

Judicial Proceedings Panel Subcommittee Site Visits

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

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

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

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

Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	Naval Station Norfolk, VA¹ Joint Base Langley-Eustis, VA	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	Fort Carson, CO Peterson Air Force Base, CO Schriever Air Force Base, CO U.S. Air Force Academy, CO	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	Fort Bragg, NC Camp Lejeune, NC	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	Naval Station San Diego, CA Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA Camp Pendleton, CA	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA Joint Base Andrews, MD U.S. Naval Academy, MD Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea Camp Humphreys, South Korea Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea Camp Butler, Japan Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

¹ Installations in bold type are the actual meeting locations for the site visits.

JPP Subcommittee Site Visit
Tabulation of Interviews Conducted

Overall Total Interviewed – 284

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

1. Site Visit A

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

Total Interviewed – 28

2. Site Visit B

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

Total Interviewed – 16

3. Site Visit C

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

Total Interviewed – 21

4. Site Visit D

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

Total Interviewed – 17

5. Site Visit E

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

Total Interviewed – 19

6. Site Visit F

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

Total Interviewed – 48

7. Site Visit G

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

Total Interviewed – 29

8. Site Visit H

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

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

SVC/VLC – 4

MCIO Investigators – 4

SARCs/VAs/VWAPs – 12

Commanders – 1

Total Interviewed – 32

9. Site Visit I

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

Defense Counsel – 9 (most had prior experience)

SVC/VLC – 4

MCIO Investigators – 6 and 1 civilian PD detective

SARCs/VAs/VWAPs – 5

Commanders – 2

SJAs – 2

Total Interviewed – 40

10. Site Visit J

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

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

SVC/VLC – 3 and 1 paralegal

MCIO Investigators – 4

SARCs/VAs/VWAPs – 3

Commanders – 7

SJAs – 1

Military Judges – 3 former military judges

Total Interviewed – 34

Judicial Proceedings Panel Subcommittee Site Visit B

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

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

JPP Subcommittee Members in Attendance

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

JPP Staff Members in Attendance

Captain Tammy P. Tideswell, U.S. Navy, JPP Staff Director
Ms. Stayce Rozell, JPP Senior Paralegal
Mrs. Meghan Peters, JPP Attorney Advisor

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

In-brief

At the Academy (hereinafter "the Academy"), the Superintendent welcomed the Subcommittee members and discussed the Academy's relatively new sexual assault prevention program. This is a four-year mandatory education program led by hand-selected students who are identified as strong leaders. The program addresses broader issues of alcohol consumption and promotes respectful interactions among students. The goal is to focus on sexual assault prevention, not just the response (i.e., UCMJ action), and to involve students directly in influencing and training their peers.

Briefing by the Legal Staff

This scheduled event did not take place because the briefing from the Superintendent was extended to 9:30am, when the SAPR and SARC roundtable was scheduled to begin. The Staff

Judge Advocate to the Superintendent provided the Subcommittee members with a brief overview of how UCMJ authority is administered for the students, Staff, and Faculty at the Academy.

Roundtable with SAPR Personnel

The Subcommittee spoke with three members of the SAPR team. A senior officer in the grade of O-6 heads the SAPR program and administers the program in coordination with the SARC and a sexual assault training specialist.

- SAPR Training and Victim Services. The SARC, who had come to the Academy from another university, observed that Academy students differ from typical college students in some important ways that may create barriers to reporting. One such difference is a unique sense of personal pride in attending the Academy and a corresponding desire not to be associated with a sexual assault or the risky behaviors that may have preceded the incident (i.e., “this couldn’t have happened to me, I am supposed to be strong and display good judgment, and not be in the weak position of a victim...”).

The participants also provided their nuanced view of the relationship between prevention and response efforts, noting it is not optimal to have the same entity delivering both the prevention and response training, particularly since the response is associated with accountability and discipline. Since 2008, the SAPR office has been more focused on the response piece, while another sexual assault office handles the prevention training through peer-to-peer interaction. SAPR personnel are on standby when sexual assault events occur in order to counsel victims if needed. The curriculum includes bystander intervention, role-playing exercises, also known as “edu-tainment,” and a block on male victim issues.

- Sexual assault case trends. Participants estimated 25% of student complaints involve incidents that occurred before they entered military service or during a period of prior enlisted service. The participants indicated that while they felt confident in the response systems that they have in place, the legal outcomes of the cases confound them. The participants reported an acquittal rate of 80-90% for sexual assault cases, most of which involve students as both accuser and accused, but struggled to explain the trend. The SARC also noted that expectation management becomes a challenge because a SARC or VA, as a first-responder, does not attempt to gauge the likelihood of success at a trial, and so a victim could be very surprised by an acquittal. The participants observed that the effects of an acquittal are “crushing” to the victim.

Roundtable with Trial Counsel

A senior trial counsel and trial counsel from the area participated in the round table discussion at the Academy. The Academy falls within their area of responsibility, and they also handle cases at other installations in the area.

- Training. The participants held very positive views of their training sponsored by the Trial Counsel Assistance Program (TCAP) and additional courses, such as the Army’s two-week course for CID agents. The senior trial counsel said that every advanced advocacy course he’s attended devoted time to sexual assault prosecutions. Sexual assault comprises 80-85% of the caseload in the area.

- Victims' Counsel Program. One prosecutor had a very favorable view of the VC program because it relieves the prosecutor of the burden of explaining the legal process and likely case outcome to the victim. Prosecutors technically cannot advise a victim not to talk to the Defense, but VC can do so. One prosecutor viewed this as beneficial.

- Relationship with MCIO. Working relationships with the MCIO have improved due to the fact that prosecutors interact with investigators more often now than they did a few years ago. In addition to meeting early to discuss new reports of sexual assault, the prosecutors meet with the MCIO monthly to discuss all pending cases.

- New Article 32 Procedures. The trial counsel stated that under the new procedures, most Article 32 hearings have become a "30-minute script-reading exercise." Prosecutors feel the new format does not help them develop their case. The Service has appointed senior Judge Advocates in the Reserves with military and/or civilian judicial experience to serve as Preliminary Hearing Officers. Some of those officers tend to replicate the past practices and conduct a more robust hearing. When asked what, if anything, they would change about the current system, one participant responded that a grand jury model should be considered, and the other participant felt that the Article 32 should be altogether eliminated since convening authorities can ignore the recommendation.

- Referral Process / Pressure on Convening Authorities (CAs). When asked about their conviction rate for sexual assault, one prosecutor responded, "I don't care about losing..." He/she further explained that prosecutors should not place undue weight on the results they achieve because going to trial is part of good order and discipline, and thus "the right thing to do." Neither participant sensed political pressure was causing convening authorities to refer weak cases, and they have seen cases where the prosecutor's evaluation of the merits of a case carry more sway than a victim's preference for going to court.

Roundtable with Victims' Counsel

Three VC participated in the roundtable discussion with Subcommittee members, one of whom is the regional VC and supervisor for the VC assigned to the Academy. All of the VC were second or third-tour Judge Advocates.

- Training and experience. All of the VC had attended a one-week VC course at the Army JAG School in Charlottesville, Virginia or the Air Force VC Course. They also participate in recurrent, informal training opportunities by collaborating on-line with VCs from other offices (using their "shared portal"). The VC had strong, favorable views of the VC program. Another VC came from a previous assignment as a defense counsel.

- Overall views of the VC program. The regional VC suggested the VC program should be replicated in civilian jurisdictions. Comparing common practices in state court with the military, the VC noted defense attorneys in some state courts can interview and depose victims before trial, in which case a prosecutor cannot stop a problematic line of questioning. The participants reported allowing only a select few defense counsel to interview a client. Participants generally agreed the value of a VC is their ability to explain to a victim all of the consequences of going forward to trial and help them make the decision to participate or not. Additionally, the VC is well-situated to allay a victim's concerns about liability for collateral misconduct. In other

words, the VC may be able to keep a victim involved in a trial where the victim might otherwise refuse to cooperate for fear of getting into trouble.

- New Article 32 procedures. Participants agreed the new Article 32 format is “great for VC.” Two VCs indicated none of their clients had testified at an Article 32 hearing yet, and one noted that on at least one occasion when the victim refused to testify, s/he was still allowed to observe the Article 32 hearing along with the VC. The VC observed that defense counsel are waiving the hearings more often, presumably to prevent “tipping the victim’s hand” by giving the victim and VC an opportunity to learn more about the case. The participants acknowledged that the previous Article 32 procedures were useful for vetting cases, though it could turn into a “circus.” Today, the hearing effectively can’t devolve into a mini-trial.

- Expedited Transfers. The participants noted that although expedited transfers are not available at the Service Academies, in general this is a great policy because sometimes the transfer is the (only) result that a victim desires.

- Relationships with other actors in the military justice system. Participants said they have a good rapport with the SAPR office, but they do not work as well with personnel from the Family Advocacy Program. They noted SARCs emphasize the availability of VC services to victims more often than they used to. VC expressed the desire for well-defined rules pertaining to VC protocols in the courtroom.

Roundtable with Defense Counsel

The Subcommittee spoke by phone with two defense counsel assigned to the area. Both counsel were attending a training course on sexual assault trials in San Diego, California at the time of the site visit.

The participants had prior military justice experience and had completed more than one tour prior to their current assignment. The vast majority of their cases involve sexual assault offenses.

- New Article 32 Procedures. The Senior Defense counsel who participated in the roundtable said he/she does not like the new format because it is no longer an effective tool for vetting cases. He/she sees most cases referred to a general court-martial, where everything is on the line for his/her clients. This individual also felt that as a result of the changes to the system, victims are not challenged before trial, and they are frequently the only or the primary evidence in the case. As a result, defense counsel are losing discovery material and weak (“garbage”) cases are getting through to trial.

- Conviction Rate / Pressure to refer cases. Defense counsel opined that the pendulum has swung too far. Convening authorities disregard the PHO based on the current political climate, and the fact that nearly everything goes forward to trial explains the high acquittal rate. One participant also described a case that was actually dropped because the victim clearly lied, but the prosecutors and investigators would not investigate the victim for lying to officials. Another example of the overall imbalance is SAPR messaging is reinforced in every possible venue, but nowhere does the command remind service members about defendants’ rights.

- Victim's Counsel. Defense counsel indicated they do not like the program because it makes it feel like there are two parties (Trial Counsel and Victim) against the accused. Counsel also stated the VC make the criminal justice system feel more like the civil system. One particular problem encountered is VC standing to appear in court. Defense counsel have seen victims stop a trial so that they can speak with their VC during the recess. They have also seen more instances in which victims try not to answer questions on the witness stand, ostensibly based on advice of their attorney. Defense counsel are able to work with VC to negotiate plea deals, but participants question whether support for a deal, or lack thereof, comes from the victim or the VC.

- MRE 513 /412. Defense counsel feel that as a result of the change to the rule, they can't look at a victim's mental health records anymore. One recurring issue is defense seeks records when they know the victim is diagnosed with borderline personality disorder, because it may explain why they lied in alleging sexual assault against their client, but this line of argument has not proven successful.

Roundtable with Investigators

Three investigators participated in the roundtable discussion with the Subcommittee. All of the agents had received training specific to sexual assault offenses and attended FLET-C, the six-month-long FBI course. Recent MCIO training courses include a block on the role of the VC in the legal process. A few of the participants had prior experience with other civilian law enforcement agencies before joining the MCIO, which is not uncommon among MCIOs as a whole.

- Sexual contact cases. MCIO agents expressed frustration that they now have to investigate every reported sexual contact case as a sex crime on par with sexual assault and rape. They noted that based on their experience in civilian law enforcement, the states do not have something similar to Abusive Sexual Contact under Art. 120, which treats a broad set of touching offenses as felonies. States would probably classify those offenses as misdemeanors or simple assaults (not sex crimes).

- Receiving reports / initiating an investigation. Investigators explained that 90% of the sexual assault complaints they receive come to them from the SARCs, rather than from victims. Then investigators have to schedule a victim interview through the VC and this necessarily delays the initiation of the investigation. They also classified the vast majority of the complaints as "stale," or delayed, as opposed to "fresh." This was highlighted as important due to the general feeling that stale complaints are harder to investigate than fresh complaints. Another trend they've seen is an increase in third-party reports, where a victim's friend feels obligated to report a sexual assault, and the MCIO ends up pursuing a case with an uncooperative victim. In those cases, the MCIO ends up interviewing all of the victim's friends and family regardless of whether the victim wants to go forward.

- Relationship with VC. Participants offered that victims now refuse to turn over their cell phones to investigators for examination and evidence collection. One investigator stated that VCs consistently interject during the agent's interviews with victims, often when an agent verbally utters or asks for the victim's PII (personally identifiable information, e.g., home address). The MCIO has developed alternate approaches when possible, such as writing down the personal information they wish to confirm with the victim, but the MCIO explained the

problem with this over-protective approach is the interruptions destroy the agents' ability to build rapport with the victim, and they may be seen as an adversary. Another example involved VCs objecting to questions based on their assessment of what might present a tactical advantage to the defense at trial. The "objectionable" question consisted of asking the victim what resolution or outcome they wanted to see in their case. VC advise clients not to answer this question. However, MCIO agents explained that based on their training, this is a routine, important question to ask.

- Relationship with trial counsel. Trial counsel are involved much earlier in sexual assault investigations and this has yielded positive results in terms of the investigator-prosecutor relationship.

Roundtable with Company Officers

Company Officers in the grade of O-3 met with the Subcommittee and shared their insights into the Academy's culture and how lower-level incidents are handled with the students. The Company Officers are responsible for student personal and professional development.

Their general impression is that the Academy's message regarding preventing and responding to sexual assault is well received. They identified the greater challenge being the improvement of student behavior when off duty and outside the Academy campus, particularly when alcohol consumption is involved.

Certification

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

//signed//

Member, Judicial Proceedings Panel Subcommittee