

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 E

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

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

Participating JPP Subcommittee Members

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

Participating JPP Staff Members

Lieutenant Colonel Patricia H. Lewis, U.S. Army, JPP Deputy Staff Director
Mr. Dale Trexler, JPP Chief of Staff

Participating Service Members

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

The sessions began at 8:30 a.m.

Roundtable with Victim Advocates (VAs) /Sexual Assault Response Coordinators (SARCs)/ Victims' Counsel (VC).

According to the SARCS, members of the Service are very satisfied with the services given to victims by VCs. The program allows VCs to work with victims as long as they want. Victims are allowed to keep their VC even if they move to another jurisdiction. The VC billets are longer than one-year assignments.

Participants also noted that the VC program in their location is a very good program. VCs consult via speakerphone during interviews if they are not in the area. VCs accompany their clients to other locations if necessary. About 14 months ago, there was concern that in other jurisdictions and in other Services VCs were not as available as they are in this location.

Vcs establish relationships with their clients immediately. Victims rarely decline services, but this may occur if there is an independent investigation (e.g., an investigation conducted by local law

enforcement) and the victim does not feel like going through the process again. Participants noted that more male victims decline the services of VCs and VAs than female victims. Male victims often express that they believe they can “handle it.” One issue that has arisen is that victims who do not have a VC advising them may give others access to their medical records. For example, if commanding officers and senior enlisted members ask victims for their medical records, the victims hand over their records because they are used to following the orders of their superiors without question. There are also reports that noncommissioned officers often discourage victims from using VCs and SARCs.

One participant, a retired military criminal investigation organization special agent (SA) (certified child forensic interviewer) with twenty years of experience working with sexual assaults, commented that she/he has observed a pattern of minimization of VCs. She/he thought the VC would be a part of the process as an advocate for the victim. Instead, she/he believes VCs do not seem to have a voice in court and judges do not ask them for their opinions. When she/he goes to court, she/he sees that the VCs are not advised of motions hearings or filings that involve the victim and are not allowed to raise objections in court. In one Service, VCs serve in one-year billets while trial counsel and defense counsel serve for two years.

Trial Counsel.

Participants expressed a concern about trial counsel being “out gunned” at trial. For example, during one trial, the trial counsel representing the government was a new O-2, while the two defense counsel who represented the accused were of the rank of O-3.

Ethical Issues.

Participants noted a number of potential ethical issues, including:

- Reports of trial counsel telling victims that if they do not talk, the case will be delayed.
- Reports of defense counsel bullying VAs and SARCs to talk about their interactions with the victim by obtaining a court order.
- Reports of counsel not following the rules by interrogating and badgering a SARC before trial.

Seriousness of Sexual Assault.

Service members receive training about the reporting process. They have 100% unfettered access to the commander for sexual assault cases. Participants emphasized that sexual assaults are taken seriously within the unit. If the commander sees a problem, he “hits the big red button.”

Collateral Misconduct.

Participants noted that in one Service, commanders are allowed to investigate collateral matters, but they are strongly encouraged not to adjudicate collateral matters while the sexual assault matter is active. In contrast, another Service prohibits investigation of collateral matters while the sexual assault investigation is active.

Confidentiality and Privileges.

Participants commented that the privacy privilege for chaplains is respected. Unit VAs and SARCs also have confidentiality under Military Rules of Evidence (MREs) 513 and 514. However, in some instances involving collateral misconduct, defense counsel ask to interview Unit VAs and SARCs.

There are reports that counsel often request information about the victim to see if they will get it, even though they know they are not entitled to the information. Apparently, this breach is only specific to this location. Other areas do not report this problem.

Participants expressed concern about the lack of confidentiality of the Case Management Group. Defense counsel will request minutes, so SARCs are not able to speak freely about the victim and his or her ability to receive services. If it is made known that the victim saw a mental health professional, those records are requested by defense counsel for trial.

Roundtable with Victims' Counsel (VC)

VCs Participation in Courts-Martial Process.

VCs commented that scheduling hearings can be a problem because of all of the different schedules to take into consideration. If the VC is not available, counsel will sometimes proceed without the VC. Sometimes the Staff Judge Advocate (SJA) Office will push back and suggest that another VC step in to substitute for the person who is unable to attend. Counsel do not seem to care about or want to acknowledge the attorney/client privilege associated with VCs. However, some VCs commented that in their Service, the military judge will push the trial counsel and defense counsel to acknowledge the VC and adjust their schedules to make sure all parties are present.

In another Service, some judges have ruled that VCs are not parties to the case and do not have standing to request continuances. At times, VCs are not invited to 802 sessions (meetings in chamber). This is personality driven. Motions have not been filed to challenge the military judge when VCs are left out of in chamber sessions with counsel. VCs are allowed to be heard during Article 6b and MREs 412 and 513 issues.

According to the VCs, from the client's perspective, there are too many attorneys involved. Sexual assault cases include trial counsel, defense counsel, VCs. If there are any collateral matters, the victim now has a personal defense counsel and possibly a legal assistance attorney. VCs provide very limited support, which is why the other attorneys are needed.

VCs commented that they feel comfortable about their role in the military justice system. They believe they have kept the process fair for the victim and the accused. VCs are not supposed to reach out to the clients, but the trial counsel may recommend that the victim speak to a VC. This is how VCs are contacted by victims.

In another Service, VCs are also comfortable with their roles in the court-martial process. If the VC stands up during trial, the judge will call for an Article 39a session (session without members and witnesses present).

Expedited Transfers.

One resource often used is the expedited transfer. The commander has to determine if a credible report exists before said transfer is approved. The "credibility" is tied to the victim's willingness to

participate. Sometimes the victim just wants to leave the base, but the commander will not allow the expedited transfer. The Service is so small and the base is even smaller that the victim is still in the same world, regardless of the location of the transfer. It is the VCs' perception that service members who abuse the system are rare.

Career Implications.

In the Service, being a VC has become more desirable and the Service is assigning "higher quality" people into the positions. As everyone who was up for promotion in these positions received a promotion, being a VC is no longer considered a career killer.

Other VCs commented that they are also doing well with promotions. Initially there was a concern about VCs not being promoted, but now the program is being taken seriously and gaining traction.

Training.

VCs conduct outreach training with SARCs and VAs. As a result, SARCs and VAs now notify VCs if they are contacted by defense counsel to be interviewed.

Political Pressure.

The VCs commented that commanders take more sexual assault cases to trial than civilian prosecutors would. Commanders do not like to be the deciders on evidentiary matters, so they send the cases to trial. Even when several legal "eyes" have reviewed the case and have agreed there is no probable cause or that the case is very weak, there are times when the commander will still send the case forward to trial. There have been cases where they know before trial that they cannot meet the standard of proof, but the victim still wants to go forward. In those instances, the victims have closure and are satisfied even after acquittal.

VCs noted that being honest and managing the victim's expectations is very important to the process. Even though many cases are referred to trial, VCs believe the commanders are getting a bit more comfortable with making the tough call not to forward a case and will occasionally pass on sending a case to trial.

Roundtable with Staff Judge Advocates

Staff Judge Advocates noted that generally, the military justice process is working well but there is some tension between protecting the victim, ensuring due process of the accused, and still accomplishing the mission. Sometimes it is hard to realize what the tensions are, but the SJA has a role in ensuring the safety of the victim.

Expedited Transfers.

SJAs commented that they usually send the victim to an area where they have a good support system. They noted, however, that they need to have a better process for screening expedited transfers. All requests for expedited transfers are granted. They added, "Why have a process for 'granting' [an expedited transfer] if the commanders are going to approve the transfer anyway."

SJAs added that the expedited transfer is one way to ensure the case never sees justice because (1) victims do not want to return; and (2) when the victim returns for trial, he or she may reach out to friends, talk about the past, go out together, etc, which inadvertently has a negative effect on the

case. Sometimes the conversations and or behavior will show a different side of the story, which defense counsel will exploit during trial. This behavior creates material for cross-examination that may guarantee an acquittal because of the negative impression it leaves with the panel members.

The trigger for an expedited transfer is an unrestricted report. If there is no unrestricted report, there is no transfer. SJAs noted that this should not be the case, and expedited transfers should be approved for restricted reports as well.

Expedited transfers are difficult when trying to keep the victim on base, because the billets are not available. The base is too small and positions too limited to ensure that the victim continues to work in his or her military occupational specialty. It is easier to preserve the career of the victim if he or she is sent to another location.

VC Program.

SJAs noted that prosecutors have lost their relationships with the victims and they continue to lose touch because of the VCs. Victims are no longer interested in talking to trial counsel because of the VCs.

SJAs also felt that the relationship between the trial counsel and the victim has deteriorated because the VC is an obstacle to that relationship. However, SJAs noted that it is easier to get information directly from the victim as an SJA because the VCs serve as a good conduit between them and the victim.

Over-Referral of Cases.

SJAs from one Service commented that the changes to the military justice system have caused commanders to take even weak sexual assault cases to trial. They noted that it appears that Congress did intend to force the hand of commanders to take sexual assault cases into court that may not have gone into court in the past. They added that by limiting or removing the discretion of the commander, you limit his or her ability to determine risk.

An SJA from another Service commented that commanders are not always exercising their judgement, and are using the court-martial in place of their discretion. He noted that there is a lot of pressure to take a sexual assault case to trial, especially if the victim wants to proceed, even if the case is weak and there are ethical reasons why the case should not go forward. He believed, however, that two years ago there was more political pressure to take weak cases forward. Today, VCs have the ability to talk to the victims and explain why the evidence is weak or strong.

One SJA noted that he no longer relies on the Article 32 advice because he does not want to have another judge advocate (the Preliminary Hearing Officer) telling him whether a case should go forward. He believes that determining whether a case should go forward is his job. The practice has changed because now the SJA prepares memoranda explaining why certain referral decisions were made. He does not think the process is working for the better.

The SJAs commented that the military justice system is unfair because it results in bringing cases forward when there are no truly viable allegations. The message that is being sent is that a Service member can be prosecuted for offenses that are not substantive or meritorious. This has affected the sense of fairness of the entire military justice system and possibly morale.

Training.

An SJA commented that no money is spent training and educating SJAs on sexual assault. Many resources are spent on the end of the process, not the beginning of the process.

Changes to the UCMJ.

SJAs stated that the UCMJ is designed to operate in all types of war. Whatever tweaks are made to the military justice process should be designed to survive throughout future wars.

Investigators.

The SJAs noted that investigations are taking too long because the MCIOs work all of the cases. The Department of Defense created the requirement that the MCIOs take all of the sexual assault cases. This is a problem. They recommended that the statutes/policies of each investigative agency should be amended so that non-penetrative “contact” cases could be handled by the lower level investigative agencies, such as the Marine Corps Criminal Investigations Division (CID) or the Military Police Investigators (MPI).

Round Table with Military Investigators

VC Program and Relationships.

Investigators noted that when the VC program first started, the laws and policies were not clear. As a result, there was a lack of communication between investigators and VCs. Now that the laws and policies are more clearly defined, the relationships between investigators and the VCs, and between the investigators and the prosecutors, are better.

Investigators from the MCIO commented that there are not enough VCs to support the amount of victims in their jurisdiction. The training for VCs seems a bit “gray” and they are still trying to figure out how to interact with the investigators.

Relationships with Victims.

Investigators commented that the system has become so victim-focused that the rights of the accused are now neglected. Investigators are not always allowed to question the victim because it may be perceived as “badgering” the victim. Even when the facts seem to point to a need to question a victim, investigators have to get permission to question the victim a second time, which they do not get very often, particularly in sexual assault cases.

Investigators expressed concern about what may happen to them if they believe the victim may not be telling them the truth. They feel they have to handle the victim with “kid gloves.” Instead of challenging the victim on questionable matters, the investigators ask for clarification from the victim. This often occurs when alcohol is involved or when the victim exchanges text messages. Investigators will not ask for a warrant for the victim’s phone because they do not want to create the appearance that the victim is being mistreated. Sometimes they are not able to collect incriminating information because it is embarrassing to the victim. They recommended that there should be a more defined policy on how to accomplish these types of investigations and gain access to this type of information, because they feel that they are unable to conduct unbiased investigations. The investigators also recommend limiting the commander’s ability to ever charge collateral misconduct against the victim.

Training.

The investigators said the Federal Law Enforcement Training Course (FLETC) they attend is outstanding. They also praised the Adult Sexual Assault Training. It makes the law enforcement community take a good look at their own biases and see those biases in a different light from the victim's point of view.

Investigators are trained on how to find better ways of getting information from the victim (e.g., cognitive receptors, touch, smell, etc.). MCIO investigators do a lot to overcompensate for some of the obstacles they are seeing. They have been trained to observe what is going on behind the scenes.

Time and Resources.

The MCIO does a full scope investigation regardless of the severity of the crime. This can, despite their best efforts, prevent them from devoting the necessary time to more serious crimes. According to the Department of Defense Instruction (DoDI) 6495.02, if someone states that they were sexually assaulted, the MCIO must investigate it immediately. They must fully investigate non-penetrative "contact" crimes, and this demands a huge draw on their resources. Agents are burning out because they are doing too much work with too few resources. They want to be allowed to send contact cases or misdemeanor type cases to the military police investigators.

The investigators asked, "Where does common sense begin?" One agent observed that you can no longer date in the military. There is no viable way to get to "first base" without committing a potential crime. Another problem is that many young people grew up in a culture where horseplay is common (e.g., slapping on the butt or hitting someone in the testicles while passing by in the hallway), but now this type of behavior is charged as sexual assault. They recommended creating misdemeanor offenses for these types of behaviors, similar to the civilian sector.

As of June 2012, commanders may not interfere with sending cases to trial. Consequently, they are afraid to use common sense to take care of some of these minor issues. In April 2012, the Secretary of Defense withheld disposition authority for allegations of completed or attempted rape, sexual assault, and forcible sodomy from all commanders who do not possess at least Special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher. Memorandum from the Secretary of Defense, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), *available at* http://www.dod.gov/dodgc/images/withhold_authority.pdf: *effective by* June 28, 2012.

Roundtable with Trial Counsel

Political Pressure and Over-Referral of Cases.

One counsel noted that the political environment is such that commanders are so concerned about not being promoted if they do not take a sexual assault to trial that they will take all cases to trial, including many weak cases.

He added that the hallmark of what made the criminal justice system great, preserving the constitutional rights of the accused, has been eroded. There is a cultural shift because we are creating people who do not believe they have to take responsibility for their actions. Congress is tinkering with the laws to protect victims and interfere with an accused's right or ability to defend him or herself.

He commented that cases should not go forward if there is insufficient evidence to prove the charges (e.g., two intoxicated individuals who are too drunk to understand or remember what happened). The court-martial process is taking the place of command judgment. Commanders are pressed to go forward on these cases even without sufficient evidence. Counsel noted that people do not realize the damage that is done when they walk weak cases into court. Jury members show up skeptical and cynical to hear these weak cases and the result may be jury nullification. Over-referral of cases is affecting the acquittal rate. Two years ago they had 50% acquittals, which was reported by a military newspaper.

Other trial counsel mentioned that members of the legal office also feel a great deal of pressure because they are forced to go forward with weak cases (especially if the victim wants to go forward). They have no discretion. Trial counsel spend a lot of time trying to draft an airtight reason for why a case should not go forward. This is after much time was spent trying to figure out if they have enough evidence to charge an offense.

The counsel noted that the military has an environment where victims are protected, even when there is plenty of evidence to show that many of the cases are not justified. One time a victim was approached by trial counsel for a year (approximately 15-17 visits) before she would let the case drop. The victim kept changing her mind about whether to proceed. The case was weak. This information was placed in the prosecutorial memorandum and still the trial counsel felt she needed to see the victim for many visits before she had enough evidence to justify dropping the case.

Counsel believe that convening authorities should be allowed to retain their decision-making power. Convening authorities should be allowed to handle lower level cases for the purpose of good order and discipline. Counsel recommended that a convening authority for a particular case be outside of the chain of command of the parties involved so that he or she is insulated from political pressure.

Counsel stated that the statutes are confusing. This version of Article 120 does not give a lot of middle ground to work with. He added that the military should shift its focus to train Service members at basic training and boot camp that come to the military with baggage.

Relationship with VCs.

Trial counsel believe that VCs prevent them from having a better relationship with victims. The presence of VCs has hindered the process. Trial counsel cannot connect with victims the way they used to. Victims are oversaturated and overwhelmed by the amount of people involved in the military justice process.

Expedited Transfers.

Counsel noted that there are many perceived incentives for claiming to be a victim of sexual assault in the military (e.g., expedited transfers and not being punished for collateral offenses). Defense counsel will bring up the victim's request for an expedited transfer to the members during trial in an effort to show a motive to fabricate.

However, one trial counsel who was a victim of domestic violence said the expedited transfer "was a life saver, mentally," for him. Although he experienced the process as a victim, he sees his role as trial counsel to represent the Service and not the victim. However, he thinks the victim should be a party in the case and he thinks there should be a three party system.

Roundtable with Defense Counsel.

Delay.

Defense counsel noted that the time it takes to process cases is just too slow. For example, they currently have a case where the accused has been in the area, pending trial, since 2015.

Charging.

Defense counsel noted that trial counsel do not always charge cases properly. For example, the accused may be charged with bodily harm without consent, yet at trial, trial counsel will argue that the victim was “incapable of consent,” which is a different element. Defense counsel will often request a Bill of Particulars in an attempt to get the Government to explain why the charge is drafted as published.

Defense counsel are concerned about the proposal to fold part of Article 93 into Article 120. Article 93 is a military charge that does not require sex registration; if it ends up being included in Article 120, offenses that used to be handled with a Letter of Reprimand, non-judicial punishment, or a Chapter action will now be raised to the level of rape.

Military judges will use the language in *United States v. Pease* as a guide for members' instructions.

Probable Cause and Due Process Issues.

Defense counsel noted that even when no probable cause is found at the Article 32 preliminary hearing, the convening authority can still push a case forward. One of the defense counsel recommended that if probable cause is not found, the decision should be binding.

Defense counsel noted a number of injustices faced by the accused. For example, an accused may be transferred at the victim's request; even if there is eventually an acquittal, the accused's career will be ruined. One defense counsel observed that many of his clients who are acquitted are leaving the Service.

Victim's Counsel (VC).

The defense counsel believe the VC program is one of the most significant threats to the court-martial process because the court-martial structure is designed to be a two-party process. They noted that there is now a third “quasi” party in the process; unless there are significant changes to the UCMJ, they will continue to have problems because the system is currently not designed to handle three parties.

Defense counsel noted that trial counsel sometimes fail to explain the courts-martial process to victims. This is why the role of the VC became necessary. Defense counsel believe that trial counsel should still be responsible for this task.

Some defense counsel expressed that there need to be very clear and uniform standards to define the roles of VCs in the court-martial process. The defense counsel added that there need to be ethical rules regarding VCs' responsibility to provide notice of *Brady* or *Giglio* issues, etc. Currently, the question remains regarding whether VCs are required to tell the defense if their clients are not telling the truth (though they may be obligated by their bar rules). VCs also have no discovery obligations.

Defense counsel noted that it is problematic that the VC is preparing the victim for his/her statement. Defense counsel often do not have access to the victim until he/she is on the stand. During trial, defense counsel will shed light on and inform the jury of the victim's unwillingness to speak to them.

Defense counsel added that VCs are discouraging victims from providing text messages and cell phones to investigators.

Access to Evidence.

Some defense counsel have found it beneficial to their clients, but not necessarily the courts-martial process, to delay the case when they did not have access to evidence. For example, defense counsel cannot order civilian witnesses-such as retired military members-to come to their location.

Meetings with Victims.

In order to have a successful encounter with the victim, defense counsel have found it helpful not to talk about the facts of the case at the first meeting. They will only discuss the courts-martial process, unless the victim wants to go further.

Article 32 Hearings.

Defense counsel noted that victims no longer testify at Article 32 hearings. This may be damaging to a victim because the first time he or she testifies about the matter is usually at trial and the victim is not prepared for the experience.

Defense Counsel used to use the Article 32 as a discovery tool. Now the 39a Session (motions hearing) is the preferred choice, because the testimony will now be on the record.

Defense Counsel want the findings of the PHO to be binding on the Convening Authority. They also recommended that the PHO should be an officer (O-4 or higher) and someone not appointed from the same SJA office where the trial counsel is assigned. They also suggested that magistrates could handle the Article 32 hearing instead of PHO judge advocates, because magistrates have a better handle of the rules of evidence.

Resources.

One Service does not have a Trial Counsel Assistance Program or Defense Counsel Assistance Program for the purposes of training. They stated that it would be a bad idea to create such an entity.

Defense counsel would like independent investigators that are confidential assets to rundown leads, interview witnesses, and help with the case. This will help with case preparation and defense counsel will not have to worry about approaching the SJA or convening authority for assistance to prepare for trial.

Certification

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

//signed//

Subcommittee Member, Judicial Proceedings Panel