encourage the reporting of rape by  
20 victims; so that we can address these  
21 concerns; so that we can affirm the victim's  
22 right to be left alone; so that we can also

1 prevent this offender from reoffending. In  
2 order to do that, we have to give Rape Shield  
3 litigation and this particular rule of  
4 evidence that you are looking at the force  
5 that it was intended to have.

6 My respectful recommendation is  
7 that you look carefully at the exceptions and  
8 limit the applicability of those exceptions  
9 and do so by conditioning what the relevancy  
10 is. To do otherwise, my concern would be that  
11 those areas that are specifically excluded are  
12 going to become including factors in  
13 litigation.

14 I appreciate this time to speak  
15 with you and I am happy to entertain any  
16 questions.

17 CHAIR HOLTZMAN: Thank you, Ms.  
18 Powers. Ms. Kepros, please.

19 MS. KEPROS: Thank you, Madam  
20 Chair. My name is Laurie Rose Kepros. I am  
21 the Director of Sexual Litigation for the  
22 Colorado Office of the State Public Defender.

1 I train and advise over 500 lawyers across the  
2 State of Colorado in their representation of  
3 clients who have been charged or convicted of  
4 sex crimes.

5 Prior to that, I spent ten years  
6 as a trial lawyer. I had a specialty caseload  
7 involving sexual assault cases. I have tried  
8 dozens of jury trials involving sex cases. I  
9 have consulted on over 2,000 sex assault cases  
10 in my state since 2010.

11 I am a little outnumbered in terms  
12 of the representation of defenders and  
13 prosecutors or former prosecutors at this  
14 table but I do hope that within the  
15 constituency of this panel, that doesn't have  
16 to mean that you are not going to hear what I  
17 am going to say.

18 I did review your pre-reading  
19 materials. I did review the task you have  
20 been given for this panel and the work you  
21 have been asked to do. I have to admit, the  
22 law of my state was not always accurately

1 reflected in these materials. I will note,  
2 Professor Fishman was an exception. He got it  
3 right when he talked about Colorado in the  
4 context of the privilege rules.

5 But I want to start with what I  
6 think is very good news. Some of the  
7 historical information in those materials  
8 about why Rape Shield laws were created in the  
9 first place, some of the examples, the 1912  
10 case, the 1950s cases were horrific. And they  
11 were practices that I do not see in any  
12 semblance in practice today. I cannot imagine  
13 witnesses having their sexual history  
14 indiscriminately paraded in front of the jury.  
15 I don't believe juries tolerate that  
16 information. And frankly, any other  
17 consideration you may have for that practice,  
18 it wouldn't be effective today. The public  
19 certainly does not have a taste for that  
20 behavior and it is just not what is going on  
21 in the courts, as least the courts of my  
22 state.

1           I can also say as a defense  
2 attorney, I have no interest in presenting  
3 irrelevant evidence. I have no interest in  
4 alienating the factfinders. I have an  
5 interest in defending my client consistent  
6 with his or her constitutional rights.

7           I do think, given the task you  
8 have been handed of trying to analyze military  
9 rules and compare and contrast with some of  
10 the civilian practice, there are benefits and  
11 problems with doing that. One example that  
12 came to my mind in the discussion about the  
13 limits of this kind of 413 evidence at an  
14 Article 32 hearing is I can tell you in my  
15 state in 2006, they eliminated the ability to  
16 introduce Rape Shield evidence during  
17 preliminary hearing. The ground did not shift  
18 that much in my state and that was largely  
19 because the scope and function of our  
20 preliminary hearing basically had made that  
21 evidence inadmissible anyway. It was already  
22 something that wasn't coming in, that wasn't

1 being used. So, not that much happened.

2 The contrast that I have heard  
3 about with what happens in your Article 32  
4 hearing derives directly from the fact that  
5 military defenders do not have access to  
6 confidential investigations, subpoenas, and  
7 the other resources that I have. I don't  
8 depend on a preliminary hearing as part of the  
9 investigation in my case or as one of the  
10 limited opportunities to investigate facts  
11 that may be central to the defense of my  
12 client in that case.

13 So, I think there can be a danger  
14 in saying well, let's look at two statutes  
15 side by side and say just adopt one statute  
16 when, in fact, you have to put that statute in  
17 context of the entire broader scheme.

18 Kind of the flip side of that is  
19 the way that these Rape Shield laws operate  
20 nationally is actually very uniform in  
21 outcome. I rely on and cite as persuasive  
22 authority the decisions of other jurisdictions

1 all the time. I think there is sort of a  
2 common sense among judges, among appellate  
3 decisions, among trial decisions about the  
4 kinds of things that are and are not  
5 permissible. And I mean I would volunteer  
6 that is probably that something that changes  
7 with time, depending on standards, depending  
8 on expectations, and education, and all the  
9 other things that continue to evolve in any  
10 society. So, I don't think they're as static  
11 and I think you see that in the decisions.

12 I did do a similar kind of  
13 assignment for myself to something that was  
14 discussed in your last panel, which is trying  
15 to think through where do we see Rape Shield  
16 issues arising in adult victim sex assault  
17 cases. Because I can tell you, they come up  
18 a lot more often in cases involving child  
19 victims, at least in my practice. While I  
20 have seen them in cases involving adult  
21 accusers, we have in my state two scenarios  
22 that have already been discussed this morning

1 that don't even trigger the pre-review  
2 provisions of our Rape Shield statute. They  
3 are not presumed to be irrelevant, as every  
4 other kind of sexual assault evidence would be  
5 or sexual behavior evidence would be. Those  
6 are, where there is a past history between the  
7 accuser and the accused of sexual contact and  
8 what I will call the physical evidence  
9 exception and I know you know what I mean by  
10 that, that doesn't mean that evidence comes  
11 in. It means it comes in subject to all of  
12 the other rules of evidence, 401, 403.

13 I totally agree prior consent does  
14 not mean there was consent at the time of the  
15 alleged offense but I do not agree that it can  
16 never mean anything. I think we are certainly  
17 going to take differently a defendant who is  
18 a stranger to a victim versus somebody who had  
19 a relationship, where they are claiming that  
20 it was a consensual act and I think that has  
21 to be analyzed differently in the context of  
22 the situation.

1                   Other situations that have come up  
2                   in the context of Rape Shield in our state:  
3                   where there have been prior false allegations  
4                   of sexual abuse, I know the comments to M.R.E.  
5                   412 kind of said that doesn't really trigger  
6                   this. I don't know how that works in  
7                   practice. It does have to be litigated per  
8                   our statute.

9                   And I think there is also a  
10                  somewhat parallel issue which I will  
11                  characterize as lying about matters that are  
12                  somehow related to sexual behavior. And I  
13                  have to say I agreed with the outcome in  
14                  Ellerbrock but not the analysis. I don't  
15                  think it was the motive to lie that made it  
16                  relevant. I think it was the fact there had  
17                  been a lie that made it relevant.

18                  When someone has an affair, what  
19                  is critical is not necessarily the fact that  
20                  there was sexual behavior involved, it was  
21                  that they lied, that they betrayed someone  
22                  close in their life. That they were willing

1 to tell a falsehood about something with the  
2 person that they have that most, level of  
3 intimacy. And I think of all the limits we  
4 put on character evidence in general in  
5 criminal proceedings, the thing we let people  
6 talk about, the evidence we do permit for both  
7 sides, is that when somebody gets caught  
8 lying, you get to bring that to the attention  
9 of factfinders because it calls into question  
10 all the other things they may have to say.

11 I can tell you one situation that  
12 arises in the context of Rape Shield is when  
13 there was information disclosed at the time of  
14 the outcry or something that puts into context  
15 the allegation. Sometimes it is the  
16 complainant himself or herself who is bringing  
17 this information to the floor and it is sort  
18 of a res gestae, part of the information in  
19 the case.

20 Certainly, we have seen civilian  
21 court prostitution issues. I don't know that  
22 that would arise as much in the military

1 context. And then we do have situations where  
2 the presence of a committed romantic  
3 relationship may give rise to a motive to  
4 falsely accuse, and that is something what we  
5 have had to litigate.

6 I guess I agree with Ms. Powers  
7 that I think exceptions is really where the  
8 devil is in the details here. Unsurprising to  
9 you, I am going to come out the other way. If  
10 you don't have exceptions, you can't have  
11 justice. If you don't have exceptions to  
12 total bans on evidence, then the Constitution  
13 loses all meaning. What is the point of a  
14 confrontation right? What is the point of due  
15 process if the information that undercuts the  
16 government's theory of the case cannot be  
17 presented? And no matter how broad your  
18 experience, no matter how many cases you have  
19 looked at, if you have practiced for 25 years  
20 like Ms. Powers, if you see the volume of  
21 cases I see, truth is stranger than fiction  
22 and it is probably more true in this context

1 than any other.

2 I can tell you I read the article  
3 that talked about would abortion evidence ever  
4 be admissible under Rape Shield. If you had  
5 asked me that, I would have said of course  
6 not. Never. What on earth does that have to  
7 do with anything in a sexual assault  
8 prosecution except that I can also now tell  
9 you I have tried that case, where the abortion  
10 that my clients refused to pay for was the  
11 motive for the complainant in that case to  
12 falsely accuse my client when she learned that  
13 if he was convicted he could be ordered to pay  
14 for the abortion as restitution. It was the  
15 central issue in the case and it did result in  
16 my client's acquittal that that evidence was  
17 admitted.

18 A similar kind of issue, something  
19 that generally, no, it isn't necessarily  
20 relevant but the judges need the ability to  
21 consider these as case specific relevancy  
22 issues. We had a published decision in my

1 state that involved rape fantasy evidence.  
2 The alleged victim had a rape fantasy that had  
3 been communicated to the defendant, had been  
4 explored with the defendant. This evidence  
5 was excluded in trial. The case was reversed  
6 on appeal. Because without the context of  
7 that information, the jury was unable -- they  
8 just saw what was a rape. It would look like  
9 a rape in every other sense, in terms of  
10 violence, and the behavior, and the conduct  
11 but without that piece of information, they  
12 could not fairly assess what was actually  
13 going on between those parties at that time.

14 After the reversal, the case was  
15 retried, a scenario that I don't believe is  
16 beneficial to victims, witnesses, anybody, the  
17 defendant was acquitted. That evidence was  
18 that important to the jury in that case.

19 I was glad to hear the Gaddis case  
20 brought up this morning. I discovered it in  
21 my own research in preparation for today. I  
22 was a little concerned it wasn't more

1 prominent in the materials. It was cited,  
2 obviously, in the Ellerbrock case. But I  
3 don't think what Gaddis says is so  
4 revolutionary in the context of constitutional  
5 law. Gaddis says we have supremacy clause in  
6 the United States Constitution. Everything is  
7 subservient to the U.S. Constitution. The  
8 Constitution is the law of the land. Any rule  
9 you make is going to have to respect the  
10 dictates of the Constitution. No matter how  
11 eloquent your rule, that can never be -- that  
12 can overcome the mandates of the Constitution.  
13 And certainly when you are talking about the  
14 government's power to potentially stigmatize  
15 someone who is a sex offender for life,  
16 potentially incarcerate them for life, that  
17 cannot really be overstated.

18 That isn't to say there isn't  
19 other considerations to the victim's privacy.  
20 They are important, too. And certainly, if  
21 you are limiting evidence that is coming in to  
22 relevant information, that is going to be

1 addressed. If it is not relevant, it  
2 shouldn't come in, period. If it is not  
3 relevant, frankly, there shouldn't even be a  
4 motion. There shouldn't even be a hearing to  
5 litigate it or fight about it.

6           The problem if you eliminate what  
7 I will refer to as the constitutional catchall  
8 in 412(b)(1)(c) is that then if you have a  
9 scenario that is no longer addressed by your  
10 rule, your entire rule is unconstitutional.  
11 And as Gaddis noted in dicta, it is dicta,  
12 they are already flirting with that. They are  
13 already flirting with that. They said in  
14 Gaddis it was okay because the way the facts  
15 of that case played out, everything sort of  
16 lined up and those interests were similar to  
17 a 403 analysis.

18           But the scenario where the  
19 constitutional interests are essential and  
20 there is another maybe high, maybe  
21 overwhelming interest of the complainant in  
22 privacy, that can never trump those other

1 constitutional interests.

2 I do think we have guidance from  
3 the United States Supreme Court in a very  
4 parallel context. In 2004 in Holmes versus  
5 South Carolina, the United States Supreme  
6 Court struck down a South Carolina rule that  
7 severely limited the defense's ability to  
8 present alternate suspect evidence. In that  
9 context, they said your rule is keeping out  
10 constitutionally relevant and necessary  
11 information. You can't do that with your  
12 rule.

13 I think it was in Dean Anderson's  
14 article, in fact, that she noted another  
15 commentator had made a remark about how the  
16 point of maybe having this constitutional  
17 exception is it does change the rule's  
18 constitutionality really for all time because  
19 it can always be as responsive as the  
20 Constitution demands that it be.

21 I have to say with all those  
22 thoughts, when I look at these materials, I am

1 not persuaded that tinkering with your statute  
2 or rule is probably going to address the  
3 concerns that have been brought out in the  
4 materials or in some of the comments I have  
5 heard this morning.

6 I think to the extent that the  
7 concern is a bias by the public that somebody  
8 is going to be biased against a promiscuous  
9 complainant, that can be addressed in voir  
10 dire. That is what challenges for cause are  
11 for. If you have people who are biased on a  
12 panel, that can be addressed through that  
13 mechanism. The concern is that the judges or  
14 the members will misuse the evidence. We use  
15 jury instructions. We use limiting  
16 instructions. We do this routinely in  
17 criminal practice when it comes to character  
18 evidence. And similarly those are issues that  
19 can be vetted and addressed through a rigorous  
20 voir dire.

21 If you don't like the rulings the  
22 judges are giving, train the judges better.

1 Change the bench book. I think that was a  
2 suggestion that I heard during the earlier  
3 deliberations in another context.

4 The prosecutors could be trained  
5 not to open the door into things that would  
6 potentially open up evidence to Rape Shield  
7 scrutiny. Train the judges they can utilize  
8 experts.

9 I heard the comments from both my  
10 co-panelists and this panel that there is a  
11 problem because there is no review if there is  
12 an acquittal. Well, perhaps that is something  
13 that could be reviewed. I know in my state we  
14 have a procedure for original proceedings.  
15 You could petition our state supreme court.  
16 And I will tell you, we certainly have had a  
17 lot of Rape Shield case law develop under  
18 those, what we call Rule 21 proceedings. We  
19 also have provisions that allow prosecutors to  
20 appeal an acquittal on a question of law.  
21 Obviously, it does not change the legal status  
22 of that defendant but it does provide an

1 opportunity for appellate courts to weigh in  
2 on those policy matters and it does give the  
3 prosecution some sort of relief if they think  
4 that judges are only making decisions at the  
5 trial court level that are not being subject  
6 to review.

7           Ultimately, I think we have to  
8 remember that if someone is accused of a crime  
9 in the military, and especially a sexual  
10 assault, these are individuals who have  
11 already been willing to risk their lives to  
12 protect your constitutional rights and we need  
13 to make sure any rule that is put forth  
14 adequately protects their constitutional  
15 rights and if the rule is written with an eye  
16 toward defending the person who has been  
17 wrongly accused of these kinds of offenses.

18           And like everyone else, I am happy  
19 to take questions.

20           CHAIR HOLTZMAN: Thank you very  
21 much for your testimony. Professor Fishman.

22           PROF FISHMAN: Madam Chairman,

1 ladies and gentlemen of the Panel, it is a  
2 pleasure to be here. I just got this  
3 assignment yesterday afternoon. So, I am not  
4 as prepared as everyone else on the panel but  
5 I do consider myself fairly knowledgeable  
6 about Rule 412 in the Federal Rules and how  
7 these issues play out in state courts, having  
8 been researching and writing about it for a  
9 long time.

10 I am a former prosecutor back in  
11 the 19th Century or thereabouts in New York  
12 County with Frank Hogan and Robert Morgenthau.  
13 I have been a law professor at Catholic  
14 University since 1977 and I have earned the  
15 gray hair in my beard.

16 I find myself in the unusual  
17 circumstance of agreeing somewhat more with  
18 the defense side than some of my colleagues  
19 further to the left of me. I think Rule 412,  
20 certainly in the civilian context works  
21 reasonably well and I would not tinker with it  
22 very much at all. I think the idea of

1 educating judges perhaps better as to how the  
2 constitutional exception should be applied is  
3 not a bad idea. The education of anybody  
4 about anything is generally a good idea.

5 I would not tinker with the  
6 presumption, I would say that if the  
7 complainant and the defendant have had a prior  
8 sexual relationship, the presumption is that  
9 evidence is admissible, depending on a variety  
10 of factors. For example, what was the nature  
11 of the previous relationship? How long ago  
12 did that relationship end or is it ongoing?  
13 Are they living together or did they get  
14 together and hook up once a month or so? Are  
15 the facts of their previous relationship and  
16 the type of activity they engaged in similar  
17 to what is alleged now or is what is alleged  
18 now totally different than it was before? If  
19 there are allegations now involving group sex,  
20 was there previous involvement with group sex  
21 or is that the first time?

22 Is there evidence of violence? Is

1       there evidence that this time the complainant  
2       got beat up where she hadn't gotten beat up  
3       before?  If that is the case, that would  
4       certainly decrease the relevance of any prior  
5       consensual relationship.

6                       So, I think both the subdivision  
7       (b) and subdivision(c) are pretty well written  
8       as they should be.  If judges are  
9       misconstruing it, then we have to educate the  
10      judges better.  But I think those two  
11      provisions, certainly in the civilian context,  
12      are appropriate as written and I think  
13      probably should remain that way in the  
14      military context as well.

15                      CHAIR HOLTZMAN:  Thank you very  
16      much.  We will have the opportunity now to  
17      question.  Mr. Taylor?

18                      MR. TAYLOR:  First of all, thank  
19      you very much all the panel members for being  
20      here today and for your excellent testimony.

21                      I would like to ask you, if I may,  
22      Ms. Long, about your comments regarding how

1 law and policy are developed. As a public  
2 policy professor myself, I am very interested  
3 in your comments about the extent to which  
4 there has or has not been research and what  
5 kind of research is out there that you think  
6 ought to be taken into account or what kind  
7 needs to be conducted in order to fulfil some  
8 of the goals of your proposal.

9 MS. LONG: Thank you. The most  
10 prominent or the most relevant piece of  
11 research that I am aware of was I believe I  
12 provided it to the Panel, it was conducted by  
13 a researcher with the last name of Flowe and  
14 it looked at the relationship between prior  
15 consensual sexual activity to ultimate outcome  
16 in terms of whether or not a victim would  
17 report a rape. And it found across the board,  
18 particularly with even sexually active  
19 individuals, in particular those kind of  
20 individuals for whom their sexual history  
21 comes in, that it not only bore no -- while it  
22 was relevant to whether or not they reported

1 a rape, it made them less likely of reporting  
2 a rape, not because -- the way the study was  
3 designed was not that there was any unsurety  
4 about whether or not it was a rape, they were  
5 given progressive narratives, if you will,  
6 with the final one outlining a rape. What  
7 changed is that they didn't report it.  
8 Whether or not it is because they, as  
9 frequently happens, blame themselves or  
10 whether it was because of their past history.

11 Now, this was one study but I will  
12 tell you I only became aware of it just in the  
13 last year. And I am someone who was a  
14 prosecutor and has been working on this issue.  
15 And it is because of lawyers and litigators,  
16 we are trained to look at precedent and to  
17 apply it to the case at hand. But what we  
18 started seeing and what I started seeing in my  
19 work with giving TA and other projects is that  
20 the outcome of the decisions are not matching  
21 the reality. And so I found this social  
22 science study to be very relevant. And you

1 don't see -- I have never seen it cited. Now,  
2 I did not do a search to find out if it was  
3 cited in any decisions, but you don't often  
4 see that. And to me, that is more persuasive  
5 about the relevance of history than people's  
6 opinions based on standards. That is  
7 dangerous, really, because it is not grounded  
8 in anything foundational.

9 MR. TAYLOR: Would any other panel  
10 member like to address that issue?

11 PROF FISHMAN: Only to this  
12 extent. The fact that a majority of cases may  
13 tend in one direction really should not  
14 determine the admissibility of evidence in any  
15 particular case where the jury has to decide  
16 what did this defendant do, what did this  
17 complainant do.

18 So, I would love to see the study  
19 and it may be very useful but it doesn't  
20 necessarily determine what should be done in  
21 a particular case.

22 MS. LONG: May I respond? Just, I

1 think I agree. I mean we are not in a  
2 position where we would be able to introduce  
3 that. And I think you run into problems when  
4 you introduce studies. I think it is  
5 informative, though, on making a decision  
6 about relevance because right now we are at a  
7 place where we are assuming particular things  
8 are relevant. And I count myself as someone  
9 who when I was first presented with these  
10 cases in the courtroom, your first case, you  
11 know what you know. And they don't teach you  
12 in law school and if you don't have specific  
13 expertise in sexual violence, you are learning  
14 right there. And my opinion of what might or  
15 might not have been relevant to different  
16 things was based on my opinion and my  
17 experience, not necessarily something  
18 objective and defensible.

19 MS. POWERS: That's okay, go  
20 ahead.

21 MS. KEPROS: I would just make a  
22 brief comment on that issue. It just is that,

1 as I think you were discussing in your  
2 deliberations, it isn't solely the intentions  
3 or feelings of the victim that determine  
4 whether or not someone is culpable for a  
5 crime.

6 The defendant needs a culpable  
7 mental state. We know that from the U.S.  
8 Supreme Court in In Re Winship. And whatever  
9 study you may have that speaks to whether that  
10 person intended consent or felt consent, that  
11 doesn't answer the question of what was in the  
12 defendant's mind. And that is the difference  
13 between guilt and innocence in some  
14 circumstances.

15 MS. POWERS: And just, if I might  
16 add, I think that it is a very good idea to  
17 access research that has been done in the  
18 social science. As we all know, in social  
19 science research, there is a neutral  
20 methodology that is employed and it is very  
21 specific as to developing information. I  
22 think that is an excellent reference point.

1 I am more concerned when we run into a  
2 potential of myths and misconceptions that  
3 have been commonly held throughout the ages,  
4 guiding some of our legal determinations as  
5 developments.

6 So, I am in accord with that  
7 thought that we begin with a solid foundation  
8 and research and be guided by that.

9 MR. STONE: If I might just  
10 comment and ask if you have a reaction. While  
11 generally, I agree with you, in the military,  
12 which is a very structured organization where  
13 people have to follow certain rules in order  
14 for a military unit to succeed and people have  
15 to live together in barracks, whether they are  
16 on the front lines or not and you are grouping  
17 together people who, even more so than in  
18 university college dorms, where they can leave  
19 the university if they don't like the people  
20 they got stuck with, military has a very  
21 structured situation. I think that is, for  
22 example, why we were willing to talk here and

1 have testimony from people in favor of a  
2 strict liability rule. After the first 30  
3 days that a recruit comes in, any sexual  
4 activity with a person of a higher rank would  
5 automatically be a violation. I mean, that is  
6 totally unlike civilian society and I don't  
7 think any civilian social sciences would  
8 probably point to having that kind of a rule.

9 So, we are dealing with a very  
10 specific situation which has raised problems  
11 among the women who come here to testify  
12 before us, who, almost uniformly, are no  
13 longer in the service because they wanted out  
14 in the same way that a woman raped at a  
15 college wants a transfer to a different  
16 university.

17 So, I think there is that caveat  
18 on what social science tells us because we  
19 have to have a functioning and effective and  
20 good morale in the military.

21 I would just like to see if you  
22 have a comment.

1 MS. POWERS: If I might, I  
2 appreciate that, sir. And the rules are  
3 important and there should be a lot of regard.  
4 I think I see more developments of the social  
5 sciences to help us when we try to come to  
6 grips with some of the evidentiary holdings as  
7 to relevance and perhaps be guided by some of  
8 that thought while still maintaining the  
9 rules, which are necessary to govern conduct.

10 So, I think I see it in a smaller  
11 and more specific sense, helping to shape how  
12 we approach promulgating rules, if you will,  
13 as to relevance within that framework.

14 CHAIR HOLTZMAN: Mr. Taylor, did  
15 you finish your questioning?

16 MR. TAYLOR: I did, thank you.

17 CHAIR HOLTZMAN: Do you have any  
18 additional questions?

19 MR. STONE: Well, I just have one  
20 other observation that maybe Ms. Kepros would  
21 like to react to. And that is when she said  
22 that she agreed with the result in Ellerbrock

1 but not the reasoning, as I understand it,  
2 then, based on what she said, what she is  
3 saying is the defense counsel should have  
4 proffered the evidence that the woman had a  
5 dating relationship with somebody as soon as  
6 her husband went away and he was furious when  
7 he came back because she didn't tell him about  
8 that and, therefore, she lied about her dating  
9 relationship once before and she would have  
10 the same issue again.

11 But that seems to me, acknowledges  
12 that having said she had a sexual relationship  
13 was way more probative -- excuse me --  
14 prejudicial than necessary to make the point  
15 that she had lied about having any kind of a  
16 dating relationship. So, I think that that is  
17 the point that the Ellerbrock court is  
18 absolutely wrong on. And it sounds to me from  
19 your explanation like you agree with us.

20 MS. KEPROS: May I address that?

21 CHAIR HOLTZMAN: Yes, please.

22 MS. KEPROS: Okay, thank you. Mr.

1 Stone, actually I think that might have been  
2 an appropriate balance for a court to strike  
3 because what was probative to me was the  
4 dishonest behavior. The dishonest behavior in  
5 the context of engaging with someone outside  
6 the relationship.

7 I can't tell you what was right to  
8 do in that case because I don't have the  
9 benefit of the whole record. I don't know if  
10 that was something you could tease out or  
11 limit. Certainly, I see in practice and I  
12 have heard from some of the military attorneys  
13 that even have spoken today, judges do craft  
14 those kind of limitations on evidence all the  
15 time. You are allowed to say A but not B. We  
16 do a stipulation so that the witness doesn't  
17 have to walk that line. We can do that kind  
18 of problem-solving.

19 I just think that it is very  
20 important that we not lose sight of the fact  
21 that some evidence may be relevant as it bears  
22 on credibility, even if the relevance isn't

1 the sexual behavior itself. And I think that  
2 is, at times, the most appropriate balance, to  
3 eliminate the reference to the sexual  
4 behavior, to allow the evidence of the  
5 untruthful behavior.

6 MR. STONE: There was one other  
7 comment that you made that struck me that you  
8 spoke about wanting to see case-specific  
9 relevancy of issues and how important it might  
10 be if a person acknowledged that they had a  
11 prior sexual relationship. But I presume, you  
12 can tell me if I am wrong, that you would  
13 staunchly defend your right not to have to  
14 proffer for the judge to look at in-camera,  
15 the fact that your client, your defendant, may  
16 have told you within the lawyer/client  
17 privilege that he thinks he raped this person  
18 and, by the way, he was doing this all the  
19 time at college or wherever else it was.

20 And I think the point of the  
21 Supreme Court's ruling, particularly in  
22 Jaffee, and this goes as to psychological

1 privileges with psychological counselors is  
2 that the privilege is there to protect the  
3 person just like the attorney-client  
4 privilege. And the Supreme Court said in  
5 Jaffee that the defendant's right under Brady  
6 or confrontation has to bow to that privilege.  
7 And the reason they gave is because your  
8 clients aren't going to tell you that they  
9 have been doing this all over campus if they  
10 know that you might have to disclose it. And  
11 the victims who have been raped, aren't going  
12 to see sociological and psychological  
13 counselors if they find out that those  
14 counselors are going to release what they have  
15 told them. And the Supreme Court says that  
16 right in the opinion. Therefore, the evidence  
17 will be gone if they take down the barrier to  
18 protecting it.

19 MS. KEPROS: Thank you, Mr. Stone.  
20 I think your understanding of Jaffee is  
21 incorrect. It was a civil case. It did not  
22 assess the confrontation clause. It did not

1 assess a Brady violation. Those issues were  
2 not resolved by the Supreme Court. What  
3 happened in Jaffee is the Supreme Court  
4 recognized the existence of a privilege. I  
5 think you are overstating the scope of the  
6 holding in Jaffee. It did not apply to the  
7 context that you are referencing.

8 That being said, we have  
9 privileges for a lot of good policy reasons  
10 and I don't disagree with the fact that we  
11 have them. I can also tell you, as an  
12 attorney, my privilege to have confidential  
13 communication with my client does have  
14 exceptions as well. And there are contexts  
15 where that privilege is subject to review,  
16 where I have to provide information, where I  
17 have had to provide testimony about  
18 information my client has provided. That is  
19 part of the balance that goes along with most  
20 privileges because you can't just take one  
21 policy consideration and ignore everything  
22 else that may be good for society.

1 CHAIR HOLTZMAN: Judge Jones.

2 JUDGE JONES: No, thanks.

3 CHAIR HOLTZMAN: Admiral Tracey?

4 VADM (R) TRACEY: No, thank you.

5 CHAIR HOLTZMAN: I have a couple  
6 questions. First, I am interested in your,  
7 Ms. Kepros, your discussion of the appeals  
8 process, the kind of hypothetical appeals  
9 process that you have in Colorado. How has  
10 that -- what do you think that has done in  
11 terms of making of your equivalent to 412 a  
12 fairer and more effective role?

13 MS. KEPROS: Well, I have to admit  
14 I don't necessarily agree with all of the  
15 decisions of our Supreme Court that happened  
16 as a consequence of that process.

17 The way that process works is we  
18 have a Colorado Appellate Rule 21. It allows  
19 both sides to petition the Colorado Supreme  
20 Court for this kind of extraordinary review.  
21 I will tell you they don't take most of the  
22 cases.

1                   CHAIR HOLTZMAN:  Is this a kind of  
2                   advisory opinion?

3                   MS. KEPROS:  There is an actual  
4                   case.  So, they do look at the particular --  
5                   it is more in the nature of an interlocutory  
6                   appeal but in our state, that is limited to  
7                   prosecutors.  The Rule 21 can be pursued by  
8                   either side.  And one of the thresholds that  
9                   the court considers in whether they take the  
10                  Rule 21 or not is whether or not it is an  
11                  issue that they could adequately address on  
12                  appeal.  And sometimes in the context of this  
13                  kind of evidence, evidence that may be very  
14                  critical to an outcome, they have taken a  
15                  number of these cases as Rule 21s, they have  
16                  issued decisions.  So, that process all occurs  
17                  before there is ever a trial.

18                  It has been useful in our state, I  
19                  think especially at defining the contours of  
20                  some of our statutory language.  We have the  
21                  term sexual conduct.  The military has the  
22                  term sexual behavior.  There is nothing

1 innately intuitive about what that means. And  
2 so we have had, for example, cases where our  
3 Supreme Court has told us whether something  
4 even comes within the Rape Shield statute.  
5 That can be the first dispute in court,  
6 whether this piece of evidence, for example,  
7 evidence that someone had solicited another  
8 person for prostitution but not evidence that  
9 they had engaged in sexual activity. Does  
10 that come within the term sexual conduct? So  
11 our Supreme Court has been able to speak to  
12 that, for example.

13           You know those kind of pieces of  
14 information have trickled out of our court.  
15 I think that in terms of uniformity in  
16 practice in what trial judges do, there is a  
17 benefit to that. And again, that doesn't mean  
18 I always agree with the ruling but it does  
19 provide sort of a mechanism that case-specific  
20 scenarios can be evaluated by multiple levels  
21 of the judiciary prior to trial.

22           CHAIR HOLTZMAN: So, it is just an

1 appeal to the Supreme Court, as opposed to any  
2 intermediary court.

3 MS. KEPROS: That is the Rule 21  
4 process. We have a separate process where  
5 prosecutors are allowed to take an appeal  
6 post-conviction on a question of law.

7 CHAIR HOLTZMAN: And that is an  
8 advisory opinion, basically, that the court is  
9 giving under those circumstances.

10 MS. KEPROS: I think that is a  
11 fair characterization.

12 CHAIR HOLTZMAN: And aside from  
13 the fact that you don't agree with some of the  
14 decisions, do most people feel this is a  
15 beneficial way of dealing, of trying to  
16 resolve some of the issues under say 412?

17 MS. KEPROS: In all fairness,  
18 Madam Chair, I think it is one of those things  
19 that we are just accustomed to it.

20 CHAIR HOLTZMAN: Okay.

21 MS. KEPROS: And so we have never  
22 really had to make a decision. We have had

1 this practice in my state for a long time. It  
2 certainly does provide a mechanism to get  
3 guidance and I think there is value in that.

4 CHAIR HOLTZMAN: Great. Okay, I  
5 don't think I have any other questions. I  
6 just want to thank you very much for the  
7 testimony that you have given us and the time  
8 that you have taken.

9 Does anybody else have an issue?  
10 Okay, thank you very much.

11 Well, I think we can take our  
12 lunch break at this point and thank everybody  
13 for the help you have given us.

14 (Whereupon, the above-entitled  
15 matter went off the record at 12:13 p.m. and  
16 resumed at 1:00 p.m.)

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1:00 p.m.

CHAIR HOLTZMAN: Good afternoon,  
everybody. I think we are ready to proceed.  
Thank you all for your patience.

Our next panel is one on Victim  
Privacy in Sexual Assault Cases Involving  
Mental Health Records. Some of the people who  
are going to be on this panel we've already  
heard from, and we appreciate their  
willingness to stick around and educate us  
again in the afternoon, and we have one new  
member.

Professor Clifford Fishman of  
Catholic University Law School, Ms. Patricia  
Powers, the Senior Deputy Prosecuting  
Attorney, Yakima County, Ms. Laurie Rose  
Kepros, Director of Sexual Litigation, Office  
of Colorado State Public Defender, and our new  
witness will be Ms. Viktoria Kristiansson,  
Attorney Advisor to AEquitas.

But she's represented, because she

1       couldn't attend, sadly, by Ms. Long, who again  
2       kindly agreed to stay and help educate us this  
3       afternoon.

4                       So I guess we're reversing the  
5       order from this morning. We'll start with  
6       Professor Fishman.

7                       PROF. FISHMAN: Thank you, Madam  
8       Chair. It's a pleasure to be here again.

9                       The most interesting thing about  
10      what we know about the contours of the  
11      psychotherapy privilege in criminal cases is  
12      how little we know.

13                      We know that in Jaffee the Supreme  
14      Court said it's an absolute privilege, but  
15      that was in the context of a civil case, and  
16      we really don't have any definitive statement  
17      from the Court since about whether the  
18      privilege applies, the extent, or how it  
19      applies in criminal cases.

20                      Most states have come to the  
21      conclusion, not all, that even if the  
22      privilege is absolute on its face, it still

1 may have to yield, in the appropriate case, to  
2 some degree of discovery on behalf of the  
3 defense attorney.

4 But I was disturbed to hear in an  
5 earlier panel this morning that apparently the  
6 routine practice is for the judge in the case  
7 to routinely get all the hospital records at  
8 the beginning of the trial, as a matter of  
9 routine.

10 No state follows that approach in  
11 the civilian courts, but the standard is the  
12 defense attorney must make a fairly  
13 substantial showing that there is a good  
14 likelihood, evidence definitely material to  
15 the defense will be in those records before  
16 the defense can even have the judge take a  
17 look at the records in camera.

18 And I think that is the standard  
19 that should be required across the board, in  
20 military courts as well as in civilian courts.

21 The degree to which someone is  
22 likely to, if she takes therapy seriously and

1 she's able to do it, which she should be  
2 doing, to reveal her hopes, or fears, or  
3 dreams, her lived experiences so profound and  
4 so self-revealing that there should be a  
5 barrier to even a judge looking at those  
6 records unless the defense makes a powerful  
7 showing.

8           One of the difficulties is the  
9 ability to define precisely what that showing  
10 may be. Courts have used dozens of different  
11 phrases. A reasonable ground to believe, a  
12 reasonable probability, a reasonable belief,  
13 a reasonable likelihood, as I tell my  
14 students, when in doubt, throw the word  
15 reasonable into a sentence two or three times,  
16 and it will probably be right.

17           But I think all of these judicial  
18 formulas are clear that it's not just enough  
19 to say, well, she claimed she was raped and  
20 now she's in counseling, so maybe there will  
21 be something in those records that will be  
22 useful to me.

1                   There must be some specific facts  
2                   that the defense attorney can use. My theory  
3                   is that putting all of these definitions  
4                   together, I can come up with a fairly familiar  
5                   phrase that basically captures the idea. The  
6                   defense attorney must establish probable cause  
7                   to believe that material evidence will be in  
8                   the records.

9                   Now we're familiar with the phrase  
10                  probable cause. We don't have to try to figure  
11                  out what the difference between all these  
12                  other formulas are.

13                  If a prosecutor or police officer  
14                  can show a sufficient probability to intrude  
15                  upon the privacy of a target and search his  
16                  home, his office, or his car, then that might  
17                  be an appropriate standard, not for the  
18                  defense attorney to search the records, but  
19                  for the defense attorney to ask the judge to  
20                  search the records.

21                  And again, not just a mere  
22                  allegation that maybe there's something in

1 there. If, for example, there is other  
2 evidence that the complainant recanted her  
3 accusation to some people, or if the  
4 complainant's behavior either before or  
5 immediately after the alleged rape is very,  
6 very inconsistent with what she claims  
7 happened, evidence of that sort of thing might  
8 be enough to trigger an in camera review by  
9 the judge.

10 And then the judge decides what,  
11 if anything, should be revealed to the defense  
12 attorney.

13 But the idea of letting the judge  
14 in every case review the records, to me, is  
15 totally inconsistent with what every single  
16 state does, and I see -- I'm not familiar with  
17 the military, but I see no compelling reason  
18 why that formula or that procedure should be  
19 changed for military purposes.

20 And I think also the standard that  
21 the Court has basically set in deciding what  
22 information should be revealed is the basic

1 standard that the Court set forth in Bailey  
2 and Brady, that its material should be  
3 revealed to a defense attorney only if there  
4 is a reasonable probability that the evidence  
5 is necessary to assure that the outcome of the  
6 trial would be one which we can accept with  
7 confidence.

8 That is, if there's a reasonable  
9 possibility that this evidence might alter the  
10 verdict, might alter the outcome of the trial,  
11 then the judge has to disclose it.

12 And again, the mere fact that the  
13 complainant had self-doubts or blamed herself,  
14 or was unsure about some of the details at  
15 some point or another, would not be enough to  
16 trigger the judge's obligation or  
17 responsibility to reveal the information. It  
18 has to be something more substantial than  
19 that.

20 That in essence is what the case  
21 law says from the civilian courts, and it  
22 seems to me that would be an appropriate start

1 for the military courts to proceed from as  
2 well. Thank you.

3 CHAIR HOLTZMAN: Thank you. Ms.  
4 Powers.

5 MS. POWERS: Thank you, and thank  
6 you for an opportunity to speak with you again  
7 this afternoon.

8 Again, privacy is a core value for  
9 victims. The loss of privacy or the invasion  
10 of privacy is one of the singular reasons why  
11 many victims choose not to disclose or report  
12 a sexual assault.

13 In terms of a victim's disclosure,  
14 whether a victim is able to disclose a sexual  
15 assault in an immediate fashion, or whether a  
16 victim is unable to disclose a sexual assault  
17 until months or even years has passed, from  
18 working with victims over the past period of  
19 time that I have been serving as a prosecutor,  
20 when that disclosure is made, regardless of  
21 when it's made on a timeline, that is an acute  
22 event for a victim.

1                   She steps from within herself,  
2 realistically, into a spotlight of public  
3 opinion. And I say that regardless of which  
4 jurisdiction she's disclosing in.

5                   That's how acute of a situation  
6 this is for a victim. And the principal and  
7 almost controlling fear at the point of  
8 disclosure is the loss of privacy.

9                   It goes without saying that  
10 guaranteeing an accused or a defendant a fair  
11 trial is what we're about. It's our  
12 Constitution, and it's the focus of criminal  
13 litigation. But I suggest also that victims  
14 have a right to justice as well.

15                   In reviewing the rule having to do  
16 with mental health records, I can understand  
17 that there has to be a showing for release of  
18 those records.

19                   I heard with considerable concern  
20 -- I believe it was Mr. Stone, this morning,  
21 that talked in terms of judges accessing these  
22 records without a request being made by

1 counsel.

2 And that is a concern, for two  
3 reasons. First of all, a judge having access  
4 to records before the fact of litigation puts  
5 a judge in a position of reviewing and perhaps  
6 reaching determinations, at least in terms of  
7 embryonic analysis, if you will, or early  
8 analysis.

9 Secondly, it should be the  
10 province of counsel, if there is a basis for  
11 making that request, to make that request to  
12 have an offer of proof. I don't know that  
13 probable cause is sufficient when you consider  
14 it in line with a privilege.

15 I think that a higher showing  
16 might be necessary when we talk about invading  
17 someone's privilege. These records have  
18 information in them that is extremely personal  
19 to victims.

20 As an example, we know with  
21 increasing frequency that many victims of  
22 sexual assault have been victimized earlier,

1 when they were children or adolescents, and  
2 sometimes as adults. Those records are going  
3 to have that information.

4 We also know that many victims, if  
5 not a majority of victims, tend to blame  
6 themselves for sexual assault. Well I knew  
7 him. I shouldn't have put myself in that  
8 position. I never should have been drinking  
9 with him, I shouldn't have left with somebody  
10 that I had only known for a short period of  
11 time.

12 Those disclosures are going to be  
13 referred to in those records. And if that is  
14 to be disclosed, that is first of all, not  
15 relevant, but secondly it's highly injurious  
16 to victims and to their ability to maintain  
17 their involvement in the prosecution.

18 And I think we need to be aware  
19 also that there is potentially a concern with  
20 victims withdrawing their participation in a  
21 prosecution. For some victims, the price is  
22 simply too high.

1                   An offer of proof, however, should  
2                   be based upon whatever evidence is available  
3                   that should obviate, to the judge, the  
4                   necessity of an in camera review of those  
5                   records.

6                   And that offer of proof should not  
7                   just be made pro forma. It should be made  
8                   with notice to the other party so that it can  
9                   be responded to by the other attorney. It  
10                  could be litigated. And then the judge can  
11                  make a reasonable decision as to whether these  
12                  concerns rise to the level of invading the  
13                  person's privacy.

14                  Many times there also is access  
15                  given to these records that contain some  
16                  reference to a mental illness or a mental  
17                  disorder. For example, if a victim is bipolar  
18                  -- what relevance would this have to the  
19                  allegations of the rape? There wouldn't be  
20                  any relevance to it.

21                  And yet that information sometimes  
22                  is accessed in the records. Once the records

1 are accessed, we find then that the next  
2 request is going to be a psychological  
3 evaluation of the victim, which is disfavored  
4 in most states unless a very high showing is  
5 made for the necessity of that.

6 So opening that door has very  
7 serious consequences that we need to consider.

8 To give you an example in the  
9 medical field of some of the inroads that are  
10 being made, there's discussion in terms of  
11 training sexual assault nurse examiners that  
12 nurses need to seriously question whether they  
13 need to ask a victim, their patient, about  
14 past psychological issues or psychiatric  
15 treatment.

16 A nurse in her examination, or  
17 obtaining that history from the victim, needs  
18 to be guided by the information that she needs  
19 to know in order to provide care to her  
20 victim, and also provide for psychological  
21 well-being and safety planning.

22 And in discussing this with many

1 SANEs around the country, there's a lot more  
2 focus on not asking a victim questions to get  
3 into her psychological background or  
4 psychiatric background because it simply isn't  
5 relevant to the work.

6 So I just wanted to consider that  
7 inroads are being made in other professions as  
8 well that give force to the meaning of this  
9 privilege.

10 If we get to the point where  
11 disclosure of these records, or whether the  
12 records are just accessed by judges, and if  
13 they are disclosed without a showing of, I  
14 think, necessity for that, we believe that it  
15 could have a chilling effect on victims and  
16 their disclosure.

17 This is information that is  
18 protected, and to release this information,  
19 first of all, it is not always relevant in a  
20 prosecution or in defense of someone, but  
21 secondly, the injury that it does to victims  
22 is nearly limitless.

1                   So I would invite your  
2                   consideration of those features.

3                   CHAIR HOLTZMAN: Thank you very  
4                   much. We'll next hear from Ms. Kepros. Thank  
5                   you, again.

6                   MS. KEPROS: Thank you, Madam  
7                   Chair. I am going to focus my comments today  
8                   really on Colorado's version of this issue,  
9                   just because it's the one I am most acquainted  
10                  with, and because my state has been identified  
11                  as a total ban kind of state, where I think  
12                  one of the documents that was included in the  
13                  pre-reading material said if you're in  
14                  Colorado, you just need to show up and assert  
15                  your privilege, and nobody should have the  
16                  opportunity to review this information.

17                  And I want to explain that is not  
18                  quite how it works. And again, that is  
19                  because, as with all other rules and  
20                  processes, there is a constitutional mandate  
21                  that overlays any other statute, policy --  
22                  everything else is subject to those

1 constitutional requirements.

2           It is not characterized in my  
3 state as a probable cause standard. It is  
4 more characterized as a waiver standard. An  
5 express or implied waiver, something that puts  
6 this kind of information at issue in the  
7 proceeding, is what the courts are looking for  
8 to evaluate whether or not it's information  
9 that should properly be disclosed, really to  
10 anybody, including the judge, and then  
11 certainly to any other parties or anybody else  
12 involved in the case.

13           That being said, there are a  
14 couple statutory processes that automatically  
15 take things out of the privilege in my state.  
16 One similar to the military rule is that if  
17 the information was mandatorily reported in  
18 some fashion, the privilege is abrogated, that  
19 whole outcry is subject to disclosure.

20           There is no privilege. It doesn't  
21 even exist in that context. So if information  
22 came out in that fashion, there is no

1 privilege.

2 If there is an allegation that  
3 concerns the, I guess somehow the status or  
4 quality of the person who is alleged to have  
5 been abused, that is another time that it is  
6 literally read out of the statute.

7 If there's an allegation that it's  
8 an at-risk victim, there is no privilege in  
9 Colorado. Because one of the things at issue  
10 is the mental and psychiatric health,  
11 depending on the alleged thing that makes the  
12 person at risk.

13 When it's at issue in the  
14 litigation, obviously the attorneys get access  
15 to that information. Those are decisions  
16 prosecutors have influence over -- how they  
17 charge the case, what they allege.

18 Another scenario that arises, that  
19 is, if there is evidence being offered under  
20 the theory that it's rape trauma syndrome or  
21 there's some sort of evidence that a person's  
22 behavior is consistent with having been

1 sexually victimized, when that is put on the  
2 table, that opens the door.

3 And because there has to be an  
4 opportunity to fairly challenge those claims,  
5 under those kind of circumstances, courts are  
6 far more likely to take possession, do an in  
7 camera review, and then disclose some of the  
8 information to the attorneys who are  
9 litigating that.

10 And so again, I have seen judges  
11 say, hey, prosecutor, you don't want the  
12 defense to get this information? Don't call  
13 your expert on rape trauma syndrome. Don't  
14 put this at issue, and then the defense  
15 doesn't get that information.

16 I mean, they really put it in  
17 their hands and let them make that choice,  
18 because it is opening the door in some sense  
19 that gives the defense the need, absolute  
20 constitutional need, for confrontation and due  
21 process, and frankly effective assistance of  
22 counsel, to get into those issues.

1                   Another time that we have  
2                   sometimes seen waiver is in the context of  
3                   serious questions about the competency of the  
4                   witness -- when there is serious concern that  
5                   the witness cannot accurately relay, report  
6                   information, has a problem reality testing.

7                   Sometimes that's related to a  
8                   specific mental health diagnosis, like  
9                   schizophrenia. Sometimes it's coming up in  
10                  other contexts. But I have had judges release  
11                  that kind of information when there is a  
12                  serious concern about, this person may not  
13                  even be able to tell us what has happened in  
14                  reality.

15                  And those are sometimes  
16                  circumstances where the court will also  
17                  authorize a psychiatric evaluation. Those are  
18                  very, very rare circumstances. But they do  
19                  need to occur at some point.

20                  I think it's sort of akin to what  
21                  we see in U.S. Supreme Court jurisprudence  
22                  about the limits the court has as a gatekeeper

1 on totally unreliable evidence, right? If  
2 some kind of expert testimony is totally  
3 unreliable, they can keep it out. If some  
4 kind of evidence related to an eyewitness ID  
5 is totally unreliable, they can keep it out.

6 If you have a person who cannot  
7 actually provide information that has to do  
8 with reality, the court can keep it out, and  
9 serving that function, it triggers the due  
10 process clauses, obviously, of the federal  
11 Constitution and in state court of the state  
12 constitution as well.

13 So even though we have a total  
14 ban, there are some exceptions here. I do  
15 want to mention there is that constitutional  
16 overlay to everything. And so no matter what  
17 you make your rule, no matter what you say it  
18 is going to permit or what situations you can  
19 anticipate, there is always going to be a  
20 limit.

21 I share, the people who have just  
22 spoken on this topic, I share the support for

1 the idea of doing this in a very formal  
2 process where privacy is maintained while the  
3 issues are being sorted out.

4 I think there is also benefit to,  
5 frankly, a defendant, if those records are not  
6 reviewed, that they still be contained in a  
7 sealed and confidential fashion in the record,  
8 so that if that is an issue on appeal, there  
9 can be an opportunity for a reviewing court to  
10 assess whether or not it's appropriate for  
11 that court to review that information.

12 We have had cases in my state that  
13 were reversed because information was not  
14 turned over to the defendant that should have  
15 been. And that could not have happened, that  
16 protection for the defendant could not have  
17 been there, had the records not been in the  
18 appellate record, and had there not been an  
19 opportunity to review that.

20 So I think all interests are  
21 served by a process that is that formal.

22 Finally, I think we need to

1 remember that when any witness shares what  
2 might otherwise be privileged information with  
3 a prosecutor, with law enforcement, with other  
4 governmental agents, it's not privileged  
5 anymore. So once it's on the table, there is  
6 no privilege.

7           Once they've shared that  
8 information, and sometimes that's how it  
9 happens, there is no longer a privilege. The  
10 privileged information is information that  
11 nobody else has had access to, and I just  
12 don't want to lose sight of that, because if  
13 the prosecutor knows about it, definitely  
14 we're getting into Brady material, definitely  
15 we're getting into Giglio material, and  
16 information that I don't think there's any  
17 debate the United States Supreme Court would  
18 say has to be disclosed.

19           CHAIR HOLTZMAN: Thank you very  
20 much. And now Ms. Long, I guess you're going  
21 to appear on behalf of Ms. Kristiansson. Thank  
22 you.

1 MS. LONG: I am, thank you. And  
2 thank you to the Panel again for extending an  
3 invitation to us, to Ms. Kristiansson, to  
4 testify about the psychotherapist-patient  
5 privilege and the use of and ramifications of  
6 the use of a victim's mental health records in  
7 criminal legal proceedings, specifically  
8 concerning sexual assault cases, as such cases  
9 are often where these privileges are  
10 challenged, and thus have a significant  
11 impact.

12 And I would just say before I  
13 continue with Ms. Kristiansson's remarks, that  
14 again, I want to make clear that from the  
15 prosecution's standpoint, justice and truth-  
16 seeking is the goal. This is our ethical duty  
17 and responsibility.

18 And one of the slippery slopes  
19 with privileges is that when they relate to  
20 victims, sometimes they are seen as privilege  
21 lite versus the, you know, the full privilege  
22 that is accorded to others.

1                   And while we certainly believe  
2                   that the defendant's constitutional right must  
3                   be upheld to have a fair and impartial  
4                   process, there are also rights due to the  
5                   victim in these cases.

6                   Ms. Kristiansson was asked to talk  
7                   about general information regarding the laws;  
8                   how the privilege is addressed by prosecutors,  
9                   defense attorneys, and the courts; how  
10                  requests to seek mental health records and  
11                  accept the privilege can impact a victim in a  
12                  case; and the conclusion is fundamentally the  
13                  military rules are similar to those around the  
14                  country.

15                  Issues arise and problems persist  
16                  in the military system just as they do in the  
17                  civilian world, less because of the rules  
18                  themselves and more so because of the  
19                  implementation by attorneys and at times  
20                  judges.

21                  So where there have been calls for  
22                  training, that's certainly important, but

1 anything in terms of recommendations that can  
2 be done in a manual for court-martials [sic]  
3 or other, more formal documents would be very  
4 helpful.

5 Ms. Kristiansson also wanted to  
6 start off her testimony, and I think it's  
7 important, to distinguish between  
8 confidentiality and privilege, which is  
9 oftentimes confused, even by professionals in  
10 the field.

11 Confidentiality laws encourage  
12 open, honest, and safe communication between  
13 victims and professionals that they rely on to  
14 support their healing and pursuit of justice.

15 These services are provided in a  
16 compassionate and secure setting, and they may  
17 be necessary to meet sexual or domestic  
18 violence victims' needs -- legal, medical,  
19 mental health, counseling, housing, or  
20 financial.

21 Confidentiality is in fact the  
22 foundation upon which victims rebuild their

1 trust, empowerment, and autonomy after they  
2 have been greatly diminished or destroyed  
3 following acts of violence.

4           However, while confidentiality is  
5 a duty, a privilege is a legal right that  
6 gives both the sharer and the holder of  
7 information special protection to refuse to  
8 disclose privileged communications within the  
9 confines of certain relationships.

10           These privileges provide a  
11 protective veil behind which clients can speak  
12 truthfully about personal and often painful  
13 details to trusted professionals without fear  
14 that their most personal thoughts will be  
15 revealed.

16           So as pointed out before, a  
17 process or practice where mental health  
18 records are routinely turned over, even in an  
19 in camera fashion, would challenge that.

20           The laws generally -- in  
21 recognition of the benefits of these  
22 privileged relationships, communications

1 between individuals in protected relationships  
2 are essentially elevated over the public's  
3 desire to obtain this information.

4 It is the right of privacy, the  
5 right of a person to be free from unwarranted  
6 public scrutiny or exposure, and the desire to  
7 help individuals and members of society, that  
8 has led to the development of the professional  
9 privileges, including that of the  
10 psychotherapist-patient.

11 All 50 states recognize some form  
12 of the psychotherapist-patient privilege  
13 encompassing communications between a patient  
14 and his or her psychiatrist, clinical  
15 psychologist, or clinical social worker.

16 The federal rule contains all  
17 privileges comprehensively in 501.

18 While these rules are generally  
19 similar to the Military Rule of Evidence 513,  
20 two notable differences exist. First, the  
21 Military Rule 513 includes procedures in the  
22 rule itself. Subsection 8, for example,

1 specifies that the request must be in writing  
2 and the time by which it must be filed.

3 While most jurisdictions do  
4 require a written motion by the defendant  
5 seeking discovery of the privileged records,  
6 few jurisdictions have outlined their  
7 procedure, where the military provides it in  
8 detail.

9 Second, the Military Rule of  
10 Evidence 513 includes an exception when  
11 admission or disclosure of a communication is  
12 constitutionally required. No state rules of  
13 evidence that cover the psychotherapist-  
14 patient privilege specifically include a  
15 constitutionally required exception.

16 The rule's scope in the context of  
17 what is constitutional is discussed in  
18 advisory and other opinions. The Military  
19 Rule of Evidence 513's inclusion implies  
20 something more than the traditional 403  
21 balance test.

22 Several state courts have upheld

1 the privilege on a range of grounds. Where a  
2 defendant fails to allege a particularized  
3 need for privileged records, she or he is not  
4 entitled to in camera review.

5 A vague assertion that the victim  
6 may have made statements to her therapist that  
7 might possibly differ from the victim's  
8 anticipated trial testimony does not provide  
9 a sufficient basis to justify ignoring the  
10 victim's right to rely upon her statutory  
11 privilege.

12 And in our experience, both in  
13 training and technical assistance, this  
14 request and this argument is common.

15 Without the showing of a  
16 particularized need, a trial court's refusal  
17 to conduct an in camera hearing to examine  
18 communications does not violate the  
19 defendant's due process right or his or her  
20 confrontation rights.

21 Further, the psychotherapist-  
22 patient privilege only limits access to

1 statements made during the course of  
2 treatment. It does not foreclose all lines of  
3 defense questioning. It does not place the  
4 defense in a disadvantageous position, as  
5 neither the defense nor the prosecution have  
6 access to the privileged files.

7 In weighing the public interests  
8 protected by shielding the file with those  
9 advanced by disclosure, many courts have  
10 concluded that the balance tips in favor of  
11 non-disclosure.

12 The federal rule encompassed in  
13 Rule 501 addresses the reach of the privilege  
14 on a case-by-case basis. Cases that have  
15 permitted in camera production of records have  
16 done so under circumstances of note, for  
17 example, when a child victim disclosed sexual  
18 abuse to a psychologist who reported the abuse  
19 to authorities, or where the defendant's  
20 constitutional right to prepare and cross-  
21 examine a witness was at issue.

22 Historically, the Court has

1 supported the victim's right to be free from  
2 harassment and humiliation.

3 Defense Requests for Records, The  
4 Prosecutor's Response, and The Courts -- A  
5 scenario could play out as follows. The  
6 defense attorney requests that a victim's  
7 mental health records be subpoenaed on the  
8 basis that they contain potentially  
9 exculpatory evidence.

10 Such requests may be a defense  
11 strategy that is either designed to introduce  
12 irrelevant information, to embarrass, harass,  
13 or intimidate the victim, or they may be  
14 rooted in a desire to delay access to justice,  
15 as research and anecdotal evidence show that  
16 trial delays contribute to victims' inability  
17 to continue to engage with prosecutors and the  
18 criminal justice system.

19 Notably, such requests are often  
20 facades for fishing expeditions when the  
21 defense has no basis upon which to believe  
22 that the information sought will actually be

1 material to the defense.

2 There are quite an amount of  
3 remarks here, which I'm happy to continue  
4 reading, but I know that the Panel may have  
5 questions.

6 CHAIR HOLTZMAN: Could you  
7 summarize them?

8 MS. LONG: I can just summarize  
9 them to basically say, in large part, they're  
10 not much different from what has already been  
11 said.

12 That it's important that when the  
13 defense attempts to subpoena records based on  
14 an argument that's not particularized, that  
15 the judges and the judiciary hold them to the  
16 specific piece.

17 And that we remember that this  
18 privilege is a legal privilege, and it  
19 shouldn't be treated as less than a privilege,  
20 than the attorney-client privilege, for  
21 example.

22 CHAIR HOLTZMAN: Thank you very

1 much. Members of the Panel, we'll start with  
2 you, Mr. Taylor.

3 MR. TAYLOR: Certainly we would  
4 like to thank the panel for your excellent  
5 comments, certainly very helpful in many  
6 respects. Ms. Powers, I was particularly  
7 interested in your comment regarding the  
8 appropriate standard that the judge should use  
9 when making these decisions.

10 I think if I understood Professor  
11 Fishman correctly, he said that probable cause  
12 or something like that might be the  
13 appropriate standard. And then if I  
14 understood you correctly, you said well maybe  
15 that's not the right standard.

16 I don't want to put words in your  
17 mouth, but please explain what you think the  
18 right standard would be.

19 MS. POWERS: And I respect  
20 Professor Fishman's efforts in that regard.  
21 But probable cause, in my experience in  
22 arguing that, is almost a more likely than

1 not, it's a reasonable suspicion, that a crime  
2 may have been committed.

3 And the concern that I have with  
4 that standard being applied to a privilege is  
5 that puts us back in the position of an offer  
6 of proof. I have reason to believe that the  
7 victim may have made inconsistent comments to  
8 her therapist. My concern would be that that  
9 could be a showing, not quite probable cause,  
10 but perhaps in that area.

11 I think there needs to be more  
12 functionally a showing of necessity. And  
13 necessity may be defined as an application of  
14 a constitutional standard, for example.

15 But I think that the showing, the  
16 offer of proof, needs to be compelling to the  
17 point that it is necessary to conduct an in  
18 camera review. I don't think it can really be  
19 a lesser showing, because if we do, I think  
20 what we're doing, essentially, is watering  
21 down that privilege and going back to, I  
22 believe there might be inconsistent

1 statements, I think that she may have perhaps  
2 withdrawn her disclosure, you know, based upon  
3 evidence that just isn't compelling.

4 MR. TAYLOR: Professor Fishman,  
5 would you like to comment on that?

6 PROF. FISHMAN: Yes. We may be  
7 quibbling over semantics here, because I read  
8 a few of the verbal formulae that various  
9 state and federal courts use as to the degree  
10 of showing.

11 I think probable cause is a more  
12 demanding -- first of all, we're talking about  
13 what must the defense attorney show to have  
14 the judge look at the records, not what must  
15 the defense attorney show to be able to  
16 actually see the records themselves.

17 It must be particularized, not  
18 just a general statement, I think that's clear  
19 from the case law. I am just saying probable  
20 cause is probably as good a way to summarize  
21 all of these other different verbal formulae  
22 that the states have used as any because it's

1 a standard we're familiar with and it's a  
2 standard that has some teeth to it.

3 If I can digress briefly, there's  
4 an aspect of Rule 513 here that I find very  
5 disturbing that I didn't mention in my opening  
6 statement.

7 513(e)(2) says that the judge can  
8 hold a hearing on the admissibility of these  
9 records, and either side can call the victim  
10 or the complainant as a witness at this  
11 hearing.

12 The idea that the defense attorney  
13 should be allowed to call the complainant at  
14 a preliminary hearing to determine the  
15 admissibility of the complainant's  
16 psychological or psychotherapy records I find  
17 very disturbing.

18 It's a free shot at discovery,  
19 it's a free shot at the defense attorney  
20 perhaps trying to intimidate the complainant,  
21 and I don't see any parallel to that in any of  
22 the civilian statutes that I've seen.

1           And I think it's something that I  
2 was surprised, sort of, to see. It's also in  
3 Rule 412 of the military rules. I can see it  
4 perhaps somewhat more plausibly there. But in  
5 513(e) I think that should be taken out.

6           I don't think the defense attorney  
7 should have the right to call as a witness the  
8 complainant in a hearing to determine the  
9 admissibility of the complainant's  
10 psychotherapy records. It doesn't belong, it  
11 has too much potential to be abused.

12           MR. TAYLOR: Thank you very much  
13 for pointing that out. Does either of the  
14 other two panel members have any particular  
15 comment on this question?

16           MS. KEPROS: Well now I'm sort of  
17 just hearing what you just said and I'm  
18 thinking about what I want to say about that,  
19 too. In terms of the standard -- is that the  
20 original query, right?

21           I actually had never considered  
22 the probable cause standard. I think it's

1 very appealing because if it's good enough to  
2 lock someone up and take away their freedom,  
3 it's a pretty meaningful standard, we would  
4 hope.

5 And I think that does show the  
6 teeth to it that was just alluded to from  
7 Professor Fishman in his comments.

8 So I think it's helpful. I  
9 haven't given it a lot of thought, but I would  
10 encourage you to continue exploring whether  
11 that's a useful standard.

12 I have to react to this issue of  
13 who may be called as a witness in a  
14 proceeding. In practice, no, does that  
15 happen? I don't think that happens. I never  
16 have seen that happen.

17 Could there maybe be a scenario  
18 where it would be an appropriate thing? I  
19 guess there could. And what happens in real  
20 life is judges have, among their other duties  
21 under the rules of evidence, the duty to  
22 control the order of the proceedings, the duty

1 to control what is and isn't relevant, the  
2 ability to say, no, you may not call that  
3 person as a witness. No, I don't want to hear  
4 that information.

5 Judges do that all the time under  
6 Colorado's Rule of Evidence 611, I am sure  
7 there's an equivalent provision in the M.R.E.  
8 So I don't think that changes anything,  
9 whether that provision is there or not. I  
10 think that already exists, and if somebody had  
11 a compelling reason to present that kind of  
12 evidence, then that probably would matter.

13 I also think that you can't --  
14 we're back to, you can't anticipate every  
15 possible scenario. And if the concern is  
16 privacy, the hearing could be closed just like  
17 it's contemplated in the context of 412. If  
18 the hearing is closed, that things are sealed,  
19 that protections are imposed above and beyond  
20 just oh, we're going to let this person be  
21 called as a witness.

22 And I can't forget that there is

1 this limited ability for military defenders to  
2 access information. They don't get to do  
3 confidential investigations, and that really  
4 changes the landscape when you're talking  
5 about privacy. It also changes the landscape  
6 when it comes to what is the expectation of  
7 privacy.

8 That's a concept we hear in Fourth  
9 Amendment jurisprudence all the time. What is  
10 the expectation of privacy in the military?  
11 And it's different. And that's why this is a  
12 new rule for this system. There wasn't even  
13 one for the longest time, and I don't think we  
14 should forget that there is a reason there  
15 wasn't one, and the fact there is one is a  
16 change.

17 CHAIR HOLTZMAN: Judge Jones?

18 JUDGE JONES: I just had a quick  
19 question, Ms. Powers [sic], when you were  
20 talking about your sort of waiver standard in  
21 Colorado.

22 I understand the notion of having

1 to determine competence, but I think you also  
2 mentioned something about at risk, and I  
3 wasn't sure what that meant.

4 MS. KEPROS: This is just an  
5 artifact of our statutes. It is a sentence  
6 enhancer if the alleged victim, really in most  
7 crimes, is an at risk person. That is further  
8 defined in our statute to include certain  
9 mental and physical disabilities.

10 And so if that element has to be  
11 proved by the government beyond a reasonable  
12 doubt as an element of the crime, that statute  
13 contains in it a provision that abrogates our  
14 privilege.

15 CHAIR HOLTZMAN: Admiral Tracey.

16 VADM(R) TRACEY: Could I ask,  
17 also, for some clarification? Did I  
18 understand you to say that you hold the  
19 records inside the case for appellate review  
20 even if they are not reviewed in camera, that  
21 that's part of your practice in Colorado?

22 MS. KEPROS: Admiral, that is

1 correct.

2 CHAIR HOLTZMAN: Mr. Stone.

3 MR. STONE: I guess my question is  
4 whether you think, just like you think the  
5 legal landscape is different in the military,  
6 whether it is more damaging in the military to  
7 have records that the judge decided it was not  
8 a sufficient basis to review then taken from  
9 the medical facility, not only presented and  
10 held in the clerk's office or whatever of the  
11 first level of the military review, then sent  
12 up to all the other various levels, when we  
13 know that's a closed system and people who are  
14 military judges at all levels today could turn  
15 out to be functioning in your unit in a  
16 different capacity tomorrow.

17 So the person involved knows that  
18 if they, for example, had explained their  
19 history of being exploited as a child, those  
20 records are still circulating.

21 Whereas in the civil system,  
22 maybe, in Colorado, they don't ever expect to

1 be under the control of whatever that unit is  
2 at the appellate level. Does that change your  
3 view any on whether those records should be  
4 sealed and sent along?

5 MS. KEPROS: That's a very  
6 interesting difference between the systems.  
7 It's certainly not one I've given a lot of  
8 consideration to.

9 I can point out that I heard, I'm  
10 sorry, I don't remember his last name, the  
11 colonel's testimony this morning that he had  
12 concerns about information being --

13 CHAIR HOLTZMAN: Colonel Baker.

14 MS. KEPROS: Thank you very much,  
15 Madam Chair, Colonel Baker. -- about  
16 information being shared. I guess I have to  
17 assume that tension exists throughout military  
18 life if that's the process. I don't know if  
19 there are provisions that would amount to a  
20 conflict of interest or ways to avoid those  
21 sort of conflicts.

22 I can tell you one thing we do

1 experience that's not identical but somewhat  
2 comparable in civil practice is our criminal  
3 judges are often also domestic judges.

4 They are also often judges who are  
5 presiding over dependency and neglect cases,  
6 where sometimes very similar, if not  
7 identical, issues are being evaluated. And  
8 they are asked to, you know, separate their  
9 roles, consider the information for the  
10 limited purpose that it's before them.

11 And if they can't do so, all  
12 attorneys have an ethical obligation to not  
13 participate, right? That is a conflict of  
14 interest, and we have that, regardless of any  
15 rule, we have ethical standards that we have  
16 to obey.

17 So I wish I could speak better to  
18 the military system. I just don't know enough  
19 about it.

20 MR. STONE: You were also  
21 commenting how the landscape is different  
22 because the military investigators -- and I

1 may not be accurate, but I believe that they  
2 think they have routine access to the hospital  
3 records, the on-base hospital records, and  
4 again, my understanding is, and I could be  
5 wrong, that that's what happened in the Naval  
6 Academy case.

7           And that's another reason that I  
8 think this panel needs to be given the record  
9 to see if that happened in the Naval Academy  
10 case.

11           If it didn't happen, I'd be  
12 delighted to find out I'm wrong. If it did  
13 happen, that's an indication that there needs  
14 to be a different procedure and a change.  
15 Because that is a case, at least according to  
16 the newspapers, where the victim has come  
17 forward since then and said she's sorry she  
18 was ever convinced to aid the prosecution and  
19 go forward in the case.

20           And that is the ---- that's the  
21 typical situation we're trying to avoid. And  
22 there you've got a victim who did go forward,

1 and now all she does is regret that it ruined  
2 her naval career, as well as the naval careers  
3 of the three people who were accused.

4 So they -- instead of helping the  
5 situation, it doesn't look like it helped the  
6 victim at all, without whom there couldn't  
7 have been a prosecution.

8 But the point I was going to say  
9 is you seem to base the fact that the military  
10 investigators seem to routinely be able to get  
11 their hands on these records as saying,  
12 therefore it's within the prosecution's  
13 knowledge and the prosecution has to turn over  
14 Brady and Giglio, and I agree.

15 But isn't the alternative scenario  
16 possible, too? That it should not be routine  
17 for the military investigators to get it, and  
18 if the prosecution has no idea what's there,  
19 then Giglio and Brady do not come into play  
20 when third-party medical providers, wherever  
21 they are, have some information about the  
22 person being molested as a child.

1                   So in other words, the situation  
2                   may not be that the only solution is that you  
3                   turn it over and seal it. It may be a little  
4                   more separations appropriate.

5                   MS. KEPROS: Well, and I think  
6                   that's what happens in real life. I think  
7                   there are lots of scenarios where prosecutors,  
8                   government entities, never learn about the  
9                   fact somebody's seeing a therapist.

10                  I think that happens all the time.  
11                  And therefore, it just doesn't come into play.

12                  However, the distinction I'm  
13                  trying to make is between the confidential  
14                  defense investigation I am able to conduct as  
15                  a civilian defense attorney, that I do not  
16                  believe that military defenders are able to  
17                  do. Because I can go and look for information  
18                  that may bear on that.

19                  I am not saying that I am going to  
20                  be able to get confidential records. Of  
21                  course I am not going to. I am going to have  
22                  to go through a formal process, and a

1 subpoena, and all of these limits we've  
2 already discussed.

3 But I do think it makes a  
4 difference that I can go out into the world,  
5 or send my staff is actually how it really  
6 happens, and we can look into what else might  
7 be going on, what could account for a false  
8 accusation in this context.

9 MR. STONE: And why do you think  
10 the military investigators can't? For  
11 example, in the Naval Academy case, they sent  
12 their investigators out and subpoenaed  
13 psychological records from a non-military  
14 psychologist as well. Why do you think  
15 they're limited?

16 MS. KEPROS: I will defer that  
17 question to the military defenders that are on  
18 one of the later panels because I don't know  
19 their policies well enough.

20 CHAIR HOLTZMAN: Mr. Stone, let me  
21 just see if I'm right here. The defense, in  
22 a military prosecution, normally has to ask

1 permission of the prosecutor to get a subpoena  
2 issued, unless it's at the -- certainly at the  
3 preliminary stage of trial, the defense  
4 counsel will go to a judge to get that  
5 information.

6 But my question would be, assuming  
7 that the defense -- and the Response Panel,  
8 which is the predecessor panel to this,  
9 recommended that the defendant's rights to  
10 obtain information be enhanced -- assuming  
11 that those rights were enhanced, would that  
12 affect your judgment about how to administer  
13 Rule 513?

14 MS. KEPROS: I think that's a fair  
15 question. I guess the answer, unhelpfully,  
16 Madam Chair, is it depends. It depends what  
17 those enhancements were. It depends how they  
18 are effectuated.

19 I think it would probably change  
20 the calculus. If people are otherwise able to  
21 get access to the relevant information, that  
22 addresses the constitutional prejudice.

1                   If they are not, then the person  
2                   has had an unconstitutional proceeding. And  
3                   so you either fix the problem or you don't.

4                   CHAIR HOLTZMAN: Okay. I just  
5                   wanted to ask a couple of questions about  
6                   that. Somehow, when you go down to the  
7                   constitutional issue, it's as though that  
8                   means that the information kind of has to come  
9                   in, it sort of --- you've elevated this to  
10                  some kind of extraordinary point.

11                  And I certainly believe in the  
12                  Constitution, and I'm a strong advocate of  
13                  constitutional rights. But we do have  
14                  privileges that, while there are exceptions to  
15                  them, are very strong. And if I go to my  
16                  attorney and explain a lot of what happened,  
17                  there's no right in the Constitution to get  
18                  that information from the attorney.

19                  That's established. It's  
20                  established not because it's one  
21                  constitutional privilege against another, but  
22                  there are societal provisions, or societal

1 needs, that the courts believe, require an  
2 attorney-client privilege.

3 Yes, it may undo justice in a  
4 particular case. It may undo the truth-  
5 finding requirement in a particular case.

6 But the courts have decided that  
7 this satisfies, or is required, for other,  
8 more important needs. So the constitutional  
9 needs of a particular case don't always trump  
10 social policy.

11 The same is true with husband-wife  
12 privilege. That's -- I mean, there are  
13 circumstances, yes, where the privilege can be  
14 eroded, but that's under very circumscribed  
15 circumstances. And we don't just say, oh, the  
16 Constitution. It's not just oh, the  
17 Constitution. These are really policy issues,  
18 in fact, that are being determined by the  
19 court.

20 So I think we have to be very  
21 careful in saying the Constitution requires  
22 that this material be disclosed. We have

1 privileges that are not invaded, even though  
2 it undermines truth-finding and maybe justice  
3 in a particular case.

4 So I think that that's only the  
5 beginning of the inquiry, it's not the end of  
6 the inquiry, as you were suggesting. That's  
7 just my personal opinion about that.

8 MS. KEPROS: May I say something?

9 CHAIR HOLTZMAN: Yes, you may  
10 respond.

11 MS. KEPROS: I just wanted to  
12 identify, the only case that I can think of --  
13 and I don't know if there's been anything  
14 since 2007 when Professor Fishman wrote his  
15 article -- in Pennsylvania v. Ritchie, the  
16 United States Supreme Court considered  
17 otherwise privileged social services  
18 information.

19 And they said a criminal defendant  
20 has a due process right in that context to  
21 that otherwise privileged information. I  
22 understand there are distinctions made in the

1 case law about whether that's equivalent to a  
2 psychotherapist's privilege. There are  
3 distinctions like that made in case law in my  
4 own state.

5 But I do think we recognize that  
6 is a context where the Supreme Court has said  
7 no, there is a point where the Constitution  
8 and its supremacy has to trump that.

9 And with all due respect, your  
10 attorney-client privilege, it has limits. And  
11 there are points where your attorney could be  
12 brought into a forum and questioned about  
13 things you told that attorney that might be  
14 generally considered to be confidential or  
15 privileged.

16 CHAIR HOLTZMAN: But that's  
17 extremely rare with regard to attorney-client  
18 privilege, and extremely rare with regard to  
19 husband-wife privilege. And those privileges  
20 are pretty well constrained even though they  
21 affect, as I said, the truth-finding objective  
22 of the trial and the justice in a particular

1 case.

2 But Professor Fishman, you wanted  
3 to say something. But I also want to ask  
4 about how this -- and I wasn't just referring  
5 to the, anyway -- how does the patient-doctor  
6 privilege intersect with the therapist  
7 privilege?

8 I mean, is that something that's  
9 more invaded, less invaded? Is that  
10 considered more sacrosanct? Is the  
11 Constitution less applicable in those cases?  
12 I just want to get an idea of what the  
13 interplay is between those two privileges.

14 PROF. FISHMAN: I know in civil  
15 litigation, if you put your client's medical  
16 or mental condition in play, you waive the  
17 privilege.

18 A point that I wanted to make  
19 about what Ms. Kepros said, the Ritchie case,  
20 the privilege was not an absolute privilege.  
21 In fact, the statute said this material can be  
22 revealed to the prosecutor but nobody else.

1                   And so clearly if it's revealed  
2                   and went to the prosecutor, the court said,  
3                   then due process trumps that because now the  
4                   prosecutor has it, so there's that.

5                   And also Ritchie was decided  
6                   before Jaffee, which talks about the privilege  
7                   as being absolute. So we can't rely on  
8                   Ritchie as a valuable precedent unless the  
9                   privilege we're dealing with in a particular  
10                  case is qualified rather than absolute.

11                  I mean, you're right of course, we  
12                  could, I think it would be constitutional; if  
13                  the attorney-client privilege or the  
14                  parishioner-clergyman privilege or the marital  
15                  communication privilege are absolute, there's  
16                  no compelling reason why the psychotherapist-  
17                  patient privilege could not also be absolute.

18                  That's a decision that we as  
19                  lawyers and judges have the power to make  
20                  because we make the rules. And my sense is  
21                  that the privilege should yield in an  
22                  appropriate case of a compelling showing of

1       probable cause and necessity can be made.

2                       But it wouldn't shock me for the  
3       Supreme Court to come down and say no, this is  
4       an absolute privilege, period, just like the  
5       attorney-client privilege. That would resolve  
6       all the -- we'd have one less series of panels  
7       we'd have to conduct, I guess.

8                       My sense is that it should be a  
9       privilege that can be breached with a  
10       sufficiently compelling showing. But why do  
11       I say that about that and not about the  
12       attorney-client privilege? Very difficult to  
13       articulate the reason.

14                      CHAIR HOLTZMAN: May I ask, your  
15       comments about my second point, which may be  
16       revealing on this question, I don't know. I'm  
17       not an expert on the doctor-patient privilege,  
18       and I would like to compare it, if you are  
19       able to, to --

20                      PROF. FISHMAN: Unfortunately,  
21       that is not an issue that I --

22                      CHAIR HOLTZMAN: -- to the

1 therapist-patient privilege. Is it more  
2 severe? Is it more protected? Is it more  
3 recognized? Is it more sacrosanct?

4 PROF. FISHMAN: Well certainly the  
5 doctor-patient privilege is much older. I  
6 mean, there's centuries of case law about  
7 that, where the psychotherapist privilege is  
8 newer because psychotherapy is a much more  
9 recent development.

10 And really, it wasn't put firmly  
11 on the map until Jaffee -- I mean that Jaffee  
12 laid down the law that yes, this is part of  
13 the law of the land.

14 And so we're still kind of  
15 exploring that, whereas we've got centuries of  
16 history in terms of the parameters of the  
17 doctor-patient privilege. We're still feeling  
18 our way. The fact that we're having this  
19 discussion proves that.

20 We don't know what the law  
21 ultimately will be because the Supreme Court  
22 hasn't decided it yet. Congress hasn't passed

1 a statute on it yet. So we're groping our  
2 way. That's really the only thing I can say.

3 CHAIR HOLTZMAN: Does anybody else  
4 have something they want to say about that?  
5 Yes, Ms. Kepros.

6 MS. KEPROS: Thank you, Madam  
7 Chair. I can just offer, in my state it's the  
8 same statute. They're just subsections of the  
9 same privilege statute. Actually, attorney-  
10 client privilege is in there, lots of  
11 different privileges are thrown into that same  
12 statute. And the analysis is really  
13 comparable across those.

14 And just, I have to say, if my  
15 client is that one rare case, the one rare,  
16 very unusual circumstance, I am always going  
17 to ask that the Constitution trump the  
18 privilege.

19 CHAIR HOLTZMAN: Well, I don't  
20 think the privilege is contrary to the  
21 Constitution, let me just put it that way.  
22 Ms. Long.

1 MS. LONG: I have one perspective  
2 I want to offer on the distinction, maybe,  
3 between psychotherapist and doctor-patient,  
4 and I think that that comes from a lot of the  
5 misunderstanding in the field or exploitation  
6 of mental health conditions, whereas  
7 prosecutors may just assume that they are  
8 relevant to the credibility of a victim and so  
9 may be careless, at times, about redacting or  
10 about making a motion to protect the record.

11 But there are also times where the  
12 defense exploits some perhaps misperceptions  
13 about this and a judge is not careful about  
14 holding their feet to the fire, and the  
15 prosecutor as well.

16 So I think that might be one of  
17 the causes of the breach. So training could  
18 definitely make an impact there.

19 CHAIR HOLTZMAN: Yes, Ms. Powers,  
20 did you want to say something?

21 MS. POWERS: Yes. I agree with  
22 that as well. In my experience, the

1 psychotherapist privilege and the medical  
2 privilege are treated in an equivalent  
3 fashion.

4           From a victim's point of view,  
5 many victims that I've worked with feel that  
6 their statements to a counselor or  
7 psychotherapist should even be more protected.

8           One of the issues that comes up in  
9 a system where we talk about potentially  
10 sealing records even if they aren't going to  
11 be admitted, from a victim's point of view,  
12 there can always be a motion to access those  
13 records.

14           And it may not be in this trial,  
15 but it may be at a later time. It may come up  
16 in a family law proceeding, for example,  
17 another civil proceeding, or maybe this person  
18 may even be a victim in another.

19           But once those records are sealed,  
20 then they can be accessed by making the  
21 appropriate motion and showing of necessity.

22           So I'm concerned about obtaining

1 the record that isn't going to be used and  
2 keeping it sealed, knowing that it's there.  
3 And I think that could present a problem for  
4 victims that we should also consider.

5 When we're talking about  
6 protecting the privilege, I think it needs to  
7 be, I think whether it's semantic or not, I  
8 think there needs to be a showing of actual  
9 necessity to access those records.

10 Once those records are accessed,  
11 it calls into play a number of other features  
12 of litigation -- request for a defense  
13 psychological evaluation of a victim, and  
14 argument along those lines.

15 And what that does for the  
16 potential reporting of other victims is to  
17 really bring forward the chilling effect that  
18 we're really trying to avoid. So I just  
19 wanted to share those concerns as well.

20 MR. STONE: If I could I'd just  
21 like to ask Ms. Powers and Professor Fishman  
22 whether they can comment. I know in Maryland,

1 for example, a common situation is one of  
2 those exceptions that Ms. Kepros brought up,  
3 is brought up all the time. Serious concern  
4 with reality testing of the victim.

5 What that tends to be is the  
6 defense counsel says "Judge, this victim can't  
7 tell truth from their own wishes and dreams,  
8 and, therefore we need to see those records."

9 And the Maryland highest court,  
10 the Maryland Court of Appeals has before it  
11 right now a case called Johnson which has been  
12 briefed and argued because the defense  
13 counsel, when a judge reviews the record, the  
14 judge said I think you're just fishing when  
15 you say that. Defense counsel said yes, I am.  
16 Trial judge said well then, if you're fishing,  
17 you don't get the records, and the  
18 intermediate court of appeals, in a reported  
19 decision, said that is sufficient.

20 And the dissent in the  
21 intermediate court said then you've just done  
22 away with the privilege. Because every

1 defense counsel, if he's doing his job, is  
2 going to say "I don't think this victim," if  
3 there are psychological records, "can tell  
4 truth and reality from unreality." And  
5 therefore, you are always going to turn over  
6 those records.

7           And I guess my question is, is  
8 that fairly common in other states that you  
9 know of? And I guess the reason I'm  
10 concerned, and I'm concerned in the military  
11 as well, is because unlike the civil situation  
12 you spoke about, or the one that came up in  
13 the Supreme Court, in a civil situation the  
14 victim controls the case.

15           In a criminal situation, the  
16 victim does not control what the prosecutor  
17 does. And if the prosecutor thinks it's in  
18 the interest of the military service or the  
19 state to go ahead, they go ahead, and the  
20 victim may be saying well only, I don't want  
21 to do quite this or the other, that does not,  
22 they can't withdraw the case when they feel

1 like withdrawing the case.

2           So the victim is put at risk of  
3 their records -- them being re-victimized in  
4 the interests of broader justice. So that's  
5 why I'm curious to know whether in your  
6 experience other states have what, despite the  
7 narrowness of the language, turns out to be a  
8 very broad exception when defense counsels say  
9 well, we've got to see whether this victim who  
10 has been to a psychologist or psychiatrist can  
11 tell truth from fiction.

12           PROF. FISHMAN: Well the  
13 prevailing view is that a sufficiently  
14 factually-backed allegation along those lines  
15 may be enough to trigger an in camera  
16 inspection.

17           But it's not just enough to say  
18 well, maybe she's got this condition. He'd  
19 have to -- the person would have to bring in  
20 other witnesses or other documents which  
21 substantiate the substantial likelihood that  
22 the witness has this sort of difficulty

1 dealing with reality.

2           There's always a strong factual  
3 showing that has to be made before even  
4 triggering the in camera inspection. That's  
5 the way all of the cases that I've read  
6 basically handle it.

7           And if the Maryland Court of  
8 Special Appeals ruled as you described it,  
9 it's an appalling misapprehension of upholding  
10 the stated law, and I hope that the court of  
11 appeals will reverse it. Because clearly,  
12 that would open the door to every defense  
13 attorney making that request, and that door  
14 should not be open.

15           There has to be a substantial  
16 factual showing independent of what might be  
17 in the records before even triggering the  
18 obligation to go and show a look at the  
19 records. That's how it is, and that's how it  
20 should be.

21           MS. POWERS: Yes, and I would just  
22 add to that, I hear that in every case. "Well

1 we have reason to believe that she's unable to  
2 determine truth from fantasy."

3 It's almost every case, and you  
4 know, as the professor is telling us, the key  
5 to it is really forcing feet to the fire in an  
6 offer of proof. What is this based upon?  
7 What evidence is there? And that's litigated.  
8 And that's litigated to the satisfaction of  
9 the trial court.

10 And most of the time, judges who  
11 have education in the area are going to reach  
12 a decision that is insufficient because of the  
13 privilege. There's not an evidentiary  
14 showing, and there's not a showing of  
15 necessity. So I'm anxious to follow that case  
16 as well.

17 PROF. FISHMAN: There's one other  
18 aspect of the case law, by the way, which says  
19 that not only must the defense attorney show  
20 a probability that there's stuff in the  
21 records that will be useful, but also that  
22 comparable evidence is not available from non-

1 privileged sources.

2 And that's important too, because  
3 if the defense attorney has sufficient  
4 evidence of this without going through the  
5 privileged sources, there's no need for it.

6 Now that cuts both ways because if  
7 the source of non-privileged information is  
8 somebody who is, shall we say, not exactly a  
9 close friend of the complainant, the  
10 credibility of that witness may be attacked at  
11 trial, whereas what the complainant may have  
12 said to the therapist would be much more  
13 credible to a jury.

14 But still, that is a universally  
15 applied requirement. Not only must you show  
16 a strong probability of probable cause, or  
17 however we want to define the standard, that  
18 there is highly exculpatory information in  
19 those records, which triggers the in camera  
20 inspection, but before the in camera  
21 inspection you must also be able to show that  
22 we simply have not been able to find after due

1 diligence any comparable evidence that we  
2 could show.

3 Which is kind of a catch-22. If  
4 I'm the defense attorney, I've got to show  
5 enough evidence to show that there's a serious  
6 problem with this complainant, but my evidence  
7 can't be strong enough, because if it's too  
8 strong, I would have the judge look at the  
9 records.

10 And I have no problem with that.  
11 I have no problem with putting the feet to the  
12 fire, as Ms. Powers says. Because getting  
13 access -- even getting the judge to look at  
14 those records -- should be the very very very  
15 rare exception. Any system which makes it  
16 routine is a system which is out of control.  
17 It is simply not playing the game by the rules  
18 that they should be playing by.

19 CHAIR HOLTZMAN: I just have a  
20 quick question. Maybe this is not the correct  
21 panel to ask the question of. What happens if  
22 the victim goes to a non-military therapist,

1 or goes to a non-military therapist in a  
2 civilian world, and in that state, there's a  
3 stronger psychotherapist-patient privilege  
4 than there is in the military? What happens  
5 in a trial there?

6 PROF. FISHMAN: That's one of  
7 those questions we don't know the answer to.  
8 I mean if it's a military hospital, it's a  
9 government hospital, and due process kicks in.  
10 If it's a private hospital, then the question  
11 is, does the compulsory process clause of the  
12 Sixth Amendment have the same teeth in terms  
13 of getting an exposure or an in camera  
14 inspection of a private hospital or a private  
15 therapist's record?

16 CHAIR HOLTZMAN: My question is a  
17 little bit different from that. My question  
18 is what happens if the state has a stricter  
19 patient-psychotherapist provision than the  
20 federal government?

21 PROF. FISHMAN: Well if the case  
22 is tried in state court, obviously the state

1 --

2 CHAIR HOLTZMAN: No, under the  
3 military rules.

4 PROF. FISHMAN: Since there's no  
5 -- I think the federal courts basically would  
6 presume to respect the state privilege as  
7 strong. But as someone keeps saying, the  
8 Constitution sometimes may trump the  
9 privilege.

10 Again, we don't know. The simple  
11 answer is we don't know what the parameters  
12 are even if it's a public agency record, we  
13 certainly don't know what the rules would  
14 ultimately be. There's cases all over the  
15 map, and certainly nothing close to a  
16 consensus.

17 CHAIR HOLTZMAN: Thank you for  
18 your help. Okay wait, there's one more  
19 question and then we're finished.

20 MR. STONE: I just have one  
21 question based on what you just said, in part.  
22 In that answer, you said that you think that

1 a system that is looking at the records in  
2 every case is out of control. Do you think  
3 that a system that goes and gets the records  
4 and seals them in an envelope and puts them in  
5 a court record and sends them up and preserves  
6 them that way, in every case, is out of  
7 control?

8 PROF. FISHMAN: Yes, I think so.  
9 I think so. Unless the defense attorney can  
10 make, I am calling it probable cause, other  
11 courts use various phrases. Unless the  
12 defense attorney can make a factually specific  
13 showing establishing some reasonable  
14 probability that the records contain highly  
15 exculpatory evidence, those records should  
16 stay with the hospital or with the therapist.

17 MR. STONE: Because it's chilling  
18 the victim?

19 PROF. FISHMAN: Yes, I think  
20 there's always the possibility of leaks.  
21 Somebody might open an envelope accidentally  
22 or not realize their privilege. The fewer

1 copies of the records that exist the better,  
2 and the closer they're held by the agency  
3 conducting the therapy, or the doctor  
4 conducting the therapy, the safer they are  
5 from accidental disclosure.

6 CHAIR HOLTZMAN: Okay, thank you  
7 very much for the testimony. We really value  
8 your contribution and appreciate your time and  
9 your patience with us. Thanks.

10 Do we need to take a break or --  
11 do we need a break? Okay. I'm fine. We'll  
12 go to our next panel, which is Victim Advocacy  
13 Perspectives on Privacy Issues in Judicial  
14 Proceedings.

15 I think we'll take a two minute  
16 break.

17 (Whereupon, the meeting went off  
18 the record at 2:01 p.m. and resumed at 2:04  
19 p.m.)

20 CHAIR HOLTZMAN: Let's start.

21 Our next panel is on Victim  
22 Advocacy Perspectives on Privacy Issues in

1 Judicial Proceedings. We're very fortunate to  
2 have Ms. Miranda Petersen, Program & Policy  
3 Director, Protect our Defenders; Mr. Ryan  
4 Guilds, counsel at Arnold & Porter; and Mr.  
5 Greg Jacob, Policy Director, Service Women's  
6 Action Network.

7 We want to thank you, to begin  
8 with, for taking your time to appear before  
9 us.

10 And sorry we're a little bit late.  
11 As you can see these are very difficult  
12 issues, and we're trying to be as  
13 knowledgeable and conscientious as we can be.

14 So we will start with Ms.  
15 Petersen. Thank you for appearing before us.

16 MS. PETERSEN: Thank you, Madam  
17 Chair. And thank you for the opportunity to  
18 speak here today about the vital issue of  
19 victims' privacy rights, which is a central  
20 component of a fair and effective justice  
21 system.

22 While the military justice system

1 has rules in place designed to protect  
2 victims' privacy rights to a degree, in  
3 practice, protection of these rules has proven  
4 wholly inadequate.

5 I will begin by addressing  
6 Military Rule of Evidence 412, the rape shield  
7 rule. M.R.E. 412 was adopted with the hope of  
8 shielding victims of sexual assault from the  
9 often embarrassing and degrading cross-  
10 examination and evidence presentations common  
11 to prosecution of such offenses.

12 Recently, the President signed an  
13 executive order altering the Rules for Court-  
14 Martial 405(i) to explicitly allow the  
15 consideration of a victim's prior sexual  
16 history at Article 32 preliminary hearings.

17 Prior to this executive order, RCM  
18 405(i) prohibited the admission of evidence of  
19 a victim's prior sexual behavior during  
20 Article 32 hearings. Nevertheless, most  
21 investigating officers permitted consideration  
22 of such evidence anyway, leading to an

1       onslaught of attacks against victims' privacy  
2       rights prior to trial.

3                       While advocates and attorneys  
4       fought this practice, the President acted to  
5       codify the right to admit such evidence at the  
6       Article 32. This move undermines the rape  
7       shield rule and undercuts Article 32 reforms  
8       passed in the wake of the Naval Academy case,  
9       where the victim was subjected to humiliating  
10      and degrading questions that had no  
11      evidentiary value, but were instead intended  
12      to intimidate and punish her, a practice we  
13      see permitted all too often.

14                      Although defense will no longer be  
15      able to compel a victim to testify during  
16      Article 32 hearings, under the executive order  
17      they will still be able to call witnesses  
18      regarding the victim's sexual history in order  
19      to attack the victim's character.

20                      Supporters of the executive order  
21      argue that, because M.R.E. 412 evidence will  
22      be considered under seal, the victim's privacy

1 will be protected. However, the executive  
2 order expressly permits the convening  
3 authority to review the entire Article 32  
4 record -- including M.R.E. 412 evidence --  
5 that is deemed inadmissible.

6 This incentivizes the accused to  
7 drum up as much potential M.R.E. 412 evidence  
8 as possible, knowing that even if it is  
9 irrelevant or inadmissible at trial, it will  
10 still be available for review by the convening  
11 authority in deciding whether to review a case  
12 to court-martial -- refer a case to court-  
13 martial.

14 A victim's prior sexual behavior  
15 or predisposition is never constitutionally  
16 required at an Article 32 investigation  
17 because the investigation itself is not  
18 required by the Constitution.

19 Instead of enabling the use of  
20 victims' prior sexual history, which is  
21 completely irrelevant to the determination of  
22 probable cause, evidence under M.R.E. 412

1 should be limited to review by a judge during  
2 a closed hearing at a court-martial, and  
3 should be barred from the Article 32 pre-trial  
4 hearing.

5                   Unfortunately, we encounter  
6 similar issues for M.R.E. 513, the  
7 psychotherapist-patient privilege. M.R.E. 513  
8 was designated -- was designed to prevent  
9 disclosure of confidential communications  
10 between the patient and his or her therapist,  
11 except in extremely limited circumstances.

12                   This was done to allow victims to  
13 receive appropriate care and to prevent  
14 fishing expeditions of the type we still see.

15                   In the military, the  
16 constitutionally required exception to the  
17 rule has been utilized by judges to justify  
18 automatic in camera review of all mental  
19 health records, often leading to the  
20 disclosure of large chunks of a victim's  
21 therapy records. This practice undermines the  
22 very core and intent of the privilege.

1                   The mother of a civilian victim  
2                   recently described her daughter's experience  
3                   in the military justice process in the  
4                   following way:

5                   "Imagine the fear and intense  
6                   feeling of betrayal, being a high school kid  
7                   who finally agreed to go to counseling after  
8                   a rape because of assurances that her  
9                   conversations with her therapist could not be  
10                  released to anyone for any reason, only to be  
11                  told her rapist's rights outweigh her patient-  
12                  psychotherapist privilege and HIPAA-assured  
13                  privacy rights.

14                  She in fact, under M.R.E. 513,  
15                  does not have any privacy rights, and the  
16                  right to work through the damage her rapist  
17                  inflicted upon her emotionally and mentally,  
18                  if his constitutional rights are asserted.  
19                  She felt raped and betrayed all over again."

20                  And I will just note, in this  
21                  case, not only were her civilian therapy  
22                  records subpoenaed, but her therapist was

1 subpoenaed to testify at a hearing in regards  
2 to the notes that they had already turned over  
3 to the defense.

4 Military judges are rendering  
5 M.R.E. 513 meaningless by their orders to  
6 disclose privileged psychotherapy records  
7 without proper consideration of the victims'  
8 rights and a showing of constitutional harm.

9 As a result of this widespread  
10 practice, we have heard from SVCs that they  
11 feel compelled to advise their clients not to  
12 seek mental healthcare if they want their  
13 assailant brought to justice, or not to report  
14 if they plan to seek treatment, because  
15 private conversations with mental health  
16 providers can and will be used to intimidate,  
17 silence, and undermine their clients'  
18 credibility in court.

19 To counter this, M.R.E. 513 should  
20 be rewritten to give communications between  
21 patients and mental health professionals the  
22 same level of protection as those under the

1 attorney-client privilege in alignment with  
2 other privileges under the UCMJ.

3 A member of the American  
4 Psychoanalyst Association recently summed up  
5 the issue well, saying, "Attempts to search  
6 sexual assault victims psychotherapy records  
7 to expose inconsistencies demonstrate an  
8 appalling misunderstanding of psychotherapy  
9 and the narratives that emerge from it," and  
10 continued, "To consider as evidence records  
11 based on these tentative descriptions seems to  
12 me to require a denial of everything we have  
13 learned in the past 50 years about how people  
14 experience trauma."

15 Sexual assault victims must be  
16 able to rely on this privilege. It is unjust  
17 and counterproductive to promise victims their  
18 privacy is protected when they seek help, only  
19 to revoke it once they come forward and report  
20 the crime.

21 Finally, in order to adequately  
22 protect victims' privacy and ensure their

1 privilege is not infringed upon, victims must  
2 be given the right to interlocutory appeal for  
3 rulings that violate their rights, as is  
4 afforded to civilian victims under the Crime  
5 Victims' Rights Act.

6           Without the ability to appeal  
7 adverse rulings, victims have no mechanism to  
8 challenge these unilateral decisions and  
9 adequately enforce their rights, and judges  
10 lack guidance from senior jurists on how to  
11 properly interpret and apply these rules.

12           Too often, victims are forced to  
13 balance two basic and fundamental rights --  
14 the right to be protected from unreasonable  
15 intrusion into their personal, intimate  
16 details of their lives, and the right to  
17 pursue justice against the person who violated  
18 them.

19           This is a choice that no victim  
20 should ever have to face, and I urge this  
21 panel to recommend changes that eliminate the  
22 loopholes that are rendering these so-called

1       protections ineffective, and to establish a  
2       mechanism for enforcement for when those rules  
3       are inappropriately applied.

4                       I have attached to my statement  
5       that I have provided the Panel a full  
6       statement by the victim's mother that I quoted  
7       from earlier. Thank you.

8                       CHAIR HOLTZMAN: Thank you. Mr.  
9       Guilds.

10                      MR. GUILDS: Madam Chair, thank  
11       you very much for the opportunity to appear  
12       today.

13                      As you said, my name is Ryan  
14       Guilds. I am an attorney at Arnold & Porter  
15       in Washington, D.C.

16                      Arnold & Porter has a long history  
17       of pro bono representation, and that history  
18       extends to the representation of victims of  
19       crime, including crimes for victims of  
20       military sexual assault.

21                      Our representation in this area  
22       extends to virtually every branch of the armed

1 services, and it has touched every aspect of  
2 the military criminal justice system.

3 And as an aside from my statement,  
4 I understand there's been some questions about  
5 the Naval Academy case. That was my case, and  
6 I'll be happy to answer those questions to the  
7 extent that I can.

8 In my view, the military justice  
9 system has made some incremental improvements  
10 in respecting sexual assault survivors' rights  
11 to dignity and privacy.

12 But much more needs to be done.  
13 It remains the case that military sexual  
14 assault survivors do not enjoy the same level  
15 of privacy protections afforded to their  
16 civilian counterparts.

17 The reasons for these differences  
18 are neither constitutionally justified nor  
19 linked to a unique military purpose.

20 Take first the application of  
21 M.R.E. 412. The language of the military's  
22 rape shield law does not in my view materially

1 differ from analogous provisions in the  
2 federal and state systems. Nevertheless,  
3 there are significant differences in how the  
4 military investigates and prosecutes sexual  
5 assault cases and applies Military Rule of  
6 Evidence 412 that make military sexual assault  
7 survivors far more likely to be asked about  
8 the most intense and personal details of their  
9 lives.

10                   And it begins with how the  
11 military investigates sexual assaults. It is  
12 common practice for military and criminal  
13 investigators -- and I say common practice, I  
14 will tell you my experience is mostly with  
15 respect to the Navy, those are most of the  
16 cases that I have had, for whatever reason --  
17 but in those cases, there has been a routine  
18 desire by the part of investigators to explore  
19 the sexual history of the survivors, and to do  
20 so without any real need.

21                   That results in the disclosure of  
22 information that would not be disclosed in a

1 civilian proceeding, nor should this type of  
2 typical investigative technique take place in  
3 the military.

4 Under the current rules, the  
5 questioning of survivors about their prior  
6 sexual history means that this information may  
7 be considered in an Article 32 proceeding.

8 Military defense counsels' ability  
9 to use this information to smear the victim  
10 has no parallel -- no parallel -- in the  
11 civilian system.

12 Civilian sexual assault victims do  
13 not testify at preliminary hearings; they are  
14 rarely interviewed by defense counsel, and  
15 they are not forced to endure an Article 32  
16 process that allows the convening authority  
17 unfettered access to potential 412 evidence  
18 regardless of its admissibility.

19 Making matters worse, the current  
20 system does not provide victims' legal counsel  
21 with a clearly-defined right to intercede in  
22 Article 32 in court-martial proceedings where

1 the victim's rights are at stake.

2           Recent military case law makes  
3 clear that the sexual assault survivor has a  
4 right to be heard. But to be effective, that  
5 right must extend not just to interaction with  
6 trial counsel or to arguments before hearings,  
7 but at the hearings themselves.

8           The military justice system's  
9 closed docketing system and practice of  
10 preventing victims' legal counsel from having  
11 access to case materials and motions also  
12 seriously undermines the ability of people  
13 like me to protect our clients.

14           While some trial counsel provide  
15 these materials, many others do not. There is  
16 no similar restriction -- no similar  
17 restriction in the civilian courts -- and no  
18 legitimate military objective served by  
19 limiting victims' lawyers access to the  
20 materials they need to do their jobs.

21           This unequal access to information  
22 only reinforces the view in the mind of the

1 survivor that they are not a respected part of  
2 the process.

3 Turning now to Military Rule of  
4 Evidence 513, it is my sincere view that  
5 M.R.E. 513, by its language and application,  
6 is the single greatest threat to the privacy  
7 and dignity of military sexual assault  
8 survivors in this country.

9 M.R.E. 513 is described as a  
10 privilege, but in fact, as interpreted and  
11 implied by military judges, it is nothing of  
12 the sort.

13 Military judges routinely pierce  
14 the privilege by conducting in camera reviews  
15 based on the scantiest evidence. What should  
16 be at least in my view an absolute privilege,  
17 but at minimum a near absolute privilege, has  
18 devolved into a fishing expedition followed by  
19 a mere relevancy determination.

20 The result for victims is  
21 catastrophic. Military VLCs rightly warn  
22 survivors that if they decide to file an

1       unrestricted report, it is likely that their  
2       most private medical and counseling records  
3       will be disclosed.

4                   And in my case, all too often  
5       victims are simply unwilling to accept that  
6       risk and choose not to come forward.

7                   Alternatively, victims refuse to  
8       get the services they need out of fear that  
9       their most personal and intimate emotions will  
10      be turned over to the very person who caused  
11      them in the first place.

12                   Defense counsel and military  
13      judges erroneously focus on the  
14      constitutionally-required exception set forth  
15      in M.R.E. 513 as the basis for piercing the  
16      survivors' doctor-patient or therapy  
17      privilege.

18                   But no court has ever held that  
19      the Constitution mandates the routine  
20      disclosure of a victim's medical or therapy  
21      records.

22                   In fact, such records are rarely

1 sought in civilian proceedings precisely  
2 because of the stringent rules in place to  
3 restrict their disclosure.

4 To make matters worse, military  
5 crime victims do not have an ability to timely  
6 appeal the disclosure of their records. The  
7 result is that crime victims are in the  
8 untenable position of either accepting that  
9 their private thoughts and records will be  
10 disclosed or refusing to proceed with a  
11 criminal charge.

12 It is a result that must change if  
13 the military is to make meaningful progress in  
14 its efforts to support and respect sexual  
15 assault survivors. Thank you.

16 CHAIR HOLTZMAN: Thank you very  
17 much, Mr. Guilds. Mr. Jacob.

18 MR. JACOB: Good afternoon, Madam  
19 Chair and distinguished members of the Panel.  
20 Thanks for the opportunity to come and address  
21 the Panel. It's most appreciated.

22 I'd also like to thank the Panel

1 for requesting the point of view of advocates  
2 and victims in the last panel and in this  
3 panel, and I hope that's something that  
4 happens going forward.

5 Too often it's the voices of those  
6 that are most affected by these issues that  
7 are least heard by policymakers, and it's  
8 deeply appreciated.

9 My name is Greg Jacob. I am the  
10 Policy Director at the Service Women's Action  
11 Network, former Marine Corps Enlisted  
12 Infantryman and Infantry Officer.

13 The work we do at SWAN is informed  
14 by the populations that we serve. We maintain  
15 a social service and a legal referral help  
16 line for service members or veterans to call  
17 that are having issues with cases that are  
18 referred to attorneys like Mr. Guilds here.

19 We've also held two national  
20 summits here in Washington, D.C. on military  
21 sexual violence. We've brought more than 300  
22 sexual assault survivors to The Hill for

1 direct advocacy for training workshops and  
2 panels.

3 It's been our interaction with  
4 survivors that privacy issues and issues  
5 around mental health records are a consistent  
6 concern that we've heard, and it's one the DoD  
7 is all too aware of.

8 Data from the DoD shows that  
9 concerns about privacy is one of the main  
10 reasons why sexual assaults are chronically  
11 under-reported.

12 Privacy concerns are exacerbated  
13 by the climate of retaliation in the military,  
14 and they are the cornerstones upon which the  
15 military's Restricted Reporting system was  
16 built.

17 We've seen privacy concerns with  
18 regard to, specifically with regard to, mental  
19 health records contribute to victims  
20 withdrawing from the court-martial process  
21 entirely.

22 Even more damaging than the impact

1 that these concerns have on the prosecution of  
2 cases is the difficult decision by some  
3 survivors not to seek out or to stop mental  
4 health treatments for their sexual assaults  
5 due to the possibility that information  
6 contained in their health records will become  
7 public, be used against them as a part of  
8 trial proceedings.

9 Here are some of the things we've  
10 heard from survivors on this issue.

11 One survivor quit going to  
12 counseling when she found out her records  
13 could be released to the court. The thought  
14 of the perpetrator finding out the details of  
15 her suffering was abhorrent enough for her to  
16 abruptly end her treatment.

17 One survivor said that his therapy  
18 wasn't nearly as effective as it could have  
19 been early on. He said it was impossible for  
20 him to fully open up about his assault until  
21 after the trial had completed.

22 Another survivor was afraid of

1 being charged with collateral misconduct. She  
2 had told her counselor she had violated the  
3 Command's alcohol policy the night of the  
4 attack.

5 A common refrain from officers and  
6 senior enlisted survivors is that they're  
7 worried about not being able to maintain the  
8 confidence of their Commands, should details  
9 of their attacks be made known -- specifically  
10 that their boss would question their judgment  
11 or think twice about their ability to lead.  
12 Both of these in the military can result in  
13 being relieved.

14 Some of these concerns might  
15 already be addressed in current military law  
16 and procedure, but such things are not widely  
17 known among service members. Until the  
18 average service member attends law school,  
19 perception basically remains reality.

20 It was mentioned earlier that the  
21 military is a unique environment, and as we've  
22 gone through this process of looking at

1 military law, we've seen how it differs from  
2 the civilian world.

3 And mental health care is a real  
4 sticky wicket when it comes to the military,  
5 just in general.

6 As a former Marine Commander and  
7 now as Policy Director for SWAN, I've seen  
8 both sides of this issue. While I was a young  
9 infantry NCO, I was taught that one of the  
10 basic leadership principles was that normally  
11 Marines look out for their welfare.

12 And later on, as an Infantry  
13 Officer and Company Commander, one of my top  
14 priorities was to ensure that the Marines of  
15 my Command were physically and mentally fit  
16 for duty and combat-ready. If I failed in  
17 either of these tasks, I would be relieved.

18 I believed at the time, like most  
19 Commanders I know, that in order to ensure the  
20 health, fitness, and readiness of my Marines,  
21 I had to have an unobstructed line of sight  
22 into what type of care they were receiving,

1 specifically medical care and the prescription  
2 of medications.

3 I was trained that the privacy  
4 laws concerning personal health information as  
5 they apply to the military grant exceptions to  
6 Commanders to specifically ensure that this  
7 readiness imperative is met.

8 Additionally, I can tell you that  
9 any Marine that was seeing a psychologist or  
10 a chaplain or a counselor, or was enrolled in  
11 any sort of treatment program, either  
12 voluntarily or Command-directed, got  
13 additional attention from the Command.

14 And yes, it did affect the way in  
15 which these Marines were tasked, organized,  
16 and utilized.

17 Clearly there is a need to strike  
18 a balance between the rights of victims and  
19 the ability for prosecutors and defense  
20 counsel to represent their clients.

21 Based on what we've heard from  
22 survivors, as well as the personal experience

1 of SWAN's organizational staff, we see this  
2 issue causing genuine harm to survivors,  
3 whether that's based on legal practices or  
4 just on perception alone.

5 For survivors not to get the  
6 treatment that he or she needs for the trauma  
7 inflicted by their assault is at best  
8 inhumane, and at its worst can be life-  
9 threatening.

10 In the context of other inroads  
11 being made in other areas, I'd like to make  
12 one other point concerning mental health  
13 counseling.

14 Over the past 18 months, SWAN has  
15 been working with the Pentagon, Congress, and  
16 the Office of the Director of National  
17 Intelligence to remove the requirement for  
18 sexual assault survivors to disclose their  
19 mental health counseling when they apply or  
20 renew their security clearance.

21 The need for this change was  
22 driven by survivors who told us similar

1 stories about abandoning their therapy or not  
2 seeking out much-needed counseling to avoid  
3 having to disclose it on this form.

4 Disclosure was considered a red  
5 flag by security clearance adjudicators, and  
6 like the courts, they would pull the records  
7 to ascertain if they were a security risk  
8 based on their counseling records.

9 If they couldn't get a clearance,  
10 or if an individual lost his clearance, his or  
11 her career was over.

12 When we presented our request for  
13 an exception for disclosure to the Director of  
14 National Intelligence, James Clapper, he  
15 agreed with us. He said that the greater  
16 security risk was for an individual who needs  
17 counseling not to get it.

18 I am happy to say the security  
19 clearance form now instructs applicants who  
20 have received counseling for sexual assault  
21 not to disclose.

22 This is important to this

1 discussion. The fact that the government  
2 office responsible for keeping our state's  
3 secret a secret no longer needs access to the  
4 mental health records of sexual assault  
5 survivors in order to accomplish its national  
6 security mission calls into question whether  
7 the military needs to review how they handle  
8 military health records at large.

9 I thank the Panel for its time,  
10 and I look forward to answering any questions  
11 you may have.

12 CHAIR HOLTZMAN: Thank you very  
13 much. Members of the Panel? We'll start with  
14 you, Mr. Taylor.

15 MR. TAYLOR: Thank you, Madam  
16 Chair. And thanks to all three of you for  
17 your statements today.

18 Ms. Petersen, I took it from what  
19 you were saying that you think part of the  
20 problem here is the policy, and part of it is  
21 the implementation. Is that correct?

22 MS. PETERSEN: Yes.

1 MR. TAYLOR: You made a couple of  
2 what I would call substantive suggestions  
3 regarding the executive order and the reach of  
4 it, if you will, in terms of who can see the  
5 records.

6 You also talked about a more  
7 absolute privilege as opposed to, you analyzed  
8 -- excuse me, analogized it to the attorney-  
9 client privilege. And then finally, you spoke  
10 in terms of some sort of interlocutory appeal.

11 So those were three changes that  
12 could be made to policy. Am I hearing you  
13 correctly?

14 MS. PETERSEN: Yes.

15 MR. TAYLOR: Were there others  
16 that you would also suggest, or is that an  
17 accurate summary of the three you've  
18 mentioned?

19 MS. PETERSEN: I think those are  
20 the three that are most relevant to what we're  
21 discussing today.

22 I think that another that was

1 discussed earlier would be strengthening and  
2 clarifying the right of SVCs to represent  
3 their clients and to access records, because  
4 in order to rebut a lot of these rulings, you  
5 have to know what the rulings were or what the  
6 arguments were that were being made in order  
7 to get them, and we're not seeing that  
8 uniformly across the Services, and really from  
9 judge, from situation -- it's just very  
10 situational right now.

11 MR. TAYLOR: So to the panel in  
12 general, what do you think the problem is  
13 here? You were particularly harsh, I think,  
14 in your criticism of some of the judges' --  
15 perhaps appropriately so -- decisions, and the  
16 way they handled it. What do you think some  
17 of the problems are here? Why is this  
18 happening?

19 MR. GUILDS: Well I think that  
20 there's a few -- I think there's a few issues.  
21 I think that with respect to what I know best,  
22 right, as a victims' rights lawyer, right, so

1 to speak to what I do, what needs to change,  
2 and Ms. Petersen mentioned it, I need to have  
3 the materials.

4 I have been in cases where I've  
5 quite literally sat there and received facts  
6 for the very first time while I am arguing a  
7 412 motion.

8 And I've been given the  
9 opportunity to appear; I've been given the  
10 opportunity to make arguments to the court.  
11 But I don't have all of the information, and  
12 as a lawyer, that's never a good thing.

13 So I think that is one of the huge  
14 issues that I have. In other cases that's not  
15 the situation, I have been provided with all  
16 of the records.

17 And there is a way to do that, Mr.  
18 Taylor, without -- you know, why doesn't the  
19 military provide the information? And I think  
20 it's not necessarily because they're trying to  
21 hide something; I think they are used to the  
22 closed docketing system that they have, so

1 they're used to proceeding in that way.

2 And I think also that trial  
3 counsel are concerned that those materials  
4 might make their way into the hands of the  
5 victim, who will then be asked questions in  
6 cross-examination about them.

7 But there's a way to fix that.  
8 And it's a routine way, which is you simply  
9 don't give those materials to your client.

10 So there are practical solutions  
11 to that issue that I think can be overcome.

12 I think with respect to 412, I  
13 think there's a more systematic -- systemic  
14 problem with respect to 412.

15 We can debate the case law, but at  
16 the end of the day, the reality is, it's just  
17 more questions are being asked and more  
18 answers are being given around sexual history  
19 information in the military than in the  
20 civilian setting.

21 And then, once they're asked,  
22 they're out there for the convening authority

1 to review, even if ultimately they are  
2 determined not to fall within an exception.  
3 And that's an issue.

4 Take it to the courts-martial  
5 process -- and I've had cases like this, and  
6 the Naval Academy case is one of them -- I  
7 cannot stop the disclosure of that 412  
8 information from happening once the judge  
9 rules. I have no right to appeal it in the  
10 military. And that's not the case in the  
11 civilian system.

12 I tried very hard in the Naval  
13 Academy case. Took two writs -- in two  
14 separate cases -- both to the Court of  
15 Criminal Appeals, and ultimately up to the  
16 CAAF, and was unsuccessful.

17 There must be a way for victims to  
18 achieve their rights, to have their rights  
19 respected, before the case goes to trial. If  
20 not, there will be no adequate review process  
21 with respect to either 412 or 513. I could go  
22 on, but those are some that come to mind.

1 MS. PETERSEN: I would just add  
2 with respect to the appeals, I mean right now,  
3 when you're trying to appeal, there is no --  
4 I mean, all of the case law, and I think this  
5 was mentioned earlier too, is based off of a  
6 case where a defendant appeals. And right  
7 now, there aren't any rulings actually on  
8 these issues right now.

9 And until you have the ability to  
10 appeal, you won't have a broader framework for  
11 judges to follow so that you can have some  
12 sort of uniformity and some sort of consensus  
13 on how these rules should be applied, other  
14 than the --

15 CHAIR HOLTZMAN: One second. When  
16 you said there's no case law on these issues,  
17 what exactly did you mean?

18 MS. PETERSEN: I mean on 412 and  
19 513.

20 MR. GUILDS: The issue with  
21 respect to the reason there isn't case law,  
22 right, is that judges are reluctant to --

1 military judges, like all judges, are  
2 reluctant to make mistakes.

3 They don't want to issue a ruling  
4 that's going to result in a defendant's  
5 criminal conviction being overturned.

6 And so as a result, the reason  
7 that you see, I think, in the military routine  
8 disclosure of 513 evidence is because the  
9 judges don't want to be wrong. And so -- and  
10 because there's no interlocutory appeal right,  
11 there's no way to really look at these issues,  
12 unless a military judge denies access to the  
13 records in their entirety and the issue goes  
14 up on appeal in that way.

15 And so as a result, you have a  
16 skewed analysis. You have courts saying the  
17 defendant's rights weren't violated because  
18 they didn't turn it over or they weren't  
19 allowed to use it at trial. But you don't  
20 have any real meaningful discussion.

21 And that was our argument in the  
22 Naval Academy case, these are public records.

1 That was our argument in the Naval Academy  
2 case, which is, you CAAF must step forward and  
3 tell the military judges what the standard is.

4 I have enormous respect for the  
5 judge in the Naval Academy case -- enormous  
6 respect. I don't think he made that decision  
7 because he was a bad person. I think he made  
8 that decision because he did not have proper  
9 guidance from the CAAF.

10 CHAIR HOLTZMAN: Thank you. Judge  
11 Jones?

12 JUDGE JONES: Mr. Guilds, assuming  
13 that you don't have and aren't going to get an  
14 absolute privilege in this world --

15 MR. GUILDS: Sure.

16 JUDGE JONES: -- aside from the  
17 suggestions you made, as has Ms. Petersen,  
18 about an interlocutory appeal, what other than  
19 the way the 412 and 513 are being -- shall I  
20 say -- administered by the judges, is there  
21 anything about the statutes themselves that  
22 you would change?

1 MR. GUILDS: What I would change

2 --

3 JUDGE JONES: I hear a lot of  
4 criticism about the decisions that are getting  
5 made based on the statutes.

6 MR. GUILDS: Sure. I would change  
7 -- it's frustrating for me because every  
8 statute has a constitutionally required  
9 exception. Every piece of language has a  
10 constitutionally required exception, right?  
11 So you don't need to have that in the statute.

12 So I think that language is  
13 confusing. I think it causes judges to not be  
14 sure what the Constitution means in this  
15 context.

16 And I don't think it is what the  
17 military judges and the courts have today  
18 viewed it to be. The fact is that the right  
19 to confrontation is not a discovery right.  
20 And the Brady right is not a right that  
21 extends to personal, private medical records.

22 So those issues -- I say that with

1 respect to Brady unless they are in the hands  
2 of the prosecutor -- it's my view that even  
3 the military records for the Naval Academy  
4 survivor that were by the military are not in  
5 the hands of the prosecution, for purposes of  
6 Brady, but that may be too technical an issue  
7 for here.

8 JUDGE JONES: It has been a source  
9 of decisions, obviously, as you know --

10 MR. GUILDS: Sure. Yes.

11 JUDGES JONES: -- and they've gone  
12 both ways.

13 MR. GUILDS: And they've gone both  
14 ways, that's right, that's right. And it's  
15 not a surprise where I come out on that. But  
16 I would say this, I would say this question  
17 came up before as well.

18 I think in the Naval Academy case,  
19 and again, this is a matter of public record,  
20 in the Naval Academy case there were civilian  
21 records. There were civilian records that  
22 were subpoenaed. And I tried, and I have a

1 lot of people at my firm who tried with me, to  
2 prevent those records from being disclosed.

3 So Madam Chair, to your question  
4 earlier with respect to whether or not  
5 Maryland law could have prevented those, yes,  
6 under Maryland law they were not supposed to  
7 be disclosed. I still could not get them kept  
8 from the military judge's in camera review.

9 So I think that there are a series  
10 of steps. I also think to Mr. Stone's point,  
11 the question has come up previously, in that  
12 case and others, do we routinely disclose, how  
13 do we, how do defense counsel, trial counsel,  
14 obtain 513 records?

15 And I think Madam Chair, it sounds  
16 like you know the answer to this. It's that  
17 when defendants want to get materials, they  
18 must solicit the help of trial counsel, of the  
19 prosecutors. And it is the prosecutors who  
20 obtain those materials.

21 So in the Naval Academy case, as a  
22 matter of routine, they subpoenaed and had

1 those records sealed. They didn't review  
2 them, they had them sealed. But they did have  
3 them turned over. And they attempted to do  
4 that with respect to the civilian records as  
5 well. They were initially unsuccessful, until  
6 the military judge issued a ruling ordering  
7 the civilian provider to turn the records  
8 over.

9 So they are turned over routinely,  
10 and that does risk the potential for  
11 disclosure, and it does have the chilling  
12 effect I think Mr. Stone alluded to before.  
13 And I don't see any reason for it. I think  
14 it's really a question of efficiency why you'd  
15 have to give those records --

16 JUDGE JONES: You mean there's  
17 been no application made, no justification, no  
18 probable cause offering -- ?

19 MR. GUILDS: The moment I walked  
20 in on the very first meeting with trial --  
21 sorry to interrupt you, ma'am -- the moment I  
22 walked into the very first meeting with trial

1 counsel, they already had the records.

2 Now they had not reviewed them.  
3 They had left them in a sealed envelope. But  
4 they were -- this is the military. They were  
5 prepared. So they had the records, should  
6 they need to turn them over.

7 Now they hadn't reviewed them.  
8 Trial counsel had not reviewed them. In fact,  
9 trial counsel did not want them. They were  
10 the records that were requested by defense  
11 counsel.

12 Nevertheless, they were then  
13 ultimately reviewed by the military judge once  
14 the military judge made a determination that  
15 he should conduct an in camera review.

16 JUDGE JONES: And you disagreed  
17 with his determination?

18 MR. GUILDS: Of course. Yes. And  
19 I think it's not unique -- I mean, I am not  
20 being critical of that military judge. I  
21 would say that routinely, what military judges  
22 do is they ask, is it relevant? Is it

1 potentially relevant?

2 And what that comes down to at the  
3 end of the day is a question of credibility.  
4 They ask, well, is there some issue of  
5 credibility in this case?

6 This is a sexual assault case.  
7 It's going to almost always be about  
8 credibility. So in my view, and what we  
9 argued in our papers to the CAAF, was that  
10 means that in every case the records are going  
11 to be reviewed in camera.

12 And I think the reality is, and I  
13 think this was mentioned earlier, we lawyers,  
14 we like our privilege, but we're not as keen  
15 on protecting the privileges of others.

16 And I think that's the issue here.  
17 I think military judges routinely view that  
18 they are in the best position to determine  
19 what needs to be turned over. And I think  
20 they do that because they don't have a proper  
21 standard to review that 513 evidence.

22 JUDGE JONES: So the two

1 exceptions, for instance, you don't think are  
2 sufficient. The statements of what's  
3 inadmissible.

4 MR. GUILDS: Yes, I think that  
5 there should be -- in my view, absent some  
6 substantial showing that the victim is  
7 incapacitated and unable to recollect or  
8 testify truthfully, I don't think there should  
9 be any breach of the privilege. I just see no  
10 reason for it.

11 I mean, unless the sexual assault  
12 occurred during the course of the treatment,  
13 I see no reason for the relevancy of that  
14 information.

15 It is no different from what I  
16 have -- I am a, surprisingly, I am a defense  
17 counsel by trade -- so it's no different than  
18 the communications I have with my clients when  
19 we prepare for trial.

20 That person needs to have the  
21 ability to speak with me freely. And I can  
22 generally say to that client, everything you

1 tell me I can't disclose. Unless you tell me  
2 you are about to go commit a crime, I can't  
3 disclose it.

4 I do not have the ability to tell  
5 that to my victims, clients. I just don't.  
6 And until I do, they are going to be chilled  
7 in their ability to both seek treatment and to  
8 move forward with trials.

9 JUDGE JONES: You know, I was just  
10 going to say, I am still trying to figure out  
11 what we could do to change the statute.

12 MR. GUILDS: Well I would  
13 eliminate the statute.

14 JUDGE JONES: You would eliminate  
15 it, that's what I --

16 MR. GUILDS: Yes.

17 CHAIR HOLTZMAN: Eliminate what  
18 statute?

19 MR. GUILDS: I would eliminate 513  
20 in its entirety. I would create an absolute  
21 privilege. I would rewrite 513 is what I  
22 would really say. I would rewrite 513 to

1 create a near-absolute privilege.

2 And there's plenty of examples of  
3 that. I think folks much smarter than me on  
4 the previous panel were describing the various  
5 standards that would replace. So I don't  
6 know, I could give you a line-by-line, but at  
7 the end of the day I think it really needs to  
8 be a near-absolute privilege.

9 JUDGE JONES: Thank you, I do have  
10 one other question. You started to talk about  
11 Article 32s. Do you see any improvements, now  
12 that there's congressional --

13 MR. GUILDS: I do. And I don't  
14 want to underestimate the improvements that  
15 have been made.

16 I mean I speak passionately about  
17 this, as we all do, because we care about  
18 these issues, but the military has made some  
19 substantial improvements.

20 The fact that what happened to my  
21 client in the Article 32 in the Naval Academy  
22 case could not happen today. And that's

1 progress. And I applaud the military for it.

2 JUDGE JONES: And that's because  
3 she could not be compelled to take the stand.

4 MR. GUILDS: Correct.

5 JUDGE JONES: Is there any  
6 certainty about depositions yet, as far as you  
7 know?

8 MR. GUILDS: No, I don't. And I  
9 am concerned about that. I am concerned about  
10 both the depositions and the interview  
11 process, to tell you the truth. And I am  
12 concerned about where they are headed.

13 As I think you probably know,  
14 there is no analogous situation in the  
15 civilian system. Victims don't, my civilian  
16 victim clients don't talk to defense counsel.  
17 My head would explode if that happened.

18 That just is not a thing that  
19 happens in the civilian setting. And the  
20 reason that it happens in the military is  
21 really hard for me to discern.

22 There is no real military

1 objective, there's nothing meaningfully  
2 different about the military justice system to  
3 warrant that difference.

4 JUDGE JONES: Well, you are  
5 probably the wrong person to ask, but where  
6 does discovery occur if it's no longer  
7 supposed to occur in the 32?

8 MR. GUILDS: Well I think it  
9 occurs, there is discovery outside of the 32  
10 process now, right? There are interviews that  
11 can take place, there are subpoenas that can  
12 be issued.

13 I think that we could look to  
14 virtually any jurisdiction in the country for  
15 how discovery could take place, because that's  
16 how it takes places.

17 A preliminary hearing, any good  
18 defense counsel can probably get a little bit  
19 out of a civilian preliminary hearing in terms  
20 of discovery, but that's not where it comes.  
21 It comes from the rules --

22 JUDGE JONES: No I am saying,

1       though, that I was under the impression the 32  
2       was a discovery, was used for discovery, and  
3       not just because culturally it grew into that,  
4       but that it was meant to function as a, and  
5       again, I'm probably asking the wrong person --

6               MR. GUILDS:  No I will say, I have  
7       a view, I probably have a view on everything,  
8       my wife would tell you.

9               But I will tell you this.  If you  
10      look at what the statute describes as the  
11      purpose of an Article 32, it is not for  
12      discovery.

13              JUDGE JONES:  No, no, that I  
14      understand.

15              MR. GUILDS.  Yes.  But you are  
16      right that in the past it was used for  
17      discovery, and the defense counsel is going to  
18      use every opportunity they can to explore and  
19      defend their client.

20              I don't fault them for it, and I  
21      think that's an example of a change for the  
22      positive.

1 MS. PETERSEN: I would, I can  
2 defer to the person with a law degree here too  
3 on this, but in terms of discovery, I think  
4 the issue with the depositions comes down to  
5 whether or not the victim is going to be  
6 available at the court-martial to testify and  
7 to be cross-examined.

8 And unless there's -- in the  
9 military I think that, I'm not an expert on  
10 this area, but an extraordinary circumstance  
11 would be if the victim was not going to be  
12 able to be testify and be cross-examined at  
13 trial, that they would be deposed in order to  
14 preserve the testimony to read into the record  
15 at trial.

16 But absent that I'm not sure, I  
17 mean I would consider that to be their right  
18 in access.

19 And I would just mention in terms  
20 of the 32, the reason that we feel so strongly  
21 about 412 with the Article 32, I mean I think  
22 that the Naval Academy case is a really great

1 example. That was a chief judge, that was a  
2 military judge, serving as an investigating  
3 officer.

4 But most of the times, these are  
5 JAG officers, these aren't necessarily judges.  
6 They're not necessarily someone who has any  
7 experience weighing these rules that are being  
8 given the ability to weigh all of this really  
9 nuanced -- I mean, we've had testimony all day  
10 about how nuanced, and how particular, and how  
11 technical these questions are -- and the fact  
12 that they can come in at that stage, besides  
13 the damage that it does to the victim just at  
14 that stage and then to have to do it again at  
15 the trial, but under someone who's not  
16 operating or functioning as a military judge.

17 They're functioning as an  
18 investigating officer who is going to make a  
19 recommendation to the convening authority, who  
20 then reviews that recommendation. They  
21 weren't there for the trial, they weren't  
22 there for any of these hearings. And that

1 that convening authority can then still review  
2 that entire record regardless -- you know, the  
3 IO can say, this is admissible, this is not,  
4 not only in deciding whether or not to refer  
5 the case to court-martial, but on the back  
6 end, in terms of sentencing, although I think  
7 that there are maybe new regulations in  
8 regards to the sentencing that have been  
9 announced by DoD.

10 But I think that that's why we  
11 feel particularly strong in terms of 412 and  
12 513, but in terms of the executive order and  
13 the applicability of 412 at preliminary  
14 hearings.

15 CHAIR HOLTZMAN: Thank you very  
16 much. Admiral Tracey.

17 VADM(R) TRACEY: Help me a little  
18 bit.

19 I thought I heard Colonel Baker  
20 this morning describe a process that does  
21 mirror what you believe are the requirements  
22 of a motion being made, a determination on the

1 merits of the motion as to whether or not the  
2 records could be recovered, and then the  
3 records reviewed if they are recovered in  
4 camera and what have you, and you're saying  
5 that those procedures are routinely not being  
6 followed.

7 MR. GUILDS: No, I think that  
8 those are the procedures, so if I misspoke, I  
9 apologize, Admiral. The way it works in the  
10 cases that I have familiarity with, the  
11 records are requested before there is a motion  
12 filed.

13 They do that so they have the  
14 records available for the court to quickly  
15 review.

16 Then they file their 513 motion.  
17 Then there's argument. And then, depending  
18 upon what the judge decides, they are reviewed  
19 by the judge, and then ultimately the judge  
20 will decide what to do in terms of turning  
21 them over.

22 VADM(R) TRACEY: So effectively,

1 the procedures are not being followed. They  
2 are requisitioning the records before having  
3 made the motion.

4 MR. GUILDS: That is correct.

5 VADM(R) TRACEY: And that's  
6 routine, you said.

7 MR. GUILDS: That happens, and it  
8 has happened in every case that I have either  
9 participated in or supervised, and that's over  
10 a dozen.

11 VADM(R) TRACEY: Thank you.

12 CHAIR HOLTZMAN: Mr. Stone?

13 MR. STONE: Yes, my question was  
14 going to be the same. So you don't get any  
15 notification before the records are pulled  
16 from the medical provider?

17 MR. GUILDS: I mean I get a  
18 notification in that I know they're going to  
19 do it, but you are correct, I don't get any  
20 notice or any ability to object or file a  
21 motion or do anything like that, if that's  
22 what you're asking.

1                   MR. STONE: Which is totally  
2 unlike the civil [sic] system.

3                   MR. GUILDS: Correct.

4                   MR. STONE: Is it your  
5 understanding that there is any kind of a  
6 HIPAA release that is required from the --  
7 that the medical provider requires as they  
8 would in a private hospital, in the state  
9 hospital?

10                  MR. GUILDS: No, there is no  
11 release. I mean, in military there is no  
12 release provided.

13                  MR. STONE: And what is the  
14 explanation of the violation of the HIPAA  
15 releases?

16                  MR. GUILDS: I think the  
17 explanation is that they're a member of the  
18 military and they have reduced expectations of  
19 privacy with respect to those records.

20                  MR. STONE: Have they ever told  
21 you that? Or are you guessing at that?

22                  MR. GUILDS: I mean, those are

1 issues we have attempted to litigate. There  
2 has been no decision on it. But that is the  
3 justification that --

4 MR. STONE: Because the military  
5 thinks they're exempt from HIPAA releases.

6 MR. GUILDS: I mean, no one has  
7 told me that expressly, but that is my sense  
8 of why they believe that they could do it. I  
9 don't want to, I am definitely not here to  
10 testify on behalf of the military, as I think  
11 they probably know.

12 MR. STONE: Okay. One  
13 clarification, you said that what happened to  
14 your client in the Naval Academy case couldn't  
15 happen today because she couldn't be cross-  
16 examined. I understood that that is not the  
17 case until December 26th.

18 MR. GUILDS: Correct.

19 MR. STONE: So that could happen  
20 today.

21 MR. GUILDS: Well, in the cases  
22 that I have, we have just taken in a couple of

1 new cases, and they are applying those rules  
2 now. So whether or not as a matter of the law  
3 it takes place, they're scheduling 32s.

4 I have a client, potential client,  
5 who is not going to testify at the Article 32.

6 MR. STONE: But doesn't the law  
7 say as to offenses committed after December  
8 26th, at the moment?

9 MR. GUILDS: Well, go ahead.

10 MS. PETERSEN: I believe that the  
11 NDAA that was passed last year, the statute  
12 does say that it will apply with offenses  
13 beginning, occurring on or after December --

14 MR. STONE: So therefore, even if  
15 the hearing is held after December 26th in  
16 cases, those people are still going to be  
17 subject to being called and cross-examined.

18 MR. GUILDS: Potentially, yes.

19 MS. PETERSEN: Potentially.

20 MR. STONE: Unless that's fixed.

21 Okay. I have a question, and maybe Ms.

22 Petersen, or maybe somebody on the panel

1 knows, and I'll just tell you what I am  
2 concerned about and you can tell me whether  
3 it's uniform across all Services or if they  
4 differ in their practices.

5           And that is I gather that they all  
6 have this closed proceeding of filing, so as  
7 victim's counsel, even though you've noticed  
8 that you're representing the victim, you don't  
9 get access to the filings or the docket sheet,  
10 is that right?

11           MR. GUILDS: So, it varies. So in  
12 some cases, I would get access to the 412 and  
13 513 materials. So I got access to the  
14 materials in the Naval Academy case, for  
15 example, related to those particular motions.

16           I didn't get access to the other  
17 materials that were referred to or referenced  
18 in those motions.

19           So for example, I came into that  
20 case after the Article 32 had taken place. I  
21 did not have the Article 32 transcript to  
22 respond in that case. So when it was time for

1 me to make my arguments and do my job, I was  
2 at a disadvantage.

3 MR. STONE: Isn't the victim  
4 supposed to be entitled to a copy of the  
5 Article 32 transcript?

6 MR. GUILDS: After.

7 CHAIR HOLTZMAN: After what?

8 MR. GUILDS: So they get them  
9 after trial, they are entitled to a certified  
10 record.

11 Now there are changes in the  
12 rules, as I understand them, that will apply,  
13 that will provide them with the access to the  
14 recording before. And that is an improvement.  
15 If that indeed takes places, that will  
16 certainly be an improvement.

17 MR. STONE: I guess what I am  
18 asking is, do you know if that kind of  
19 selective release to you of only proceedings  
20 somebody else thinks are relevant is only in  
21 the Navy or the Marine Corps or the Air Force  
22 or the Army, do you know if it's across the

1 Services the same way?

2 MR. GUILDS: I have never  
3 represented anyone in the Marine Corps. All  
4 other three service branches, it is the same.  
5 I get incomplete access to information.

6 MS. PETERSEN: I have been told by  
7 victims' legal counsel in the Marine Corps,  
8 Navy, and Air Force instances similar to what  
9 Ryan, Mr. Guilds, is describing.

10 And I recently had another case  
11 that we're working on recently with civilian  
12 counsel, I was told a couple weeks ago that  
13 the judge had ordered a hearing on -- he was  
14 going to make some rulings regarding 412 and  
15 513, he was going to give defense and trial  
16 counsel the opportunity to brief.

17 The civilian counsel was notified  
18 by trial counsel after the hearing had taken  
19 place. So he was given an opportunity to  
20 brief after the fact, but he wasn't there for  
21 the hearing.

22 MR. STONE: So these hearings, I

1 gather they are Rule 802 hearings?

2 MS. PETERSEN: 802, yes.

3 MR. STONE: The victim's counsel  
4 are not getting notice --

5 MS. PETERSEN: He was not noticed  
6 --

7 MR. STONE: -- ahead of time.

8 MS. PETERSEN: Right, he was not  
9 given notice of an 802 hearing. It took  
10 place. He heard after the fact from trial  
11 counsel --

12 MR. STONE: Right. So they're not  
13 invited to participate, they're not invited to  
14 file a brief.

15 MS. PETERSEN: He was invited to  
16 file a brief. But I think that, and I'm, I  
17 can't say for sure, I only get this  
18 information from those that we speak to who  
19 are going through this, but it seems to be a  
20 little ad hoc.

21 It depends on the judge who is  
22 presiding over that hearing, what their

1 opinion is on what the role is of a victim's  
2 legal counsel.

3 And again, that's because it's not  
4 codified. We have this ruling from CAAF that  
5 says you have a right to be heard through  
6 counsel on 412 and 513, but there is nothing  
7 in the SVC language, in the statutes that have  
8 been passed by Congress, or anywhere else,  
9 that explicitly outlines the rights of a  
10 victim's legal counsel in terms of operating  
11 at court, what notice they're entitled to when  
12 they're entitled to argue on behalf of their  
13 client.

14 MR. STONE: Now when you show up  
15 in court, do you have the same standing as the  
16 prosecutor and the defense counsel? Do you  
17 have a table and a place to sit, just the way  
18 they do? Or are you just left on your own?

19 MR. GUILDS: It depends. It  
20 depends on the issue and it depends on the  
21 military judge.

22 As Ms. Petersen said, there is no

1 specific requirements or rules to deal with a  
2 victim's legal counsel.

3 In the Naval Academy case, the  
4 judge was gracious enough to place us in the  
5 jury box, and we made arguments with respect  
6 to 412 and 513 from the jury box.

7 And it kind of felt like being on  
8 the jury because I was learning information  
9 for the first time while I was arguing my  
10 motions.

11 MR. STONE: So is what I'm hearing  
12 that even though the Services have made a  
13 process to appoint and accommodate counsel for  
14 victims, within the legal system, even when  
15 they note their appearance, they're not  
16 getting all the pleadings in the case ahead of  
17 time, they're not getting notice of hearings,  
18 they're not getting an ability to have a place  
19 to sit in the courtroom.

20 And I gather they can't even  
21 always speak, if, as we heard before, they're  
22 trying to pass a rule that says that the

1 counsel can be heard, not just the victims.

2 Am I hearing that right?

3 MR. GUILDS: Not from me. I think  
4 that that goes too far. I think that the  
5 military judge in the Naval Academy case, for  
6 example, took pains to provide opportunities  
7 for us to be heard -- let me argue even in  
8 the midst of the court-martial with respect to  
9 412 and 513 issues.

10 Now he made it clear that if I  
11 stood up at any other time, I might be  
12 visiting the brig. But he also made clear  
13 that I had an opportunity to participate with  
14 respect to those proceedings.

15 In other situations, it has been  
16 made clear to me that trial counsel is  
17 responsible for updating me. Trial counsel is  
18 responsible for providing me the briefs. And  
19 unless I have something really good to say,  
20 trial counsel will be the one that argues  
21 their motions.

22 But honestly, it really varies.

1 Oftentimes trial counsel wants me to speak on  
2 behalf of the victim and encourages me to both  
3 make argument and file briefs with respect to  
4 412 and 513.

5 I think the issues that come up,  
6 really with respect to 412 and 513, are in the  
7 Article 32, where it is very unclear what my  
8 rights and what my -- what my rights as a  
9 lawyer on behalf of my client are. I had an  
10 Article 32 where I was sitting next to my  
11 client and there was potential 412 and I must  
12 tell you, I was unsure what to do.

13 I don't like to stand up and  
14 object when I don't have clear standing, but  
15 I was uncomfortable with the situation. And  
16 I believe that I should not have to rely upon  
17 trial counsel to assert my client's rights.

18 Trial counsel has a different  
19 objective. Trial counsel has a different  
20 duty. My duty is to my client, and my  
21 client's rights. And I should have an  
22 opportunity to voice those when appropriate

1 for issues that are relevant.

2 MR. STONE: I find it somewhat  
3 anomalous that you say you have tremendous  
4 respect for that judge when you have just  
5 said, unless you were joking --

6 MR. GUILDS: Oh, I am not joking.

7 MR. STONE: -- that if you stood  
8 up and objected to something, you could find  
9 yourself in the brig. I totally understand a  
10 judge saying, "I'm sorry but I don't think you  
11 have standing to object to that issue."

12 But I really don't understand a  
13 judge saying, "You better not stand up unless  
14 I -- except under these parameters, or you're  
15 going to wind up in contempt." I have never  
16 heard a judge go that far.

17 MR. GUILDS: The judge didn't say  
18 that. And I should take more seriously those  
19 words. What the judge made clear to me in  
20 that case is that, and in many cases, is that  
21 I cannot just simply stand up, whenever I  
22 want, and object.

1                   Did he say if I did so, I was  
2 going to be held in contempt? No. But if  
3 you've appeared before that military judge,  
4 you know that you afford him a tremendous  
5 amount of respect, and I do.

6                   I think that military judge was  
7 actually in the lead in trying to find ways to  
8 incorporate victims' legal counsel into the  
9 process.

10                  Do I agree with every decision he  
11 made? No. Do I agree with his decisions with  
12 respect to 412 and 513? Absolutely not.

13                  But do I think that there are  
14 military judges out there who are trying to  
15 find the right balance and bring the victims'  
16 legal counsel into the process? I do.

17                  And I honestly think that that is  
18 not unique to the military. I think that  
19 there are civilian victims' legal counsel who  
20 confront similar issues with respect to this  
21 problem, and I applaud the military for its  
22 Victims' Legal Counsel Program. I think there

1 can be enhancements, but I think it's a  
2 tremendous asset, and I applaud them for  
3 incorporating it.

4 MR. STONE: Did the judge allow  
5 you to attend bench conferences when he called  
6 bench conferences?

7 MR. GUILDS: He sure did. He did.  
8 Now, and other judges have not, right? And  
9 other judges, I have been not invited to  
10 anything other than after-the-fact  
11 determinations. And that's what I think we're  
12 getting to --

13 MR. STONE: Do you think there  
14 needs to be a new rule that gives you the  
15 standing that is equivalent to the other  
16 attorneys in the courtroom to have full access  
17 to pleadings, bench conferences, and  
18 proceedings, and to file whatever you want to  
19 file?

20 MR. GUILDS: Absolutely. Without  
21 question. Absolutely.

22 MR. STONE: A need for it.

1                   MR. GUILDS: Absolutely. There is  
2 a need for it, and in that case, we saw the  
3 benefits of it. We saw the benefits of my  
4 ability to -- you know, one of the important  
5 things that a victim's legal counsel does is  
6 to explain the proceedings to their client,  
7 right?

8                   That's an important aspect of the  
9 Victims' Legal Counsel Program. If I don't  
10 have access to the materials and the  
11 conversations, how can I do that? I mean  
12 really all I am is the paralegal of the trial  
13 counsel. I need to be able to provide my own  
14 interpretation, my own legal judgment to what  
15 is going on. And I can only do that if I have  
16 equal access to the information.

17                   And most importantly, there is no  
18 good reason not to provide it. I think Mr.  
19 Stone you know, this is information I would  
20 get in a civilian proceeding. And so there's  
21 no real military objective for not having the  
22 same process in our military justice system.

1 CHAIR HOLTZMAN: Mr. Guilds.

2 MR. GUILDS: Yes ma'am.

3 CHAIR HOLTZMAN: You say that the  
4 Naval Academy situation couldn't occur today  
5 because the victim couldn't be cross-examined.

6 MR. GUILDS: What I meant to say,  
7 and if I didn't I apologize, is the Article  
8 32, 30 hours of cross-examination, could not  
9 occur today, yes ma'am.

10 CHAIR HOLTZMAN: Right. Okay.  
11 But the rulings on -- but, even though the  
12 cross-examination of the victim couldn't take  
13 place, that doesn't mean that the mindset of  
14 the judges with respect to how 412 works would  
15 be any different today from the way it was in  
16 the Naval Academy case. Is that correct?

17 MR. GUILDS: That is correct.

18 CHAIR HOLTZMAN: So what I'm  
19 trying to do is indicate that it's not just  
20 the -- that we need more than the removal of  
21 the victim from the potentiality of cross-  
22 examination in the Article 32, if we're going

1 to get Article 412 properly implemented.

2 MR. GUILDS: Absolutely. And if I  
3 have made it appear otherwise, I apologize.  
4 I absolutely agree.

5 CHAIR HOLTZMAN: I don't think  
6 you've made it unclear. I just want to  
7 clarify it beyond peradventure of a doubt.

8 MS. PETERSEN: And I just wanted  
9 to add, as was referenced a little bit in my  
10 statement, that even if the victim can't  
11 testify, that doesn't mean that there won't be  
12 an attempt to admit 412 evidence and that that  
13 same process won't, you won't pull it from  
14 witnesses, or you won't try to present other  
15 -- get at that testimony in other ways.

16 So I think that the harm is still  
17 there. Maybe the victim isn't the one being  
18 subjected to those questions directly. But  
19 that doesn't mean a victim won't always  
20 testify -- choose to testify at the 32, and it  
21 doesn't mean that that evidence still wouldn't  
22 come in.

1                   MR. GUILDS: Yes, and I would just  
2 hasten to add that what I've seen in some of  
3 my cases is that actually, during the  
4 investigation process, the military criminal  
5 investigators actually obtain a release from  
6 the victim for the disclosure of medical  
7 records.

8                   So I have gotten cases after the  
9 fact of that interview where those records are  
10 already disclosed. And that reveals, just  
11 potentially, obviously it reveals 513, but it  
12 also potentially reveals additional 412  
13 evidence.

14                  CHAIR HOLTZMAN: Is that going to  
15 change with the appointment at the outset of  
16 Special Victims' Counsel? Both -- two issues.  
17 One, the signing of a waiver, and secondly,  
18 the questioning by the military investigators  
19 with regard to prior sexual conduct.

20                  MR. GUILDS: It is my sincere hope  
21 that it will happen, and it will happen for  
22 those individuals who have a right to Victims'

1 Legal Counsel. I also represent civilians who  
2 don't have that same right. It won't  
3 necessarily happen in those cases.

4 CHAIR HOLTZMAN: Now are civilians  
5 in the military --

6 MR. GUILDS: In the military  
7 justice system, yes ma'am.

8 CHAIR HOLTZMAN: I see.

9 MR. GUILDS: So they are not  
10 appointed Victims' Legal Counsel. Some of the  
11 cases that I have, for example, are precisely  
12 because the VLCs are not able to represent the  
13 victim.

14 And so it will not happen in those  
15 cases. I am hopeful, as I think you are  
16 alluding to, that the VLC Program will prevent  
17 that from happening. That is certainly  
18 mission and objective one of a VLC when they  
19 walk into an interview with an investigator.

20 CHAIR HOLTZMAN: Now with regard  
21 to 513 and 412, 513 you say should be  
22 completely rewritten to make it a much

1 stronger privilege.

2 MR. GUILDS: Correct.

3 CHAIR HOLTZMAN: In both cases,  
4 Article 412 and 513, do you believe that the  
5 exemption for what's constitutionally required  
6 should be removed?

7 MR. GUILDS: I do.

8 CHAIR HOLTZMAN: Do you agree with  
9 that, Ms. Petersen?

10 MS. PETERSEN: Yes.

11 CHAIR HOLTZMAN: Mr. Jacob, do you  
12 have an opinion on that?

13 MR. JACOB: Yes.

14 CHAIR HOLTZMAN: Okay, I want to  
15 go to the Article 32 issue that you raised,  
16 Ms. Petersen, which is the executive order  
17 just recently allowed prior sexual conduct to  
18 come in?

19 MS. PETERSEN: So they altered the  
20 way that it's --

21 CHAIR HOLTZMAN: Can you please  
22 explain --

1 MS. PETERSEN: Yes.

2 CHAIR HOLTZMAN: -- how something  
3 like this could happen in the year two  
4 thousand and -- when was this done?

5 MS. PETERSEN: This was done this  
6 year.

7 CHAIR HOLTZMAN: 2014?

8 MS. PETERSEN: Yes. And I believe  
9 that the argument is that they're increasing  
10 the protections. I think that that's a  
11 misunderstanding of the way that the rule  
12 should be applied.

13 At least from our understanding of  
14 the way that the rule for Court-Martial  
15 previously required 412, in terms of how it  
16 regulated 412 evidence, it said that 412  
17 evidence could be considered by a judge at a  
18 court-martial.

19 So by every measure, in terms of,  
20 from our perspective, it should not have been  
21 applied at 32s. You didn't have judges  
22 administrating Article 32 hearings, you have

1 officers, now you have JAG officers.

2 So the 412 evidence was still  
3 coming in. There was a lot of confusion and  
4 a lot of, I can just call it controversy over  
5 whether 412 should or should not have come in.

6 I think the President's -- the  
7 argument for the executive order was that  
8 they're quelling that controversy by  
9 explicitly applying M.R.E. 412 because now you  
10 have a process that you have to follow, you're  
11 saying the rule absolutely does apply, and it  
12 would give, in theory, give consistency.

13 The problem is we see the way 412  
14 is applied at 32 hearings, and it's not  
15 protecting victims in the way that it should.

16 Our contention from the beginning  
17 when we saw this proposed executive order was  
18 no, 412 evidence should not be coming in at a  
19 32. Just because it is, it's doing so  
20 erroneously, and the President should have  
21 clarified at that point that M.R.E. 412  
22 evidence could not be admitted at a 32.

1                   Instead, he went the other way and  
2                   codified what was at times being done  
3                   erroneously.

4                   It's not that it wasn't  
5                   necessarily being done.

6                   CHAIR HOLTZMAN: Now could you  
7                   just articulate why you think that 412  
8                   information should not come in at the Article  
9                   32 stage?

10                  MS. PETERSEN: First and foremost  
11                  because Article 32 has now been changed to be  
12                  a probable cause determination, and there's no  
13                  reason to pry into a victim's prior sexual  
14                  history. From my perspective, there should  
15                  very rarely ever be a reason for you to pry.

16                  But at the 32 stage, when their  
17                  sole -- the sole purpose of that hearing now  
18                  is to determine probable cause for trial for  
19                  whether or not you should go forward to an  
20                  Article 32, it should not be applied.

21                  The second reason is because of  
22                  the executive order. In the executive order,

1 while it -- it explicitly applies to M.R.E.  
2 412, and then it also explains that even if  
3 it's ruled inadmissible, a convening authority  
4 can still review the entire record prior to  
5 making that referral.

6 So now you're saying, first of all  
7 412 evidence can come in, and second of all,  
8 even if the IO, who is not a military judge,  
9 rules that it's not going to be admissible at  
10 trial, a convening authority will have -- I  
11 mean, how is that not going to be prejudicial  
12 to the victim, when that evidence is already  
13 not going to be admissible at trial, but the  
14 fact-finder, the person who gets to decide  
15 whether or not they even get to the courtroom,  
16 is allowed to basically see it, and for what  
17 other reason than to consider it?

18 CHAIR HOLTZMAN: Well, and then of  
19 course that affects the plea bargaining  
20 decision, and sentencing --

21 MS. PETERSEN: Right.

22 CHAIR HOLTZMAN: -- and the

1 decision as to whether to refer.

2 MS. PETERSEN: Yes, so we believe  
3 it was extremely misguided and that it should  
4 have gone the other way, it should have  
5 prevented this from happening.

6 And as I said with the Naval  
7 Academy case, I mean even judges aren't clear  
8 on how to apply this, but at a 32 where you  
9 have a much more open process, you have much  
10 fewer restrictions, and you have someone who's  
11 not functioning as a judge, it's limitless,  
12 the opportunities for harm to the victim.

13 CHAIR HOLTZMAN: Okay. Well I  
14 find it incomprehensible and astonishing, I  
15 guess I have views that --

16 MR. STONE: Just a clarification.  
17 So are you saying that you think at the  
18 Article 32 hearings, only military judges,  
19 rather than any JAG officers, should preside?

20 MS. PETERSEN: I mean, I think  
21 that there have been reasons why that hasn't  
22 happened, in terms of the ability to have that

1 many judges.

2 I think it's something we would  
3 have to look into more before I could say what  
4 our position is on that.

5 But I mean, I think in theory --

6 MR. STONE: I am not assuming that  
7 we have enough judges. They could always make  
8 people more [sic] judges, I am just asking  
9 whether that theoretically is what you're  
10 saying you want.

11 MS. PETERSEN: No, because I don't  
12 think ultimately that even helps, because the  
13 convening authority, the commander, still  
14 makes the decision.

15 You don't have a magistrate judge  
16 reviewing this and making a decision. You  
17 have an IO and then you have the convening  
18 authority separately.

19 CHAIR HOLTZMAN: On the question  
20 of materials that are available to the  
21 convening authority, what happens to 513  
22 material? Is that also made available to the

1 convening authority?

2 MR. GUILDS: Yes, I mean if it --

3 CHAIR HOLTZMAN: Even if it's not  
4 admitted, even if it's considered privilege,  
5 is that still made available to the convening  
6 authority?

7 MR. GUILDS: Not to my knowledge,  
8 no, I have never seen a case where it's been  
9 -- because it doesn't get turned over to  
10 anyone other than the military judge.

11 It remains under seal to everyone.  
12 Trial counsel has not seen it. Defense  
13 counsel has not seen it.

14 Now if, in the Naval Academy case,  
15 there had been a different result, there was  
16 a set of records that were turned over to the  
17 defense. Those materials presumably would  
18 become part of the sealed record, and then the  
19 convening authority would have had access to  
20 those.

21 But that's only because they would  
22 have been disclosed.

1 MR. STONE: So if the IO sees it,  
2 then the convening authority sees it.

3 MR. GUILDS: Not necessarily. I  
4 mean the IO is before -- well, yes. You were  
5 talking earlier in the process.

6 CHAIR HOLTZMAN: What's an IO?

7 MR. GUILDS: Investigating  
8 officer.

9 MR. STONE: The investigating  
10 officer, the presiding officer at the 32.

11 MR. GUILDS: At the Article 32.  
12 We're sort of mixing -- I think I was  
13 interpreting your question Madam Chair to be  
14 at the time of sentencing or adjudication, at  
15 the end of the process. If you're talking  
16 about the --

17 CHAIR HOLTZMAN: I am talking  
18 about: does the convening authority at any  
19 time, from the beginning of time to the point  
20 at which -- to the end of the trial, does the  
21 convening authority get to see Article 513 --  
22 I mean Rule 513 material?

1                   MR. GUILDS: Typically, in the  
2 cases that I have -- I mean, not typically, in  
3 all of the cases that I have, the 513 evidence  
4 does not come out until after there is a  
5 referral.

6                   CHAIR HOLTZMAN: I see.

7                   MR. GUILDS: So then once there's  
8 a referral, and Ms. Petersen can correct me if  
9 she has different information, but after that,  
10 once you get to the courts-martial, if that  
11 information has been provided and turned over  
12 to the defense, or it somehow gets into the  
13 record, then of course the convening authority  
14 at that stage --

15                  CHAIR HOLTZMAN: I am not talking  
16 about that. I am talking about when only the  
17 trial judge has seen it, if the trial judge  
18 has seen it.

19                  MS. PETERSEN: You mean if there's  
20 been an in camera review, but they haven't  
21 been turned over.

22                  CHAIR HOLTZMAN: Correct.

1 MS. PETERSEN: At that point, with

2 --

3 CHAIR HOLTZMAN: Does the  
4 convening authority get to see that material?

5 MR. GUILDS: No. In my  
6 experience, I have not seen that happen, and  
7 I don't believe that that's the case.

8 I have never seen an instance when  
9 the convening authority was provided access to  
10 those materials.

11 VADM(R) TRACEY: Excuse me, but  
12 that might happen in 412?

13 CHAIR HOLTZMAN: Yes.

14 CHAIR HOLTZMAN: All of that is of

15 --

16 MR. GUILDS: In 412, absolutely,  
17 it will happen. Because there's a hearing  
18 about that information that's not with respect  
19 to the sealed records.

20 MR. STONE: Which is the hearing  
21 that Ms. Petersen is complaining about, that  
22 it shouldn't be heard --

1 MS. PETERSEN: Well there's the  
2 Article 32 --

3 MR. STONE: -- at the Article 32,  
4 it should wait until the trial.

5 MS. PETERSEN: Right. But there's  
6 an Article 32 hearing, and then they have to  
7 hold a 412 hearing at the Article 32 hearing,  
8 to review the evidence and decide what is and  
9 is not admissible.

10 But regardless of that  
11 determination, the convening authority will  
12 see the record --

13 MR. GUILDS: It's the classic  
14 unringing of the bell, right? The information  
15 is all out there in the open, regardless of  
16 whether it falls within a 412 exception or  
17 not.

18 And then ultimately, the  
19 investigating officer will make a  
20 determination about what falls within an  
21 exception. But it's all already out there,  
22 right? And the damage to the survivor has

1 already occurred.

2 CHAIR HOLTZMAN: Let me also ask  
3 about 412 in terms of, are there any other  
4 changes that you would make to it aside from  
5 removing the catch-all constitutional  
6 provision at the end?

7 MR. GUILDS: With respect to the  
8 language itself, Madam Chair?

9 CHAIR HOLTZMAN: Yes.

10 MR. GUILDS: None that I can  
11 identify at this time.

12 CHAIR HOLTZMAN: So (a) and (b)  
13 are okay, in your view.

14 MR. GUILDS: Well, it's (a) and  
15 (b) and how (a) and (b) are applied, right?  
16 But those are my jobs in the court, to argue  
17 before the CAAF and others with respect to  
18 those.

19 I don't see 412 in terms of its  
20 language, outside of the constitutionally  
21 required exception, being meaningfully  
22 different than most other jurisdictions.

1                   CHAIR HOLTZMAN: Okay. So, but  
2                   it's in the, in your view, and same with you  
3                   Ms. Petersen and Mr. Jacob, it's in the  
4                   interpretation of the catch-all quote unquote  
5                   constitutional provision that you've seen 412  
6                   interpreted in a way that's radically  
7                   different from the way it's being interpreted  
8                   in the states, around the country and in the  
9                   federal system.

10                   MR. GUILDS: Yes.

11                   CHAIR HOLTZMAN: And interpreted  
12                   in a way that's harmful to victims and  
13                   victims' rights to privacy.

14                   MR. GUILDS: Without question.

15                   MR. STONE: Before we leave that,  
16                   do you think there's some reason that when,  
17                   and I presume you did, you cite the other  
18                   federal and state cases from around the  
19                   country about the way that catch-all provision  
20                   is interpreted around the country, that the  
21                   military judges don't -- choose not to follow  
22                   other federal authority?

1                   MR. GUILDS: I can't speak for the  
2 military judges, obviously. My view is that  
3 they are afraid that if they do, there will  
4 wind up being a new trial for the defendant,  
5 which is why we need to have a clearly  
6 articulated standard from the CAAF that  
7 provides meaningful guidance as to what are  
8 the requirements under 412.

9                   CHAIR HOLTZMAN: And your reliance  
10 on CAAF, I guess, that's the --

11                   MR. GUILDS: Court of Appeals for  
12 the Armed Forces, I apologize.

13                   CHAIR HOLTZMAN: How do you  
14 reconcile your statement with United States v.  
15 Ellerbrock? Do we have confidence in the CAAF  
16 in light of that case?

17                   MR. GUILDS: I don't. I mean, I'm  
18 critical of the CAAF determination with  
19 respect to 412, and I do think that there are  
20 issues with respect to how 412 is interpreted,  
21 and I have not, I will be clear, I have not  
22 analyzed what we might change within the law

1 to adjust as a result of that decision.

2 CHAIR HOLTZMAN: Well, I don't  
3 know -- have you done that, Ms. Petersen?

4 MS. PETERSEN: Have I done -- ?  
5 I'm sorry.

6 CHAIR HOLTZMAN: Have you looked  
7 at 412 in light of Ellerbrock?

8 MS. PETERSEN: So we have a UCMJ  
9 expert that works with us who has drafted an  
10 analysis. That's a little out of my depth, I  
11 think, to speak to directly, but I'd be happy  
12 to provide it for you.

13 CHAIR HOLTZMAN: Okay. The other  
14 thing I would ask you to provide with all due  
15 respect, and out of just desperation for help  
16 on this, is that if you have any thoughts  
17 about how to redraft these, 513 and 412, we  
18 would definitely like to see that from you --

19 MR. GUILDS: Homework. We're on  
20 it.

21 CHAIR HOLTZMAN: -- and any other  
22 thoughts about that, including any revision of

1 this executive order -- I don't have the  
2 number, you probably have cited to it, I am  
3 sorry not to remember --

4 MS. PETERSEN: I have the number.

5 CHAIR HOLTZMAN: -- that you  
6 mentioned that affects the use of prior sexual  
7 conduct in a --

8 MS. PETERSEN: It's Executive  
9 Order 13669, and I'm happy to provide --

10 CHAIR HOLTZMAN: Yes, will you  
11 provide any thoughts you have about how that  
12 should be either rewritten, or whether it  
13 should just be junked?

14 MS. PETERSEN: And I will say, I  
15 believe that the Joint Services Committee has  
16 made new recommendations this year, this --  
17 very recently, that eliminate, that would  
18 eliminate the -- I don't want to speak to it  
19 because I've only heard about it, I haven't  
20 seen it -- eliminate the constitutionally  
21 required exception at Article 32s.

22 So that's in the wake of this

1 previous executive order, which we've been  
2 extremely --

3 MR. STONE: But I presume you  
4 think they should eliminate the constitutional  
5 requirement whether it's at the Article 32 or  
6 a trial, for the whole process, right?

7 MS. PETERSEN: Altogether, and  
8 also eliminate -- and also prohibit 412  
9 evidence from coming in the 32 stage at all.

10 CHAIR HOLTZMAN: Do you think  
11 there needs to be more training for military  
12 judges on the issue of prior sexual conduct?

13 MS. PETERSEN: I think there needs  
14 to be more training in the military legal  
15 system across the board on prior sexual  
16 history, and just the effects of trauma, and  
17 also how victims experience sexual assault,  
18 and whether or not their behavior has any  
19 bearing on that.

20 Because I think that there are a  
21 lot of attitudes which are echoed in society  
22 as well, but which are harmful to the ability

1 for the victim to be served.

2 And I'd also say that, I know that  
3 Special Victims' Counsel is being saved for  
4 another day for this panel, but in terms of  
5 the ability to protect victims, I think that  
6 the Special Victims' Counsel are mostly really  
7 amazing, they want to do a good job. But I  
8 think that they also could use training on how  
9 to be more rigorously advocating.

10 Because a lot of times, for  
11 instance, you see, if you have an investigator  
12 who comes in and gets this information from a  
13 victim before you get through the process, if  
14 you don't have SVCs who understand that those  
15 are all potentials that may happen, and aren't  
16 there to intercept that, a victim is not going  
17 to know, and it's going to be too late.

18 And I think that we see that as  
19 well, where we see cases where it's just that  
20 it's not being anticipated, and so at that  
21 point it's really too late to do anything  
22 about it.



1 to be present.

2 CHAIR HOLTZMAN: Thank you. Did  
3 you want to ask something?

4 JUDGE JONES: I have one question.  
5 With respect to this constitutional right, in  
6 this, in 412 the judge is being told, you'd  
7 better admit evidence that, were you to  
8 exclude it, would violate the constitutional  
9 rights of the accused.

10 Well even if that wasn't there,  
11 isn't that correct?

12 MR. GUILDS: Yes, it is.

13 JUDGE JONES: So why -- it may be  
14 redundant, but do you see some other impact of  
15 having that language in there?

16 MR. GUILDS: I think it scares  
17 military judges into being afraid to make a  
18 mistake.

19 I think that you're absolutely  
20 right. I think it's a point we've been trying  
21 to make today, which is there's no reason for  
22 it. You don't need -- no statute needs to

1 say, unless the Constitution says that it's  
2 wrong, right? I mean that's the premise of  
3 our system, it's the foundation of our  
4 government.

5 I think that judges are -- I think  
6 that there's both a culture where this has  
7 been routinely turned over, and you mentioned  
8 training, Madam Chair. I would say that from  
9 my perspective, fundamentally important that  
10 I would like to see more of is trial counsel  
11 fighting vigorously to object to 513 and 412  
12 evidence coming in.

13 I think that there is a perception  
14 that it's going to come in, and so as a result  
15 of that, there's less of a fight to prevent it  
16 from coming in. And that's not because trial  
17 counsel are bad attorneys. It's because they  
18 choose to fight elsewhere.

19 And if I could have every trial  
20 counsel in this country in the room, the one  
21 thing I would tell them is the most important  
22 thing for a survivor is not the result. The

1 most important thing for most survivors is to  
2 know that someone is fighting for them.

3 And that's what I would like trial  
4 counsel to recognize, that when they walk into  
5 the courtroom, even if they lose, if they  
6 vigorously pursue objections with respect to  
7 412 and 513, they have done honor to the  
8 survivor.

9 CHAIR HOLTZMAN: So what you're  
10 saying, just to follow up on Judge Jones's  
11 point: the constitutional catch-all provision  
12 is unnecessary from your point of view because  
13 every statute has to, every judge in every  
14 decision has to be applying the Constitution.

15 MR. GUILDS: Correct.

16 CHAIR HOLTZMAN: But what you're  
17 saying is that this invites a kind of new  
18 level of scrutiny that without it, wouldn't be  
19 there.

20 And that -- or at least that's  
21 your explanation, because you're saying that  
22 even with the constitutional catch-all

1 provision, in the federal courts and in state  
2 courts, they're doing the right thing, more or  
3 less. Not perfectly, but we don't have the  
4 same problems.

5 So you're attributing the problem  
6 of allowing 412 evidence that you don't think  
7 is relevant, you're attributing that to the  
8 catch-all clause.

9 MR. GUILDS: Correct. It's a  
10 bogeyman. It's --

11 CHAIR HOLTZMAN: It's a kind of an  
12 invitation for mischief, is what you see.

13 MR. GUILDS: Absolutely.

14 CHAIR HOLTZMAN: Not that it's  
15 necessary --

16 MR. GUILDS: It is not necessary.

17 CHAIR HOLTZMAN: -- but it also  
18 always has to be taken into account by any  
19 judge in making any determination as to what  
20 is constitutional.

21 MR. GUILDS: Right.

22 JUDGE JONES: But do you agree

1 that there are constitutional limitations  
2 because of the right to a fair trial, that  
3 have to be taken into account when looking at  
4 privileged or other information?

5 MR. GUILDS: I certainly think  
6 that the Constitution, obviously, is supreme  
7 with respect to these issues.

8 I think that the Constitution with  
9 respect to a defendant's rights has very  
10 little to say with respect to privilege --  
11 with respect to an attorney-client privilege,  
12 with respect to doctor-patient privilege, with  
13 respect to the psychotherapy privilege.

14 I am hard-pressed to find  
15 instances where the Constitution would require  
16 the disclosure of that information. I don't  
17 think Brady requires it, I don't think the  
18 confrontation clause requires it, I don't  
19 think as a matter of substantive due process  
20 or procedural due process that it needs to be  
21 turned over.

22 JUDGE JONES: Non-privileged

1 information?

2 MR. GUILDS: Non-privileged  
3 information, I mean I'd have to understand  
4 exactly what you refer to. I mean certainly  
5 information in the hands of the government,  
6 right, that's material to the defense, needs  
7 to be turned over. We all know that, pursuant  
8 to Brady.

9 I am not suggesting that  
10 information like that shouldn't be turned  
11 over. I am suggesting that if a privilege is  
12 at stake, that the information should not be  
13 turned over.

14 And I think that with respect to  
15 412, we know that the vast majority of that  
16 information isn't getting in because it's  
17 relevant, it's getting in to smear the victim.  
18 And that's a recognition of 412, is that that  
19 information isn't relevant to the proceeding.

20 JUDGE JONES: That again is, we're  
21 back to your dispute with how well the judges  
22 are making rulings. And you may be correct.

1 MR. GUILDS: Sure.

2 JUDGE JONES: It's not how the  
3 statute is written, and you do, I think you  
4 agree that there are circumstances where some  
5 evidence has to go in, or should be permitted  
6 in, and to not permit it in because it would  
7 cause a victim invasion of the victim's  
8 privacy is trumped by the Constitution.

9 MR. GUILDS: Absolutely.

10 JUDGE JONES: And I guess that's  
11 what I am getting at.

12 MR. GUILDS: Yes, there are  
13 absolutely situations with respect to 412,  
14 only here with respect to 412, I certainly see  
15 situations where information is going to be  
16 relevant and necessary and required to  
17 confront the victim at trial.

18 It seems like alternative source  
19 of injury, for example, which isn't  
20 identified, if there was someone else  
21 involved, that might, if the time frame was  
22 close enough, be relevant to that

1 determination.

2 So there are certainly situations  
3 where I think that evidence would come in.  
4 And my suggestion is not that in the 412  
5 context it would be absolute.

6 In my experience, those are few  
7 and far between.

8 JUDGE JONES: I understand.

9 CHAIR HOLTZMAN: Just on that  
10 point also, judges routinely have to balance  
11 the question of admissibility of evidence in  
12 terms of prejudicing the trial.

13 There is no statement in that  
14 federal rule of evidence saying, except for  
15 what, you know the Constitution requires,  
16 because the implication is that the judges  
17 will always carry in their head what due  
18 process requires. It is not required to be  
19 set out.

20 I think the point you are making  
21 is that for some reason, in the military, this  
22 provision seems to have open -- it's like an

1 open sesame, it's opened a door to material  
2 that shouldn't have come in.

3 Not that we're not saying,  
4 obviously, the Constitution should be  
5 considered.

6 MR. GUILDS: Correct. I agree,  
7 Madam Chair.

8 CHAIR HOLTZMAN: Well, I think we  
9 have exhausted you.

10 (Laughter.)

11 CHAIR HOLTZMAN: Thank you for  
12 your testimony, and really appreciate your  
13 guidance, and we really would welcome with all  
14 humility any written assistance you could give  
15 us on --

16 MS. PETERSEN: Thank you very  
17 much.

18 MR. GUILDS: Thank you for the  
19 opportunity to appear today.

20 CHAIR HOLTZMAN: Okay. 3:15,  
21 we're probably very late. We're very late.

22 (Whereupon, the meeting went off

1 the record at 3:18 p.m. and resumed at 3:24  
2 p.m.)

3 CHAIR HOLTZMAN: I'm sorry that  
4 we're running way behind. It's just that we  
5 need a lot of education on this subject, or at  
6 least I do.

7 Our next panel -- and I want to  
8 thank the people who are testifying -- will  
9 provide us with the perspectives of military  
10 trial counsel. We will hear from Lieutenant  
11 Colonel Brian Thompson, Commander Jonathan  
12 Stephens, Major Rebecca DiMuro, and Major  
13 Peter Houtz. I hope I've pronounced the names  
14 correctly.

15 In any case, let's start with  
16 Lieutenant Colonel Brian Thompson.

17 LT COL THOMPSON: Thank you,  
18 ma'am.

19 CHAIR HOLTZMAN: Thank you, sir.  
20 Thank you for appearing.

21 LT COL THOMPSON: Of course,  
22 ma'am. Members of the Panel, I'm a veteran of

1 more than 100 court-martials as senior  
2 prosecutor and senior defense counsel. In  
3 those two positions, I have reviewed more than  
4 1,000 circumstances related to court-martials,  
5 including a large degree of sexual assault  
6 cases. For the last two years, I have served  
7 as the Air Force's Chief Senior Trial Counsel  
8 and also head of our Special Victims Unit. In  
9 that capacity, I have managed 18 Air Force  
10 Senior Trial Counsel, including all of our  
11 SVU.

12 In addition to that management  
13 responsibility, I also maintain a core  
14 litigation portfolio of senior officer cases  
15 and other high-profile cases. This year I  
16 prosecuted more than six O-5 cases for sexual  
17 assault, and I have three additional O-5 sex  
18 assault cases pending on my docket.

19 I only mention that to provide  
20 background for my opinion, and I should  
21 mention my personal opinion, about a number of  
22 changes to the system that can improve the

1 protections accorded victims at little or no  
2 adverse impact to the military justice system.  
3 Many of these you have heard already in the  
4 discussions today, but I will just list them  
5 briefly.

6 First, and potentially the most  
7 important, is the rollback of Executive Order  
8 13669. And, again, my personal opinion, that  
9 executive order seems to be a misguided and  
10 tone-deaf expansion of counsel's ability to  
11 delve into, at best, marginally relevant  
12 private matters for the effective purpose of  
13 embarrassing and intimidating sex assault  
14 victims from continuing to cooperate in the  
15 prosecution of these offenses.

16 Second, as Mr. Stone noted  
17 earlier, the effective date of the new Article  
18 32 probable cause proceeding is noted for  
19 offenses that occur after the 26th of December  
20 2014, essentially establishing a dual process,  
21 a separate but unequal process for military  
22 and civilian victims of sexual offense, which

1 should be remedied.

2           Additionally, as noted by Ms.  
3 Jones, the deposition rules, particularly in  
4 the Air Force in litigation recently,  
5 potentially provides an avenue by which  
6 counsel can circumvent the new rules about  
7 availability of victims that testify at 32 and  
8 subject them to depositions where the  
9 protections of MRE 412 and 513 are subject to  
10 more inconsistency, given that those  
11 deposition officers who preside over those  
12 proceedings aren't necessarily trained in  
13 sexual assault and privacy and privilege  
14 protections.

15           Additionally, as discussed by your  
16 last panel, prior to execution or  
17 implementation of Executive Order 13669, the  
18 law at least arguably provided that the  
19 investigating officers at Article 32 hearings  
20 were prohibited from inquiring into matters  
21 that would otherwise fall under the  
22 protections of MRE 412.

1           Given the change to the rule, that  
2           is no longer the case. By rolling back  
3           Executive Order 13669, a change to the system  
4           that would further protect the victims of  
5           sexual assault, is some clear guidance, either  
6           statutory or regulatory, that makes it clear  
7           that that is the case -- that an investigating  
8           officer, or when the system changes, to  
9           provide probable cause officers -- are not  
10          allowed to delve into issues falling under  
11          412.

12           Given the number of questions that  
13          occurred from the other Panel members and  
14          earlier panels about the way we work the  
15          military, I will defer to the rest of my  
16          members -- panel to introduce themselves and  
17          answer any questions you have on any of those  
18          matters.

19           CHAIR HOLTZMAN: Thank you.  
20          Commander Stephens?

21           CDR STEPHENS: Good morning, Madam  
22          Chair. Thank you very much for having me here

1 as well. I appreciate the opportunity.

2 CHAIR HOLTZMAN: Good morning.

3 CDR STEPHENS: This has been so --  
4 this has been so interesting. It seems like  
5 it was just this morning that I -- I would  
6 like to say that I, again, in the interest of  
7 time, I echo many of Colonel Thompson's  
8 sentiments, specifically with MRE 412. I,  
9 too, do not see any need to allow 412 to be  
10 inquired into at the Article 32 proceeding.

11 In the Navy, it has been over the  
12 last -- I have been a JAG for the last 10  
13 years in the Navy. And so since I have been  
14 in the Navy I have been a Senior Defense  
15 Counsel. I'm now the Senior Trial Counsel in  
16 Norfolk, having just arrived from Japan as the  
17 Executive Officer of our prosecution shop in  
18 Japan.

19 So I have been doing military  
20 justice now for the better part of 10 years,  
21 and it has been -- 412 evidence has been  
22 available at hearings before. And, in my

1 opinion, I don't see the relevance for it at  
2 that time. Especially given that we are  
3 moving to a probable cause determination  
4 hearing, it doesn't seem -- I won't say I --  
5 I hate to use the word "never" in the legal  
6 context, so I will refrain from doing that.  
7 But very rarely can I see a probable cause  
8 determination turning on 412 evidence.

9           That may, in fact, be admissible  
10 later. I do believe that there are times when  
11 such evidence would be admissible. But I  
12 think that if you look at our standard, and  
13 the standard of all states and pretty much  
14 every other jurisdiction, they all focus on a  
15 finding by a judge or a court, and I think  
16 that that's because that recognizes the  
17 difficulty that this question presents.

18           And I think in the Navy there was  
19 a mention earlier about we do have lawyers  
20 that are IOs. We have actually had that for  
21 a long time in the Navy and Marine Corps. But  
22 the lawyers oftentimes aren't -- there

1 certainly aren't military judges for the most  
2 part, and usually they are very -- I won't say  
3 inexperienced; they are just sometimes either  
4 second or third tour attorneys, some of whom  
5 are SJAs and are doing us a service by taking  
6 time out of their normal job to come and do  
7 what can be very challenging work in trying to  
8 assess a sexual assault case.

9           So some of them don't have  
10 military justice experience at all, and they  
11 shouldn't be the ones being forced to make  
12 these decisions and perhaps make an incorrect  
13 decision that would impact the victim.

14           And even if you take it one step  
15 further, if you consider what the purpose of  
16 the 32 is, it's to provide an investigation  
17 for a commander. These commanders take this  
18 responsibility very diligently, but they do  
19 not have any legal training either. And so,  
20 again, if every other jurisdiction requires a  
21 military judge to do this, it doesn't make  
22 sense to me why we have a lawyer who may be

1 very junior with no military justice  
2 experience to inquire into matters to present  
3 to a commander who doesn't have any legal  
4 experience. Some of them may, actually. Some  
5 of them are pretty impressive.

6 But as far as training that we  
7 know of, they are not lawyers by trade, these  
8 commanders. And so they, too, wouldn't be  
9 equipped pretty much in any other jurisdiction  
10 to make a determination under 412. So I don't  
11 know why the military allows that to happen,  
12 in my opinion.

13 Other than that, I look forward to  
14 answering any questions that you may have.

15 CHAIR HOLTZMAN: Thank you,  
16 Commander.

17 Major Rebecca DiMuro?

18 MAJ DiMURO: Yes. Thank you,  
19 ma'am.

20 CHAIR HOLTZMAN: Thank you for  
21 coming.

22 MAJ DiMURO: Absolutely. It has

1       been my privilege during my time in the  
2       military to get to be almost always a  
3       practitioner, and I am truly at the  
4       practitioner level. I have been on active  
5       duty in the JAG Corps for about 10 years, and  
6       I came in as an educational delay. And I  
7       immediately came in, was a trial counsel. I  
8       moved and worked on the appellate court for a  
9       while, and then I came back and I was able to  
10      be a defense counsel and a senior defense  
11      counsel.

12                   I am now again serving at the  
13      trial level as something called a special  
14      victim prosecutor at Fort Bragg, and that  
15      means that, really, these conversations are  
16      uniquely interesting to me, because this is my  
17      wheelhouse. I deal almost exclusively in sex  
18      crimes in a very busy jurisdiction.

19                   I agree with -- and I'm not going  
20      to repeat -- the stance on 412. I think that  
21      Article 32 is not the proper forum, and the  
22      individuals involved in the 32 are not well

1 equipped, nor is the -- nor are the  
2 protections in place for a 412 inquiry to  
3 occur at that level.

4 I have been fortunate enough to  
5 sit here today, and I'd like to focus just the  
6 last couple of comments I have before  
7 questions on things that came up from the  
8 panel, in particular 513. I found the  
9 discussion of 513 actually to be rather eye-  
10 opening to me, and I started really thinking  
11 about perhaps there are some provisions and  
12 changes that could be made.

13 To reiterate Professor Fishman's  
14 stance, and then as the panel sort of grew off  
15 of that, 513 does lack a clear standard. It  
16 lacks the standard to trigger obtaining the  
17 records, and it lacks the standard to trigger  
18 the release of those records.

19 I agree with Professor Fishman's  
20 analysis -- and, warranted, I have not looked  
21 into this substantially, but the probable  
22 cause determination does seem a sound one. I

1 agree with what he said. Case law to describe  
2 and to define probable cause is very well  
3 developed in the criminal justice system  
4 overall, in the military system no  
5 differently.

6 If officers of the law are able to  
7 search your home, seize evidence based on  
8 probable cause, I think we do have a good hold  
9 on what that standard is. And that certainly  
10 trial counsel, operating off of a discovery  
11 request, should also be able to make that sort  
12 of determination as they do when assisting a  
13 CID agent with obtaining a warrant. As a  
14 military -- part-time military magistrate,  
15 they work with that probable cause standard.

16  
17 So certainly by the time you're a  
18 trial counsel you should be capable of doing  
19 that. That is a good standard to use, and I  
20 would support the research and development of  
21 that as a work-in on 513.

22 And I think a secondary standard

1 for the military judge for release, something  
2 more than "out of an abundance of caution,"  
3 which is kind of how we operate. I do think  
4 that our trial judiciary takes the review of  
5 these records very seriously, but I would also  
6 advise perhaps some standardization for what  
7 is an in-camera review.

8 In practice, over my last nine  
9 years, I've seen different applications of  
10 what is an in-camera review. Some judges have  
11 allowed counsel to all come into the office  
12 and review the records and then highlight what  
13 they think is appropriate. Some judges  
14 absolutely review themselves, but then the  
15 release is somewhat arbitrary. And I can see  
16 when I was a defense counsel wondering what  
17 else might have been in there.

18 Some kind of standard practice for  
19 what is in-camera review, and then a release  
20 standard, a threshold that should be hit,  
21 something also articulated in the statute,  
22 might be a good idea.

1           The counsel -- or the Panel,  
2       excuse me, asked a lot of questions about 513  
3       and the release of records. And just for  
4       clarification, 513 does not apply to any level  
5       but trial. So, in practice, at a 32 there is  
6       not going to be a 513 discussion at all. So  
7       there is no movement of those mental health  
8       records through that 32 process.

9           Overall in the field mental health  
10      records are being protected better, and I  
11      agree that more training is a great idea,  
12      especially at the investigative level. But  
13      overall 513, more than 412, is that mental  
14      health stuff is being protected better. But  
15      I do think that the rule has some rework in  
16      it, and the implementation and the addition of  
17      the SVCs to the program, to military justice  
18      as a whole, has helped this develop and we  
19      should continue to use them to do so.

20           And the second thing I'd like to  
21      highlight for the Panel members -- and I can  
22      certainly provide a copy of this -- it doesn't

1 appear maybe that you all have it yet -- is  
2 just on 1 October 2014 the Army TJAG released  
3 a policy memo, 14-09, with regard to the  
4 release of information to SVCs, which is very  
5 relevant obviously to this 412 and 513  
6 discussion. And that has clearly outlined,  
7 without question, at least in the Army's  
8 position, which and when information is  
9 released to the SVC to assist.

10 And about 90 percent of my cases  
11 in SVC is involved now, if not more. We are  
12 encouraging it, and we are being advised to  
13 encourage it at the prosecutor level. And I  
14 am doing that at Fort Bragg, which is a very  
15 busy jurisdiction.

16 And we are now following this  
17 guidance, and the release basically says, you  
18 know, things that are -- the charge sheet and  
19 anything that the victim has personally made  
20 -- the victim's statement, a video, if she has  
21 made an interview, so that right at ground  
22 level the SVC is aware of what their client

1 has put out into the world. And then, it is  
2 as applicable.

3 So post 32 -- I know the Panel  
4 asked a question, does the SVC or the victim  
5 get a copy of the transcript from the 32?  
6 They get the summarized or the verbatim  
7 version of their client's testimony, and that  
8 is part of this policy memo. So it's a  
9 continuing obligation of disclosure to  
10 maintain that informed state for the SVC, so  
11 that they can participate.

12 And, again, pending any questions  
13 from the Panel, I just wanted to address those  
14 couple of things that came up during the  
15 discussions today.

16 CHAIR HOLTZMAN: Thank you very  
17 much.

18 And Major Houtz?

19 MAJ HOUTZ: Major Houtz, ma'am.

20 CHAIR HOLTZMAN: From the Marine  
21 Corps.

22 MAJ HOUTZ: Madam Chair, thanks

1 for the invitation to be here. Ladies and  
2 gentlemen, thank you.

3 My name is Major Pete Houtz, and  
4 I'm the Regional Trial Counsel for the  
5 National Capital Region located in Quantico.

6 I've been a Judge Advocate for  
7 about 14 years, and I've been a litigator in  
8 the Marine Corps Judge Advocate community for  
9 the majority of that time. I've spent some  
10 time outside of that field, but I have always  
11 come back to it.

12 My office handles misconduct in  
13 the National Capital Region, which includes  
14 the Marine Corps Reserves, all of the  
15 Reserves, MARFOREUR Europe, and other command  
16 -- various commands. We have a piece of a  
17 four-piece pie in the Marine Corps.

18 We handle all of the misconduct,  
19 to include obviously a fair amount of sexual  
20 crimes, to include sexual assaults and rapes.  
21 I would echo the comments from Colonel Baker.  
22 This is the first time I've heard him make

1 those comments today, and I echo those.

2 My experience over the last year,  
3 year and a half, as Regional Trial Counsel has  
4 been that reporting has gone up, that our  
5 caseload has gone up -- and I'm talking about  
6 sexual assault cases right now -- and that the  
7 litigation involving 412 and 513 has gone up.  
8 It has increased.

9 We expect, as prosecutors -- and  
10 my prosecutors expect, and I see, in every  
11 case where we charge a 120 offense there is  
12 going to be litigation over 513 and 412. It  
13 is -- very rare is there a case where that  
14 doesn't occur.

15 With regard to 412, there's  
16 established procedures under case law and the  
17 statute, I echo what my colleagues here said,  
18 and I won't repeat all of their comments. We  
19 are comfortable litigating 412 right now. We  
20 do it a lot, and I think we do it well in the  
21 Marine Corps.

22 The Article 32 investigation

1 process, which is about to change somewhat in  
2 December of 2014 -- again, I echo their  
3 comments. My personal opinion, which is based  
4 on my experience, is that there is really no  
5 reason to litigate 412 at a probable cause  
6 hearing. It's -- for all those reasons that  
7 have been discussed today in favor of that  
8 opinion, I will spare you me repeating, but I  
9 do adopt them all.

10 With regard to 513, I echo Mr.  
11 Guilds' comments. That's a visceral area for  
12 victims. It's more so than I think 412, in my  
13 experience. And if I understand him  
14 correctly, the victims that I talk to -- and  
15 which is becoming rarer and rarer nowadays  
16 because of victims' legal counsel, my direct  
17 access as a prosecutor to victims now is  
18 attenuated at best.

19 They care about the process, not  
20 necessarily the outcome of the trial. And if  
21 they are informed during the process and they  
22 are walked through the 513 process and 412

1 process, and they understand in advance what  
2 is going to happen, they can make smart  
3 decisions. And that requires us to work  
4 closely with the victims' legal counsel and,  
5 if we have an opportunity, the victim.

6 The military judges struggle with  
7 the threshold decision to hold an in-camera  
8 review. That seems to be -- and we use the  
9 Klemick case, a three-part test in that -- for  
10 the military judges to determine whether to  
11 pull the trigger on that in-camera review.

12 My experience has been -- what I  
13 have listed to today is that it seems like it  
14 is a fait accompli that they are going to  
15 review in-camera. That has not been my  
16 experience. My experience has been that it's  
17 about 50/50. They take a look at a Klemick  
18 test, and if they think they have enough for  
19 that threshold decision they will review the  
20 records in-camera.

21 With that, I will -- I will  
22 entertain any questions, ladies and gentlemen.

1 Thank you.

2 CHAIR HOLTZMAN: Okay. Maybe we  
3 will go from that way to that way. Mr. Stone?

4 MR. STONE: I guess the question I  
5 wanted to ask, Major DiMuro, you're a special  
6 victims prosecutor, which means there should  
7 be, in theory at least, a special victims  
8 counsel for the victim in every one of your  
9 cases. Is that right?

10 MAJ DiMURO: Certainly, any victim  
11 is availed of that right. Yes, so --

12 MR. STONE: Yes. If they want it.

13 MAJ DiMURO: Yes. Absolutely.

14 MR. STONE: In the civilian  
15 system, in a case where there is a victim's  
16 counsel, they have access to the complete  
17 docket sheet and every pleading and the right  
18 to go to every hearing that the court is  
19 holding. But I think I heard you just say you  
20 make sure that they are getting the pleadings  
21 involving 412 and 513.

22 I guess my observation and then my

1 question. My observation is I didn't think  
2 that the authorization for special victims  
3 counsel in the military said anything about  
4 limiting them to specific hearings like 412  
5 and 513, although I hear that judges are doing  
6 it, and I hear you telling me that the  
7 practice is that those are the pleadings they  
8 are getting. Can you explain to me what you  
9 think the rationale is, if there is one, for  
10 why they are not given complete access to the  
11 case like the other counsel in the case?

12 MAJ DiMURO: Well, sir, if I  
13 stated that they are only getting 412 and 513  
14 pleadings, that has certainly been the focus  
15 of this panel. And so I was simply saying  
16 that they definitely get 412 and 513  
17 pleadings, the SVC.

18 For example, in a case I'm trying  
19 right now, there was a motion for continuance  
20 brought by the defense. I immediately had  
21 that forwarded on to the SVC, because I  
22 believe the victim has a position on whether

1 or not delay occurs.

2 We litigate mainly 412 and 513  
3 motions. I'm trying, as I sit here, to think  
4 of an example of a motion that would have any  
5 relevance to an SVC and the victim that they  
6 wouldn't get a copy of the motion. Certainly,  
7 they can come to any hearing, and they are  
8 always notified whenever we are going to go  
9 into session.

10 Most of the time now SVCs are  
11 listed from -- if they're assigned, listed  
12 from the EDR on, our electronic docketing  
13 request. And they simply maintain a status on  
14 correspondence with all the counsel. So they  
15 are always tracking the state of the case.  
16 They are involved in when we schedule, when we  
17 schedule a 39(a). My trial counsel are  
18 reaching out, finding out the availability of  
19 the victim through the SVC and of the SVC, and  
20 that's always added to the discussions.

21 MR. STONE: And I gather they are  
22 not invited to all the 802 hearings.

1 MAJ DiMURO: The 802 hearings --  
2 in chambers? Sir, is that what you're talking  
3 about? That is --

4 MR. STONE: Your pretrial  
5 hearings, right. They can be in chambers or  
6 not, but --

7 MAJ DiMURO: Well, so in our  
8 system, actually, that's not the case. The  
9 RCM 802 hearing is an in chambers hearing. An  
10 Article 39(a) session is a motion, something  
11 where you are actually in court. So an 802  
12 session has been, as far as I have seen -- and  
13 I have spoken with other SVPs practicing  
14 around our jurisdiction -- it does seem to  
15 still be judge-dependent as to whether or not  
16 the SVC is invited or allowed into that  
17 hearing.

18 We don't typically discuss  
19 anything of substance in an 802. It's usually  
20 about scheduling the next 39(a) or some issue  
21 that may have popped up where timing is no  
22 longer working. And the SVC -- if court is

1 opened, which is at the close of an 802 or the  
2 next time we are on the record, the 802  
3 session is summarized on the record.

4 Anything on the record is open  
5 court, and the SVC is certainly told when that  
6 hearing is going to take place. And if they  
7 want to be there and -- they and their client  
8 want to be there, that's an open session and  
9 they are certainly allowed to come.

10 MR. STONE: I guess I was trying  
11 to see if I could get you to articulate to me  
12 why they are not invited to the closed  
13 hearing, since their client is the moving  
14 complainant in the case. I mean, I'm even  
15 struck by you saying you've got a motion for  
16 a continuance, and you forwarded it on.

17 I guess my reaction is, why are  
18 you screening what you are forwarding on? Why  
19 aren't they getting every pleading? In a  
20 normal civil case in the rest of this country,  
21 in those jurisdictions where there is a right  
22 for a victim's counsel and they enter a notice

1 of appearance, every counsel shows a copy of  
2 service of every pleading on the victim's  
3 counsel.

4 And you may think that they are  
5 getting what they need, but it means you are  
6 screening what they get, and they may have a  
7 different view than you as to what they need.  
8 But they will never get to know it, as we  
9 heard from an earlier panel, until after a  
10 decision is made.

11 MAJ DiMURO: Well, I don't know if  
12 I agree with the fact that they are never  
13 going to get to hear it until after a decision  
14 is made. We certainly -- I understand the  
15 notion that it perhaps sounds like counsel is  
16 screening, and to some degree you are correct.

17  
18 The government counsel in a  
19 criminal system screen all the time. A  
20 discovery request is sent to me and my  
21 counsel; not the court. I determine that  
22 first level of relevant evidence to be turned

1 over. I mean, as an officer of the court, I  
2 have an obligation to maintain the  
3 transparency required to my system, and it is  
4 first on me.

5 If someone questions my or my  
6 counsel or anyone filling a prosecutorial  
7 individual's role, if they question the  
8 credibility, the veracity, the candor toward  
9 the tribunal of how that officer of the court  
10 is fulfilling that role, they can question it  
11 to the judge.

12 So I think the notion that somehow  
13 the trial counsel is not in a good position to  
14 determine who needs what when is a little  
15 misplaced, because I think our system does  
16 rely on that.

17 Now, that said, I think that -- I  
18 apologize.

19 CHAIR HOLTZMAN: Go ahead.

20 MR. STONE: Go on.

21 MAJ DiMURO: That said, I think  
22 that the SVC role in the Army -- I can't

1 comment on any other branch, but certainly my  
2 experience is in the Army -- is that it has  
3 been a work in progress, and it has been a  
4 successful work in progress. I mean, it may  
5 be a plane we are building in flight, but I  
6 think it is going really well.

7           And I think that certainly my  
8 relationships with the SVCs that practice in  
9 my jurisdiction is that they have not felt  
10 they have been left out of anything. If  
11 anything, they have often said, "Okay. Thanks  
12 for the notice. Talked to my client. We're  
13 good."

14           They are certainly being  
15 forwarded, if not automatically, a lot of the  
16 time defense counsel are just continuing -- or  
17 government counsel, when we file something,  
18 just continuing on the same email chain that  
19 we have already started with that EDR to the  
20 court that notified everybody of the dates of  
21 trial. And motions are dropped on that same  
22 email chain.

1           I rarely find that I don't need  
2           to, in a sex assault case, discuss something  
3           with the victim anyway, since, as you said,  
4           there is certainly a bulk of the movement in  
5           that case. But they are not for me  
6           necessarily the person I am representing.

7           In the beginning of your line of  
8           questioning, sir, you said something about  
9           sort of in a civil case they are the moving  
10          party. And for me, my job is to represent the  
11          government in taking charges forward. Often,  
12          as a good example, I may have multiple victims  
13          in a case.

14          So it is on me to balance the  
15          needs of all those people in the prosecution  
16          of this one individual. But I take that very  
17          seriously, and I make sure, to the extent that  
18          I can -- and I believe it's sort of why the  
19          program of SVP was created -- that I'm  
20          supposed to be more skilled at doing this --  
21          to ensure that everyone is getting all the  
22          information they need. And I think the SVC

1 program is a good one, and we are using it  
2 well.

3 And I haven't had those  
4 complaints, that anyone -- I heard the Panel  
5 talking about those sorts of things, but I  
6 haven't had people come back to me and say,  
7 "You know what? You kept something from us."  
8 Or, "How could you not have told me?"  
9 Because, to be honest, that's not going to go  
10 really well in my case. I need to develop  
11 that relationship, and I need to keep those  
12 people looped in.

13 And so I haven't experienced that,  
14 and I'm not sure if -- you know, I know people  
15 alluded to it when they were talking, but I  
16 didn't hear any examples, like "In this case,  
17 this is what happened."

18 MR. STONE: Do you do a followup  
19 with your victims to see if they stay in the  
20 military or are happy with the outcome?

21 MAJ DiMURO: I usually see my  
22 victims again, sir. I do a followup with my

1 victims usually a couple of days after trial  
2 regardless of how it turns out and say, "Why  
3 don't you come by the office and see me." I  
4 get -- sometimes, unfortunately, my outcomes  
5 are not great for them. So I give them a  
6 little bit of time, and I always have them  
7 come back by.

8 We have -- in the Army we have  
9 enjoyed -- the SVC is just another component  
10 of the team that we have already had assisting  
11 people. We had victim witness liaisons. We  
12 had unit victim advocates. We had brigade  
13 SHARPs.

14 When I take a victim to trial, she  
15 or he can, if they avail themselves of it,  
16 come with a team of support personnel. And so  
17 what I'll do is say, "Hey, look, nobody wants  
18 to talk to me right now, because we just  
19 finished. And I'm exhausted and you're  
20 exhausted. But you know what? Come by my  
21 office in a couple of days, and we're just  
22 going to talk about what happens now."

1           And I start that conversation long  
2 before we ever get to trial, and that  
3 conversation doesn't end when the judge says  
4 the case is over. It is going to happen a  
5 couple days later. I mean, we have enjoyed a  
6 good system, and I have enjoyed being a part  
7 of it as it has grown over the last 10 years.

8           But the resources I have available  
9 to me, and I believe my success -- when I was  
10 defense and as government now -- is because I  
11 use them all. And I think that using the SVC,  
12 keeping them looped in, that's an asset. If  
13 you use it right, it's a great asset,  
14 regardless of whether the case is successful  
15 or not.

16           MR. STONE: Let me just say, first  
17 again as an observation, and then I'll ask my  
18 question, the observation that I have is based  
19 on exactly the distinction you just made,  
20 which is that you represent a much bigger body  
21 than just the victim. You may represent lots  
22 of victims, but, really, you don't. You

1 represent the military Service, trying to  
2 figure out what's best for them. And your  
3 entire team represents the military Service.

4 So if an admission is made about  
5 the prior psychiatric history of a victim to  
6 your team, it has got to be turned over. So  
7 --

8 MAJ DiMURO: No, sir. That's --  
9 the individuals that I listed don't all -- I  
10 represent -- you know, the U.S. Army versus  
11 somebody, and I stand there and any counsel  
12 who stands with me is representing those  
13 interests. But the victim advocates and  
14 certainly the SVCs -- I mean, in particular  
15 the SVCs, special victim counsel -- I  
16 apologize for the acronym.

17 CHAIR HOLTZMAN: I think we know  
18 what that means by now. Thank you.

19 MAJ DiMURO: They absolutely  
20 don't. They represent the kinds of --

21 MR. STONE: Absolutely. But they  
22 are not part of your team. I went down to the

1 Army training for special victims counsel, and  
2 it was made very clear at that training that  
3 there is only 80 percent of the time when the  
4 special victims counsel agrees with the  
5 prosecutor in that case. They thought that  
6 was a very high number, but that indicates  
7 that there is 20 percent of the time when they  
8 are not on your team. And you seem to brush  
9 that aside.

10 And when your special -- when your  
11 victim assistants talk to a victim and the  
12 victim says something, your assistants are  
13 considered part of your team for Brady  
14 purposes. So it is turned over.

15 MAJ DiMURO: Which assistants are  
16 you talking about, sir?

17 MR. STONE: I'm talking about the  
18 people on your SHARP teams and the non-legal  
19 assistance you give to victims when you tell  
20 them to come in and get help.

21 MAJ DiMURO: Those individuals do  
22 not report to me. They don't work for me. I

1 didn't train them, and I --

2 MR. STONE: You don't get the  
3 reports of the -- it's not passed up to you  
4 when a victim comes in to talk to you?

5 MAJ DiMURO: When they come to  
6 talk to me --

7 MR. STONE: I was under the  
8 impression that everything that doesn't go  
9 through the special victims counsel is  
10 something that you have a Brady obligation to  
11 know.

12 MAJ DiMURO: I am not privy to  
13 those conversations. So if -- I don't know  
14 when a victim goes and talks to their unit  
15 victim advocate. I'm not made aware of that.  
16 If a restricted report is done, they could  
17 talk to their victim advocate every day.

18 MR. STONE: No. I understand that  
19 -- I understand the restricted report context.  
20 But I guess my point is, to take the example  
21 you gave at the beginning, you know, you keep  
22 going back to these examples, and none of them

1        seem to make sense to me.  If you get a  
2        discovery request, it may be true that it's up  
3        to you to figure out what you are going to  
4        have to respond to that discovery request.

5                    But that request, a copy of that  
6        request, needs to go to the victim's counsel  
7        at the same time you get it, because in all  
8        likelihood the discovery is into what may well  
9        be the prior sexual history of the victim.  
10       And the victim's legal counsel needs to be  
11       able to say to the victim right then and  
12       there, "I want you to know they are asking  
13       about your prior history.  You and I should  
14       talk about this, because if there is a lot in  
15       there that you think is going to come out and,  
16       you know, you don't want it to come out, you  
17       need to tell me now, so that I can talk to the  
18       prosecutor and tell her.  If there's things  
19       you have to turn over, she is not going to go  
20       forward with the case."

21                    I say this because at that  
22       training, I want you to know that the three

1 victims who came and spoke to us at that  
2 training, none of them was happy and planned  
3 to make the military a future career. Every  
4 one of them had an experience that leads them  
5 to believe, regardless of the outcome of the  
6 case -- and it was good in the majority of  
7 cases -- but they can't stay in the military  
8 as a result of that prosecution.

9 So although you may see what you  
10 are doing as necessary for the military, and  
11 I may, too, the victim has a different  
12 interest involved, and that is really why they  
13 are not coming forward.

14 CHAIR HOLTZMAN: We are going to  
15 have to compress --

16 MR. STONE: Sure.

17 CHAIR HOLTZMAN: -- I'm sorry --  
18 because we've got another panel after you.  
19 So, Major, if you want to respond to that,  
20 please feel free.

21 MAJ DiMURO: Ma'am, what I would  
22 say -- my response to that would be that at

1 the beginning, at the onset when I talked  
2 about the materials that I disclose, that I  
3 want to disclose, a discovery request for 412  
4 is exactly the sort of thing that we would  
5 disclose. I would immediately send that.

6 I don't know what 412 evidence is  
7 out there. I don't know what prior issues are  
8 out there. I used to be able to go to the  
9 victim directly. Now I go through the SVC to  
10 go to the victim. So I don't disagree with  
11 you at all, sir. That's my point.

12 In order to figure out how to try  
13 my case, I have to develop a relationship with  
14 these individuals. I call them a team that's  
15 working for the victim. They are not working  
16 for me; they're working for the victim. I use  
17 that terminology, because I used it with my  
18 counsel, because I want to encourage a  
19 positive relationship with those individuals.

20 I want us to think not of the SVC  
21 as a barrier to get access to the victim, but  
22 as someone who is significant in the trying of

1 this case and we should look at it as another  
2 tool, because I think that's a positive way to  
3 look at it. Not as someone getting in between  
4 me and my victim, as a lot of I think  
5 practitioners felt when the implementation of  
6 the SVC program happened, that somehow it  
7 stood in the way of the rapport they used to  
8 be able to build. I don't think that. I  
9 think all of these people are here to help  
10 this individual that I may sometimes be  
11 dragging through a very long process. So I  
12 label that to be a positive thing.

13 MR. STONE: Well, I just --

14 CHAIR HOLTZMAN: I just want to go  
15 through -- I'm sorry, Mr. Stone. We have to  
16 give everybody a chance --

17 MR. STONE: Sure.

18 CHAIR HOLTZMAN: -- and get to the  
19 next panel. Admiral Tracey?

20 VADM(R) TRACEY: Major, because  
21 you've got the current role, I'll ask you,  
22 many of the advocates that you mentioned on

1 the victim's side are positions that have been  
2 created since you became a JAG.

3 MAJ DiMURO: Yes, ma'am.

4 VADM(R) TRACEY: So what sort of  
5 policies are out there -- are there policies  
6 across all of the Services on how you, as a  
7 trial counsel, should be incorporating the  
8 special victim counsel, et cetera, into your  
9 practices? And what kind of training did you  
10 get after these positions were arranged, so  
11 that you would have some opportunity to think  
12 through what might be different in the way you  
13 conduct your business?

14 MAJ DiMURO: Yes, ma'am. So I can  
15 only speak for the Army, and that is my own --  
16 I just am not sure, and I know everyone has a  
17 slightly different implementation. But for  
18 us, around November, late October/November, it  
19 came out that we are going to start this  
20 program and it is going to get stood up and be  
21 fully in effect.

22 And as -- like I said, there's 23

1 of us in the country, special victim  
2 prosecutors, and the idea is that we are out  
3 at units and covering down on area  
4 jurisdictions to provide a more enhanced level  
5 of trial practice experience.

6 So I have been fortunate in mine.  
7 So for me -- and I can really only speak about  
8 how my higher level, my trial counsel  
9 assistance program, TCAP, sort of trained out  
10 to the SVPs immediately, and that was  
11 immediate. I mean, there was immediate  
12 guidance pushed down that this program is a  
13 priority, and it is significant, and we, as  
14 sort of the keepers of sexual assault  
15 prosecutions and the individuals who are  
16 supposed to help jurisdictions do this better,  
17 need to find a way to work this.

18 But, like I said, it has been a  
19 bit of a plane built in flight, in that I  
20 can't say every jurisdiction has had the same  
21 experience. At 18th Airborne Corps in Fort  
22 Bragg where I am, we were very fortunate. We

1 got good individuals appointed as SVCs. They  
2 received some immediate crash course training,  
3 and there was a handbook, and they passed that  
4 handbook, you know, over and they said, "Look  
5 at this. Read what we think we are supposed  
6 to be doing."

7 And I worked hand in hand with  
8 sort of the Chief of Legal Assistance and the  
9 SVCs. Even though we are not by any means  
10 answering to the same call, I work to  
11 understand what they did, and I pushed that  
12 back out to my counsel. But I know that since  
13 that -- that was sort of the initial rev up.  
14 Since then, there has been at least I know of  
15 three training sessions in the Army.

16 I believe maybe all were conducted  
17 either at Fort Belvoir, this area, or at the  
18 JAG school, to get SVCs read up and trained  
19 up. And I have seen an enhanced skill quality  
20 coming out, and we have a better understanding  
21 of how they are supposed to be used.

22 But it is -- I mean, literally the

1 program is in its infancy, but I know that it  
2 is a priority and the Army has certainly been  
3 pushing more training toward it than I have  
4 seen probably in any other area right now.

5 VADM(R) TRACEY: But focused  
6 principally on the SVC rather than training  
7 for trial counsel as to how to use the SVC --

8 MAJ DiMURO: Yes. So I also  
9 participate -- in my job as an SVP, I  
10 participate in our -- we have something called  
11 a new prosecutor's course. It's quarterly  
12 held, and I get called in to teach at that.  
13 And I can say that in the last four iterations  
14 the SVC program has been -- so since the  
15 creation of it has been mentioned with  
16 increased emphasis, until the last session I  
17 just participated in, when an entire block of  
18 instruction held by a former SVC and myself  
19 actually was done.

20 So this is pushed out to all new  
21 trial counsel, and they are all supposed to go  
22 through this course within the first three

1 months, ideally after maybe they have done a  
2 couple of cases, so they have some basis. So  
3 it has now been built into, as a block of  
4 instruction, just like anything else, like  
5 preferral is a block of instruction, or  
6 Article 32s.

7 VADM(R) TRACEY: Thank you.

8 CHAIR HOLTZMAN: Judge Jones? Mr.  
9 Taylor?

10 MR. TAYLOR: First of all, thank  
11 you all for your testimony, and thank you for  
12 your service. We all appreciate it very much.  
13 In order to take the heat off of Major DiMuro  
14 for a second, I do want to raise a question  
15 for the rest of you that she raised, and that  
16 is the question of what standard you observe  
17 judges applying in this question involving 513  
18 issues.

19 One reason I asked Professor  
20 Fishman and Ms. Powers the question that I did  
21 was because it became pretty clear to me in  
22 reading through our own rules that there is,

1 at least to my mind, not a clear standard. So  
2 what has been your experience in terms of what  
3 kind of standards judges are using?

4 LT COL THOMPSON: I'll start with  
5 that.

6 MR. TAYLOR: Please.

7 LT COL THOMPSON: Clearly, under  
8 the 513(b)(A) and the constitutionally  
9 required exception for release of this  
10 information, judges apply a different standard  
11 to what that language means. Probably the  
12 best way to do it in terms of what the  
13 discussion was earlier, what the standard of  
14 -- what standard should be applied, is  
15 probably elimination of the constitutionally  
16 required exception, and require the defense to  
17 show, by clear, convincing evidence, which is  
18 another standard that military lawyers, and in  
19 fact all judges are used to applying in a  
20 variety of cases, before the judge will  
21 conduct an in-camera review.

22 As it is now, most judges look to

1 the constitutionally required exception  
2 language, and apply to it a relevance and  
3 discovery purposes for purpose of  
4 confrontation, the ability to impeach a  
5 witness at trial, as opposed to a  
6 constitutional standard for exculpatory  
7 information relevant to a fair trial,  
8 obviously a lesser standard.

9           The judges, as I think the Marine  
10 Corps counsel has stated, about half the  
11 judges apply a heightened standard. About  
12 half the judges don't. It just depends on  
13 them. But there is no guidance other than  
14 some case law that maybe the Marine Corps  
15 Court of Appeals that I think all of our  
16 services use at this point to require the  
17 defense to meet a higher burden.

18           There is no other regulatory or  
19 statutory guidance which provides the judges  
20 any explanation of what they should be  
21 applying it to or what "constitutionally  
22 required" means.

1                   MR. TAYLOR:  Would anyone else  
2                   like to comment on that?

3                   CDR STEPHENS:  Sir, I would just  
4                   like to say that I agree that the standards  
5                   are kind of -- they are not standard, for lack  
6                   of a better term.  So, and I think certainly  
7                   some -- and I have been here all day and had  
8                   an opportunity to listen to some of the  
9                   suggestions, I think it would be great to have  
10                  a standard put into the rule.

11                  I would like to say that, one, I  
12                  think that the military judges, you know, put  
13                  a lot into these decisions when they are  
14                  making them.  You know, they do review them,  
15                  in my experience.  It's not a quid pro quo.  
16                  Once they are turned over, they just  
17                  immediately turn them over.  I think that they  
18                  also recognize the importance of protecting  
19                  these records when they should be protected.

20                  I said I started doing defense 10  
21                  years ago.  Back then, as a defense counsel,  
22                  I remember being able to just ask for the

1 records and I just got them. There was no --  
2 I just got them through discovery. So I have  
3 no doubt, sir, that we have some room to  
4 improve, but I would like to say that over the  
5 last 10 years we have improved.

6 And I think that through forums  
7 like this and panels like this we can --  
8 certainly can identify ways to move forward.  
9 But certainly now they are not freely turned  
10 over, as -- there was some discussion, it  
11 seemed to me, that records are freely turned  
12 over. I can't speak for the other Services.  
13 I would be surprised just for the simple  
14 reason in the Navy, at our medical centers,  
15 they all have legal shops.

16 There are certain provisions in  
17 BUMED and SECNAV Instructions that allow for  
18 the disclosure to law enforcement of certain  
19 records. But those are, in my experience when  
20 I have tried to get them, very, very closely  
21 guarded by the legal teams that are in place  
22 there. And so there is a law enforcement-

1 specific investigator exception, and then  
2 post-referral there is an exception to ensure  
3 that military judges are involved.

4 So I do think that we -- you know,  
5 we probably could improve a bit in the  
6 standard of help. But I think that it is --  
7 it has improved tremendously since I have been  
8 there.

9 MR. TAYLOR: One other suggestion  
10 that came from a previous panel member had to  
11 do with the extent to which, as trial counsel,  
12 people really fight hard when these issues  
13 come up about 412 and 513. So I wondered if  
14 you would care to comment about what policies  
15 you have, formally or informally, or how your  
16 training works when it comes to this  
17 particular issue. Anyone can answer that.

18 CDR STEPHENS: I'll start. I  
19 think that the most fundamental things that we  
20 spoke of is, you know, absent certain  
21 instances where it's just obviously  
22 potentially relevant, we have every interest

1 in making sure that we are working with the  
2 victim to move towards a resolution.

3 I mean, if we brought the case, as  
4 the government, to bear, we believe there is  
5 probable cause that a crime was committed.  
6 The victim is our star witness most of the  
7 time to that end.

8 So it doesn't do us any good to  
9 not advocate those where we need to on her  
10 behalf, typically her, but whoever the  
11 victim's behalf. So I do think that as far as  
12 training, I don't know that there's any more  
13 training, perhaps, you know, in certain  
14 places, but I would imagine that all of us  
15 would encourage the counsel that work for us  
16 to, you know, advocate the law as it stands,  
17 which is we should not allow -- these rules  
18 are here for a purpose.

19 You know, you could argue that 412  
20 shouldn't have even been necessary; simple  
21 relevancy rules should have been able to  
22 handle that. Obviously, that wasn't the case,

1 which is why we have 412. So I think it's  
2 incumbent upon us in the right scenarios to  
3 ensure that 412 is enforced.

4 I don't know that we need any --  
5 and that is for you guys to decide, if we need  
6 any new training in that. But I think that  
7 certainly it's something that we take  
8 seriously, understanding that there are times  
9 where our interest will diverge from the  
10 victim, I think, and there may be times when  
11 in the small sliver where -- and that's why  
12 these VLC -- we call them VLC, to be  
13 difficult, the victim's legal counsel in the  
14 Navy, I think that's a huge addition to the  
15 program, is that, you know, from a prosecutor  
16 standpoint, they could see where the judge is  
17 going and say, you know, "I have to pick my  
18 battles, you know, at some point, so that, you  
19 know, the judge isn't going to be against me,"  
20 whereas the victim's counsel can, you know, go  
21 the full way.

22 And even -- and I would say that

1       disparity is very infrequent, but it does  
2       exist. I think --

3                   MR. TAYLOR: Would any other panel  
4       member like to comment on that?

5                   MAJ DiMURO: I entirely agree. I  
6       think that the use of the SVC program -- and  
7       this is one of those moments where I would say  
8       that even if our interests are not aligned, we  
9       are a team in representing that person who is,  
10      without a doubt, the most significant part of  
11      the government's case, even if not the  
12      government's only represented party.

13                   So I often find in practice that I  
14      can work with the SVC. And as the panel prior  
15      to us who were talking about victims'  
16      interests and what matters the most is that  
17      sense that they were represented through the  
18      process and that they were informed through  
19      the process.

20                   And a lot of times counsel in  
21      court, just because of the nature of being in  
22      court, don't have the ability to step out and

1 find out how the victim is doing or explain  
2 what had occurred. And so the use of the SVC  
3 to be there with them during the hearing, to  
4 explain to them what is happening, even when  
5 I am in front of the bar, my counsel and I are  
6 in front of the bar and we can't do that.

7 And then to make some arguments  
8 that need to be made for the victim's sake, to  
9 understand, the same way that the accused can  
10 have impassioned arguments made on his or her  
11 behalf. I think that the ability now for the  
12 SVC to do that for the victim helps to keep  
13 everyone sort of in the right position to move  
14 what are often sort of glacially moving cases  
15 forward. I mean, they -- with the expansion  
16 of more motions practice in our systems  
17 overall, which I think all of the Services  
18 have been experiencing, these cases slow down  
19 even more than they used to, because these  
20 motions take time to resolve.

21 And so people have to -- it's a  
22 marathon, not a sprint, is what I always say

1 to all my witnesses, really, and certainly to  
2 the victims. So that the SVC's ability to  
3 help make those other arguments sort of helps  
4 to keep the victim on board with the process,  
5 which is sometimes very annoying, I'm sure.

6 MR. TAYLOR: Major Houtz?

7 MAJ HOUTZ: Yes, sir. I  
8 understood the question a bit differently. It  
9 went to a more zealous advocacy is what I  
10 heard earlier. If they are not zealously  
11 advocating on behalf of the government, which  
12 99.9 percent of the time parallels the  
13 victim's interest, it conceivably could not --  
14 most of the time it does -- then they are not  
15 doing their job. And if they're not doing  
16 their job, we have a remedy for that in the  
17 Marine Corps. So they zealously advocate on  
18 behalf of the government, and in doing so they  
19 are zealously advocating on behalf of the  
20 victims.

21 On 412 and 513, at the end of the  
22 day, it is the confused case law that causes

1 the problems. It's not an overly complex  
2 area. Everybody understands what they have to  
3 work with, what they have to work with, and  
4 they know how to zealously advocate and put  
5 forth the government's position. It is just  
6 -- for all the reasons discussed today, it  
7 becomes complex in applying those rules. We  
8 know what the rules are. We know what our job  
9 is.

10 And it -- until it becomes  
11 clearer, which is, as I understand it, your  
12 job to help the government figure out how to  
13 do that, we can -- it is going to be somewhat  
14 confused. But zealous advocacy is part of the  
15 basic job of a judge advocate in the Marine  
16 Corps.

17 Thank you.

18 CHAIR HOLTZMAN: Thank you. Well,  
19 that was one of the questions I was going to  
20 ask, so thank you for asking it. I just want  
21 to go back to 412 and 513. I know some of you  
22 -- all of you I think have suggested that we

1 need better standards in 513, is that correct?

2 I'm not hearing any dissent to that.

3 Now, on 412, what are you  
4 recommending that we do about 412? So we  
5 heard some specific recommendations. For  
6 example, get rid of the catch-all clause,  
7 which I don't mean to put words in anyone's  
8 mouth, but seems to be an invitation to what  
9 I would call mischief, at least in the  
10 military justice system.

11 But are there any other -- how do  
12 you feel about that suggestion? Or do you  
13 have any other suggestions that you would make  
14 about 412?

15 MAJ HOUTZ: In a 32 stage or in  
16 the --

17 CHAIR HOLTZMAN: Any point in the  
18 process, up to you.

19 LT COL THOMPSON: Madam Chairman,  
20 I think we'd all agree that --

21 CHAIR HOLTZMAN: Aside from -- I  
22 understand about the executive order. You've

1       dealt with that. I'm talking about other  
2       issues with regard -- does the statute need to  
3       be rewritten? Does it need to be -- and, if  
4       so, how? Is there anything else we need to do  
5       about it? Do we need to train judges? Just  
6       what is your view?

7                   LT COL THOMPSON: I don't want to  
8       get off on a tangent on this issue, but as I  
9       did mention earlier, when the rules change  
10      come 26 December of this year, there will be  
11      a dual system for how victims of sexual  
12      assault will be treated at probable cause  
13      Article 32 hearings going forward.

14                   Civilian witnesses, like they are  
15      now, do not have to attend, or under certain  
16      -- ruled unavailable. Military victims of  
17      sexual assault whose offense occurred prior to  
18      December 26, 2013, will still be subject to  
19      the requirement to attend that hearing and be  
20      subject to 412 questioning by, in our case,  
21      the Air Force using military judges. But, in  
22      the other Services, it could be just the JAG

1 that is not trained on these issues.

2           Additionally, I think going  
3 forward you will see, to the extent that  
4 military witnesses are not subject to  
5 questioning because they are ruled unavailable  
6 to Article 32, you will see defense counsels  
7 -- I think they should press the limits -- use  
8 the deposition process under Article 49 and  
9 RCM 706 to argue that they should be entitled  
10 to interview those witnesses through  
11 deposition prior to trial.

12           And at a deposition, since the  
13 rules aren't as clear as they even are at an  
14 Article 32 probable cause hearing, the chance  
15 for counsel to delve into private sexual  
16 matters that would otherwise fall under MRE  
17 412, are heightened. And in those situations,  
18 more often than not, in the Air Force where  
19 you have military judges as IOs at 32s, you  
20 are likely to have a captain or a major at the  
21 base level who doesn't have the kind of  
22 experience who can rule properly on that.

1                   So while the language of 412, like  
2                   I think counsel has talked about today, isn't  
3                   as problematic as the application of 412s in  
4                   different settings, I think this panel could  
5                   look at the application in 412 potentially in  
6                   depositions as a way to further shield victims  
7                   of sexual assault from additional prying into  
8                   those matters.

9                   CHAIR HOLTZMAN:  Anybody else have  
10                  any comment?  Okay.  Judge Jones?

11                  JUDGE JONES:  Perhaps I missed --  
12                  I must have misheard, but I thought someone  
13                  said that even though the statute was not yet  
14                  in effect that the practice had already  
15                  changed in 32s.  Or am I -- I misheard?

16                  MAJ DiMURO:  The witness -- the  
17                  victims aren't attending -- military victims  
18                  aren't attending?

19                  JUDGE JONES:  Yes.

20                  MAJ DiMURO:  They're attending,  
21                  ma'am.

22                  JUDGE JONES:  Okay.

1 MAJ DiMURO: You know, they are  
2 represented. The SVC will be present, if they  
3 have one, and things like that.

4 JUDGE JONES: All right. So,  
5 basically, it's not going to start -- the new  
6 statute will not go into effect until the date  
7 Congress gave it.

8 MAJ DiMURO: Yes, ma'am.

9 LT COL THOMPSON: And I think the  
10 problem is I think just -- I think you heard  
11 earlier that just a couple of days ago, I  
12 think it was last Friday, the new rules, the  
13 new executive order proposal asked that how  
14 that is all going to happen went out for  
15 public comment.

16 And also interesting in that, I  
17 think Joint Service Commission has noted the  
18 problems of using 412 in these where I have  
19 noted that they are going to eliminate the  
20 constitutionally required section, both the  
21 412 and 513, in Article 32s going forward.

22 CHAIR HOLTZMAN: Okay. Well, I'm

1       sure there are loads more questions, but we  
2       have one more panel and, as Robert Frost said,  
3       many miles to go before we sleep. So thanks  
4       so much for your informative testimony, and we  
5       appreciate your time.

6                     Our next panel will be  
7       Perspectives of Military Defense Counsel.

8                     Good afternoon, everyone. Thank  
9       you for attending. And this is Perspectives  
10      of Military Defense Counsel Panel. We will  
11      hear from Commander Steve Reyes, Major Andrea  
12      Hall, Major Shari Shugart, and Major Matthew  
13      Powers.

14                    We'll start with Commander Reyes.

15                    CDR REYES: Good evening, ma'am.

16                    CHAIR HOLTZMAN: Thank you for  
17      coming.

18                    CDR REYES: It's a pleasure to be  
19      here.

20                    CHAIR HOLTZMAN: Thank you very  
21      much.

22                    CDR REYES: My name is Commander

1 Steve Reyes, and I am currently the Director  
2 of the Defense Counsel Assistance Program. As  
3 the Director, my job is basically just to  
4 provide consultation and training of reachback  
5 services for defense counsels throughout the  
6 entire Navy area of responsibility.

7 This position requires me to  
8 actually go to the field and have observations  
9 and awareness of the cases that are going on.  
10 As we all are primarily aware of, those are  
11 predominantly sexual assault, 120-type cases.  
12 And I think I can provide the perspective of  
13 what is going on currently in the field of  
14 practice here in the Navy.

15 For the sake of time, if I may,  
16 ma'am, if I could just have some -- respond to  
17 some points that were made before in the past,  
18 and then open up to your questions, too, as  
19 well. I do have some prepared comments, but  
20 I'll skip those.

21 CHAIR HOLTZMAN: Well, we'll just  
22 receive the comments as part of the record,

1 and they'll be posted on the website.

2 CDR REYES: Yes, ma'am.

3 CHAIR HOLTZMAN: -- your written  
4 comments. Thank you.

5 CDR REYES: Thank you, ma'am. A  
6 couple of things that I wanted to address was  
7 particularly -- one point that they had  
8 mentioned with respect to the constitutional  
9 exception under 412 and 513, particularly the  
10 notion of completely abrogating it from the  
11 rules, what I find -- I find to be  
12 particularly interesting, the comment that the  
13 -- you know, the constitutional exception was  
14 essentially an avenue for mischief.

15 CHAIR HOLTZMAN: I said that.

16 CDR REYES: Yes, ma'am. Yes,  
17 ma'am.

18 (Laughter)

19 And I think particularly -- and  
20 not meaning to call you out, ma'am, but --

21 (Laughter)

22 I think what I find particularly

1       troubling, if I may, about that comment is  
2       primarily that's the notion of -- that we have  
3       military officers who are trained advocates,  
4       trained lawyers, who essentially are sworn to  
5       defend the Constitution. And all of a sudden,  
6       if you put into black and white a provision  
7       that we all know, like Mrs. Jones has said, is  
8       going to apply regardless, this gives them an  
9       open invitation for mischief.

10               But I think the most important  
11       thing to realize is that in 513, and in 412,  
12       the constitutional exception was prescribed by  
13       the President of the United States. He  
14       specifically intentionally put that in there.

15               If we had decided to take away  
16       that provision, that language --  
17       constitutional protection -- from those rules,  
18       what message are we sending with respect to  
19       the fairness of the military justice system?  
20       That all of a sudden we decided to get rid of  
21       that provision, get rid of the phrase  
22       "constitutionally required," so what message

1 exactly are we sending?

2 I don't think -- in my honest  
3 opinion, I don't think it's the right message.  
4 You know, 70 years ago, Professor Morgan, who  
5 was a professor in Mr. Stone's alma mater,  
6 Harvard Law School, chaired a committee  
7 regarding the military UCMJ, and the issue  
8 there was the protection of the defendant's  
9 rights and his constitutional protections.

10 I think if you go with the step of  
11 actually abrogating a specific requirement  
12 that the President placed in there in two  
13 specific rules, that we're sending the  
14 inappropriate message, especially, as Mrs.  
15 Jones says, it is going to apply.

16 The second point I wanted to talk  
17 about was with trial counsels in the prior  
18 hearing, their assertion of perhaps getting  
19 rid of Article 412 [sic] in Article 32  
20 hearings. That reminded me of a hearing I was  
21 in a couple of weeks ago in which trial  
22 counsel was objecting to a piece of evidence

1 because he said it wasn't relevant.

2 His argument was, "Your Honor,  
3 it's only relevant for defense counsel. So,  
4 therefore, it shouldn't come in." It wasn't  
5 relevant for trial counsel, but it was only  
6 relevant for defense counsel.

7 And so the reason why I bring up  
8 that story is primarily to point out that what  
9 we are talking here is that if we preclude 412  
10 evidence, and if it is constitutionally  
11 required, we may be precluding a piece of  
12 information that may go against 100 percent,  
13 right, the government's case. May completely  
14 and utterly undermine the government's case in  
15 chief. And we are precluding that from the  
16 Article 32, and, by implication, we are  
17 precluding that from the convening authority's  
18 consideration.

19 Now, I also want to add that the  
20 Article 32 isn't a "probable cause  
21 determination." I mean, it is probably to the  
22 advantage for the government to label it as a

1     probable cause determination, but if you  
2     actually take a look at the statute as written  
3     it is not just probable cause, but it is also  
4     to determine appropriate disposition.

5             And so appropriate disposition, if  
6     you look at it, is, what is the proper forum?  
7     Should we go to a special court-martial or  
8     general court-martial? In addition, should  
9     the charges even be referred? So the question  
10    that remains is, should the charges even be  
11    referred?

12            And in making that determination,  
13    the convening authority has to consider all  
14    relevant evidence. So if we have 412 evidence  
15    that completely undermines and dispels the  
16    government's case in chief or undermines the  
17    complaining witness' testimony, right, we are  
18    precluding that from the Article 32? How much  
19    credit would we have in the convening  
20    authority's determination?

21            We are essentially saying we are  
22    allowing cases that may not provide probable

1 cause determination, allowing cases that would  
2 probably not survive a directed verdict  
3 motion, to go forward because we want to  
4 preclude that evidence, 412 evidence, at an  
5 Article 32 hearing.

6 Now, the last point, a couple of  
7 points I wanted to make before I eat up all  
8 their time here is in current practice I  
9 believe that 412 is -- provides robust  
10 protection for the complaining witness or for  
11 the alleged victim. And I think the  
12 difference here that we have, as opposed to  
13 before in the past, is we now have the  
14 introduction of the zealous advocate. Right?

15 CHAIR HOLTZMAN: Of what? I'm  
16 sorry.

17 CDR REYES: A zealous advocate.  
18 Yes, ma'am. This is the special victims  
19 counsel, or the VLC as we call them in the  
20 Navy, and what we find in the Navy is that VLC  
21 or that SVC is in every 412/513 hearing.  
22 Right? That VLC or that SVC is someone who is

1 actually making argument, both law and fact,  
2 for the complaining witness.

3 Now, that is something that is new  
4 that we hadn't seen before in the past. Once  
5 you introduce an attorney, a lawyer, who has  
6 a responsibility to provide zealous advocacy  
7 for the client into the equation, right, you  
8 are going to provide protections for that  
9 person.

10 One point I wanted to add with  
11 respect to, does the complaining witness have  
12 an avenue to challenge any type of 412 or 513  
13 evidence? We all know that there was some  
14 mention with respect to interlocutory appeals  
15 and whether or not that's effective or not.  
16 I invite the members of this panel to take  
17 note of the fact that L.R.M. v. Kastenberg,  
18 right, a case that we all know very well, was  
19 an extraordinary writ appeal now -- done by  
20 the victim. Now it can be an extraordinary  
21 writ appeal done by victim counsel.

22 So there are occasions in which

1 the issues merit actions or reactions by the  
2 Court of Appeals of the Armed Forces or the  
3 service courts, and where Service courts will  
4 take it, right, and ensure the protections of  
5 the victims are being met.

6 Your Honor, without having to take  
7 up the rest of my colleagues' time, I will be  
8 subject to any of your questions.

9 Thank you.

10 CHAIR HOLTZMAN: Thank you very  
11 much.

12 MAJ HALL: Thank you. Good  
13 afternoon.

14 CHAIR HOLTZMAN: Major Hall?

15 MAJ HALL: Members of the Panel,  
16 I'm Major Andrea Hall, and I am currently the  
17 Senior Defense Counsel stationed at Joint Base  
18 Lewis-McChord. In my duties there -- I have  
19 been there for just over two years, and I  
20 supervise five area defense counsel and five  
21 defense paralegals located in Washington,  
22 Montana, and Alaska.

1                   During the time as a senior  
2                   defense counsel, I have represented  
3                   approximately 45 airmen at various stages of  
4                   the court-martial process, with 39 of them --  
5                   or, I'm sorry, 33 of them having to do with  
6                   either sexual assault or rape allegations.  
7                   Prior to that, I spent two years as an area  
8                   defense counsel at Langley Air Force Base,  
9                   Virginia, and then prior to that I spent four  
10                  years in two base legal offices where I  
11                  prosecuted approximately 20 cases.

12                  I just want to state that my  
13                  opinions here today are solely my opinions.  
14                  They do not represent the opinion of the Judge  
15                  Advocate General of the Air Force or the Air  
16                  Force Trial Defense Division.

17                  I would like to comment, without  
18                  trying to reiterate what you have already been  
19                  told, but with respect to MRE 412 at Article  
20                  32 investigations, I think that it has been  
21                  more clear with the recent changes to RCM 405,  
22                  as to what does and does not apply to the

1 Article 32 proceeding. However, there is  
2 still some disparity in whether or not the  
3 Constitution-required exception is applicable  
4 to these Article 32 investigations, at least  
5 in the Air Force.

6 In the Air Force, it is largely  
7 dependent upon who your investigating officer  
8 is, and that determines whether or not that  
9 Constitution-required exception applies at the  
10 Article 32 investigation. And, in my  
11 experience, when you have a military judge  
12 acting as the investigating officer, that  
13 exception is typically applied at the  
14 Article 32 proceeding.

15 And it just -- one way or another,  
16 it would be nice to have a clear answer on the  
17 way ahead as to whether or not the  
18 Constitution-required should apply or should  
19 not apply at Article 32 investigations.

20 And I would like to piggyback on  
21 Commander Reyes. That -- the Article 32, the  
22 process is also to make the recommendations as

1 to how the case should proceed. And I think  
2 that the MRE 412 evidence, especially some  
3 Constitution-required evidence, is definitely  
4 relevant to that consideration.

5 One thing I heard earlier today is  
6 that military judges are rendering MRE 513  
7 meaningless, and that testimony -- or that  
8 military judges are automatically conducting  
9 in-camera reviews and then releasing large  
10 amounts of these records.

11 I can tell you that that has not  
12 been my experience, and that we do have to  
13 come -- have to meet certain factors to even  
14 get an in-camera review. I know that you've  
15 heard the Klemick case mentioned. It involves  
16 a Navy case. The Air Force judges do seem to  
17 be following that standard.

18 So we do have hurdles that we have  
19 to overcome before we can even get an in-  
20 camera review. And there are often times  
21 where either we don't get there and there is  
22 no in-camera review, or there is an in-camera

1 review and no records are released.

2 So I just would like to say that I  
3 don't think that MRE 513 has been rendered  
4 meaningless.

5 And, finally, I would like to  
6 address the comments earlier advocating for  
7 eliminating 513 totally or else making it an  
8 absolute privilege. In this current  
9 environment, as a defense counsel, it feels  
10 like every allegation is being referred to  
11 trial regardless of whether an investigating  
12 officer recommends that it be referred.

13 And even if the investigating  
14 officer is a military judge and recommends  
15 that it not be referred, it seems that it is  
16 getting referred. And, in my view, if we have  
17 records where alleged victims are talking  
18 about the very thing before which the court is  
19 there to decide, in my view, I should have  
20 access to those in order to adequately  
21 confront the witnesses against my client,  
22 especially if a military judge has deemed

1 those things to be relevant.

2 So, absent any questions, I don't  
3 have any further initial comments.

4 Thank you.

5 CHAIR HOLTZMAN: Thank you very  
6 much, Major.

7 And now we have Major Shugart?

8 MAJ SHUGART: Hi, ma'am.

9 CHAIR HOLTZMAN: Thank you.

10 MAJ SHUGART: Thank you for  
11 allowing me the opportunity to speak here,  
12 again, with my own opinions, but on behalf of  
13 the United States Army Trial Defense Service.

14 I am a senior defense counsel. I  
15 am currently stationed in Hawaii, and I act  
16 there as the senior defense counsel for all  
17 Service members accused of any misconduct that  
18 may result in any disposition, including  
19 court-martial.

20 As a military justice  
21 practitioner, I have served both as a trial  
22 counsel and a defense counsel, and I also

1 supervise defense counsel. I have also served  
2 as a professor in the Criminal Law Department  
3 at the Judge Advocate General's Legal Center  
4 and School, and I have also served with the  
5 Office of the Judge Advocate General in the  
6 Criminal Law Division.

7 As a senior defense counsel, I  
8 represent soldiers, and I also supervise  
9 defense counsel who represent soldiers. The  
10 majority of our cases now, in our current  
11 environment, usually have at least one Article  
12 120 offense associated with the charges. And  
13 they are generally contested courts-martial,  
14 either before a military judge or a panel.

15 And currently I am defending or am  
16 supervising the defense of over 20 Service  
17 members who are currently somewhere in the  
18 process associated with a courts-martial. I  
19 would again like to also, with respect to 412,  
20 adopt some of the comments that the members  
21 that came before me have mentioned. And it is  
22 my opinion that 412 is working in both the

1 courts-martial process and at the 32, but I do  
2 believe that we do need some clarification at  
3 the 32 as to how 412 will work.

4 And what I mean by that is, with  
5 respect to the constitutional exception, I do  
6 think, again, as the prior individuals have  
7 mentioned, that it really requires a  
8 consideration of that evidence for purposes of  
9 the convening authority. The purpose of the  
10 32, as was mentioned, is for not only a  
11 probable cause hearing, but is for the  
12 convening authority to make a determination.

13 And as part of this process, as  
14 part of this due process, it is very important  
15 that he have a complete picture of that case  
16 prior to referring the case to trial, or for  
17 any other disposition. With respect to MRE  
18 513 -- what I wanted to add on 412, with  
19 respect to how it is conducted at a court-  
20 martial, the defense is held to a very high  
21 standard in applying 412.

22 These motions, both the 412 and

1 513, are actively litigated by both parties in  
2 courts-martial. And, in practice, the  
3 exceptions under 412, the first two exceptions  
4 are straightforward and strictly applied. We  
5 are finding, in military courts-martial in the  
6 Army, that we are held to that standard, that  
7 we demonstrate that the evidence is material,  
8 relevant, and favorable to the defense, or  
9 vital.

10 And it is my opinion that those  
11 military judges that are seeing this 412  
12 evidence are making rulings that are  
13 reasonable based upon that exception.

14 With respect to 513, I do have  
15 concerns not only in the process of obtaining  
16 those records, but reviewing the evidence for  
17 use in a court-martial. Again, 513 is  
18 actively litigated in the court-martial  
19 process in the Army by both parties.

20 Potential evidence under 513 is most often  
21 used to address not only credibility but the  
22 perception of the -- or the ability to

1 perceive of the witness. And that evidence  
2 may be very critical to the fact finder.

3 But what I grow concerned about,  
4 both for the accused and for the victim, is  
5 how easily that evidence is obtained. As was  
6 highlighted by the government in their  
7 previous hearing, there is a law enforcement  
8 exception under 513 that allows the CID to  
9 make that request through the command judge  
10 advocate's office at the medical provider that  
11 allows them, using that exception, to have  
12 those records turned over both for the victim  
13 and for the accused.

14 And that is concerning, because  
15 prior to this, being in this role, I did not  
16 appreciate how easy it was to have those  
17 records turned over. Very frequently in the  
18 513 process those records are turned over to  
19 the government, or that request is made post-  
20 referral for those documents. They have those  
21 documents when we make that 513 motion, and  
22 they are able to hand them over to the judge

1 for an in-camera review.

2 With respect to the review, I  
3 would like to see clarification on the way  
4 that these records are reviewed. The in-  
5 camera review happens differently across  
6 jurisdictions. Often judges will review those  
7 records in-camera by themselves.

8 My concern is that I think that  
9 the parties are in the best position to  
10 determine the relevance of the material in  
11 that -- in those records upon a showing that  
12 they may be material to the case. What we do  
13 find in some jurisdictions is they are holding  
14 a 39(a) session where they have those records  
15 available, marked as an appellate exhibit, for  
16 both the government and defense to review, and  
17 they make arguments with respect to the  
18 relevancy of those matters in the documents.

19 And the reason I think that's  
20 important is because it's not always issues  
21 about your -- about credibility that may be at  
22 issue. For example, the ability to perceive.

1 I have had cases where the complaining witness  
2 has been on a prescription medication, either  
3 prior to or during or after the alleged event.  
4 And that information is absolutely critical,  
5 understanding whether or not they were on that  
6 medication at the time that they perceived  
7 that event, and whether or not that affected  
8 that event.

9 And so there are specific  
10 instances where we need that information. So  
11 I would like to see clarification on how we  
12 are able to review those matters in a court-  
13 martial process. And I think that would be  
14 very -- very helpful, but I do not advocate in  
15 any way that we eliminate 513.

16 And subject to any questions,  
17 thank you very much, again, for your time.

18 CHAIR HOLTZMAN: Thank you.

19 Major Powers?

20 MAJ POWERS: Thank you, ma'am.

21 Madam Chair, ladies and gentlemen, good  
22 evening. Thank you. I appreciate the

1 opportunity to be here this evening.

2 My name is Matthew Powers. I am  
3 the Senior Defense Counsel for the National  
4 Capital Region. My primary practice is down  
5 in Quantico, Virginia, just about 30 miles  
6 south of here.

7 I have been in the Marine Corps  
8 for almost 14 years, but only the last six  
9 years, since 2008, have I been a lawyer. My  
10 first duty station was down in North Carolina  
11 where I was a trial counsel for about two  
12 years. I got a very rapid turnover; three  
13 days and a handshake and I was given 43 cases  
14 and I was told, "Go forth and prosecute."

15 And I did, and during that time  
16 period I was able to get a lot of really good  
17 training. So I have seen, really, a sea  
18 change to the way we approach military  
19 justice, specifically with respect to sexual  
20 assault cases.

21 I have reviewed some of the past  
22 transcripts from prior hearings, and I see a

1 lot of familiar names of individuals that I  
2 have had courses from over the last six years.  
3 From that period, I moved -- still down in  
4 North Carolina -- I was a Special Assistant  
5 U.S. Attorney for two years down in the  
6 Eastern District of North Carolina.

7           Between those two billets, I have  
8 tried about -- well, I have been the  
9 prosecutor on I'd say at least 30 sex assault  
10 cases. Of those, three or four were in the  
11 Eastern District of North Carolina.

12           These cases -- these cases where  
13 we've got the individual, the victim, you've  
14 got -- you've got a real person who has been  
15 affected, either emotionally or physically, by  
16 this. I have seen that and I have worked with  
17 victims as a prosecutor extensively. And I  
18 believe that has affected very much the way I  
19 approach my defense practice. It has shaped  
20 the way I approach these cases.

21           When I read about -- in the read-  
22 ahead materials that were provided, when I

1 read about the prior -- before 412 existed,  
2 the way that cases were approached, I truly  
3 find it shocking and also appalling to the  
4 point where I don't see -- to me, as a defense  
5 attorney, putting on the history, the sexual  
6 history, the sexual past of a victim is  
7 completely unnecessary. It is not something  
8 that I see in my practice at all today.

9 I supervise six counsel here in  
10 the National Capital Region. At this point,  
11 between prosecution and defense, I have  
12 touched over 50 sex assault cases. I have  
13 never seen anything like what is described in  
14 these examples we have before us.

15 What I want to highlight about 412  
16 is that this notion that we have repeated  
17 violations of MRE 412, it's just not true.  
18 It's just not my experience. I just haven't  
19 seen it.

20 What I do see is cases where I  
21 have litigated MRE 412 issues as a defense  
22 attorney. I would say that in about half of

1 the cases that I have litigated as a defense  
2 attorney, about half of them there have been  
3 412 issues. The other half, they just haven't  
4 existed and they haven't come up.

5 With respect to 513, that's only  
6 been in about a third of the cases that I have  
7 litigated as a defense attorney. Two-thirds  
8 of the cases it's not even an issue. As  
9 everyone has described, the standard that we  
10 use is the Klemick standard. That is the  
11 motion we file; that is the request we make to  
12 the military judge.

13 I have had military judges tell  
14 me, no, they are not going to review the  
15 documents in-camera. I have had one instance  
16 where they have, and I wanted to share that  
17 with you because I think it's important. The  
18 military judge in that case reviewed some  
19 counselor records with the complaining witness  
20 in that case, with the alleged victim.

21 And about 20 pages of those  
22 records were turned over to defense, to me,

1 pretrial. They were heavily redacted, but I  
2 had a general idea of what I was looking at.  
3 Halfway through my cross-examination of that  
4 witness, of the complaining witness, the judge  
5 stopped and gave me another 63 pages of  
6 records. And he did that because it was Brady  
7 material. He had Brady material. He saw what  
8 was in the records was directly contradictory  
9 to what she was saying on the stand.

10 My client would have gone to  
11 prison, I believe this, but for those records  
12 and it was direct, 180-degree opposite.  
13 That's why we have to have these records. We  
14 have to have them in certain cases. Not in  
15 all of them. And I'm not advocating for it,  
16 and I don't believe any of my co-counsel up  
17 here would be advocating for that. I don't  
18 think that's the right answer.

19 But the test that is in place, in  
20 my experience, has worked. And it has worked  
21 as well for the 412 cases.

22 CHAIR HOLTZMAN: Major, could I

1 ask you to wrap up, please?

2 MAJ POWERS: Yes, ma'am. I am --

3 CHAIR HOLTZMAN: Because we are  
4 really running out of time.

5 MAJ POWERS: The last thing I  
6 wanted to say is just, subject to your  
7 questions, I appreciate your time, ma'am.  
8 That's all I have.

9 CHAIR HOLTZMAN: Thank you very  
10 much.

11 I'm going to call on Judge Jones  
12 first, because of the time urgencies. Judge  
13 Jones, do you have any questions?

14 JUDGE JONES: No.

15 CHAIR HOLTZMAN: Admiral Tracey?

16 VADM(R) TRACEY: I don't have any  
17 questions. Thank you.

18 CHAIR HOLTZMAN: Mr. Taylor?

19 MR. TAYLOR: I'm going to ask one  
20 brief question, and then anyone can respond to  
21 it. We heard testimony earlier today that in  
22 some cases all the defense had to say in order

1 to get the issue of 412 and 513 evidence  
2 before the judge is to say that the  
3 information was relevant.

4 And my question to anybody who  
5 would like to address it is, how much of a  
6 showing do you or your counsel typically have  
7 to make in order to get a ruling on this  
8 issue?

9 CDR REYES: I could answer that.  
10 From my experience, and speaking from counsel  
11 in the field, we are getting a general  
12 frustration that it is actually the catch 22  
13 situation that the Professor had mentioned in  
14 the beginning of the panel.

15 The one thing that we are using  
16 here is the Klemick factor for 513 evidence.  
17 And if you don't have the citation, it's 65  
18 M.J. 576, and does specifically set out the  
19 standards that we have to use. There -- and  
20 this goes back to the catch 22 that was  
21 mentioned before -- is we have to demonstrate  
22 with reasonable particularity, right, why we

1 need the specific evidence. What steps have  
2 we done to try to obtain that evidence, and is  
3 there any other way, using non-privileged  
4 avenues or non-privileged material, that you  
5 can actually obtain those evidence?

6 And so that seems to be a hurdle  
7 that we have to do in all of -- in most of the  
8 Navy cases that I have seen before we actually  
9 even have the in-camera hearing. And that  
10 portion of the hearing, doing the Klemick  
11 factors, VLC is represented there, so they can  
12 make an argument as to -- to counteract our  
13 initial motion, as well as trial counsel is  
14 there to as well.

15 With respect to 412, it is  
16 definitely not that easy, where you could just  
17 say that it's absolutely relevant. You know,  
18 the requirements set up in both Ellerbrock and  
19 Gaddis talks about, you know, it's relevant  
20 and material. And then you have to do, does  
21 the probative value outweigh the unfair  
22 prejudice? And there we -- that is all on the

1 defense. The defense has the burden by -- to  
2 demonstrate that, and so it's really not just  
3 I show up and it's relevant, and all of a  
4 sudden I get it.

5 MAJ POWERS: Mr. Taylor, if I may  
6 add to that, the one thing that I would want  
7 to highlight is this. In my experience, what  
8 I've seen is that when you are talking about  
9 412 evidence, we make that demonstration that  
10 it's relevant, it's material, but the judge  
11 still narrowly tailors that evidence. So  
12 you're not putting on specific instances.

13 So, for example, in cases where I  
14 have needed to demonstrate a relationship, it  
15 is -- I'm focused on that there is a  
16 boyfriend-girlfriend, there is a romantic  
17 relationship, and that is why there is a  
18 motive to fabricate in this case. So it's  
19 that -- it is narrowly tailored. It's not  
20 going into sexual conduct; it is narrowly  
21 tailored to what you need to be able to show  
22 in your specific case. So the judge uses the

1 tools they have to pinpoint what is relevant,  
2 and it's just not an open the door and bring  
3 it all in.

4 CHAIR HOLTZMAN: Thank you. I  
5 just -- I'm going to take the privilege of  
6 just responding briefly to this issue of  
7 constitutionality, because -- just because the  
8 President put it in an executive order, I  
9 wouldn't necessarily assume from that that  
10 this is some sacrosanct, well-thought-through  
11 decision.

12 Actually, the language with regard  
13 to confidentiality -- to constitutionality was  
14 added in order to get the bill passed through  
15 the House of Representatives initially, 412.  
16 I was part of the drafting of the Rules of  
17 Evidence for federal courts. There was not  
18 one single occasion -- and we -- I don't know  
19 how many Rules of Evidence there are, 50, 100,  
20 200. No one ever inserted a provision saying  
21 that the judges have to weigh the  
22 constitutionality of any one of those Rules of

1 Evidence. Not one.

2 But because we were dealing with  
3 the issue of rape, and there was a lot of  
4 concern among members of Congress that somehow  
5 something drastic and terrible would happen,  
6 they added that language of constitutionality,  
7 which has been part and parcel of the thinking  
8 since then.

9 That's just a little bit of  
10 background, so I wouldn't say that this  
11 necessarily reflects the deepest thinking. It  
12 was an effort actually to constrain the  
13 workings of 412. So that's -- I just wanted  
14 to add that, and appreciate very much your  
15 testimony.

16 Sorry, Mr. Stone, I just --  
17 because we have to leave soon, so I --

18 MR. STONE: A very quick comment  
19 and very quick question. The comment was,  
20 please, Commander Reyes, next time refer to it  
21 as maybe the President's alma mater and let me  
22 off the hook.

1 CDR REYES: Yes, sir.

2 MR. STONE: Major Shugart, you  
3 said one thing that struck me, and maybe you  
4 can help me by telling me the details, as if  
5 I were the judge. You said most times when  
6 you want the 513 evidence it goes to the  
7 credibility of witness and their ability to  
8 perceive. Give me a factual example of what  
9 you mean. That's what I want to get -- if  
10 they were drunk or what?

11 MAJ SHUGART: No, sir. For  
12 example, I have a case right now where the  
13 complaining witness says that on the night of  
14 the event she was taking a particular  
15 prescription of medication in a particular  
16 dose. And because she took that dose, she  
17 could not appreciate the accused carrying her  
18 from the bed, down the stairs, onto the couch  
19 and sexually assaulting her until she came to.

20 But the medical records indicate  
21 that she, on a daily basis, takes that same  
22 amount of medication as part of a

1 prescription, and yet she functions very well  
2 throughout the day. And so that medication  
3 and her ability -- and her taking that  
4 medication would be very relevant to the  
5 discussion as to her ability to perceive what  
6 was happening on the night of that event.

7 MR. STONE: And you wouldn't have  
8 been able to ask her exactly the same question  
9 when she took the stand? "You take this  
10 medication every day, and don't you function  
11 every day?"

12 MAJ SHUGART: Well, having the  
13 knowledge of her taking that medication on a  
14 daily basis was in her medical records. We  
15 would not necessarily have that evidence  
16 outside of her records, sir.

17 CHAIR HOLTZMAN: Okay. Well,  
18 thanks, to all of the members for the  
19 testimony and for your willingness to share  
20 any thoughts with us. And if you have any  
21 other further comments you want to make,  
22 please feel free to contact the Staff or any

1 member of the Panel.

2 Thanks again very much, and thanks  
3 to the audience, too. Thanks to members of  
4 the Panel and to C-SPAN.

5 (Whereupon, the above-entitled  
6 matter went off the record at 4:44 p.m.)

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This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel  
on Military Sexual Assault

Before: US DOD

Date: 10-10-14

Place: Arlington, VA

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