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

A G E N D A

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

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

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

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

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

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

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

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

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

Each public meeting of the Judicial Proceedings Panel includes time to receive comments and input from the public. The Panel did not receive any requests from the public to appear at today's meeting. All materials from today's meeting, however, and previous meetings are available on the JPP's website at jpp.whs.mil.

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Mr. Taylor.

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

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

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

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

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

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

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

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

system to the appellate level. Thank you.

CHAIR HOLTZMAN: Admiral Tracey.

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

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

CHAIR HOLTZMAN: Mr. Stone.

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

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

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

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

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

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

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

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

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

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

matter how slight.

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

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

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

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

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

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

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

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

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

Good. Okay. The first is drug or

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

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

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

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

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

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

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

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

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

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

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

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

LT COL GREEN: Ma'am, we could

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

CHAIR HOLTZMAN: How does the Panel feel about that?

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

CHAIR HOLTZMAN: Okay.

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

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

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

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

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

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

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

to spend some time thinking all this through. I think it's confusing, I certainly agree.

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

JUDGE JONES: Right.

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

JUDGE JONES: It sort of connotes force.

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

JUDGE JONES: Act itself, right.

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

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

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

CHAIR HOLTZMAN: Mr. Stone, sir?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

concepts, so ---

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Okay.

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

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

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

CHAIR HOLTZMAN: Okay, good. Thank

you.

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

LT COL GREEN: That's correct.

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

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

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

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

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

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

CHAIR HOLTZMAN: But could that be challenged, Kyle?

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Mr. Taylor.

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

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

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

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

CHAIR HOLTZMAN: Thank you. Mr.

Stone, sir.

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

problems we're hearing that result from that definition.

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Anybody have any other comment?

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE JONES: Yes.

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

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

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

Next item, accused perception of

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

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

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

deleted in her opinion.

CHAIR HOLTZMAN: And where would that deletion take place?

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

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

I would --- before making any

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

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

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

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

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

Kyle, did we actually have anybody

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

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

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

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

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

don't know, at least to me.

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

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

have to think through.

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

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

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

fact I think would shrink as a defense.

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

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

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

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

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

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

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

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

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

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

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

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

And as I said earlier, I think

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

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

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

JUDGE JONES: Is it still in 134?

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

CHAIR HOLTZMAN: An oversight by Congress? Shocking.

MR. TAYLOR: I know it would be unusual.

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Anybody else?

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

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

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

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

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

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

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

VADM(R) TRACEY: Great idea.

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

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

CHAIR HOLTZMAN: Yes, sir?

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

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

MR. TAYLOR: If I may?

CHAIR HOLTZMAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

VADM(R) TRACEY: Yes.

JUDGE JONES: Yes.

MR. TAYLOR: Yes.

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

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

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

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

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

CHAIR HOLTZMAN: Any other?

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

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

JUDGE JONES: I agree with that.

VADM(R) TRACEY: As well.

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

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

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

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

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

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

Welcome to both of you. And I

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

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

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

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

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

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

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

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

needed to determine the fact or innocence of an accused.

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

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

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

I will close with this anecdote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If I could have the next slide, please.

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

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

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

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

When a military judge receives a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I would suggest that it may be,

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

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

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

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

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

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

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

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

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

MR. BARTO: Thank you, ma'am.

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

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

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

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

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

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

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

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

MR. TAYLOR: Thank you.

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

JUDGE JONES: That is evidence

that would not have been under just a 403 analysis.

COL BAKER: Right. Yes, ma'am.

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

only 412 but 403 apply in this new universe.

CHAIR HOLTZMAN: Do you have any other questions?

MR. TAYLOR: No thank you.

CHAIR HOLTZMAN: Mr. Stone.

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

through counsel.

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Any other

questions?

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

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

COL BAKER: I will start with the

second one, first, because it is easiest.

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

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

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

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

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

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

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

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

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

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

JUDGE JONES: Yes. I mean were

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

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

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

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

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

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

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

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

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

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

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

MR. BARTO: Admiral Tracey, if I

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

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

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

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

I know now that I could have

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

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

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

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

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

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

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

COL BAKER: But it is an explicit

exception. I mean, so that --

MR. BARTO: It is excluded. Evidence of predisposition is excluded.

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

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

CHAIR HOLTZMAN: Then I apologize.

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

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

MR. BARTO: The same.

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

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

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

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

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

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

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

So, I am just wondering, you are

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

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

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

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

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

are infecting the court decisions here.

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

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

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

I am glad to be in the majority on this.

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

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

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

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

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

You can't start with the

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

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

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

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

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

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

MR. BARTO: Yes.

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

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

But I notice Mr. Stone wanted to say something.

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

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

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

up.

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

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

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

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

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

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

So, it is now the rule, rather

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Mr. Barto, did you have a point that you wanted to make in response?

MR. BARTO: No, Madam Chair, thank you for the opportunity, though.

MR. TAYLOR: I have one quick question, please, for you, Mr. Barto.

In one of the reading materials that was provided to us, which was a 2003 article on M.R.E. 513, it was stated that under the Army regulation at that time, that trial counsel, CID agents, and commanders could access mental health records, if they had an official need for the information. And that was contrasted with the Air Force rule which did not allow that because of 513.

So, my question is, has that changed? Has the Army now changed so that it is operating in constancy with the spirt of 513?

MR. BARTO: I don't want to overstate my knowledge on this area, Mr.

Taylor but I believe it has changed.

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

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: No, thank you.

CHAIR HOLTZMAN: Admiral Tracey?

VADM (R) TRACEY: I'm good.

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

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

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

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

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

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

MS. LONG: Thank you.

CHAIR HOLTZMAN: Welcome to the panel.

MS. LONG: Thank you for having me.

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

Just for some background, --

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

MS. LONG: About ten minutes.

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

MS. LONG: Absolutely. Absolutely.

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

And so my remarks today are based

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

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

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

In essence, there are legislative

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

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

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

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

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

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

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

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

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

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

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

There is no exemption if you are

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

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

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

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

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

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

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

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

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

JUDGE JONES: Sure.

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

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

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

I have a few comments this morning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

being used. So, not that much happened.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

than any other.

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

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

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

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

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

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

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

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

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

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

constitutional interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

PROF FISHMAN: Madam Chairman,

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

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

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

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

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

Is there evidence of violence? Is

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. LONG: May I respond? Just, I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TAYLOR: I did, thank you.

CHAIR HOLTZMAN: Do you have any additional questions?

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

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

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

MS. KEPROS: May I address that?

CHAIR HOLTZMAN: Yes, please.

MS. KEPROS: Okay, thank you. Mr.

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Judge Jones.

JUDGE JONES: No, thanks.

CHAIR HOLTZMAN: Admiral Tracey?

VADM (R) TRACEY: No, thank you.

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

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

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

CHAIR HOLTZMAN: Is this a kind of advisory opinion?

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

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

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

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

CHAIR HOLTZMAN: So, it is just an

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

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

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

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

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

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

CHAIR HOLTZMAN: Okay.

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

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

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

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

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

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

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Thank you. Ms. Powers.

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

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

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

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

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

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

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

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

counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And in discussing this with many

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

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

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

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

So I would invite your consideration of those features.

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

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

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

constitutional requirements.

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

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

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

privilege.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, I think we need to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Confidentiality is in fact the foundation upon which victims rebuild their

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

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

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

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

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

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

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

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

The federal rule contains all privileges comprehensively in 501.

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

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

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

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

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

Several state courts have upheld

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

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

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

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

Further, the psychotherapist-patient privilege only limits access to

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

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

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

Historically, the Court has

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

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

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

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

material to the defense.

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

CHAIR HOLTZMAN: Could you summarize them?

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

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

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

CHAIR HOLTZMAN: Thank you very

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I can't forget that there is

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

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

CHAIR HOLTZMAN: Judge Jones?

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

I understand the notion of having

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

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

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

CHAIR HOLTZMAN: Admiral Tracey.

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

MS. KEPROS: Admiral, that is

correct.

CHAIR HOLTZMAN: Mr. Stone.

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

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

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

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

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

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

CHAIR HOLTZMAN: Colonel Baker.

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

I can tell you one thing we do

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

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

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

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

MR. STONE: You were also commenting how the landscape is different because the military investigators -- and I

may not be accurate, but I believe that they think they have routine access to the hospital records, the on-base hospital records, and again, my understanding is, and I could be wrong, that that's what happened in the Naval Academy case.

And that's another reason that I think this panel needs to be given the record to see if that happened in the Naval Academy case.

If it didn't happen, I'd be delighted to find out I'm wrong. If it did happen, that's an indication that there needs to be a different procedure and a change. Because that is a case, at least according to the newspapers, where the victim has come forward since then and said she's sorry she was ever convinced to aid the prosecution and go forward in the case.

And that is the ---- that's the typical situation we're trying to avoid. And there you've got a victim who did go forward,

and now all she does is regret that it ruined her naval career, as well as the naval careers of the three people who were accused.

So they -- instead of helping the situation, it doesn't look like it helped the victim at all, without whom there couldn't have been a prosecution.

But the point I was going to say is you seem to base the fact that the military investigators seem to routinely be able to get their hands on these records as saying, therefore it's within the prosecution's knowledge and the prosecution has to turn over Brady and Giglio, and I agree.

But isn't the alternative scenario possible, too? That it should not be routine for the military investigators to get it, and if the prosecution has no idea what's there, then Giglio and Brady do not come into play when third-party medical providers, wherever they are, have some information about the person being molested as a child.

So in other words, the situation may not be that the only solution is that you turn it over and seal it. It may be a little more separations appropriate.

MS. KEPROS: Well, and I think that's what happens in real life. I think there are lots of scenarios where prosecutors, government entities, never learn about the fact somebody's seeing a therapist.

I think that happens all the time. And therefore, it just doesn't come into play.

However, the distinction I'm trying to make is between the confidential defense investigation I am able to conduct as a civilian defense attorney, that I do not believe that military defenders are able to do. Because I can go and look for information that may bear on that.

I am not saying that I am going to be able to get confidential records. Of course I am not going to. I am going to have to go through a formal process, and a

subpoena, and all of these limits we've already discussed.

But I do think it makes a difference that I can go out into the world, or send my staff is actually how it really happens, and we can look into what else might be going on, what could account for a false accusation in this context.

MR. STONE: And why do you think the military investigators can't? For example, in the Naval Academy case, they sent their investigators out and subpoenaed psychological records from a non-military psychologist as well. Why do you think they're limited?

MS. KEPROS: I will defer that question to the military defenders that are on one of the later panels because I don't know their policies well enough.

CHAIR HOLTZMAN: Mr. Stone, let me just see if I'm right here. The defense, in a military prosecution, normally has to ask

permission of the prosecutor to get a subpoena issued, unless it's at the -- certainly at the preliminary stage of trial, the defense counsel will go to a judge to get that information.

But my question would be, assuming that the defense -- and the Response Panel, which is the predecessor panel to this, recommended that the defendant's rights to obtain information be enhanced -- assuming that those rights were enhanced, would that affect your judgment about how to administer Rule 513?

MS. KEPROS: I think that's a fair question. I guess the answer, unhelpfully, Madam Chair, is it depends. It depends what those enhancements were. It depends how they are effectuated.

I think it would probably change the calculus. If people are otherwise able to get access to the relevant information, that addresses the constitutional prejudice.

If they are not, then the person has had an unconstitutional proceeding. And so you either fix the problem or you don't.

CHAIR HOLTZMAN: Okay. I just wanted to ask a couple of questions about that. Somehow, when you go down to the constitutional issue, it's as though that means that the information kind of has to come in, it sort of --- you've elevated this to some kind of extraordinary point.

And I certainly believe in the Constitution, and I'm a strong advocate of constitutional rights. But we do have privileges that, while there are exceptions to them, are very strong. And if I go to my attorney and explain a lot of what happened, there's no right in the Constitution to get that information from the attorney.

That's established. It's established not because it's one constitutional privilege against another, but there are societal provisions, or societal

needs, that the courts believe, require an attorney-client privilege.

Yes, it may undo justice in a particular case. It may undo the truth-finding requirement in a particular case.

But the courts have decided that this satisfies, or is required, for other, more important needs. So the constitutional needs of a particular case don't always trump social policy.

The same is true with husband-wife privilege. That's -- I mean, there are circumstances, yes, where the privilege can be eroded, but that's under very circumscribed circumstances. And we don't just say, oh, the Constitution. It's not just oh, the Constitution. These are really policy issues, in fact, that are being determined by the court.

So I think we have to be very careful in saying the Constitution requires that this material be disclosed. We have

privileges that are not invaded, even though it undermines truth-finding and maybe justice in a particular case.

So I think that that's only the beginning of the inquiry, it's not the end of the inquiry, as you were suggesting. That's just my personal opinion about that.

MS. KEPROS: May I say something?

CHAIR HOLTZMAN: Yes, you may respond.

MS. KEPROS: I just wanted to identify, the only case that I can think of -- and I don't know if there's been anything since 2007 when Professor Fishman wrote his article -- in Pennsylvania v. Ritchie, the United States Supreme Court considered otherwise privileged social services information.

And they said a criminal defendant has a due process right in that context to that otherwise privileged information. I understand there are distinctions made in the

case law about whether that's equivalent to a psychotherapist's privilege. There are distinctions like that made in case law in my own state.

But I do think we recognize that is a context where the Supreme Court has said no, there is a point where the Constitution and its supremacy has to trump that.

And with all due respect, your attorney-client privilege, it has limits. And there are points where your attorney could be brought into a forum and questioned about things you told that attorney that might be generally considered to be confidential or privileged.

CHAIR HOLTZMAN: But that's extremely rare with regard to attorney-client privilege, and extremely rare with regard to husband-wife privilege. And those privileges are pretty well constrained even though they affect, as I said, the truth-finding objective of the trial and the justice in a particular

case.

But Professor Fishman, you wanted to say something. But I also want to ask about how this -- and I wasn't just referring to the, anyway -- how does the patient-doctor privilege intersect with the therapist privilege?

I mean, is that something that's more invaded, less invaded? Is that considered more sacrosanct? Is the Constitution less applicable in those cases? I just want to get an idea of what the interplay is between those two privileges.

PROF. FISHMAN: I know in civil litigation, if you put your client's medical or mental condition in play, you waive the privilege.

A point that I wanted to make about what Ms. Kepros said, the Ritchie case, the privilege was not an absolute privilege. In fact, the statute said this material can be revealed to the prosecutor but nobody else.

And so clearly if it's revealed and went to the prosecutor, the court said, then due process trumps that because now the prosecutor has it, so there's that.

And also Ritchie was decided before Jaffee, which talks about the privilege as being absolute. So we can't rely on Ritchie as a valuable precedent unless the privilege we're dealing with in a particular case is qualified rather than absolute.

I mean, you're right of course, we could, I think it would be constitutional; if the attorney-client privilege or the parishioner-clergyman privilege or the marital communication privilege are absolute, there's no compelling reason why the psychotherapist-patient privilege could not also be absolute.

That's a decision that we as lawyers and judges have the power to make because we make the rules. And my sense is that the privilege should yield in an appropriate case of a compelling showing of

probable cause and necessity can be made.

But it wouldn't shock me for the Supreme Court to come down and say no, this is an absolute privilege, period, just like the attorney-client privilege. That would resolve all the -- we'd have one less series of panels we'd have to conduct, I guess.

My sense is that it should be a privilege that can be breached with a sufficiently compelling showing. But why do I say that about that and not about the attorney-client privilege? Very difficult to articulate the reason.

CHAIR HOLTZMAN: May I ask, your comments about my second point, which may be revealing on this question, I don't know. I'm not an expert on the doctor-patient privilege, and I would like to compare it, if you are able to, to --

PROF. FISHMAN: Unfortunately, that is not an issue that I --

CHAIR HOLTZMAN: -- to the

therapist-patient privilege. Is it more severe? Is it more protected? Is it more recognized? Is it more sacrosanct?

PROF. FISHMAN: Well certainly the doctor-patient privilege is much older. I mean, there's centuries of case law about that, where the psychotherapist privilege is newer because psychotherapy is a much more recent development.

And really, it wasn't put firmly on the map until Jaffee -- I mean that Jaffee laid down the law that yes, this is part of the law of the land.

And so we're still kind of exploring that, whereas we've got centuries of history in terms of the parameters of the doctor-patient privilege. We're still feeling our way. The fact that we're having this discussion proves that.

We don't know what the law ultimately will be because the Supreme Court hasn't decided it yet. Congress hasn't passed

a statute on it yet. So we're groping our way. That's really the only thing I can say.

CHAIR HOLTZMAN: Does anybody else have something they want to say about that? Yes, Ms. Kepros.

MS. KEPROS: Thank you, Madam Chair. I can just offer, in my state it's the same statute. They're just subsections of the same privilege statute. Actually, attorney-client privilege is in there, lots of different privileges are thrown into that same statute. And the analysis is really comparable across those.

And just, I have to say, if my client is that one rare case, the one rare, very unusual circumstance, I am always going to ask that the Constitution trump the privilege.

CHAIR HOLTZMAN: Well, I don't think the privilege is contrary to the Constitution, let me just put it that way. Ms. Long.

MS. LONG: I have one perspective I want to offer on the distinction, maybe, between psychotherapist and doctor-patient, and I think that that comes from a lot of the misunderstanding in the field or exploitation of mental health conditions, whereas prosecutors may just assume that they are relevant to the credibility of a victim and so may be careless, at times, about redacting or about making a motion to protect the record.

But there are also times where the defense exploits some perhaps misperceptions about this and a judge is not careful about holding their feet to the fire, and the prosecutor as well.

So I think that might be one of the causes of the breach. So training could definitely make an impact there.

CHAIR HOLTZMAN: Yes, Ms. Powers, did you want to say something?

MS. POWERS: Yes. I agree with that as well. In my experience, the

psychotherapist privilege and the medical privilege are treated in an equivalent fashion.

From a victim's point of view, many victims that I've worked with feel that their statements to a counselor or psychotherapist should even be more protected.

One of the issues that comes up in a system where we talk about potentially sealing records even if they aren't going to be admitted, from a victim's point of view, there can always be a motion to access those records.

And it may not be in this trial, but it may be at a later time. It may come up in a family law proceeding, for example, another civil proceeding, or maybe this person may even be a victim in another.

But once those records are sealed, then they can be accessed by making the appropriate motion and showing of necessity.

So I'm concerned about obtaining

the record that isn't going to be used and keeping it sealed, knowing that it's there. And I think that could present a problem for victims that we should also consider.

When we're talking about protecting the privilege, I think it needs to be, I think whether it's semantic or not, I think there needs to be a showing of actual necessity to access those records.

Once those records are accessed, it calls into play a number of other features of litigation -- request for a defense psychological evaluation of a victim, and argument along those lines.

And what that does for the potential reporting of other victims is to really bring forward the chilling effect that we're really trying to avoid. So I just wanted to share those concerns as well.

MR. STONE: If I could I'd just like to ask Ms. Powers and Professor Fishman whether they can comment. I know in Maryland,

for example, a common situation is one of those exceptions that Ms. Kepros brought up, is brought up all the time. Serious concern with reality testing of the victim.

What that tends to be is the defense counsel says "Judge, this victim can't tell truth from their own wishes and dreams, and, therefore we need to see those records."

And the Maryland highest court, the Maryland Court of Appeals has before it right now a case called Johnson which has been briefed and argued because the defense counsel, when a judge reviews the record, the judge said I think you're just fishing when you say that. Defense counsel said yes, I am. Trial judge said well then, if you're fishing, you don't get the records, and the intermediate court of appeals, in a reported decision, said that is sufficient.

And the dissent in the intermediate court said then you've just done away with the privilege. Because every

defense counsel, if he's doing his job, is going to say "I don't think this victim," if there are psychological records, "can tell truth and reality from unreality." And therefore, you are always going to turn over those records.

And I guess my question is, is that fairly common in other states that you know of? And I guess the reason I'm concerned, and I'm concerned in the military as well, is because unlike the civil situation you spoke about, or the one that came up in the Supreme Court, in a civil situation the victim controls the case.

In a criminal situation, the victim does not control what the prosecutor does. And if the prosecutor thinks it's in the interest of the military service or the state to go ahead, they go ahead, and the victim may be saying well only, I don't want to do quite this or the other, that does not, they can't withdraw the case when they feel

like withdrawing the case.

So the victim is put at risk of their records -- them being re-victimized in the interests of broader justice. So that's why I'm curious to know whether in your experience other states have what, despite the narrowness of the language, turns out to be a very broad exception when defense counsels say well, we've got to see whether this victim who has been to a psychologist or psychiatrist can tell truth from fiction.

PROF. FISHMAN: Well the prevailing view is that a sufficiently factually-backed allegation along those lines may be enough to trigger an in camera inspection.

But it's not just enough to say well, maybe she's got this condition. He'd have to -- the person would have to bring in other witnesses or other documents which substantiate the substantial likelihood that the witness has this sort of difficulty

dealing with reality.

There's always a strong factual showing that has to be made before even triggering the in camera inspection. That's the way all of the cases that I've read basically handle it.

And if the Maryland Court of Special Appeals ruled as you described it, it's an appalling misapprehension of upholding the stated law, and I hope that the court of appeals will reverse it. Because clearly, that would open the door to every defense attorney making that request, and that door should not be open.

There has to be a substantial factual showing independent of what might be in the records before even triggering the obligation to go and show a look at the records. That's how it is, and that's how it should be.

MS. POWERS: Yes, and I would just add to that, I hear that in every case. "Well

we have reason to believe that she's unable to determine truth from fantasy."

It's almost every case, and you know, as the professor is telling us, the key to it is really forcing feet to the fire in an offer of proof. What is this based upon? What evidence is there? And that's litigated. And that's litigated to the satisfaction of the trial court.

And most of the time, judges who have education in the area are going to reach a decision that is insufficient because of the privilege. There's not an evidentiary showing, and there's not a showing of necessity. So I'm anxious to follow that case as well.

PROF. FISHMAN: There's one other aspect of the case law, by the way, which says that not only must the defense attorney show a probability that there's stuff in the records that will be useful, but also that comparable evidence is not available from non-

privileged sources.

And that's important too, because if the defense attorney has sufficient evidence of this without going through the privileged sources, there's no need for it.

Now that cuts both ways because if the source of non-privileged information is somebody who is, shall we say, not exactly a close friend of the complainant, the credibility of that witness may be attacked at trial, whereas what the complainant may have said to the therapist would be much more credible to a jury.

But still, that is a universally applied requirement. Not only must you show a strong probability of probable cause, or however we want to define the standard, that there is highly exculpatory information in those records, which triggers the in camera inspection, but before the in camera inspection you must also be able to show that we simply have not been able to find after due

diligence any comparable evidence that we could show.

Which is kind of a catch-22. If I'm the defense attorney, I've got to show enough evidence to show that there's a serious problem with this complainant, but my evidence can't be strong enough, because if it's too strong, I would have the judge look at the records.

And I have no problem with that. I have no problem with putting the feet to the fire, as Ms. Powers says. Because getting access -- even getting the judge to look at those records -- should be the very very very rare exception. Any system which makes it routine is a system which is out of control. It is simply not playing the game by the rules that they should be playing by.

CHAIR HOLTZMAN: I just have a quick question. Maybe this is not the correct panel to ask the question of. What happens if the victim goes to a non-military therapist,

or goes to a non-military therapist in a civilian world, and in that state, there's a stronger psychotherapist-patient privilege than there is in the military? What happens in a trial there?

PROF. FISHMAN: That's one of those questions we don't know the answer to. I mean if it's a military hospital, it's a government hospital, and due process kicks in. If it's a private hospital, then the question is, does the compulsory process clause of the Sixth Amendment have the same teeth in terms of getting an exposure or an in camera inspection of a private hospital or a private therapist's record?

CHAIR HOLTZMAN: My question is a little bit different from that. My question is what happens if the state has a stricter patient-psychotherapist provision than the federal government?

PROF. FISHMAN: Well if the case is tried in state court, obviously the state

--

CHAIR HOLTZMAN: No, under the military rules.

PROF. FISHMAN: Since there's no -- I think the federal courts basically would presume to respect the state privilege as strong. But as someone keeps saying, the Constitution sometimes may trump the privilege.

Again, we don't know. The simple answer is we don't know what the parameters are even if it's a public agency record, we certainly don't know what the rules would ultimately be. There's cases all over the map, and certainly nothing close to a consensus.

CHAIR HOLTZMAN: Thank you for your help. Okay wait, there's one more question and then we're finished.

MR. STONE: I just have one question based on what you just said, in part. In that answer, you said that you think that

a system that is looking at the records in every case is out of control. Do you think that a system that goes and gets the records and seals them in an envelope and puts them in a court record and sends them up and preserves them that way, in every case, is out of control?

PROF. FISHMAN: Yes, I think so. I think so. Unless the defense attorney can make, I am calling it probable cause, other courts use various phrases. Unless the defense attorney can make a factually specific showing establishing some reasonable probability that the records contain highly exculpatory evidence, those records should stay with the hospital or with the therapist.

MR. STONE: Because it's chilling the victim?

PROF. FISHMAN: Yes, I think there's always the possibility of leaks. Somebody might open an envelope accidentally or not realize their privilege. The fewer

copies of the records that exist the better, and the closer they're held by the agency conducting the therapy, or the doctor conducting the therapy, the safer they are from accidental disclosure.

CHAIR HOLTZMAN: Okay, thank you very much for the testimony. We really value your contribution and appreciate your time and your patience with us. Thanks.

Do we need to take a break or -- do we need a break? Okay. I'm fine. We'll go to our next panel, which is Victim Advocacy Perspectives on Privacy Issues in Judicial Proceedings.

I think we'll take a two minute break.

(Whereupon, the meeting went off the record at 2:01 p.m. and resumed at 2:04 p.m.)

CHAIR HOLTZMAN: Let's start.

Our next panel is on Victim Advocacy Perspectives on Privacy Issues in

Judicial Proceedings. We're very fortunate to have Ms. Miranda Petersen, Program & Policy Director, Protect our Defenders; Mr. Ryan Guilds, counsel at Arnold & Porter; and Mr. Greg Jacob, Policy Director, Service Women's Action Network.

We want to thank you, to begin with, for taking your time to appear before us.

And sorry we're a little bit late. As you can see these are very difficult issues, and we're trying to be as knowledgeable and conscientious as we can be.

So we will start with Ms. Petersen. Thank you for appearing before us.

MS. PETERSEN: Thank you, Madam Chair. And thank you for the opportunity to speak here today about the vital issue of victims' privacy rights, which is a central component of a fair and effective justice system.

While the military justice system

has rules in place designed to protect victims' privacy rights to a degree, in practice, protection of these rules has proven wholly inadequate.

I will begin by addressing Military Rule of Evidence 412, the rape shield rule. M.R.E. 412 was adopted with the hope of shielding victims of sexual assault from the often embarrassing and degrading cross-examination and evidence presentations common to prosecution of such offenses.

Recently, the President signed an executive order altering the Rules for Court-Martial 405(i) to explicitly allow the consideration of a victim's prior sexual history at Article 32 preliminary hearings.

Prior to this executive order, RCM 405(i) prohibited the admission of evidence of a victim's prior sexual behavior during Article 32 hearings. Nevertheless, most investigating officers permitted consideration of such evidence anyway, leading to an

onslaught of attacks against victims' privacy rights prior to trial.

While advocates and attorneys fought this practice, the President acted to codify the right to admit such evidence at the Article 32. This move undermines the rape shield rule and undercuts Article 32 reforms passed in the wake of the Naval Academy case, where the victim was subjected to humiliating and degrading questions that had no evidentiary value, but were instead intended to intimidate and punish her, a practice we see permitted all too often.

Although defense will no longer be able to compel a victim to testify during Article 32 hearings, under the executive order they will still be able to call witnesses regarding the victim's sexual history in order to attack the victim's character.

Supporters of the executive order argue that, because M.R.E. 412 evidence will be considered under seal, the victim's privacy

will be protected. However, the executive order expressly permits the convening authority to review the entire Article 32 record -- including M.R.E. 412 evidence -- that is deemed inadmissible.

This incentivizes the accused to drum up as much potential M.R.E. 412 evidence as possible, knowing that even if it is irrelevant or inadmissible at trial, it will still be available for review by the convening authority in deciding whether to review a case to court-martial -- refer a case to court-martial.

A victim's prior sexual behavior or predisposition is never constitutionally required at an Article 32 investigation because the investigation itself is not required by the Constitution.

Instead of enabling the use of victims' prior sexual history, which is completely irrelevant to the determination of probable cause, evidence under M.R.E. 412

should be limited to review by a judge during a closed hearing at a court-martial, and should be barred from the Article 32 pre-trial hearing.

Unfortunately, we encounter similar issues for M.R.E. 513, the psychotherapist-patient privilege. M.R.E. 513 was designated -- was designed to prevent disclosure of confidential communications between the patient and his or her therapist, except in extremely limited circumstances.

This was done to allow victims to receive appropriate care and to prevent fishing expeditions of the type we still see.

In the military, the constitutionally required exception to the rule has been utilized by judges to justify automatic in camera review of all mental health records, often leading to the disclosure of large chunks of a victim's therapy records. This practice undermines the very core and intent of the privilege.

The mother of a civilian victim recently described her daughter's experience in the military justice process in the following way:

"Imagine the fear and intense feeling of betrayal, being a high school kid who finally agreed to go to counseling after a rape because of assurances that her conversations with her therapist could not be released to anyone for any reason, only to be told her rapist's rights outweigh her patient-psychotherapist privilege and HIPAA-assured privacy rights.

She in fact, under M.R.E. 513, does not have any privacy rights, and the right to work through the damage her rapist inflicted upon her emotionally and mentally, if his constitutional rights are asserted. She felt raped and betrayed all over again."

And I will just note, in this case, not only were her civilian therapy records subpoenaed, but her therapist was

subpoenaed to testify at a hearing in regards to the notes that they had already turned over to the defense.

Military judges are rendering M.R.E. 513 meaningless by their orders to disclose privileged psychotherapy records without proper consideration of the victims' rights and a showing of constitutional harm.

As a result of this widespread practice, we have heard from SVCs that they feel compelled to advise their clients not to seek mental healthcare if they want their assailant brought to justice, or not to report if they plan to seek treatment, because private conversations with mental health providers can and will be used to intimidate, silence, and undermine their clients' credibility in court.

To counter this, M.R.E. 513 should be rewritten to give communications between patients and mental health professionals the same level of protection as those under the

attorney-client privilege in alignment with other privileges under the UCMJ.

A member of the American Psychoanalyst Association recently summed up the issue well, saying, "Attempts to search sexual assault victims psychotherapy records to expose inconsistencies demonstrate an appalling misunderstanding of psychotherapy and the narratives that emerge from it," and continued, "To consider as evidence records based on these tentative descriptions seems to me to require a denial of everything we have learned in the past 50 years about how people experience trauma."

Sexual assault victims must be able to rely on this privilege. It is unjust and counterproductive to promise victims their privacy is protected when they seek help, only to revoke it once they come forward and report the crime.

Finally, in order to adequately protect victims' privacy and ensure their

privilege is not infringed upon, victims must be given the right to interlocutory appeal for rulings that violate their rights, as is afforded to civilian victims under the Crime Victims' Rights Act.

Without the ability to appeal adverse rulings, victims have no mechanism to challenge these unilateral decisions and adequately enforce their rights, and judges lack guidance from senior jurists on how to properly interpret and apply these rules.

Too often, victims are forced to balance two basic and fundamental rights -- the right to be protected from unreasonable intrusion into their personal, intimate details of their lives, and the right to pursue justice against the person who violated them.

This is a choice that no victim should ever have to face, and I urge this panel to recommend changes that eliminate the loopholes that are rendering these so-called

protections ineffective, and to establish a mechanism for enforcement for when those rules are inappropriately applied.

I have attached to my statement that I have provided the Panel a full statement by the victim's mother that I quoted from earlier. Thank you.

CHAIR HOLTZMAN: Thank you. Mr. Guilds.

MR. GUILDS: Madam Chair, thank you very much for the opportunity to appear today.

As you said, my name is Ryan Guilds. I am an attorney at Arnold & Porter in Washington, D.C.

Arnold & Porter has a long history of pro bono representation, and that history extends to the representation of victims of crime, including crimes for victims of military sexual assault.

Our representation in this area extends to virtually every branch of the armed

services, and it has touched every aspect of the military criminal justice system.

And as an aside from my statement, I understand there's been some questions about the Naval Academy case. That was my case, and I'll be happy to answer those questions to the extent that I can.

In my view, the military justice system has made some incremental improvements in respecting sexual assault survivors' rights to dignity and privacy.

But much more needs to be done. It remains the case that military sexual assault survivors do not enjoy the same level of privacy protections afforded to their civilian counterparts.

The reasons for these differences are neither constitutionally justified nor linked to a unique military purpose.

Take first the application of M.R.E. 412. The language of the military's rape shield law does not in my view materially

differ from analogous provisions in the federal and state systems. Nevertheless, there are significant differences in how the military investigates and prosecutes sexual assault cases and applies Military Rule of Evidence 412 that make military sexual assault survivors far more likely to be asked about the most intense and personal details of their lives.

And it begins with how the military investigates sexual assaults. It is common practice for military and criminal investigators -- and I say common practice, I will tell you my experience is mostly with respect to the Navy, those are most of the cases that I have had, for whatever reason -- but in those cases, there has been a routine desire by the part of investigators to explore the sexual history of the survivors, and to do so without any real need.

That results in the disclosure of information that would not be disclosed in a

civilian proceeding, nor should this type of typical investigative technique take place in the military.

Under the current rules, the questioning of survivors about their prior sexual history means that this information may be considered in an Article 32 proceeding.

Military defense counsels' ability to use this information to smear the victim has no parallel -- no parallel -- in the civilian system.

Civilian sexual assault victims do not testify at preliminary hearings; they are rarely interviewed by defense counsel, and they are not forced to endure an Article 32 process that allows the convening authority unfettered access to potential 412 evidence regardless of its admissibility.

Making matters worse, the current system does not provide victims' legal counsel with a clearly-defined right to intercede in Article 32 in court-martial proceedings where

the victim's rights are at stake.

Recent military case law makes clear that the sexual assault survivor has a right to be heard. But to be effective, that right must extend not just to interaction with trial counsel or to arguments before hearings, but at the hearings themselves.

The military justice system's closed docketing system and practice of preventing victims' legal counsel from having access to case materials and motions also seriously undermines the ability of people like me to protect our clients.

While some trial counsel provide these materials, many others do not. There is no similar restriction -- no similar restriction in the civilian courts -- and no legitimate military objective served by limiting victims' lawyers access to the materials they need to do their jobs.

This unequal access to information only reinforces the view in the mind of the

survivor that they are not a respected part of the process.

Turning now to Military Rule of Evidence 513, it is my sincere view that M.R.E. 513, by its language and application, is the single greatest threat to the privacy and dignity of military sexual assault survivors in this country.

M.R.E. 513 is described as a privilege, but in fact, as interpreted and implied by military judges, it is nothing of the sort.

Military judges routinely pierce the privilege by conducting in camera reviews based on the scantiest evidence. What should be at least in my view an absolute privilege, but at minimum a near absolute privilege, has devolved into a fishing expedition followed by a mere relevancy determination.

The result for victims is catastrophic. Military VLCs rightly warn survivors that if they decide to file an

unrestricted report, it is likely that their most private medical and counseling records will be disclosed.

And in my case, all too often victims are simply unwilling to accept that risk and choose not to come forward.

Alternatively, victims refuse to get the services they need out of fear that their most personal and intimate emotions will be turned over to the very person who caused them in the first place.

Defense counsel and military judges erroneously focus on the constitutionally-required exception set forth in M.R.E. 513 as the basis for piercing the survivors' doctor-patient or therapy privilege.

But no court has ever held that the Constitution mandates the routine disclosure of a victim's medical or therapy records.

In fact, such records are rarely

sought in civilian proceedings precisely because of the stringent rules in place to restrict their disclosure.

To make matters worse, military crime victims do not have an ability to timely appeal the disclosure of their records. The result is that crime victims are in the untenable position of either accepting that their private thoughts and records will be disclosed or refusing to proceed with a criminal charge.

It is a result that must change if the military is to make meaningful progress in its efforts to support and respect sexual assault survivors. Thank you.

CHAIR HOLTZMAN: Thank you very much, Mr. Guilds. Mr. Jacob.

MR. JACOB: Good afternoon, Madam Chair and distinguished members of the Panel. Thanks for the opportunity to come and address the Panel. It's most appreciated.

I'd also like to thank the Panel

for requesting the point of view of advocates and victims in the last panel and in this panel, and I hope that's something that happens going forward.

Too often it's the voices of those that are most affected by these issues that are least heard by policymakers, and it's deeply appreciated.

My name is Greg Jacob. I am the Policy Director at the Service Women's Action Network, former Marine Corps Enlisted Infantryman and Infantry Officer.

The work we do at SWAN is informed by the populations that we serve. We maintain a social service and a legal referral help line for service members or veterans to call that are having issues with cases that are referred to attorneys like Mr. Guilds here.

We've also held two national summits here in Washington, D.C. on military sexual violence. We've brought more than 300 sexual assault survivors to The Hill for

direct advocacy for training workshops and panels.

It's been our interaction with survivors that privacy issues and issues around mental health records are a consistent concern that we've heard, and it's one the DoD is all too aware of.

Data from the DoD shows that concerns about privacy is one of the main reasons why sexual assaults are chronically under-reported.

Privacy concerns are exacerbated by the climate of retaliation in the military, and they are the cornerstones upon which the military's Restricted Reporting system was built.

We've seen privacy concerns with regard to, specifically with regard to, mental health records contribute to victims withdrawing from the court-martial process entirely.

Even more damaging than the impact

that these concerns have on the prosecution of cases is the difficult decision by some survivors not to seek out or to stop mental health treatments for their sexual assaults due to the possibility that information contained in their health records will become public, be used against them as a part of trial proceedings.

Here are some of the things we've heard from survivors on this issue.

One survivor quit going to counseling when she found out her records could be released to the court. The thought of the perpetrator finding out the details of her suffering was abhorrent enough for her to abruptly end her treatment.

One survivor said that his therapy wasn't nearly as effective as it could have been early on. He said it was impossible for him to fully open up about his assault until after the trial had completed.

Another survivor was afraid of

being charged with collateral misconduct. She had told her counselor she had violated the Command's alcohol policy the night of the attack.

A common refrain from officers and senior enlisted survivors is that they're worried about not being able to maintain the confidence of their Commands, should details of their attacks be made known -- specifically that their boss would question their judgment or think twice about their ability to lead. Both of these in the military can result in being relieved.

Some of these concerns might already be addressed in current military law and procedure, but such things are not widely known among service members. Until the average service member attends law school, perception basically remains reality.

It was mentioned earlier that the military is a unique environment, and as we've gone through this process of looking at

military law, we've seen how it differs from the civilian world.

And mental health care is a real sticky wicket when it comes to the military, just in general.

As a former Marine Commander and now as Policy Director for SWAN, I've seen both sides of this issue. While I was a young infantry NCO, I was taught that one of the basic leadership principles was that normally Marines look out for their welfare.

And later on, as an Infantry Officer and Company Commander, one of my top priorities was to ensure that the Marines of my Command were physically and mentally fit for duty and combat-ready. If I failed in either of these tasks, I would be relieved.

I believed at the time, like most Commanders I know, that in order to ensure the health, fitness, and readiness of my Marines, I had to have an unobstructed line of sight into what type of care they were receiving,

specifically medical care and the prescription of medications.

I was trained that the privacy laws concerning personal health information as they apply to the military grant exceptions to Commanders to specifically ensure that this readiness imperative is met.

Additionally, I can tell you that any Marine that was seeing a psychologist or a chaplain or a counselor, or was enrolled in any sort of treatment program, either voluntarily or Command-directed, got additional attention from the Command.

And yes, it did affect the way in which these Marines were tasked, organized, and utilized.

Clearly there is a need to strike a balance between the rights of victims and the ability for prosecutors and defense counsel to represent their clients.

Based on what we've heard from survivors, as well as the personal experience

of SWAN's organizational staff, we see this issue causing genuine harm to survivors, whether that's based on legal practices or just on perception alone.

For survivors not to get the treatment that he or she needs for the trauma inflicted by their assault is at best inhumane, and at its worst can be life-threatening.

In the context of other inroads being made in other areas, I'd like to make one other point concerning mental health counseling.

Over the past 18 months, SWAN has been working with the Pentagon, Congress, and the Office of the Director of National Intelligence to remove the requirement for sexual assault survivors to disclose their mental health counseling when they apply or renew their security clearance.

The need for this change was driven by survivors who told us similar

stories about abandoning their therapy or not seeking out much-needed counseling to avoid having to disclose it on this form.

Disclosure was considered a red flag by security clearance adjudicators, and like the courts, they would pull the records to ascertain if they were a security risk based on their counseling records.

If they couldn't get a clearance, or if an individual lost his clearance, his or her career was over.

When we presented our request for an exception for disclosure to the Director of National Intelligence, James Clapper, he agreed with us. He said that the greater security risk was for an individual who needs counseling not to get it.

I am happy to say the security clearance form now instructs applicants who have received counseling for sexual assault not to disclose.

This is important to this

discussion. The fact that the government office responsible for keeping our state's secret a secret no longer needs access to the mental health records of sexual assault survivors in order to accomplish its national security mission calls into question whether the military needs to review how they handle military health records at large.

I thank the Panel for its time, and I look forward to answering any questions you may have.

CHAIR HOLTZMAN: Thank you very much. Members of the Panel? We'll start with you, Mr. Taylor.

MR. TAYLOR: Thank you, Madam Chair. And thanks to all three of you for your statements today.

Ms. Petersen, I took it from what you were saying that you think part of the problem here is the policy, and part of it is the implementation. Is that correct?

MS. PETERSEN: Yes.

MR. TAYLOR: You made a couple of what I would call substantive suggestions regarding the executive order and the reach of it, if you will, in terms of who can see the records.

You also talked about a more absolute privilege as opposed to, you analyzed -- excuse me, analogized it to the attorney-client privilege. And then finally, you spoke in terms of some sort of interlocutory appeal.

So those were three changes that could be made to policy. Am I hearing you correctly?

MS. PETERSEN: Yes.

MR. TAYLOR: Were there others that you would also suggest, or is that an accurate summary of the three you've mentioned?

MS. PETERSEN: I think those are the three that are most relevant to what we're discussing today.

I think that another that was

discussed earlier would be strengthening and clarifying the right of SVCs to represent their clients and to access records, because in order to rebut a lot of these rulings, you have to know what the rulings were or what the arguments were that were being made in order to get them, and we're not seeing that uniformly across the Services, and really from judge, from situation -- it's just very situational right now.

MR. TAYLOR: So to the panel in general, what do you think the problem is here? You were particularly harsh, I think, in your criticism of some of the judges' -- perhaps appropriately so -- decisions, and the way they handled it. What do you think some of the problems are here? Why is this happening?

MR. GUILDS: Well I think that there's a few -- I think there's a few issues. I think that with respect to what I know best, right, as a victims' rights lawyer, right, so

to speak to what I do, what needs to change, and Ms. Petersen mentioned it, I need to have the materials.

I have been in cases where I've quite literally sat there and received facts for the very first time while I am arguing a 412 motion.

And I've been given the opportunity to appear; I've been given the opportunity to make arguments to the court. But I don't have all of the information, and as a lawyer, that's never a good thing.

So I think that is one of the huge issues that I have. In other cases that's not the situation, I have been provided with all of the records.

And there is a way to do that, Mr. Taylor, without -- you know, why doesn't the military provide the information? And I think it's not necessarily because they're trying to hide something; I think they are used to the closed docketing system that they have, so

they're used to proceeding in that way.

And I think also that trial counsel are concerned that those materials might make their way into the hands of the victim, who will then be asked questions in cross-examination about them.

But there's a way to fix that. And it's a routine way, which is you simply don't give those materials to your client.

So there are practical solutions to that issue that I think can be overcome.

I think with respect to 412, I think there's a more systematic -- systemic problem with respect to 412.

We can debate the case law, but at the end of the day, the reality is, it's just more questions are being asked and more answers are being given around sexual history information in the military than in the civilian setting.

And then, once they're asked, they're out there for the convening authority

to review, even if ultimately they are determined not to fall within an exception. And that's an issue.

Take it to the courts-martial process -- and I've had cases like this, and the Naval Academy case is one of them -- I cannot stop the disclosure of that 412 information from happening once the judge rules. I have no right to appeal it in the military. And that's not the case in the civilian system.

I tried very hard in the Naval Academy case. Took two writs -- in two separate cases -- both to the Court of Criminal Appeals, and ultimately up to the CAAF, and was unsuccessful.

There must be a way for victims to achieve their rights, to have their rights respected, before the case goes to trial. If not, there will be no adequate review process with respect to either 412 or 513. I could go on, but those are some that come to mind.

MS. PETERSEN: I would just add with respect to the appeals, I mean right now, when you're trying to appeal, there is no -- I mean, all of the case law, and I think this was mentioned earlier too, is based off of a case where a defendant appeals. And right now, there aren't any rulings actually on these issues right now.

And until you have the ability to appeal, you won't have a broader framework for judges to follow so that you can have some sort of uniformity and some sort of consensus on how these rules should be applied, other than the --

CHAIR HOLTZMAN: One second. When you said there's no case law on these issues, what exactly did you mean?

MS. PETERSEN: I mean on 412 and 513.

MR. GUILDS: The issue with respect to the reason there isn't case law, right, is that judges are reluctant to --

military judges, like all judges, are reluctant to make mistakes.

They don't want to issue a ruling that's going to result in a defendant's criminal conviction being overturned.

And so as a result, the reason that you see, I think, in the military routine disclosure of 513 evidence is because the judges don't want to be wrong. And so -- and because there's no interlocutory appeal right, there's no way to really look at these issues, unless a military judge denies access to the records in their entirety and the issue goes up on appeal in that way.

And so as a result, you have a skewed analysis. You have courts saying the defendant's rights weren't violated because they didn't turn it over or they weren't allowed to use it at trial. But you don't have any real meaningful discussion.

And that was our argument in the Naval Academy case, these are public records.

That was our argument in the Naval Academy case, which is, you CAAF must step forward and tell the military judges what the standard is.

I have enormous respect for the judge in the Naval Academy case -- enormous respect. I don't think he made that decision because he was a bad person. I think he made that decision because he did not have proper guidance from the CAAF.

CHAIR HOLTZMAN: Thank you. Judge Jones?

JUDGE JONES: Mr. Guilds, assuming that you don't have and aren't going to get an absolute privilege in this world --

MR. GUILDS: Sure.

JUDGE JONES: -- aside from the suggestions you made, as has Ms. Petersen, about an interlocutory appeal, what other than the way the 412 and 513 are being -- shall I say -- administered by the judges, is there anything about the statutes themselves that you would change?

MR. GUILDS: What I would change --

JUDGE JONES: I hear a lot of criticism about the decisions that are getting made based on the statutes.

MR. GUILDS: Sure. I would change -- it's frustrating for me because every statute has a constitutionally required exception. Every piece of language has a constitutionally required exception, right? So you don't need to have that in the statute.

So I think that language is confusing. I think it causes judges to not be sure what the Constitution means in this context.

And I don't think it is what the military judges and the courts have today viewed it to be. The fact is that the right to confrontation is not a discovery right. And the Brady right is not a right that extends to personal, private medical records.

So those issues -- I say that with

respect to Brady unless they are in the hands of the prosecutor -- it's my view that even the military records for the Naval Academy survivor that were by the military are not in the hands of the prosecution, for purposes of Brady, but that may be too technical an issue for here.

JUDGE JONES: It has been a source of decisions, obviously, as you know --

MR. GUILDS: Sure. Yes.

JUDGES JONES: -- and they've gone both ways.

MR. GUILDS: And they've gone both ways, that's right, that's right. And it's not a surprise where I come out on that. But I would say this, I would say this question came up before as well.

I think in the Naval Academy case, and again, this is a matter of public record, in the Naval Academy case there were civilian records. There were civilian records that were subpoenaed. And I tried, and I have a

lot of people at my firm who tried with me, to prevent those records from being disclosed.

So Madam Chair, to your question earlier with respect to whether or not Maryland law could have prevented those, yes, under Maryland law they were not supposed to be disclosed. I still could not get them kept from the military judge's in camera review.

So I think that there are a series of steps. I also think to Mr. Stone's point, the question has come up previously, in that case and others, do we routinely disclose, how do we, how do defense counsel, trial counsel, obtain 513 records?

And I think Madam Chair, it sounds like you know the answer to this. It's that when defendants want to get materials, they must solicit the help of trial counsel, of the prosecutors. And it is the prosecutors who obtain those materials.

So in the Naval Academy case, as a matter of routine, they subpoenaed and had

those records sealed. They didn't review them, they had them sealed. But they did have them turned over. And they attempted to do that with respect to the civilian records as well. They were initially unsuccessful, until the military judge issued a ruling ordering the civilian provider to turn the records over.

So they are turned over routinely, and that does risk the potential for disclosure, and it does have the chilling effect I think Mr. Stone alluded to before. And I don't see any reason for it. I think it's really a question of efficiency why you'd have to give those records --

JUDGE JONES: You mean there's been no application made, no justification, no probable cause offering -- ?

MR. GUILDS: The moment I walked in on the very first meeting with trial -- sorry to interrupt you, ma'am -- the moment I walked into the very first meeting with trial

counsel, they already had the records.

Now they had not reviewed them. They had left them in a sealed envelope. But they were -- this is the military. They were prepared. So they had the records, should they need to turn them over.

Now they hadn't reviewed them. Trial counsel had not reviewed them. In fact, trial counsel did not want them. They were the records that were requested by defense counsel.

Nevertheless, they were then ultimately reviewed by the military judge once the military judge made a determination that he should conduct an in camera review.

JUDGE JONES: And you disagreed with his determination?

MR. GUILDS: Of course. Yes. And I think it's not unique -- I mean, I am not being critical of that military judge. I would say that routinely, what military judges do is they ask, is it relevant? Is it

potentially relevant?

And what that comes down to at the end of the day is a question of credibility. They ask, well, is there some issue of credibility in this case?

This is a sexual assault case. It's going to almost always be about credibility. So in my view, and what we argued in our papers to the CAAF, was that means that in every case the records are going to be reviewed in camera.

And I think the reality is, and I think this was mentioned earlier, we lawyers, we like our privilege, but we're not as keen on protecting the privileges of others.

And I think that's the issue here. I think military judges routinely view that they are in the best position to determine what needs to be turned over. And I think they do that because they don't have a proper standard to review that 513 evidence.

JUDGE JONES: So the two

exceptions, for instance, you don't think are sufficient. The statements of what's inadmissible.

MR. GUILDS: Yes, I think that there should be -- in my view, absent some substantial showing that the victim is incapacitated and unable to recollect or testify truthfully, I don't think there should be any breach of the privilege. I just see no reason for it.

I mean, unless the sexual assault occurred during the course of the treatment, I see no reason for the relevancy of that information.

It is no different from what I have -- I am a, surprisingly, I am a defense counsel by trade -- so it's no different than the communications I have with my clients when we prepare for trial.

That person needs to have the ability to speak with me freely. And I can generally say to that client, everything you

tell me I can't disclose. Unless you tell me you are about to go commit a crime, I can't disclose it.

I do not have the ability to tell that to my victims, clients. I just don't. And until I do, they are going to be chilled in their ability to both seek treatment and to move forward with trials.

JUDGE JONES: You know, I was just going to say, I am still trying to figure out what we could do to change the statute.

MR. GUILDS: Well I would eliminate the statute.

JUDGE JONES: You would eliminate it, that's what I --

MR. GUILDS: Yes.

CHAIR HOLTZMAN: Eliminate what statute?

MR. GUILDS: I would eliminate 513 in its entirety. I would create an absolute privilege. I would rewrite 513 is what I would really say. I would rewrite 513 to

create a near-absolute privilege.

And there's plenty of examples of that. I think folks much smarter than me on the previous panel were describing the various standards that would replace. So I don't know, I could give you a line-by-line, but at the end of the day I think it really needs to be a near-absolute privilege.

JUDGE JONES: Thank you, I do have one other question. You started to talk about Article 32s. Do you see any improvements, now that there's congressional --

MR. GUILDS: I do. And I don't want to underestimate the improvements that have been made.

I mean I speak passionately about this, as we all do, because we care about these issues, but the military has made some substantial improvements.

The fact that what happened to my client in the Article 32 in the Naval Academy case could not happen today. And that's

progress. And I applaud the military for it.

JUDGE JONES: And that's because she could not be compelled to take the stand.

MR. GUILDS: Correct.

JUDGE JONES: Is there any certainty about depositions yet, as far as you know?

MR. GUILDS: No, I don't. And I am concerned about that. I am concerned about both the depositions and the interview process, to tell you the truth. And I am concerned about where they are headed.

As I think you probably know, there is no analogous situation in the civilian system. Victims don't, my civilian victim clients don't talk to defense counsel. My head would explode if that happened.

That just is not a thing that happens in the civilian setting. And the reason that it happens in the military is really hard for me to discern.

There is no real military

objective, there's nothing meaningfully different about the military justice system to warrant that difference.

JUDGE JONES: Well, you are probably the wrong person to ask, but where does discovery occur if it's no longer supposed to occur in the 32?

MR. GUILDS: Well I think it occurs, there is discovery outside of the 32 process now, right? There are interviews that can take place, there are subpoenas that can be issued.

I think that we could look to virtually any jurisdiction in the country for how discovery could take place, because that's how it takes places.

A preliminary hearing, any good defense counsel can probably get a little bit out of a civilian preliminary hearing in terms of discovery, but that's not where it comes. It comes from the rules --

JUDGE JONES: No I am saying,

though, that I was under the impression the 32 was a discovery, was used for discovery, and not just because culturally it grew into that, but that it was meant to function as a, and again, I'm probably asking the wrong person --

MR. GUILDS: No I will say, I have a view, I probably have a view on everything, my wife would tell you.

But I will tell you this. If you look at what the statute describes as the purpose of an Article 32, it is not for discovery.

JUDGE JONES: No, no, that I understand.

MR. GUILDS. Yes. But you are right that in the past it was used for discovery, and the defense counsel is going to use every opportunity they can to explore and defend their client.

I don't fault them for it, and I think that's an example of a change for the positive.

MS. PETERSEN: I would, I can defer to the person with a law degree here too on this, but in terms of discovery, I think the issue with the depositions comes down to whether or not the victim is going to be available at the court-martial to testify and to be cross-examined.

And unless there's -- in the military I think that, I'm not an expert on this area, but an extraordinary circumstance would be if the victim was not going to be able to be testify and be cross-examined at trial, that they would be deposed in order to preserve the testimony to read into the record at trial.

But absent that I'm not sure, I mean I would consider that to be their right in access.

And I would just mention in terms of the 32, the reason that we feel so strongly about 412 with the Article 32, I mean I think that the Naval Academy case is a really great

example. That was a chief judge, that was a military judge, serving as an investigating officer.

But most of the times, these are JAG officers, these aren't necessarily judges. They're not necessarily someone who has any experience weighing these rules that are being given the ability to weigh all of this really nuanced -- I mean, we've had testimony all day about how nuanced, and how particular, and how technical these questions are -- and the fact that they can come in at that stage, besides the damage that it does to the victim just at that stage and then to have to do it again at the trial, but under someone who's not operating or functioning as a military judge.

They're functioning as an investigating officer who is going to make a recommendation to the convening authority, who then reviews that recommendation. They weren't there for the trial, they weren't there for any of these hearings. And that

that convening authority can then still review that entire record regardless -- you know, the IO can say, this is admissible, this is not, not only in deciding whether or not to refer the case to court-martial, but on the back end, in terms of sentencing, although I think that there are maybe new regulations in regards to the sentencing that have been announced by DoD.

But I think that that's why we feel particularly strong in terms of 412 and 513, but in terms of the executive order and the applicability of 412 at preliminary hearings.

CHAIR HOLTZMAN: Thank you very much. Admiral Tracey.

VADM(R) TRACEY: Help me a little bit.

I thought I heard Colonel Baker this morning describe a process that does mirror what you believe are the requirements of a motion being made, a determination on the

merits of the motion as to whether or not the records could be recovered, and then the records reviewed if they are recovered in camera and what have you, and you're saying that those procedures are routinely not being followed.

MR. GUILDS: No, I think that those are the procedures, so if I misspoke, I apologize, Admiral. The way it works in the cases that I have familiarity with, the records are requested before there is a motion filed.

They do that so they have the records available for the court to quickly review.

Then they file their 513 motion. Then there's argument. And then, depending upon what the judge decides, they are reviewed by the judge, and then ultimately the judge will decide what to do in terms of turning them over.

VADM(R) TRACEY: So effectively,

the procedures are not being followed. They are requisitioning the records before having made the motion.

MR. GUILDS: That is correct.

VADM(R) TRACEY: And that's routine, you said.

MR. GUILDS: That happens, and it has happened in every case that I have either participated in or supervised, and that's over a dozen.

VADM(R) TRACEY: Thank you.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes, my question was going to be the same. So you don't get any notification before the records are pulled from the medical provider?

MR. GUILDS: I mean I get a notification in that I know they're going to do it, but you are correct, I don't get any notice or any ability to object or file a motion or do anything like that, if that's what you're asking.

MR. STONE: Which is totally unlike the civil [sic] system.

MR. GUILDS: Correct.

MR. STONE: Is it your understanding that there is any kind of a HIPAA release that is required from the -- that the medical provider requires as they would in a private hospital, in the state hospital?

MR. GUILDS: No, there is no release. I mean, in military there is no release provided.

MR. STONE: And what is the explanation of the violation of the HIPAA releases?

MR. GUILDS: I think the explanation is that they're a member of the military and they have reduced expectations of privacy with respect to those records.

MR. STONE: Have they ever told you that? Or are you guessing at that?

MR. GUILDS: I mean, those are

issues we have attempted to litigate. There has been no decision on it. But that is the justification that --

MR. STONE: Because the military thinks they're exempt from HIPAA releases.

MR. GUILDS: I mean, no one has told me that expressly, but that is my sense of why they believe that they could do it. I don't want to, I am definitely not here to testify on behalf of the military, as I think they probably know.

MR. STONE: Okay. One clarification, you said that what happened to your client in the Naval Academy case couldn't happen today because she couldn't be cross-examined. I understood that that is not the case until December 26th.

MR. GUILDS: Correct.

MR. STONE: So that could happen today.

MR. GUILDS: Well, in the cases that I have, we have just taken in a couple of

new cases, and they are applying those rules now. So whether or not as a matter of the law it takes place, they're scheduling 32s.

I have a client, potential client, who is not going to testify at the Article 32.

MR. STONE: But doesn't the law say as to offenses committed after December 26th, at the moment?

MR. GUILDS: Well, go ahead.

MS. PETERSEN: I believe that the NDAA that was passed last year, the statute does say that it will apply with offenses beginning, occurring on or after December --

MR. STONE: So therefore, even if the hearing is held after December 26th in cases, those people are still going to be subject to being called and cross-examined.

MR. GUILDS: Potentially, yes.

MS. PETERSEN: Potentially.

MR. STONE: Unless that's fixed. Okay. I have a question, and maybe Ms. Petersen, or maybe somebody on the panel

knows, and I'll just tell you what I am concerned about and you can tell me whether it's uniform across all Services or if they differ in their practices.

And that is I gather that they all have this closed proceeding of filing, so as victim's counsel, even though you've noticed that you're representing the victim, you don't get access to the filings or the docket sheet, is that right?

MR. GUILDS: So, it varies. So in some cases, I would get access to the 412 and 513 materials. So I got access to the materials in the Naval Academy case, for example, related to those particular motions.

I didn't get access to the other materials that were referred to or referenced in those motions.

So for example, I came into that case after the Article 32 had taken place. I did not have the Article 32 transcript to respond in that case. So when it was time for

me to make my arguments and do my job, I was at a disadvantage.

MR. STONE: Isn't the victim supposed to be entitled to a copy of the Article 32 transcript?

MR. GUILDS: After.

CHAIR HOLTZMAN: After what?

MR. GUILDS: So they get them after trial, they are entitled to a certified record.

Now there are changes in the rules, as I understand them, that will apply, that will provide them with the access to the recording before. And that is an improvement. If that indeed takes places, that will certainly be an improvement.

MR. STONE: I guess what I am asking is, do you know if that kind of selective release to you of only proceedings somebody else thinks are relevant is only in the Navy or the Marine Corps or the Air Force or the Army, do you know if it's across the

Services the same way?

MR. GUILDS: I have never represented anyone in the Marine Corps. All other three service branches, it is the same. I get incomplete access to information.

MS. PETERSEN: I have been told by victims' legal counsel in the Marine Corps, Navy, and Air Force instances similar to what Ryan, Mr. Guilds, is describing.

And I recently had another case that we're working on recently with civilian counsel, I was told a couple weeks ago that the judge had ordered a hearing on -- he was going to make some rulings regarding 412 and 513, he was going to give defense and trial counsel the opportunity to brief.

The civilian counsel was notified by trial counsel after the hearing had taken place. So he was given an opportunity to brief after the fact, but he wasn't there for the hearing.

MR. STONE: So these hearings, I

gather they are Rule 802 hearings?

MS. PETERSEN: 802, yes.

MR. STONE: The victim's counsel are not getting notice --

MS. PETERSEN: He was not noticed --

MR. STONE: -- ahead of time.

MS. PETERSEN: Right, he was not given notice of an 802 hearing. It took place. He heard after the fact from trial counsel --

MR. STONE: Right. So they're not invited to participate, they're not invited to file a brief.

MS. PETERSEN: He was invited to file a brief. But I think that, and I'm, I can't say for sure, I only get this information from those that we speak to who are going through this, but it seems to be a little ad hoc.

It depends on the judge who is presiding over that hearing, what their

opinion is on what the role is of a victim's legal counsel.

And again, that's because it's not codified. We have this ruling from CAAF that says you have a right to be heard through counsel on 412 and 513, but there is nothing in the SVC language, in the statutes that have been passed by Congress, or anywhere else, that explicitly outlines the rights of a victim's legal counsel in terms of operating at court, what notice they're entitled to when they're entitled to argue on behalf of their client.

MR. STONE: Now when you show up in court, do you have the same standing as the prosecutor and the defense counsel? Do you have a table and a place to sit, just the way they do? Or are you just left on your own?

MR. GUILDS: It depends. It depends on the issue and it depends on the military judge.

As Ms. Petersen said, there is no

specific requirements or rules to deal with a victim's legal counsel.

In the Naval Academy case, the judge was gracious enough to place us in the jury box, and we made arguments with respect to 412 and 513 from the jury box.

And it kind of felt like being on the jury because I was learning information for the first time while I was arguing my motions.

MR. STONE: So is what I'm hearing that even though the Services have made a process to appoint and accommodate counsel for victims, within the legal system, even when they note their appearance, they're not getting all the pleadings in the case ahead of time, they're not getting notice of hearings, they're not getting an ability to have a place to sit in the courtroom.

And I gather they can't even always speak, if, as we heard before, they're trying to pass a rule that says that the

counsel can be heard, not just the victims. Am I hearing that right?

MR. GUILDS: Not from me. I think that that goes too far. I think that the military judge in the Naval Academy case, for example, took pains to provide opportunities for us to be heard -- let me argue even in the midst of the court-martial with respect to 412 and 513 issues.

Now he made it clear that if I stood up at any other time, I might be visiting the brig. But he also made clear that I had an opportunity to participate with respect to those proceedings.

In other situations, it has been made clear to me that trial counsel is responsible for updating me. Trial counsel is responsible for providing me the briefs. And unless I have something really good to say, trial counsel will be the one that argues their motions.

But honestly, it really varies.

Oftentimes trial counsel wants me to speak on behalf of the victim and encourages me to both make argument and file briefs with respect to 412 and 513.

I think the issues that come up, really with respect to 412 and 513, are in the Article 32, where it is very unclear what my rights and what my -- what my rights as a lawyer on behalf of my client are. I had an Article 32 where I was sitting next to my client and there was potential 412 and I must tell you, I was unsure what to do.

I don't like to stand up and object when I don't have clear standing, but I was uncomfortable with the situation. And I believe that I should not have to rely upon trial counsel to assert my client's rights.

Trial counsel has a different objective. Trial counsel has a different duty. My duty is to my client, and my client's rights. And I should have an opportunity to voice those when appropriate

for issues that are relevant.

MR. STONE: I find it somewhat anomalous that you say you have tremendous respect for that judge when you have just said, unless you were joking --

MR. GUILDS: Oh, I am not joking.

MR. STONE: -- that if you stood up and objected to something, you could find yourself in the brig. I totally understand a judge saying, "I'm sorry but I don't think you have standing to object to that issue."

But I really don't understand a judge saying, "You better not stand up unless I -- except under these parameters, or you're going to wind up in contempt." I have never heard a judge go that far.

MR. GUILDS: The judge didn't say that. And I should take more seriously those words. What the judge made clear to me in that case is that, and in many cases, is that I cannot just simply stand up, whenever I want, and object.

Did he say if I did so, I was going to be held in contempt? No. But if you've appeared before that military judge, you know that you afford him a tremendous amount of respect, and I do.

I think that military judge was actually in the lead in trying to find ways to incorporate victims' legal counsel into the process.

Do I agree with every decision he made? No. Do I agree with his decisions with respect to 412 and 513? Absolutely not.

But do I think that there are military judges out there who are trying to find the right balance and bring the victims' legal counsel into the process? I do.

And I honestly think that that is not unique to the military. I think that there are civilian victims' legal counsel who confront similar issues with respect to this problem, and I applaud the military for its Victims' Legal Counsel Program. I think there

can be enhancements, but I think it's a tremendous asset, and I applaud them for incorporating it.

MR. STONE: Did the judge allow you to attend bench conferences when he called bench conferences?

MR. GUILDS: He sure did. He did. Now, and other judges have not, right? And other judges, I have been not invited to anything other than after-the-fact determinations. And that's what I think we're getting to --

MR. STONE: Do you think there needs to be a new rule that gives you the standing that is equivalent to the other attorneys in the courtroom to have full access to pleadings, bench conferences, and proceedings, and to file whatever you want to file?

MR. GUILDS: Absolutely. Without question. Absolutely.

MR. STONE: A need for it.

MR. GUILDS: Absolutely. There is a need for it, and in that case, we saw the benefits of it. We saw the benefits of my ability to -- you know, one of the important things that a victim's legal counsel does is to explain the proceedings to their client, right?

That's an important aspect of the Victims' Legal Counsel Program. If I don't have access to the materials and the conversations, how can I do that? I mean really all I am is the paralegal of the trial counsel. I need to be able to provide my own interpretation, my own legal judgment to what is going on. And I can only do that if I have equal access to the information.

And most importantly, there is no good reason not to provide it. I think Mr. Stone you know, this is information I would get in a civilian proceeding. And so there's no real military objective for not having the same process in our military justice system.

CHAIR HOLTZMAN: Mr. Guilds.

MR. GUILDS: Yes ma'am.

CHAIR HOLTZMAN: You say that the Naval Academy situation couldn't occur today because the victim couldn't be cross-examined.

MR. GUILDS: What I meant to say, and if I didn't I apologize, is the Article 32, 30 hours of cross-examination, could not occur today, yes ma'am.

CHAIR HOLTZMAN: Right. Okay. But the rulings on -- but, even though the cross-examination of the victim couldn't take place, that doesn't mean that the mindset of the judges with respect to how 412 works would be any different today from the way it was in the Naval Academy case. Is that correct?

MR. GUILDS: That is correct.

CHAIR HOLTZMAN: So what I'm trying to do is indicate that it's not just the -- that we need more than the removal of the victim from the potentiality of cross-examination in the Article 32, if we're going

to get Article 412 properly implemented.

MR. GUILDS: Absolutely. And if I have made it appear otherwise, I apologize. I absolutely agree.

CHAIR HOLTZMAN: I don't think you've made it unclear. I just want to clarify it beyond peradventure of a doubt.

MS. PETERSEN: And I just wanted to add, as was referenced a little bit in my statement, that even if the victim can't testify, that doesn't mean that there won't be an attempt to admit 412 evidence and that that same process won't, you won't pull it from witnesses, or you won't try to present other -- get at that testimony in other ways.

So I think that the harm is still there. Maybe the victim isn't the one being subjected to those questions directly. But that doesn't mean a victim won't always testify -- choose to testify at the 32, and it doesn't mean that that evidence still wouldn't come in.

MR. GUILDS: Yes, and I would just hasten to add that what I've seen in some of my cases is that actually, during the investigation process, the military criminal investigators actually obtain a release from the victim for the disclosure of medical records.

So I have gotten cases after the fact of that interview where those records are already disclosed. And that reveals, just potentially, obviously it reveals 513, but it also potentially reveals additional 412 evidence.

CHAIR HOLTZMAN: Is that going to change with the appointment at the outset of Special Victims' Counsel? Both -- two issues. One, the signing of a waiver, and secondly, the questioning by the military investigators with regard to prior sexual conduct.

MR. GUILDS: It is my sincere hope that it will happen, and it will happen for those individuals who have a right to Victims'

Legal Counsel. I also represent civilians who don't have that same right. It won't necessarily happen in those cases.

CHAIR HOLTZMAN: Now are civilians in the military --

MR. GUILDS: In the military justice system, yes ma'am.

CHAIR HOLTZMAN: I see.

MR. GUILDS: So they are not appointed Victims' Legal Counsel. Some of the cases that I have, for example, are precisely because the VLCs are not able to represent the victim.

And so it will not happen in those cases. I am hopeful, as I think you are alluding to, that the VLC Program will prevent that from happening. That is certainly mission and objective one of a VLC when they walk into an interview with an investigator.

CHAIR HOLTZMAN: Now with regard to 513 and 412, 513 you say should be completely rewritten to make it a much

stronger privilege.

MR. GUILDS: Correct.

CHAIR HOLTZMAN: In both cases, Article 412 and 513, do you believe that the exemption for what's constitutionally required should be removed?

MR. GUILDS: I do.

CHAIR HOLTZMAN: Do you agree with that, Ms. Petersen?

MS. PETERSEN: Yes.

CHAIR HOLTZMAN: Mr. Jacob, do you have an opinion on that?

MR. JACOB: Yes.

CHAIR HOLTZMAN: Okay, I want to go to the Article 32 issue that you raised, Ms. Petersen, which is the executive order just recently allowed prior sexual conduct to come in?

MS. PETERSEN: So they altered the way that it's --

CHAIR HOLTZMAN: Can you please explain --

MS. PETERSEN: Yes.

CHAIR HOLTZMAN: -- how something like this could happen in the year two thousand and -- when was this done?

MS. PETERSEN: This was done this year.

CHAIR HOLTZMAN: 2014?

MS. PETERSEN: Yes. And I believe that the argument is that they're increasing the protections. I think that that's a misunderstanding of the way that the rule should be applied.

At least from our understanding of the way that the rule for Court-Martial previously required 412, in terms of how it regulated 412 evidence, it said that 412 evidence could be considered by a judge at a court-martial.

So by every measure, in terms of, from our perspective, it should not have been applied at 32s. You didn't have judges administrating Article 32 hearings, you have

officers, now you have JAG officers.

So the 412 evidence was still coming in. There was a lot of confusion and a lot of, I can just call it controversy over whether 412 should or should not have come in.

I think the President's -- the argument for the executive order was that they're quelling that controversy by explicitly applying M.R.E. 412 because now you have a process that you have to follow, you're saying the rule absolutely does apply, and it would give, in theory, give consistency.

The problem is we see the way 412 is applied at 32 hearings, and it's not protecting victims in the way that it should.

Our contention from the beginning when we saw this proposed executive order was no, 412 evidence should not be coming in at a 32. Just because it is, it's doing so erroneously, and the President should have clarified at that point that M.R.E. 412 evidence could not be admitted at a 32.

Instead, he went the other way and codified what was at times being done erroneously.

It's not that it wasn't necessarily being done.

CHAIR HOLTZMAN: Now could you just articulate why you think that 412 information should not come in at the Article 32 stage?

MS. PETERSEN: First and foremost because Article 32 has now been changed to be a probable cause determination, and there's no reason to pry into a victim's prior sexual history. From my perspective, there should very rarely ever be a reason for you to pry.

But at the 32 stage, when their sole -- the sole purpose of that hearing now is to determine probable cause for trial for whether or not you should go forward to an Article 32, it should not be applied.

The second reason is because of the executive order. In the executive order,

while it -- it explicitly applies to M.R.E. 412, and then it also explains that even if it's ruled inadmissible, a convening authority can still review the entire record prior to making that referral.

So now you're saying, first of all 412 evidence can come in, and second of all, even if the IO, who is not a military judge, rules that it's not going to be admissible at trial, a convening authority will have -- I mean, how is that not going to be prejudicial to the victim, when that evidence is already not going to be admissible at trial, but the fact-finder, the person who gets to decide whether or not they even get to the courtroom, is allowed to basically see it, and for what other reason than to consider it?

CHAIR HOLTZMAN: Well, and then of course that affects the plea bargaining decision, and sentencing --

MS. PETERSEN: Right.

CHAIR HOLTZMAN: -- and the

decision as to whether to refer.

MS. PETERSEN: Yes, so we believe it was extremely misguided and that it should have gone the other way, it should have prevented this from happening.

And as I said with the Naval Academy case, I mean even judges aren't clear on how to apply this, but at a 32 where you have a much more open process, you have much fewer restrictions, and you have someone who's not functioning as a judge, it's limitless, the opportunities for harm to the victim.

CHAIR HOLTZMAN: Okay. Well I find it incomprehensible and astonishing, I guess I have views that --

MR. STONE: Just a clarification. So are you saying that you think at the Article 32 hearings, only military judges, rather than any JAG officers, should preside?

MS. PETERSEN: I mean, I think that there have been reasons why that hasn't happened, in terms of the ability to have that

many judges.

I think it's something we would have to look into more before I could say what our position is on that.

But I mean, I think in theory --

MR. STONE: I am not assuming that we have enough judges. They could always make people more [sic] judges, I am just asking whether that theoretically is what you're saying you want.

MS. PETERSEN: No, because I don't think ultimately that even helps, because the convening authority, the commander, still makes the decision.

You don't have a magistrate judge reviewing this and making a decision. You have an IO and then you have the convening authority separately.

CHAIR HOLTZMAN: On the question of materials that are available to the convening authority, what happens to 513 material? Is that also made available to the

convening authority?

MR. GUILDS: Yes, I mean if it --

CHAIR HOLTZMAN: Even if it's not admitted, even if it's considered privilege, is that still made available to the convening authority?

MR. GUILDS: Not to my knowledge, no, I have never seen a case where it's been -- because it doesn't get turned over to anyone other than the military judge.

It remains under seal to everyone. Trial counsel has not seen it. Defense counsel has not seen it.

Now if, in the Naval Academy case, there had been a different result, there was a set of records that were turned over to the defense. Those materials presumably would become part of the sealed record, and then the convening authority would have had access to those.

But that's only because they would have been disclosed.

MR. STONE: So if the IO sees it, then the convening authority sees it.

MR. GUILDS: Not necessarily. I mean the IO is before -- well, yes. You were talking earlier in the process.

CHAIR HOLTZMAN: What's an IO?

MR. GUILDS: Investigating officer.

MR. STONE: The investigating officer, the presiding officer at the 32.

MR. GUILDS: At the Article 32. We're sort of mixing -- I think I was interpreting your question Madam Chair to be at the time of sentencing or adjudication, at the end of the process. If you're talking about the --

CHAIR HOLTZMAN: I am talking about: does the convening authority at any time, from the beginning of time to the point at which -- to the end of the trial, does the convening authority get to see Article 513 -- I mean Rule 513 material?

MR. GUILDS: Typically, in the cases that I have -- I mean, not typically, in all of the cases that I have, the 513 evidence does not come out until after there is a referral.

CHAIR HOLTZMAN: I see.

MR. GUILDS: So then once there's a referral, and Ms. Petersen can correct me if she has different information, but after that, once you get to the courts-martial, if that information has been provided and turned over to the defense, or it somehow gets into the record, then of course the convening authority at that stage --

CHAIR HOLTZMAN: I am not talking about that. I am talking about when only the trial judge has seen it, if the trial judge has seen it.

MS. PETERSEN: You mean if there's been an in camera review, but they haven't been turned over.

CHAIR HOLTZMAN: Correct.

MS. PETERSEN: At that point, with --

CHAIR HOLTZMAN: Does the convening authority get to see that material?

MR. GUILDS: No. In my experience, I have not seen that happen, and I don't believe that that's the case.

I have never seen an instance when the convening authority was provided access to those materials.

VADM(R) TRACEY: Excuse me, but that might happen in 412?

CHAIR HOLTZMAN: Yes.

CHAIR HOLTZMAN: All of that is of --

MR. GUILDS: In 412, absolutely, it will happen. Because there's a hearing about that information that's not with respect to the sealed records.

MR. STONE: Which is the hearing that Ms. Petersen is complaining about, that it shouldn't be heard --

MS. PETERSEN: Well there's the Article 32 --

MR. STONE: -- at the Article 32, it should wait until the trial.

MS. PETERSEN: Right. But there's an Article 32 hearing, and then they have to hold a 412 hearing at the Article 32 hearing, to review the evidence and decide what is and is not admissible.

But regardless of that determination, the convening authority will see the record --

MR. GUILDS: It's the classic unringing of the bell, right? The information is all out there in the open, regardless of whether it falls within a 412 exception or not.

And then ultimately, the investigating officer will make a determination about what falls within an exception. But it's all already out there, right? And the damage to the survivor has

already occurred.

CHAIR HOLTZMAN: Let me also ask about 412 in terms of, are there any other changes that you would make to it aside from removing the catch-all constitutional provision at the end?

MR. GUILDS: With respect to the language itself, Madam Chair?

CHAIR HOLTZMAN: Yes.

MR. GUILDS: None that I can identify at this time.

CHAIR HOLTZMAN: So (a) and (b) are okay, in your view.

MR. GUILDS: Well, it's (a) and (b) and how (a) and (b) are applied, right? But those are my jobs in the court, to argue before the CAAF and others with respect to those.

I don't see 412 in terms of its language, outside of the constitutionally required exception, being meaningfully different than most other jurisdictions.

CHAIR HOLTZMAN: Okay. So, but it's in the, in your view, and same with you Ms. Petersen and Mr. Jacob, it's in the interpretation of the catch-all quote unquote constitutional provision that you've seen 412 interpreted in a way that's radically different from the way it's being interpreted in the states, around the country and in the federal system.

MR. GUILDS: Yes.

CHAIR HOLTZMAN: And interpreted in a way that's harmful to victims and victims' rights to privacy.

MR. GUILDS: Without question.

MR. STONE: Before we leave that, do you think there's some reason that when, and I presume you did, you cite the other federal and state cases from around the country about the way that catch-all provision is interpreted around the country, that the military judges don't -- choose not to follow other federal authority?

MR. GUILDS: I can't speak for the military judges, obviously. My view is that they are afraid that if they do, there will wind up being a new trial for the defendant, which is why we need to have a clearly articulated standard from the CAAF that provides meaningful guidance as to what are the requirements under 412.

CHAIR HOLTZMAN: And your reliance on CAAF, I guess, that's the --

MR. GUILDS: Court of Appeals for the Armed Forces, I apologize.

CHAIR HOLTZMAN: How do you reconcile your statement with United States v. Ellerbrock? Do we have confidence in the CAAF in light of that case?

MR. GUILDS: I don't. I mean, I'm critical of the CAAF determination with respect to 412, and I do think that there are issues with respect to how 412 is interpreted, and I have not, I will be clear, I have not analyzed what we might change within the law

to adjust as a result of that decision.

CHAIR HOLTZMAN: Well, I don't know -- have you done that, Ms. Petersen?

MS. PETERSEN: Have I done -- ? I'm sorry.

CHAIR HOLTZMAN: Have you looked at 412 in light of Ellerbrock?

MS. PETERSEN: So we have a UCMJ expert that works with us who has drafted an analysis. That's a little out of my depth, I think, to speak to directly, but I'd be happy to provide it for you.

CHAIR HOLTZMAN: Okay. The other thing I would ask you to provide with all due respect, and out of just desperation for help on this, is that if you have any thoughts about how to redraft these, 513 and 412, we would definitely like to see that from you --

MR. GUILDS: Homework. We're on it.

CHAIR HOLTZMAN: -- and any other thoughts about that, including any revision of

this executive order -- I don't have the number, you probably have cited to it, I am sorry not to remember --

MS. PETERSEN: I have the number.

CHAIR HOLTZMAN: -- that you mentioned that affects the use of prior sexual conduct in a --

MS. PETERSEN: It's Executive Order 13669, and I'm happy to provide --

CHAIR HOLTZMAN: Yes, will you provide any thoughts you have about how that should be either rewritten, or whether it should just be junked?

MS. PETERSEN: And I will say, I believe that the Joint Services Committee has made new recommendations this year, this -- very recently, that eliminate, that would eliminate the -- I don't want to speak to it because I've only heard about it, I haven't seen it -- eliminate the constitutionally required exception at Article 32s.

So that's in the wake of this

previous executive order, which we've been extremely --

MR. STONE: But I presume you think they should eliminate the constitutional requirement whether it's at the Article 32 or a trial, for the whole process, right?

MS. PETERSEN: Altogether, and also eliminate -- and also prohibit 412 evidence from coming in the 32 stage at all.

CHAIR HOLTZMAN: Do you think there needs to be more training for military judges on the issue of prior sexual conduct?

MS. PETERSEN: I think there needs to be more training in the military legal system across the board on prior sexual history, and just the effects of trauma, and also how victims experience sexual assault, and whether or not their behavior has any bearing on that.

Because I think that there are a lot of attitudes which are echoed in society as well, but which are harmful to the ability

for the victim to be served.

And I'd also say that, I know that Special Victims' Counsel is being saved for another day for this panel, but in terms of the ability to protect victims, I think that the Special Victims' Counsel are mostly really amazing, they want to do a good job. But I think that they also could use training on how to be more rigorously advocating.

Because a lot of times, for instance, you see, if you have an investigator who comes in and gets this information from a victim before you get through the process, if you don't have SVCs who understand that those are all potentials that may happen, and aren't there to intercept that, a victim is not going to know, and it's going to be too late.

And I think that we see that as well, where we see cases where it's just that it's not being anticipated, and so at that point it's really too late to do anything about it.

CHAIR HOLTZMAN: Well, and so what that also calls for is possible retraining of military investigators on questioning in that respect.

MS. PETERSEN: I have heard from Special Victims' Counsel and Victims' Legal Counsel issues with both the investigators and the legal offices.

With the legal offices, in terms of coordinating dates for trials, so not always being consulted about scheduling of trials and Article 32s.

But also, and I think that this is something that will probably be worked out, as SVCs become a more consistent presence, but that you need to go through counsel in order to contact the victim, that you can't just go and interview the victim.

We've had, I have heard of instances where investigators have felt that it's their prerogative to go and contact a victim, regardless of whether the SVC is going

to be present.

CHAIR HOLTZMAN: Thank you. Did you want to ask something?

JUDGE JONES: I have one question. With respect to this constitutional right, in this, in 412 the judge is being told, you'd better admit evidence that, were you to exclude it, would violate the constitutional rights of the accused.

Well even if that wasn't there, isn't that correct?

MR. GUILDS: Yes, it is.

JUDGE JONES: So why -- it may be redundant, but do you see some other impact of having that language in there?

MR. GUILDS: I think it scares military judges into being afraid to make a mistake.

I think that you're absolutely right. I think it's a point we've been trying to make today, which is there's no reason for it. You don't need -- no statute needs to

say, unless the Constitution says that it's wrong, right? I mean that's the premise of our system, it's the foundation of our government.

I think that judges are -- I think that there's both a culture where this has been routinely turned over, and you mentioned training, Madam Chair. I would say that from my perspective, fundamentally important that I would like to see more of is trial counsel fighting vigorously to object to 513 and 412 evidence coming in.

I think that there is a perception that it's going to come in, and so as a result of that, there's less of a fight to prevent it from coming in. And that's not because trial counsel are bad attorneys. It's because they choose to fight elsewhere.

And if I could have every trial counsel in this country in the room, the one thing I would tell them is the most important thing for a survivor is not the result. The

most important thing for most survivors is to know that someone is fighting for them.

And that's what I would like trial counsel to recognize, that when they walk into the courtroom, even if they lose, if they vigorously pursue objections with respect to 412 and 513, they have done honor to the survivor.

CHAIR HOLTZMAN: So what you're saying, just to follow up on Judge Jones's point: the constitutional catch-all provision is unnecessary from your point of view because every statute has to, every judge in every decision has to be applying the Constitution.

MR. GUILDS: Correct.

CHAIR HOLTZMAN: But what you're saying is that this invites a kind of new level of scrutiny that without it, wouldn't be there.

And that -- or at least that's your explanation, because you're saying that even with the constitutional catch-all

provision, in the federal courts and in state courts, they're doing the right thing, more or less. Not perfectly, but we don't have the same problems.

So you're attributing the problem of allowing 412 evidence that you don't think is relevant, you're attributing that to the catch-all clause.

MR. GUILDS: Correct. It's a bogeyman. It's --

CHAIR HOLTZMAN: It's a kind of an invitation for mischief, is what you see.

MR. GUILDS: Absolutely.

CHAIR HOLTZMAN: Not that it's necessary --

MR. GUILDS: It is not necessary.

CHAIR HOLTZMAN: -- but it also always has to be taken into account by any judge in making any determination as to what is constitutional.

MR. GUILDS: Right.

JUDGE JONES: But do you agree

that there are constitutional limitations because of the right to a fair trial, that have to be taken into account when looking at privileged or other information?

MR. GUILDS: I certainly think that the Constitution, obviously, is supreme with respect to these issues.

I think that the Constitution with respect to a defendant's rights has very little to say with respect to privilege -- with respect to an attorney-client privilege, with respect to doctor-patient privilege, with respect to the psychotherapy privilege.

I am hard-pressed to find instances where the Constitution would require the disclosure of that information. I don't think Brady requires it, I don't think the confrontation clause requires it, I don't think as a matter of substantive due process or procedural due process that it needs to be turned over.

JUDGE JONES: Non-privileged

information?

MR. GUILDS: Non-privileged information, I mean I'd have to understand exactly what you refer to. I mean certainly information in the hands of the government, right, that's material to the defense, needs to be turned over. We all know that, pursuant to Brady.

I am not suggesting that information like that shouldn't be turned over. I am suggesting that if a privilege is at stake, that the information should not be turned over.

And I think that with respect to 412, we know that the vast majority of that information isn't getting in because it's relevant, it's getting in to smear the victim. And that's a recognition of 412, is that that information isn't relevant to the proceeding.

JUDGE JONES: That again is, we're back to your dispute with how well the judges are making rulings. And you may be correct.

MR. GUILDS: Sure.

JUDGE JONES: It's not how the statute is written, and you do, I think you agree that there are circumstances where some evidence has to go in, or should be permitted in, and to not permit it in because it would cause a victim invasion of the victim's privacy is trumped by the Constitution.

MR. GUILDS: Absolutely.

JUDGE JONES: And I guess that's what I am getting at.

MR. GUILDS: Yes, there are absolutely situations with respect to 412, only here with respect to 412, I certainly see situations where information is going to be relevant and necessary and required to confront the victim at trial.

It seems like alternative source of injury, for example, which isn't identified, if there was someone else involved, that might, if the time frame was close enough, be relevant to that

determination.

So there are certainly situations where I think that evidence would come in. And my suggestion is not that in the 412 context it would be absolute.

In my experience, those are few and far between.

JUDGE JONES: I understand.

CHAIR HOLTZMAN: Just on that point also, judges routinely have to balance the question of admissibility of evidence in terms of prejudicing the trial.

There is no statement in that federal rule of evidence saying, except for what, you know the Constitution requires, because the implication is that the judges will always carry in their head what due process requires. It is not required to be set out.

I think the point you are making is that for some reason, in the military, this provision seems to have open -- it's like an

open sesame, it's opened a door to material that shouldn't have come in.

Not that we're not saying, obviously, the Constitution should be considered.

MR. GUILDS: Correct. I agree, Madam Chair.

CHAIR HOLTZMAN: Well, I think we have exhausted you.

(Laughter.)

CHAIR HOLTZMAN: Thank you for your testimony, and really appreciate your guidance, and we really would welcome with all humility any written assistance you could give us on --

MS. PETERSEN: Thank you very much.

MR. GUILDS: Thank you for the opportunity to appear today.

CHAIR HOLTZMAN: Okay. 3:15, we're probably very late. We're very late.

(Whereupon, the meeting went off

the record at 3:18 p.m. and resumed at 3:24 p.m.)

CHAIR HOLTZMAN: I'm sorry that we're running way behind. It's just that we need a lot of education on this subject, or at least I do.

Our next panel -- and I want to thank the people who are testifying -- will provide us with the perspectives of military trial counsel. We will hear from Lieutenant Colonel Brian Thompson, Commander Jonathan Stephens, Major Rebecca DiMuro, and Major Peter Houtz. I hope I've pronounced the names correctly.

In any case, let's start with Lieutenant Colonel Brian Thompson.

LT COL THOMPSON: Thank you, ma'am.

CHAIR HOLTZMAN: Thank you, sir. Thank you for appearing.

LT COL THOMPSON: Of course, ma'am. Members of the Panel, I'm a veteran of

more than 100 court-martials as senior prosecutor and senior defense counsel. In those two positions, I have reviewed more than 1,000 circumstances related to court-martials, including a large degree of sexual assault cases. For the last two years, I have served as the Air Force's Chief Senior Trial Counsel and also head of our Special Victims Unit. In that capacity, I have managed 18 Air Force Senior Trial Counsel, including all of our SVU.

In addition to that management responsibility, I also maintain a core litigation portfolio of senior officer cases and other high-profile cases. This year I prosecuted more than six O-5 cases for sexual assault, and I have three additional O-5 sex assault cases pending on my docket.

I only mention that to provide background for my opinion, and I should mention my personal opinion, about a number of changes to the system that can improve the

protections accorded victims at little or no adverse impact to the military justice system. Many of these you have heard already in the discussions today, but I will just list them briefly.

First, and potentially the most important, is the rollback of Executive Order 13669. And, again, my personal opinion, that executive order seems to be a misguided and tone-deaf expansion of counsel's ability to delve into, at best, marginally relevant private matters for the effective purpose of embarrassing and intimidating sex assault victims from continuing to cooperate in the prosecution of these offenses.

Second, as Mr. Stone noted earlier, the effective date of the new Article 32 probable cause proceeding is noted for offenses that occur after the 26th of December 2014, essentially establishing a dual process, a separate but unequal process for military and civilian victims of sexual offense, which

should be remedied.

Additionally, as noted by Ms. Jones, the deposition rules, particularly in the Air Force in litigation recently, potentially provides an avenue by which counsel can circumvent the new rules about availability of victims that testify at 32 and subject them to depositions where the protections of MRE 412 and 513 are subject to more inconsistency, given that those deposition officers who preside over those proceedings aren't necessarily trained in sexual assault and privacy and privilege protections.

Additionally, as discussed by your last panel, prior to execution or implementation of Executive Order 13669, the law at least arguably provided that the investigating officers at Article 32 hearings were prohibited from inquiring into matters that would otherwise fall under the protections of MRE 412.

Given the change to the rule, that is no longer the case. By rolling back Executive Order 13669, a change to the system that would further protect the victims of sexual assault, is some clear guidance, either statutory or regulatory, that makes it clear that that is the case -- that an investigating officer, or when the system changes, to provide probable cause officers -- are not allowed to delve into issues falling under 412.

Given the number of questions that occurred from the other Panel members and earlier panels about the way we work the military, I will defer to the rest of my members -- panel to introduce themselves and answer any questions you have on any of those matters.

CHAIR HOLTZMAN: Thank you. Commander Stephens?

CDR STEPHENS: Good morning, Madam Chair. Thank you very much for having me here

as well. I appreciate the opportunity.

CHAIR HOLTZMAN: Good morning.

CDR STEPHENS: This has been so -- this has been so interesting. It seems like it was just this morning that I -- I would like to say that I, again, in the interest of time, I echo many of Colonel Thompson's sentiments, specifically with MRE 412. I, too, do not see any need to allow 412 to be inquired into at the Article 32 proceeding.

In the Navy, it has been over the last -- I have been a JAG for the last 10 years in the Navy. And so since I have been in the Navy I have been a Senior Defense Counsel. I'm now the Senior Trial Counsel in Norfolk, having just arrived from Japan as the Executive Officer of our prosecution shop in Japan.

So I have been doing military justice now for the better part of 10 years, and it has been -- 412 evidence has been available at hearings before. And, in my

opinion, I don't see the relevance for it at that time. Especially given that we are moving to a probable cause determination hearing, it doesn't seem -- I won't say I -- I hate to use the word "never" in the legal context, so I will refrain from doing that. But very rarely can I see a probable cause determination turning on 412 evidence.

That may, in fact, be admissible later. I do believe that there are times when such evidence would be admissible. But I think that if you look at our standard, and the standard of all states and pretty much every other jurisdiction, they all focus on a finding by a judge or a court, and I think that that's because that recognizes the difficulty that this question presents.

And I think in the Navy there was a mention earlier about we do have lawyers that are IOs. We have actually had that for a long time in the Navy and Marine Corps. But the lawyers oftentimes aren't -- there

certainly aren't military judges for the most part, and usually they are very -- I won't say inexperienced; they are just sometimes either second or third tour attorneys, some of whom are SJAs and are doing us a service by taking time out of their normal job to come and do what can be very challenging work in trying to assess a sexual assault case.

So some of them don't have military justice experience at all, and they shouldn't be the ones being forced to make these decisions and perhaps make an incorrect decision that would impact the victim.

And even if you take it one step further, if you consider what the purpose of the 32 is, it's to provide an investigation for a commander. These commanders take this responsibility very diligently, but they do not have any legal training either. And so, again, if every other jurisdiction requires a military judge to do this, it doesn't make sense to me why we have a lawyer who may be

very junior with no military justice experience to inquire into matters to present to a commander who doesn't have any legal experience. Some of them may, actually. Some of them are pretty impressive.

But as far as training that we know of, they are not lawyers by trade, these commanders. And so they, too, wouldn't be equipped pretty much in any other jurisdiction to make a determination under 412. So I don't know why the military allows that to happen, in my opinion.

Other than that, I look forward to answering any questions that you may have.

CHAIR HOLTZMAN: Thank you, Commander.

Major Rebecca DiMuro?

MAJ DiMURO: Yes. Thank you, ma'am.

CHAIR HOLTZMAN: Thank you for coming.

MAJ DiMURO: Absolutely. It has

been my privilege during my time in the military to get to be almost always a practitioner, and I am truly at the practitioner level. I have been on active duty in the JAG Corps for about 10 years, and I came in as an educational delay. And I immediately came in, was a trial counsel. I moved and worked on the appellate court for a while, and then I came back and I was able to be a defense counsel and a senior defense counsel.

I am now again serving at the trial level as something called a special victim prosecutor at Fort Bragg, and that means that, really, these conversations are uniquely interesting to me, because this is my wheelhouse. I deal almost exclusively in sex crimes in a very busy jurisdiction.

I agree with -- and I'm not going to repeat -- the stance on 412. I think that Article 32 is not the proper forum, and the individuals involved in the 32 are not well

equipped, nor is the -- nor are the protections in place for a 412 inquiry to occur at that level.

I have been fortunate enough to sit here today, and I'd like to focus just the last couple of comments I have before questions on things that came up from the panel, in particular 513. I found the discussion of 513 actually to be rather eye-opening to me, and I started really thinking about perhaps there are some provisions and changes that could be made.

To reiterate Professor Fishman's stance, and then as the panel sort of grew off of that, 513 does lack a clear standard. It lacks the standard to trigger obtaining the records, and it lacks the standard to trigger the release of those records.

I agree with Professor Fishman's analysis -- and, warranted, I have not looked into this substantially, but the probable cause determination does seem a sound one. I

agree with what he said. Case law to describe and to define probable cause is very well developed in the criminal justice system overall, in the military system no differently.

If officers of the law are able to search your home, seize evidence based on probable cause, I think we do have a good hold on what that standard is. And that certainly trial counsel, operating off of a discovery request, should also be able to make that sort of determination as they do when assisting a CID agent with obtaining a warrant. As a military -- part-time military magistrate, they work with that probable cause standard.

So certainly by the time you're a trial counsel you should be capable of doing that. That is a good standard to use, and I would support the research and development of that as a work-in on 513.

And I think a secondary standard

for the military judge for release, something more than "out of an abundance of caution," which is kind of how we operate. I do think that our trial judiciary takes the review of these records very seriously, but I would also advise perhaps some standardization for what is an in-camera review.

In practice, over my last nine years, I've seen different applications of what is an in-camera review. Some judges have allowed counsel to all come into the office and review the records and then highlight what they think is appropriate. Some judges absolutely review themselves, but then the release is somewhat arbitrary. And I can see when I was a defense counsel wondering what else might have been in there.

Some kind of standard practice for what is in-camera review, and then a release standard, a threshold that should be hit, something also articulated in the statute, might be a good idea.

The counsel -- or the Panel, excuse me, asked a lot of questions about 513 and the release of records. And just for clarification, 513 does not apply to any level but trial. So, in practice, at a 32 there is not going to be a 513 discussion at all. So there is no movement of those mental health records through that 32 process.

Overall in the field mental health records are being protected better, and I agree that more training is a great idea, especially at the investigative level. But overall 513, more than 412, is that mental health stuff is being protected better. But I do think that the rule has some rework in it, and the implementation and the addition of the SVCs to the program, to military justice as a whole, has helped this develop and we should continue to use them to do so.

And the second thing I'd like to highlight for the Panel members -- and I can certainly provide a copy of this -- it doesn't

appear maybe that you all have it yet -- is just on 1 October 2014 the Army TJAG released a policy memo, 14-09, with regard to the release of information to SVCs, which is very relevant obviously to this 412 and 513 discussion. And that has clearly outlined, without question, at least in the Army's position, which and when information is released to the SVC to assist.

And about 90 percent of my cases in SVC is involved now, if not more. We are encouraging it, and we are being advised to encourage it at the prosecutor level. And I am doing that at Fort Bragg, which is a very busy jurisdiction.

And we are now following this guidance, and the release basically says, you know, things that are -- the charge sheet and anything that the victim has personally made -- the victim's statement, a video, if she has made an interview, so that right at ground level the SVC is aware of what their client

has put out into the world. And then, it is as applicable.

So post 32 -- I know the Panel asked a question, does the SVC or the victim get a copy of the transcript from the 32? They get the summarized or the verbatim version of their client's testimony, and that is part of this policy memo. So it's a continuing obligation of disclosure to maintain that informed state for the SVC, so that they can participate.

And, again, pending any questions from the Panel, I just wanted to address those couple of things that came up during the discussions today.

CHAIR HOLTZMAN: Thank you very much.

And Major Houtz?

MAJ HOUTZ: Major Houtz, ma'am.

CHAIR HOLTZMAN: From the Marine Corps.

MAJ HOUTZ: Madam Chair, thanks

for the invitation to be here. Ladies and gentlemen, thank you.

My name is Major Pete Houtz, and I'm the Regional Trial Counsel for the National Capital Region located in Quantico.

I've been a Judge Advocate for about 14 years, and I've been a litigator in the Marine Corps Judge Advocate community for the majority of that time. I've spent some time outside of that field, but I have always come back to it.

My office handles misconduct in the National Capital Region, which includes the Marine Corps Reserves, all of the Reserves, MARFOREUR Europe, and other command -- various commands. We have a piece of a four-piece pie in the Marine Corps.

We handle all of the misconduct, to include obviously a fair amount of sexual crimes, to include sexual assaults and rapes. I would echo the comments from Colonel Baker. This is the first time I've heard him make

those comments today, and I echo those.

My experience over the last year, year and a half, as Regional Trial Counsel has been that reporting has gone up, that our caseload has gone up -- and I'm talking about sexual assault cases right now -- and that the litigation involving 412 and 513 has gone up. It has increased.

We expect, as prosecutors -- and my prosecutors expect, and I see, in every case where we charge a 120 offense there is going to be litigation over 513 and 412. It is -- very rare is there a case where that doesn't occur.

With regard to 412, there's established procedures under case law and the statute, I echo what my colleagues here said, and I won't repeat all of their comments. We are comfortable litigating 412 right now. We do it a lot, and I think we do it well in the Marine Corps.

The Article 32 investigation

process, which is about to change somewhat in December of 2014 -- again, I echo their comments. My personal opinion, which is based on my experience, is that there is really no reason to litigate 412 at a probable cause hearing. It's -- for all those reasons that have been discussed today in favor of that opinion, I will spare you me repeating, but I do adopt them all.

With regard to 513, I echo Mr. Guilds' comments. That's a visceral area for victims. It's more so than I think 412, in my experience. And if I understand him correctly, the victims that I talk to -- and which is becoming rarer and rarer nowadays because of victims' legal counsel, my direct access as a prosecutor to victims now is attenuated at best.

They care about the process, not necessarily the outcome of the trial. And if they are informed during the process and they are walked through the 513 process and 412

process, and they understand in advance what is going to happen, they can make smart decisions. And that requires us to work closely with the victims' legal counsel and, if we have an opportunity, the victim.

The military judges struggle with the threshold decision to hold an in-camera review. That seems to be -- and we use the Klemick case, a three-part test in that -- for the military judges to determine whether to pull the trigger on that in-camera review.

My experience has been -- what I have listed to today is that it seems like it is a fait accompli that they are going to review in-camera. That has not been my experience. My experience has been that it's about 50/50. They take a look at a Klemick test, and if they think they have enough for that threshold decision they will review the records in-camera.

With that, I will -- I will entertain any questions, ladies and gentlemen.

Thank you.

CHAIR HOLTZMAN: Okay. Maybe we will go from that way to that way. Mr. Stone?

MR. STONE: I guess the question I wanted to ask, Major DiMuro, you're a special victims prosecutor, which means there should be, in theory at least, a special victims counsel for the victim in every one of your cases. Is that right?

MAJ DiMURO: Certainly, any victim is availed of that right. Yes, so --

MR. STONE: Yes. If they want it.

MAJ DiMURO: Yes. Absolutely.

MR. STONE: In the civilian system, in a case where there is a victim's counsel, they have access to the complete docket sheet and every pleading and the right to go to every hearing that the court is holding. But I think I heard you just say you make sure that they are getting the pleadings involving 412 and 513.

I guess my observation and then my

question. My observation is I didn't think that the authorization for special victims counsel in the military said anything about limiting them to specific hearings like 412 and 513, although I hear that judges are doing it, and I hear you telling me that the practice is that those are the pleadings they are getting. Can you explain to me what you think the rationale is, if there is one, for why they are not given complete access to the case like the other counsel in the case?

MAJ DiMURO: Well, sir, if I stated that they are only getting 412 and 513 pleadings, that has certainly been the focus of this panel. And so I was simply saying that they definitely get 412 and 513 pleadings, the SVC.

For example, in a case I'm trying right now, there was a motion for continuance brought by the defense. I immediately had that forwarded on to the SVC, because I believe the victim has a position on whether

or not delay occurs.

We litigate mainly 412 and 513 motions. I'm trying, as I sit here, to think of an example of a motion that would have any relevance to an SVC and the victim that they wouldn't get a copy of the motion. Certainly, they can come to any hearing, and they are always notified whenever we are going to go into session.

Most of the time now SVCs are listed from -- if they're assigned, listed from the EDR on, our electronic docketing request. And they simply maintain a status on correspondence with all the counsel. So they are always tracking the state of the case. They are involved in when we schedule, when we schedule a 39(a). My trial counsel are reaching out, finding out the availability of the victim through the SVC and of the SVC, and that's always added to the discussions.

MR. STONE: And I gather they are not invited to all the 802 hearings.

MAJ DiMURO: The 802 hearings -- in chambers? Sir, is that what you're talking about? That is --

MR. STONE: Your pretrial hearings, right. They can be in chambers or not, but --

MAJ DiMURO: Well, so in our system, actually, that's not the case. The RCM 802 hearing is an in chambers hearing. An Article 39(a) session is a motion, something where you are actually in court. So an 802 session has been, as far as I have seen -- and I have spoken with other SVPs practicing around our jurisdiction -- it does seem to still be judge-dependent as to whether or not the SVC is invited or allowed into that hearing.

We don't typically discuss anything of substance in an 802. It's usually about scheduling the next 39(a) or some issue that may have popped up where timing is no longer working. And the SVC -- if court is

opened, which is at the close of an 802 or the next time we are on the record, the 802 session is summarized on the record.

Anything on the record is open court, and the SVC is certainly told when that hearing is going to take place. And if they want to be there and -- they and their client want to be there, that's an open session and they are certainly allowed to come.

MR. STONE: I guess I was trying to see if I could get you to articulate to me why they are not invited to the closed hearing, since their client is the moving complainant in the case. I mean, I'm even struck by you saying you've got a motion for a continuance, and you forwarded it on.

I guess my reaction is, why are you screening what you are forwarding on? Why aren't they getting every pleading? In a normal civil case in the rest of this country, in those jurisdictions where there is a right for a victim's counsel and they enter a notice

of appearance, every counsel shows a copy of service of every pleading on the victim's counsel.

And you may think that they are getting what they need, but it means you are screening what they get, and they may have a different view than you as to what they need. But they will never get to know it, as we heard from an earlier panel, until after a decision is made.

MAJ DiMURO: Well, I don't know if I agree with the fact that they are never going to get to hear it until after a decision is made. We certainly -- I understand the notion that it perhaps sounds like counsel is screening, and to some degree you are correct.

The government counsel in a criminal system screen all the time. A discovery request is sent to me and my counsel; not the court. I determine that first level of relevant evidence to be turned

over. I mean, as an officer of the court, I have an obligation to maintain the transparency required to my system, and it is first on me.

If someone questions my or my counsel or anyone filling a prosecutorial individual's role, if they question the credibility, the veracity, the candor toward the tribunal of how that officer of the court is fulfilling that role, they can question it to the judge.

So I think the notion that somehow the trial counsel is not in a good position to determine who needs what when is a little misplaced, because I think our system does rely on that.

Now, that said, I think that -- I apologize.

CHAIR HOLTZMAN: Go ahead.

MR. STONE: Go on.

MAJ DiMURO: That said, I think that the SVC role in the Army -- I can't

comment on any other branch, but certainly my experience is in the Army -- is that it has been a work in progress, and it has been a successful work in progress. I mean, it may be a plane we are building in flight, but I think it is going really well.

And I think that certainly my relationships with the SVCs that practice in my jurisdiction is that they have not felt they have been left out of anything. If anything, they have often said, "Okay. Thanks for the notice. Talked to my client. We're good."

They are certainly being forwarded, if not automatically, a lot of the time defense counsel are just continuing -- or government counsel, when we file something, just continuing on the same email chain that we have already started with that EDR to the court that notified everybody of the dates of trial. And motions are dropped on that same email chain.

I rarely find that I don't need to, in a sex assault case, discuss something with the victim anyway, since, as you said, there is certainly a bulk of the movement in that case. But they are not for me necessarily the person I am representing.

In the beginning of your line of questioning, sir, you said something about sort of in a civil case they are the moving party. And for me, my job is to represent the government in taking charges forward. Often, as a good example, I may have multiple victims in a case.

So it is on me to balance the needs of all those people in the prosecution of this one individual. But I take that very seriously, and I make sure, to the extent that I can -- and I believe it's sort of why the program of SVP was created -- that I'm supposed to be more skilled at doing this -- to ensure that everyone is getting all the information they need. And I think the SVC

program is a good one, and we are using it well.

And I haven't had those complaints, that anyone -- I heard the Panel talking about those sorts of things, but I haven't had people come back to me and say, "You know what? You kept something from us." Or, "How could you not have told me?" Because, to be honest, that's not going to go really well in my case. I need to develop that relationship, and I need to keep those people looped in.

And so I haven't experienced that, and I'm not sure if -- you know, I know people alluded to it when they were talking, but I didn't hear any examples, like "In this case, this is what happened."

MR. STONE: Do you do a followup with your victims to see if they stay in the military or are happy with the outcome?

MAJ DiMURO: I usually see my victims again, sir. I do a followup with my

victims usually a couple of days after trial regardless of how it turns out and say, "Why don't you come by the office and see me." I get -- sometimes, unfortunately, my outcomes are not great for them. So I give them a little bit of time, and I always have them come back by.

We have -- in the Army we have enjoyed -- the SVC is just another component of the team that we have already had assisting people. We had victim witness liaisons. We had unit victim advocates. We had brigade SHARPs.

When I take a victim to trial, she or he can, if they avail themselves of it, come with a team of support personnel. And so what I'll do is say, "Hey, look, nobody wants to talk to me right now, because we just finished. And I'm exhausted and you're exhausted. But you know what? Come by my office in a couple of days, and we're just going to talk about what happens now."

And I start that conversation long before we ever get to trial, and that conversation doesn't end when the judge says the case is over. It is going to happen a couple days later. I mean, we have enjoyed a good system, and I have enjoyed being a part of it as it has grown over the last 10 years.

But the resources I have available to me, and I believe my success -- when I was defense and as government now -- is because I use them all. And I think that using the SVC, keeping them looped in, that's an asset. If you use it right, it's a great asset, regardless of whether the case is successful or not.

MR. STONE: Let me just say, first again as an observation, and then I'll ask my question, the observation that I have is based on exactly the distinction you just made, which is that you represent a much bigger body than just the victim. You may represent lots of victims, but, really, you don't. You

represent the military Service, trying to figure out what's best for them. And your entire team represents the military Service.

So if an admission is made about the prior psychiatric history of a victim to your team, it has got to be turned over. So --

MAJ DiMURO: No, sir. That's -- the individuals that I listed don't all -- I represent -- you know, the U.S. Army versus somebody, and I stand there and any counsel who stands with me is representing those interests. But the victim advocates and certainly the SVCs -- I mean, in particular the SVCs, special victim counsel -- I apologize for the acronym.

CHAIR HOLTZMAN: I think we know what that means by now. Thank you.

MAJ DiMURO: They absolutely don't. They represent the kinds of --

MR. STONE: Absolutely. But they are not part of your team. I went down to the

Army training for special victims counsel, and it was made very clear at that training that there is only 80 percent of the time when the special victims counsel agrees with the prosecutor in that case. They thought that was a very high number, but that indicates that there is 20 percent of the time when they are not on your team. And you seem to brush that aside.

And when your special -- when your victim assistants talk to a victim and the victim says something, your assistants are considered part of your team for Brady purposes. So it is turned over.

MAJ DiMURO: Which assistants are you talking about, sir?

MR. STONE: I'm talking about the people on your SHARP teams and the non-legal assistance you give to victims when you tell them to come in and get help.

MAJ DiMURO: Those individuals do not report to me. They don't work for me. I

didn't train them, and I --

MR. STONE: You don't get the reports of the -- it's not passed up to you when a victim comes in to talk to you?

MAJ DiMURO: When they come to talk to me --

MR. STONE: I was under the impression that everything that doesn't go through the special victims counsel is something that you have a Brady obligation to know.

MAJ DiMURO: I am not privy to those conversations. So if -- I don't know when a victim goes and talks to their unit victim advocate. I'm not made aware of that. If a restricted report is done, they could talk to their victim advocate every day.

MR. STONE: No. I understand that -- I understand the restricted report context. But I guess my point is, to take the example you gave at the beginning, you know, you keep going back to these examples, and none of them

seem to make sense to me. If you get a discovery request, it may be true that it's up to you to figure out what you are going to have to respond to that discovery request.

But that request, a copy of that request, needs to go to the victim's counsel at the same time you get it, because in all likelihood the discovery is into what may well be the prior sexual history of the victim. And the victim's legal counsel needs to be able to say to the victim right then and there, "I want you to know they are asking about your prior history. You and I should talk about this, because if there is a lot in there that you think is going to come out and, you know, you don't want it to come out, you need to tell me now, so that I can talk to the prosecutor and tell her. If there's things you have to turn over, she is not going to go forward with the case."

I say this because at that training, I want you to know that the three

victims who came and spoke to us at that training, none of them was happy and planned to make the military a future career. Every one of them had an experience that leads them to believe, regardless of the outcome of the case -- and it was good in the majority of cases -- but they can't stay in the military as a result of that prosecution.

So although you may see what you are doing as necessary for the military, and I may, too, the victim has a different interest involved, and that is really why they are not coming forward.

CHAIR HOLTZMAN: We are going to have to compress --

MR. STONE: Sure.

CHAIR HOLTZMAN: -- I'm sorry -- because we've got another panel after you. So, Major, if you want to respond to that, please feel free.

MAJ DiMURO: Ma'am, what I would say -- my response to that would be that at

the beginning, at the onset when I talked about the materials that I disclose, that I want to disclose, a discovery request for 412 is exactly the sort of thing that we would disclose. I would immediately send that.

I don't know what 412 evidence is out there. I don't know what prior issues are out there. I used to be able to go to the victim directly. Now I go through the SVC to go to the victim. So I don't disagree with you at all, sir. That's my point.

In order to figure out how to try my case, I have to develop a relationship with these individuals. I call them a team that's working for the victim. They are not working for me; they're working for the victim. I use that terminology, because I used it with my counsel, because I want to encourage a positive relationship with those individuals.

I want us to think not of the SVC as a barrier to get access to the victim, but as someone who is significant in the trying of

this case and we should look at it as another tool, because I think that's a positive way to look at it. Not as someone getting in between me and my victim, as a lot of I think practitioners felt when the implementation of the SVC program happened, that somehow it stood in the way of the rapport they used to be able to build. I don't think that. I think all of these people are here to help this individual that I may sometimes be dragging through a very long process. So I label that to be a positive thing.

MR. STONE: Well, I just --

CHAIR HOLTZMAN: I just want to go through -- I'm sorry, Mr. Stone. We have to give everybody a chance --

MR. STONE: Sure.

CHAIR HOLTZMAN: -- and get to the next panel. Admiral Tracey?

VADM(R) TRACEY: Major, because you've got the current role, I'll ask you, many of the advocates that you mentioned on

the victim's side are positions that have been created since you became a JAG.

MAJ DiMURO: Yes, ma'am.

VADM(R) TRACEY: So what sort of policies are out there -- are there policies across all of the Services on how you, as a trial counsel, should be incorporating the special victim counsel, et cetera, into your practices? And what kind of training did you get after these positions were arranged, so that you would have some opportunity to think through what might be different in the way you conduct your business?

MAJ DiMURO: Yes, ma'am. So I can only speak for the Army, and that is my own -- I just am not sure, and I know everyone has a slightly different implementation. But for us, around November, late October/November, it came out that we are going to start this program and it is going to get stood up and be fully in effect.

And as -- like I said, there's 23

of us in the country, special victim prosecutors, and the idea is that we are out at units and covering down on area jurisdictions to provide a more enhanced level of trial practice experience.

So I have been fortunate in mine. So for me -- and I can really only speak about how my higher level, my trial counsel assistance program, TCAP, sort of trained out to the SVPs immediately, and that was immediate. I mean, there was immediate guidance pushed down that this program is a priority, and it is significant, and we, as sort of the keepers of sexual assault prosecutions and the individuals who are supposed to help jurisdictions do this better, need to find a way to work this.

But, like I said, it has been a bit of a plane built in flight, in that I can't say every jurisdiction has had the same experience. At 18th Airborne Corps in Fort Bragg where I am, we were very fortunate. We

got good individuals appointed as SVCs. They received some immediate crash course training, and there was a handbook, and they passed that handbook, you know, over and they said, "Look at this. Read what we think we are supposed to be doing."

And I worked hand in hand with sort of the Chief of Legal Assistance and the SVCs. Even though we are not by any means answering to the same call, I work to understand what they did, and I pushed that back out to my counsel. But I know that since that -- that was sort of the initial rev up. Since then, there has been at least I know of three training sessions in the Army.

I believe maybe all were conducted either at Fort Belvoir, this area, or at the JAG school, to get SVCs read up and trained up. And I have seen an enhanced skill quality coming out, and we have a better understanding of how they are supposed to be used.

But it is -- I mean, literally the

program is in its infancy, but I know that it is a priority and the Army has certainly been pushing more training toward it than I have seen probably in any other area right now.

VADM(R) TRACEY: But focused principally on the SVC rather than training for trial counsel as to how to use the SVC --

MAJ DiMURO: Yes. So I also participate -- in my job as an SVP, I participate in our -- we have something called a new prosecutor's course. It's quarterly held, and I get called in to teach at that. And I can say that in the last four iterations the SVC program has been -- so since the creation of it has been mentioned with increased emphasis, until the last session I just participated in, when an entire block of instruction held by a former SVC and myself actually was done.

So this is pushed out to all new trial counsel, and they are all supposed to go through this course within the first three

months, ideally after maybe they have done a couple of cases, so they have some basis. So it has now been built into, as a block of instruction, just like anything else, like preferral is a block of instruction, or Article 32s.

VADM(R) TRACEY: Thank you.

CHAIR HOLTZMAN: Judge Jones? Mr. Taylor?

MR. TAYLOR: First of all, thank you all for your testimony, and thank you for your service. We all appreciate it very much. In order to take the heat off of Major DiMuro for a second, I do want to raise a question for the rest of you that she raised, and that is the question of what standard you observe judges applying in this question involving 513 issues.

One reason I asked Professor Fishman and Ms. Powers the question that I did was because it became pretty clear to me in reading through our own rules that there is,

at least to my mind, not a clear standard. So what has been your experience in terms of what kind of standards judges are using?

LT COL THOMPSON: I'll start with that.

MR. TAYLOR: Please.

LT COL THOMPSON: Clearly, under the 513(b)(A) and the constitutionally required exception for release of this information, judges apply a different standard to what that language means. Probably the best way to do it in terms of what the discussion was earlier, what the standard of -- what standard should be applied, is probably elimination of the constitutionally required exception, and require the defense to show, by clear, convincing evidence, which is another standard that military lawyers, and in fact all judges are used to applying in a variety of cases, before the judge will conduct an in-camera review.

As it is now, most judges look to

the constitutionally required exception language, and apply to it a relevance and discovery purposes for purpose of confrontation, the ability to impeach a witness at trial, as opposed to a constitutional standard for exculpatory information relevant to a fair trial, obviously a lesser standard.

The judges, as I think the Marine Corps counsel has stated, about half the judges apply a heightened standard. About half the judges don't. It just depends on them. But there is no guidance other than some case law that maybe the Marine Corps Court of Appeals that I think all of our services use at this point to require the defense to meet a higher burden.

There is no other regulatory or statutory guidance which provides the judges any explanation of what they should be applying it to or what "constitutionally required" means.

MR. TAYLOR: Would anyone else like to comment on that?

CDR STEPHENS: Sir, I would just like to say that I agree that the standards are kind of -- they are not standard, for lack of a better term. So, and I think certainly some -- and I have been here all day and had an opportunity to listen to some of the suggestions, I think it would be great to have a standard put into the rule.

I would like to say that, one, I think that the military judges, you know, put a lot into these decisions when they are making them. You know, they do review them, in my experience. It's not a quid pro quo. Once they are turned over, they just immediately turn them over. I think that they also recognize the importance of protecting these records when they should be protected.

I said I started doing defense 10 years ago. Back then, as a defense counsel, I remember being able to just ask for the

records and I just got them. There was no -- I just got them through discovery. So I have no doubt, sir, that we have some room to improve, but I would like to say that over the last 10 years we have improved.

And I think that through forums like this and panels like this we can -- certainly can identify ways to move forward. But certainly now they are not freely turned over, as -- there was some discussion, it seemed to me, that records are freely turned over. I can't speak for the other Services. I would be surprised just for the simple reason in the Navy, at our medical centers, they all have legal shops.

There are certain provisions in BUMED and SECNAV Instructions that allow for the disclosure to law enforcement of certain records. But those are, in my experience when I have tried to get them, very, very closely guarded by the legal teams that are in place there. And so there is a law enforcement-

specific investigator exception, and then post-referral there is an exception to ensure that military judges are involved.

So I do think that we -- you know, we probably could improve a bit in the standard of help. But I think that it is -- it has improved tremendously since I have been there.

MR. TAYLOR: One other suggestion that came from a previous panel member had to do with the extent to which, as trial counsel, people really fight hard when these issues come up about 412 and 513. So I wondered if you would care to comment about what policies you have, formally or informally, or how your training works when it comes to this particular issue. Anyone can answer that.

CDR STEPHENS: I'll start. I think that the most fundamental things that we spoke of is, you know, absent certain instances where it's just obviously potentially relevant, we have every interest

in making sure that we are working with the victim to move towards a resolution.

I mean, if we brought the case, as the government, to bear, we believe there is probable cause that a crime was committed. The victim is our star witness most of the time to that end.

So it doesn't do us any good to not advocate those where we need to on her behalf, typically her, but whoever the victim's behalf. So I do think that as far as training, I don't know that there's any more training, perhaps, you know, in certain places, but I would imagine that all of us would encourage the counsel that work for us to, you know, advocate the law as it stands, which is we should not allow -- these rules are here for a purpose.

You know, you could argue that 412 shouldn't have even been necessary; simple relevancy rules should have been able to handle that. Obviously, that wasn't the case,

which is why we have 412. So I think it's incumbent upon us in the right scenarios to ensure that 412 is enforced.

I don't know that we need any -- and that is for you guys to decide, if we need any new training in that. But I think that certainly it's something that we take seriously, understanding that there are times where our interest will diverge from the victim, I think, and there may be times when in the small sliver where -- and that's why these VLC -- we call them VLC, to be difficult, the victim's legal counsel in the Navy, I think that's a huge addition to the program, is that, you know, from a prosecutor standpoint, they could see where the judge is going and say, you know, "I have to pick my battles, you know, at some point, so that, you know, the judge isn't going to be against me," whereas the victim's counsel can, you know, go the full way.

And even -- and I would say that

disparity is very infrequent, but it does exist. I think --

MR. TAYLOR: Would any other panel member like to comment on that?

MAJ DiMURO: I entirely agree. I think that the use of the SVC program -- and this is one of those moments where I would say that even if our interests are not aligned, we are a team in representing that person who is, without a doubt, the most significant part of the government's case, even if not the government's only represented party.

So I often find in practice that I can work with the SVC. And as the panel prior to us who were talking about victims' interests and what matters the most is that sense that they were represented through the process and that they were informed through the process.

And a lot of times counsel in court, just because of the nature of being in court, don't have the ability to step out and

find out how the victim is doing or explain what had occurred. And so the use of the SVC to be there with them during the hearing, to explain to them what is happening, even when I am in front of the bar, my counsel and I are in front of the bar and we can't do that.

And then to make some arguments that need to be made for the victim's sake, to understand, the same way that the accused can have impassioned arguments made on his or her behalf. I think that the ability now for the SVC to do that for the victim helps to keep everyone sort of in the right position to move what are often sort of glacially moving cases forward. I mean, they -- with the expansion of more motions practice in our systems overall, which I think all of the Services have been experiencing, these cases slow down even more than they used to, because these motions take time to resolve.

And so people have to -- it's a marathon, not a sprint, is what I always say

to all my witnesses, really, and certainly to the victims. So that the SVC's ability to help make those other arguments sort of helps to keep the victim on board with the process, which is sometimes very annoying, I'm sure.

MR. TAYLOR: Major Houtz?

MAJ HOUTZ: Yes, sir. I understood the question a bit differently. It went to a more zealous advocacy is what I heard earlier. If they are not zealously advocating on behalf of the government, which 99.9 percent of the time parallels the victim's interest, it conceivably could not -- most of the time it does -- then they are not doing their job. And if they're not doing their job, we have a remedy for that in the Marine Corps. So they zealously advocate on behalf of the government, and in doing so they are zealously advocating on behalf of the victims.

On 412 and 513, at the end of the day, it is the confused case law that causes

the problems. It's not an overly complex area. Everybody understands what they have to work with, what they have to work with, and they know how to zealously advocate and put forth the government's position. It is just -- for all the reasons discussed today, it becomes complex in applying those rules. We know what the rules are. We know what our job is.

And it -- until it becomes clearer, which is, as I understand it, your job to help the government figure out how to do that, we can -- it is going to be somewhat confused. But zealous advocacy is part of the basic job of a judge advocate in the Marine Corps.

Thank you.

CHAIR HOLTZMAN: Thank you. Well, that was one of the questions I was going to ask, so thank you for asking it. I just want to go back to 412 and 513. I know some of you -- all of you I think have suggested that we

need better standards in 513, is that correct? I'm not hearing any dissent to that.

Now, on 412, what are you recommending that we do about 412? So we heard some specific recommendations. For example, get rid of the catch-all clause, which I don't mean to put words in anyone's mouth, but seems to be an invitation to what I would call mischief, at least in the military justice system.

But are there any other -- how do you feel about that suggestion? Or do you have any other suggestions that you would make about 412?

MAJ HOUTZ: In a 32 stage or in the --

CHAIR HOLTZMAN: Any point in the process, up to you.

LT COL THOMPSON: Madam Chairman, I think we'd all agree that --

CHAIR HOLTZMAN: Aside from -- I understand about the executive order. You've

dealt with that. I'm talking about other issues with regard -- does the statute need to be rewritten? Does it need to be -- and, if so, how? Is there anything else we need to do about it? Do we need to train judges? Just what is your view?

LT COL THOMPSON: I don't want to get off on a tangent on this issue, but as I did mention earlier, when the rules change come 26 December of this year, there will be a dual system for how victims of sexual assault will be treated at probable cause Article 32 hearings going forward.

Civilian witnesses, like they are now, do not have to attend, or under certain -- ruled unavailable. Military victims of sexual assault whose offense occurred prior to December 26, 2013, will still be subject to the requirement to attend that hearing and be subject to 412 questioning by, in our case, the Air Force using military judges. But, in the other Services, it could be just the JAG

that is not trained on these issues.

Additionally, I think going forward you will see, to the extent that military witnesses are not subject to questioning because they are ruled unavailable to Article 32, you will see defense counsels -- I think they should press the limits -- use the deposition process under Article 49 and RCM 706 to argue that they should be entitled to interview those witnesses through deposition prior to trial.

And at a deposition, since the rules aren't as clear as they even are at an Article 32 probable cause hearing, the chance for counsel to delve into private sexual matters that would otherwise fall under MRE 412, are heightened. And in those situations, more often than not, in the Air Force where you have military judges as IOs at 32s, you are likely to have a captain or a major at the base level who doesn't have the kind of experience who can rule properly on that.

So while the language of 412, like I think counsel has talked about today, isn't as problematic as the application of 412s in different settings, I think this panel could look at the application in 412 potentially in depositions as a way to further shield victims of sexual assault from additional prying into those matters.

CHAIR HOLTZMAN: Anybody else have any comment? Okay. Judge Jones?

JUDGE JONES: Perhaps I missed -- I must have misheard, but I thought someone said that even though the statute was not yet in effect that the practice had already changed in 32s. Or am I -- I misheard?

MAJ DiMURO: The witness -- the victims aren't attending -- military victims aren't attending?

JUDGE JONES: Yes.

MAJ DiMURO: They're attending, ma'am.

JUDGE JONES: Okay.

MAJ DiMURO: You know, they are represented. The SVC will be present, if they have one, and things like that.

JUDGE JONES: All right. So, basically, it's not going to start -- the new statute will not go into effect until the date Congress gave it.

MAJ DiMURO: Yes, ma'am.

LT COL THOMPSON: And I think the problem is I think just -- I think you heard earlier that just a couple of days ago, I think it was last Friday, the new rules, the new executive order proposal asked that how that is all going to happen went out for public comment.

And also interesting in that, I think Joint Service Commission has noted the problems of using 412 in these where I have noted that they are going to eliminate the constitutionally required section, both the 412 and 513, in Article 32s going forward.

CHAIR HOLTZMAN: Okay. Well, I'm

sure there are loads more questions, but we have one more panel and, as Robert Frost said, many miles to go before we sleep. So thanks so much for your informative testimony, and we appreciate your time.

Our next panel will be Perspectives of Military Defense Counsel.

Good afternoon, everyone. Thank you for attending. And this is Perspectives of Military Defense Counsel Panel. We will hear from Commander Steve Reyes, Major Andrea Hall, Major Shari Shugart, and Major Matthew Powers.

We'll start with Commander Reyes.

CDR REYES: Good evening, ma'am.

CHAIR HOLTZMAN: Thank you for coming.

CDR REYES: It's a pleasure to be here.

CHAIR HOLTZMAN: Thank you very much.

CDR REYES: My name is Commander

Steve Reyes, and I am currently the Director of the Defense Counsel Assistance Program. As the Director, my job is basically just to provide consultation and training of reachback services for defense counsels throughout the entire Navy area of responsibility.

This position requires me to actually go to the field and have observations and awareness of the cases that are going on. As we all are primarily aware of, those are predominantly sexual assault, 120-type cases. And I think I can provide the perspective of what is going on currently in the field of practice here in the Navy.

For the sake of time, if I may, ma'am, if I could just have some -- respond to some points that were made before in the past, and then open up to your questions, too, as well. I do have some prepared comments, but I'll skip those.

CHAIR HOLTZMAN: Well, we'll just receive the comments as part of the record,

and they'll be posted on the website.

CDR REYES: Yes, ma'am.

CHAIR HOLTZMAN: -- your written comments. Thank you.

CDR REYES: Thank you, ma'am. A couple of things that I wanted to address was particularly -- one point that they had mentioned with respect to the constitutional exception under 412 and 513, particularly the notion of completely abrogating it from the rules, what I find -- I find to be particularly interesting, the comment that the -- you know, the constitutional exception was essentially an avenue for mischief.

CHAIR HOLTZMAN: I said that.

CDR REYES: Yes, ma'am. Yes, ma'am.

(Laughter)

And I think particularly -- and not meaning to call you out, ma'am, but --

(Laughter)

I think what I find particularly

troubling, if I may, about that comment is primarily that's the notion of -- that we have military officers who are trained advocates, trained lawyers, who essentially are sworn to defend the Constitution. And all of a sudden, if you put into black and white a provision that we all know, like Mrs. Jones has said, is going to apply regardless, this gives them an open invitation for mischief.

But I think the most important thing to realize is that in 513, and in 412, the constitutional exception was prescribed by the President of the United States. He specifically intentionally put that in there.

If we had decided to take away that provision, that language -- constitutional protection -- from those rules, what message are we sending with respect to the fairness of the military justice system? That all of a sudden we decided to get rid of that provision, get rid of the phrase "constitutionally required," so what message

exactly are we sending?

I don't think -- in my honest opinion, I don't think it's the right message. You know, 70 years ago, Professor Morgan, who was a professor in Mr. Stone's alma mater, Harvard Law School, chaired a committee regarding the military UCMJ, and the issue there was the protection of the defendant's rights and his constitutional protections.

I think if you go with the step of actually abrogating a specific requirement that the President placed in there in two specific rules, that we're sending the inappropriate message, especially, as Mrs. Jones says, it is going to apply.

The second point I wanted to talk about was with trial counsels in the prior hearing, their assertion of perhaps getting rid of Article 412 [sic] in Article 32 hearings. That reminded me of a hearing I was in a couple of weeks ago in which trial counsel was objecting to a piece of evidence

because he said it wasn't relevant.

His argument was, "Your Honor, it's only relevant for defense counsel. So, therefore, it shouldn't come in." It wasn't relevant for trial counsel, but it was only relevant for defense counsel.

And so the reason why I bring up that story is primarily to point out that what we are talking here is that if we preclude 412 evidence, and if it is constitutionally required, we may be precluding a piece of information that may go against 100 percent, right, the government's case. May completely and utterly undermine the government's case in chief. And we are precluding that from the Article 32, and, by implication, we are precluding that from the convening authority's consideration.

Now, I also want to add that the Article 32 isn't a "probable cause determination." I mean, it is probably to the advantage for the government to label it as a

probable cause determination, but if you actually take a look at the statute as written it is not just probable cause, but it is also to determine appropriate disposition.

And so appropriate disposition, if you look at it, is, what is the proper forum? Should we go to a special court-martial or general court-martial? In addition, should the charges even be referred? So the question that remains is, should the charges even be referred?

And in making that determination, the convening authority has to consider all relevant evidence. So if we have 412 evidence that completely undermines and dispels the government's case in chief or undermines the complaining witness' testimony, right, we are precluding that from the Article 32? How much credit would we have in the convening authority's determination?

We are essentially saying we are allowing cases that may not provide probable

cause determination, allowing cases that would probably not survive a directed verdict motion, to go forward because we want to preclude that evidence, 412 evidence, at an Article 32 hearing.

Now, the last point, a couple of points I wanted to make before I eat up all their time here is in current practice I believe that 412 is -- provides robust protection for the complaining witness or for the alleged victim. And I think the difference here that we have, as opposed to before in the past, is we now have the introduction of the zealous advocate. Right?

CHAIR HOLTZMAN: Of what? I'm sorry.

CDR REYES: A zealous advocate. Yes, ma'am. This is the special victims counsel, or the VLC as we call them in the Navy, and what we find in the Navy is that VLC or that SVC is in every 412/513 hearing. Right? That VLC or that SVC is someone who is

actually making argument, both law and fact, for the complaining witness.

Now, that is something that is new that we hadn't seen before in the past. Once you introduce an attorney, a lawyer, who has a responsibility to provide zealous advocacy for the client into the equation, right, you are going to provide protections for that person.

One point I wanted to add with respect to, does the complaining witness have an avenue to challenge any type of 412 or 513 evidence? We all know that there was some mention with respect to interlocutory appeals and whether or not that's effective or not. I invite the members of this panel to take note of the fact that L.R.M. v. Kastenberg, right, a case that we all know very well, was an extraordinary writ appeal now -- done by the victim. Now it can be an extraordinary writ appeal done by victim counsel.

So there are occasions in which

the issues merit actions or reactions by the Court of Appeals of the Armed Forces or the service courts, and where Service courts will take it, right, and ensure the protections of the victims are being met.

Your Honor, without having to take up the rest of my colleagues' time, I will be subject to any of your questions.

Thank you.

CHAIR HOLTZMAN: Thank you very much.

MAJ HALL: Thank you. Good afternoon.

CHAIR HOLTZMAN: Major Hall?

MAJ HALL: Members of the Panel, I'm Major Andrea Hall, and I am currently the Senior Defense Counsel stationed at Joint Base Lewis-McChord. In my duties there -- I have been there for just over two years, and I supervise five area defense counsel and five defense paralegals located in Washington, Montana, and Alaska.

During the time as a senior defense counsel, I have represented approximately 45 airmen at various stages of the court-martial process, with 39 of them -- or, I'm sorry, 33 of them having to do with either sexual assault or rape allegations. Prior to that, I spent two years as an area defense counsel at Langley Air Force Base, Virginia, and then prior to that I spent four years in two base legal offices where I prosecuted approximately 20 cases.

I just want to state that my opinions here today are solely my opinions. They do not represent the opinion of the Judge Advocate General of the Air Force or the Air Force Trial Defense Division.

I would like to comment, without trying to reiterate what you have already been told, but with respect to MRE 412 at Article 32 investigations, I think that it has been more clear with the recent changes to RCM 405, as to what does and does not apply to the

Article 32 proceeding. However, there is still some disparity in whether or not the Constitution-required exception is applicable to these Article 32 investigations, at least in the Air Force.

In the Air Force, it is largely dependent upon who your investigating officer is, and that determines whether or not that Constitution-required exception applies at the Article 32 investigation. And, in my experience, when you have a military judge acting as the investigating officer, that exception is typically applied at the Article 32 proceeding.

And it just -- one way or another, it would be nice to have a clear answer on the way ahead as to whether or not the Constitution-required should apply or should not apply at Article 32 investigations.

And I would like to piggyback on Commander Reyes. That -- the Article 32, the process is also to make the recommendations as

to how the case should proceed. And I think that the MRE 412 evidence, especially some Constitution-required evidence, is definitely relevant to that consideration.

One thing I heard earlier today is that military judges are rendering MRE 513 meaningless, and that testimony -- or that military judges are automatically conducting in-camera reviews and then releasing large amounts of these records.

I can tell you that that has not been my experience, and that we do have to come -- have to meet certain factors to even get an in-camera review. I know that you've heard the Klemick case mentioned. It involves a Navy case. The Air Force judges do seem to be following that standard.

So we do have hurdles that we have to overcome before we can even get an in-camera review. And there are often times where either we don't get there and there is no in-camera review, or there is an in-camera

review and no records are released.

So I just would like to say that I don't think that MRE 513 has been rendered meaningless.

And, finally, I would like to address the comments earlier advocating for eliminating 513 totally or else making it an absolute privilege. In this current environment, as a defense counsel, it feels like every allegation is being referred to trial regardless of whether an investigating officer recommends that it be referred.

And even if the investigating officer is a military judge and recommends that it not be referred, it seems that it is getting referred. And, in my view, if we have records where alleged victims are talking about the very thing before which the court is there to decide, in my view, I should have access to those in order to adequately confront the witnesses against my client, especially if a military judge has deemed

those things to be relevant.

So, absent any questions, I don't have any further initial comments.

Thank you.

CHAIR HOLTZMAN: Thank you very much, Major.

And now we have Major Shugart?

MAJ SHUGART: Hi, ma'am.

CHAIR HOLTZMAN: Thank you.

MAJ SHUGART: Thank you for allowing me the opportunity to speak here, again, with my own opinions, but on behalf of the United States Army Trial Defense Service.

I am a senior defense counsel. I am currently stationed in Hawaii, and I act there as the senior defense counsel for all Service members accused of any misconduct that may result in any disposition, including court-martial.

As a military justice practitioner, I have served both as a trial counsel and a defense counsel, and I also

supervise defense counsel. I have also served as a professor in the Criminal Law Department at the Judge Advocate General's Legal Center and School, and I have also served with the Office of the Judge Advocate General in the Criminal Law Division.

As a senior defense counsel, I represent soldiers, and I also supervise defense counsel who represent soldiers. The majority of our cases now, in our current environment, usually have at least one Article 120 offense associated with the charges. And they are generally contested courts-martial, either before a military judge or a panel.

And currently I am defending or am supervising the defense of over 20 Service members who are currently somewhere in the process associated with a courts-martial. I would again like to also, with respect to 412, adopt some of the comments that the members that came before me have mentioned. And it is my opinion that 412 is working in both the

courts-martial process and at the 32, but I do believe that we do need some clarification at the 32 as to how 412 will work.

And what I mean by that is, with respect to the constitutional exception, I do think, again, as the prior individuals have mentioned, that it really requires a consideration of that evidence for purposes of the convening authority. The purpose of the 32, as was mentioned, is for not only a probable cause hearing, but is for the convening authority to make a determination.

And as part of this process, as part of this due process, it is very important that he have a complete picture of that case prior to referring the case to trial, or for any other disposition. With respect to MRE 513 -- what I wanted to add on 412, with respect to how it is conducted at a court-martial, the defense is held to a very high standard in applying 412.

These motions, both the 412 and

513, are actively litigated by both parties in courts-martial. And, in practice, the exceptions under 412, the first two exceptions are straightforward and strictly applied. We are finding, in military courts-martial in the Army, that we are held to that standard, that we demonstrate that the evidence is material, relevant, and favorable to the defense, or vital.

And it is my opinion that those military judges that are seeing this 412 evidence are making rulings that are reasonable based upon that exception.

With respect to 513, I do have concerns not only in the process of obtaining those records, but reviewing the evidence for use in a court-martial. Again, 513 is actively litigated in the court-martial process in the Army by both parties. Potential evidence under 513 is most often used to address not only credibility but the perception of the -- or the ability to

perceive of the witness. And that evidence may be very critical to the fact finder.

But what I grow concerned about, both for the accused and for the victim, is how easily that evidence is obtained. As was highlighted by the government in their previous hearing, there is a law enforcement exception under 513 that allows the CID to make that request through the command judge advocate's office at the medical provider that allows them, using that exception, to have those records turned over both for the victim and for the accused.

And that is concerning, because prior to this, being in this role, I did not appreciate how easy it was to have those records turned over. Very frequently in the 513 process those records are turned over to the government, or that request is made post-referral for those documents. They have those documents when we make that 513 motion, and they are able to hand them over to the judge

for an in-camera review.

With respect to the review, I would like to see clarification on the way that these records are reviewed. The in-camera review happens differently across jurisdictions. Often judges will review those records in-camera by themselves.

My concern is that I think that the parties are in the best position to determine the relevance of the material in that -- in those records upon a showing that they may be material to the case. What we do find in some jurisdictions is they are holding a 39(a) session where they have those records available, marked as an appellate exhibit, for both the government and defense to review, and they make arguments with respect to the relevancy of those matters in the documents.

And the reason I think that's important is because it's not always issues about your -- about credibility that may be at issue. For example, the ability to perceive.

I have had cases where the complaining witness has been on a prescription medication, either prior to or during or after the alleged event. And that information is absolutely critical, understanding whether or not they were on that medication at the time that they perceived that event, and whether or not that affected that event.

And so there are specific instances where we need that information. So I would like to see clarification on how we are able to review those matters in a court-martial process. And I think that would be very -- very helpful, but I do not advocate in any way that we eliminate 513.

And subject to any questions, thank you very much, again, for your time.

CHAIR HOLTZMAN: Thank you.

Major Powers?

MAJ POWERS: Thank you, ma'am. Madam Chair, ladies and gentlemen, good evening. Thank you. I appreciate the

opportunity to be here this evening.

My name is Matthew Powers. I am the Senior Defense Counsel for the National Capital Region. My primary practice is down in Quantico, Virginia, just about 30 miles south of here.

I have been in the Marine Corps for almost 14 years, but only the last six years, since 2008, have I been a lawyer. My first duty station was down in North Carolina where I was a trial counsel for about two years. I got a very rapid turnover; three days and a handshake and I was given 43 cases and I was told, "Go forth and prosecute."

And I did, and during that time period I was able to get a lot of really good training. So I have seen, really, a sea change to the way we approach military justice, specifically with respect to sexual assault cases.

I have reviewed some of the past transcripts from prior hearings, and I see a

lot of familiar names of individuals that I have had courses from over the last six years. From that period, I moved -- still down in North Carolina -- I was a Special Assistant U.S. Attorney for two years down in the Eastern District of North Carolina.

Between those two billets, I have tried about -- well, I have been the prosecutor on I'd say at least 30 sex assault cases. Of those, three or four were in the Eastern District of North Carolina.

These cases -- these cases where we've got the individual, the victim, you've got -- you've got a real person who has been affected, either emotionally or physically, by this. I have seen that and I have worked with victims as a prosecutor extensively. And I believe that has affected very much the way I approach my defense practice. It has shaped the way I approach these cases.

When I read about -- in the read-ahead materials that were provided, when I

read about the prior -- before 412 existed, the way that cases were approached, I truly find it shocking and also appalling to the point where I don't see -- to me, as a defense attorney, putting on the history, the sexual history, the sexual past of a victim is completely unnecessary. It is not something that I see in my practice at all today.

I supervise six counsel here in the National Capital Region. At this point, between prosecution and defense, I have touched over 50 sex assault cases. I have never seen anything like what is described in these examples we have before us.

What I want to highlight about 412 is that this notion that we have repeated violations of MRE 412, it's just not true. It's just not my experience. I just haven't seen it.

What I do see is cases where I have litigated MRE 412 issues as a defense attorney. I would say that in about half of

the cases that I have litigated as a defense attorney, about half of them there have been 412 issues. The other half, they just haven't existed and they haven't come up.

With respect to 513, that's only been in about a third of the cases that I have litigated as a defense attorney. Two-thirds of the cases it's not even an issue. As everyone has described, the standard that we use is the Klemick standard. That is the motion we file; that is the request we make to the military judge.

I have had military judges tell me, no, they are not going to review the documents in-camera. I have had one instance where they have, and I wanted to share that with you because I think it's important. The military judge in that case reviewed some counselor records with the complaining witness in that case, with the alleged victim.

And about 20 pages of those records were turned over to defense, to me,

pretrial. They were heavily redacted, but I had a general idea of what I was looking at. Halfway through my cross-examination of that witness, of the complaining witness, the judge stopped and gave me another 63 pages of records. And he did that because it was Brady material. He had Brady material. He saw what was in the records was directly contradictory to what she was saying on the stand.

My client would have gone to prison, I believe this, but for those records and it was direct, 180-degree opposite. That's why we have to have these records. We have to have them in certain cases. Not in all of them. And I'm not advocating for it, and I don't believe any of my co-counsel up here would be advocating for that. I don't think that's the right answer.

But the test that is in place, in my experience, has worked. And it has worked as well for the 412 cases.

CHAIR HOLTZMAN: Major, could I

ask you to wrap up, please?

MAJ POWERS: Yes, ma'am. I am --

CHAIR HOLTZMAN: Because we are really running out of time.

MAJ POWERS: The last thing I wanted to say is just, subject to your questions, I appreciate your time, ma'am. That's all I have.

CHAIR HOLTZMAN: Thank you very much.

I'm going to call on Judge Jones first, because of the time urgencies. Judge Jones, do you have any questions?

JUDGE JONES: No.

CHAIR HOLTZMAN: Admiral Tracey?

VADM(R) TRACEY: I don't have any questions. Thank you.

CHAIR HOLTZMAN: Mr. Taylor?

MR. TAYLOR: I'm going to ask one brief question, and then anyone can respond to it. We heard testimony earlier today that in some cases all the defense had to say in order

to get the issue of 412 and 513 evidence before the judge is to say that the information was relevant.

And my question to anybody who would like to address it is, how much of a showing do you or your counsel typically have to make in order to get a ruling on this issue?

CDR REYES: I could answer that. From my experience, and speaking from counsel in the field, we are getting a general frustration that it is actually the catch 22 situation that the Professor had mentioned in the beginning of the panel.

The one thing that we are using here is the Klemick factor for 513 evidence. And if you don't have the citation, it's 65 M.J. 576, and does specifically set out the standards that we have to use. There -- and this goes back to the catch 22 that was mentioned before -- is we have to demonstrate with reasonable particularity, right, why we

need the specific evidence. What steps have we done to try to obtain that evidence, and is there any other way, using non-privileged avenues or non-privileged material, that you can actually obtain those evidence?

And so that seems to be a hurdle that we have to do in all of -- in most of the Navy cases that I have seen before we actually even have the in-camera hearing. And that portion of the hearing, doing the Klemick factors, VLC is represented there, so they can make an argument as to -- to counteract our initial motion, as well as trial counsel is there to as well.

With respect to 412, it is definitely not that easy, where you could just say that it's absolutely relevant. You know, the requirements set up in both Ellerbrock and Gaddis talks about, you know, it's relevant and material. And then you have to do, does the probative value outweigh the unfair prejudice? And there we -- that is all on the

defense. The defense has the burden by -- to demonstrate that, and so it's really not just I show up and it's relevant, and all of a sudden I get it.

MAJ POWERS: Mr. Taylor, if I may add to that, the one thing that I would want to highlight is this. In my experience, what I've seen is that when you are talking about 412 evidence, we make that demonstration that it's relevant, it's material, but the judge still narrowly tailors that evidence. So you're not putting on specific instances.

So, for example, in cases where I have needed to demonstrate a relationship, it is -- I'm focused on that there is a boyfriend-girlfriend, there is a romantic relationship, and that is why there is a motive to fabricate in this case. So it's that -- it is narrowly tailored. It's not going into sexual conduct; it is narrowly tailored to what you need to be able to show in your specific case. So the judge uses the

tools they have to pinpoint what is relevant, and it's just not an open the door and bring it all in.

CHAIR HOLTZMAN: Thank you. I just -- I'm going to take the privilege of just responding briefly to this issue of constitutionality, because -- just because the President put it in an executive order, I wouldn't necessarily assume from that that this is some sacrosanct, well-thought-through decision.

Actually, the language with regard to confidentiality -- to constitutionality was added in order to get the bill passed through the House of Representatives initially, 412. I was part of the drafting of the Rules of Evidence for federal courts. There was not one single occasion -- and we -- I don't know how many Rules of Evidence there are, 50, 100, 200. No one ever inserted a provision saying that the judges have to weigh the constitutionality of any one of those Rules of

Evidence. Not one.

But because we were dealing with the issue of rape, and there was a lot of concern among members of Congress that somehow something drastic and terrible would happen, they added that language of constitutionality, which has been part and parcel of the thinking since then.

That's just a little bit of background, so I wouldn't say that this necessarily reflects the deepest thinking. It was an effort actually to constrain the workings of 412. So that's -- I just wanted to add that, and appreciate very much your testimony.

Sorry, Mr. Stone, I just -- because we have to leave soon, so I --

MR. STONE: A very quick comment and very quick question. The comment was, please, Commander Reyes, next time refer to it as maybe the President's alma mater and let me off the hook.

CDR REYES: Yes, sir.

MR. STONE: Major Shugart, you said one thing that struck me, and maybe you can help me by telling me the details, as if I were the judge. You said most times when you want the 513 evidence it goes to the credibility of witness and their ability to perceive. Give me a factual example of what you mean. That's what I want to get -- if they were drunk or what?

MAJ SHUGART: No, sir. For example, I have a case right now where the complaining witness says that on the night of the event she was taking a particular prescription of medication in a particular dose. And because she took that dose, she could not appreciate the accused carrying her from the bed, down the stairs, onto the couch and sexually assaulting her until she came to.

But the medical records indicate that she, on a daily basis, takes that same amount of medication as part of a

prescription, and yet she functions very well throughout the day. And so that medication and her ability -- and her taking that medication would be very relevant to the discussion as to her ability to perceive what was happening on the night of that event.

MR. STONE: And you wouldn't have been able to ask her exactly the same question when she took the stand? "You take this medication every day, and don't you function every day?"

MAJ SHUGART: Well, having the knowledge of her taking that medication on a daily basis was in her medical records. We would not necessarily have that evidence outside of her records, sir.

CHAIR HOLTZMAN: Okay. Well, thanks, to all of the members for the testimony and for your willingness to share any thoughts with us. And if you have any other further comments you want to make, please feel free to contact the Staff or any

member of the Panel.

Thanks again very much, and thanks to the audience, too. Thanks to members of the Panel and to C-SPAN.

(Whereupon, the above-entitled matter went off the record at 4:44 p.m.)

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C E R T I F I C A T E

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

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

Court Reporter