JUDICIAL PROCEEDINGS PANEL

INITIAL REPORT

February 2015

JUDICIAL PROCEEDINGS PANEL

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Report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

INITIAL REPORT

– Article 120 of the Uniform Code of Military Justice

– Special Victims' Counsel Programs

– Rights and Needs of Sexual Assault Victims Throughout the Judicial Process

– Victim Privacy Issues in Military Sexual Assault Cases — Privileges and Protections

February 2015

JUDICIAL PROCEEDINGS PANEL

Elizabeth Holtzman, Chair

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February 4, 2015

The Honorable John McCain
Chair, Committee
on Armed Services
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Washington, DC 20510

The Honorable Jack Reed
Ranking Member, Committee
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United States Senate
Washington, DC 20510

The Honorable Mac Thornberry
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The Honorable Adam Smith
Ranking Member, Committee
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The Honorable Charles Hagel
Secretary of Defense
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Dear Chairs, Ranking Members and Mr. Secretary:

We are pleased to submit the initial report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), as required by section 576 of the National Defense Authorization Act for Fiscal Year 2013. This report summarizes the JPP's assessments from the first six months of our review of judicial proceedings for adult sexual assault and related offenses conducted under the Uniform Code of Military Justice (UCMJ) since 2012, when Article 120 of the UCMJ was amended.

To gather information for this report, the JPP held seven days of public meetings, in which we heard from military leaders, sexual assault survivors, sexual assault advocacy groups, DoD and civilian victim services personnel, military and civilian prosecutors, defense counsel and victims' counsel, academics and subject matter experts, legislators, and private citizens. We also received thousands of pages of documents from the Department of Defense, the Military Services, and civilian victim advocacy organizations in response to our requests for information.

For this initial report, we focused on Article 120 of the UCMJ, the Special Victims' Counsel Program and victim rights, and victim privacy issues in sexual assault crimes. We made eleven recommendations and referred seventeen issues for additional consideration by a subcommittee. The JPP will continue its review through September 2017, and future reports will address issues discussed in this report and other topics assigned for our consideration.

The JPP expresses sincere appreciation to everyone who contributed to this report. We especially want to thank the sexual assault survivors who participated in our meetings and shared their personal insights and perspectives in an effort to help others and improve military judicial proceedings.

Respectfully submitted,

Honorable Elizabeth Holtzman, Chair

Honorable Barbara S. Jones

Victor Stone

Thomas W. Taylor

Patricia A. Tracey

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Executive Summary

RESPONSIBILITIES OF THE JUDICIAL PROCEEDINGS PANEL

Congress directed the Judicial Proceedings Panel (JPP) "to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice [UCMJ] involving adult sexual assault and related offenses" after the 2012 amendment of Article 120 of the UCMJ, "for the purpose of developing recommendations for improvements to such proceedings." The Secretary of Defense appointed five members to the JPP in June 2014, and this Panel held its first meeting in August. Congress required the JPP to submit its first report within 180 days after its first meeting and subsequent reports through fiscal year 2017.

Congress assigned numerous duties to the JPP covering a wide array of topics, and the Response Systems to Adult Sexual Assault Crimes Panel (RSP), which completed its report in June 2014, recommended additional issues for the JPP to consider. The JPP began its review by examining key issues in military judicial proceedings. This first report covers the following topics:

- the effect and implementation of the 2012 amendments to Article 120 of the UCMJ;
- the effect and implementation of special victims' counsel programs by the Department of Defense and the military Services;
- victim privacy issues in military sexual assault cases; and
- the rights and needs of sexual assault victims to receive case information and participate in the military judicial process.

To conduct its review and assessment, the JPP held seven days of public meetings with more than 100 witnesses. In addition, the JPP received and reviewed thousands of pages of documents provided by the Department of Defense (DoD), the military Services, and victim advocacy organizations. A member of the JPP also attended a training course conducted by the Army for newly assigned special victims' counsel.

ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE

Article 120 is the statute used to prosecute sexual assault crimes under the UCMJ. It has been substantially revised since the UCMJ was first adopted in 1951. The most recent version, enacted by Congress in 2012, incorporates all sexual assault offenses under the UCMJ into a single article. Although Article 120 was amended in June 2012, the JPP noted that the President has not yet signed guidance to define elements of the statute's offenses or provide model specifications for prosecutors. Such guidance is essential for military justice practitioners to understand and implement the revisions to Article 120 in order to effectively investigate, prosecute, and defend sexual assault cases. The review process for issuing Article 120 guidance appears to have involved extensive delays both within and outside DoD, which have created serious obstacles for practitioners. In the view of the JPP, the process is moving too slowly and should be streamlined.

In the 2012 version of Article 120, the JPP identified nine issues related to the definitions of terms and two issues related to its elements and to enumerated offenses. Some presenters before the JPP indicated that the lack of clarity or specificity in some definitions may create difficulty or uncertainty in prosecuting cases, though many said further revisions to Article 120—a statute significantly revised twice in recent years—would make prosecutions more complex. While additional amendments may complicate the jobs of prosecutors, the JPP is concerned because sexual assault prevention training for all Service members uses language from Article 120, and vague terms may leave members of the military confused about standards of behavior and expectations. The JPP believes that the issues identified regarding the current statute are complicated and that additional consideration is necessary. We recommend that a subcommittee be appointed to continue examining each issue and provide recommendations.

The JPP also considered how the military prosecutes crimes under the UCMJ involving abuse of authority, including relationships between trainers and trainees, recruits and recruiters, and senior and subordinate military members in the same chain of command. The JPP heard from military justice officials and practitioners on the questions of whether the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 was effective and appropriate and whether, under the 2012 version of the UCMJ, prosecutors can charge coercive sexual relationships as sexual assault under Article 120. The JPP also heard suggestions to change how coercive sexual relationships are addressed. We heard proposals to amend Article 120 to add specific provisions for prosecuting such relationships or to create strict liability for offenses committed by basic training instructors against trainees. We also heard proposals to add coercive sexual relationships currently charged under other articles of the UCMJ to DoD's list of offenses that trigger sex offender registration. The JPP recommends that a subcommittee examine these issues and provide recommendations.

Finally, the JPP reviewed whether Article 120 should be split into two separate articles for penetrative and contact (non-penetrative) offenses. In the JPP's view, such bifurcation of sex offenses is unnecessary and would create further confusion. The JPP recommends against dividing Article 120 and does not believe further evaluation of this issue is warranted.

SPECIAL VICTIMS' COUNSEL PROGRAMS

The military Services and Department of Defense created special victims' counsel (SVC) programs in 2013. Congress mandated in the National Defense Authorization Act for Fiscal Year 2014 that each Service establish an SVC program for the purpose of providing legal assistance to military victims of sexual assault. The JPP reviewed the organization and staffing of the Services' SVC programs and heard from stakeholders in the military justice system to assess how counsel who serve as SVCs represent and support victims of sexual assault.

DoD has not standardized the organization of the SVC programs, and the military Services have structured their programs differently. SVCs in four Services work under independent chains of command, while SVCs in the Army work within the legal assistance office of the installation staff judge advocate. Irrespective of whether SVCs report to an independent organization or to installation leadership, the JPP believes that SVCs must be fully devoted to their clients' interests. SVCs must be able to advocate candidly and forthrightly on behalf of their clients, including placing their clients' priorities above those of their Service, without fear of harm to their career, retribution, or retaliation. Before making a recommendation about whether one reporting structure is preferable to another, the JPP will seek additional information from the Services on the rationale for their program's structure

and on the safeguards that protect SVCs when their client's interest runs contrary to the interests of the command or unit.

Another concern of the JPP is that the statutory requirement for SVC services is tied to the entitlement for legal assistance services. This requirement may leave some victims of sexual assault perpetrated by Service members beyond the reach of the SVC program, because under the statute they are not entitled to legal assistance services. The JPP intends to continue to review additional information about victim demographics and SVC eligibility requirements.

SVCs play an important role in the military justice process, and the JPP believes that counsel appointed to serve as SVCs need adequate criminal justice experience to ensure their competence to represent the rights and interests of their clients. The military justice system is not well served by inexperienced SVCs. For SVC programs to succeed, leaders and others in the military Services must be confident that SVCs help victims and improve the justice system. Requiring SVCs to have adequate experience is essential to that success. JPP members agree that current SVC training is sufficient, but this Panel is concerned that DoD has no program in place to assess training quality and effectiveness. In addition, the JPP recommends that DoD develop a policy to standardize and evaluate both the substantive training requirements and the time frame within which SVCs receive training to ensure that newly assigned SVCs are sufficiently prepared beforehand for their duties. DoD should make certain that measures are in place to assess and monitor the quality and effectiveness of training.

The JPP also considered where SVCs are assigned and how that location influences their ability to serve their clients effectively. The JPP urges the Services to place SVCs where they can most readily have face-to-face interactions with clients. The JPP recognizes that budget and logistics necessarily affect the number and locations of SVC offices, and it commends the initiatives described by the Services to overcome problems caused by the geographic separation between SVCs and their clients. The JPP encourages the Services to regularly monitor the distribution of SVC resources and to continue to implement inventive and efficient ways to serve clients.

The JPP is concerned about a lack of standardized assessment and evaluation of the operations of the SVC programs, for which metrics have not yet been developed. Such metrics are necessary to communicate realistic expectations and then judge how well the programs perform. DoD needs to oversee the establishment of program performance measures and evaluations. In addition to sharing best practices, the Services should collaborate on assessment measures. Assessment measures should include, but should not be limited to:

- victim satisfaction surveys;
- the rate at which victims who file restricted and unrestricted reports use the services of SVCs;
- the rate at which victim clients who have filed restricted reports convert their reports to unrestricted;
- the rate at which victim clients choose not to continue, or drop out of, investigation and judicial resolution of their case;
- use of the expedited transfer program and whether those victims who use the program stay in or leave the military;

- the rate at which SVC victim clients elect to stay in the military compared to the rate for those who do not receive assistance from SVCs; and
- delays in investigations or judicial proceedings attributable to SVC participation as compared to delays in cases that do not involve SVCs.

Rather than applying different evaluation standards, it is important to develop metrics uniformly across the military Services to assess client satisfaction and program performance. DoD should evaluate, monitor, and report on the SVC programs; provide guidance to the Services; and ensure centralized, standardized assessment of SVC program effectiveness.

RIGHTS AND NEEDS OF SEXUAL ASSAULT VICTIMS THROUGH THE JUDICIAL PROCESS

The Crime Victims' Rights Act (CVRA), passed by Congress in 2004, grants procedural and participatory rights to all victims of federal crimes. The CVRA does not expressly state whether it applies to crime victims of federal offenses prosecuted under the UCMJ. In 2014, Congress codified victims' rights into the military justice process as Article 6b of the UCMJ and specified that guidance for implementing these rights be established within one year. That deadline has passed, but DoD and the military Services continue to work to develop policy and practices to support the rights and needs of sexual assault victims during the judicial process.

Delays in issuing guidance to implement Article 6b of the UCMJ, like the delays that have impeded effective application of the 2012 version of Article 120, pose a significant obstacle for victims to fully exercise their right to be heard, their right to notice, and their access to case information and documents. Many practitioners told the JPP that inconsistent practices and procedures complicate the efforts of SVCs to adequately represent their clients and assert their clients' rights in court.

Lack of access to case information and documents is a particular problem for victims and victims' counsel. Civilian experts told the JPP that victims' counsel must have access to information similar to that afforded to prosecutors and defense counsel to effectively represent their clients in judicial proceedings. SVCs testified that equal access is especially crucial when advising victims in the military justice system.

The military Services have begun to address this need for access to information, but recent guidance from leadership of the Services' Judge Advocate General's Corps either focuses too narrowly on specific documents and evidentiary issues or improperly relies on the Privacy Act and Freedom of Information Act (FOIA). SVCs should not have to file FOIA requests to retrieve relevant information about proceedings in which their clients have a concrete, particularized interest. The JPP recommends that DoD direct the Services to ensure that SVCs and victims have appropriate access to docketing information and case filings. In part, this could be accomplished by adopting an electronic system akin to the civilian PACER (Public Access to Court Electronic Records) service.

Case law and legislation establish that victims have the right to be heard through their SVCs. However, the ability of victims to be heard continues to be limited because the rules and procedures for SVCs to follow in judicial proceedings remain unclear. The JPP recommends that the Secretary of Defense direct the Services to establish uniform practices and procedures concerning SVCs' participation in all military judicial proceedings.

Finally, Article 6b of the UCMJ does not specify mechanisms for enforcing victims' rights. In the FY15 NDAA, Congress legislated that victims may seek review of trial court violations of Military Rules of Evidence (M.R.E.) 412 and 513 in the military appellate courts. This is a less robust instrument than the right of mandatory interlocutory review with expedited procedures provided for victims under the CVRA. The JPP recommends that the Secretary of Defense consider establishing expedited procedures for victims to seek mandatory interlocutory review in the Service Courts of Criminal Appeals of any alleged violation of victims' rights. Further, the Secretary of Defense should review statutes and regulations to ensure victims are eligible for SVC representation so long as a victim's right exists and is at issue.

VICTIM PRIVACY ISSUES IN MILITARY SEXUAL ASSAULT CASES – PRIVILEGES AND PROTECTIONS

Sexual assault prosecutions frequently involve conflicts between the right of an accused person to present a defense and the desire to protect the privacy interests of the alleged victim. In military judicial proceedings, evidentiary issues regarding the victim's sexual history or mental health often are the cause of such conflicts, and the JPP reviewed the military rules of evidence that are intended to prevent the unwarranted introduction of evidence that unreasonably intrudes into the privacy of sexual assault victims.

M.R.E. 412 is the military's rape shield rule. Significant public attention has focused on the introduction of the sexual history of victims at Article 32 hearings, the UCMJ's preliminary procedure used to consider charges before they are referred to general courts-martial. Congress substantially modified Article 32 requirements in the FY14 NDAA, and new implementing guidance signed by the President in June 2014 clarifies the authority of Article 32 investigating officers to resolve M.R.E. 412 matters according to the standards and procedures used by military judges at courts-martial. These changes, combined with DoD's pending proposal to eliminate the "constitutionally required" exception to M.R.E. 412 at Article 32 hearings, which the JPP supports, are positive steps toward improving safeguards for the privacy of sexual assault victims at pretrial hearings. In light of the FY14 NDAA changes, which took effect on December 26, 2014, the JPP will monitor M.R.E. 412 issues at Article 32 hearings.

In addition, the JPP will continue its assessment of the application of M.R.E. 412 at courts-martial proceedings. Specifically, the JPP will review the scope of relevancy determinations to determine whether the rule should be clarified. The JPP will continue to explore the use of the rule's balancing tests and consider whether the "constitutionally required" exception in M.R.E. 412 should be eliminated at trial. Before providing recommendations, the JPP intends to conduct its statutory task of reviewing case records that involve M.R.E. 412 to better understand the practical impact of such issues at courts-martial.

M.R.E. 513 is the rule of privilege that permits patients to protect their communications with psychotherapists. The JPP received testimony that the Services' practices and procedures for determining the admissibility of information contained in mental health records for military judicial proceedings are inconsistent. The JPP believes that some of the problems may be alleviated by recent amendments to M.R.E. 513. Changes enacted by Congress, which become effective in June 2015, will eliminate the "constitutionally required" exception, increase the burden on the party seeking the production of mental health records or communications, allow for an *in camera* review only if the moving party meets its burden and such review is necessary to rule on production or admissibility, and

narrowly tailor any production or disclosure under the rule. The JPP will continue to monitor how M.R.E. 513 matters are addressed in military judicial proceedings in light of these changes.

Although M.R.E. 513 controls access to mental health records in judicial proceedings, the JPP also heard that Service guidance and common practice of investigators and commanders in this area are not uniform across DoD. Releasing patients' mental health information or acknowledging that victims are receiving counseling are serious invasions of privacy. The JPP wants to ensure that the exceptions to disclose mental health information to commanders for the purpose of determining fitness for duty or to law enforcement for investigative purposes are limited to those purposes and not used for judicial proceedings. The JPP also recommends that DoD issue specific, uniform guidance to ensure that mental health records are neither sought from a medical treatment facility by investigators or military justice practitioners nor acknowledged or released by medical treatment facility personnel until a military judge or Article 32 hearing officer has ordered their production. The JPP intends to continue its assessment of this issue.

RECENT AND PENDING LEGISLATION AND POLICY

Laws and policies regarding military judicial proceedings for sexual assault crimes are rapidly evolving. Since the JPP began its review, new requirements from previous NDAAs have taken effect and additional requirements in the FY15 NDAA have, or soon will, become law. In addition, DoD and the military Services continue to revise policies and regulations. DoD recently completed its initial review of the RSP's recommendations from its June 2014 report and will be implementing changes or further studying issues that overlap with some JPP tasks.

Many of these amendments and policy revisions affect issues, procedures, and rules that the JPP has considered in its meetings since August 2014 and will likely affect the JPP's assessment over the course of its review. The JPP will continue reviewing the effects of these changes in future reports.

OVERALL POLICY IMPLEMENTATION

The JPP recognizes that establishing new policy based on statutory amendments takes time. However, the numerous and substantial changes in sexual assault laws have created a confusing landscape for victims and practitioners at all levels of military judicial proceedings. To minimize uncertainty, implementation of policy and regulations must be accomplished quickly and effectively. As noted above, guidance regarding Article 120 elements and model specifications and Article 6b victims' rights procedures and enforcement has not been published. Without guidance, practitioners lack critical information they require to accurately and effectively apply statutory revisions. Until guidance is published, the JPP cannot fully assess the implementation of those statutes. The JPP strongly recommends that the Secretary of Defense examine the DoD and interagency review process for establishing guidance to implement statutory provisions of the UCMJ and explore options to streamline procedures.

CONCLUSION

Since its inception six months ago, the JPP has heard a wide range of perspectives and received a substantial amount of information on issues affecting military judicial proceedings for adult sexual assault crimes. This introductory report marks the beginning of the JPP's multiyear mandate to provide the Secretary of Defense and Congress with a thorough review and assessment and to make recommendations to improve the military justice system. The JPP's analysis and recommendations appear in blue throughout this report. Future reports will review the issues discussed here and expand the JPP's analysis on topics assigned for consideration.

The JPP greatly appreciates the support and cooperation it has received from DoD, the military Services, other organizations, and individuals outside the military. With their assistance, the JPP has gained invaluable insights and a deeper understanding of how the programs and procedures described in this report work within the military justice system. The JPP looks forward to continuing to engage with these and other organizations and individuals as it continues its review.

Sexual assault remains a clear threat to our military's cohesiveness, morale, and effectiveness and to the well-being of the women and men who serve our country in uniform. Through this and future reports, the JPP is committed to improving the military judicial proceedings used to adjudicate these crimes.

Summary of Panel Recommendations

JPP RECOMMENDATIONS

Recommendation 1: **The Secretary of Defense examine the DoD and interagency review process for establishing guidance for implementing statutory provisions of the UCMJ and explore options to streamline the procedures.**

- Executive order guidance for implementing the 2012 amendment to Article 120 and the 2013 incorporation of victims' rights in Article 6b of the UCMJ have not yet been published.
- Delays in completing executive order guidance for the 2012 provisions of Article 120 have resulted in the Services creating their own guidance, procedures, and policies for the statute, which may or may not comport with the intent or requirements of the statute or with the President's guidance for its implementation and application.
- Delays in completing DoD and executive order guidance to implement Article 6b of the UCMJ limit the full exercise of victims' right to be heard, right to notice, and access to case information and documents.
- Without guidance, practitioners lack critical information they require to accurately and effectively apply statutory revisions; until guidance is published, this Panel cannot fully assess implementation.

Recommendation 2: **The Secretary of Defense direct the Services to implement additional selection criteria requiring that judge advocates have adequate criminal justice experience before they are assigned as special victims' counsel.**

- Experience is necessary to ensure SVCs' competence to represent the rights and interests of their clients.
- While military justice experience is desirable, prior civilian criminal justice experience may be sufficient to give an SVC the familiarity with constitutional and other legal issues needed to provide suitable representation.
- This expands on Response Systems Panel Recommendation 47, subsequently adopted by DoD, that SVCs have appropriate trial experience, whenever possible, before being selected as special victims' counsel.

Recommendation 3: **The Department of Defense develop a policy to standardize both the time frame within which to receive SVC training and the substantive requirements of SVC training.**

- Newly assigned SVCs must be trained in advance to ensure that they are prepared for their duties. At present, some SVCs may begin to serve clients before they receive SVC training.

- DoD should ensure that measures are in place to assess and monitor the quality and effectiveness of training.

Recommendation 4: **The Secretary of Defense direct the Services to perform regular evaluations to ensure SVCs' assignment to locations that maximize the opportunity for face-to-face interactions between SVCs and clients, and to develop effective means for SVCs to communicate with clients when face-to-face communication is not possible.**

- The JPP is cognizant of practical constraints, including monetary and logistical limitations, that must be considered when determining the number and locations of SVC offices and commends the Services for using other resources to resolve or minimize issues caused by the separation between SVCs and clients.

Recommendation 5: **The Secretary of Defense establish appropriate SVC program performance measures and standards, including evaluating, monitoring, and reporting on the SVC programs; establishing guiding principles for the Services; and ensuring centralized, standardized assessment of SVC program effectiveness and client satisfaction.**

- Assessment metrics are necessary to determine how the SVC programs are performing.
- SVC programs have been operating for one year, but assessment and evaluation metrics for the programs have not yet been developed.
- Rather than allowing different evaluation standards for each Service, metrics should apply uniformly across the military Services.
- Assessment measures should include, but should not be limited to:

    1. victim satisfaction surveys;
    2. the rates at which victims who file restricted and unrestricted reports use the services of SVCs;
    3. the rate at which victim clients who have filed restricted reports convert their reports to unrestricted;
    4. the rate at which victim clients choose not to continue, or drop out of, investigation and judicial resolution of their case;
    5. use of the expedited transfer program and whether those victims who use the program stay in or leave the military;
    6. the rate at which SVC victim clients elect to stay in the military compared to the rate for those who do not receive assistance from SVCs; and
    7. delays in investigations or judicial proceedings attributable to SVC participation as compared to delays in cases that do not involve SVCs.

Recommendation 6: **The Secretary of Defense direct the Services to ensure SVCs and victims have appropriate access to docketing information and case filings. In part, this could be accomplished by adopting an electronic system akin to the civilian PACER (Public Access to Court Electronic Records) service.**

- The military Services have recently developed SVC and victim access policies that focus narrowly on M.R.E. 412 and M.R.E. 513 issues and are improperly grounded in administrative law—specifically, the Privacy Act and the Freedom of Information Act, which establish guidance for access by the general public.
- SVCs should not have to file FOIA requests to access relevant information about proceedings in which their clients have a concrete, particularized interest.

Recommendation 7: **The Secretary of Defense direct the Services to establish uniform practices and procedures concerning SVCs' participation for all military judicial proceedings.**

- Inconsistent policies and practices regarding SVC participation during court proceedings limit the ability of victims to be heard.

Recommendation 8: **The Secretary of Defense consider establishing expedited procedures for victims to seek mandatory interlocutory review in the Service Courts of Criminal Appeals of any alleged violation of victims' rights.**

- The FY14 NDAA did not specify any mechanism to enforce the rights guaranteed by Article 6b, and the FY15 NDAA merely recognizes victims' right to seek discretionary review (i.e., a writ of mandamus) in the appellate courts for issues pertaining to M.R.E.s 412 and 513.
- In federal civil and criminal cases, the CVRA establishes mandatory and expedited interlocutory review of any trial court decision pertaining to a victim's right. The CVRA does not expressly state whether it applies to victims of offenses prosecuted under the UCMJ.

Recommendation 9: **The Secretary of Defense propose timely revisions to statutes, the MCM, and/or regulations to extend eligibility for SVC representation so long as a right of the victim exists and is at issue.**

- The Response Systems Panel made a similar suggestion, Recommendation 44, which DoD subsequently referred to the Joint Service Committee.
- The right of victims to be heard is at particular risk when they are no longer in contact with their SVC, or in cases in which they have declined representation in the first place.

Recommendation 10: **The President sign an executive order eliminating the "constitutionally required" exception within M.R.E. 412 at Article 32 hearings.**

- The JPP supports the Joint Service Committee's proposal to eliminate the exception and agrees with DoD's rationale that the "constitutionally required" exception is not necessary if there is not a right to confrontation at the pretrial hearing.

Recommendation 11: **The Secretary of Defense issue specific, uniform guidance to ensure that mental health records are neither sought from a medical treatment facility by investigators or military justice practitioners nor acknowledged or released by medical treatment facility personnel until a military judge or Article 32 hearing officer has ordered their production.**

- Guidance and common practice among investigators in obtaining mental health records are not uniform across DoD.
- Mental health records, which are sometimes sought in advance to be readily available for use at Article 32 hearings or trial, should not be released from a military treatment facility without an order from a military judge or the hearing officer.

ISSUES THAT SHOULD BE DIRECTED TO A SUBCOMMITTEE FOR FURTHER EVALUATION

ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE

a. Issues Related to Definitions and Elements

- **Issue 1:** Is the current definition of "consent" unclear or ambiguous?
- **Issue 2:** Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?
- **Issue 3:** Should the statute define "incapable of consenting?"
- **Issue 4:** Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?
- **Issue 5:** Does the definition of "bodily harm" require clarification?
- **Issue 6:** Is the definition of "threatening wrongful action" ambiguous or too narrow?
- **Issue 7:** How should "fear" be defined to acknowledge both subjective and objective factors?
- **Issue 8:** Is the definition of "force" too narrow?
- **Issue 9:** Are the definitions of "sexual act" and "sexual contact" too narrow, or are they overly broad?
- **Issue 10:** Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?
- **Issue 11:** Should the offense of "indecent act" be added to the UCMJ as an enumerated offense?

b. Issues Related to Coercive Sexual Relationships and Abuse of Authority

- **Issue 12:** Is the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 appropriate and effective when sexual conduct is involved?
- **Issue 13:** Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?
- **Issue 14:** Should the definition of "threatening or placing that other person in fear" be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?
- **Issue 15:** Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?
- **Issue 16:** Should sexual relationships between basic training instructors and trainees be treated as strict liability offenses under Article 120?
- **Issue 17:** As an alternative to further amending Article 120, should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD's list of offenses that trigger sex offender registration?

ISSUES REQUIRING NO FURTHER STUDY AND NO ACTION

BIFURCATING ARTICLE 120 INTO SEPARATE PENETRATIVE AND CONTACT (NON-PENETRATIVE) OFFENSES

- The JPP believes that bifurcating different types of sex offenses under the UCMJ is not necessary at this time and would create further confusion. The JPP recommends against this action and does not believe that further evaluation of this issue is warranted.

I. Overview of the JPP's Assessment

A. JPP RESPONSIBILITIES

In 2013, Congress directed that the Judicial Proceedings Panel (JPP) be established "to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice [UCMJ] involving adult sexual assault and related offenses" since 2012, when Article 120 of the UCMJ was amended, "for the purpose of developing recommendations for improvements to such proceedings."[1] The Secretary of Defense appointed five members to the JPP in June 2014, including two members who previously served on the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel, or RSP).[2]

In the National Defense Authorization Acts (NDAAs) for Fiscal Year (FY) 2013, 2014, and 2015, Congress assigned numerous tasks to the JPP covering a wide array of topics (see Appendix A). In addition, the final report of the Response Systems Panel recommended that the JPP assess particular recommendations.[3] Congress required the JPP to submit its first report, including any proposals for legislative or administrative changes that the JPP considers appropriate, to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives within 180 days after the Panel's first meeting, which occurred on August 7, 2014.[4] The JPP must also submit subsequent reports annually through September 2017, when the Panel concludes.

B. INITIAL TOPICS FOR ASSESSMENT

The JPP began its work by reviewing the punitive article in the UCMJ that is used to prosecute sexual assault crimes in the military—Article 120. Next, the JPP focused on victim privacy issues in sexual assault crimes, including a review of the rules that govern the use of evidence of other sexual conduct and the mental health communications and records of alleged victims in military judicial proceedings. It also reviewed the Special Victims' Counsel (SVC) Program, which the Department of Defense (DoD) and the military Services first established in 2013. In addition, the JPP reviewed how the SVC programs assist sexual assault victims in obtaining information about their cases and exercising their rights under the UCMJ.

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1 National Defense Authorization Act for Fiscal Year 2013 [hereinafter FY13 NDAA], Pub. L. No. 112-239, § 576, 126 Stat. 1632 (2013).

2 For a list and short biographies of the JPP members, see Appendix B.

3 Report of the Response Systems to Adult Sexual Assault Crimes Panel 48 (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/00_Report_Final_20140627.pdf; *see also* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Dec. 15, 2014) [hereinafter DoD RSP Implementation Memo], *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/05_DoDResponse_RSPRecommendations_20141215.pdf.

4 *See* FY13 NDAA, Pub. L. No. 112-239, § 576(c)(2), 126 Stat. 1632 (2013).

For its initial assessment, the JPP addressed the following assigned tasks and recommended issues:

1. Assess and make recommendations to improve the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under Article 120 the UCMJ that were enacted by section 541 of the FY12 NDAA.[5]

2. Assess the likely consequences of amending the definition of rape and sexual assault under Article 120 of the UCMJ to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing his or her position in the chain of command to gain access to or coerce the other person.[6]

3. Consider whether to recommend legislation that would either split sexual assault offenses under Article 120 into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120.[7]

4. Assess the implementation and effect of 10 U.S.C. § 1044e, as added by section 1716 of the FY14 NDAA (requiring the military Services to designate legal counsel to provide legal assistance to victims of sex-related offenses), and make such recommendations for modifying section 1044e as the JPP considers appropriate.[8]

5. Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under Article 32 of the UCMJ and any instances in which prior sexual conduct was determined to be inadmissible.[9]

6. Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.[10]

7. Review and assess the impact of the use of a victim's mental health records by the accused during the preliminary hearing conducted under Article 32 of the UCMJ and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.[11]

8. Review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right.[12]

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5 FY13 NDAA, Pub. L. No. 112-239, § 576(d)(2)(A), 126 Stat. 1632 (2013).

6 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(b)(1)(A), 127 Stat. 672 (2013) [hereinafter FY14 NDAA].

7 RSP Report, *supra* note 3, at 48.

8 FY14 NDAA, Pub. L. No. 113-66, § 1731(b)(1)(B), 127 Stat. 672 (2013).

9 FY13 NDAA, Pub. L. No. 112-239, § 576(d)(2)(E), 126 Stat. 1632 (2013).

10 FY13 NDAA, Pub. L. No. 112-239, § 576(d)(2)(F), 126 Stat. 1632 (2013).

11 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 545(a)(1), 128 Stat. 3292 (2014) [hereinafter FY15 NDAA].

12 RSP Report, *supra* note 3, at 26 (Recommendation 45); *see also* DoD RSP Implementation Memo, *supra* note 3.

C. METHODOLOGY OF REVIEW

To inform its assessments and gain a comprehensive understanding of the issues, the JPP gathered information by various methods. The JPP held seven days of public meetings, where it heard from more than 100 witnesses.[13] The JPP also requested and reviewed information from the DoD, the military Services, and victim advocacy organizations, comprising thousands of pages of documents that included policies, proposals and their criticisms, procedures, statistics, records of legal proceedings, and surveys. In addition, the JPP reviewed publicly available information and conducted legal research and analysis of relevant topics, in accordance with the Federal Advisory Committee Act of 1972.[14] A member of the JPP attended an Army SVC training course at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. He provided a summary review of the course and his personal assessment to the other JPP members at the November public meeting of the JPP.

The information received and considered by the JPP is available on its website (http://jpp.whs.mil). The JPP wishes to express its gratitude to all presenters and to those who provided information and other assistance as part of this review and assessment.

D. RECENT AND ONGOING LEGISLATIVE AND POLICY INITIATIVES

For this review, the JPP sought to understand the practical consequences of legislative, executive, and policy changes and their effects on the issues that the Panel was tasked to assess. In addition to the amendments made to Article 120 in 2012, Congress and the President have also recently directed other substantial changes to laws and regulations. These revisions include changes to the rules for preliminary hearings and evidentiary rules, restrictions on court-martial jurisdiction for the most serious sexual assault offenses, mandates for secretarial review of disagreements between convening authorities and their staff judge advocates on referral decisions in sexual assault cases, institution of mandatory minimum sentences for the most serious sex offenses, and restrictions on clemency authority for convening authorities.

Laws and policies regarding military judicial proceedings for sexual assault crimes continue to change, and many amendments and rules have just become effective or have not yet taken effect. Most recently, in the FY15 NDAA passed in December 2014, Congress enacted additional significant amendments to military judicial proceedings. Some of these amendments have or will substantially change issues, procedures, and rules that the JPP has considered in its meetings since August 2014. Where possible, the JPP reviewed these changes in this report, and it will continue to assess how recent modifications affect military judicial proceedings.

In addition, DoD recently completed its initial review of the recommendations made by the RSP in its June 2014 report. On December 15, 2014, the Secretary of Defense announced full or in-part approval of 98 recommendations, disapproval of 1 recommendation, and referral or deferral of the remaining recommendations to working groups or panels for further study.[15] The JPP will continue to monitor DoD's and Congress's response to the RSP's recommendations and how the DoD reviews and implements them.

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13 For a list of witnesses who provided testimony or written comments at public meetings of the JPP, see Appendix D.

14 5 U.S.C. App. 2 (2012); *see also* 41 C.F.R. § 102-3.50(a).

15 U.S. Dep't of Def., DoD RSP Implementation Memo, *supra* note 3.

The JPP is mindful that ongoing amendments and their implementation will likely affect its assessment over the course of its review. The JPP will continue to review the effects of changes to military judicial proceedings for sexual assault crimes and provide additional evaluation in future reports.

II. Article 120 of the Uniform Code of Military Justice

Article 120 is the basic statute used to prosecute sexual assault crimes under the Uniform Code of Military Justice. Article 120 has been substantially revised since the UCMJ was first adopted in 1951. The most recent version, enacted by Congress in 2012, incorporates all sexual assault offenses under the UCMJ into Article 120. Consistent with its charter and specific tasks, the JPP examined the language, elements, and crimes encompassed by the statute in order to assess its effectiveness.

A. THE EVOLUTION OF ARTICLE 120

In 1950, Congress adopted the UCMJ, applying one criminal code to all the military Services.[16] The UCMJ provided jurisdiction over all offenses committed by military Service members.[17] The 1951 version of the UCMJ adopted the now-antiquated common law definition of rape and rules of evidence, which "made it difficult to convict a service member accused of rape."[18]

Article 120(a) of the 1951 version of the UCMJ prohibited a male from engaging in "an act of sexual intercourse with a female not his wife, by force and without her consent."[19] The military rules of evidence required the victim to resist in order to prove force.[20] The defendant could offer evidence of the victim's sexual history to demonstrate that she likely consented.[21] The rules also permitted the accused to undermine the victim's credibility by offering "evidence that the alleged victim failed to make a complaint of the offense within a reasonable time."[22] In addition, the rules required

16 Manual for Courts-Martial, United States IX (1951 ed.) [hereinafter 1951 MCM]; *see also* Report of the Sex Crimes and the UCMJ Subcommittee: A Report For the Joint Service Committee on Military Justice [hereinafter JSC Report] 21 (Feb. 2005), *available at* http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (citing The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 203 (1976)).

17 Major Mark D. Sameit, *When a Convicted Rape Is Not Really Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 Mil. L. Rev. 77, 84 (2013); JSC Report, *supra* note 16, at 21 (citing The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 203 (1976)).

18 Sameit, *supra* note 17, at 85.

19 1951 MCM, pt. XXVII, ¶ 199a. The UCMJ combined the offenses of rape and carnal knowledge into two sections of Article 120. *See* JSC Report, *supra* note 16, at 21 (citing 1951 MCM ch. XXVII, ¶ 199a).

20 1951 MCM ch. XXVIII, ¶ 199a ("[I]f a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent.").

21 JSC Report, *supra* note 16, at 22 (citing 1951 MCM ch. XXVII, ¶ 153b) ("For the purpose of impeaching the credibility of the alleged victim, evidence that the victim has an unchaste character is admissible, under the above conditions, in a prosecution for any sexual offense . . . even though consent is not an element of the offense.").

22 *Id.* (citing 1951 MCM ch. XXVII, ¶ 142c) ("In prosecutions for sexual offenses . . . evidence that the alleged victim of such an offense made complaint thereof within a short time thereafter is admissible."). The rules of evidence adopted the common law "fresh complaint rule," which was intended to corroborate the victim's testimony and bolster the credibility of a sexual assault victim by demonstrating that he or she complained to someone within a reasonable time for sympathy, protection, or advice. *See State v. Balles*, 47 N.J. 331, 338 (1966). The rule created a paradox in sexual assault cases and proved more harmful than helpful to sexual assault complainants, because many sexual assault victims delay reporting the offense. *See* Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule,* 37 B.C. L. Rev. 441 (1996). The fresh complaint theory is not recognized by most courts now, because it created a "promptness" requirement and expectation that "real" victims would report serious attacks. Studies now show that it is not inherently "natural" for the victim to

corroboration in sexual offense cases if the victim's testimony was "self-contradictory, uncertain, or improbable."[23]

The 1969 edition of the *Manual for Courts-Martial* (MCM) only slightly altered the rape provision.[24] Victims still had to take "measures of resistance" and make their lack of consent "reasonably manifest."[25] Otherwise, consent could be inferred from the lack of resistance.[26] In addition, the *Manual* provided that an accused could be found guilty of rape when a victim was of "unsound mind" or was rendered incapable of providing consent because she was unconscious.[27] However, an act was not considered rape if the accused used fraud to obtain consent.[28]

Simultaneously, women's rights advocates in the civilian sector were "push[ing] hard to change the requirements for corroboration, resistance, the fresh complaint rule, and to protect the victims from having their sexual histories publicly exposed at trial" in state and federal courts across the country.[29] By the 1970s, only fifteen states required corroboration.[30] In 1978, Congress adopted the Privacy Protection for Rape Victims Act, which prevented the defense from offering a victim's sexual history in federal cases, except in limited circumstances.[31]

In 1980, the President issued an Executive Order promulgating the Military Rules of Evidence, which were intended to mirror the Federal Rules of Evidence and incorporate the reforms already undertaken in the civilian sector.[32] The new Military Rules of Evidence and the revision to the UCMJ in 1984 provided greater protections to victims of rape by eliminating the expectation that a victim file a fresh complaint and that a victim's statement be corroborated.[33] Modeled after Federal Rule of Evidence 412, Military Rule of Evidence (M.R.E.) 412 established a rape shield provision that generally barred a victim's prior sexual history from being admitted as evidence of propensity to engage in sex.[34]

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confide in someone or to disclose that he or she was sexually assaulted immediately following the offense. *See* Andrea R. Barter, "SJC Revisits and Revises the Fresh Complaint Rule," Law. J. (Mass. Bar Ass'n Nov. 2005), *available at* http://www.massbar.org/publications/lawyers-journal/2005/november/sjc-revisits-and-revises-the.

23 JSC Report, *supra* note 16, at 22 (citing 1951 MCM ch. XXVII, ¶ 153a) ("[A] conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense . . . if such testimony is self-contradictory, uncertain, or improbable.").

24 Manual for Courts-Martial, United States ch. XXVIII, ¶ 199a (1969 ed.) [hereinafter 1969 MCM].

25 1969 MCM ch. XXVIII, ¶ 199a.

26 *Id.*

27 *Id.*

28 *Id.*

29 Sameit, *supra* note 17, at 86.

30 *Id.*

31 Pub. L. No. 95-540, 92 Stat. 2046 (1978) (codified as Fed. R. Evid. 412). Those exceptions were for (1) evidence that "is constitutionally required to be admitted"; (2) evidence of "past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not . . . the source of semen or injury"; or (3) evidence of "past sexual behavior with the accused . . . offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior" at issue. *Id.* at § 2.

32 Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

33 JSC Report, *supra* note 16, at 25.

34 *Id.* In 1984, the MCM was further revised: the discussion section of the 1951 MCM, ch. XXVII, ¶ 199a, which questioned the credibility of rape victims and required corroboration and a "fresh complaint," was deleted entirely. After the 1984 revision, Congress amended Article 120 two additional times, in 1992 and 1996: the changes struck gender-specific

In May 2001, the National Institute of Military Justice (NIMJ) issued the *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, also known as the Cox Report, which recommended that the rape and sodomy provisions be repealed and replaced with "a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code."[35]

Three years later, Congress mandated that the Secretary of Defense review the UCMJ and MCM to determine what changes would be required "to improve the ability of the military justice system to address issues relating to sexual assault" and to conform the UCMJ and the MCM "more closely to other Federal laws and regulations that address such issues."[36] A subcommittee to the Joint Service Committee (JSC) was formed to review sexual offenses under the UCMJ and MCM.

The JSC subcommittee issued its report in 2005, detailing six options that ranged from no change to major revisions.[37] The JSC subcommittee disagreed with the Cox Report's recommendation for change and unanimously concluded that sexual misconduct in the military could be effectively prosecuted under the existing law.[38] The subcommittee also found that any "rationale for significant change [would be] outweighed by the confusion and disruption that such change would cause," and that any changes to the UCMJ or other regulations would be unlikely to result in any significant increase in prosecutions of sexual offenses.[39] However, a majority of the subcommittee determined that *if changes were made* to Article 120, the preferred option was the one that "best takes into account unique military requirements, and at the same time . . . promotes good order and discipline, enhances the military justice system for service members by creating clear prohibitions, and distinguishes between different degrees of criminal sexual misconduct, providing greater clarity to the law of sexual assaults."[40]

In July 2005, the Court of Appeals for the Armed Forces (CAAF) called Article 120 "antiquated in its approach to sexual offenses" and found that it did not "reflect the more recent trend for rape statutes to recognize gradations in the offense based on context."[41] The Court continued: "Because Article 120 is dated, its elements may not easily fit the range of circumstances now generally recognized as 'rape,' including date rape, acquaintance rape, statutory rape, as well as stranger-on-stranger rape. As a result,

language and added being mistaken about the facts as an affirmative defense for those accused of carnal knowledge—that is, sexual intercourse, under circumstances not amounting to rape, with a person who is not the accused's spouse and is under age 16. JSC Report, *supra* note 16, at 27.

35 Major Jennifer Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, Army Law., Aug. 2007, at 1, 17 (citing Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001)).

36 *See* National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811 (2004).

37 JSC Report, *supra* note 16, at 3–5.

38 *Id.* at 15 (rebutting Cox Commission's recommendation and listing "five reasons [that] militate against change").

39 *Id.* at 1; *see also* Brigadier General (Ret.) Jack Nevin and Lieutenant Joshua R. Lorenz, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the "New" Article 120*, 67 A.F. L. Rev. 269, 278 (2011) (citing JSC Report, *supra* note 16, at 2).

40 JSC Report, *supra* note 16, at 208; *see also Transcript of JPP Public Meeting* 221 (Aug. 7, 2014) (testimony of Mr. Dwight Sullivan, Office of the General Counsel, Department of Defense); *id.* at 271 (testimony of Col Gary Jackson, U.S. Air Force, Staff Judge Advocate, Global Strike Command).

41 *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005).

the traditional military rape elements have been applied in contexts for which the elements were not initially contemplated."[42]

Congress completely overhauled Article 120 in 2007,[43] creating fourteen separate offenses for various types of sexual crimes.[44] The new statute bifurcated the traditional crime of rape into two separate offenses (rape and aggravated sexual assault) and removed "without consent" from the definition.[45] The new Article 120 also required the accused to raise consent and mistake of fact as to consent as affirmative defenses to certain offenses and expressly required the accused to support those defenses by a preponderance of the evidence.[46] If the accused met this initial burden of proof, the burden then shifted to the prosecution to disprove beyond a reasonable doubt the existence of consent or mistake of fact as to consent.[47]

In 2011, CAAF decided *United States v. Prather*,[48] a case that involved an aggravated sexual assault offense against a person who was substantially incapacitated. CAAF considered the requirement in the 2007 version of Article 120 that an accused raise and prove consent and mistake of fact as to consent as affirmative defenses to the charge. CAAF concluded that the statute unconstitutionally shifted the burden to the accused by requiring the accused to prove that the victim had the capacity to consent by a preponderance of the evidence.[49] The Court further concluded that the statute created a legal impossibility by requiring the prosecution to disprove beyond a reasonable doubt the existence of consent or mistake of fact as to consent once the accused met his or her initial burden to prove the same by a preponderance of the evidence.[50]

B. THE 2012 REFORMS TO ARTICLE 120

Congress again substantially revised Article 120 in the National Defense Authorization Act for Fiscal Year 2012.[51] Among many modifications, the new statute removed the shift of the burden of proof, reduced the total number of sex offenses from fourteen to ten, and changed a number of the names and definitions of the offenses.[52] The JPP's descriptions of specific modifications to Article 120 are addressed below.

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42 *Id.*

43 In amending the statute, Congress did, however, follow the JSC subcommittee majority's recommendation for how to restructure the statute if change was made. Among other recommendations, the subcommittee's preferred option had proposed to add several other sexual misconduct provisions that were punishable then under Article 134 of the UCMJ, provide more specific notice of conduct that was unlawful, and explain when age, consent, marriage, and mistake of fact are applicable as affirmative defenses. JSC Report, *supra* note 16, at 4-5.

44 Manual for Courts-Martial, United States pt. IV, ¶ 45 (2008 ed.) [hereinafter 2008 MCM].

45 2008 MCM pt. IV, ¶ 45; *see also* Nevin and Lorenz, *supra* note 39, at 280.

46 2008 MCM pt. IV, ¶ 45; *see also* Nevin and Lorenz, *supra* note 39, at 280; 2008 MCM pt. IV, ¶ 45(t)(14)–(16).

47 *Id.*

48 *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (ruling that shifting the burden of proof to the defense to raise consent and mistake of fact as to consent as affirmative defenses to certain offenses was unconstitutional).

49 *Id.* at 344; *see also United States v. Medina,* 69 M.J. 462 (C.A.A.F. 2011).

50 *Prather*, 69 M.J. at 344-45.

51 National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 582, 125 Stat. 1298 (2011).

52 Colonel R. Peter Masterton, Colonel David Robertson, and Colonel Wendy P. Daknis, *Annual Review of Developments in Instructions*, Army Law., Dec. 2013, at 4, 7.

1. Delayed Implementation Guidance

Congress required changes to Article 120, which took effect on June 28, 2012. According to Articles 36 and 56 of the UCMJ, the President prescribes pre-and post-trial rules for courts-martial, further defines elements of crimes, and sets maximum punishments for offenses, after proposals undergo interagency review.[53] Some executive guidance to implement the 2012 version of Article 120 still remains unfinished today, more than two and a half years after the statute took effect.[54]

On May 15, 2013, almost one year after the new statute's effective date, the President issued Executive Order 13643, which established maximum punishments for Article 120 offenses.[55] An executive order addressing the elements and specifications for Article 120 is currently undergoing interagency review, and it has yet to be signed by the President.[56] In the interim, the trial judiciaries for the military Services published elements, model specifications, and legal instructions in the *Military Judges Benchbook*.[57] This interim guidance applies at all courts-martial for Article 120 offenses committed on or after June 28, 2012.[58]

The delay—which remains partially unresolved—in establishing implementation guidance for the 2012 statutory provisions of Article 120 raises significant concerns. Implementation guidance is essential for military justice practitioners to effectively investigate, prosecute, and defend sexual assault cases. Without such guidance, they lack critical information to accurately and effectively implement the revisions to Article 120. In the absence of standardized guidance established by executive order, the JPP heard that the trial judiciaries and organizations within the military Services have created their own guidance, procedures, and policies for the statute. Ad hoc guidance is not an appropriate substitute for formalized guidance established via executive order, because it may or may not comport with the intent or requirement of the statute or with the President's guidance for its implementation and application.

The review process for issuing Article 120 guidance appears to have involved extensive delays both within and outside DoD, which have created serious obstacles for practitioners who are litigating sexual assault offenses. The JPP members believe that the process for establishing implementation guidance is moving too slowly and should be streamlined.

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53 In Articles 36 and 56 of the UCMJ, Congress authorized the President to prescribe pre- and post-trial rules for courts-martial, further define elements of crimes, and set maximum punishments for offenses. This guidance is accomplished via executive order and inserted into the Manual for Courts-Martial as the Military Rules of Evidence, Rules for Courts-Martial, and explanatory information for offenses and rules. Executive orders are used to define terminology within statutory offenses and set forth model specifications used by prosecutors when charging offenses. Establishing common guidance and procedures ensures efficient and consistent processing of military justice cases. Guidance also serves to highlight or clarify any underlying drafting or congressional intent for requirements. *See* Manual for Courts-Martial, United States (2012 ed.) [hereinafter 2012 MCM].

54 On January 6, 2006, Congress passed amendments to Article 120 to take effect on October 1, 2007. This delay allowed the executive branch 21 months to enact implementing guidance for the new statute. On September 28, 2007, the President issued Executive Order 13447, providing definitions and guidance for the new version of Article 120. Guidance from the EO was incorporated into the new version of the UCMJ that was published a few days later on October 1, 2007. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3134 (2006); Exec. Order No. 13,447, 72 Fed Reg. 56,179 (Oct. 2, 2007); 2008 MCM pt. IV, ¶ 45.

55 Exec. Order No. 13,643, 78 Fed. Reg. 29,559, 29,606 (May 21, 2013).

56 For an overview of the executive order implementation process, see *Transcript of JPP Public Meeting* 224-26, 244–45 (Sept. 19, 2014) (testimony of Col Michael Lewis, U.S. Air Force, Chief, Military Justice Division).

57 *See, e.g.,* U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (Sept. 10, 2014) [hereinafter Military Judges' Benchbook], *available at* http://www.apd.army.mil/pdffiles/p27_9.pdf.

58 *Id.* at 474.

2. Initial JPP Assessment of the 2012 Version of Article 120

At its August, September, and December 2014 public meetings, the JPP heard testimony and received information about the evolution and current state of Article 120. National experts in rape and sexual assault law, military law experts from the military Services, prosecution and defense practitioners, members of Congress, and sexual assault victims provided information and perspectives for the JPP's consideration. The JPP focused its review on assessing the current state of Article 120, identifying issues with its language and implementation, and assessing whether changes should be made to the law or its implementing guidance.

The JPP identified nine issues related to the definitions of terms under the 2012 version of Article 120 and two issues related to the elements and enumerated offenses included under Article 120. The following two sections explain each issue and describe improvements suggested by the presenters. The JPP's current assessments are also provided; however, the Panel believes that additional consideration of these complex issues is necessary and recommends that a subcommittee should continue to examine these issues and provide recommendations.

3. Issues Related to Article 120 Definitions

a. Is the current definition of "consent" unclear or ambiguous?

Under the current version of Article 120, consent is defined as follows:

> (A) The term 'consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.
>
> (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force likely to cause death or grievous bodily harm . . . .
>
> (C) Lack of consent may be inferred based on the circumstances of the offense. . . .[59]

While lack of consent was not specifically included as an element of rape or sexual assault in the current statute, the question of consent remains relevant to issues such as force and capacity, as well as to whether the government has proven all of the elements of the offense beyond a reasonable doubt.[60]

Some witnesses testified to the JPP that the current definition is inconsistent and confusing. According to Professor Stephen J. Schulhofer of New York University School of Law, it mixes three of the four definitions of consent used throughout American jurisdictions.[61] He believes the statute is awkwardly constructed and the consent language is vague and contradictory. He suggested the JPP propose a fresh

59 2012 MCM pt. IV, ¶ 45(g)(8).

60 Military Judges' Benchbook, *supra* note 57, ch. 3-45-13, Note 8.

61 Letter from Professor Stephen J. Schulhofer, NYU School of Law, American Law Institute, to JPP [hereinafter Schulhofer Letter] 3–4 (Aug. 8, 2014).

start to the sexual assault statute rather than attempt to piecemeal an amendment.[62] In contrast, other witnesses, including trial practitioners, said that the definition is clear, unambiguous, and should not be altered.[63]

It appears from the information presented to the JPP that many trial practitioners and criminal law experts find it difficult to interpret the statute's definition of consent. The JPP's own deliberations highlighted the ambiguity of the statute, which seems to require something akin to affirmative consent (i.e., "freely given agreement") while also providing that lack of consent may be inferred from the circumstances. The JPP recognizes that any modifications to definitions of consent could have a significant impact on the remainder of the statute. As the Judge Advocate General of the Navy, Vice Admiral Nanette M. DeRenzi, told the JPP, "While we should strive for clarity in the Code, the military justice system is comprised of interconnected rules and statutes. Changes to any other part of the system should be reviewed carefully and understood fully to avoid potential unintended consequences."[64] Therefore, before making any determinations or reaching any conclusions, the JPP recommends that a subcommittee consider this issue.

b. Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?

The 2007 version of Article 120 eliminated consent as an element the prosecution had to prove in sex crimes, but it added affirmative defenses that an accused could assert, averring that the alleged victim consented to the act (defense of "consent") or that the accused honestly and reasonably was mistaken as to certain facts regarding the victim's consent (defense of "mistake of fact as to consent").[65] CAAF found that the defenses in the 2007 statute unconstitutionally shifted the burden to the accused, and the 2012 revision to Article 120 removed consent and mistake of fact as to consent as affirmative defenses.[66] Instead, the statute now provides for "any applicable defenses" available under the UCMJ.[67] Because mistake of fact is a recognized defense under Rule for Courts-Martial 916(j), it arguably applies to cases under Article 120.[68] However, "consent" is not available as a general defense for any crimes under the UCMJ, including sex crimes.[69]

Several witnesses told the JPP that the availability of consent and mistake of fact as to consent under the current statute is unclear, because they were explicitly included in the 2007 version of Article 120 but not in the 2012 version.[70] Other witnesses said that the mistake of fact defense still clearly applied,

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62 *Id.* at 1–4.

63 *See Transcript of JPP Public Meeting* 21 (Sept. 19, 2014) (testimony of Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program); *see also id.* at 65 (testimony of LtCol Chris Thielemann, U.S. Marine Corps, Regional Trial Counsel).

64 *See Transcript of JPP Public Meeting* 236 (Dec. 12, 2014) (testimony of VADM Nanette M. DeRenzi, Judge Advocate General, U.S. Navy).

65 2008 MCM pt. IV, ¶ 45(r).

66 Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, Effective 28 June 2012*, Emerging Issues 7 (2012), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes_Defenses_Analysis_Clark_2012.pdf.

67 2012 MCM pt. IV, ¶ 45(f).

68 Clark, *supra* note 66, at 7, 9.

69 Clark, *supra* note 66.

70 *Transcript of JPP Public Meeting* 104 (Sept. 19, 2014) (testimony of Major Frank Kostik, U.S. Army, Senior Defense

but contended that it should be reintroduced into the statute to expressly limit its applicability and make clear any limitations on its scope.[71] In a recent article on the 2012 amendment to Article 120, Professor Lisa Schenck further explained why the mistake of fact defense should be reintroduced into the statute:

> A statutory definition provides transparency to victims and non-lawyers who cannot assess the scope of this defense, which is otherwise buried in case law. Moreover, a statutory definition increases stability since it is less subject to judicial interpretation and reversal of convictions when a trial judge's instructions do not comport with an appellate body's views. Limiting judicial discretion restricts the defense's scope and thus ensures a more victim-oriented defense.[72]

Under Article 120(a)(1), a rape occurs when an accused commits as a sexual act upon another using unlawful force.[73] Article 120(g)(6) goes on to define unlawful force as "an act of force done without legal justification or excuse."[74] The *Military Judges Benchbook*, consistent with the Court of Appeals for the Armed Forces decision in *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), currently instructs courts-martial panels that under the 2012 version of the rape statute,

> All of the evidence concerning consent to the sexual conduct is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence that the alleged victim consented to the sexual act, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the accused used unlawful force . . . .[75]

The JPP heard testimony that this instruction misapplies the law and Article 120 instructions on consent as an affirmative defense.[76] Two highly qualified experts for the Army's Trial Defense Service told the JPP that by using the language "legal justification or excuse," Congress intended to establish consent as a defense within the express terms of the statute.[77] They contended that consent is a legal justification or excuse and that court-martial panels should be so instructed.[78] Both said that an

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Counsel); *see also* Email from Col Gary M. Jackson, U.S. Air Force, to the JPP (Aug. 11, 2014) [hereinafter Jackson Email], *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/18_201408_Jackson_Art120_UCMJ_Comments_Redacted.pdf.

71 Professor Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?,* 11 Ohio St. J. Crim. L. 439, 463 (2014).

72 *Id.*

73 2012 MCM pt. IV, ¶ 45(a)(1).

74 2012 MCM pt. IV, ¶ 45(a)(1), (g)(6).

75 Military Judges' Benchbook, *supra* note 57, at para. 3-45-13, Note 8.

76 *Transcript of JPP Public Meeting* 14 (Sept. 19, 2014) (testimony of Mr. Edward J. O'Brien, former Highly Qualified Expert, U.S. Army Trial Defense Services).

77 *Id.* at 34 (testimony of Mr. Edward J. O'Brien, Highly Qualified Expert, U.S. Army Trial Defense Services); *see also* Ronald W. White, "The Redemptive Role of 'Justification or Excuse' in Article 120(a) (2011): We Don't Need a New Statute; We Need New Implementation" 2 (unnumbered) (undated; provided to JPP Sept. 12, 2014), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/26_TheRedemptiveRole_White.pdf.

78 *Written Statement of Mr. Edward J. O'Brien to the JPP, "The Article 120 Implementation Challenge: Avoiding Unintended Consequences and Unjust Outcomes"* (Sept. 19, 2014); White, *supra* note 77, at 10.

executive order or a modification to the *Benchbook*, rather than an amendment to the statute, would appropriately remedy this issue.[79]

During deliberations, members of the JPP agreed that the statute's lack of clarity in its definition of consent contributes to confusion about the role of consent in determining knowledge or intent in Article 120 offenses. The JPP also agreed that consent and mistake of fact as to consent are important defenses and that the statute should clearly indicate what constitutes a mistake of fact and whether the defense applies to rape and sexual assault offenses. The JPP recommends that a subcommittee further evaluate these issues and provide recommendations.

c. Should the statute define "incapable of consenting"?

The 2007 revision to Article 120 made a sexual act or contact criminal, if the victim was "substantially incapacitated" or "substantially incapable." These standards focused on the victim rather than the offender—specifically, on the victim's ability to appraise the nature of the sexual act, decline to participate in the sexual act, or communicate unwillingness to engage in the sexual act.[80] But "substantially incapacitated" proved to be difficult for prosecutors to prove beyond a reasonable doubt in court. The statutory language required jury panels to concentrate on the mental state of the victim, paying little attention to the knowledge of the accused.[81]

The 2012 statute removed the concept of substantial incapacitation and replaced it with a "knew or should have known" standard that shifted the focus from the victim to the offender and whether he or she knew or should have known that the "other person is incapable of consenting to the sexual act due to (A) impairment by any drug, intoxicant, or other similar substances . . . or (B) a mental disease or defect . . . ."[82] While its inclusion of the language "know or reasonably should know" injects an objective prong into the analysis, Congress did not provide additional definitions for "incapable of consenting" and "impairment."[83]

Numerous witnesses told the JPP that the interpretation of "incapable of consenting" and "impairment" under the 2012 version of Article 120 raised just as many problems as had language in the 2007 version of the statute. Noting that the statute includes no definitions or further guidance, witnesses provided anecdotes of military judges using their "common sense and the knowledge of human nature to the ways of the world" to determine the meaning of "incapable of consent."[84] They

79 *See Transcript of JPP Public Meeting* 25 (Sept. 19. 2014) (testimony of Mr. Ronald W. White, former Highly Qualified Expert, U.S. Army Trial Defense Services); *id.* at 36–37 (testimony of Mr. Edward J. O'Brien, Highly Qualified Expert, U.S. Army Trial Defense Services).

80 Clark, *supra* note 66, at 5.

81 *Id.*

82 2012 MCM pt. IV, ¶ 45(b)(3).

83 *Transcript of JPP Public Meeting* 59 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program).

84 *Transcript of JPP Public Meeting* 11 (Sept. 19, 2014) (testimony of Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program); *id.* at 64 (testimony of LtCol Christopher J. Thielemann, U.S. Marine Corps, Regional Trial Counsel); *id.* at 104 (testimony of MAJ Frank E. Kostik, Jr., U.S. Army, Senior Defense Counsel); *id.* at 71 (testimony of Maj Mark F. Rosenow, U.S. Air Force, Chief of Policy and Coordination, Special Victims Unit); *see also* Schulhofer Letter, *supra* note 61, at 2.

recommended amending the statute to provide either a definition or a statutory test to determine when an individual is incapable of consent.[85]

During deliberations, the JPP determined that additional review was required. In particular, it noted the interrelationship between incapacity and consent and the importance of providing clear definitions. Because sexual assault prevention training for all Service members uses language from Article 120, vague terms may leave them confused about standards of behavior and expectations. The JPP believes that a subcommittee should further assess the definitions and provide recommendations.

d. Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?

Under the current statute, an accused is guilty of rape if he or she commits a sexual act upon another person by

> administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.[86]

As written, the statute does not require the substance to be administered with the specific intent to impair an individual's capacity.

Professor Schulhofer asserted to the JPP that the statute should be narrowly tailored to criminalize only the intentional administration of an intoxicant for the purpose of committing a sexual act, not actions that are accidental or negligent.[87] No military practitioners raised this issue with the JPP or mentioned any problems at the trial level.[88]

During deliberations, JPP members noted that only one presenter highlighted the issue of intent with regard to the administration of a drug or intoxicant.[89] It was not clear to the JPP if a conviction would be possible in cases in which the substance was administered by accident or without proof of intent. Before drawing any conclusions with regard to the breadth of this provision in the statute and whether the issue necessitates consideration of statutory changes, the JPP recommends that a subcommittee hear from military justice practitioners about how cases alleging accidental administration have been addressed or litigated.

e. Does the definition of "bodily harm" require clarification?

The 2012 version of Article 120 expanded the offense of sexual assault to include sexual acts by causing bodily harm.[90] Within the offense of sexual assault based on bodily harm (as well as abusive

85 Schulhofer Letter, *supra* note 61, at 2; *see also Transcript of JPP Public Meeting* 75 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program); *id.* at 12 (testimony of Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program); *id.* at 65 (testimony of LtCol Christopher J. Thielemann, U.S. Marine Corps, Regional Trial Counsel).

86 2012 MCM pt. IV, ¶ 45(a)(5).

87 Schulhofer Letter, *supra* note 61, at 2.

88 *Transcript of JPP Public Meeting* 21–22 (Oct. 10, 2014).

89 *Id.*

90 2012 MCM pt. IV, ¶ 45(b)(1)(B).

sexual contact based on bodily harm), consent is not an independent element. However, under the current statute, bodily harm is defined as "any offensive touching of another, however slight, including any *nonconsensual* sexual act or *nonconsensual* sexual contact."[91] Thus, in cases in which the bodily harm alleged is the sexual act (or contact) itself, lack of consent can effectively become an element of the offense.[92]

The issue raised to the JPP is whether sexual assault based on bodily harm under Article 120(b)(1)(B) includes only offenses that involved bodily harm *in addition* to the sexual act or if the statute also includes offenses that involved only a nonconsensual sexual act.[93] According to several current practitioners, the definition of bodily harm, as well as the statutory scheme surrounding the bodily harm offense, is ambiguous and created confusion at trial.[94] One solution recommended to the JPP was to amend the definition of bodily harm to include "physical pain, illness, or any impairment" while establishing a separate and distinct offense under Article 120 for sexual intercourse without consent.[95] However, another witness argued the bodily harm definition should not be altered and that Congress's intention to include sex without consent as an offense was clear.[96]

During deliberations, the JPP members found the definition of bodily harm confusing. The JPP believes that a subcommittee should further review the definition and provide recommendations.

f. Is the definition of "threatening wrongful action" ambiguous or too narrow?

Under the 2012 version of Article 120, a person can be found guilty of a sexual assault if that person commits a sexual act or contact upon another person by "threatening or placing that other person in fear." The *Manual for Courts-Martial* defines threatening or placing that other person in fear as

> a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.[97]

The *Manual* does not define the term "wrongful action" and provides no guidance on whether Congress intended this provision to cover the inherently coercive senior-subordinate relationships unique to the military.[98] Significantly, the 2007 version of Article 120 specified that persons could be placed in fear "through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of another."[99]

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91 2012 MCM pt. IV, ¶ 45(g)(3) (emphasis added).

92 Masterton, Robertson, and Daknis, *supra* note 52, at 8 (citing 2012 MCM pt. IV, ¶ 45(g)(3)).

93 *Transcript of JPP Public Meeting* 122–23 (Sept. 19, 2014) (testimony of Lt Col Julie L. Pitvorec, U.S. Air Force, Chief, Senior Defense Counsel).

94 *See Id.*; *see also* Schulhofer Letter, *supra* note 61, at 3.

95 Schulhofer Letter, *supra* note 61, at 3.

96 *Transcript of JPP Public Meeting* 11 (Sept. 19, 2014) (testimony of Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program).

97 2012 MCM pt. IV, ¶ 45(g)(7).

98 *Id.*

99 2008 MCM pt. IV, ¶ 45(t)(7)(B)(ii)(III).

Some witnesses contended that this provision was too narrow or was ambiguous, because it did not encompass sexual acts or contact that is induced through promises of career advancement or undeserved favorable treatment.[100] Others testified to the contrary that the current language was adequate to charge sexual assaults resulting from inherently coercive relationships and that the "threat of . . . wrongful action" language was appropriately broad and could encompass senior-subordinate relationships.[101]

During deliberations, the JPP agreed that additional review was necessary to determine whether the current statutory language is intended to cover relationships unique to the military and, if so, whether the statute is sufficiently broad. The JPP recommends that a subcommittee further evaluate the statute and provide recommendations.

g. How should "fear" be defined to acknowledge both subjective and objective factors?

Because the definition of "threatening or placing that other person in fear" hinges on "caus[ing] a reasonable fear," it is clear that for offenses under Article 120 involving threats or placing a victim in fear, an objective "reasonable person" standard must be met rather than a subjective standard that takes into account the victim's actual mind-set.[102] The JPP received testimony that the "reasonable" test should be amended to recognize a victim's actual fears.[103]

During deliberations, the JPP agreed that additional review was necessary to determine whether a different test should replace the current objective test and to evaluate the most effective and efficient means of implementing such a change. In addition, as discussed in section C.2.b below, the definition of "threatening or placing that other person in fear" in the 2012 version of the statute was substantially narrowed from the definition used in the 2007 version. This raises questions as to whether the current version sufficiently criminalizes certain types of sexual misconduct, particularly those that involve abuse of authority. The JPP recommends that a subcommittee conduct this evaluation and provide recommendations.

h. Is the definition of "force" too narrow?

Under the 2007 version of the Article 120 statute, force was defined as an "action to compel submission of another or to overcome or prevent another's resistance" by use or suggestion of a dangerous weapon, or by "physical violence, strength, power, or restraint . . . *sufficient that the other person could not avoid or escape the sexual conduct*."[104] According to one expert, this phrasing required the victim to resist the assault.[105]

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100 Schulhofer Letter, *supra* note 61, at 3; *see also Transcript of JPP Public Meeting* 58 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program).

101 *See Transcript of JPP Public Meeting* 215–16 (Sept. 19, 2014) (testimony of CAPT Robert J. Crow, U.S. Navy, Director, Criminal Law Division).

102 2012 MCM pt. IV, ¶ 45(a)(3).

103 Schenck, *supra* note 71, at 452; Jackson Email, *supra* note 40.

104 2008 MCM pt. IV, ¶ 45(t)(5) (emphasis added).

105 Clark, *supra* note 66, at 2.

The 2012 revision to Article 120 amended the definition of force to focus objectively on the offender's conduct rather than subjectively on the victim's behavior.[106] Force is now defined as "(A) the use of a weapon; (B) the use of such physical strength or violence *sufficient to overcome, restrain, or injure a person*; or (C) inflicting physical harm *sufficient to coerce or compel submission by the victim*."[107] Subsection (B) measures the offender's use of physical strength or violence by an objective reasonable person standard rather than by the actions of the particular victim in a case.[108] While subsection (C) does look at the particular victim, it does not place the burden of resistance on that person.[109]

The JPP considered input from two witnesses who advocated for a broader definition of force.[110] Professor Schenck noted that the 2012 version of Article 120 restricts "force" to a situation in which a weapon is used, rather than simply displayed or suggested.[111] The degree of force to compel the victim's submission is more subjective than in the 2007 version and places less emphasis on whether the victim could escape the assault.[112] Professor Schenck therefore recommended that Article 120(g)(5) should include "the use, the display, or the suggestion of the use of a weapon."[113] Professor Schulhofer argued that there should be two categories of forcible rape—one encompassing unlawful force applied against a person; the other, escalated use of force that could cause death or grievous bodily harm.[114]

During deliberations, the JPP decided that additional review was warranted to determine if the definition of force should be broadened.[115] The JPP recommends that a subcommittee conduct further evaluation and provide recommendations.

i. Are the definitions of "sexual act" and "sexual contact" too narrow, or are they overly broad?

The JPP heard testimony that the statute's definition of sexual act may be overbroad. The current Article 120 defines a "sexual act" as follows:

> (a) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
>
> (b) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.[116]

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106 *Id.*

107 2012 MCM pt. IV, ¶ 45(g)(5) (emphasis added).

108 Clark, *supra* note 66, at 2.

109 *Id.*; 2012 MCM pt. IV, ¶ 45(g)(5)(C).

110 Schenck, *supra* note 71, at 452; Schulhofer Letter, *supra* note 61, at 2.

111 Schenck, *supra* note 71, at 451.

112 *Id.*

113 *Id.* at 452.

114 Schulhofer Letter, *supra* note 61, at 1.

115 *Transcript of JPP Public Meeting* 44 (Oct. 10, 2014) (Panel deliberations).

116 2012 MCM pt. IV, ¶ 45 (g)(1)(A),(B).

One witness observed that a military member who put his or her finger in the mouth of another to abuse or harass that person could be charged as committing a sexual act under part (b) of the 2012 definition.[117] A military defense counsel recommended amending the definition to eliminate the potential of a sexual assault conviction in cases in which objects or "any body part" are inserted into another's mouth for a purpose that is not sexual.[118]

The JPP also heard testimony that the statute's definition of sexual contact may either be too narrow or overbroad. The current version of Article 120 defines "sexual contact" as follows:

> (A) touching or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or
>
> (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.[119]

The definition of sexual contact in the 2012 version of Article 120 was expanded from the 2007 version, in which a sexual contact was defined as

> the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.[120]

Witnesses before the JPP were split on whether the new definition of sexual contact was too narrow or was overly broad. Those who criticized the definition as too narrow contended that the statute does not include a sexual touching of another person through the use of an inanimate object (e.g., a doctor using a stethoscope).[121] The Army Court of Criminal Appeals issued a recent unpublished opinion on this exact issue and found otherwise, holding that touching with a stethoscope, "if done under requisite circumstances, can constitute a sexual contact."[122]

Conversely, those who viewed the definition as overly broad reasoned that the definition allows for possible inclusion of "hypotheticals [that are] absurd"; one observed that "if the absurdity can be removed from the definition, then I think it adds respect to the law."[123] Another presenter

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117 *Transcript of JPP Public Meeting* 105 (Sept. 19, 2014) (testimony of MAJ Frank E. Kostik, Jr., U.S. Army, Senior Defense Counsel).

118 *Id.*

119 2012 MCM pt. IV, ¶ 45(g)(2)(A),(B).

120 2008 MCM pt. IV, ¶ 45(t)(2).

121 *Transcript of JPP Public Meeting* 11 (Sept. 19, 2014) (testimony of Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program).

122 *United States v. Schloff*, Misc. No. 20140708 (A. Ct. Crim. App. Dec. 16, 2014) (unpublished opinion).

123 *Transcript of JPP Public Meeting* 302–03 (Aug. 7, 2014) (testimony of COL Timothy Grammel, U.S. Army (Retired)).

agreed, noting that the definition could be used to impose unnecessary or inappropriate collateral consequences, such as sex offender registration for acts of touching that are not necessarily sexual.[124]

During deliberations, members of the JPP agreed that additional review of these definitions is warranted, and the JPP recommends that a subcommittee conduct further evaluation and provide recommendations.

4. Issues Related to Statutory Elements and Additional Offenses

a. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?

> According to Article 120 (b)(2) and (b)(3), a person is guilty of a sexual assault when he or she
>
> (2) commits a sexual act upon another person when the person *knows or reasonably should know* that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
>
> (3) commits a sexual act upon another person when the other person when the other person is incapable of consenting to the sexual act due to—
>
> (A) impairment by any drug, intoxicant, or other similar substance, and that condition *is known or reasonably should be known* by the person; or
>
> (B) a mental disease or defect, or physical disability, and that condition *is known or reasonably should be known* by the person.[125]

The requirement to prove that the accused knew or reasonably should have known is not found in the federal sexual abuse statute, 18 U.S.C. § 2242, upon which Article 120(b)(2) and (b)(3) were based.[126] The JPP received testimony that this additional requirement in Article 120 is essentially an extra *mens rea* element that the prosecution must prove, which, in turn, affords unnecessary protections to the accused.[127]

During deliberations, the JPP decided that additional review by a subcommittee is warranted to assess this knowledge requirement included in Article 120 and to provide recommendations.

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124 *Transcript of JPP Public Meeting* 249–52 (Aug. 7, 2014) (testimony of Mr. William E. Cassara, Attorney at Law, U.S. Army (Retired)).

125 2012 MCM pt. IV, ¶ 45(b)(2),(3) (emphasis added).

126 Schenck, *supra* note 71, at 453; *see also* Jackson Email, *supra* note 40. Section 2242 states: "Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (2) engages in a sexual act with another person if that other person is (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life." 18 U.S.C. § 2242 (2012).

127 Schenck, *supra* note 71, at 453.

b. Should the offense of "indecent act" be added to the UCMJ as an enumerated offense?

The UCMJ offense of "indecent acts with another" traditionally proscribed a variety of sexual misconduct that was not otherwise prohibited, such as consensual sexual intercourse in the presence of others and sex acts with an animal or a corpse.[128] The 2007 amendment to Article 120 moved "indecent acts with another" from Article 134 to Article 120 and eliminated the element of the conduct as prejudicial to good order and discipline or discrediting the Service.[129] The 2012 amendment to Article 120, however, removed the offense entirely. Currently, "indecent act" is not an enumerated offense under the UCMJ.[130]

The JPP received testimony that the statute should be amended to restore indecent acts as an enumerated offense.[131] The prosecution may still charge an indecent act as a general disorder offense under Article 134, but it must prove as an additional element that the conduct was prejudicial to good order and discipline or discredited the Service.[132] In addition, the maximum punishment for a general disorder Article 134 offense is four months' confinement and forfeiture of two-thirds pay per month for four months, whereas the maximum punishment for an indecent act charged under the 2007 version of Article 120 was up to five years' confinement, forfeiture of all pay and allowances, and a dishonorable discharge.[133]

During deliberations, members of the JPP agreed that additional review was necessary to consider whether indecent acts should be restored as an enumerated offense. The JPP recommends that a subcommittee conduct further evaluation and provide recommendations.

5. Initial JPP Assessment of Article 120 Definitions and Elements

The JPP believes that a subcommittee should further evaluate each issue describe above regarding definitions and elements for offenses according to the 2012 version of Article 120. In particular, the subcommittee should explore the following questions:

1. Is the current definition of "consent" unclear or ambiguous?
2. Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?
3. Should the statute define "incapable of consenting?"
4. Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?
5. Does the definition of "bodily harm" require clarification?
6. Is the definition of "threatening wrongful action" ambiguous or too narrow?

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128 Schenck, *supra* note 71, at 449.

129 *Id.*

130 *Id.* at 448.

131 *Transcript of JPP Public Meeting* 60 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program).

132 Schenck, *supra* note 71, at 449; *see also* 2012 MCM pt. IV, ¶ 60c(5) (explaining that in charging a general disorder offense under Article 134, the government also has to ensure that offense alleged is not covered by another enumerated, punitive offense under UCMJ).

133 *See United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011) (clarifying maximum punishment for general disorder offenses charged under Article 134); 2012 MCM, app. 28, at 11 (Paragraph 45.f(6)) (providing maximum punishment for indecent acts charged under 2007 version of Article 120).

7. How should fear be defined to acknowledge both subjective and objective factors?
8. Is the definition of "force" too narrow?
9. Are the definitions of "sexual act" and "sexual contact" too narrow, or are they overly broad?
10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?
11. Should the offense of "indecent act" be added to the UCMJ as an enumerated offense?

The subcommittee should assess what effect, if any, each issue has had in military justice practice and whether appellate review is pending or anticipated that would provide additional insight regarding interpretation of the terms. If the subcommittee members determine that change is necessary or warranted, their recommendations should offer specific language for proposed amendment(s). In assessing options for changes to Article 120, the subcommittee should consider how effectively each option resolves the concern and what effect the amendment would likely have on the prosecution or defense of sexual assault crimes in the military judicial system. They should also determine whether the importance of stability outweighs the importance of clarity.

C. COERCIVE SEXUAL RELATIONSHIPS AND ABUSE OF AUTHORITY

1. Coercive Sexual Relationships within Criminal Law

According to the Model Penal Code, "American law has long since moved beyond the early 20th century view that physical harm and threats of violence were the only impermissible means by which to secure submission to a sexual demand."[134] Many civilian jurisdictions now criminalize a sexual intrusion upon another when consent to that intrusion has been coerced by impermissible pressures or threats.[135] In addition to those coerced by traditional methods, jurisdictions now criminalize certain sexual relationships in which a perpetrator with some authority over a subordinate wields that authority to coerce that individual into a sexual encounter.[136] Such relationships include prison guards and prisoners, parole officers and parolees, and probation officers and those on probation.[137] The proposed Model Penal Code explains that "the need for additional statutory coverage arises primarily because of the pervasive ability of [those] in positions of power to deploy more subtle threats and improper offers of special privileges . . . ."[138]

Because of the command structure in which they work, military members may be particularly vulnerable to coercive sexual relationships.[139] Accordingly, certain relationships, including those of a sexual nature, between select individuals in the military are considered inherently coercive and are

134 American Law Institute, Model Penal Code: Sexual Assault and Related Offenses: Tentative Draft No. 1, at 48 (2014), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/03_ProposedRevision_MPC213_Excerpt_201405.pdf.

135 *Id.*

136 *Id.*

137 *Id.* at 56.

138 *Id.*

139 U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-14 (Nov. 6, 2014), *available at* http://www.apd.army.mil/pdffiles/r600_20.pdf.

strictly prohibited by Service regulations.[140] Specifically, each military Service has regulations that strictly prohibit and criminalize sexual relationships between senior and subordinate military members within the same direct chain of command, trainers and trainees, and recruiters and recruits.[141]

2. Current Practices for Charging Coercive Sexual Relationships In the Military

a. Charging Coercive Sexual Relationships Outside of Article 120

In the FY14 NDAA, Congress codified the requirement that the military Services must have policies prohibiting Service members in positions of authority from having relationships with recruits and trainees. Section 1741 requires the military Services to maintain policies and/or regulations that define inappropriate and prohibited relationships, communication, conduct, and contact between members of the Armed Forces who exercise authority or control over, or supervise, prospective members or persons in entry-level processing or training.[142] The provision requires Service policies to specify that such conduct is subject to punitive action under the UCMJ and that the offender will automatically be processed for administrative separation if a punitive discharge is not adjudged at a court-martial.[143] Section 1741 further required the Secretary of Defense to report back to Congress within 120 days on whether an additional article should be created under the UCMJ to address violations of these policies.[144]

In its May 2014 "Report on Protections for Prospective Members," DoD stated that each of the military Services had punitive regulations prohibiting coercive relationships and described how violations could be charged under the UCMJ:[145]

> Service members who violate a punitive regulation may be punished under Article 92(1) for failure to obey a lawful general order or regulation. So long as the punitive regulation is lawful, knowledge is imputed to the service member and is not an element of the offense.[146]

The maximum punishment that may be imposed at a court-martial for a violation of this provision of Article 92 is a dishonorable discharge (or dismissal for an officer), forfeiture of all pay and

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140 *Id.*

141 *See generally id.*, ch. 4; U.S. Dep't of Air Force, Instr. 36-2909, Professional and Unprofessional Relationships (June 19, 2014), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi36-2909/afi36-2909.pdf; U.S. Dep't of Navy, Sec'y of Navy Instr. 5300.26D, Department of the Navy (DON) Policy on Sexual Harassment (Jan. 3, 2006), *available at* http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5300.26D.pdf; U.S. Marine Corps, Order 1000.9A, Sexual Harassment (May 30, 2006), *available at* http://www.marines.mil/Portals/59/Publications/MCO%201000.9A.pdf; U.S. Coast Guard, Commandant Instr. M1000.6A , Personnel Manual, ch. 8, § H (Interpersonal Relationships with the Coast Guard) (May 14, 2002), *available at* http://isddc.dot.gov/OLPFiles/USCG/010564.pdf.

142 FY14 NDAA, Pub. L. No. 113-66, § 1741, 127 Stat. 672 (2013).

143 *Id.*

144 FY14 NDAA, Pub. L. No. 113-66, § 1741(d), 127 Stat. 672 (2013).

145 U.S. Dep't of Def., Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training 2 (May 2014) [hereinafter DoD Report on Protections for Prospective Members], *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/29_ReportOnProtectionsForProspectiveMembers_DoD_2014.pdf.

146 *See* 2012 MCM pt. IV, ¶ 16.c.(1)(d) (2012).

allowances, and confinement for two years.[147] Coercive relationships may also be charged, depending on the specific facts of the offense, under Article 93, maltreatment; Article 128, assault; or Article 134, conduct that discredits the Service or is prejudicial to good order and discipline. "Report on Protections for Prospective Members" stated that a new UCMJ article or an additional provision under Article 120 was not required because "statutes and regulations are in place to hold offenders appropriately accountable when prospective and new members of the military are victimized by service members who exercise control over them."[148]

Those who testified before the JPP against changing Article 120 highlighted the articles and regulations that already prohibit inappropriate coercive sexual relationships.[149] Numerous witnesses, including prosecutors, staff judge advocates, military justice experts, a civilian defense counsel, and the Army's Judge Advocate General, told the JPP that current UCMJ punitive articles and regulations sufficiently criminalize sexual relationships between senior officials and subordinates, trainers and trainees, and recruiters and recruits, contending that the statute does not require further revision.[150]

Several witnesses, however, told the JPP that prosecuting offenses of senior-subordinate relationships under punitive articles other than Article 120 is not sufficient, because conviction under them generally does not require sex offender registration.[151] They contend that such offenses should be charged and viewed as sex offenses, because while a sexual relationship between a senior and a subordinate may appear consensual, the inherently coercive nature of the relationship prevents the subordinate from rendering freely given consent.

b. Charging Coercive Sexual Relationships Under Article 120

Any case involving overt force or threat of force may be charged as an offense under Article 120. But for cases that involve coercive sexual relationships without overt force, the ability to charge conduct as a criminal offense under Article 120 has been diminished by amendments to the statute.

Under the pre-2007 version of Article 120, cases without overt force relied on the doctrine of constructive force—an alternative legal theory that recognizes use of threats and intimidation to gain control or prevent resistance as a type of force.[152] Military courts further developed this theory to address instances of clearly nonconsensual sexual acts—especially between military members with rank disparity—when there was no use of overt physical force.[153] The necessary force was found to

147 *Id.*

148 DoD Report on Protections for Prospective Members, *supra* note 145, at 1, 12–13 (e.g., Articles 92, 93, 120, 120(c), 128, 133, and 134).

149 *See Transcript of JPP Public Meeting* 242 (Sept. 19, 2014) (testimony of CAPT Robert Crow, U.S. Navy, Director, Criminal Law Division (OJAG Code 20)); *id.* at 62 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program) (distinguishing articles used to charge inappropriate relationships as "military discipline offenses" from Article 120 sexual assault offenses).

150 *See Transcript of JPP Public Meeting* 253 (Aug. 7, 2014) (testimony of Mr. William E. Cassara, Attorney at Law, U.S. Army (Retired)); *see also Transcript of JPP Public Meeting* 158 (Sept. 19, 2014) (testimony of CAPT Steven J. Andersen, U.S. Coast Guard, Commanding Officer, Legal Services Command); *id.* at 179 (testimony of Maj Melanie J. Mann, U.S. Marine Corps, Military Justice Officer).

151 *See, e.g., Transcript of JPP Public Meeting* 207 (Sept. 19, 2014) (testimony of LTC Michael E. Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command).

152 Black's Law Dictionary 656 (10th ed. 2014).

153 DoD Report on Protections for Prospective Members, *supra* note 145, at 2.

belong by nature to fear, coercion, or abuse of authority.[154] However, the mere existence of a sexual relationship between individuals of a different rank was not alone enough to sustain a conviction under Article 120 of the UCMJ.[155] Under the constructive force doctrine, military appellate courts determined that the victim's lack of consent must be manifest and/or the accused must have explicitly used the difference in rank to create a situation of dominance and control.[156]

The 2007 version of Article 120 eliminated the need for the judicially created doctrine of constructive force by adding a specific provision addressing coercive or threatening relationships between individuals of different rank. The definition of "placing in fear" was expanded to include "the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person."[157] Thus, sexual interactions between senior military personnel and their subordinates that met the statutory elemental requirements could be charged as aggravated assault or abusive sexual contact under Article 120. Other provisions of Article 120 applied when actual force or threat of force was involved.[158]

The 2012 version of Article 120 does not contain language that specifically addresses the use of military rank to threaten or coerce, without force, an individual into a sexual relationship. Instead, the current statute includes the following definition:

> The term 'threatening or placing that other person in fear' means a communication or actions that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.[159]

Some witnesses told the JPP that the current statutory language in Article 120 does not clearly criminalize sexual relationships between senior personnel and their subordinates resulting from coercion and/or abuse of authority when force and lack of consent are not overtly present.[160] Two witnesses described the difficulty of charging coercive sexual relationships as sexual assault offenses under Article 120(b)(1)(A), a sexual act accomplished though fear of wrongful action, noting that the statutory language was ineffective for such cases.[161] The witnesses recommended amending Article 120 to specifically encompass situations in which senior Service members use their position of authority to coerce a subordinate into a sexual act or contact.[162] Representative Lois Frankel supplied a proposed

154 *Id.*

155 *Id.*

156 Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, Army Law., Apr. 2001, at 64, 65.

157 2008 MCM pt. IV, ¶ 45(t)(7)(b)(ii).

158 *Id.*

159 2012 MCM pt. IV, ¶ 45(g)(7).

160 *Transcript of JPP Public Meeting* 137 (Sept. 19, 2014) (testimony of Rep. Lois Frankel, D-22nd FL); *id.* at 142 (testimony of Ms. Elisha Morrow).

161 *Transcript of JPP Public Meeting* 58 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program); *see also* Schulhofer Letter, *supra* note 61, at 3.

162 *Transcript of JPP Public Meeting* 58 (Sept. 19, 2014) (testimony of LTC Alexander N. Pickands, U.S. Army, Chief, Trial Counsel Assistance Program).

amendment to Article 120 to add a specific provision for offenses committed by use of the person's position of authority.[163]

DoD's May 2014 report observed that various provisions of Article 120 are available for prosecutors to charge sexual relationships between senior and subordinate Service members when the conduct meets the elements of the offense.[164] Two witnesses testifying before the JPP noted that Article 120(b)(1)(B), which classifies a sexual act causing bodily harm as sexual assault, may apply to offenses when the victim is unable to consent, according to the concept of constructive force—for example, a drill sergeant having sexual intercourse with a trainee.[165] The Army Judge Advocate General recounted to the JPP the Army's most recent successful prosecution of a drill sergeant who misused his position; his indictment under Article 120(b)(1)(A) relied on the theory of constructive force.[166]

However, it is not clear that the examples described by these witnesses capture all conduct that may be criminally objectionable. For example, the most recent Army case cited by the Army Judge Advocate General involved a drill sergeant who threatened wrongful action against the subordinate victims—asserting that he would kick them out of the Army if they did not comply.[167] It is less clear that the same theory would have permitted charging the offense under Article 120 if the drill sergeant had instead proposed action to benefit the victims—for example, promising they would be selected for promotion or special schools if they complied.

The definition for "threatening or placing that other person in fear" used in the 2012 version of Article 120 is less encompassing than the 2007 definition. The JPP agrees that as a result, the 2012 version of Article 120 does not sufficiently criminalize sexual relationships between senior and subordinates when force or the threat of force is not overt.

3. Strict Liability for Trainer-Trainee Offenses

In 2013, Representative Jackie Speier proposed legislation to create a strict liability offense when a training instructor engages in a sexual relationship with a trainee who is undergoing basic training or within 30 days of such training. The bill proposes to criminalize under Article 120 any sexual relationship between an instructor and trainee, presuming an absence of consent.[168] During her testimony to the JPP, Representative Speier described numerous trips to basic training bases. In her view, military culture and the strict adherence to rank and authority that is thrust upon basic trainees lead to a coercive environment in which trainees simply do not believe they can refuse advances by their more senior instructors.[169]

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163 *See Written Submission of Representative Lois Frankel, "Red Line Version of Article 120 with Frankel Proposal"* (Sept. 19, 2014); *see also Transcript of JPP Public Meeting* 136–38 (Sept. 19, 2014) (testimony of Rep. Lois Frankel, D-22nd FL).

164 DoD Report on Protections for Prospective Members, *supra* note 145, at 13.

165 *Transcript of JPP Public Meeting* 173 (Sept. 19, 2014) (testimony of LCDR Ryan J. Stormer, U.S. Navy, Trial Counsel Assistance Program); *id.* at 181 (testimony of LTC Jim Varley, U.S. Army, Deputy Chief, Government Appellate Division).

166 *See Transcript of JPP Public Meeting* 258 (Dec. 12, 2014) (testimony of LTG Flora D. Darpino, The Judge Advocate General, U.S. Army).

167 Alan S. Zagier, *Fort Leonard Wood Drill Sergeant Found Guilty of Sex Assaults,* Army Times, Sept. 24, 2014, *available at* http://archive.armytimes.com/article/20140924/NEWS06/309240058/Fort-Leonard-Wood-drill-sergeant-found-guilty-sex-assaults.

168 H.R. 430, 113th Cong. (2013), Protect Our Military Trainees Act.

169 *Transcript of JPP Public Meeting* 128 (Sept. 19, 2014) (testimony of Rep. Jackie Speier, D-14th CA).

Representative Speier told the JPP that the issue of consent was paramount during recent courts-martial of military training instructors who were accused of sexually assaulting trainees at Lackland Air Force Base, Texas. She noted that many of the instructors acknowledged sexual relationships with the trainees but argued at trial that the relationships were consensual and therefore not criminal. She stated that on the basis of this defense, many of the instructors were found not guilty of sexual offenses but guilty of lesser offenses that did not carry the collateral consequence of having to register as a sex offender.[170] From these outcomes, Representative Speier concluded that the UCMJ and Article 120 do not properly deal with military training environments, and she declared, "I believe there should be strict liability." She also told the JPP that current military regulations discourage victims from reporting sexual assaults resulting from abuse of authority, because they leave victims subject to possible UCMJ action for engaging in consensual relationships with instructors.[171]

In law, strict liability is liability that does not depend on intent to harm. Instead, it is based on the breach of an absolute duty to make something safe.[172] In this context, strict liability would make the trainer who engages in a sexual act with a trainee guilty of a sexual assault owing solely to his or her position of trust and authority as it relates to the victimized subordinate. The assumption of this legal theory is that trainers of military personnel have an absolute duty to make safe every aspect of the training environment—from equipment integrity to command structure and interpersonal relationships. Any deviation from this standard would be an affront to the authority placed in those leaders and would cause trainees to distrust the immediate chain of command and military leadership as a whole.[173] In an opinion piece, Congresswoman Speier wrote, "There should be strict accountability for any [trainer] who has sex with his or her trainee. Period. There is clearly no consent when a training instructor tells you do something in an environment where the student is at his [or her] mercy 24/7."[174]

The JPP heard from numerous witnesses who recommended against a strict liability standard that would remove any consideration of the trainer's intent.[175] Witnesses contended that such a standard would be overbroad, criminalize truly consensual relationships, and result in unjust outcomes.[176] Other witnesses reasoned that the UCMJ already criminalizes such conduct, that the current charging mechanisms appropriately cover abuses of power in training environments, and that an additional punitive provision is not necessary.[177]

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170 *Id.* at 128.

171 *Id.* at 129, 131.

172 Black's Law Dictionary 926 (10th ed. 2014).

173 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Prevention and Reporting of Sexual Assault and Other Misconduct in Initial Military Training (Sept. 25, 2012), *available at* http://www.sapr.mil/public/docs/news/Prevention_and_Report_of_Sexual_Assault.pdf.

174 Reps. Jackie Speier, Susan Davis, and Loretta Sanchez, *Code of Military Justice Needs to Be Updated for 21st Century*, San Antonio Express-News, Oct. 8, 2012, *available at* http://www.mysanantonio.com/opinion/commentary/article/Code-of-Military-Justice-needs-to-be-updated-for-3929510.php.

175 *See Transcript of JPP Public Meeting* 192 (Sept. 19, 2014) (testimony of LTC Jim Varley, U.S. Army, Deputy Chief, Government Appellate Division); *id.* at 183 (testimony of LTC Michael E. Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command).

176 *See Transcript of JPP Public Meeting* 192 (Sept. 19, 2014) (testimony of LTC Jim Varley, U.S. Army, Deputy Chief, Government Appellate Division); *id.* at 183 (testimony of LTC Michael E. Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command).

177 *See Transcript of JPP Public Meeting* 253 (Aug. 7, 2014) (testimony of Mr. William E. Cassara, Attorney at Law, U.S. Army (Retired)); *see also Transcript of JPP Public Meeting* 201–02 (Sept. 19, 2014) (testimony of CAPT Steven J. Andersen, U.S. Coast Guard, Commanding Officer, Legal Services Command); *id.* at 186–87 (testimony of Col Polly S.

4. Initial JPP Assessment of Coercive Sexual Relationships and Abuse of Authority Cases

The JPP believes that a subcommittee should evaluate coercive sexual relationships and situations involving abuse of authority and provide recommendations regarding Article 120. Specifically, the subcommittee should consider the following questions:

1. Is the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 appropriate and effective when sexual conduct is involved?
2. Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?
3. Should the definition of "threatening or placing that other person in fear" be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?
4. Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?
5. Should sexual relationships between basic training instructors and trainees be treated as strict liability offenses under Article 120?
6. As an alternative to further amending Article 120, should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD's list of offenses that trigger sex offender registration?

D. SEPARATING PENETRATIVE AND CONTACT (NON-PENETRATIVE) OFFENSES

In 2014, the Response Systems to Adult Sexual Assault Crimes Panel recommended that the JPP consider "whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120."[178] During its review, the RSP compared the statutory framework of Article 120 to civilian rape and sexual assault statutes and found that some civilian statutes separate penetrative offenses from less serious contact offenses and include them under different articles or provisions of a criminal code.[179] The RSP heard that "sexual assault [usually] refers to felony-level crimes like rape, penetrative offenses. Misdemeanors are contact offenses, contact with an intent to satisfy sexual desires, sexual gratification." In contrast, Article 120 "spans all of those things" and includes "a very broad range of conduct." The RSP found that such a structure may lead to conflated or incorrect statistics on sexual assault in the military because contact offenses are labeled as sexual assault.[180]

The JPP heard testimony on the issue from witnesses who advocated both for and against bifurcation. Those in favor argued that bifurcation would provide more clarity to trial practitioners and clearly

Kenny, U.S. Air Force, Staff Judge Advocate, Air Education and Training Command).

178 RSP Report, *supra* note 3, at 48 (Recommendation 113); *see also Transcript of RSP Public Meeting* 215 (May 29, 2014) (Panel deliberations).

179 RSP Report, *supra* note 3, at 27.

180 *See Transcript of RSP Public Meeting* 212 (May 5, 2014) (presentation of Dean Elizabeth Hillman, Chair, Comparative Systems Subcommittee, to RSP).

separate more egregious penetrative offenses from less severe contact offenses.[181] Those opposed said that amending Article 120 again would only add to the confusion of trial practitioners by creating yet another statutory scheme (the fourth in a decade).[182] These witnesses said that proper training and experience would alleviate any existing confusion regarding the current statute, and they recommended against separating the offenses.[183] In particular, during the December 2014 public meeting, the Judge Advocate General of the Coast Guard told the JPP that he saw continued value in grouping penetrative and contact offenses together under one article. Specifically, he noted that bifurcation could send an unintended message that non-penetrative sexual offenses are less worthy of concern and therefore more tolerable.[184]

During deliberations, the JPP agreed that bifurcating different types of sex offenses under the UCMJ at this time would create further confusion. The members agree that there is no compelling need for this change and that categorizing sex offenses is complicated whether they are combined in one statute or separated. The JPP does not believe bifurcation to be necessary and concludes that this issue does not warrant further evaluation or assessment.

E. JPP ANALYSIS AND RECOMMENDATIONS ON ARTICLE 120

From the outset, the JPP has been mindful of potential harm that may result from further revisions to Article 120, a statute that has already been significantly revised twice in recent years. The JPP heard from numerous witnesses who recommended strongly against any major revisions to the statute.[185] Presenters told the JPP that military justice practitioners must currently navigate through three different statutes with different definitions and requirements, which vary according to the time frame of an alleged offense.

The senior military attorneys of each of the Services and other practitioners cautioned against continued revisions to Article 120. Noting the unique purpose of military law, the Air Force Judge Advocate General urged the JPP to consider that changes to the UCMJ should be tailored to promoting justice, maintaining good order and discipline, and promoting efficiency in the military establishment.[186] Witnesses also highlighted other avenues, such as executive orders, case law, and judicial instructions, that could be used to provide clarity and additional guidance to alleviate many of the concerns articulated to the JPP.[187]

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181 *See Transcript of JPP Public Meeting* 297 (Aug. 7, 2014) (testimony of Col Gary M. Jackson, U.S. Air Force, Staff Judge Advocate, Global Strike Command).

182 *See Transcript of JPP Public Meeting* 200, 299 (Aug. 7, 2014) (testimony of Mr. Dwight Sullivan, Office of the General Counsel, Department of Defense); *id.* at 301 (testimony of COL Timothy Grammel, U.S. Army (Retired)).

183 *See id.*

184 *See Transcript of JPP Public Meeting* 287 (Dec. 12, 2014) (testimony of RADM Steven D. Poulin, Judge Advocate General and Chief Counsel, U.S. Coast Guard); *see also Transcript of JPP Public Meeting* 200, 299 (Aug. 7, 2014) (testimony of Mr. Dwight Sullivan, Office of the General Counsel, Department of Defense); *id.* at 301 (testimony of COL Timothy Grammel, U.S. Army (Retired)).

185 *See Transcript of JPP Public Meeting* 11 (Sept. 19, 2014) (testimony of Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program); *see also Transcript of JPP Public Meeting* 270 (Aug. 7, 2014) (testimony of Col Gary Jackson, U.S. Air Force); *id.* at 265 (testimony of COL Timothy Grammel, U.S. Army (Retired)).

186 *See Transcript of JPP Public Meeting* 273 (Dec. 12, 2014) (testimony of Lt Gen Christopher F. Burne, The Judge Advocate General, U.S. Air Force).

187 *See Transcript of JPP Public Meeting* 98 (Sept. 19, 2014) (testimony of Lt Col Julie L. Pitvorec, U.S. Air Force, Chief Senior Defense Counsel); *see also Transcript of JPP Public Meeting* 273 (Aug. 7, 2014) (testimony of CAPT Christian Reismeier, Chief Judge, Department of the Navy).

While additional amendments may complicate the jobs of prosecutors, the JPP believes that terms and definitions within the statute must be clear to avoid confusion about standards of behavior and expectations, especially since sexual assault prevention training for Service members uses language from Article 120. The statutory issues identified to the JPP and the concerns about the potential consequences of additional statutory amendments demonstrated to the JPP members that additional review is important and justified. The JPP subcommittee should closely consider the issues discussed in this report and evaluate the potential consequences of changes or amendments.

III. Special Victims' Counsel Programs

A. OVERVIEW OF THE SPECIAL VICTIMS' COUNSEL PROGRAMS

On August 14, 2013, the Secretary of Defense directed that special victims' counsel[188] programs be established within each military Service.[189] Four months later, on December 26, 2013, the President signed the National Defense Authorization Act for Fiscal Year 2014, which amended Title 10, Section 1044e, of the United States Code to require special victims' counsel programs within each military Service for the purpose of "providing legal assistance to military victims of sexual assault."[190] The statute detailed the scope of a special victims' counsel's assistance, qualifications, training, and availability, and declared the relationship between a victim and a special victims' counsel to be that between attorney and client.[191] The statute made each Service's Judge Advocate General (JAG) or Staff Judge Advocate (SJA) to the Commandant responsible for establishing and supervising special victims' counsel.[192] Each Service has since implemented various regulations and procedures for their respective SVC programs.[193]

The Air Force established its permanent SVC program on June 1, 2013.[194] One month later, on July 12, 2013, the Coast Guard implemented its SVC program.[195] The Navy's Victims' Legal Counsel Program (VLCP) began in August 2013, with the Marine Corps' Victims' Legal Counsel Organization (VLCO) following in October 2013.[196] Both programs reached full operating capacity in January 2014. The Army implemented its program on November 1, 2013.[197] Table 3.1 outlines the status and organizational structure of each program as of November 14, 2014.

188 Victims' counsel within the Navy and Marine Corps are known as victims' legal counsel (VLC); however, for the purposes of this report, the term "SVCs" will be used when referring generally to victims' counsel across the Services.

189 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013), *available at* http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

190 FY14 NDAA, Pub. L. No. 113-66, § 1716(a)(1)(A), 127 Stat. 672 (2013) (inserting 10 U.S.C. § 1044e).

191 FY14 NDAA, Pub. L. No. 113-66, § 1716(a), 127 Stat. 672 (2013) (inserting 10 U.S.C. § 1044e(b)–(d)).

192 FY14 NDAA, Pub. L. No. 113-66, § 1716(a), 127 Stat. 672 (2013) (inserting 10 U.S.C. § 1044e(e)(1)).

193 *See generally* Services' Responses to JPP Request for Information 19(c) (Nov. 6, 2014).

194 U.S. Dep't of Def., Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014, at 6 (Apr. 2014) [hereinafter DoD Report on Section 1716 Implementation], *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20141114/03_DoD_ReportImplementation_Sec1716_FY14NDAA.pdf. From January to May 2013, the Air Force implemented a pilot SVC program consisting of 60 judge advocates serving as part-time SVCs. *See id.*

195 *Id.* at 8.

196 *Id.* at 2–4.

197 *Id.* at 1.

Table 3.1. Size and Structure of the Special Victims' Counsel Programs (as of November 14, 2014)

Service	Personnel/Locations	Caseload (figures are aggregate since each program's inception)	Reporting Structure
Army	76 active duty SVCs 75 Reserve SVCs Support staff assigned by the installation SJA 37 offices Note: SVCs also have collateral duty as legal assistance attorneys	1,434 clients 7,995 consultations with clients 1,852 interviews with TC/DC/MCIO 304 courts-martial appearances 330 post-trial counseling sessions 3 writ filings at ACCA	SVCs report to the chief of legal assistance within the office of the installation SJA
Air Force	28 SVCs 10 paralegals 19 offices Note: By summer 2015, the Air Force expects to have 40 SVCs assigned; 6 additional installations will be added in January 2015.	1,200+ clients 1,800+ interviews 220 Article 32 investigations 183 courts-martial	SVCs report to the Chief, SVC Division; chain of command is independent of convening authorities or SJAs
Navy	31 VLCs 10 legal specialists (yeomen) 5 regions, 23 offices	829 clients 118 Article 32 investigations 111 pretrial motion hearings 83 general courts-martial 20 special courts-martial 63 pretrial conferences	VLCs report through regional VLC to the VLCP Chief of Staff; chain of command is independent of convening authorities or SJAs
Marine Corps	13 active duty VLCs 1 activated Reserve VLC 9 legal support personnel 4 regions; 11 offices	422 clients	VLCs report to the VLCO Officer in Charge; chain of command is independent of convening authorities or SJAs
Coast Guard	2 SVCs (full-time) 18 SVCs (collateral duty) 2 support personnel 2 full-time SVC offices with collateral SVCs in various locations Note: 3 additional full-time SVCs to have been added in December 2014.	99 clients	SVCs report to the SVC Program Manager; chain of command is independent of convening authorities or SJAs

SOURCES: Services' Responses to JPP Requests for Information 19(a), 19(c), 21(a), 21(c), 21(d), 21(e), 22 (a),(b) (Nov. 6, 2014); *see* also *Transcript of JPP Public Meeting* 64 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Chief, Special Victims' Counsel Program); *id.* at 103 (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division); *id.* at 93–94, 98 (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program); *id.* at 78–81, 84–85 (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization); *id.* at 109–12 (testimony of CDR Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel).

Note: Personnel and location figures reflect the current number of personnel and locations serving at the time of testimony and data submissions. Caseload figures provide an aggregate of the Service's entire client caseload, spanning from each program's inception to the time of testimony and data submissions. The number of clients in the table refers only to adult sexual assault clients. Marine Corps VLCs see clients for all types of criminal cases and served 745 clients total. *Transcript of JPP Public Meeting* 84–85 (Nov 14, 2014) (testimony of Col Carol K. Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps).

Special victims' counsel are available to victims of sex-related offenses regardless of whether they file a restricted report, file an unrestricted report, or chose not to file a report.[198] The primary duty of an SVC is to zealously represent his or her clients' rights and interests, including during the criminal investigation, preliminary hearing, pretrial litigation, plea negotiations, court-martial proceedings, and post-trial phase of a court-martial.[199] Victims may also consult with an SVC on civil legal matters, eligibility for military benefits, and options for responding to adverse administrative actions related

198 FY14 NDAA, Pub. L. No. 113-66, § 1716(f)(2), 127 Stat. 672 (2013) (inserting 10 U.S.C. § 1044e(a)). Section 1716(f) provides:

> (1) An individual eligible for military legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense shall be offered the option of receiving assistance from a Special Victims' Counsel upon report of an alleged sex-related offense *or at the time the victim seeks assistance* from a Sexual Assault Response Coordinator, Sexual Assault Victim Advocate, military criminal investigator, victim/witness liaison, trial counsel, a healthcare provider, or any other personnel designated by the Secretary concerned for purposes of this subsection.
>
> (2) The assistance of a Special Victims' Counsel under this subsection shall be available to an individual eligible for military legal assistance under section 1044 of this title regardless of whether the individual elects unrestricted or restricted reporting of the alleged sex-related offense. The individual shall also be informed that the assistance of an SVC may be declined, in whole or in part, but that declining such assistance does not preclude the individual from subsequently requesting the assistance of a Special Victims' Counsel.

FY14 NDAA, Pub. L. No. 113-66, § 1716(a)(1), 127 Stat. 672 (2013) (inserting 10 U.S.C. § 1044e(f)) (emphasis added); *see also* Navy's Response to JPP Request for Information 19(a) (Nov. 6, 2014), encl. 14, Memorandum from Commander, Naval Legal Service Command to DoD SAPRO, subject: Navy Victims' Legal Counsel (VLC) Program (June 3, 2014) ("Victims can seek assistance from a VLC at any point following a sexual assault . . . . VLC can assist victims in understanding and exercising their options in filing a report."); U.S. Marine Corps, Order P5800.16A, Marine Corps Manual for Legal Administration para. 6003.3.a (Feb. 10, 2014) (stating that "[a] victim of sexual assault shall be informed of and given the opportunity to consult with a VLC as soon as the victim receives assistance from a SARC, SAPR or FAP VA, military criminal investigator" with no language requiring the filing of a report before seeking such assistance), *available at* http://www.marines.mil/Portals/59/MCO%20P5800.16A%20W%20CH%201-7.pdf; RSP Report, *supra* note 3, at 31 (Recommendation 61) (recommending that "[t]he Secretary of Defense develop and implement policy and regulations such that sexual assault victims have the right and the ability to consult with a special victim counsel before deciding whether to make a restricted or unrestricted report, or no report at all"). DoD subsequently approved the RSP recommendation. DoD RSP Implementation Memo, *supra* note 3, at 6. *But see* U.S. Army, Special Victim Counsel Handbook [hereinafter Army SVC Handbook] ch. 1 (Nov. 1, 2013) ("To be eligible for SVC assistance, a victim of sexual assault must make an unrestricted or restricted report of sexual assault under the UCMJ . . . ."), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf; U.S. Air Force, Special Victims' Counsel Rules of Practice and Procedure 6 (Rule 1) (July 1, 2013) [hereinafter Air Force SVC Rules] ("In order to be eligible for SVC, a victim of sexual assault must report (in a restricted or unrestricted report) they are a victim of sexual assault under the UCMJ . . . ."), *available at* http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q19c_USAF.pdf; Coast Guard's Response to JPP Request for Information 19(a) (Nov. 6, 2014), att. 10 ("United States Coast Guard Special Victims' Counsel Program EOC Concept of Operations") para. 6.2 (Victim Eligibility During EOC: Sex-Related Offense Defined) (stating that eligibility for an SVC requires that "[a] person reports (either by restricted or unrestricted report) that he or she is a victim of a sex-related offense").

199 *See, e.g.,* Air Force SVC Rules, *supra* note 198; *see also* Army SVC Handbook, *supra* note 198, ch. 4 (Nov. 1, 2013), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

to their case.[200] Finally, SVCs educate clients on the military justice system, the roles of sexual assault response personnel, and the variety of medical and other non-legal assistance available to them. SVCs are not part of the Victim and Witness Assistance Program (VWAP), but Air Force guidance, for example, notes that the legal services provided through its program are intended to align with and strengthen the VWAP by representing the interests of a client so that he or she can fully participate in the military criminal justice process.[201]

B. SPECIAL VICTIMS' COUNSEL SELECTION AND EXPERIENCE

In addition to the basic qualification requirements laid out in the FY14 NDAA,[202] each Service has individual standards to determine whether SVCs are qualified. These criteria are outlined in Table 3.2. Ultimately, all SVCs are selected by each Service's Judge Advocate General/Staff Judge Advocate to the Commandant.

Table 3.2. Special Victims' Counsel Selection Criteria

Service	Criteria	Military Justice Experience Required	SVC Tour Length
Army	Personality, maturity, good judgment, listening ability, and personal courage; nominated by SJA; approved by TJAG	No; approximately 50% of current SVCs had previous military justice experience.	1–2 years
Air Force	8 selection criteria, including court-martial and litigation experience, leadership qualities, and desire to serve as SVC; nomination process through multiple levels of AF JAG leadership; selected by TJAG	Yes; must also be trial certified by TJAG after review by seasoned trial attorney and evaluation by a military judge and staff judge advocate.	Generally 2 years
Navy	Experience level, professional maturity, interpersonal skills, and desire to serve as SVC; seasoned JAG with preference for at least 3 completed tours, but have taken JAGs with 1 completed tour who had worked in military justice; candidates must be recommended for program and are interviewed by VLC Chief or Deputy Chief; approved by TJAG	Yes; preferably with experience on both prosecution and defense.	Not provided

200 10 U.S.C. § 1044e (2012).

201 *See* Air Force SVC Rules, *supra* note 198, at 11 (Rule 3); *see also* Army SVC Handbook, *supra* note 198, para. 3-5(c)).

202 These qualifications require a judge advocate or civilian attorney to (1) be a member of the bar of a federal court or of the highest court of a state, and (2) be certified as competent to be designated as an SVC by the Service's Judge Advocate General. *See* FY14 NDAA, Pub. L. No. 113-66, § 1716(a), 127 Stat. 672 (2013) (referencing 10 U.S.C. § 1044(d)(2)).

Marine Corps	Candidates are nominated for position; VLC Chief conducts review of nominee's personnel file to determine military justice experience and temperament for the position; must satisfy DoD sensitive selection screening process and be certified by Navy TJAG	Regional VLCs must have 2 years of military justice experience; VLCs must have at least 6 months' experience in military justice.	Generally 18 months
Coast Guard	Selection based on combination of volunteers and normal assignment selection process; does not have special career tracks for SVCs; career history reviewed before assignment	No.	2–4 years

SOURCES: Services' Responses to JPP Requests for Information 22(c), 25 (Nov. 6, 2014); *Transcript of JPP Public Meeting* 132–33 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program); *id.* at 134–35 (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division); *id.* at 131–32 (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program); *id.* at 82–83 (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization); *id.* at 112–13, 130 (testimony of CDR Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel); *see also* Policy Memorandum 14-01, Office of The Judge Advocate General, U.S. Army, subject: Special Victim Counsel, para. 5 (Nov. 1, 2013), *available at* http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q20_USA.pdf.

The JPP heard from numerous presenters concerning the background and experience of SVCs, particularly on whether SVCs should be required to have previous military justice experience and, if so, how much prior experience is sufficient for them to effectively counsel victims.[203] As noted in Table 3.2, each of the Services, other than the Army and Coast Guard, requires some level of military justice experience of SVCs, although the minimum varies considerably (from just six months to two years).[204] Despite the lack of an explicit requirement, the Army SVC Program Chief reported that more than 50% of the Army's current SVC cadre had prior military justice experience before serving as an SVC.[205]

Some presenters told the JPP that for some SVCs, their lack of military justice experience hindered their ability to effectively represent victims.[206] For instance, one criminal investigator noted that SVCs without experience in investigations and trial processes don't always understand the harm that delays in responding to requests may do to time-sensitive investigations.[207] When an investigator needs a

203 *See generally Transcript of JPP Public Meeting* 129–30 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization); *id.* at 131–32 (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program); *id.* at 132–34 (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program); *id.* at 134–36 (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

204 *See Transcript of JPP Public Meeting* 82 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization); *id.* at 131–32 (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program); *id.* at 355 (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel).

205 *Transcript of JPP Public Meeting* 132–33 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program).

206 *See generally Transcript of JPP Public Meeting* 318 (Nov. 14, 2014) (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)); *id.* at 344–47(testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel); *id.* at 353–54 (testimony of Maj Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel); *id.* at 354–55 (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel); *id.* at 355–56 (testimony of MAJ William Babor, U.S. Air Force, Senior Defense Counsel).

207 *See generally Transcript of JPP Public Meeting* 280 (Nov. 14, 2014) (testimony of Mr. James W. Boerner, Special Agent,

victim to contact the alleged assailant to attempt to elicit incriminating statements in what is known as a pretext communication, or seeks perishable evidence on cell phones, an SVC who does not fully appreciate the value of such evidence at trial may unintentionally hurt the case in his or her zeal to "protect" a victim.[208] And an Army defense counsel described recent instances of unnecessary delays caused by two different SVCs, both of whom lacked military justice experience and did not understand trial practice fundamentals, client representation, and the scope of attorney-client privilege in military courts.[209]

Despite the clear benefits of previous military justice experience, one presenter also described the practical difficulty that requiring such experience would pose for the Services. The Army SVC Program Chief told the JPP that such a requirement for SVCs, while good in theory, would be unfeasible given the current size of the force and global distribution of its Service members.[210]

Presenters also told the JPP that some Services do not require prior military justice experience for military defense counsel, indicating that lack of trial experience among counsel who are involved in courts-martial may be a problem affecting the entire military justice system rather than just the SVC program.[211] Presenters noted an inequity that might result from requiring more experience of victims' counsel than of the counsel for the accused Service member.[212]

The JPP believes that counsel appointed to serve as SVCs need adequate criminal justice experience to ensure their competence to represent the rights and interests of their clients. Prosecutors and defense counsel told the JPP that dealing with SVCs who lack criminal justice experience would be difficult because they would not have the experience to make the best calls at the right time. While military justice experience is desirable, prior civilian criminal justice experience may be sufficient to give an SVC the familiarity with constitutional and other legal issues needed to provide suitable representation. This recommendation expands on a similar recommendation from the Response Systems Panel, subsequently adopted by DoD, that SVCs have "appropriate trial experience, whenever possible, prior to being selected as special victims' counsel."[213]

U.S. Army Criminal Investigative Command (CID)); *id.* at 268 (testimony of Mr. Mike Defamio, Supervisory Special Agent, U.S. Navy Criminal Investigative Service (NCIS)); *id.* at 282 (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)).

208 *Transcript of JPP Public Meeting* 260 (Nov. 14, 2014) (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)).

209 *Transcript of JPP Public Meeting* 344 (Nov. 14, 2014) (testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel).

210 *Transcript of JPP Public Meeting* 133–34 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program).

211 *Transcript of JPP Public Meeting* 353–54 (Nov. 14, 2014) (testimony of Maj Kyle R. Kilian, U.S. Marine Corps, Senior Defense Counsel).

212 *See generally Transcript of JPP Public Meeting* 353–54 (Nov. 14, 2014) (testimony of Maj Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel); *id.* at 354–55 (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel); *id.* at 355–56 (testimony of MAJ William Babor, U.S. Air Force, Senior Defense Counsel).

213 RSP Recommendation 47 states that the Secretary of Defense "direct the Services to implement additional selection criteria for their individual Special Victims' Counsel programs to require that counsel have appropriate trial experience whenever possible, prior to being selected as special victims' counsel. RSP Report, *supra* note 3, at 26. RSP Recommendation 47 was subsequently accepted by the Department of Defense. DoD RSP Implementation Memo, *supra* note 3, at 4.

The military system is not well served by inexperienced SVCs. For SVC programs to succeed, leaders and others in the military Services must be confident that SVCs help victims and improve the justice system. Requiring SVCs to have adequate experience is essential to that success.

C. SPECIAL VICTIMS' COUNSEL TRAINING

The FY14 NDAA requires all counsel who provide legal assistance to support victims of alleged sex-related offenses to receive "in-depth and advanced training."[214] The statute does not specify when such training must occur, although each Service requires judge advocates to successfully complete specialized training either before, or as soon as practicable after, assignment to SVC duties.[215]

SVC program managers told the JPP that the Services attempt to select new special victims' counsel far enough in advance that they can receive training before assuming their duties.[216] These efforts are not always successful, however. Among the Armed Forces, only the Coast Guard reported any SVCs currently serving who have not yet attended specialized training.[217] The Navy and Marine Corps stated that experienced regional victims' legal counsel supervise any individual who has not received training prior to assignment as a VLC.[218] The Navy reported that to date, all VLCs have received training either before or within 90 days of assuming VLC duties.[219] The Army does not authorize SVCs to take clients until they have received SVC training.[220] Even though the Air Force requires SVC training "as soon as practicable" after assignment, all Air Force judge advocates serving as SVCs since the program's inception have had specialized training before representing clients.[221]

DoD does not prescribe a standard curriculum or duration for SVC training courses. Instead, each Service sets its own requirements.[222] The Air Force, Army, and Navy have each established SVC training courses at their respective Judge Advocate General's schools. They range from two to five days in length and cover the areas of neurobiology of trauma, ethics, military justice, victim privacy, legal representation of victims, and Military Rules of Evidence, as well as advocacy exercises.[223] Outside

214 FY14 NDAA, Pub. L. No. 113-66, § 1716(b), 127 Stat. 672 (2013).

215 *See* Services' Responses to JPP Requests for Information 19(g), 28(c) (Nov. 6, 2014). Note: The Army requires that all SVCs receive training prior to taking clients.

216 *See Transcript of JPP Public Meeting* 136 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization); *id.* at 135 (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

217 Coast Guard's Response to JPP Request for Information 28(b) (Nov. 6, 2014) (noting that the three Coast Guard SVCs all have prior military justice experience).

218 Navy's and Marine Corps' Responses to JPP Request for Information 28(c) (Nov. 6, 2014) (including Navy's VLC Certification Policy, Enclosure 23).

219 Navy's Response to JPP Request for Information 28(d) (Nov. 6, 2014); *see also* Army SVC Handbook, *supra* note 198, ch. 8-2 (SVC Training).

220 Army's Response to JPP Request for Information 28(d) (Nov. 6, 2014).

221 Air Force's Response to JPP Request for Information 28(c) (Nov. 6, 2014).

222 *See* Air Force's Response to JPP Request for Information 19(h) (Nov. 6, 2014) (referencing Attachment 19.8, SVC Course Master Curriculum Plan). The Air Force Judge Advocate General's School developed the first SVC course curriculum plan in December 2012 for a three-day course offered at the Air Force Judge Advocate General's School at Maxwell AFB, Montgomery, Alabama.

223 *See* Air Force's Response to JPP Request for Information 19(h) (Nov. 6, 2014). To date, the Air Force has hosted four week-long SVC courses and five intermediate sexual assault litigation courses. Air Force's Response to JPP Request for

experts participate as instructors in all of the Services' SVC courses.[224] The most recent Army SVC course included instruction by Air Force and Marine Corps judge advocates in addition to Army criminal law instructors, an Army investigator, a civilian Army nurse who is a forensic examiner in sexual assault cases, experienced SVCs, and actual victim clients.[225] The Marine Corps sends its VLCs to initial training at the courses offered by the Air Force, Army, and Navy, supplemented by its own annual two-day organization-wide VLC training event.[226] The Coast Guard does not offer its own training course and, like the Marine Corps, sends its SVCs to attend the courses offered by the other Services.[227]

In August 2014, JPP member Victor Stone attended four of the five days of the Army's SVC training course at the Army JAG School in Charlottesville, Virginia.[228] In his subsequent report to the full JPP, he assessed the technical training as comprehensive, and he noted no concerns with the curriculum or instruction. However, he felt that the experiences shared by several of the presenters during the course raised some serious issues regarding implementation of the SVC program.[229] Most of those issues are addressed elsewhere in this report; they include failure to notify victims about access to SVCs early enough in the process, failure to give SVCs notice of and access to pleadings and other relevant information needed to represent their clients, a lack of procedural rules, and unauthorized release of mental health records to military investigators and trial and defense counsel.[230]

The Army, Air Force, and Navy indicated that they will offer SVC training courses in 2015, and the Marine Corps will host an annual organization-wide training event.[231] The Army will hold two SVC training courses, two SVC continuing education courses, two child-victim courses, and one advanced child-victim training course in 2015; representatives of the other Services will be invited to attend.[232]

Information 29 (Nov. 6, 2014). In addition to the formal course, Air Force SVC training is continuously supplemented through internal training and other formal courses within the Air Force (Air Force's Response to JPP Request for Information 19(g) (Nov. 6, 2014)); the Army has held three week-long SVC training courses and one online course (Army's Response to JPP Request for Information 29 (Nov. 6, 2014)); the Navy has offered one two-day VLC course and holds regular group training via video teleconferencing (Navy's Response to JPP Request for Information 19(g) (Nov. 6, 2014)). The Navy also takes advantage of courses offered by the other Services when the timing of those courses is more beneficial to new VLC personnel. Navy's Response to JPP Request for Information 29 (Nov. 6, 2014).

224 *See* Navy's Response to JPP Request for Information 19(h) (Nov. 6, 2014) (referencing Air Force SVC training course curriculum for Oct. 15–18, 2013 training and Navy VLC training course curriculum from its Jan. 15-16 training course—both of which included instruction by Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute, and Dr. Rebecca Campbell, expert on the neurobiology of trauma, from Michigan State University—and Army SVC course curriculum for its Aug. 18–22 training that included Dr. Kim Lonsway, Director of Research, End Violence Against Women International (EVAWI)).

225 *See* Army's Responses to JPP Requests for Information 29, 30 (Nov. 6, 2014).

226 Marine Corps' Response to JPP Request for Information 29 (Nov. 6, 2014).

227 Coast Guard's Response to JPP Request for Information 29 (Nov. 6, 2014).

228 *See* Victor Stone, "U.S. Army Training Course, TJAGLCS, Charlottesville, VA, August 18–22, 2014: Trip Report of Mr. Victor Stone, Judicial Proceedings Panel Member," *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20141114/13_ArmySVC_Course_TripReport_Stone.pdf; *see also Transcript of JPP Public Meeting* 244-57 (Nov. 14, 2014) (testimony of Mr. Stone).

229 *Id.*

230 *Id.* For further discussion of the issues raised, see Section III(F), *Notification of the Availability of Legal Assistance and the Scope of Representation*; Section IV(B), *Victims' Notice and Access to Information*; and Section V(C), *Military Rule of Evidence 513 (Psychotherapist-Patient Privilege)*, *infra*.

231 *See* Services' Responses to JPP Request for Information 30 (Nov. 6, 2014).

232 *See* Army's Response to JPP Request for Information 30 (Nov. 6, 2014).

The Air Force plans to offer two SVC courses and will hold week-long intermediate sexual assault litigation courses at various base locations in 2015.[233] In addition, the Air Force Judge Advocate General's School periodically offers webcasts and distance education modules, available to all judge advocates and paralegals, on sexual assault topics.[234] The Air Force invites participants from the other Services for its training courses when seats are available.[235] The Navy indicated that it expects to hold at least one VLC course each year and will continue to take advantage of courses offered by the Army and Air Force.[236] The Marine Corps plans to continue to host one organization-wide training event annually and to send its VLCs to training events hosted by other Services.[237] The Coast Guard does not plan to host its own SVC course and will continue to send Coast Guard SVCs to the other Services' courses.[238]

In addition to their own military-focused courses, the Services told the JPP that many SVCs have also attended civilian courses and conferences to learn about victim privacy litigation and victims' rights.[239] The Air Force, Navy, Marine Corps, and Coast Guard sent SVCs to attend the National Crime Victims' Law Institute's week-long Crime Victims' Law course in Portland, Oregon, in June 2014.[240] Most of the Services indicated that they also sent SVCs to attend conferences on child sexual assault and trauma.[241]

While agreeing that current SVC training is sufficient, the JPP is concerned about how it will be maintained in the future. DoD has no program in place to assess training quality, which is a significant concern. In addition, the JPP recommends that DoD develop a policy to standardize both the time frame within which SVCs receive training, to ensure that newly assigned SVCs are sufficiently prepared for their duties, and the substantive training requirements. Newly assigned SVCs must be trained in advance to ensure that they are prepared for their duties. DoD should make certain that measures are in place to assess and monitor the quality and effectiveness of training.

D. GEOGRAPHIC LOCATION AND SVC STAFFING

For reasons that range from workload requirements to personnel constraints,[242] SVCs are not assigned to every military installation.[243] As a result, clients seeking SVC support may be assigned to an SVC

233 *See id.*

234 *See id.*

235 *See id.* Note: The Air Force held an SVC course specifically for the other Services in October 2013. *Id.*

236 *See* Navy's Response to JPP Request for Information 30 (Nov. 6, 2014).

237 *See* Marine Corps' Response to JPP Request for Information 30 (Nov. 6, 2014).

238 *See* Coast Guard's Response to JPP Request for Information 30 (Nov. 6, 2014).

239 *See* Services' Responses to JPP Request for Information 32 (Nov. 6, 2014).

240 *See id.*; *see* also *Transcript of JPP Public Meeting* 83 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization).

241 *See* Services' Responses to JPP Request for Information 32 (Nov. 6, 2014).

242 *See Transcript of JPP Public Meeting* 172 (Nov. 14, 2014) (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel).

243 *See* Services' Responses to JPP Request for Information 21(c) (Nov. 6, 2014) (showing that Army placed one or more SVCs at 37 installations; the Air Force staffed 10 regions, covering 25 installations; the Navy staffed 23 fleet locations with at least one SVC; the Marine Corps staffed 10 installations; and the Coast Guard maintains two full-time SVC offices with 18 collateral-duty SVCs located at Coast Guard installations nationwide).

located at a different base or installation than the client's duty station.[244] Under such circumstances, presenters told the JPP, SVCs have access to a variety of methods to communicate with clients, and SVCs currently have sufficient travel budgets to meet with clients in person when necessary.[245]

The Air Force SVC program is part of the Air Force Legal Operations Agency's Community Legal Services Directorate, which oversees the provision of legal assistance to clients. The Air Force SVC program consists of a headquarters office for policy and management and three to five supervising judge advocates to cover the "worldwide mission and span of control issues given the number of Air Force personnel." To determine the locations of SVC offices, the Air Force SVC program leadership assessed current client caseloads for each base, proximity to commercial transportation hubs, and historical military justice data.[246] As a result of its continuing assessment and review, the Air Force is moving thirteen SVC offices to different locations to better meet the demand for the program.[247] The Air Force also plans to increase the number of SVC offices from nineteen to twenty-five, housing a total of forty SVCs, by January 2015. Currently, ten paralegals support SVC offices at regional locations.[248] The Air Force structures its SVC organization much like its area defense counsel program, with supervisory authority that does not include convening authorities or base legal offices.[249]

The Navy VLC program is part of the Naval Legal Service Command, which oversees all primary legal support missions, including legal assistance, defense counsel services, and government and trial counsel services. Like the Air Force, the Navy analyzed sexual assault reports and historical military justice data across its installations to determine the initial staffing and placement of its VLC offices. The Navy currently has five VLC regions and twenty-three offices at its installations in the United States and around the world.[250] Navy VLC program leadership and Navy JAG Corps leadership told the JPP that they monitor actual demand to ensure that adequate numbers of SVCs are appropriately placed.[251]

Unlike the Air Force and Navy programs, whose SVC Program Chiefs report to their Service's centralized directors of legal assistance programs, the Marine Corps VLC program is not aligned with the Service's legal assistance mission, and the Marine Corps VLC Program Chief works directly for the Staff Judge Advocate to the Commandant of the Marine Corps.[252] The Marine Corps currently has eleven VLC offices, which are staffed by seventeen judge advocates, one paralegal, and eight legal services specialists.[253] The VLC program is structured into four regions—National Capital Region,

244 *See, e.g., Transcript of JPP Public Meeting* 81 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization).

245 *Id.*; *id.* at 112 (testimony of CDR Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel).

246 *See* Air Force's Response to JPP Request for Information 21(d), 21(b) (Nov. 6, 2014).

247 *See* Air Force's Response to JPP Request for Information 21(b) (Nov. 6, 2014). The JPP did not receive the data or reports utilized in this assessment.

248 Air Force's Response to JPP Request for Information 21(c) (Nov. 6, 2014).

249 *See* Air Force's Response to JPP Request for Information 21(d) (Nov. 6, 2014).

250 *See* Navy's Responses to JPP Requests for Information 21(d), 21(b), 21(c) (Nov. 6, 2014).

251 *See* Navy's Response to JPP Request for Information 21(b) (Nov. 6, 2014). The JPP did not receive the data or reports utilized in the initial or subsequent staffing analysis.

252 *See supra* Table 3.1; Marine Corps' Response to JPP Request for Information 21(d) (Nov. 6, 2014). Air Force SVC Program Chiefs report through the Air Force Community Services Legal Director (who oversees three divisions that provide legal assistance), to the Air Force Legal Operations Agency Commander. Navy VLC Program Chiefs report up through the VLC chain of command to the Commander of Naval Legal Service Command.

253 *See* Marine Corps' Response to JPP Request for Information 21(c) (Nov. 6, 2014). In addition to the 15 active duty VLCs, the Marine Corps has one reserve VLC on one-year active duty orders, one civilian paralegal, eight enlisted legal service

Eastern (US) Region, Western (US) Region, and Pacific Region—with one supervisory VLC assigned to each. The Marine Corps VLC organization was originally established by VLC program leadership to meet anticipated demand, and the Marine Corps indicated that the demand and requirements for additional VLC positions will continue to be evaluated.[254]

As in the Marine Corps, the Coast Guard SVC Program Chief reports directly to the Coast Guard Deputy Judge Advocate General. Because of its small size, the Coast Guard established two SVC offices, one on the East Coast (in Arlington, Virginia) and the other on the West Coast (in Alameda, California). The Coast Guard is monitoring the total number of pending sexual assault cases and total number of victims receiving SVC support, and its goal is to keep individual SVC caseloads from exceeding thirty-five clients.[255]

Unlike the other Services, the Army did not establish a separate stovepiped chain of command for SVCs and does not designate judge advocates to serve solely as SVCs. Instead, SVC services in the Army are provided through its legal assistance offices, where judge advocates assist soldiers with personal legal matters and adverse personnel actions, such as letters of reprimand, negative evaluation reports, or other actions taken against the soldier by the command.[256] In the Army, legal assistance attorneys provide service to individual clients on confidential matters and routinely establish attorney-client relationships.[257] In the other military Services, by contrast, legal offices provide legal assistance as an additional duty, but do not work with clients on adverse personnel actions, such as unfavorable evaluations or administrative reprimands, which are instead referred to designated defense counsel.[258]

According to the Army's decentralized model, each installation's SJA, in consultation with the SVC Program Chief, determines the number of SVCs that are required for his or her installation. Army SVCs are supervised and supported locally by the Chief of Legal Assistance and the SJA, and they also receive support and technical oversight from the Legal Assistance Policy Division and the SVC Program Chief. Currently, thirty-seven active duty Army SJA offices provide SVC services worldwide.[259]

Irrespective of the organizational model, the JPP heard from multiple presenters that the physical separation between SVCs and their clients raised concerns across all Services. A sexual assault response coordinator (SARC) told the JPP that initial investigative interviews are commonly delayed because

specialists, two auxiliary VLCs, and two drilling reserve VLCs. *Id.*

254 *See* Navy's Responses to JPP Requests for Information 21(c), 21(b) (Nov. 6, 2014). The JPP did not receive further detail or the data utilized to determine initial or subsequent anticipated demand.

255 *See* Coast Guard's Responses to JPP Requests for Information 21(d), 21(b) (Nov. 6, 2014).

256 U.S. Dep't of Army, Reg. 27-3, Army Legal Assistance Program ch. 3-6g(4) (Sept. 13, 2011) (stating that legal assistance attorneys provide services to clients for military administrative matters such as line of duty investigations, IG investigations, physical evaluation boards, medical evaluation boards, and letters of reprimand), *available at* http://www.apd.army.mil/pdffiles/r27_3.pdf.

257 *See Transcript of JPP Public Meeting* 66–67 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program).

258 *See* U.S. Dep't of Air Force, Instr. 51-504, Legal Assistance, Notary, and Preventive Law Programs ch. 1.7.2-3 (Jan. 24, 2013) (providing that matters involving adverse action under UCMJ or adverse administrative action are to be referred to appropriate military defense counsel), *available at* http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-504/afi51-504.pdf; U.S. Dep't of Navy, JAG Instr. 5801.2B, Navy Legal Assistance Program 6-2b (Feb. 15, 2013) (prohibiting legal assistance attorneys from representing a victim at administrative or criminal forum with respect to victim's rights and requiring that such matters be referred to appropriate defense office, Formal Physical Evaluation Board counsel, or a private attorney), *available at* http://www.jag.navy.mil/library/instructions/5801_2b.pdf.

259 Army's Responses to JPP Requests for Information 21(b), 21(c) (Nov. 6, 2014).

geographically separated SVCs typically want to speak with a client before the client meets with investigators.[260] The SARC also described delays in case management group meetings,[261] including one meeting that involved participation by four SVCs at four different locations.[262] She recommended that SVCs should be assigned to every installation.[263] Another SARC felt that her Service did not have enough SVCs and that SVC-client consultations via telephone were very impersonal.[264] Finally, a SARC described a case involving one victim who obtained a local SVC and a second victim who was assigned an SVC from a different location; she observed that the local SVC was far more engaged in the case.[265]

An SVC explained to the JPP that remote discussions with clients may also pose confidentiality concerns. He described an investigation in which the government sought his client's cellular phone as evidence. The cell phone also contained text messages between the SVC and his client—and while he was able to work with the government to wall off those communications, the issue would not have arisen if he were meeting face-to-face with his client rather than communicating electronically.[266]

Whether the SVC is placed within a convening authority's chain of command or in an organization independent of the convening authority, the JPP believes that an SVC's ability to represent a client's interest free from command influence is of utmost importance. SVCs must be allowed to advocate candidly and forthrightly on behalf of their clients to the maximum extent possible, including placing their clients' priorities above those of the Service, without fear of harm to their career, retribution, or retaliation. Before making a recommendation as to whether one reporting structure is preferable to another, the JPP will request additional information from the Services asking for the rationale for their program's structure as well as for details about what, if any, safeguards are in place to protect SVCs when their client's interest runs contrary to the interests of the command or unit.

The JPP is cognizant of practical constraints, including monetary and logistical limitations, that must be considered when determining the number and locations of SVC offices. While having SVCs geographically separated from their clients is not ideal, the JPP commends the Services for using other resources to resolve or minimize issues caused by the separation between SVCs and clients. The JPP encourages them to continue to implement inventive and efficient ways to address the situation. The JPP also recognizes that several of the Services are performing regular reevaluations of how SVC resources are distributed and recommends that all Services continue this effort. Above all, the

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260 *Transcript of JPP Public Meeting* 50–52 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force).

261 *See* U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 9 (Feb. 12, 2014) (providing that Case Management Groups shall be chaired by Installation Commander and SARC, convening on monthly basis to review individual cases from unrestricted reports, direct system coordination, and victim access to quality services), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf. Members include the victim's commander, all SARCs on the installation, the Victim Advocate, health care provider or counselor, chaplain, and legal representative for the victim, Victim Witness Assistance Program representative, criminal investigator, and SJA office representative to provide the case disposition. *Id.*

262 *Transcript of JPP Public Meeting* 50–52 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force).

263 *Id.*

264 *Transcript of JPP Public Meeting* 54–55 (Dec. 12, 2014) (testimony of Ms. Simone Hall, Sexual Assault Response Coordinator, U.S. Coast Guard).

265 *Transcript of JPP Public Meeting* 76–77 (Dec. 12, 2014) (testimony of SFC Bridgett Joseph, U.S. Army, Sexual Assault Response Coordinator).

266 *Transcript of JPP Public Meeting* 224 (Nov. 14, 2014) (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel).

JPP encourages the Services to place SVCs in as many locations as feasible in order to maximize the opportunity for face-to-face interactions between SVCs and clients, and to develop effective means for SVCs to communicate with clients when face-to-face communication is not possible.

E. VICTIM ELIGIBILITY REQUIREMENTS

Title 10, Section 1044e, of the United States Code requires each Service to designate SVCs to provide services to individuals eligible for military legal assistance who are victims of alleged sex-related offenses.[267] Section 1044 of Title 10 establishes that the following individuals are eligible for legal assistance, and therefore for SVC representation:

- active duty Service members and their dependents;
- Reserve and National Guard members when on active duty or inactive training duty and their dependents;
- retired Service members and their dependents; and
- certain civilians overseas.[268]

This statutory guidance defines those who are entitled to legal assistance, although the Secretary concerned also has inherent authority to make others eligible based on resources and availability. Federal civilian employees, contractors, divorced spouses, family members who are not dependents of a military member, or other civilian victims who have been sexually assaulted by active duty Service members may not be eligible for SVC services, because providing legal assistance to them is not mandatory.[269] In incidents with multiple victims, Section 1044's eligibility restrictions may preclude some victims from receiving SVC support while ensuring support for others involved in the same case.

The Navy VLC Program Chief told the JPP that Navy policy originally followed the Section 1044 eligibility criteria. However, the Navy has broadened its interpretation of eligibility "such that Reservists are now treated similarly to active duty personnel and there is no longer a military nexus required nor do they have to be on orders."[270] Marine Corps VLCs follow the Section 1044 requirements, but the Marine Corps VLC Program Chief noted that updates to Marine Corps regulations have allowed them to "open the door to eligibility a little bit more and not stay within the four corners of the 1044 statute," particularly with respect to overseas civilians.[271] The Army, Air Force, and Coast Guard indicated that their Services follow Section 1044 more strictly, and all require a military nexus to provide support for sexual assault offenses.[272]

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267 10 U.S.C. § 1044e(a) (2012) (Designation; Purposes) ("The Secretary concerned shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance to an individual eligible for military legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.").

268 *Id.*

269 *See Transcript of JPP Public Meeting* 147–51 (Nov. 14, 2014) (testimony of each Service Program Manager in response to question from Panel Member regarding eligibility criteria for SVC services).

270 *Transcript of JPP Public Meeting* 147–48 (Nov. 14, 2014) (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program).

271 *Transcript of JPP Public Meeting* 149 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization).

272 *See Transcript of JPP Public Meeting* 138, 148–49 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program); *id.* at 149 (testimony of Col Carol K. Joyce, U.S. Marine Corps,

In addition to differences among the Services in their interpretations of *who* is eligible, one Service also described a different application of the statute regarding *which crimes* create SVC eligibility. Section 1044e requires legal counsel to be designated for victims of "an alleged sex-related offense,"[273] which is further defined as any allegation of a violation or attempted violation of Articles 120, 120a, 120b, 120c, or 125 of the UCMJ.[274] Although the statute specifies that counsel must be made available for these enumerated offenses, no language in it prohibits SVCs from representing clients who are victims of other offenses. While the Army, Navy, Air Force, and Coast Guard limit SVC representation to victims of sexual assault offenses, the Marine Corps has elected to make SVC representation available to victims eligible for "legal assistance" for *all* crimes.[275]

Currently, there is not sufficient data to evaluate the possible impact on resources of expanding SVC eligibility to additional victims or for additional crimes in the other Services. To assess demand for expanded eligibility, the Air Force SVC program is now tracking the number of victims who request an SVC but are determined not to be eligible for SVC services. However, the Air Force SVC Program Chief noted that these data may not fully reflect actual demand, because they do not include requests made to other offices or individuals, such as requests by victims to SARCs or investigators.[276]

As an initial observation, the JPP is concerned that the statutory basis creating eligibility for SVC services is tied to eligibility for legal assistance services. This requirement precludes the program from supporting all victims of sexual assault perpetrated by Service members, because many such individuals are not eligible for legal assistance under the statute. The JPP intends to review additional information about victim demographics and SVC eligibility requirements before providing its full assessment and recommendations.

F. NOTIFICATION OF THE AVAILABILITY OF LEGAL ASSISTANCE AND THE SCOPE OF REPRESENTATION

Regardless of whether a victim intends to make a restricted (i.e., confidential) or unrestricted initial report, eligible victims of sexual offenses must be advised that legal assistance services are available.[277] 10 U.S.C. § 1565b(a)(2) requires that a victim be informed of his or her eligibility for legal assistance when "seek[ing] assistance from a Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, or a trial counsel."[278] Although the

Officer in Charge, Victims' Legal Counsel Organization); *id.* at 150 (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division); *id.* at 150 (testimony of CDR Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel).

273 10 U.S.C. § 1044e(a) (2012). The statute provides legal counsel for sex-related offenses.

274 10 U.S.C. § 1044e(g) (2012) (Alleged Sex-related Offense Defined) ("In this section, the term 'alleged sex-related offense' means any allegation of (1) a violation of section 920, 920a, 920b, 920c, or 925 of this title (article 120, 120a, 120b, 120c, or 125 of the Uniform Code of Military Justice); or (2) an attempt to commit an offense specified in a paragraph (1) as punishable under section 880 of this title (article 80 of the Uniform Code of Military Justice).").

275 *Transcript of JPP Public Meeting* 78 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization).

276 *Transcript of JPP Public Meeting* 51–55 (Nov. 14, 2014) (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

277 U.S. Dep't of Def., Form 2910, Victim Reporting Preference Statement (June 2014), *available at* http://www.dtic.mil/whs/directives/forms/eforms/dd2910.pdf.

278 Section 1565b(a)(2) states: "A member of the armed forces or dependent who is the victim of sexual assault shall be informed of the availability of assistance under paragraph (1) as soon as the member or dependent seeks assistance from a

statute makes clear that victims of sexual assault must be informed of the services available, presenters expressed different views about the timing of such notification, especially if the victim was already informed that the services are available when making the initial report.[279]

The JPP heard that in practice, SARCs and victim advocates (VAs) provide information about SVC representation before victims choose what type of report they wish to make.[280] Trial counsel and military criminal investigators also must make victims aware of the availability of legal assistance counsel, but the Services, following guidance and common practices, meet this requirement at different stages of the criminal process.[281]

Investigators from the Army Criminal Investigation Command and Naval Criminal Investigative Service told the JPP that they inform victims about SVC assistance before an investigator's interview begins.[282] However, a special investigator from the Air Force Office of Special Investigations said that his organization interprets the statute to require that investigators inform victims of the option to consult with an SVC only at some point during the interview, not necessarily at the outset.[283] The Air Force investigator explained that determining when to notify victims about their eligibility for SVC representation is a case-by-case decision "based on the issues in how it came to us, the flow of information, the structure of how that occurred."[284] The agent affirmed that this right is "something that we discuss during the interview. And we say that as [sic] it's available and not necessarily a right."[285]

Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, or a trial counsel. The member or dependent shall also be informed that the legal assistance and the services of a Sexual Assault Response Coordinator or a Sexual Assault Victim Advocate under paragraph (1) are optional and may be declined, in whole or in part, at any time." 10 U.S.C. § 1565b(a)(2) (2012).

279 *See Transcript of JPP Public Meeting* 264–65, 271–72 (Nov. 14, 2014) (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)).

280 *See* 10 U.S.C. § 1565b (2012); *see also Transcript of JPP Public Meeting* 49 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force); *id.* at 57 (testimony of Ms. Marie A. Brodie, Sexual Assault Response Coordinator, U.S. Marine Corps).

281 *See Transcript of JPP Public Meeting* 259, 264–65, 271–75 (Nov. 14, 2014) (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)); *id.* at 271–75 (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)).

282 *Transcript of JPP Public Meeting* 271 (Nov. 14, 2014) (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)); *id.* at 268 (testimony of Mr. Mike Defamio, Supervisory Special Agent, U.S. Naval Criminal Investigative Service (NCIS)); *see also* FY14 NDAA, Pub. L. No. 113-66, § 1716(a)(1), 127 Stat. 672 (2013) (inserting 10 U.S.C. § 1044e(f)); U.S. Dep't of Def., Instr. 5505.18, Investigation of Adult Sexual Assault in the Department of Defense encl. 2.11 (May 1, 2013) (requiring an MCIO investigator assigned to conduct an adult sexual assault investigation to inform a sexual assault victim of availability of legal assistance and services of a SARC or VA in accordance with Section 581 of FY12 NDAA), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf. Note: DoDI 5505.18 is not updated to reflect implementation of the SVC programs. *See also* U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 2, para. 6(m) (Feb. 12, 2014) (requiring Service Secretaries to "[e]stablish procedures that require, upon seeking assistance from a SARC, SAPR VA, MCIO, the Victim Witness Assistance Program (VWAP), or trial counsel, that each Service member who reports that he or she has been a victim of a sexual assault be informed of and given the opportunity to . . . [c]onsult with legal assistance counsel, and in cases where the victim may have been involved in collateral misconduct . . . , to consult with defense counsel").

283 *Transcript of JPP Public Meeting* 282 (Nov. 14, 2014) (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)).

284 *Id.* at 272.

285 *Id.* at 274.

The Program Chief from the Marine Corps told the JPP that this notification requirement should be clarified. In her view, the statute creates a right that "should mean that no victim should be asked to sign any document or make any decisions, should they elect to want to talk to an SVC or VLC."[286]

Once a victim seeks the assistance of an SVC, 10 U.S.C. § 1044e(b) outlines the SVC's scope of representation for his or her client. SVCs told the JPP that they understand their roles in explaining victim rights and the process to clients, assisting them with issues in military criminal proceedings that result from their complaint, and assisting them in seeking other help such as mental health services or counseling.[287] But they are less sure about how and when they may represent a client in matters involving any possible misconduct, such as underage drinking, curfew infractions, or orders violations, that may be associated with the sexual assault incident.[288]

10 U.S.C. § 1044e provides that legal consultation regarding collateral misconduct by a victim extends to discussing "the victim's right to seek military defense services." SVC program policies in the Army, Air Force, and Marine Corps direct SVCs to refer victims who may be subject to disciplinary action related to the sexual offense to military defense counsel.[289] Army policy further specifies that only military defense counsel will handle matters of victim misconduct, regardless of their severity or disposition. In contrast, policies of the Navy, Marine Corps, and Coast Guard authorize SVCs to engage in limited advocacy on behalf of a client who is alleged to have committed minor misconduct, although they make clear that only military defense counsel can represent the client if the misconduct can lead to involuntary separation or court-martial.[290] The Air Force permits a victim client to choose between his or her defense counsel or special victims' counsel (or keep both) after consulting with a military defense counsel about any collateral misconduct.[291] Finally, Army, Air Force, and Marine

286 *Transcript of JPP Public Meeting* 90–91 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization).

287 Section 1044e(b)(1) states: Legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military *defense* Services." 10 U.S.C. § 1044e(b)(1) (2012) (emphasis added).

288 *See Transcript of JPP Public Meeting* 194–98 (Nov. 14, 2014) (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel) (discussing how he works with trial counsel and command regarding collateral misconduct); *id.* at 199–201 (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel) (suggesting that SVCs could benefit from clearer rules on engaging on clients' behalf with respect to collateral misconduct); *see also* U.S. Marine Corps, Order P5800.16A, Marine Corps Manual for Legal Administration para. 6004.4 (Feb. 10, 2014) ("If a victim appears to have committed collateral misconduct related to the crime of which he or she is a victim, the VLC may advise the victim on his or her legal options, including seeking testimonial or transactional immunity. Victims may be referred to the Marine Corps Defense Services Organization to consult with a defense counsel as appropriate for misconduct committed that may require defense counsel services."), *available at* http://www.marines.mil/Portals/59/MCO%20P5800.16A%20W%20CH%201-7.pdf; Coast Guard's Response to JPP Request for Information 19(a) (Nov. 6, 2014), att. 10 ("United States Coast Guard Special Victims' Counsel Program EOC Concept of Operations") para. 10.3a (SVC Responsibilities) ("Consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim's right to seek military defense services. While SVCs will not undertake activities to represent the victim with respect to collateral misconduct because they are not detailed defense counsel but will facilitate interaction with Defense Service Offices. OSVC will consider exceptions in coordination with CG-094M.").

289 *See* Army's and Air Force's Responses to JPP Request for Information 19(b) (Nov. 6, 2014); Army SVC Handbook, *supra* note 198, ch. 5-1; Air Force SVC Rules, *supra* note 198, at 16 (Rule 5.2).

290 *See* Services' Responses to JPP Request for Information 19 (Nov. 6, 2014).

291 *See* Air Force's Response to JPP Request for Information 19 (Nov. 6, 2014); *see also id.,* att. 19.3 ("Sample Special Victims' Counsel Scope of Representation Letter").

Corps SVCs told the JPP that they are able to negotiate with the command for immunity from disciplinary action for their clients' minor collateral misconduct.[292]

Practitioners expressed varied views to the JPP regarding these policies. A victims' rights advocate told the JPP that SVCs were severely restricted in representing their clients in adversarial or criminal proceedings, as well as in helping victims to initiate complaints to the inspector general and Congress.[293] A number of SVCs discussed ways in which they could work more effectively with clients and better coordinate clients' participation in investigations or judicial proceedings if rules more clearly allowed SVCs to address clients' collateral misconduct. SVCs explained that they primarily advise clients regarding the potential consequences of different courses of action related to the misconduct.[294] Making an important observation, a Marine SVC noted that while he would represent a client for his or her minor misconduct (e.g., underage drinking), when dealing with serious offenses that have harsher consequences he would want to consult with a defense counsel, under whose area of responsibility those offenses primarily fall.[295]

Before providing its assessment and recommendations, the JPP intends to request and review additional information from the Services—including details on their current investigator policies and practices—as to how and when victims are notified that SVC services are available. The JPP recognizes that this issue was previously addressed by the Response Systems Panel. In its report, the RSP recommended that the Secretary of Defense develop and implement a policy that would make advising a victim of the availability of SVC assistance the first step of a sexual assault investigation, before he or she decides whether to file a restricted or unrestricted report, or no report at all.[296] Consequently, the RSP further recommended that investigators be required to clearly inform victims of the availability of SVC services *before* interviewing them, thus enabling an SVC to explain the implications of the interview for a victim's ability to preserve the right to make a restricted report. This is the only RSP recommendation that DoD rejected outright.[297]

On the question of SVCs' scope of representation, particularly as it relates to their ability to handle collateral misconduct of their client, the JPP recognized that many SVCs, especially junior ones, do not have the background or certification necessary to represent clients for collateral misconduct. At the

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292 *See Transcript of JPP Public Meeting* 188 (Nov. 14, 2014) (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel); *see also id.* at 201 (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel); *see also id.* at 199 (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel). In noting the difference immunity can make in a client's willingness to come forward and be candid, Captain Kirk explained how he was able to work with local prosecutors to get immunity for a client who was involved in an incident that occurred off-base. *Id.*

293 *Transcript of JPP Public Meeting* 14, 46 (Dec. 12, 2014) (testimony of Col Don Christensen, U.S. Air Force (Retired), President, Protect Our Defenders); *see also* U.S. Air Force, Air Force Special Victims' Counsel Charter 3 ("An SVC should not assist a member in preparing IG complaints, Military Equal opportunity Complaints, Congressional Complaints, or similar matters. However, if an SVC is already representing a client, the SVC may advise the client that these and similar avenues exist for addressing a complaint. Further, the SVC may review a client's IG, Congressional, or similar complaint for the purpose of assuring that the contents of the complaint do not jeopardize the client's rights or position with respect to the matter that led to the original representation."), *available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/04_USAF_SpecialVictimsCounsel_Charter.pdf.

294 *See Transcript of JPP Public Meeting* 201–03 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel); *id.* at 187 (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel); *id.* at 199 (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel).

295 *Transcript of JPP Public Meeting* 229 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel).

296 RSP Report, *supra* note 3, at 32 (Recommendation 62).

297 *Compare* DoD RSP Implementation Memo, *supra* note 3, at 13, *with id.* at 1–17.

same time, it noted the benefits of allowing an SVC, who has established rapport with his or her client, to resolve minor disciplinary issues. However, before making any recommendations on this concern, the JPP intends to review a yet-to-be-released revision of DoD Instruction 1030.02 that will address SVCs' scope of representation.

G. SVC PROGRAM OVERSIGHT AND EVALUATION

1. Oversight

The FY14 NDAA required the Secretary of Defense and the Secretary of Homeland Security to prescribe regulations for and periodically evaluate the special victims' counsel programs that were mandated by Congress.[298] The FY14 NDAA specified that within ninety days of its enactment, the Secretary of Defense was to provide a report to Congress describing how the Armed Forces planned to implement the SVC Program requirements contained in the act.[299] This report, which was issued by DoD in April 2014, gave Congress a series of status updates for each Service's SVC program.[300]

DoD advised the JPP that the Department does not oversee operation of or standards for the Services' SVC programs, and DoD has not issued any regulations, directives, or instructions regarding the SVC programs since their inception.[301] DoD plans to issue an instruction for the Victim and Witness Assistance Program revised to reflect the addition of SVC programs and changes in DoD policy regarding crime victims' rights, which were recently expanded when additional victims' rights were codified in Article 6b of the UCMJ.[302]

Congress assigned administrative responsibility for the SVC programs to the military Services, subject to DoD program policies.[303] The Secretaries of each Service are responsible for establishing

298 FY14 NDAA, Pub. L. No. 113-66, § 1716(a)(1)(h), 127 Stat. 672 (2013) (Establishing, 10 U.S.C. § 1044e(h) Regulations) ("The Secretary of Defense and the Secretary of the Department in which the Coast Guard is operating shall prescribe regulations to carry out this section; and 10 U.S.C. 1044e(e)(2) Administrative Responsibility – The Secretary of Defense (and, in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating) shall conduct a periodic evaluation of the Special Victims' Counsel Programs operated under this section.").

299 FY14 NDAA, Pub. L. No. 113-66, § 1716(c)(1), 127 Stat. 672 (2013) (Report Required) ("Not later than 90 days after the date of enactment of this Act, the Secretary of Defense, in coordination with the Secretary of Homeland Security with respect to the Coast Guard, shall submit to the Committees on Armed Services and Commerce, Science, and Transportation of the Senate and the Committees on Armed Services and Transportation and Infrastructure of the House of Representatives a report describing how the Armed Forces will implement the requirements of section 1044e of title 10, U.S.C.").

300 DoD Report on Section 1716 Implementation, *supra* note 194, at 1.

301 DoD's Response to JPP Request for Information 35(e) (Nov. 6, 2014).

302 *Transcript of JPP Public Meeting* 52–53 (Nov. 14, 2014) (testimony of Lt Col Ryan D. Oakley, Deputy Director, Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness); *see also* DoD's Response to JPP Requests for Information 20, 35(e) (Nov. 6, 2014). VWAP was established by DoD following the passage of federal crime victim rights legislation in the 1990s. In addition to enumerating DoD policy regarding victims' rights, the program designates paralegals or judge advocates, known as victim witness liaisons (VWLs), to assist victims of crime during the court-martial process and to inform victims of their rights. VWLs work for the prosecutor, do not have privileged communications with victims and are often part-time or collateral duty jobs. *See generally* U.S. Dep't of Def., Dir. 1030.01, Victim and Witness Assistance (Apr. 23, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf; U.S. Dep't of Def., Instr. 1030.2, Victim and Witness Assistance Procedures (June 4, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf; *see also* FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

303 FY14 NDAA, Pub. L. No. 113-66, § 1716(a)(1)(e), 127 Stat. 672 (2013) (Establishing 10 U.S.C. 1044e(e)(1) Administrative Responsibility) ("Consistent with the regulations prescribed under subsection (h), the Judge Advocate

and supervising SVCs,[304] with the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps providing operational oversight for their respective programs.[305] Similarly, the Coast Guard special victims' counsel program is managed by the Coast Guard Deputy Judge Advocate General.[306]

While the programs are independent, the Services have adopted a "team-based" approach to coordinating the SVC programs that relies on regular meetings between the SVC program managers.[307] Program leaders told the JPP that they share best practices, lessons learned, and standard templates to ensure as much uniformity as possible. However, each Service makes independent decisions about its program's management and operations, which, as described above, vary greatly.[308] The Services indicated that they have collaborated on potential victim appeals and also extended opportunities for the other programs to file amicus briefs on appellate cases involving SVC issues.[309]

2. Current Practices of Reporting Data on the SVC Programs

Neither Congress nor DoD has provided guidance on how to measure the success or performance of the SVC programs, but the Services have each established different reporting and management methodologies. For instance, the Army requires each SVC to provide monthly reports that are compiled into an overall SVC program report, which is reviewed by the SVC Program Manager. SVCs also complete a standardized intake form for each new client and record the data into a system from which reports may be generated. In addition, after each court-martial, Army SVCs must prepare a memorandum for record (MFR) documenting what occurred during the court-martial process.[310] In the Army, this report is forwarded to the SVC Program Manager and shared with the Judge Advocate General's Law Center and School (TJAGLCS) to help in developing future course curricula and student exercises.[311] In addition to examining reports, the SVC Program Manager indicated that he conducts on-site installation visits to review SVC operations. As of November 2014, the Army had completed nine of these visits.[312]

General under the jurisdiction of the Secretary and within the Marine Corps the Staff Judge Advocate to the Commandant of the Marine Corps, is responsible for the establishment and supervision of individuals designated as Special Victims' Counsel.").

304 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013), *available at* http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

305 *Transcript of JPP Public Meeting* 52–53 (Nov. 14, 2014) (testimony of Lt Col Ryan D. Oakley, Deputy Director, Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness); *see also* Services' Responses to JPP Request for Information 19(i) (Nov. 6, 2014).

306 Coast Guard's Response to JPP Request for Information 35(e) (Nov. 6, 2014).

307 *See* Services' Responses to JPP Requests for Information 19(i), 35 (Nov. 6, 2014).

308 *See* Services' Responses to JPP Request for Information 35(c) (Nov. 6, 2014).

309 *See* Air Force's Response to JPP Requests for Information 19(i), 35(a) (Nov. 6, 2014). Services have also formed a working group to develop a framework for child representation, which is an issue beyond the scope of this Panel, but one that has come up frequently in presentations. *Id.*

310 Army's Responses to JPP Requests for Information 40, 44 (Nov. 6, 2014).

311 Army's Response to JPP Request for Information 40 (Nov. 6, 2014). The Army JAG School is also currently exploring the development of an advanced representation and advocacy course curriculum based in part on these reports.

312 *Transcript of JPP Public Meeting* 65, 165 (Nov. 14, 2014) (testimony of COL James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program).

The leaders of the Air Force SVC program prepare weekly and monthly reports for the Air Force Judge Advocate General, as well as periodic reports to the Secretary and Chief of Staff of the Air Force. Weekly reports capture statistical program data, including the number of SVC requests and of courts-martial and Article 32 hearings attended by SVCs.[313] Monthly reports on case trajectories project future caseload on the basis of trends of current representation, and other monthly reports identify the distribution of cases by region and attorney. In addition, the Air Force maintains a community database that is monitored by SVC program leaders and tracks SVC performance according to nine criteria.[314] The Air Force tracks client demographic information through a standard client intake form, and SVCs complete reports for all Article 32 and court-martial proceedings attended.[315]

The Navy assesses VLC program progress through weekly status reports from each VLC to VLC program leadership and the Commander, Naval Legal Service Command (CNLSC).[316] VLC program leaders meet quarterly with the CNLSC to assess program performance, to consider policy developments, and to review pending requirements.[317] Navy VLCs use a standard client intake sheet and a standardized document checklist covering each stage in the military justice process.[318] The Navy plans to complete a self-assessment of the VLC program in FY15, focusing on program administration, and to undertake a formal inspection by senior JAG Corps leaders in FY16.[319]

The Marine Corps reported to the JPP that metrics to assess its VLC program and the program's long-term performance are still being developed.[320] Currently, VLCs use an electronic case management system to capture client intake information and case progress, and program leadership generates reports as needed.[321] In accordance with the Marine Corps Manual for Legal Administration, the VLC program chief must report annually to the Staff Judge Advocate to the Commandant of the Marine Corps regarding the delivery of VLC services.[322] The Marine Corps also noted that it responds to

313 Air Force's Responses to JPP Requests for Information 19(d), 40 (Nov. 6, 2014). The Air Force weekly reports provide (1) Number of new clients an SVC has undertaken to represent; (2) number of consultations; (3) number of Article 32s attended; (4) number of courts-martial attended; (5) number of interviews attended; (6) number of conversions from restricted to unrestricted; (7) victim feedback from Victim Impact Surveys. *Id.*

314 *Id.* The performance measures are (1) meetings with client; (2) attending interviews; (3) corresponding and consulting on client's behalf; (4) advocating client's choices and directions to decisionmakers; (5) asserting privacy rights during discovery; (6) representing clients for collateral misconduct or immunity requests; (7) assisting with expedited transfers; (8) Freedom of Information Act requests; (9) Hours spent traveling related to representation. *Id.*

315 Air Force's Response to JPP Request for Information 44 (Nov. 6, 2014).

316 Navy's Responses to JPP Requests for Information 19(d), 40 (Nov. 6, 2014).

317 *Transcript of JPP Public Meeting* 97 (Nov. 14, 2014) (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program); *see also* Navy's Responses to Requests for Information 19(d), 40 (Nov. 6, 2014).

318 Navy's Response to JPP Requests for Information 44 (Nov. 6, 2014).

319 *Transcript of JPP Public Meeting* 98, 164 (Nov. 14, 2014) (testimony of CAPT Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel Program).

320 Marine Corps' Response to JPP Request for Information 19(d) (Nov. 6, 2014).

321 Marine Corps' Responses to JPP Requests for Information 19(d), 40, 44 (Nov. 6, 2014). Current metrics used: (1) Number of victims seeking and receiving VLCO services; (2) number of cases requiring active representation; (3) number of interviews attended; (4) number of court appearances; (5) number of court filings; (6) conversion rate from restricted to unrestricted reports. Marine Corps' Response to Request for Information 19(d) (Nov. 6, 2014).

322 Marine Corps' Response to JPP Request for Information 19(e) (Nov. 6, 2014) (citing U.S. Marine Corps, Order P5800.16A, Marine Corps Manual for Legal Administration ch. 7 (Feb. 26, 2014)).

regular requests from Marine Corps headquarters, DoD, members of Congress, and statutory panels such as the JPP about organization status and metrics.[323]

Coast Guard SVC program data are collected by program staff from information submitted by SARCs and trial counsel. Currently, Coast Guard SVCs are not required to complete specific forms or reports for each case. In practice, SVCs maintain personal logs of information, similar to those maintained by defense counsel. The Coast Guard Judge Advocate General and the Deputy Judge Advocate General review metrics semiannually.[324]

3. Program Evaluation Standards

During its November public meeting, the JPP heard from Ms. Meg Garvin, Executive Director of the National Crime Victims' Law Institute, regarding the military's SVC programs and the ways in which similar programs are evaluated in civilian jurisdictions. She lauded the training and attorneys in the military's SVC programs, observing that no state, county, or government entity had put in place anything equal. But civilian crime victim programs, she pointed out, are run by nonprofit organizations and generally are evaluated on client satisfaction.[325] She recommended that the military's programs give more weight in their evaluations to client satisfaction rather than case outcomes, and she stressed that SVCs require more training, including advanced training, to remain current as the law evolves.[326]

Though the information was requested from all of the Services, only the Air Force provided the JPP with specific evaluation standards for measuring the success of its program and specific data points for each metric: (1) victim impact survey results, (2) conversions from restricted to unrestricted reports, and (3) the number of clients who decline to participate in the prosecution process after filing an unrestricted report.[327]

The Marine Corps identified as its single evaluation standard "that all victims of crime that are eligible for VLCO services and that seek VLC assistance are provided effective legal advice and representation required by 10 U.S.C. 1044e."[328] The Marine Corps did not explain how the provision of "effective legal advice" is or will be measured. The Navy reported that a VLC program self-assessment conducted in FY15 will serve as its evaluation standard but did not specify what will be assessed or how the assessment will be evaluated.[329] The Army and Coast Guard did not provide narrative responses to the question, but instead referred to their programs' policy documents—neither of which makes mention of program performance measures.[330]

323 Marine Corps' Response to JPP Request for Information 19(e) (Nov. 6, 2014).

324 Coast Guard's Response to JPP Request for Information 42, 40 (Nov. 6, 2014).

325 *Transcript of JPP Public Meeting* 16–17, 27 (Nov. 14, 2014) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute).

326 *Id.* at 29–30, 57–58.

327 *Transcript of JPP Public Meeting* 162–64 (Nov. 14, 2014) (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Victims' Counsel Division); *see also* Air Force's Response to JPP Request for Information 19(f) (Nov. 6, 2014).

328 Marine Corps' Response to JPP Request for Information 19(f) (Nov. 6, 2014).

329 Navy's Response to JPP Request for Information 19(f) (Nov. 6, 2014).

330 Army's and Coast Guard's Responses to JPP Request for Information 19(f) (Nov. 6, 2014).

a. Special Victims' Counsel Utilization Rate

An evaluation standard not identified by any military Service, but considered by the JPP to be an indicator of the success and effectiveness of the SVC program, is the extent to which SVC services are actually being used by victims of sexual assault who file restricted and unrestricted reports.[331] To assess consistent data across the military Services, the JPP requested information from each Service on every counsel who served as an SVC during FY14. The Services were asked to provide detailed data, including where SVCs were assigned, the length of their assignments, what specialized training they received, their actual and maximum caseloads, and their military justice experience. The JPP also requested information about the number of clients served by SVCs and what type of support was provided to clients during the investigation and military judicial process.[332]

From the requested data, the JPP calculated the total number sexual assault victims represented by SVCs who filed either restricted or unrestricted reports in each Service during FY14.[333] The JPP then compared the total number of FY 14 sexual assault reports in the military as reported by DoD's Sexual Assault Prevention and Response Office (SAPRO) to the number of victims who used SVC services to determine SVC utilization rates.[334] Table 3.3 provides the FY14 utilization rates for each Service, indicating that across DoD, 73% of individuals who made unrestricted reports and 23% of those who made restricted reports used SVC services.[335] The difference in utilization rates between those filing restricted and unrestricted reports is substantial, and more analysis is needed to determine whether other opportunities exist to extend SVC support to more victims filing unrestricted reports.

Table 3.3. FY 2014 SVC Utilization Rates

FY 2014 SVC Utilization Rates						
SVC Utilization Rate	DoD Total	Army	Air Force	Navy	Marine Corps	Coast Guard
Unrestricted Reports	73%	60%	87%	82%	65%	54%
Restricted Reports	23%	27%	30%	19%	11%	36%
Total SVC Utilization Rate	61%	55%	69%	67%	41%	50%

SOURCES: For the purposes of this table, SVC utilization rates were calculated by dividing the total number of victims who consulted with an SVC by the total number of sexual assault reports that were reported by DoD for FY14.

331 Services' Responses to JPP Requests for Information 43(a),(b) (Nov. 6, 2014).

332 Services' Responses to JPP Request for Information 61 (Dec. 19, 2014).

333 *Id.*

334 U.S. Dep't of Def., Report to the President of the United States on Sexual Assault Prevention and Response (Dec. 2014) [hereinafter DoD POTUS Report], *available at* http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Full_Report.pdf. The term "SVC utilization rate" refers to the rate at which victims making restricted or unrestricted reports of sexual assault elect to use SVC services. This should be distinguished from the use of the term "utilization rate" in civilian legal practice, which generally tracks billing efficiency for an individual or a firm.

335 *Id.*; Services' Responses to JPP Request for Information 61 (Dec. 19, 2014). Some victims who make reports of sexual assault incidents may not qualify for SVC services, so the effective utilization rate would be somewhat higher if only those eligible for SVC services were counted.

b. Victim Satisfaction Surveys

The Air Force, Navy, and Coast Guard have each developed their own victim satisfaction surveys, although the Navy and Coast Guard did not identify these surveys as an evaluation metric.[336] The Air Force considers victim satisfaction to be its most important program evaluation standard. The Air Force Victim Impact Survey (VIS), an electronic survey provided through an outside vendor, was implemented in March 2013.[337] Containing a mixture of 42 objective and open-ended questions, it was modeled on a victim impact survey developed and administered by RAND in 2012.[338] The VIS is provided to victims after disposition of a case is complete, and victims have the choice of completing the survey anonymously or including their contact information.[339]

The Air Force provided the JPP with a copy of the VIS survey and two VIS response reports, one that was based on 45 victim responses received in FY13 and a second report based on 85 victim responses received between April 2013 and March 2014.[340] The second report, which contains the most recent data provided to the JPP, indicated that 95% of the respondents were represented by SVCs, with 98% reporting that they were either extremely satisfied or satisfied with the advice and support of their SVC during the Article 32 hearing and court-martial.[341] In addition, 98% of survey respondents said they would recommend to other victims of sexual assault that they request a special victims' counsel.[342]

Navy victims of sexual assault are asked to fill out a confidential Victim Satisfaction Survey at the close of VLC support. VLCs also encourage victims to participate in the broader DoD Survivor Experience Survey (SES) discussed in greater detail below.[343] The Navy provided the JPP with two VLC Client Satisfaction Survey Reports—one from January 2014 based on 18 responses and one from October 2014 based on 14 responses.[344] According to the October 2014 Navy report, 100% of respondents were very satisfied with their VLC attendance at the Article 32 pretrial hearing and at court proceedings. Eighty-three percent of respondents were very satisfied with their VLC's advocacy on their behalf (the remaining 17% were neutral). Eighty percent of respondents were very satisfied

336 *See* Services' Responses to JPP Request for Information 45 (Nov. 6, 2014).

337 Air Force's Responses to JPP Requests for Information 19(f), 45 (Nov. 6, 2014).

338 Air Force's Response to JPP Request for Information 45 (Nov. 6, 2014) (referencing RAND Corporation, No More Rights Without Remedies: An Impact Evaluation of the National Crime Victim Law Institute's Victims' Rights Clinics (2012), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1179.pdf).

339 *Id.*

340 *Id.*, att. 45.1 ("Military Justice Feedback – SA Victims Survey Screenshots"), att. 45.2 ("Victim Impact Survey Data (FY13)"), att. 45.3 ("Air Force Victim Impact Survey Results (Apr 2013 – Mar 2014)").

341 *Id.*, att. 45.3 ("Air Force Victim Impact Survey Results (Apr 2013 – Mar 2014)"), at 16 (Q13), 22–23 (Q24, Q26). In a comparative question about overall treatment that included victims whose cases did not necessarily go to an Article 32 or court-martial, SVCs were rated higher than any of the other stakeholders, with 88% of respondents either extremely satisfied (80%) or satisfied (8%) with their treatment by the SVC compared to 70% of respondents reporting that they were extremely satisfied (30%) or satisfied (40%) with investigators, 57% extremely satisfied (30%) or satisfied (27%) with trial counsel, 86% extremely satisfied (63%) or satisfied (23%) with their SARC, and 75% either very satisfied (48%) or satisfied (27%) with their Victim Advocate. *Id.* at 9 (Q33).

342 *Id.* at 26 (Q29).

343 Navy's Response to JPP Request for Information 45 (Nov. 6, 2014).

344 *Id.*, encl. 26 ("VLC Client Satisfaction Survey Report (29 Jan 2014)" and "VLC Client Satisfaction Survey Report (Part II) (14 Oct 2014)").

with their VLC's assistance on harassment or retaliation issues (the remaining 20% were neutral). All victim respondents said they would refer a friend who was the victim of sexual assault to a VLC.[345]

The Coast Guard's SVC program and SAPR office use a joint victim satisfaction survey completed by victims at the end of the process. The SVC program office administers the survey and maintains response data. The Coast Guard told the JPP that because the survey is provided only after the victim's case is complete, insufficient data exist at this time to create a report.[346]

The Army and Marine Corps both told the JPP that they will not independently survey victims but will exclusively rely on the SES developed by DoD's SAPRO.[347] The Marine Corps VLC Program Manager noted that she provided considerable input into the development of the SES.[348] Neither the Army nor Marine Corps identified measurement of victim satisfaction as a program performance standard.[349]

The SES was developed as an ongoing survey to provide victim feedback on the sexual assault reporting process and experience. Its questions are designed to assess awareness of reporting options and resources as well as satisfaction with how SARCs, VAs, legal personnel, medical and mental health providers, and leadership respond to sexual assault reports.[350] Uniformed military members over the age of 18 who made a restricted or unrestricted report for any form of sexual assault at least 30 days previously, but after October 1, 2013, are eligible to take the SES.[351] Survey items are Service-specific, and the survey is conducted across active duty, Reserve, and National Guard personnel.[352] SARCs are primarily responsible for coordinating with eligible respondents to complete the SES, with additional support from VAs and SVCs.[353]

The 2014 SES, which was published by DoD in December 2014 as part of DoD's report to the President on sexual assault prevention and response, compiled information from 151 surveys completed between June 4, 2014, and September 22, 2014.[354] It provided only limited victim feedback on SVCs. Sixty-eight percent of survey respondents had used an SVC or VLC, and the survey asked respondents whether their SVC had treated them professionally (97% said yes), listened to them without judgment (96% said yes), supported them (96% said yes), and thoroughly answered their questions (93% said yes).[355]

The JPP believes that victim surveys provide important feedback and information regarding the performance of SVCs and the effectiveness of the SVC programs. The JPP will continue to review

345 *Id.* at 3.

346 Coast Guard's Response to JPP Request for Information 45 (Nov. 6, 2014).

347 Army's and Marine Corps' Responses to JPP Request for Information 45 (Nov. 6, 2014).

348 Marine Corps' Response to JPP Request for Information 45 (Nov. 6, 2014).

349 Army's and Marine Corps' Responses to Request for Information 19(f) (Nov. 6, 2014).

350 Defense Manpower Data Center (DMDC), Defense Research, Surveys, and Statistics Center (RSSC), 2014 Survivor Experience Survey: Report on Preliminary Results: Fiscal Year 2014, Quarter 4, at iii (Oct. 2014), *available at* http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_2_DMDC.pdf.

351 *Id.* at iii–iv.

352 *Id.* at iv.

353 *Id.*

354 *Id.*

355 *Id.* at 51.

victim survey initiatives and the information from victim surveys in its ongoing assessment of the SVC programs.

c. Conversions from Restricted to Unrestricted Reports

The effect of SVC representation may also be reflected in the decision of victims to convert restricted reports of sexual assault to unrestricted reports. The Air Force and Marine Corps reported tracking conversion rates. Only the Air Force considers the metric a measure of program effectiveness, although the Marine Corps indicated that it views conversion rate as a measure of the VLC program's impact.[356]

The JPP used Service data for direct assessment and for comparison with other data currently collected by DoD on sexual assault. In its December 2014 Report to the President, DoD stated that 19% of all victims who made reports of sexual assault in FY14 converted from restricted to unrestricted reports.[357] Using SVC data provided to the JPP by the Services, the JPP calculated that clients represented by SVCs converted from restricted to unrestricted reports at a much higher rate—36% for DoD overall.[358] Table 3.4 provides FY14 conversion rates for DoD and each of the Services. The JPP agrees with the Air Force that conversion rates among victims who are represented by SVCs may indicate how well victims understand the consequences of their reporting decisions, their confidence in the military judicial process, and their trust in advice received from their SVCs.

Table 3.4. FY 2014 Sexual Assault Report Conversion Rates

FY 2014 Sexual Assault Report Conversion Rates						
Conversion Rate	DoD Total	Army	Air Force	Navy	Marine Corps	Coast Guard
Reported Conversion Rate	19%	20%	18%	24%	Not Reported	Not Reported
Conversions Made by SVC Clients	36%	32%	36%	38%	36%	48%
Difference	+17%	+12%	+18%	+14%	N/A	N/A

SOURCES: "Reported Conversion Rate" figures are derived from information contained within U.S. Dep't of Def., Report to the President of the United States on Sexual Assault Prevention and Response app. A (Provisional Statistical Data on Sexual Assault) (Dec. 2014). "Conversions Made by SVC Clients" figures are derived from Services' responses to JPP Request for Information 61 (Dec. 18, 2014).

d. Victim Drop-Out Rates

The rate at which clients decline to go forward in the prosecution process after making an unrestricted report, referred to as the "victim drop-out rate," may be another measure of how well SVCs are meeting the needs of their clients. Only the Air Force currently tracks drop-out rate as an indicator of its SVC program's success. In the year before the Air Force SVC program began, 29% of victims

356 See Marine Corps' Response to JPP Request for Information 19(d) (Nov. 6, 2014).

357 DoD POTUS Report, *supra* note 334, app. A (Provisional Statistical Data on Sexual Assault), at 33.

358 Services' Responses to JPP Request for Information 61 (Dec. 18, 2014).

declined to continue participating in the court-martial process.[359] One of the goals of the Air Force program was thus for SVCs to provide assistance to prevent victim fatigue and frustration, thereby reducing the drop-out rate.[360]

Using information provided by the Services, Table 3.5 provides FY14 DoD and Service drop-out rates for victims who were represented by SVCs. The data also show the percentage of victims represented by SVCs who stopped participating during each phase of the investigation and military judicial process. The JPP's review of individual SVC data provided by the Services reveals that the Air Force drop-out rate has declined significantly—from a 29% drop-out rate before the SVC program began to a 19% drop-out rate for FY14 among Air Force victims represented by SVCs.[361]

Other than the Air Force's pre-SVC program information, DoD and the Services have not tracked or reported drop-out rates for all victims who file unrestricted reports. Therefore, no additional comparative data against which to measure data from the SVC programs yet exist. However, the JPP believes that drop-out rate trends may reflect victims' trust in and satisfaction with the military justice system and legal representation provided to them through the SVC programs. The JPP will continue to monitor drop-out rates across time and within each of the military Services.

Table 3.5. FY 2014 Sexual Assault Drop-Out Rates for Victims Represented by SVCs

FY 2014 Sexual Assault Drop-Out Rates for Victims Represented by SVCs						
Victim Drop-Out	DoD Total	Army	Air Force	Navy	Marine Corps	Coast Guard
During Investigation	10%	4%	17%	8%	20%	13%
During Article 32	3%	4%	2%	1%	6%	0%
Post-Referral	1%	1%	0%	0%	3%	2%
Total Drop-Out	14%	9%	19%	10%	30%	14%

SOURCE: Derived from Services' Responses to JPP Request for Information 61 (Dec. 18, 2014).

e. JPP Assessment of SVC Program Evaluation Standards

The JPP is concerned about variations in standards and procedures that are being developed and employed to evaluate the SVC programs. Best practices and assessment measures used by some

359 *See* Jakob Rodgers, *Air Force Program Puts Lawyer in Victim's Corner,* [Colo. Springs] Gazette, Mar. 23, 2013, *available at* http://gazette.com/air-force-program-puts-lawyer-in-victims-corner/article/152664. Of 334 sexual assault cases handled by the Air Force during fiscal year 2011, 96 victims (29%) chose to stop working with investigators or prosecutors, often causing those cases to stall and leaving prosecutors unable to go forward. *Id.* According to then-Lieutenant Colonel Dawn Hankins, who headed the first Air Force-wide program, this prompted the SVC initiative in the Air Force. *Id.; see also* Air Force's Response to JPP Request for Information 19(f) (Nov. 6, 2014).

360 Air Force's Response to JPP Request for Information 19(f) (Nov. 6, 2014); *see also* Anna Mulrine, *Sexual Assault in the Military: Can Special Counsels for Victims Help?* Christian Sci. Monitor, July 17, 2013 (quoting Lt Gen Richard Harding, Judge Advocate General, U.S. Air Force).

361 *See infra* Table 3.5 (FY 2014 Sexual Assault Drop-Out Rates for Victims Represented by SVCs (percent)); Air Force's Response to JPP Request for Information 19(f) (Nov. 6, 2014). Prior to implementing the SVC Program, the Air Force experienced a 29% victim drop-out rate. Rodgers, *supra* note 359 (referencing statistic that 96 victims who were involved in Air Force's 334 sexual assault cases in FY11 (29%), stopped working with investigators or prosecutors).

of the Services should be evaluated and then made uniform across all of the Services. DoD should be evaluating, monitoring, and reporting on the SVC programs; providing guidance; and ensuring centralized, standardized assessment of their effectiveness.

The SVC programs have been operating within each Service for at least one year, but assessment and evaluation metrics for the programs have not yet been developed. Assessment metrics are necessary to evaluate program performance, and they are also important to ensuring quality control in evaluations. DoD needs to oversee the establishment of appropriate program performance measures and evaluations. Rather than applying different evaluation standards, it is important to use metrics uniformly across the military Services to assess client satisfaction and program performance.

The JPP believes that client satisfaction is an important measure of success: the performance of SVCs and the SVC programs cannot be measured without gauging it, and all the Services should be conducting victim satisfaction surveys. It is not clear to the JPP that victim satisfaction can be adequately assessed through surveys conducted only once per year. The JPP will continue to review current surveys used by the Services as well as the Survivor Experience Survey, once information from that survey becomes available.

It is also important to measure and evaluate the effects of the SVC programs to ensure that they are working effectively. For example, metrics assessing the use of the expedited transfer program and whether those victims who use the program stay in or leave the military, the retention rates for Service members who file reports of sexual assault, and delays in investigations or judicial proceedings attributable to SVC participation as compared to delays cases that do not involve SVCs would provide valuable information.

4. Other Feedback from Stakeholders in the Military Justice System

In addition to Service feedback on SVC program assessment, the JPP also heard comments and opinions about the SVC programs from a variety of stakeholders in the military justice system. Although anecdotal, these perspectives provided further insight about the programs that may be used to identify issues regarding their implementation and effect.[362]

a. Victims Who Are SVC Clients

Five victims of sexual assault who were represented by SVCs appeared before the JPP during the December 2014 public meeting.[363] Each had positive reviews of the program and the counsel they received from their SVC.[364] One victim stated that the "SVC program has positively impacted my

362 RSP Report, *supra* note 3, at 26 (Recommendation 48) (recommending that "[i]n addition to assessing victim satisfaction with the Special Victim Counsel program, the Service Secretaries survey convening authorities, staff judge advocates, prosecutors, defense counsel, military judges, and investigators to assess the effects of the program on the administration of military justice"). The recommendation was approved by DoD in Dec 2014. DoD RSP Implementation Memo, *supra* note 3, at 5.

363 *See Transcript of JPP Public Meeting* 147-245 (Dec. 12, 2014) (testimony of Petty Officer N.S., Ms. J.B., Airman V.T., SPC A.S., and Ms. R.S.). The JPP expresses its sincere gratitude to these brave survivors for their courage in speaking out on this issue and for the tremendous insight they provided to the Panel. Out of respect for the privacy of these individuals, they were identified to the JPP and in the meeting transcript by their initials.

364 *See Transcript of JPP Public Meeting* 156–57 (Dec. 12, 2014) (testimony of Ms. J.B.) (stating that her VLC was an essential part of success of process for her and of helping her keep her dignity intact and protecting her where the law allowed); *id.* at 177-78 (testimony of Ms. R.S. stating that having someone there to back her up and provide support has been a good experience).

involvement with the investigation moving forward," while another said, "I can honestly say that without her [the SVC] I probably wouldn't have been able to survive a trial and go through everything that I went through."[365] Another victim noted that she had previously been a victim in a civilian trial, describing her experience in that process as "much worse."[366] She told the JPP that she initially did not understand how having an attorney would help, but she soon found her SVC aiding her a great deal. She said that "without the support of the full SAPR Program, I would have given up a long time ago and would have never found justice."[367]

Another victim said she owed her VLC "many thanks . . . for helping keep my dignity intact and protect[ing] me in places the law allowed." She said her experience testifying at an Article 32 before being represented by an SVC left her "exposed and vulnerable," but that once she was assigned a VLC, she "was able to cooperate in the judicial process with a greater sense of security and knowledge of the process." She said her VLC "made sure evidence about my personal life that was not relevant to the case was kept out of the courtroom," and added, "I will forever be grateful to the team of military members and especially for my VLC who fought for my justice and my life."[368]

Some military victims described social retaliation they experienced after reporting their sexual assault and how their situations improved once they began working with an SVC. A Coast Guard victim told the JPP that she experienced social isolation and difficulty in her organization following her assault. She said her situation "got much better" once she was assigned an SVC, noting the importance of having someone to back her up and support her.[369]

Another victim also recounted experiencing social retaliation because many people became aware of her case. She said she "no longer felt safe or comfortable being in the area that I was. I have friends and other people looking at me different and talking about me. There were people I didn't even know who knew about me just from hearing about my situation, and it was difficult." She described the pressure she felt and said, "You go through anxiety, you've got to go see behavioral health, and your commanders or your battle buddies or your units basically don't understand because they don't know what happened to you. And if they do know, it becomes judgment, and . . . the worst thing for any soldier is judgment."[370] That victim, like others who spoke before the JPP, received assistance from her SVC to use the expedited transfer program to relocate to a new unit.[371] She said she received assistance and information from her SVC that had not been provided to her by other supporting agencies and responders.[372]

365 *Transcript of JPP Public Meeting* 149 (Dec. 12, 2014) (testimony of Petty Officer N.S.); *id.* at 175 (testimony of SPC A.S.).

366 *Transcript of JPP Public Meeting* 168 (Dec. 12, 2014) (testimony of Airman V.T.).

367 *Id.* at 168–69.

368 *Transcript of JPP Public Meeting* 157 (Dec. 12, 2014) (testimony of Ms. J.B.).

369 *Transcript of JPP Public Meeting* 176 (Dec. 12, 2014) (testimony of Petty Officer N.S.).

370 *Transcript of JPP Public Meeting* 183–84, 185–86 (Dec. 12, 2014) (testimony of SPC A.S.).

371 *Id.* at 188; *see also id.* at 188 (testimony of Airman V.T.).

372 *Transcript of JPP Public Meeting* 185-86 (Dec. 12, 2014) (testimony of SPC A.S.).

b. Special Victims' Counsel

i. Overall Assessment

All of the SVCs who appeared before the JPP had strong praise for the program. A Coast Guard SVC described the program as "a valuable component . . . that gives victims a voice and a choice in this very difficult time," while an Air Force SVC called the program "invaluable in providing victims with legal counsel to more fully participate in the process and to give them a voice in the process that they didn't have previously."[373] In noting his pride in serving as an SVC, an Army counsel stated that the program "enhance[d] a victim's privacy, dignity, understanding [of] military justice, and . . . provide[d] victims a sense of security within a process that some of my clients genuinely feel can be as traumatizing as the sexual assault itself." He said, "The confidentiality that I offer a victim as her SVC is unique and superior to what a trial counsel could provide as an agent of the government."[374]

Noting her initial hesitancy at being assigned to the position, a Navy SVC said, "I feel extremely lucky to be an [SVC]. I did not realize until I started working with clients that there was a big hole in our support system for victims where they were largely left in the dark through the military justice process." She continued, "It is also really empowering for victims to have someone whose job it is to enforce their right to be heard through the process . . . it is important for our clients that someone is fighting for them and fighting to protect their privacy."[375]

SVCs reported positive working relationships with SAPR personnel.[376] While SAPR personnel usually refer victims to SVCs, one Marine SVC described sending a particularly stressed client to SAPR personnel for counseling, adding, "[W]e refer them back and forth . . . there is good communication between the SAPR folks and us."[377] SVCs also spoke of productive working relationships with prosecutors, which they feel lead to greater consideration of a victim's rights and interests in the criminal justice process.[378]

ii. Access to Information and Procedural Rules

Many SVCs detailed issues with prosecutors, defense counsel, and investigators regarding access to information, including but not limited to all unsealed reports, transcripts, and filed pleadings.[379] A

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373 *Transcript of JPP Public Meeting* 171 (Nov. 14, 2014) (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel); *Transcript of JPP Meeting* 160 (Dec. 12, 2014) (testimony of Capt Christopher Mangels, U.S. Air Force, Special Victims' Counsel).

374 *Transcript of JPP Public Meeting* 185–86, 188 (Nov. 14, 2014) (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel).

375 *Transcript of JPP Public Meeting* 164 (Dec. 12, 2014) (testimony of LT Kathryn DeAngelo, U.S. Navy, Victims' Legal Counsel).

376 *Transcript of JPP Public Meeting* 204 (Nov. 14, 2014) (testimony of CDR Colleen Shook, U.S. Navy, Officer in Charge, Victim's Legal Program Mid-Atlantic); *id.* at 207 (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel).

377 *Transcript of JPP Public Meeting* 207–08 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel).

378 *Transcript of JPP Public Meeting* 174–76 (Nov. 14, 2014) (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel); *see also id.* at 194–95 (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel).

379 *Transcript of JPP Public Meeting* 180 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel); *id.* at 238–40 (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel, U.S. Air Force); *Transcript of JPP Public Meeting* 152 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S. Marine Corps,

Marine Corps VLC described the issue as one "we are constantly struggling toward," noting that his ability to receive documents and information is based on his personal relationships with the involved parties, not on concrete rules. The Marine SVC said that access "rules should not be dependent upon our personal relationships. Our success should not be dependent on that, especially dealing with victims' rights. They should be more clear. They should be understood by all parties in place."[380]

Similarly, SVCs described in detail the need for procedural rules to govern their participation throughout the judicial process, including SVC participation in courts-martial, and issues such as where to stand or sit, what proceedings they are entitled to be notified about and attend, and how they may be recognized and heard.[381] When asked what changes were needed in current rules, a Marine Corps VLC said he was not asking for "changes in the rules. I am asking for rules." The same SVC described the awkward way in which SVCs sometimes make appearances during trials. Although some judges were receptive to his presence, he noted, "What I do in front of one judge is going to be completely different than what my counterpart or what my subordinate attorney does to a different judge the next day in that same exact courtroom."[382] In explaining the lack of protocol or rules for his physical presence in a courtroom, an Army SVC said, "So going on the record, for example, finds me often dancing around the court as to whether I will be doing so from the gallery or behind a podium."[383] Another Marine SVC summed up the issue: "In my opinion, we need procedural rules that clearly define our role in the investigative phase, the initial disposition phase, the preliminary hearing phase, and the judicial process phase."[384]

iii. SVC Career Progression and Retaliation

The effect that serving as an SVC has on the careers and professional progress of judge advocates remains an area of concern for SVCs. The JPP heard testimony about a lieutenant-SVC who was warned by a senior-level commander to "watch her rank" and told that the interest of the Service comes before the interest of the SVC's client.[385]

The JPP heard from numerous other SVCs who said they experienced no retaliation or negative consequences as a result of their work.[386] A Marine SVC said she does not worry about retaliation or

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Regional Victims' Legal Counsel); *id.* at 165 (testimony of LT Kathryn DeAngelo, U.S. Navy, Victims' Legal Counsel).

380 *Transcript of JPP Public Meeting* 180–81 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel).

381 *See id.* at 179, 221 (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel); *id.* at 213–14 (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel); *Transcript of JPP Public Meeting* 153 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S. Marine Corps, Regional Victims' Legal Counsel); *id.* at 172 (testimony of CPT Brian E. Stransky, U.S. Army, Special Victims' Counsel); *see also infra* Section IV(C)(2) (Victims' Right to Be Reasonably Heard: Current Judicial Procedures on SVC/VLC Appearances).

382 *Transcript of JPP Public Meeting* 221, 179, 221 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel).

383 *Transcript of JPP Public Meeting* 213–14 (Nov. 14, 2014) (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel).

384 *Transcript of JPP Public Meeting* 153 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S. Marine Corps, Regional Victims' Legal Counsel).

385 *Transcript of JPP Public Meeting* 13 (Dec. 12, 2014) (testimony of Col Don Christensen, U.S. Air Force (Retired), President, Protect Our Defenders); *see also id.* at 54 (testimony of Ms. Simone Hall, Sexual Assault Response Coordinator, U.S. Coast Guard).

386 *See Transcript of JPP Public Meeting* 171 (Nov. 14, 2014) (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel); *Transcript of JPP Public Meeting* 153 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S.

that the billet "will negatively affect my career. . . . [I]n fact, I believe this billet will have a positive impact on my career."[387] One Coast Guard SVC said, "I would definitely recommend my fellow JAGs take the opportunity to serve as an SVC."[388] An SVC Program Manager observed that she had no concerns about career progression for SVCs, noting that since the inception of the program several SVCs had been selected to pursue advanced law degrees in follow-on assignments.[389] Regarding an Air Force SVC who alleged retaliation, the Air Force Judge Advocate General noted that about eighty judge advocate captains were selected for involuntary separation as part of a larger force reduction, adding that SVCs were selected at a slightly lower percentage than those in other fields of practice.[390] Finally, all Services detailed to the JPP how SVCs are officially protected from retaliation, including by federal statutes, DoD directives, and Service regulations that protect Service members more generally.[391]

c. Sexual Assault Response Personnel

SARCs from each Service generally agreed that the SVC programs are valuable to victims and that victims have responded favorably to the program.[392] The SARCs felt that the role of the SVC was complementary to their own, in that attorneys can provide legal advice and explain the military justice process to victims, filling what had been a gap in services.[393] Some SARCs told the JPP that they engage the SVC to assist in training victim advocates.[394]

Noting that SVCs are not part of the Sexual Assault Prevention and Response or Victim and Witness Assistance Programs, several SARCs explained that SVCs perform functions previously performed by victim advocates. Before the SVC program existed, victim advocates updated victims regularly on the status of their cases and the timing of upcoming hearings or pretrial interviews. Now SVCs do so, and clients and SVCs do not always inform victim advocates about case proceedings.[395] That SVCs were not co-located with SARCs and victims was a concern, in particular for the Air Force and Coast Guard, where SVCs are assigned regionally rather than at each installation.[396] SARCs observed that

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Marine Corps, Regional Victims' Legal Counsel).

387 *Transcript of JPP Public Meeting* 153 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S. Marine Corps, Regional Victims' Legal Counsel).

388 *Transcript of JPP Public Meeting* 171 (Nov. 14, 2014) (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel).

389 *Transcript of JPP Public Meeting* 84 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization).

390 *Transcript of JPP Public Meeting* 268–69 (Dec. 12, 2014) (testimony of Lt Gen Christopher F. Burne, The Judge Advocate General, U.S. Air Force).

391 *See* Services' Responses to JPP Request for Information 27 (Nov. 6, 2014).

392 *See generally Transcript of JPP Public Meeting* 49 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force); *id.* at 53 (testimony of Ms. Simone Hall, Sexual Assault Response Coordinator, U.S. Coast Guard); *id.* at 66 (testimony of Ms. Gloria M. Arteaga, Sexual Assault Response Coordinator, U.S. Navy).

393 *Transcript of JPP Public Meeting* 57 (Dec. 12, 2014) (testimony of Ms. Marie A. Brodie, Sexual Assault Response Coordinator, U.S. Marine Corps).

394 *Id.* at 62; *id.* at 69 (testimony of Ms. Gloria M. Arteaga, Sexual Assault Response Coordinator, U.S. Navy).

395 *Transcript of JPP Public Meeting* 49–50 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force); *id.* at 70 (testimony of Ms. Gloria M. Arteaga, Sexual Assault Response Coordinator, U.S. Navy); *id.* at 57 (testimony of Ms. Marie A. Brodie, Sexual Assault Response Coordinator, U.S. Marine Corps).

396 *Transcript of JPP Public Meeting* 50–51 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force); *id.* at 54–55 (testimony of Ms. Simone Hall, Sexual Assault Response Coordinator, U.S. Coast Guard).

a lack of face-to-face interaction may create problems between attorney and client or delay initial interviews by criminal investigators.[397]

d. Military Criminal Investigators

Criminal investigators testified that the SVC program enhanced victims' abilities to come forward, present key details, and understand the investigative process.[398] Investigators told the JPP that they often actively engage with SVCs because they are required by service regulations to brief victims regularly on the status of an investigation.[399] An Army investigator told the JPP that SVCs often ask to receive the information rather than have the investigators approach represented victims directly.[400]

Several presenters noted that the involvement of an SVC may lead to investigative delays.[401] Since SVCs began representing victims during investigations, investigators have experienced more delays, sometimes lasting days or weeks, before conducting initial interviews, and they have more frequently observed victims refusing to provide a written or recorded statement to investigators or to allow access to digital media devices.[402] In a positive development, investigators also noted that because the SVCs have allayed victims' worries about the consequences of collateral misconduct, sometimes victims are less hesitant to cooperate with investigators.[403]

e. Trial Counsel

Trial counsel discussed both favorable experiences and challenges they have faced since the advent of the SVC program. While stating that he viewed the program as "overwhelmingly positive," an Air Force trial counsel commented that the biggest improvement he has seen since the program was established is its positive effect on victims now that they have their own counsel to "stick up for them," accompany them to interviews and proceedings, and help them understand the process.[404] An Army

397 *Transcript of JPP Public Meeting* 54–55 (Dec. 12, 2014) (testimony of Ms. Simone Hall, Sexual Assault Response Coordinator, U.S. Coast Guard); *Transcript of JPP Public Meeting* 50–51 (Dec. 12, 2014) (testimony of Ms. Phylista Dudzinski, Sexual Assault Response Coordinator, U.S. Air Force).

398 *See Transcript of JPP Public Meeting* 268, 270 (Nov. 14, 2014) (testimony of Mr. Mike Defamio, Supervisory Special Agent, U.S. Navy Criminal Investigative Service (NCIS)); *id.* at 259 (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)).

399 *Transcript of JPP Public Meeting* 259 (Nov. 14, 2014) (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)); U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 5.3(m) (Feb. 12, 2014) (requiring commanders to direct that DoD law enforcement agents and VWAP personnel provide victims of sexual assault who elect an unrestricted report the information outlined in DoDD 1030.01 throughout the investigative and legal process).

400 *See Transcript of JPP Public Meeting* 259–60 (Nov. 14, 2014) (testimony of Mr. James W. Boerner, Special Agent, U.S. Army Criminal Investigative Command (CID)).

401 *See Transcript of JPP Public Meeting* 268 (Nov. 14, 2014) (testimony of Mr. Mike Defamio, Supervisory Special Agent, U.S. Naval Criminal Investigative Service (NCIS)); *id.* at 313-14 (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)); *id.* at 344 (testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel).

402 *See Transcript of JPP Public Meeting* 282–84 (Nov. 14, 2014) (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)); *id.* at 268, 285 (testimony of Mr. Mike DeFamio, Supervisory Special Agent, U.S. Navy Criminal Investigative Service (NCIS)).

403 *See Transcript of JPP Public Meeting* 269 (Nov. 14, 2014) (testimony of Mr. Mark Walker, Special Agent, U.S. Air Force Office of Special Investigations (AFOSI)).

404 *See Transcript of JPP Public Meeting* 396–98 (Nov. 14, 2014) (testimony of Maj Brent Jones, U.S. Air Force, Senior Trial

trial counsel explained that SVCs provide clarity and decisive feedback to the prosecution regarding the victim's wishes, particularly during plea negotiations.[405] A Navy trial counsel described mixed experiences with various SVCs but added that these experiences were no different from his experiences with various defense counsel.[406]

A Coast Guard trial counsel highlighted the importance of SVC confidentiality while detailing how an SVC can explain the strengths and weaknesses of a case to the client without being perceived as trying to persuade or dissuade the victim from proceeding.[407] A Marine prosecutor added that "much to [his] surprise," the program has been extremely positive and is a "force multiplier" in the military justice system. The same prosecutor also noted that SVCs increased the comfort level and trust of victims, who know that the SVC has only one duty—to represent them.[408]

Trial counsel also explained the new challenges they face as a result of the SVC program. A Navy trial counsel expressed a consensus view among presenters that they now have less direct communication with victims. [409] Once a victim obtains SVC representation, according to practitioners, trial counsel no longer feel able to consult with a victim, even on routine matters, without first going through the SVC. The Navy counsel explained that "once SVC is assigned in a case and my office is notified of that representation, we no longer will ever directly contact that victim."[410] An Army prosecutor echoed this position, citing his state bar's rules of professional conduct.[411] As described by the Navy counsel,

> Now, as a perhaps unintended consequence of the presence of VLC, a lot of that rapport building is taken away and not available to the prosecutor. There was a natural trust that was formed between the victim and the prosecutor when the prosecutor was the answer source. And naturally as the victim relies on and trust the VLC, they rely less on the prosecutor.[412]

As a result, case status updates from a prosecutor or questions from a prosecutor in preparation for trial are now provided to a victim through the SVC.[413] A Coast Guard trial counsel observed that this

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Counsel).

405 *See Transcript of JPP Public Meeting* 381 (Nov. 14, 2014) (testimony of LTC Scott Hutmacher, U.S. Army, Special Victim Prosecutor).

406 *See Transcript of JPP Public Meeting* 386–87 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel).

407 *Transcript of JPP Public Meeting* 401 (Nov. 14, 2014) (testimony of LT Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel).

408 *Transcript of JPP Public Meeting* 394–95 (Nov. 14, 2014) (testimony of Maj Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel).

409 *See Transcript of JPP Public Meeting* 386–87, 402 (Nov, 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel).

410 *See Transcript of JPP Public Meeting* 384 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel); *see also id.* 402 (testimony of LT Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel).

411 *See Transcript of JPP Public Meeting* 391 (Nov. 14, 2014) (testimony of Maj Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel); *see also* Army SVC Handbook, *supra* note 198, ch. 4 (referencing Army Rule of Professional Conduct 4.2).

412 *Transcript of JPP Public Meeting* 385–86 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel).

413 *See id.* at 385 (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel); *see also id.* at 392 (testimony of Maj Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel).

intermediation could present a problem when the prosecutor and SVC disagree on an appropriate case strategy.[414]

A common theme expressed by trial counsel was the issue of inexperienced SVCs. While noting that an inexperienced SVC does not necessarily impede the prosecution, the Army trial counsel stated that lack of experience could "hamper the intent of their client wanting to voice how [the sexual assault] has impacted on them, the violation on them, et cetera."[415] The Coast Guard trial counsel described times when "SVCs have set back prosecutions, either by failing to understand their client's goals or the military justice process."[416]

Overall, trial counsel agreed that the SVC program did not hamper their ability to prosecute cases.[417] When asked whether they were better or worse off in terms of doing their job since the establishment of the SVC program, a Marine trial counsel observed that it doesn't matter "whether it makes our job easy or not. The fact of the matter is that our job is made easier in some respects and more difficult in some respects. It balances itself out, and in the end, you have a victim that's better taken care of through the system and I think that's really the take-away."[418]

f. Defense Counsel

The JPP heard assessments from military defense counsel of their relationships with SVCs in the military justice system. While the defense counsel characterized their interactions with SVCs as professional, each had concerns with the program ranging from SVC experience levels to how certain aspects of the program have amounted to a shift in the balance of justice and fairness.[419] An Army defense counsel detailed her interactions with an SVC on a typical case and described a recent case on which she worked with two SVCs extensively. Noting that neither SVC had prior military justice experience, she explained how this inexperience resulted in unnecessary delays in the trial due to the SVCs' not understanding the fundamentals of trial practice and client representation. But the counsel added that she has used such experiences to help educate the SVCs on case law, rules of practices, and other military justice standards, and doing so has "garnered much more trust and effective working relationships between the SVCs and the defense counsel."[420]

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414 *See Transcript of JPP Public Meeting* 401 (Nov. 14, 2014) (testimony of LT Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel); *id.* at 392–93 (testimony of Maj Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel).

415 *Transcript of JPP Public Meeting* 404 (Nov. 14, 2014) (testimony of LTC Scott Hutmacher, U.S. Army, Special Victim Prosecutor).

416 *Transcript of JPP Public Meeting* 401 (Nov. 14, 2014) (testimony of LT Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel).

417 *See generally Transcript of JPP Public Meeting* 406 (Nov. 14, 2014) (testimony of LTC Scott Hutmacher, U.S. Army, Special Victim Prosecutor); *id.* at 417 (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel); *id.* at 405 (testimony of Maj Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel); *id.* (testimony of LT Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel).

418 *Transcript of JPP Public Meeting* 405 (Nov. 14, 2014) (testimony of Maj Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel).

419 *See generally Transcript of JPP Public Meeting* 323–24 (Nov. 14, 2014) (testimony of Maj William Babor, U.S. Air Force, Senior Defense Counsel); *id.* at 331 (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel); *id.* at 336–37 (testimony of Maj Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel); *id.* at 345–46 (testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel).

420 *Transcript of JPP Public Meeting* 343–44 (Nov. 14, 2014) (testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel).

An Air Force defense counsel observed that the SVC's role during defense interviews has "shift[ed] the balance of fairness when it comes to defense interviews of victims." He explained that SVCs actively participate and coach victims during interviews and place superficial time limits on them. He also stated that SVCs have limited discussion or have completely stopped interviews when subjects of bias, prejudice, or motive to misrepresent arose and that, in some instances, SVCs have refused defense interviews of the victim while still allowing such interviews with the prosecution.[421]

The Air Force counsel also explained that "inherently the SVC is at an adverse position to the military accused and the defense counsel," adding that the positions of the SVC and their client "are more closely aligned with that of the prosecutor" and that "some SVCs could appear to become de facto members of the prosecution."[422] When asked by the JPP how he would change the system to provide better balance in the justice system, the counsel stated, "I don't think that necessarily limiting SVCs is going to be the way to go"; instead, he proposed other counterbalances in favor of the accused such as requiring unanimous verdicts, panel members of an accused's peers, and panel members selected by someone other than a commander who has authority over the accused.[423]

A Navy defense counsel, while noting that he did not believe the entire justice system was broken, said, "I believe that the current climate has amounted to somewhat of a shift." The counsel said, "While the government has an array of investigators, advocates, special prosecutors, command representatives, victim advocates, and so forth, and you've heard here, unprecedented efforts to integrate the complaining witness into the process, my clients lack access to investigative support, administrative support, and must request any additional support, including experts, from the very officer who has referred charges against him, often through the prosecutor who is seeking to take away his liberty."[424]

The counsel said that "we have noted several areas where we believe that the presence of the VLCs has the potential to impact our client's liberty and their constitutional rights. One of the areas is just an issue of fundamental fairness." He detailed complaints with the program, including (1) an SVC being made available to a victim "even prior to an official report being made," while defense counsel are generally not assigned to an accused until charges are preferred; (2) the SVC program having its own line of travel accounting, while defense services must request funding though the convening authority; (3) SVCs limiting the defense's ability to conduct pretrial interviews of victims; and (4) SVCs, in some situations, actively working to perfect the government's case against his clients.[425]

The counsel explained why SVCs' working with trial counsel is a problem: "[W]hile a trial counsel or even a member of a military criminal investigation organization has an obligation to turn over any exculpatory material to the defense, the victim's legal counsel has no such obligation." The counsel said an SVC could argue that such material is protected by privilege, which "creates an issue with respect to fundamental fairness and whether material is being filtered through the victim's legal counsel organization." He raised the resulting question about how such information, if not attorney-client privileged and discoverable, can be obtained by the defense counsel.[426]

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421 *Transcript of JPP Public Meeting* 323–25 (Nov. 14, 2014) (testimony of Maj William Babor, U.S. Air Force, Senior Defense Counsel).

422 *Id.* at 323.

423 *Id.* at 364.

424 *Transcript of JPP Public Meeting* 367, 327 (Nov. 14, 2014) (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel).

425 *Id.* at 327–31, 350–51.

426 *Id.* at 331, 365–66.

IV. Rights and Needs of Sexual Assault Victims Throughout the Judicial Process

A. VICTIMS' RIGHTS UNDER THE UCMJ

In October 2004, Congress passed the Crime Victims' Rights Act (CVRA), which was the culmination of "a long effort to afford greater deference to victims in the criminal justice process."[427] The CVRA, which granted rights to all "crime victims," mirrored other victims' bills of rights spelled out in various state laws and supplemented other specific victims' rights under federal law.[428] The CVRA did not expressly state whether it applied to crime victims of federal offenses prosecuted under the UCMJ.

In Section 1701 of the FY14 NDAA, Congress codified eight rights for all crime victims in the military justice process as Article 6b of the UCMJ:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:
   a. A public hearing concerning the continuation of confinement prior to trial of the accused.
   b. A preliminary hearing under section 832 of this title (article 32) relating to the offense.
   c. A court-martial relating to the offense.
   d. A public proceeding of the service clemency and parole board relating to the offense.
   e. The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:
   a. A public hearing concerning the continuation of confinement prior to trial of the accused.
   b. A sentencing hearing relating to the offense.
   c. A public proceeding of the service clemency and parole board relating to the offense.

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427 Charles Doyle, Cong. Research Serv., Crime Victims' Rights Act; A Summary and Legal Analysis of 18 U.S.C. § 3771, at 1 (2012).

428 *Id.* at 1. A "crime victim" is "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771 (e) (2012).

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described above.

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.[429]

Within one year, Section 1701 required the Secretary of Defense to recommend to the President changes to the *Manual for Courts-Martial* and to prescribe regulations to implement these rights. Implementing regulations must include

(A) Mechanisms for ensuring that victims are notified of, and accorded, the rights specified in Article 6b of the Uniform Code of Military Justice.

(B) Mechanisms for ensuring that members of the Armed Forces and civilian personnel of the Department of Defense and the Coast Guard make their best efforts to ensure that victims are notified of, and accorded, the rights specified in Article 6b of the Uniform Code of Military Justice.

(C) Mechanisms for the enforcement of such rights, including mechanisms for application for such rights and for consideration and disposition of applications for such rights.

(D) The designation of an authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights.

(E) Disciplinary sanctions for members of the Armed Forces and other personnel of the Department of Defense and Coast Guard who willfully or wantonly fail to comply with requirements relating to such rights.[430]

Although Section 1701's one-year deadline to establish guidance has passed, DoD and the Services are continuing to develop policy and establish practices to provide for the rights incorporated under Article 6b.

The JPP heard from witnesses and reviewed materials and submissions regarding the rights and needs of sexual assault victims during the judicial process. Specifically, the JPP reviewed policies and practices regarding victims' notice and access to case information, the rights of victims to be reasonably heard and participate in courts-martial, and the ability of victims to challenge possible violations of their rights through interlocutory appeal.

429 FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

430 *Id.*

B. VICTIMS' NOTICE AND ACCESS TO INFORMATION

A civilian victims' rights expert who appeared at the November JPP public meeting characterized victim access to information as "among the most critical components of protecting victims' rights that exist." She explained, "Everyone in th[e] system has to have access to similar, if not equivalent information throughout" the proceedings, including after conviction.[431] Victims and their counsel require timely access to sufficient information about a case for two principal reasons. First, a victim's counsel must be reasonably aware of what is happening in a case in order to advise the client of his or her rights and on the best course of action. At the same time, a victim who lacks sufficient information about the scope and context of what is discussed in a proceeding cannot knowingly and voluntarily assert or waive his or her rights.[432]

Historically, victims of crimes in the military justice system have not been afforded the same access to case information as prosecutors and defense counsel. The newly enacted Article 6b, however, establishes opportunities for military victims and their counsel to obtain information about their case. Article 6b guarantees victims the "right to reasonable, accurate, and timely notice" of proceedings during the court-martial process; the right to be reasonably heard on pretrial confinement, sentencing, or parole hearings; and the right to confer with the counsel for the government on such proceedings. But Article 6b does not specify what information is needed by victims to adequately or reasonably provide for these rights and how to access that information. Instead, Section 1701 requires DoD and the Services to establish mechanisms to provide for, enforce, and resolve complaints about victims' rights.[433]

1. Regulations and Policies Regarding Victim Access to Information

To meet the requirements of Section 1701, the military Services have developed and implemented new policies and procedures that will ensure better access to case information for victims and their counsel. No uniform policy for access to information exists among the Military Departments, but each Service has adopted procedures and requirements ranging from policy memos from the Judge Advocate General (TJAG) to "official use" request exceptions under the Privacy Act to provide victims with access to various documents relating to their cases.

In the Air Force, following recent Air Force JAG Corps policy guidance, SVCs now use an "official-use request mechanism" under an exception to the Privacy Act to obtain some case documents that would otherwise be restricted, such as ongoing investigation reports from the Air Force Office of Special Investigations.[434] The release of records under the Privacy Act's 5 U.S.C. § 552a(b)(1) exception depends on which documents the SVC requests and the justification as to why they are needed. SVCs

431 *Transcript of JPP Public Meeting* 17–18 (Nov. 14, 2014) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute); *see also id.* at 22–23 (testimony of Mr. Michael Andrews, Project Director and Managing Attorney, District of Columbia Crime Victims' Resource Center) (agreeing that "the same access to information" is "crucial" and adding that information must not be "filtered" or "watered down" by a third party).

432 *Transcript of JPP Public Meeting* 18 (Nov. 14, 2014) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute); *see also id.* at 21–22 (testimony of Mr. Michael Andrews, Project Director and Managing Attorney, District of Columbia Crime Victims' Resource Center) ("How else are we going to counsel our clients if we don't have the same access to information as all of the parties that have been licensed to practice before the tribunal[?]").

433 FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013).

434 Special Victims' Counsel Requests for Air Force Records Under the Privacy Act and Freedom of Information Act, Op. JAG, Air Force, No. 2014/3 (July 1, 2014), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20150116/34_OpJAGAF_SVC_ReqforRecords_PA_FOIA_20140701.pdf.

cannot provide protected information to their clients, but they can use the information to shape their strategies of representation and their assessments of cases. The JPP heard testimony that this mechanism is still being refined and its application remains uneven.[435] For example, the Air Force Office of Special Investigations (AFOSI) maintains that their regulations prohibit disclosure of open reports of investigation to SVCs.[436]

The Army issued its policy regarding the disclosure of information to crime victims on October 1, 2014. Under the Army policy, trial counsel shall provide the victim and SVC, if applicable, with the following (a request is not necessary):

> (a) *Upon preferral of charges*: A copy of all statements and documentary evidence produced or provided by the victim; an excerpt of the charge sheet setting forth the preferred specifications pertaining to that victim; and the date, time, and location of any pretrial confinement review pursuant to R.C.M. 305, and the preliminary hearing pursuant to Article 32, UCMJ.
>
> (b) *Upon receipt or filing by the government*: A summarized transcript of the victim's testimony at the preliminary hearing; an excerpt of the charge sheet setting forth the referred specifications pertaining to that victim; any docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial; a copy of any motion or responsive pleadings that may limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or private medical information, or involve the victim's right to be heard; and any request to interview the victim received from defense counsel.[437]

The policy itself notes that it "is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord a victim the notice outlined in this policy."[438] Shortly after the issuance of the Army's policy, the Marine Corps and the Coast Guard issued similar policies for disclosing information to victims.[439]

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435 *Transcript of JPP Public Meeting* 238–40 (Nov. 14, 2014) (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel).

436 *Transcript of JPP Public Meeting* 105 (Nov. 14, 2014) (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division); *see also id.* at 306 (testimony of Mr. Mark Walker, Special Agent, Air Force Office of Special Investigations) ("Our investigations are open until prosecution, declination, until the resolution of the case. And once that resolution of the case is done, it is—our case is now closed. And that case is now available for Freedom of Information Act requests. Prior to that, we provide all of our information to the Staff Judge Advocate's office for dissemination to the defense.").

437 Policy Memorandum 14-09, Office of the Judge Advocate General, U.S. Army, subject: Disclosure of Information to Crime Victims (Oct. 1, 2014), *available at* http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q14_USA.pdf; *see also Transcript of JPP Public Meeting* 253–54, 306 (Dec. 12, 2014) (testimony of LTG Flora D. Darpino, The Judge Advocate General, U.S. Army) (describing TJAG Policy Memo to Panel and noting that immediately upon issuance, she e-mailed the memo to her fellow Judge Advocates General for their consideration).

438 Policy Memorandum 14-09, Office of the Judge Advocate General, U.S. Army, subject: Disclosure of Information to Crime Victims ¶ 5 (Oct. 1, 2014).

439 U.S. Marine Corps, Military Justice Branch, Practice Advisory No. 4-14, Disclosure of Information to Crime Victims (Nov. 5, 2014), *available at* http://www.hqmc.marines.mil/Portals/135/Docs/JAM/Practice%20Advisory%204-14%20-%20Release%20of%20Information%20to%20Victims.pdf; Memorandum 5810, Judge Advocate General, U.S. Coast Guard, subject: Disclosure of Information to Crime Victims (Oct. 28, 2014), *available at* http://jpp.whs.mil/Public/docs/

The Navy is currently drafting an official policy regarding the release of information to crime victims. Until this policy is developed, Navy senior trial counsel are following in practice the Army TJAG Policy of October 1, 2014. Before charges are referred, other requests for information in Navy cases not covered by this policy are made directly by the SVC or VLC to the trial counsel.[440] In cases when VLC access to pleadings is denied by the court, VLCs have filed Freedom of Information Act (FOIA) requests and appealed to higher military authorities.[441] After referral, a motion for access to information may be filed directly with the military judge.[442] In addition to JAG Corps guidance, at least one Navy-Marine Corps judicial circuit has also developed and implemented specific requirements for notifying victims and victims' counsel. These circuit rules require trial counsel to serve copies of scheduling orders on all counsel for all parties, including any independent counsel or victim advocate who represents a victim in the case.[443] These rules require service of "motions involving non-parties" and motions raising M.R.E. 412 and M.R.E. 513 issues.[444]

2. Victims' Notice and Access to Case Information in Practice

Notwithstanding Article 6b's mandates and the recent development of Service policies, victim access to case information remains inconsistent. Some SVCs told the JPP that they generally receive sufficient notice and access to information to adequately represent their clients.[445]

On the other hand, several victims' counsel testified that in their experience, some military trial counsel fail to provide victims' counsel with certain case materials and information.[446] More specifically, victims' counsel continue to experience difficulty in obtaining case documents such as pleadings, discovery, Article 32 investigation officers' reports, and reports of investigation (ROIs) by military

RFI/Set_1/Encl13-25/RFI_Enclosure_Q14_USCG.pdf. The Coast Guard policy mirrors the Army policy in adding the qualification that it does not create any entitlement arising out of failure to implement the policy.

440 *Transcript of JPP Public Meeting* 406–09, 411–12 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel); *see also* Navy and Marine Corps' Responses to JPP Requests for Information 14, 17 (Nov. 6, 2014).

441 *See, e.g., Transcript of JPP Public Meeting* 233–34 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Counsel).

442 Navy's and Marine Corps' Responses to JPP Requests for Information 16 (Nov. 6, 2014).

443 *See, e.g.,* U.S. Dep't of Navy, Navy-Marine Corps Trial Judiciary, Europe, Africa, and Southwest Asia Circuit 24 (Apr. 3, 2014) (Rule 33.7) [hereinafter Navy-Marine Corps EURAFSWA Circuit Rules], *available at* http://www.jag.navy.mil/courts/documents/EURAFSWA_CIRCUIT_RULES_OF_PRACTICE.pdf.

444 *See, e.g., id.* at 24 (Rules 33.5 and 33.7).

445 *Transcript of JPP Public Meeting* 236 (Nov. 14, 2014) (testimony of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel); *id.* at 175 (testimony of LCDR Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel); *see also Transcript of JPP Public Meeting* 166 (Dec. 12, 2014) (testimony of LT Kathryn DeAngelo, U.S. Navy, Victims' Legal Counsel) (stating "no one expects that we [VLCs] will ever have access to everything").

446 *Written Statement of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* paras. 7, 8 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 287, 316 (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders); *id.* at 273–74, 288–89 (testimony of Mr. Guilds) (testifying that this was not his experience in civilian jurisdictions and suggesting that military trial counsel are simply "used to the [military's] closed docketing system"); *Transcript of JPP Public Meeting* 89–90 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization) (alleging common practice of VLCs being provided documents for first time while victim on witness stand at Article 32 hearings and asked to adopt them); *see also Transcript of JPP Public Meeting* 11–12 (Dec. 12, 2014) (testimony of Col Don Christensen, U.S. Air Force (Retired), President, Protect Our Defenders) (testifying that "SVCs face a continual struggle . . . to receive evidence needed to represent survivors, to have access to motions filed by the parties, or to be consulted prior to the scheduling of Article 32 hearings, Article 39(a) sessions, or the court itself").

criminal investigative organizations.[447] For example, the Air Force SVC Program Manager testified that SVCs "do not receive discovery and relevant pleadings consistently,"[448] while a senior Marine Corps VLC told the JPP that some military investigative agents "will not provide [VLCs] with anything."[449]

Presenters observed that before victim rights were established under Article 6b, a counsel's ability to obtain case information and documents on behalf of a victim client often depended on his or her personal relationship with the other parties to the case. One presenter told the JPP that the new requirements and guidance have not changed this dynamic. Contending that the current rules regarding victims' access to information are "vague," he explained that the ability of SVCs "to effectively represent their clients is solely dependent upon [their] personal relationships with . . . trial counsel, defense counsel, and the military criminal investigators."[450] Another witness noted specific defects in production requirements. While she applauded the FY14 NDAA's requirement that victims be provided a record of trial, she advised the JPP that the requirement should be further extended to also provide records for courts-martial to the victim in cases that result in acquittal.[451]

Several military counsel specified the extent of victims' access to case documents.[452] Some senior military trial and defense counsel also testified that victims' counsel were provided certain motions, but not others. When asked to explain why, the counsel cited past practice and the lack of written requirements to produce the information.[453] Two of the attorneys raised the concern that providing

447 *Transcript of JPP Public Meeting* 233–34 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Counsel) (testifying that in his experience, FOIA (Freedom of Information Act) requests must be filed for reports of Article 32 investigation or NCIS investigation, and that by time requests are processed and documents are received, court-martial is over); *Transcript of JPP Public Meeting* 165–66 (Dec. 12, 2014) (testimony of LT Kathryn DeAngelo, U.S. Navy, Victims' Legal Counsel) (testifying that she is "never" provided prosecutorial merit review, which makes it "so much more difficult to advise a client regarding, for instance, her input to the convening authority on initial disposition").

448 *Transcript of JPP Public Meeting* 105–07 (Nov. 14, 2014) (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division).

449 *Transcript of JPP Public Meeting* 152 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S. Marine Corps, Regional Victims' Legal Counsel).

450 *Transcript of JPP Public Meeting* 180–81 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Regional Victims' Counsel).

451 *Transcript of JPP Public Meeting* 105–07 (Nov. 14, 2014) (testimony of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division). Noting that such records are currently summarized in the Air Force, depriving victims of the opportunity to hear the evidence and arguments resulting in the acquittal, this presenter argued that the victim should be provided either a verbatim transcript or an audiotape of the court-martial. *Id.*

452 *Transcript of JPP Public Meeting* 334–35 (Nov. 14, 2014) (testimony of Maj Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel) (testifying that VLCs routinely receive such pretrial documents as discovery timelines and victim requests as well as notice of hearings, pretrial negotiations, and trial dates); *id.* at 387 (testimony of LCDR Philip J. Hamon, Senior Trial Counsel, U.S. Navy) (testifying that VLCs are provided all scheduling orders, the charge sheet, all victim statements, any investigators' summaries of interviews, and all M.R.E. 412 and M.R.E. 513 motions along with any enclosures and any responses thereto, as well as "additional information on a case by case basis, depending on the circumstances"); *Transcript of JPP Public Meeting* 374, 384–86 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor) (citing Policy Memorandum 14-09, Office of the Judge Advocate General, U.S. Army, subject: Disclosure of Information to Crime Victims (Oct. 1, 2014) (requiring that SVCs and their clients receive summarized or verbatim transcript of their clients' testimony at Article 32 hearing)).

453 *Transcript of JPP Public Meeting* 411–12 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel); *id.* at 413 (testimony of LTC Scott Hutmacher, U.S. Army, Special Victim Prosecutor); *id.* at 357–61 (testimony of Maj Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel) (noting that amended Article 6b requires merely "reasonable and accurate notice" and testifying that defense counsel decide on case-by-case basis what is in accused's best interest and that service of pleadings to VLCs sometimes is not); *see also Transcript of JPP Public Meeting* 304–06 (Dec. 12, 2014) (testimony of LTG Flora D. Darpino, The Judge Advocate General, U.S. Army, and VADM Nanette M. DeRenzi, Judge Advocate General, U.S. Navy) (identifying access to information as one of the principal two challenges

documents, such as other witnesses' statements, could affect the victim's testimony.[454] Nevertheless, some counsel told the JPP that they personally would not object to an electronic docketing system in which all unsealed pleadings are publicly available.[455]

In contrast, other military counsel indicated that SVCs are advised of and included in Article 32 hearings and any hearings involving M.R.E. 412 or M.R.E. 513 issues.[456] A Navy senior trial counsel told the JPP that trial counsel in his practice consult with VLCs prior to docketing conferences to ensure that the VLC is available for proposed trial dates.[457] Trial counsel described the care with which they exercised their prosecutorial discretion in deciding how much and what case information to provide to victims' counsel.[458]

C. VICTIMS' RIGHT TO BE REASONABLY HEARD

1. Background

Article 6b guarantees the right of victims to receive notice of, and not to be excluded from, certain specified judicial proceedings. This right extends to pretrial confinement hearings (if any), Article 32 hearings, court-martial proceedings, and parole hearings. As noted above, the right of a victim to be present at proceedings may not be limited unless a court determines by clear and convincing evidence "that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."[459]

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currently faced by their Services' respective victims' counsel programs).

454 *Transcript of JPP Public Meeting* 410 (Nov. 14, 2014) (testimony of Maj Brent Jones, U.S. Air Force, Trial Counsel); *id.* at 331–32 (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel).

455 *Transcript of JPP Public Meeting* 413 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel); *id.* at 331–32 (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel); *see also Transcript of JPP Public Meeting* 313–15 (Dec. 12, 2014) (testimony of Lt Gen Christopher F. Burne, The Judge Advocate General, U.S. Air Force) (noting that creation of electronic docketing system currently is being considered in Air Force, with recommendations forthcoming in first half of 2015); *id.* at 119–20 (testimony of Ms. Marie A. Brodie, Installation Sexual Assault Response Coordinator (SARC) (supporting proposal of electronic docketing in military system).

456 *Transcript of JPP Public Meeting* 380–83 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor) (testifying that SVCs "definitely get 412 and 513 pleadings," usually are listed on the electronic docketing request once assigned, "simply maintain a status on correspondence with all the counsel," and "certainly . . . can come to any hearing" and are "always notified whenever we are going to go into session"); *Transcript of JPP Public Meeting* 379–81 (Nov. 14, 2014) (testimony of LTC Scott Hutmacher, U.S. Army, Special Victim Prosecutor) (testifying that in his experience, SVCs are "absolutely included" at M.R.E. 412 and M.R.E. 513 hearings as well as at R.C.M. 802 sessions, including hearing scheduling); *id.* at 334–35 (testimony of Maj Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel) (testifying that he could not recall an Article 32 hearing at which the VLC was not present); *id.* at 344 (testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel) (testifying that SVCs assigned to her cases had been "present at all Article 32 hearings and at applicable motions hearings as well").

457 *Transcript of JPP Public Meeting* 386-87 (Nov. 14, 2014) (testimony of LCDR Philip J. Hamon, U.S. Navy, Senior Trial Counsel) (adding that in his experience, trial counsel will consult with VLCs before proposing trial schedule to military judge, making sure that VLC is available on all proposed trial dates).

458 *E.g., Transcript of JPP Public Meeting* 387–88 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor) (noting that system relies on trial counsel's role to determine—for example, during discovery—"who needs what when" and assuring Panel that she takes that responsibility "very seriously").

459 FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013). Article 6b does not include the CVRA's requirement that before excluding a victim under the exception, judges: should make every effort to permit the fullest attendance possible and to consider reasonable alternatives to excluding the victim; and should clearly state on the record the reasons for any decision denying relief under the CVRA by clear and convincing evidence. RSP Report, *supra* note 3, at 142–43.

A victim has a right to be heard at (1) a public hearing concerning the continuation of the accused's pretrial confinement, (2) the sentencing phase of the accused's court-martial, and (3) a public proceeding of the clemency and parole board of the accused's Service relating to the offense or offenses of which he or she was convicted.[460] In addition, M.R.E. 412 and M.R.E. 513 both expressly state that the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings conducted under those rules.[461]

2. Current Judicial Procedures on SVC/VLC Court Appearances

The rules of practice and procedure for the participation of SVCs in courts-martial proceedings vary among and within the Services. In the Army's Rules of Practice Before Army Courts-Martial, updated on November 1, 2014, Rule 2.3.1 provides that the Rules of Court apply to all military or civilian counsel representing victims, "including but not limited to the rules on motions practice."[462]

The Uniform Rules of Practice Before Air Force Courts-Martial address victims' rights and services, but the rules do not specifically address procedures for SVCs' participation.[463] Rule 4.6 of the Air Force's Special Victims' Counsel Rules of Practice and Procedure, which govern the role of SVCs in the Air Force, states:

> Standing under the UCMJ. Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as litigation parties under the UCMJ. MREs 412, 513, and 514 afford victims a reasonable opportunity to attend these evidentiary hearings and be heard. SVCs may represent victims in these and other UCMJ proceedings where victims are afforded standing, as permitted by the presiding military judge, and may obtain copies of motions and other relevant information necessary in order for the victim's opportunity to be heard to be meaningful.[464]

Individual Navy-Marine Corps judicial circuits establish rules of practice for courts-martial. The Navy-Marine Corps Europe/Africa/Southwest Asia Circuit established rules pertaining to counsel representing victims.[465] That circuit provides that counsel representing victims may be heard before the court "to a limited extent as allowed by law" and that counsel "should be seated behind the bar except when addressing the court."[466] That circuit's rules also allow counsel to file motions and other papers with the court as deemed proper in their client's interests, and requires copies of all filings to be served on all counsel participating in the case.[467] In proceedings on M.R.E. 513 or 514 (victim advocate–

460 *See* FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013). The Response Systems Panel recommended extension of victims' right to be heard to pretrial agreements. RSP Report, *supra* note 3, at 134–35.

461 *L.R.M. v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013) (citing M.R.E. 412(c)(2) and M.R.E. 513(e)(2)).

462 U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial 4 (Nov. 1, 2013), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20150116/37_ArmyJudiciary_RulesofCourt_20131101.pdf.

463 *See* U.S. Air Force, Instr. 51-201, Administration of Military Justice §§ 7C, 7D (Sept. 25, 2014), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf.

464 U.S. Air Force, Special Victims' Counsel Rules of Practice and Procedure 14–15 (Rule 33) (July 1, 2013), *available at* http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q19c_USAF.pdf.

465 Navy-Marine Corps EURAFSWA Circuit Rules, *supra* note 443.

466 *Id.* at 23 (Rules 33.1 and 33.3).

467 *Id.* at 23–24 (Rule 33.4).

victim privilege) motions, that circuit allows victims' counsel, just as other counsel to the case may do, to move to close court proceedings.[468]

3. Clarification of Victims' Right to Be Heard

In its July 2013 decision in *L.R.M. v. Kastenberg*, the Court of Appeals for the Armed Forces considered the requirement that the victim must be afforded a reasonable opportunity to attend and be heard at evidentiary hearings under M.R.E. 412 and M.R.E. 513. *Kastenberg* found that a victim who is represented by counsel may be heard through his or her counsel, not merely as a witness, and that his or her counsel may present facts as well as legal argument. *Kastenberg* cautions, however, that this right is "not absolute" but rather is subject to "reasonable limitations." For example, CAAF noted, military judges have discretion under R.C.M. 801 to restrict victims or their counsel to being heard only through written submissions.[469] Recently, the Joint Service Committee proposed that M.R.E. 412 and M.R.E. 513 be amended to clarify, consistent with *L.R.M. v. Kastenberg*, that victims' right to be heard at hearings conducted under those rules "include[s] the right to be heard through counsel."[470] Section 534(c) of the FY15 NDAA recently codified this principle.[471]

Kastenberg partly clarified the right of victims' counsel to be reasonably heard at hearings conducted under M.R.E. 412 and M.R.E. 513, but there remains widespread confusion about procedures for representing victims in judicial proceedings and for enforcing other victim rights. One witness observed that with the advent of victims' representation in the military, SVCs "are now part of the legal landscape and . . . need to be accounted for in the rule[s]."[472] Civilian advocates, military experts, and military practitioners appearing before the JPP agreed that additional guidance and clarification about the right of victims to be heard directly and through their counsel is necessary.[473]

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468 *Id.* at 24 (Rule 33.6).

469 *L.R.M. v. Kastenberg*, 72 M.J. 364, 370–71 (C.A.A.F. 2013).

470 U.S. Dep't of Def., Joint Service Committee on Military Justice, Proposed Amendments to the Manual for Courts-Martial, United States, 79 Fed. Reg. 59,938, 59,941 (proposed Oct. 3, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-23546.pdf; *Transcript of JPP Public Meeting* 70, 99–100 (Oct. 10, 2014) (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division); *id.* at 101–02 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army); *see also* Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, Judicial Proceedings Panel, para. 2 (Oct. 16, 2014) (advising Panel that "[i]t is already the law in the military justice system" that victims have right to be heard through counsel at M.R.E. 412 and M.R.E. 513 hearings) (citing *L.R.M. v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013)); *Transcript of JPP Public Meeting* 253–54 (Dec. 12, 2014) (testimony of LTG Flora D. Darpino, The Judge Advocate General, U.S. Army) (testifying that Joint Service Committee "will also recommend that the President issue a Rule of Court Martial and Rule of Evidence to ensure that victims have timely notice of important events as the case develops"). *But see id.* at 10–11 (testimony of Col Don Christensen, U.S. Air Force (Retired), President, Protect Our Defenders) (asserting that Joint Service Committee "still has not proposed rules governing the SVC's role in the court-martial process," leaving it to appellate courts, trial judges, and staff judge advocates "to ad hoc define the role of an SVC"); *id.* at 12 (calling for amended Rules for Courts-Martial "to empower SVCs to fully represent their clients").

471 FY15 NDAA, Pub. L. No. 113-291, § 534(c), 128 Stat. 3292 (2014) (requiring within 180 days that MCM "shall be modified to provide that when a victim of an alleged sex-related offense has a right to be heard in connection with the prosecution of the alleged sex-related such offense, the victim may exercise that right through counsel").

472 *Transcript of JPP Public Meeting* 101–02 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

473 *Transcript of JPP Public Meeting* 99–100 (Oct. 10, 2014) (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division); *id.* at 101–02 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army); *see also Transcript of JPP Public Meeting* 89 (Nov. 14, 2014) (testimony of Col Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims' Legal Counsel Organization) (emphasizing continued "need for procedural

Victims' counsel universally stressed a lack of uniformity among different courts and judges regarding their standing and the procedures for participating in judicial proceedings. SVCs told the JPP that their ability to be heard in court proceedings depends both on the issue involved and on the military judge or investigating officer who is presiding.[474]

In light of this, several presenters and victims' counsel recommended rule changes to more fully define their standing and the procedures for their being heard on behalf of a client.[475] In particular, one SVC Program Manager recommended that the Rules for Courts-Martial be amended to require prompt service of all pleadings on a victim or victim's counsel, ensure SVC presence during pretrial conferences with the military judge at which the parties raise an issue affecting the victim's rights, and provide the victim or victim's counsel the right to present witness testimony and evidence during M.R.E. 412 hearings.[476] In addition, the President of Protect our Defenders, a civilian victim advocacy organization, proposed amending the Rules for Courts-Martial to provide victims with specific rights to discovery of all filings by either party to a case, statements of the accused related to an offense involving the victim, and any investigative material in the government's possession—regardless of the stage of investigation or criminal proceeding involved—as well as any recommendations the staff judge advocate makes to the convening authority.[477]

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guidance as to the role of these SVC, VLCs in the courtroom" and testifying that victims' counsel's right to question witnesses at hearings at which they are moving or responding party is not being enforced); *id.* at 179, 221–22 (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Victims' Legal Counsel).

474 *Transcript of JPP Public Meeting* 179, 221–22 (Nov. 14, 2014) (testimony of Maj Marc R. Tilney, U.S. Marine Corps, Victims' Legal Counsel) (highlighting lack of predictability as "a huge concern" for VLCs in advising clients and assessing cases, especially considering that more junior counsel are continuing to enter the VLC program); *id.* at 344 (testimony of CPT Sarah Robbins, U.S. Army, Trial Defense Counsel) (testifying that "[i]t is still clearly a two party system"); *Written Statement of CPT Jesse S. Sommer, U.S. Army, Special Victims' Counsel, to JPP* 9 (Nov. 14, 2014) (explaining that he does "not always know how, when or if" he would be allowed to object during proceedings); *Transcript of JPP Public Meeting* 213–16 (Nov. 14, 2014) (testimony of CPT Sommer) (reporting that contrary to an existing Army court rule, he is not always included in docketing decisions, and that one military judge denied his delay request to take account of his required attendance at proceedings in another case) (citing Rules of Practice Before Courts-Martial 2.3.1); *see also Transcript of JPP Public Meeting* 10–12 (Dec. 12, 2014) (testimony of Col Don Christensen, U.S. Air Force (Retired), President, Protect Our Defenders) (describing implementation of Services' SVC/VLC programs as "haphazard" and SVCs'/VLCs' role as "ill-defined," and testifying that "SVCs face a continual struggle to be heard in court"); *Transcript of JPP Public Meeting* 318–21 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP); *id.* at 317–18 (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders).

475 *Transcript of JPP Public Meeting* 152–53 (Dec. 12, 2014) (testimony of Maj William D. Ivins, III, U.S. Marine Corps, Regional Victims' Legal Counsel) (calling for "procedural rules that clearly define [VLCs'] role in the investigative phase, the initial disposition phase, the preliminary hearing phase, and the judicial process phase"); *id.* at 172 (testimony of CPT Brian Stransky, U.S. Army, Special Victims' Counsel) (testifying that "procedural changes are necessary, specifically probably to the [Rules for Courts-Martial] to give, if not equal standing to SVCs, at least . . . [recognizing that] the SVC is entitled to be present at all hearings and that their schedules ought to be accommodated as much as the other counsel"); *Transcript of JPP Public Meeting* 235–36 (Nov. 14, 2014) (testimony of CDR Colleen Shook, U.S. Navy, Senior Victims' Legal Counsel) (advising the JPP to recommend "official recognition" of VLCs' right to advocate on victims' behalf); *see also Transcript of JPP Public Meeting* 304–05 (Dec. 12, 2014) (testimony of VADM Nanette M. DeRenzi, Judge Advocate General, U.S. Navy) (agreeing that the Navy should consider "areas where we need to clarify and standardize where we can" in this area); *see also* RSP Report, *supra* note 3, at 135 (predicting that litigation about victims' right to be heard "will likely continue unless DoD issues formal clarification" and recommending that that right be clarified as "includ[ing] the right to be heard on legal issues through counsel").

476 *Written Submission of Lt Col Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division, to JPP* (provided after public meeting held Nov. 14, 2014).

477 *Written Submission of Protect Our Defenders to JPP* (provided after public meeting held Dec. 12, 2014) (recommending, in addition, granting victims the same standing as parties to the case in arguing motions before the court, and the ability to appeal decisions affecting the victim's rights made by a military judge or Article 32 preliminary hearing officer to the Service Court of Criminal Appeals); *see also Transcript of JPP Public Meeting* 324 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP) (agreeing with need for rule providing victims' counsel with full access to

Senior Service military attorneys told the JPP that policy development is under way to provide practice guidance for SVCs. At the JPP's December public meeting, the Air Force Judge Advocate General noted current efforts in the Air Force to "give SVCs greater access and availability to . . . scheduling hearings," and he told the JPP that his Service is currently developing a rule that will authorize SVCs to address the court from the podium used by trial and defense counsel.[478] The Army Judge Advocate General said that her Service is working on SVC rule changes, and the Marine Corps' representative indicated that his Service's Uniform Rules of Court are currently being studied with an eye to proposing changes in order to more clearly define the roles and responsibilities of VLCs.[479]

D. VICTIMS' MECHANISMS FOR ENFORCING RIGHTS

Section 1701 of the FY14 NDAA did not specify the legal standing of victims or appellate review to enforce the rights set forth in Article 6b. Therefore, victims and their counsel in the military justice system proceed as would a military accused: they file a request for discretionary review under the All Writs Act,[480] as occurred in *Kastenberg*[481] and subsequent cases.[482]

A filing under the All Writs Act is submitted by petition to an appellate court to seek extraordinary relief through a writ of mandamus. A writ of mandamus is normally discretionary, and the court is not required to accept the petition, entertain a request for a stay of the proceedings, or review the case. Military appellate courts have entertained petitions filed by SVCs, and the Army Court of Criminal Appeals recently wrote that "we acknowledge that the victim and her special victim counsel are not 'strangers' to this court-martial and, while not a party, do enjoy 'limited participant standing' as outlined in *Kastenberg*."[483] However, while courts have agreed to consider petitions, no statutory requirement mandates their review of petitions from victims.

In Section 535 of the FY15 NDAA, Congress added, at the end of Article 6b, a right for victims to petition the Service Courts of Criminal Appeals for a writ of mandamus if they believe "a court-martial ruling violates the victim's rights afforded by" M.R.E. 412 or M.R.E. 513.[484] The FY15 NDAA

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pleadings, bench conferences, and proceedings as well as right to file any desired pleading).

478 *Transcript of JPP Public Meeting* 309–10, 271 (Dec. 12, 2014) (testimony of Lt Gen Christopher F. Burne, The Judge Advocate General, U.S. Air Force).

479 *Transcript of JPP Public Meeting* 302 (Dec. 12, 2014) (testimony of LTG Flora D. Darpino, The Judge Advocate General, U.S. Army); *id.* at 291 (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division).

480 28 U.S.C. §§ 1651-1659 (2012).

481 While *Kastenberg* recognizes victims' right to be heard in M.R.E. 412 and 513 hearings, the Court cautioned in that case that those two rules do not create a right to appeal an adverse ruling issued after such hearings. *L.R.M. v. Kastenberg*, 72 M.J. 364, 370–71 (C.A.A.F. 2013). Explaining why it was even considering the issue raised by the victim's counsel, the *Kastenberg* Court noted that there was "no other meaningful way for these issues to reach appellate review." Thus, if the Court did not act to clarify victims' right to be heard in that case, "every military judge could interpret the scope and extent of a victim's rights differently, so that a victim . . . rights vary from courtroom to courtroom." *Id.* at 372.

482 *See SPC "H.C." v. Bridges*, Misc. No. 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (unpublished order denying writ to compel granting of trial continuance allowing SVC to attend and participate); *SPC "Y.G." v. Bridges*, Misc. No. 20140905 (A. Ct. Crim. App. Dec. 1, 2014) (same); *"S.C." v. Schubert*, Misc. No. 20140813 (A. Ct. Crim. App. Oct. 31, 2014) (denying challenge to victim's deposition); *SSG "C.C." v. Lippert*, Misc. No. 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (unpublished order ordering military judge to comply with M.R.E. 513(c)(2) prior to deciding whether to order production of victim's mental health records for *in camera* review).

483 *SPC "H.C." v. Bridges*, Misc. No. 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (unpublished order).

484 FY15 NDAA, Pub. L. No. 113-291, § 535, 128 Stat. 3292 (2014).

modification does not apply to all victims' rights in Article 6b and it does not clarify whether appellate review is discretionary or mandatory. In contrast, additional language in the CVRA specifies that the appellate court is required to "take up and decide the application," an instruction that has been interpreted to be nondiscretionary.[485]

In civilian federal courts, the CVRA also expressly provides for an expedited review of any trial court decision affecting a victim's right. The CVRA does not expressly state whether it applies to victims of offenses prosecuted under the UCMJ. The CVRA allows a victim to petition the court of appeals for a writ of mandamus as well as appellate court review within 72 hours of the petition's filing.[486] According to a civilian victims' rights expert who appeared before the JPP, victims' appellate standing is better established in civilian jurisdictions than in the military justice system. She testified that it is "a little stifling" for victim's counsel at courts-martial to not "know what your path is so that you can counsel effectively" after a military judge enters a ruling unfavorable to a victim's privacy interests. While noting that several states have put in place ombudsmen to enforce victims' rights in court, the expert recommended against that option. In her opinion, "enforcement through appellate device is a better route to go."[487]

Two civilian victim advocates who testified in October before the JPP strongly urged that the right of victims to file an interlocutory appeal be established, offering various reasons in support of their position. First, emphasizing that civilian victims enjoy this right under the CVRA, the victim advocates argued that there is no legitimate military objective served by denying military victims the same right.[488] Second, they asserted that case law currently is based solely on defense appeals from military judges' rulings favorable to victims.[489] Third, the civilian advocates argued that because victims currently lack "an ability to timely appeal the disclosure of their records," they are in "the untenable position of either accepting that their private thoughts and records will be disclosed or refusing to proceed with criminal charges."[490]

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485 *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011 (9th Cir. 2006).

486 18 U.S.C. § 3771(d)(3) (2012); *see also* RSP Report, *supra* note 3, at 135 (recommending that DoD "clarify that victims have legal standing to enforce their rights listed in Article 6b of the UCMJ at any relevant time in the proceedings, including before, during and after trial").

487 *Transcript of JPP Public Meeting* 53–55 (Nov. 14, 2014) (testimony of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute) (citing Oregon, California, Arizona, and Maryland as jurisdictions with "explicit appellate moments").

488 *Written Statement of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, and Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, to JPP* 3–4 of M.R.E. 412 Analysis (Oct. 24, 2014) (citing 18 U.S.C. § 3771(d) and asserting that victims also "should also be given the right to automatic appeal to the CAAF for review of the service courts of appeals decisions"); *Written Statement of Ms. Petersen to JPP* para. 12 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 267–68 (Oct. 10, 2014) (testimony of Ms. Petersen); *see also id.* at 290 (testimony of Mr. Guilds) (opining that discretionary *mandamus* relief currently available in theory was insufficient, as his previous unsuccessful writs seeking interlocutory review in military appellate courts demonstrated in practice).

489 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, to JPP* para. 12 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 291 (Oct. 10, 2014) (testimony of Ms. Petersen); *id.* at 292 (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP) ("[A]s 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.").

490 *Written Statement of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* para. 12 (Oct. 10, 2014); *accord Transcript of JPP Public Meeting* 276 (Oct. 10, 2014) (testimony of Mr. Guilds).

E. JPP ANALYSIS AND RECOMMENDATIONS ON VICTIMS' RIGHTS AND NEEDS

Delays in developing guidance to implement Article 6b of the UCMJ, much like the delays that have impeded effective application of the amended Article 120, pose a significant obstacle to the full exercise of victims' right to be heard, their right to notice, and their access to case information and documents. Section 1701 of the FY14 NDAA required that necessary MCM revisions be recommended and regulations prescribed by December 26, 2014. Yet guidance remains pending, and many current practitioners told the JPP that inconsistent practices and procedures impede SVCs' efforts to adequately represent their clients and assert their clients' rights in court.

In particular, inconsistent access to case information and documents continues to hinder effective representation of victim clients. Although SVCs generally receive pleadings regarding issues raised under M.R.E. 412 and M.R.E. 513, these pleadings alone may not provide victims and their counsel sufficient information to understand the full context of the case. Civilian experts told the JPP that to effectively represent any client, they must be able to track a case throughout the proceedings, and SVCs testified that equal access is especially crucial when advising victims in the military judicial system.

The military Services have begun to address this need for access to information, but recent guidance from leadership of the Services' Judge Advocate General's Corps either focuses too narrowly on specific documents and evidentiary issues or improperly relies on the Privacy Act and Freedom of Information Act (FOIA). SVCs should not have to file FOIA requests to retrieve relevant information about proceedings in which their clients have a concrete, particularized interest. The JPP recommends that DoD direct the Services to ensure that SVCs and victims have appropriate access to docketing information and case filings. In part, this could be accomplished by adopting an electronic system akin to the civilian PACER (Public Access to Court Electronic Records) service.

Inconsistent policies and practices regarding SVC participation in court proceedings limit the ability of victims to be heard. The JPP recommends that all practices and procedures concerning SVCs' participation in court—those that currently exist as well as those yet to be formulated—be made uniform for all military judicial proceedings.

The right of victims to be heard is at particular risk when they are no longer in contact with their SVC, or in cases in which they have declined representation in the first place. The RSP recommended that the opportunity for SVC representation be extended to a victim "so long as a right of the victim exists and is at issue."[491] DoD responded to the recommendation by referring the issue to the Military Justice Review Group.[492] The JPP recommends that the DoD propose timely revisions to statutes, the MCM, and/or regulations to extend eligibility for SVC representation so long as a right of the victim exists and is at issue.

Finally, as noted above, the FY14 NDAA did not specify any mechanism to enforce the rights guaranteed by Article 6b, and the FY15 NDAA merely recognizes victims' right to seek discretionary review (i.e., a writ of mandamus) in the appellate courts for issues pertaining to M.R.E.s 412 and 513. In federal civil and criminal cases, the CVRA establishes mandatory and expedited interlocutory review of any trial court decision pertaining to a victim's right. The JPP recommends that the Secretary of

491 RSP Report, *supra* note 3, at 25 (Recommendation 44).

492 DoD RSP Implementation Memo, *supra* note 3, at 14–15.

Defense consider establishing expedited procedures for victims to seek mandatory interlocutory review in the Service Courts of Criminal Appeals of any alleged violation of victims' rights.[493]

493 Noting that the CVRA established mandatory and expedited, interlocutory review of any civilian federal trial court decision on a victim's right, the RSP recommended that the Secretary of Defense "clarify that victims have legal standing to enforce their [Article 6b] rights . . . at any relevant time in the proceedings, including before, during, and after trial. RSP Report, *supra* note 3, at 28 (Recommendation 53 and third accompanying finding). DoD referred this recommendation to the Joint Service Committee. DoD RSP Implementation Memo, *supra* note 3, at 15.

V. Victim Privacy Issues in Military Sexual Assault Cases – Privileges and Protections

A. COMPETING INTERESTS AND DISTINCT CHALLENGES

Sexual assault prosecutions often involve conflicts between the right of an accused person to present a defense and the desire to protect the privacy interests of the alleged victim. In military judicial proceedings, evidentiary issues regarding the victim's sexual history or mental health often are the cause of such conflicts. These issues arise frequently in military cases because information about victims may be less private or more accessible than it is outside of the military.

Characteristics that are unique to the military environment create dynamics in military judicial proceedings that are different from civilian sexual assault prosecutions.[494] The work environment and social sphere for military personnel are often more interconnected than they are for their civilian counterparts. Military regulations and common practice commonly require unmarried Service members of junior ranks to reside on base, where they live close to one another and experience little separation between their professional and private lives. Military members generally receive all medical treatment, including mental health counseling, from their local military treatment facility. Commanders and supervisors must ensure that Service members are fit to perform their duties, so they may need access to information about a military member's medical and mental health treatment.

The merging of the social and professional lives of military personnel increases the likelihood, or at least the perception, that victims of sexual assault in the military will be unable to safeguard their privacy if they report their victimization.[495] A 2003 study at the U.S. Air Force Academy illustrates the challenges inherent to military service and their impact on the reporting of sexual assault.[496] The top two reasons cited for failing to report were fear of embarrassment and fear of ostracism by peers.[497] A more recent DoD survey indicated that 70% of women who did not report stated they did not make a report because they did not want anyone to know about the incident, and 51% said they did not believe their report would be kept confidential.[498] The unique facts of military life, combined with aggressive investigation and case development—which is common in sexual assault cases—increases the potential for unnecessarily invading a victim's privacy.[499]

In military judicial proceedings, issues involving private information about a victim often arise in disputes under M.R.E. 412 (Sex offense cases: relevance of alleged victim's sexual behavior or sexual predisposition) and M.R.E. 513 (Psychotherapist-patient privilege). M.R.E. 412 and M.R.E. 513

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494 *See generally* Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 Mil. L. Rev. 149, 179–80 (2005).

495 *Id.*

496 *See* Report of Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy 52 (2003), *available at* http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf.

497 *Id.*

498 Defense Manpower Data Center, 2012 Workplace and Gender Relations Survey of Active Duty Members: Briefing on Sexual Assault and Sexual Harassment 106 (Mar. 2013), *available at* http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf.

499 *See* Schimpf, *supra* note 494, at 180.

are both rules of exclusion that generally prevent the introduction of evidence to protect the victim's privacy.[500] However, the rules include exceptions that allow an accused to present his or her defense in certain circumstances,[501] leading to concerns about balancing the rights of the accused against the privacy interests of the victim. The rules, recent changes, and current issues are detailed below.

B. MILITARY RULE OF EVIDENCE 412 (SEX OFFENSE CASES: RELEVANCE OF ALLEGED VICTIM'S SEXUAL BEHAVIOR OR SEXUAL PREDISPOSITION)

1. The Military's Rape Shield Rule

Before 1978, evidentiary rules allowed an individual prosecuted for a sexual assault crime in the federal court system to present evidence of a victim's sexual history in his defense.[502] This line of defense often transformed trials into "inquisitions into the victim's morality, not trials of the defendant's innocence or guilt."[503] The Privacy Protection for Rape Victims Act of 1978 amended the Federal Rules of Evidence to include Rule 412. M.R.E. 412 "is substantially similar in substantive scope to Federal Rule of Evidence 412" and exists for the same reasons.[504] But M.R.E. 412 also has some notable differences, because of the unique nature of the military environment and practice.[505] In particular, M.R.E. 412 does not refer to civil proceedings, "as these are irrelevant to courts-martial practice"; tailors the procedures to "military practice"; and replaces the federal rule's *in camera* review with a closed hearing in which the victim "is afforded a reasonable opportunity to attend and be heard."[506] The purpose of M.R.E. 412 is provided in the rule's analysis:

> Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults.[507]

M.R.E. 412 is a rule of relevance, not a rule of privilege.[508] M.R.E. 412 excludes two broad categories of evidence as irrelevant: (1) evidence offered to prove that an alleged victim engaged in sexual behavior other than that charged and (2) evidence offered to prove an alleged victim's sexual predisposition (that is, information about dress, speech, or lifestyle).[509] However, M.R.E. 412(b)

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500 M.R.E. 412(a); M.R.E. 513(a).

501 M.R.E. 412(b)(1)(A-C); M.R.E. 513(d)(1–8).

502 Major Shane R. Reeves, U.S. Army, *Time to Fine-Tune Military Rule of Evidence 412*, 196 Mil L. Rev. 47, 54 (2008).

503 124 Cong. Rec. 34,912–13 (1978) (statement of Rep. Elizabeth Holtzman).

504 2012 MCM, app. 22 at 36.

505 *Id.* (stating that application of Rule has been somewhat broadened and procedural aspects of Federal Rule have been modified to adapt them to military practice).

506 *Id.* at 37.

507 *Id.* at 36.

508 *Transcript of JPP Public Meeting* 76–77 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

509 *Id.* (referring to M.R.E. 412(a)(1) and (2)).

includes three exceptions that may be used to find that otherwise excluded evidence is relevant and admissible.[510]

First, M.R.E. 412 allows the admission of specific instances of sexual behavior by a victim intended to demonstrate that a person other than the accused was the source of semen, injury, or other physical evidence.[511] This exception has been encountered less frequently since the advent of sophisticated forensic and DNA analysis.[512]

Second, M.R.E. 412 allows the admission of specific instances of sexual encounters between the alleged victim and the accused to prove consent in the case at hand.[513] Critics of this exception often observe that consent at some past point does not prove subsequent consent. Some states and commonwealths have limited its application by requiring that admissible sexual activity with the accused must be within a certain period of time in relation to the charged offense.[514] Nonetheless, the exception remains part of federal and military jurisprudence.

Third, M.R.E. 412 allows admission of evidence when exclusion would violate the accused's constitutional rights.[515] This exception recognizes "the fundamental right of the defense under the Fifth Amendment . . . to present relevant defense evidence."[516] In practice, this exception has been used to offer evidence that the alleged victim has previously made a demonstrably false sexual assault allegation or evidence of sexual behavior or predisposition that is so distinctive and so similar to the reported sexual offense that it provides context for or explains the allegations at issue. Of the three, the "constitutionally required" exception has generated the greatest amount of litigation in the military justice system.[517] The federal courts, eleven states, and the District of Columbia have a similar written exception, while thirty-nine states do not.[518]

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510 The exceptions contained in M.R.E. 412(b) mirror those included in F.R.E. 412. The original version of F.R.E. 412 presented in the Subcommittee on Criminal Justice of the House Committee on the Judiciary allowed for the introduction of evidence of a victim's sexual history only if: (1) there was a past sexual relationship with the accused and consent was at issue; or (2) the accused presented evidence that another individual caused the physical harm to the victim. Recognizing the constitutional concerns raised by opponents of the original bill and that these two exceptions were inadequate protections for defendants, the Subcommittee on Criminal Justice added an exception for the introduction of evidence that was "constitutionally required." Major Shane R. Reeves, U.S. Army, *Time to Fine-Tune Military Rule of Evidence 412,* 196 Mil. L. Rev. 47, 58 (2008); *accord* Michelle J. Anderson, *From Chastity Requirement to Sexuality and License: Sexual Consent and a New Rape Shield Law,* 70 Geo. Wash. L. Rev. 51, 92 (2002).

511 M.R.E. 412(b)(1)(A).

512 *Transcript of JPP Public Meeting* 77 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

513 M.R.E. 412(b)(1)(B).

514 *Transcript of JPP Public Meeting* 77–78 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

515 M.R.E. 412(b)(1)(C).

516 2012 MCM, app. 22 at 36.

517 *Transcript of JPP Public Meeting* 78–79 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

518 Anderson, *supra* note 510, at 83-84.

2. Use of M.R.E. 412 Evidence at Article 32 Hearings

Before any criminal charges are referred for trial by a general court-martial, the UCMJ requires a preliminary inquiry or hearing to be conducted to consider the charges and appropriate case disposition.[519] The nature of and procedures for Article 32 hearings have been the subject of significant public scrutiny, particularly in cases that involve sexual assault offenses.[520] Some presenters contended that Article 32 hearings in military sexual assault cases had devolved into "their own trials" regarding a victim's sexual behavior and history, and that "[i]f this is what Article 32 has come to be, then it is time to either get rid of it or put real restrictions on the conduct during them."[521] As a result, Congress enacted substantial changes to Article 32 pretrial hearings in the FY14 NDAA.[522]

Previously, an Article 32 pretrial investigation required an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to disposition which should be made of the case in the interest of justice and discipline."[523] In Section 1702 of the FY14 NDAA, Congress revised the purpose of Article 32 hearings and the procedures used to conduct them. Article 32 was modified to require a "preliminary hearing," limited to determining "whether there is probable cause to believe an offense has been committed and the accused committed the offense," whether the convening authority has jurisdiction over the offense and the accused, and the form of the charges, and then providing a recommendation as to "the disposition that should be made of the case."[524]

Rule for Courts-Martial (R.C.M.) 405 governs pretrial hearings conducted under Article 32.[525] Prior to June 13, 2014, R.C.M. 405(i) provided that the military rules of evidence do not apply to Article 32 pretrial investigations, except the following exclusionary rules and privileges in M.R.E.s 301, 302, 303, 305, 412 and Section V, including M.R.E. 513.[526] Although the rule stated that M.R.E.s 412 and 513 applied at Article 32 hearings, the procedures were not set out in clear detail for investigating officers who were responsible for conducting the hearings, and until recently were not required to be judge advocates.[527]

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519 10 U.S.C. § 832 (UCMJ art. 32, 2012); R.C.M. 405(a).

520 *See, e.g.*, Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. Times, Sept. 21, 2013, at A1.

521 *Id.* (citing comment of Professor Jonathan Lurie, Rutgers University School of Law).

522 *See Transcript of JPP Public Meeting* 60–66 (Aug. 7, 2014) (testimony of Mr. Dwight Sullivan and presentation, "Overview of Military Justice System and Legislation Update").

523 10 U.S.C. § 832 (UCMJ art. 32, 2012).

524 FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). Section 1702 required that changes to Article 32 take effect in one year and apply to any offenses committed on or after that date. Section 531 of the FY15 NDAA clarified that the new rules and procedures would apply for all Article 32 hearings conducted after December 26, 2014, irrespective of the date the offense was committed. FY15 NDAA, Pub. L. No. 113-291, § 531, 128 Stat. 3292 (2014).

525 2012 MCM pt. II, at 34.

526 2012 MCM pt. II, at R.C.M. 405(i) (2013). M.R.E. 301, 302, 303, and 305 address the privilege concerning compulsory self-incrimination, the privilege concerning mental examination of an accused, degrading questions, and rights warnings.

527 R.C.M. 405(i) and disc. The discussion portion of the rule notes that an "investigating officer should exercise reasonable control over the scope of inquiry" and "an investigating officer may consider any evidence, even if that evidence would not be admissible at trial." *Id. Cf.* U.S. Dep't of Def., Joint Service Committee on Military Justice, Proposed Amendments to the Manual for Courts-Martial, United States, 79 Fed. Reg. 59,938, 59,941 (proposed Oct. 3, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-23546.pdf.

On June 13, 2014, the President issued Executive Order (EO) 13669, modifying various sections of R.C.M. 405. The EO stated that M.R.E.s 301, 302, 303, 305, and Section V (Privileges, e.g., M.R.E. 513) "shall apply in their entirety." The EO also specified that M.R.E. 412 "shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d)."[528]

EO 13669 clarified the authority and procedures to be used by an Article 32 investigating officer in making evidentiary determinations. The revised rule provides that the investigating officer assumes the military judge's powers to exclude evidence from Article 32 hearings and requires the investigating officer to follow the procedures set forth in the applicable rule.[529] The EO further provides that any M.R.E. 412 evidence admitted at an Article 32 hearing, including closed hearing testimony, must be protected pursuant to the Privacy Act of 1974. The EO requires evidence that is deemed admissible by the hearing officer to be made a part of the report of investigation. Evidence that is deemed inadmissible is not to be included in the ROI, and the evidence must be safeguarded using procedures modeled after R.C.M. 1103A (Sealed exhibits and proceedings).[530]

At the JPP's request, the military Services described the impact of EO 13669 on the litigation of M.R.E. 412 issues at Article 32 proceedings. Before the President issued EO 13669, R.C.M. 405 clearly stated that M.R.E. 412 applied to Article 32 hearings. But practices among the Services differed as to application of the rule. The Air Force said EO 13669 put defense counsel "on clear notice that if they want to elicit evidence of sexual behavior or sexual predisposition, they must follow a distinct set of rules with oversight by a neutral, Judge Advocate, acting as Investigating Officer." The Marine Corps said EO 13669 has had "little impact" on Article 32 hearings in the Marine Corps because investigating officers have "always" decided whether an exception has been satisfied only after the parties have litigated whether protected evidence should be disclosed. The Coast Guard said the "most significant change" introduced by EO 13669 in the Coast Guard is that the procedures followed at court-martial to determine the admissibility of M.R.E. 412 "now clearly apply" at Article 32 hearings, including closure of the hearing, *in camera* review, and the sealing of exhibits.[531]

Some presenters who appeared before the JPP harshly criticized the EO's amendment to R.C.M. 405(i), and several advised the JPP to recommend that it be rescinded.[532] They argued that it was never appropriate for Article 32 investigating officers to consider M.R.E. 412 evidence at Article 32 hearings, and that they should be explicitly forbidden from doing so.[533] These critics contended that the Article 32 hearings' shift in focus—to determining whether probable cause exists to support the

528 Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,002 (June 18, 2014).

529 *Id.* (stating "[i]n applying these rules to a pretrial investigation, the term 'military judge,' as used in these rules, shall mean the investigating officer, who shall assume the military judge's powers to exclude evidence from the pretrial investigation, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in paragraphs (1) and (2)").

530 *Id.*

531 *Id.* Services' Responses to JPP Request for Information 46 (Nov. 6, 2014). The Army and Navy did not provide information.

532 *See, e.g., Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, to JPP* paras. 2–4 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 261–64 (Oct. 10, 2014) (testimony of Ms. Petersen); Letter from Protect Our Defenders, para. 6 (Sept. 25, 2013), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/03-Victim_Privacy/20141010/22_POD_Letter_MRE412_Obama_20130925.pdf; Press Release of Protect Our Defenders, paras. 4–6 (July 28, 2014), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/03-Victim_Privacy/20141010/23_POD_SummaryConcerns_MRE412_ExecOrder_20140728.pdf; *Transcript of JPP Public Meeting* 361–63 (Oct. 10, 2014) (testimony of Lt Col Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel); *Transcript of JPP Public Meeting* 377 (Oct. 10, 2014) (testimony of Maj Pete Houtz, U.S. Marine Corps, Regional Trial Counsel).

533 *Id.*

charges—made pretrial consideration of M.R.E. 412 even less appropriate.[534] Moreover, emphasizing that M.R.E. 412 requires difficult evidentiary determinations, several presenters argued that investigating officers often lack the expertise needed to consider such evidence at Article 32 hearings.[535]

Responding to the criticisms of the EO 13669 amendment, Mr. Paul Koffsky of the DoD Office of the General Counsel advised the JPP that before the order was issued, testimony about victims' prior sexual history was "frequently elicited at Article 32 hearings, even when such evidence would not be admissible at courts-martial." The amendment, according to Mr. Koffsky, "was designed to ensure that procedures to protect victims and their privacy are followed at Article 32 investigations, not to allow the admission of any evidence that would have been inadmissible at an Article 32 investigation before the rule change."[536]

On October 3, 2014, the Joint Service Committee recommended additional revisions to R.C.M. 405 in a draft Executive Order (Draft EO) in order to better align its procedures with the FY14 NDAA changes to the Article 32 preliminary hearing.[537] The Draft EO proposes that a new Discussion section be added to R.C.M. 405(a) to clarify that

> The function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing. The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial.[538]

The Draft EO suggests adding language to the Discussion section of R.C.M. 405(i)(1) to limit the preliminary hearing officer to considering evidence only within the limited purpose of that hearing.[539] The changes also would provide the hearing officer with explicit authority to safeguard information by ordering exhibits, proceedings, or other matters sealed under R.C.M. 1103A.[540]

If the Draft EO is signed by the President, one of its most significant changes would be to eliminate the "constitutionally required" exception to M.R.E. 412 at Article 32 hearings.[541] Military justice experts told the JPP that the Draft EO's restriction would significantly reduce M.R.E. 412 issues at Article 32 hearings, where M.R.E. 412 evidence, such as bias and motive to fabricate prior false allegations,

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534 *See, e.g.,* Press Release of Protect Our Defenders, para. 8 (July 28, 2014) (arguing that victims' prior sexual behavior "is irrelevant to the determination of whether there is probable cause" to support sexual assault charges); *Transcript of JPP Public Meeting* 333 (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders); *id.* at 364–67 (Oct. 10, 2014) (testimony of CDR Jonathan Stephens, U.S. Navy, Senior Trial Counsel).

535 *See, e.g., Transcript of JPP Public Meeting* 364–67 (Oct. 10, 2014) (testimony of CDR Jonathan Stephens, U.S. Navy, Senior Trial Counsel) (noting that even in the Navy and Marine Corps, where investigating officers must be judge advocates, investigating officers generally are not military judges and sometimes are either second- or third-tour attorneys who lack military justice experience); *id.* at 335 (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders); *id.* at 368–69 (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor).

536 Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, JPP Panel, para. 3 (Oct. 16, 2014) (quoting EO 13669) (citation omitted).

537 U.S. Dep't of Def., Joint Service Committee on Military Justice, Proposed Amendments to the Manual for Courts-Martial, United States, 79 Fed. Reg. 59,938 (proposed Oct. 3, 2014).

538 *Id.* at 59,949.

539 *Id.* at 59,950. The Discussion currently suggests that investigating officers can consider all evidence, even if it would not be admissible at trial. 2012 MCM, app. 21, at 27.

540 *Id.* at 59,941–42.

541 *Id.* at 59,938.

is commonly offered under the "constitutionally required" exception.[542] Defense counsel argued that precluding "constitutionally required" M.R.E. 412 evidence at Article 32 hearings would prevent the defense from providing information that might undermine the government's case and would, by extension, prevent the convening authority from considering such information in determining the case's disposition.[543]

According to Mr. Koffsky, the Draft EO is "legally permissible because an accused does not have a Sixth Amendment right to confrontation or to present a defense at an Article 32 preliminary hearing."[544] Mr. Koffsky added that "[t]he proposed change would eliminate what in practice appears to be the most-used Military Rule of Evidence 412 exception and the exception whose application has proved the most controversial at Article 32 investigations."[545] The Draft EO would make clear that such evidence is not admissible at Article 32 preliminary hearings.

The JPP recognizes that the significant recent changes to the rules governing Article 32 investigations will have a substantial impact on the use of M.R.E. 412 evidence at pretrial hearings. The FY14 NDAA changes to Article 32 of the UCMJ, which took effect on December 26, 2014, limit the purpose of the preliminary hearing, the matters that an accused can present, and the ability to require victims to appear and testify. EO 13669 also amended R.C.M. 405(i) to clarify for preliminary hearing officers their power to exclude evidence and the procedures they should follow when applying M.R.E. 412. The JSC Draft EO proposes additionally to eliminate the "constitutionally required" exception to M.R.E. 412 at the preliminary hearing, a change that may substantially reduce the frequency with which M.R.E. 412 issues are raised at Article 32 hearings.

These changes must be evaluated in practice before the JPP can provide its full assessment. However, information received by the JPP about practices and proceedings conducted before the recent changes will provide helpful background for the JPP as it continues to monitor pretrial consideration of M.R.E. 412 issues and evidence.

542 *See, e.g., Transcript of JPP Public Meeting* 104–05 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (discussing practical impact of promulgation of proposed EO). The Air Force informed the JPP that investigating officers for Air Force Article 32 hearings already "generally" do not apply the "constitutionally required" exception at pretrial hearings. Air Force's Response to JPP Request for Information 46 (Nov. 6, 2014).

543 *Transcript of JPP Public Meeting* 423–46 (Oct. 10, 2014) (testimony of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program); *see also id*. at 434–35 (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel); *id*. at 429–30 (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel) (testifying that while EO 13669 helped clarify whether M.R.E. 412 evidence could be considered at Article 32 hearings, it was unclear whether the "constitutionally required" exception applied, and the issue typically depends on whether the IO is a military judge or not, with military judges being more likely to allow M.R.E. 412 issues to be raised at an Article 32 hearing).

544 Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, JPP, para. 4 (Oct. 16, 2014); U.S. Dep't of Def., Joint Service Committee on Military Justice, Proposed Amendments to the Manual for Courts-Martial, United States, 79 Fed. Reg. 59,938, 59,950 (proposed Oct. 3, 2014). The JSC proposal also notes there is no constitutional requirement for a pretrial hearing officer to consider evidence under M.R.E. 513(d)(8) and 514(d)(6) at an Article 32 hearing. *Id*.

545 Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, JPP, para. 4 (Oct. 16, 2014).

3. Use of M.R.E. 412 Evidence at Courts-Martial (Military Judges' Consideration of Victims' Privacy Interest)

M.R.E. 412(c) sets forth the procedure to determine the admissibility of relevant evidence offered under the three exceptions to the rule. At a closed hearing, the military judge determines whether the evidence proffered by the defense

(1) is relevant to support one of the three M.R.E. 412(b) exceptions,

(2) meets the rule's balancing test (i.e., whether "the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy"),[546] and

(3) survives any challenge under the M.R.E. 403 balancing test, according to which the probative value is outweighed by the danger of unfair prejudice, such as confusion of the issues or misleading the panel members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[547]

The M.R.E. 412 balancing test was amended in 2007 to clarify "that in conducting the balancing test, the inquiry is whether the probative value of the evidence outweighs the danger of unfair prejudice to the victim's privacy."[548] Four years later, in *United States v. Gaddis*, the Court of Appeals for the Armed Forces found that the balancing test in M.R.E. 412(c)(3) "is needlessly confusing and could lead a military judge to exclude constitutionally required evidence."[549] The Court noted that the rule does not provide "that if the privacy interest is high, M.R.E. 412 turns into a rule of absolute privilege."[550] Therefore, the Court concluded that "the 'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused.'"[551] If the evidence is constitutionally required, then the proffered evidence "is admissible no matter how embarrassing it might be to the alleged victim."[552]

A military justice expert told the JPP that under *Gaddis*, "the constitutional right to present a defense will always trump the victim's privacy interest."[553] Nevertheless, several presenters testified that in practice, when M.R.E. 412 evidence survives application of the balancing test, military judges

546 M.R.E. 412(c)(3); such evidence is admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

547 *Id.*

548 2012 MCM, app. 22 at 37; *see also* M.R.E. 412(c). The amendment is intended to aid practitioners in applying the balancing test of M.R.E. 412. Specifically, the amendment clarified: (1) that under M.R.E. 412, the evidence must be relevant for one of the purposes highlighted in subdivision (b); (2) that in conducting the balancing test, the inquiry is whether the probative value of the evidence outweighs the danger of unfair prejudice to the victim's privacy; and (3) that even if the evidence is admissible under M.R.E. 412, it may still be excluded under M.R.E. 403. *See United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004).

549 *United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011).

550 *Gaddis*, 70 M.J. at 255 (pointing out that "in fact, the Drafters' Analysis states precisely the opposite) (quoting MCM, app. 22 at 35 ("[I]t is the Committee's intent that the Rule not be interpreted as a rule of absolute privilege.")).

551 *Gaddis*, 70 M.J. at 250 (citing M.R.E. 412(b)(1)(C)).

552 *Id.* at 256.

553 *Transcript of JPP Public Meeting* 86–87 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (noting that *Gaddis* was a divided opinion but opining that C.A.A.F. "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").

frequently issue a narrowly tailored ruling that limits the evidence that is actually presented to the fact finder.[554]

At the JPP October public meeting, some presenters testified that there was considerable uncertainty following the *Gaddis* decision about whether the victim's privacy interest and the danger of unfair prejudice to the victim would be considered by a military judge.[555] Noting that military criminal cases usually arise in communities with relatively small populations, they observed that the M.R.E. 412 balancing test accounts for the greater danger in close-knit communities that a victim's privacy will be violated when prior sexual behavior is made part of the record.[556] These presenters emphasized the "twin purposes" of the military justice system, as described in the preamble to the *Manual for Courts-Martial*—namely, not only justice but also good order and discipline within the Armed Forces.[557] Two witnesses told the JPP that the unique nature of military society and justice justifies consideration of a victim's privacy interests in circumstances in which doing so might be constitutionally suspect in civilian jurisdictions.[558]

In a written statement submitted after appearing before the JPP, two presenters urged that the M.R.E. 412 balancing test be restructured to "clarif[y] that there is no determination of whether evidence is constitutionally required until after the military judge first finds that the evidence is relevant, its probative value outweighs the unfair prejudice to the victim's privacy, and its probative value is not substantially outweighed by the usual M.R.E. 403 considerations."[559] The presenters further advised that M.R.E. 412(c)(3) should be amended to clarify that the victim's privacy is "a legitimate government interest that promotes good order and discipline in the Armed Services."[560]

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554 *See, e.g.*, *Transcript of JPP Public Meeting* 448 (Oct. 10, 2014) (testimony of Maj Matthew Powers, U.S. Marine Corps, Senior Defense Counsel); *id.* at 92 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (offering as an example that military judges often narrow the scope of permissible cross-examination); *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 3 (Oct. 24, 2014).

555 *See, e.g.*, *Transcript of JPP Public Meeting* 87–88 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

556 *Transcript of JPP Public Meeting* 89–90 (Oct. 10, 2014) (testimony of Col John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division).

557 *Transcript of JPP Public Meeting* 90–91 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

558 *Id.* at 87–91 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) ("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 [CAAF] and their action being deemed unconstitutional. The incentive might be for, perhaps, an inexperienced judge . . . to disregard the Military Rule of Evidence and obey the dicta in the [CAAF] decision. None of these options are [sic] desirable."); *id.* at 89–90 (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division). In any event, the JPP was advised, certain civilian jurisdictions have "incorporated" victim privacy protections into their criminal evidentiary codes in various ways "without raising constitutional issues of the sort that the Court of Appeals for the Armed Forces attached such significance to" in *Gaddis*. *Id.* at 119–21 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

559 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* 6 of M.R.E. 412 Analysis (Oct. 24, 2014) ("Mil. R. Evid. 412 should be amended to explicitly state that victims' privacy is a legitimate governmental interest that promotes good order and discipline in the Armed Services, and should be further revised structurally to address concerns expressed in the *Gaddis* majority regarding the 412 balancing test. The rule should be further revised to make clear that the purpose of the hearing set forth in Mil. R. Evid. 412 is not for discovery.").

560 *Id.* at 4; *id.* at 1-2 (quoting *Gaddis*, 70 M.J. at 252 (quoting *Rock v. Arkansas,* 483 U.S. 44, 55 (1987) ("'[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' (citation and quotation marks omitted).") and citing *Delaware v. Van*

Other presenters who appeared before the JPP defended CAAF's decision in *Gaddis*. They argued that *Gaddis* merely recognized that the Constitution is supreme and that all rules—in particular, criminal evidentiary rules—must respect it.[561] While prefacing his comments by noting that the victim's privacy interest cannot override the accused's constitutional rights, one presenter observed that M.R.E. 412 still requires military judges to consider the danger of unfair prejudice and allows them to limit the scope of cross-examination.[562]

Some presenters advised the JPP to recommend that the "constitutionally required" exception of M.R.E. 412 be removed.[563] They argued that the exception creates no additional requirement, because it is already presumed that no statute directs an unconstitutional outcome. Several critics contended that the exception does harm by increasing the likelihood of military judges fearing that decisions to exclude evidence offered under the exception will be reversed on appeal, potentially resulting in the invalidation of courts-martial results.[564]

Other presenters appearing before the JPP spoke in support of the "constitutionally required" exception in M.R.E. 412. A senior military defense counsel pointed out that the President specifically and intentionally prescribed the exception. He contended that removing the exception from M.R.E. 412 would send an inappropriate message about the fairness of the military justice system.[565]

4. JPP Analysis and Recommendations on M.R.E. 412 Issues

Numerous recent modifications to Article 32 and the rules by which preliminary hearings are conducted will change how and how often issues regarding private information about victims will be considered. To assess potential effects that may result from modifying M.R.E. 412, the JPP must consider the sum of all other changes to the rules for preliminary hearings. The members agree that the JPP will continue to monitor M.R.E. 412 issues at Article 32 hearings in light of these changes.

Although M.R.E. 412 applies to Article 32 hearings, investigating officers (IOs) have used different procedures when applying the rule. For instance, some IOs close M.R.E. 412 hearings, whereas others do not. The JPP believes that Executive Order 13669's clarification that IOs assume the same power to exclude M.R.E. 412 evidence at an Article 32 hearing as military judges have at courts-martial and requiring IOs to utilize M.R.E. 412 procedures at preliminary hearings, makes perfect sense. However, IOs may not be military judges, and it is not clear whether IOs will have the background or expertise to make these difficult evidentiary decisions. The JPP will monitor how the IOs carry out their duties in light of the other changes to Article 32 proceedings.

Arsdall, 475 U.S. 673, 679 (1986); *Chambers v. Mississippi,* 410 U.S. 284, 302-03 (1973); *Washington v. Texas,* 388 U.S. 14, 23, (1967)) (emphasis omitted).

561 *See, e.g., Transcript of JPP Public Meeting* 161–62 (Oct. 10, 2014) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Office of (Colorado) State Public Defender).

562 *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 5 (Oct. 24, 2014).

563 *See, e.g., Transcript of JPP Public Meeting* 350 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP)); *see also id.* at 329–30 (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Greg Jacob, Policy Director, Service Women's Action Network).

564 *See, e.g., Transcript of JPP Public Meeting* 344, 350–53 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

565 *E.g., Transcript of JPP Public Meeting* 422 (Oct. 10, 2014) (testimony of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program).

The JPP supports that portion of the Joint Service Committee's October 14, 2014, draft Executive Order that proposes to eliminate the "constitutionally required" exception of M.R.E 412 at Article 32 hearings. Defense counsel stated that the change would prevent IOs and convening authorities from making proper credibility determinations and would make it impossible for accused military members to challenge some victim accounts of alleged incidents. However, the JPP agrees with DoD's rationale that the "constitutionally required" exception is not necessary if there is no right of confrontation at the pretrial hearing. Indeed, one JPP member observed that the exception is meaningless if the Sixth Amendment's Confrontation Clause does not apply to Article 32 hearings. Therefore, the members supported the JSC's proposal to remove the language from the rule for the purpose of Article 32 hearings.

The JPP heard numerous presenters testify that M.R.E. 412 evidence has been unnecessarily admitted during Article 32 hearings, thereby jeopardizing victim privacy, and that its primary avenue of admission has been the "constitutionally required" exception. Together, procedural changes that were enacted in EO 13669 and the proposed elimination of the "constitutionally required" exception in M.R.E. 412 at Article 32 hearings should enhance the capability of investigating officers at Article 32 hearings to properly consider and exclude irrelevant evidence and protect the privacy of victims.

The proposal submitted to the JPP to recommend elimination of the "constitutionally required" exception in M.R.E. 412 at trial is a more complex matter. The UCMJ generally requires the military to follow the principles and rules of evidence used in the federal system, and F.R.E. 412 also contains "constitutionally required" language. The JPP considered a number of issues related to this exception, as detailed below.

According to M.R.E. 412, the military judge is first required to determine if the evidence offered by the accused is relevant to support the exception being raised. The JPP agreed that this relevancy determination must be made first, but recognized concerns raised about how military judges are determining relevance, especially as it pertains to the "constitutionally required" exception. Two presenters suggested that the rule should be restructured. The members agreed that the JPP needs more information on how judges make the M.R.E. 412 relevance determination before making a recommendation.

The JPP members also reviewed balancing tests used by military judges when determining the admissibility of M.R.E. 412 evidence. After establishing that evidence offered by the accused is relevant to one of the exceptions, military judges conduct an M.R.E. 412 balancing test to assess whether the probative value outweighs the danger of unfair prejudice to the alleged *victim's privacy interest*. Judges also consider M.R.E. 403 factors to assess whether the probative value of the proffered evidence outweighs the danger of unfair prejudice in general. These tests protect the victim's privacy interest and ensure that other dangers of unfair prejudice are appropriately considered.

Even when the degree of unfair prejudice seems high, current military case law makes clear that M.R.E. 412 cannot limit the introduction of evidence required by the Constitution. To give greater weight to the victim's privacy interests in the M.R.E. 412 balancing test, two presenters asserted, M.R.E. 412(c)(3) should be amended to specify that a victim's privacy is "a legitimate interest." Those presenters relied on federal Supreme Court precedent, which notes that relevant testimony may bow to accommodate other legitimate interests. The JPP has not yet determined whether a victim's privacy interest should trump a defendant's right to confrontation at trial when an accused can show that the evidence is relevant. The members do not have enough information to make recommendations relating to this suggestion to change the language in M.R.E. 412 to establish a "legitimate interest" for the victim.

In sum, the JPP plans to complete its statutory task of reviewing records that deal with M.R.E. 412 issues and to receive additional evidence before providing recommendations related to the "constitutionally required" exception in M.R.E. 412. The JPP recognizes that the "constitutionally required" language may be redundant, because a judge must always decide if something is constitutionally required, regardless of the language of the rule. However, removing this language from the rules for criminal trials may raise other concerns, particularly regarding the balance between the rights of defendants and the rights of victims. The members will return to issues relating to the "constitutionally required" exception after receiving more evidence about how the rule is being applied in practice.

C. MILITARY RULE OF EVIDENCE 513 (PSYCHOTHERAPIST-PATIENT PRIVILEGE)

1. The Military's Rule Pertaining to Victims Mental Health Records

In 1999, the President established M.R.E. 513 as a military rule of privilege to protect the communications between patients and psychotherapists.[566] M.R.E. 513(a) protects "a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[567] The privilege provided in M.R.E. 513 "belongs to the patient,"[568] and M.R.E. 513(a) specifies that the patient has "a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication."[569] Other persons, including guardians, conservators, and psychotherapists or assistants to psychotherapists, may claim the privilege on the patient's behalf.[570]

M.R.E. 513 is based on the social benefit of confidential psychotherapist counseling, which was recognized in 1996 by the U.S. Supreme Court in *Jaffee v. Redmond*.[571] In *Jaffee*, the Supreme Court held that communications between a patient and her therapist and the notes taken during their counseling sessions were protected from compelled disclosure in a civil proceeding under the general

566 *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 7, 1999).

567 M.R.E. 513(a).

568 Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, 2003-SEP Army Law., at 1, 7 (2003).

569 M.R.E. 513(a).

570 *Id.*

571 *Jaffee v. Redmond*, 518 U.S. 1 (1996); *see* 2012 MCM, app. 22, at 45 ("Rule 513 clarifies military law in light of the Supreme Court decision *Jaffee* . . . . In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. *See* analyses for Rule 302 and 501."); *see also* Flippin, *supra* note 568, at 7 (detailing the development of M.R.E. 513).

rule of privilege in F.R.E. 501.[572] M.R.E. 513 was also based on the proposed F.R.E. 504,[573] although F.R.E. 504 was never adopted.

In explaining the nature of the privilege in M.R.E. 513, a presenter told the JPP that different privileges provide varying degrees of protection for covered communications.[574] The M.R.E. 513 psychotherapist-patient privilege is a qualified privilege, because the rule provides the military judge the authority to conduct an *in camera* review and apply a balancing test to determine whether to release the records.[575] This is in contrast to other privileges in M.R.E.s 502, 503, and 504—the attorney, spouse, and clergy privileges, respectively—which do not provide the military judge with authority to conduct an *in camera* review of protected material.[576]

Exceptions to the privilege provided in M.R.E. 513 were "developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security."[577] M.R.E. 513(d) specifies eight exceptions when the privilege will not apply:

1. when the patient is dead;
2. when the communication is evidence of child abuse or of neglect, . . .;
3. when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
4. when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
5. if the communication clearly contemplated the future commission of a fraud or crime . . . ;
6. when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

572 *Jaffee*, 518 U.S. at 2. The *Jaffee* case involved a police officer who sought counseling after shooting and killing a suspect. The survivors of the suspect filed a civil suit, claiming civil rights violations by the police officer. *Id.* at 4–5. At trial, the court instructed the jury they could infer that the defendant's refusal to turn over records was evidence that the records contained unfavorable information. The jury ruled for the plaintiffs and awarded damages. The defendant police officer appealed, arguing she had a psychotherapist-patient privilege to refuse to release her records. *Id.* at 5–6. The Supreme Court interpreted F.R.E. 501 to create a federal psychotherapist-patient privilege in civil proceedings and referred federal courts to state laws to determine the extent of that privilege. *Id.* at 15.

573 Proposed F.R.E. 504, which was not adopted, would have created a psychotherapist-patient privilege substantially similar to M.R.E. 513, and would have provided: "General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family." F.R.E. app. II (Rule 504(b)). Privileges under the Federal Rules of Evidence are set out in F.R.E. 501 (Privileges in General) and F.R.E. 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). Any claim of privilege under a psychotherapist-patient doctrine in federal court is addressed by F.R.E. 501, which states, "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court."

574 *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas*, *to JPP* 2 n.2 (Oct. 10, 2014).

575 Schimpf, *supra* note 494, at 173; Flippin, *supra* note 568, at 7 (asserting that overall, M.R.E. 513 affords more protections to statements of victims than to statements of accuseds).

576 Schimpf, *supra* note 494, at 173.

577 2012 MCM, app. 22 at 45.

7. when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation . . . ;
8. when admission or disclosure of a communication is constitutionally required.[578]

The analysis to M.R.E. 513 explains that the exceptions "are intended to emphasize that military commanders are to have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment."[579] Therefore, if an exception applies, "psychotherapists are to provide such information despite a claim of privilege."[580]

Criminal defendants to sexual assault charges may have sound reasons for pursuing information from a victim's mental health records. A defendant may seek access to determine whether the victim made statements to his or her psychotherapist that are either exculpatory for an accused or impeach the victim's credibility, such as prior inconsistent statements or evidence of bias, prejudice, or motive to misrepresent.[581] Alternatively, a defendant may seek mental health record information to discover whether the victim is taking prescription medication that might alter his or her ability to accurately recall or comprehend the incident in question.[582] However, claims of interest must be balanced against the concern that misuse of evidence pertaining to mental health records may lead to an attack on the victim's character rather than introducing or considering relevant information.[583]

When an exception to the rule's privilege is asserted, M.R.E. 513(e) provides procedures for the military judge to determine the admissibility of patient records or communications, which include the requirement to conduct a hearing at which the patient may appear and be heard.[584] If necessary to rule on its admissibility, the military judge may conduct an *in camera* review of the evidence or a proffer of it. If the military judge determines that an exception applies, he or she may issue protective orders or admit only portions of the evidence.

The scope of protection and procedures provided in M.R.E. 513 have been the subject of recent public consideration, and Congress directed a number of significant changes to M.R.E. 513 in the FY15 NDAA. Section 537 requires the following modifications to the rule, effective on June 17, 2015:

- include communications with other licensed mental health within the communications covered by the privilege;

578 M.R.E. 513(d).

579 2012 MCM, app. 22 at 45.

580 *Id.*

581 M.R.E. 608(c) allows an accused to admit such evidence "to impeach the witness either by examination of the witness or by evidence otherwise adduced."

582 *Transcript of JPP Public Meeting* 438–39 (Oct. 10, 2014) (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel).

583 For instance, in the 1991 Florida sexual assault trial of William Kennedy Smith, defense attorneys alleged that the victim had a "psychological disorder that led her to make false allegations." Defense attorneys said they had "strong and compelling evidence" that the victim was mentally unstable. They sought permission to examine "all relevant records of psychological or psychiatric treatment" that she might have received. In the end, the judge in the case declined to let the jury hear evidence of the victim's psychiatric history, but the controversy over her background received wide attention in the news media, which was freely available to potential jurors. Smith was acquitted. Jeffrey Toobin, *The Consent Defense, Rape Laws May Have Changed, But Questions About the Accuser Are Often the Same*, The New Yorker, Sept. 1, 2003, at 43.

584 M.R.E. 513(e).

- eliminate the rule's "constitutionally required" exception (M.R.E. 513(d)(8));
- clarify the burden on the party seeking production or admission of protected communications or records;
- revise the standard for when a military judge can conduct an *in camera* review of communications or records; and
- require that any production or disclosure permitted by the military judge be narrowly tailored to only the specific records or communications, or portions of them, that meet the requirements for one of the enumerated exceptions to the privilege.[585]

The JPP recognizes that the FY15 NDAA modifications to M.R.E. 513 will change procedures and common practices for accessing and introducing mental health records and communications in judicial proceedings, particularly insofar as they eliminate the "constitutionally required" exception and establish standards for the initial hearing and *in camera* review. Although testimony and information received by the JPP regarding M.R.E. 513 addressed the rule prior to these amendments, they remain relevant as the JPP considers the issues they raise and assesses whether the revisions, as implemented, resolve problems with the privilege.

In addition, Section 537 addresses only procedures and practice for accessing mental health records in military judicial proceedings. The JPP reviewed how mental health care information for military members is protected outside of the judicial process and considered the ways in which the information may be accessed, which also affect the privacy interest of sexual assault victims.

2. Privacy Protection for Service Members' Mental Health Care Information

Laws and regulations protect the records and privacy interests of military members who seek mental health care, but provisions permit such information to be disclosed in certain circumstances. These exceptions are often based on obligations that do not exist outside the military, such as requirements for commanders to ensure a member's fitness for duty or fitness to perform a particular mission.[586]

In general, personal medical information, including information about mental health care, is protected from release by 45 C.F.R. Part 164, Subpart E,[587] which establishes privacy regulations for the use and disclosure of protected health information in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[588] Personal medical records are also protected records under the Privacy Act.[589]

HIPAA and Privacy Act requirements apply to DoD, which has implemented rules to cover protected health information and personally identifiable health information with limited exceptions consistent

585 FY15 NDAA, Pub. L. No. 113-291, § 537, 128 Stat. 3292 (2014).

586 *See* Services' Responses to JPP Request for Information 49 (Nov. 6, 2014).

587 Privacy of Individually Identifiable Health Information, 45 C.F.R. Part 164, Subpart E (2000).

588 Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996). Privacy protections under HIPAA prohibit disclosure of the existence of an individual's protected records or the release of those records, except in certain circumstances. The HIPAA Privacy Rule provides federal protections for individually identifiable health information, held by a covered entity, which concerns the health status, provision of health care, or payment for health care that can be used to identify an individual. 45 C.F.R. § 160.103 (2000).

589 5 U.S.C. § 552a (2012); *see also* generally U.S. Dep't of Def., Instr. 6025.18, Privacy of Individually Identifiable Health Information in DoD Health Care Programs (Dec. 2, 2009), *available at* http://www.dtic.mil/whs/directives/corres/pdf/602518p.pdf.

with HIPAA's privacy requirements.[590] Department of Defense Instruction (DoDI) 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members*, specifically requires DoD to "foster a culture of support in the provision of mental health care in order to dispel the stigma of seeking mental health care."[591] Health care providers "are not to notify a Service member's commander when the Service member obtains mental health care" unless specific circumstances related to fitness and suitability for military service make disclosure necessary. In such cases, the instruction requires health care providers to "provide the minimum amount of information . . . as required to satisfy the purpose of the disclosure."[592]

a. Disclosure to Commanders for Fitness for Duty Purposes

While limiting disclosure from health care providers, DoD Regulation 6025.18-R, *DoD Health Information Privacy Regulation*, permits commanders to use or have access to protected health information, including mental health treatment information, "to determine a member's fitness for duty."[593] No authorization from the patient is required when disclosure "[i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat."[594]

Specific regulations implemented by the military Services provide additional guidance, and they differ regarding how much information, if any, is provided to commanders, down to the company grade level, when a Service member has sought medical care for reasons related to mental health. For example, Army Regulation 40-66 mandates that commanders may be given access to treatment records when necessary, but they still must "ensure that information . . . is kept private and confidential," and must keep the information secure.[595] Air Force Instruction 44-109 mandates that commanders be notified when one of their personnel is placed on or removed from the HIL (High Interest Log) because he or she is at "serious risk" of harming him- or herself or others.[596] Protected health information includes medical and mental health records.[597]

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590 *See generally* U.S. Dep't of Def., Dir, 6025.18-R, DoD Health Information Privacy Regulation para. C1.1 (Jan. 24, 2003), *available at* http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf.

591 U.S. Dep't of Def., Instr. 6490.08, Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members para. 3.a (Aug. 17, 2011), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649008p.pdf.

592 *Id.* at para. 3.b, encl. 2 para. 1b, para. 3.b.2.

593 U.S. Dep't of Def., 6025.18-R, DoD Health Information Privacy Regulation para. C7.11.1.3.1 (Jan. 24, 2003).

594 *Id.* at C7.10.1.1.; *see also* U.S. Dep't of Def., Instr. 6025.18, Privacy of Individually Identifiable Health Information in DoD Health Care Programs encl. 2, para 1c. (Dec. 2, 2009) (stating that "healthcare providers shall provide the minimum amount of information to satisfy the purpose of the disclosure").

595 U.S. Dep't of Army, Reg. 40-66, Medical Record Administration and Healthcare Documentation para. 1-4 (Jan. 4, 2010), *available at* http://armypubs.army.mil/epubs/pdf/r40_66.pdf.

596 U.S. Dep't of Air Force, Instr. 44-109, Mental Health, Confidentiality, and Military Law 10 (July 17, 2014), *available at* http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-109/afi44-109.pdf.

597 For instance, protected health information (PHI) may be used or disclosed with the patient's consent. PHI may be released as ordered by and only to the extent authorized by court order or administrative subpoena. PHI of military members may be released to the appropriate military command authority to assure proper execution of the military mission and determine the member's fitness for duty. PHI may be released for a law enforcement purpose to a law enforcement official, in compliance with and as limited by relevant requirements of a subpoena, summons or investigative demand, if the information sought is relevant and material to a legitimate law enforcement inquiry; the request is in writing, specific and limited in scope to the information that is sought; and information that does not identify the individual could not reasonably be used. PHI may be released in response to a law enforcement official's request for such information

The JPP recognizes that such disclosure is limited to commanders to determine fitness for duty and is not an appropriate means for obtaining mental health records for use in military judicial proceedings.

b. Disclosure for Law Enforcement Purposes

In general, military treatment facilities may not release protected health information, including information about mental health treatment, pertaining to a victim of a crime without specific authorization from the individual, but there are exceptions. According to section C7.6.1.2.3.1 of DoD 6025.18-R, protected health information may be released without a crime victim's consent to a law enforcement official in response to an administrative request if the "information sought is relevant and material to a legitimate law enforcement inquiry."[598] The definition of "law enforcement official"—a person empowered by law to "[i]nvestigate or conduct an official inquiry into a potential violation of law" or "[p]rosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law"—includes both military investigators and prosecutors.[599] To obtain access without the victim's authorization, the requestor must indicate that the individual's consent for release cannot be obtained because of incapacity or other emergency circumstance, that the information "is needed to determine whether a violation of law by a person other than the victim has occurred, and [that the] information is not intended to be used against the victim."[600]

Some Service regulations provide additional guidance in this area. Air Force Instruction 44-109, *Mental Health, Confidentiality, and Military Law*, provides that "confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information and who are authorized by law or regulation to receive it," unless the evidence is privileged under M.R.E. 513.[601] When information is requested for a criminal investigation, the military treatment facility must first determine if such disclosure is authorized by an applicable exception to the M.R.E. 513 privilege. Army Regulation 40-66, *Medical Record Administration and Healthcare Documentation*, requires that when treatment records are sought for criminal investigations, a records custodian must review the requests and determine what information will be provided.[602] According to Army Regulation 195-2, *Criminal Investigation Activities*, which cites DoD 6025.18-R, medical records remain under the control of the records custodian, who will make either the records or legible certified copies available for judicial, non-judicial, or administrative proceedings.[603]

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regarding a crime victim only if the victim consents; or, if the victim is unable to consent or there is some other emergency circumstance. If the victim is unable to consent, law enforcement must represent that the information won't be used against the victim and the information is necessary to investigate a crime committed by someone other than the victim. U.S. Dep't of Def., 6025.18-R, DoD Health Information Privacy Regulation (Jan. 24, 2003).

598 *Id*. at para. C7.6.1.2.3. This DoD guidance applies only to treatment records that are maintained or controlled by a military treatment facility. Treatment records and information that are outside DoD control may be obtained only with the consent and authorization of the individual or by subpoena.

599 *Id*. at para. DL1.1.22.

600 *Id*. at paras. C7.6.3.

601 U.S. Dep't of Air Force, Instr. 44-109, Mental Health, Confidentiality, and Military Law paras. 2.1–2.5 (July 17, 2014).

602 U.S. Dep't of Army, Reg. 40-66, Medical Record Administration and Healthcare Documentation para. 5-23.e (Jan. 4, 2010).

603 U.S. Dep't of Army, Reg. 195-2, Criminal Investigation Activities para. 3-17.b (June 9, 2014), *available at* http://www.apd.army.mil/pdffiles/r195_2.pdf.

There is no requirement to notify victims before any government representative, including investigators, commanders, or prosecutors, takes action to obtain their mental health records, but DoD policy allows individuals to request information about when their protected health information is disclosed without their authorization. DoD 6025.18-R, paragraph C13.1.2.1, permits military criminal investigators to request in writing that such notice be temporarily suspended if disclosure would likely impede an investigation.[604]

The JPP recognizes that such disclosure is limited to law enforcement investigative purposes and is not an appropriate means for obtaining mental health records for use in military judicial proceedings.

3. Disclosure of Mental Health Records in Military Judicial Proceedings

a. Disclosure for Pretrial Purposes and at Article 32 Hearings

In their responses to the JPP's requests for information, the Services described common approaches and practices regarding pretrial access to the mental health records of victims.[605] The Air Force informed the JPP that its trial counsel generally do not seek consent to the release of victims' mental health records, but that some counsel have sought non-military victims' assistance "in securing such records, sealed, in anticipation of litigation under MRE 513(d)(8) regarding *in camera* review." The Air Force advised that "[s]uch a practice may be beneficial as it may avoid a delay in trial," but noted that the Service's trial counsel "routinely object to review and release of such information and aggressively litigate the issues in pretrial proceedings." Moreover, according to the Air Force, there is no known case in which an Article 32 investigating officer actually conducted an *in camera* review and released records under the procedure that applies to military judges regarding disclosures as set forth in M.R.E. 513 (e).[606]

According to the Navy, "[u]nless specifically relevant to the determination of probable cause," mental health records that are requested from military medical providers "are separated from medical records and sealed unless directed open by a military judge." While "no specific regulations or policies" other than R.C.M. 405 and M.R.E. 513 govern the handling of mental health information by Article 32 investigating officers, convening authorities "often include guidance in the appointing order directing specific protections, and investigating officers are trained to follow the restrictions of MRE 500 (series)."[607]

Similarly, the Marine Corps' response stated that M.R.E. 513 information "should not be released by an Article 32 hearing officer," and if inadvertently obtained or disclosed it "will be sealed pursuant to RCM 1103A." Marine Corps trial counsel do "not provide any MRE 513 materials to the defense at Article 32 hearings."[608]

The Coast Guard's response noted that the analysis of R.C.M. 405(i) suggests that investigating officers can preserve and protect private information contained in victims' mental health records. The Coast Guard added that "[t]his [rule's] guidance [for Article 32 hearings] is modeled after the processes

604 U.S. Dep't of Def. Dir. 6025.18-R, DoD Health Information Privacy Regulation para. C13.1.2.1 (Jan. 24, 2003).

605 *See* Services' Responses to JPP Request for Information 49 (Nov. 6, 2014).

606 Air Force's Responses to JPP Requests for Information 49, 51 (Nov. 6, 2014).

607 Navy's Responses to JPP Requests for Information 49, 51 (Nov. 6, 2014).

608 Marine Corps' Responses to JPP Requests for Information 46, 51 (Nov. 6, 2014).

used by military judges at courts-martial, and thus the two are similar," except that investigating officers lack the authority to seal an exhibit.[609] The Army similarly highlighted the power of investigating officers under R.C.M. 405, as modified by EO 13669, to exclude evidence from pretrial investigations.[610]

While the Services' explanations indicate a generally consistent approach for safeguarding a victim's mental health records before a military judge is detailed to a case, military justice practitioners appearing before the JPP provided differing perspectives on how mental health records are handled in practice. For instance, an Army trial counsel told the JPP that "overall in the field mental health records are being protected better."[611] In contrast, a defense counsel said it was "easy" to have mental health records "turned over," for use by both the government and the accused.[612] A special victims' counsel and a civilian victim advocate told the JPP that mental health records are routinely obtained from the medical facility, sealed, and brought to court before a M.R.E. 513 motion is even litigated, rather than waiting until a military judge rules on a M.R.E. 513 motion and orders records to be produced, as required by the rule.[613]

According to the Services, EO 13669 has had little effect on how M.R.E. 513 issues are litigated at Article 32 hearings.[614] The Air Force noted that EO 13669 "has not had significant impact [because] MRE 513 issues have rarely been raised during Article 32 investigations."[615] One presenter agreed with the general assessment that M.R.E. 513 evidence typically does not "come out" until after charges have been referred to a court-martial with a military judge presiding.[616] Air Force IOs understand the text of M.R.E. 513 and R.C.M. 405(i) as not giving them the power to order disclosure of victims' mental health records. Instead of requesting such records, defense counsel typically seek to ascertain merely whether a victim has received counseling and, if so, of what nature. The Marine Corps similarly indicated that for M.R.E. 513 issues as for M.R.E. 412 issues, EO 13669 has had "little impact" on its Article 32 hearings, where investigating officers have "always" decided whether an exception has been satisfied only after the parties have litigated whether protected evidence should be disclosed.[617]

Recent legislative and executive changes will likely substantially reduce issues regarding consideration of mental health records at Article 32 hearings. Amendments in the FY14 NDAA revised Article 32 procedures, and EO 13669 clarified the power of investigating officers to exclude evidence at Article 32 hearings and to use the procedures used by military judges at trial. The proposed draft Executive Order that was published on October 3, 2014, would grant the preliminary hearing officer authority to seal records under R.C.M. 1103A. The FY15 NDAA eliminated the "constitutionally required"

609 Coast Guard's Response to JPP Request for Information 51 (Nov. 6, 2014).

610 Army's Response to JPP Request for Information 51 (Nov. 6, 2014).

611 *Transcript of JPP Public Meeting* 372 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor).

612 *Transcript of JPP Public Meeting* 437 (Oct. 10, 2014) (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel).

613 *Transcript of JPP Public Meeting* 243 (Nov. 14, 2014) (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel); *Transcript of JPP Public Meeting* 309–11 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

614 Services' Responses to JPP Request for Information 46 (Nov. 6, 2014).

615 Air Force's Response to JPP Request for Information 46 (Nov. 6, 2014).

616 *Transcript of JPP Public Meeting* 338–39 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

617 Marine Corps' Response to JPP Request for Information 46 (Nov. 6, 2014).

exception to M.R.E. 513. The JPP will continue to monitor M.R.E. 513 issues in Article 32 hearings in light of these changes.

b. Seeking an Interlocutory Ruling for Production or Admission of Mental Health Records

Once charges are referred to trial and a court-martial is convened, the military judge who is detailed to the case serves as the presiding officer with authority and responsibility for court-martial proceedings.[618] This includes responsibility for controlling the production or admission of mental health communications or records. A party seeking the production or admission of such information must file a written motion with the military judge and all parties at least five days before pleas are entered, specifically describing the evidence and stating the purpose for which it is sought or offered.[619] The motion must be served on the opposing party and the military judge. The party seeking the information must also, "if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard . . . ."[620]

The practice and rules governing motions at courts-martial are set forth in R.C.M.s 905 and 906. The burden of proof for most factual issues decided by motion is a preponderance of the evidence, and it is assigned to the party filing the motion.[621] In practice, motions under M.R.E. 513 are most often filed by the defense, seeking the production and admission of the victim's mental health records. Thus, the defense usually has the burden of proof.

c. Initial Hearing

Before ordering that evidence of a patient's records or communication be produced or admitted, the military judge has always been required by M.R.E. 513 to conduct a hearing,[622] which may be closed for good cause shown (upon the motion of counsel for either party). The parties may call witnesses at the hearing, including the patient, and offer other relevant evidence. M.R.E. 513(e)(2) requires that "[t]he patient shall be afforded a reasonable opportunity to attend the hearing and be heard," but "the proceedings shall not be unduly delayed for this purpose."[623]

Presenters told the JPP that some judges order records to be produced for an *in camera* inspection without requiring the defense to meet its burden of proof.[624] Two witnesses said that military judges cite the "constitutionally required" exception of M.R.E. 513 to justify automatic *in camera* review of all mental health records, which often results in fishing expeditions for information, contrary to the intent of the rule.[625]

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618 *See* R.C.M. 501–503.

619 M.R.E. 513(e)(1)(A). The military judge may alter the rule's five-day requirement for good cause shown.

620 M.R.E. 513(e)(1)(B).

621 R.C.M. 905(c), (d).

622 In a case before a court-martial composed of a military judge and members (a jury trial), the hearing must be conducted outside the presence of the members.

623 M.R.E. 513(e)(2).

624 *E.g., Transcript of JPP Public Meeting* 266 (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders).

625 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, to JPP* para. 7 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 264 (Oct. 10, 2014) (testimony of Ms. Petersen); *Written Statement of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* para. 10 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 274 (Oct. 10,

Other presenters told the JPP that *in camera* reviews of mental health records have not been automatic in their experience and that records were not requested until after a motion for the review is filed and reviewed.[626] More specifically, several military counsel testified that military judges apply the threshold test for *in camera* review that is set forth in *United States v. Klemick*, a 2006 decision of the Navy-Marine Corps Court of Appeals.[627] The *Klemick* test imposes three requirements before a military judge may order an *in camera* review: (1) the defense must provide a "specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield" evidence admissible under an M.R.E. 513 exception; (2) the information sought must not merely prove the same point as other available information; and (3) the defense must have made "reasonable efforts to obtain the same or substantially similar information through non-privileged sources."[628] One presenter added that even when military judges find an *in camera* review of M.R.E. 513 evidence to be warranted after applying the *Klemick* test, they often exercise their discretion to limit the scope of examination or of such evidence that counsel can introduce.[629]

The FY15 NDAA modifications to M.R.E. 513 incorporate the *Klemick* standards and directly address the requirements for the moving party to meet new standards at the initial hearing:

> (A) to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
>
> (B) to demonstrate by a preponderance of the evidence that the requested information meets one of the enumerated exceptions to the privilege;
>
> (C) to show that the information sought is not merely cumulative of other information available; and

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2014) (testimony of Mr. Guilds); *Written Statement of Ms. Petersen and Mr. Guilds, Counsel, Arnold & Porter LLP, to JPP* 1 of M.R.E. 513 Analysis (Oct. 24, 2014) (quoting 2012 MCM Analysis) (emphasis omitted).

626 *Transcript of JPP Public Meeting* 125–26 (Oct. 10, 2014) (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division); *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 3 (Oct. 24, 2014); *see also Transcript of JPP Public Meeting* 405–07 (Oct. 10, 2014) (testimony of CDR Jonathan Stephens, U.S. Navy, Senior Trial Counsel) (explaining that mental health records are now "very, very closely guarded" by the legal offices at Navy hospitals pursuant to Navy regulations, and testifying that although he could recall "being able to just ask for" victims' mental health records and "just g[etting] them" when he was a defense counsel ten years ago, "now they are not freely turned over"); *Transcript of JPP Public Meeting* 242 (Nov. 14, 2014) (testimony of CDR Colleen Shook, U.S. Navy, Officer-in-Charge, Victims' Legal Program Mid-Atlantic) (testifying that unlike when she "came onboard," VLCs now lately "have been pretty successful at keeping [M.R.E. 513 evidence] protected").

627 65 M.J. 576 (N-M. Ct. Crim. App. 2006). The Court of Appeals for the Armed Forces did not review the *Klemick* case or the Navy-Marine court's analysis, but CAAF has subsequently cited the *Klemick* case positively in other contexts. *See L.R.M. v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). The *Klemick* opinion is authoritative only for Navy and Marine Corps cases, but several military counsel told the JPP that military judges in the other military Services also apply the *Klemick* test. S*ee Transcript of JPP Public Meeting* 378 (Oct. 10, 2014) (testimony of Maj Pete Houtz, U.S. Marine Corps, Regional Trial Counsel); *id.* at 404 (Oct. 10, 2014) (testimony of Lt Col Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel) (noting that there is no other guidance requiring a higher burden); *id.* at 443 (testimony of Maj Matthew Powers, U.S. Marine Corps, Senior Defense Counsel); *id.* at 431–32 (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel); *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 3 (Oct. 24, 2014); *Transcript of JPP Public Meeting* 242 (Nov. 14, 2014) (testimony of CDR Colleen Shook, U.S. Navy, Officer-in-Charge, Victims' Legal Program Mid-Atlantic); *id.* at 243 (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims' Counsel); Navy's Response to JPP Request for Information 49 (Nov. 6, 2014).

628 *United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006).

629 *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 3 (Oct. 24, 2014).

(D) to show that the moving party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[630]

The modifications to M.R.E. 513 in the FY15 NDAA will change how military judges consider M.R.E. 513 issues and when they will conduct *in camera* reviews of evidence. The revised rule will permit *in camera* review of records only when the moving party has met its burden at the initial hearing and an examination of the information is necessary to rule on whether protected records or communications should be produced or admitted.[631] The JPP will continue to monitor how M.R.E. 513 matters are addressed by military judges in light of these changes.

d. In Camera Inspection of Mental Health Records

Numerous presenters told the JPP that defense counsel in civilian criminal proceedings seeking *in camera* reviews of psychotherapist communications and orders of production by a judge must meet a strict burden of proof, and that reviews and orders for production often are not granted.[632] In most jurisdictions, a general assertion by a defendant that he or she needs a complainant's counseling records to attack the accuser's credibility or to develop possible areas of attack is insufficient to justify an *in camera* review.[633] In a significant number of jurisdictions, a defendant may not access the victim's mental health records unless the defendant can establish a "factual predicate" that there is information in the records that would demonstrate "the unreliability of either the criminal charge or the complaining witness."[634] Other courts have found that a defendant must "establish a reasonable likelihood that the privileged records contain exculpatory information."[635]

According to civilian experts who testified before the JPP, the defense must meet various standards to trigger *in camera* reviews in state and federal courts. One expert testified that while courts have used "dozens of different phrases"—such as a "reasonable ground to believe, a reasonable probability, a reasonable belief, a reasonable likelihood"—all such judicial formulas require more than mere speculation that because a victim received mental health treatment, such records might contain information that would be useful to the defense.[636]

Some presenters told the JPP that the military's standard for *in camera* review of M.R.E. 513 evidence should be further clarified, requiring the defense to show with greater certainty that material evidence is contained in the victim's mental health records.[637] Professor Clifford Fishman, who proposed a

630 FY15 NDAA, Pub. L. No. 113-291, § 537(3), 128 Stat. 3292 (2014).

631 *Id.*

632 *Transcript of JPP Public Meeting* 215–17 (Oct. 10, 2014) (testimony of Ms. Jennifer Long, Director, Æquitas); *id.* at 253 (testimony of Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (Wash.) Prosecuting Attorney's Office).

633 *E.g., Transcript of JPP Public Meeting* 216 (Oct. 10, 2014) (testimony of Ms. Jennifer Long, Director, Æquitas).

634 *See* 1 Paul DerOhannesian II, Sexual Assault Trials 23–25 (Matthew Bender 3d ed. 2006).

635 *Id.*

636 *Transcript of JPP Public Meeting* 191 (Oct. 10, 2014) (testimony of Prof. Clifford S. Fishman, Catholic University School of Law); *see also* Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 65 Or. L. Rev. 1, 50 (2007); *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas, to JPP* 3 & n.8 (Oct. 10, 2014) (citing Michigan requirements of "reasonable probability" and "particularized need"); *Transcript of JPP Public Meeting* 202–07 (Oct. 10, 2014) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Office of (Colorado) State Public Defender) (describing Colorado's waiver standard).

637 *Transcript of JPP Public Meeting* 192-95, 222-23 (Oct. 10, 2014) (testimony of Prof. Clifford S. Fishman, Catholic

probable cause standard, explained that courts must protect against fishing expeditions but must also accommodate the accused's lack of concrete knowledge. While acknowledging that *in camera* reviews do intrude into the privacy of witnesses, Professor Fishman said the intrusion associated with a probable cause standard is relatively minor and controlled; only after the judge determines, upon reviewing the records, that the defense has satisfied the higher burden will it go further.[638] Other presenters proposed even higher standards to trigger *in camera* review, such as showing "clear and convincing evidence" or functional necessity.[639]

If the military judge must examine the records at issue before ruling on the motion, he or she must do so *in camera*.[640] Changes to M.R.E. 513 made by the FY15 NDAA will clarify that a military judge may conduct an *in camera* review only when the moving party has met its burden at the hearing and an examination of the information is necessary to rule on the production or admissibility of protected records or communications.[641]

e. Production or Admission of Mental Health Records

Once the moving party meets its burden for production or admission of M.R.E. 513 evidence, the rule is silent regarding the legal standard a military judge must apply, other than requiring any production to be narrowly tailored. Unlike M.R.E. 412, which provides specific guidance to determine relevancy and weigh factors in the appropriate balancing tests, M.R.E. 513 offers no other standards to assist military judges in determining what records or communications should be disclosed or admitted.

One reviewer proposed that M.R.E. 513 should be modified to add a standard for review similar to that found in M.R.E. 412.[642] M.R.E. 412(c)(3) states that evidence is admissible under the rule if the military judge determines that it is relevant for a specified purpose and that its probative value outweighs the danger of unfair prejudice to the alleged victim's privacy. The reviewer asserted that establishing a relevancy requirement and balancing test as the standard for disclosure and admissibility could clarify the military judge's determination and make reviews of M.R.E. 513 evidence more uniform.[643]

Information from presenters did not clarify for the JPP what standard military judges currently apply, or should apply, for disclosing M.R.E. 513 evidence to the defense after *in camera* review. One military defense counsel told the JPP that military judges "often times" do not release records after reviewing them *in camera*, but she did not describe a standard that the military judges used in arriving at their

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University School of Law) (articulating proposal); *accord id.* at 222–23; *see id.* at 224–25 (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Office of (Colorado) State Public Defender) (supporting proposal); *id.* at 369–70 (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor) (same).

638 Fishman, *supra* note 636, at 53–54.

639 *Transcript of JPP Public Meeting* 403 (Oct. 10, 2014) (testimony of Lt Col Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel) (arguing also in favor of eliminating "constitutionally required" exception); *id.* at 197, 221 (testimony of Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (Wash.) Prosecuting Attorney's Office).

640 M.R.E. 513(e)(3).

641 FY15 NDAA, Pub. L. No. 113-291, § 537(4), 128 Stat. 3292 (2014).

642 *See* Flippin, *supra* note 568, at 7 (citing Stephen A. Saltzburg, Lee D. Schinasi, and David A. Schlueter, Military Rules of Evidence Manual 129 (cum. supp. 2001)).

643 A standard of relevancy comports with the reasoning in *Klemick* and follows the review of at least one recent Service appellate court. *United States v. Hudgins*, No. ACM 38305, 2014 CCA LEXIS 227 (A.F. Ct. Crim. App. Apr. 3, 2014) (unpublished decision affirming military judge's finding that the records sought were not relevant).

decisions.[644] Another presenter said that in her experience, some military judges allow counsel to review records *in camera* along with the judge, which allows counsel to highlight what they believe is appropriate, whereas other military judges review the records alone, resulting in what she perceived as "somewhat arbitrary" release decisions. She recommended that "[s]ome kind of standard practice" should be "articulated in the statute."[645]

In a 2007 article, Professor Fishman described one possible standard for disclosure of M.R.E. 513 evidence to the defense. In his view, "information contained in a prosecution witness's counseling or therapy records is likely to be relevant only to the extent that it undermines or impeaches that witness's testimony. Thus, the appropriate standard should be expressed in that context: information in such records should be disclosed to the defense only if, and to the extent, it raises significant doubts upon the truthfulness or accuracy of an important government witness's testimony."[646]

While the FY15 NDAA changes to M.R.E. 513 establish a clear burden for the moving party to meet in order for the military judge to conduct a review of the M.R.E. 513 evidence, the amendment does not provide a standard for military judges to use when determining whether the evidence should be produced or admitted. The revisions note only that the military judge must limit the information that is released, requiring that "any production or disclosure permitted by the military judge must be 'narrowly tailored' to the specific records or communications, or the portions thereof that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which such records or communications are sought."[647]

4. Other Issues Relating to M.R.E. 513

a. The "Constitutionally Required" Exception to M.R.E. 513

The "constitutionally required" evidence exception in the current version of M.R.E. 513 closely mirrors the provision in M.R.E. 412(b)(1)(C), allowing evidence otherwise excluded in sexual assault cases to be produced or admitted by the defense. In the FY15 NDAA, Congress directed that the "constitutionally required" exception be removed from M.R.E. 513, effective June 17, 2015.[648]

A civilian expert on evidentiary privileges told the JPP that "[n]o state rules of evidence that cover the psychotherapist-patient privilege specifically include a 'constitutionally required' exception."[649] Practitioners told the JPP that litigation over the exception often arises when the defense believes evidence favorable to the accused, such as evidence of bias or prior inconsistent statements affecting the victim's credibility, or evidence that the victim was taking medications that might affect his or her ability to perceive or recall the incident, is contained in the victim's mental health records.[650]

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644 *See Transcript of JPP Public Meeting* 431–32 (Oct. 10, 2014) (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel).

645 *Transcript of JPP Public Meeting* 371 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor).

646 Fishman, *supra* note 636, at 52 (footnote omitted).

647 FY15 NDAA, Pub. L. No. 113-291, § 537(5), 128 Stat. 3292 (2014).

648 FY15 NDAA, Pub. L. No. 113-291, § 537(2), 128 Stat. 3292 (2014).

649 *Transcript of JPP Public Meeting* 215 (Oct. 10, 2014) (testimony of Ms. Jennifer Long, Director, Æquitas).

650 *Transcript of JPP Public Meeting* 127 (Oct. 10, 2014) (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division); *Transcript of JPP Public Meeting* 438–39 (Oct. 10, 2014) (testimony of MAJ Shari

Case law provides little guidance on this exception to M.R.E. 513.[651] The two Service courts that have addressed it have analyzed the issue in terms of whether the records sought were "material" and "relevant" to preparing a defense. They have held that an accused must do more than merely describe evidence in terms of credibility, truthfulness, or bias. Instead, he or she must establish "a real and direct nexus" between the proffered evidence and a fact or issue in the case.[652]

Before passage of the FY15 NDAA, some presenters recommended to the JPP that Congress remove the "constitutionally required" exception in M.R.E. 513. Witnesses who criticized the exception argued that its language seems to make this privilege "different" from others, inviting military defense counsel to attempt to breach the privilege and military judges to read too much breadth into it.[653] Other presenters argued that the exception is unnecessary, because all M.R.E. privileges, by implication, must yield to constitutional requirements.[654] In any event, two witnesses, citing Supreme Court case law, told the JPP that the Constitution does not require disclosure of privileged communications, because withholding such communications does not violate a defendant's Sixth Amendment right to confront witnesses or Fifth Amendment right to due process. Pointing to thirteen states with stronger statutes on psychotherapist-patient privilege modeled after the attorney-client privilege, these presenters noted that those laws have never been overturned on due process grounds.[655]

While the FY15 NDAA does eliminate the "constitutionally required" exception to M.R.E. 513, it is possible that issues may continue to arise if courts recognize that M.R.E. privileges, by implication, must yield to constitutional requirements.

b. Strengthening the Military's Psychotherapist-Patient Privilege

Some presenters advised the JPP that the military's psychotherapist-patient privilege should be strengthened. Specifically, one presenter recommended that exceptions to the privilege should be made only if (1) the defense has made substantial showing that the victim is incapacitated and unable to recollect or testify truthfully, or (2) the reported sexual assault occurred during the course of the victim's mental health treatment.[656] These witnesses said the risk currently perceived by victims that their mental health records will be disclosed in court has a chilling effect both on their desire to seek

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Shugart, U.S. Army, Senior Defense Counsel).

651 The Court of Appeals for the Armed Forces has discussed the exception only once, doing so only in the context of the procedural mechanics of a judge who abated a case after ordering a civilian third party to produce records for an *in camera* inspection. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006).

652 *See, e.g., United States v. Hohenstein,* No. ACM 37965, 2014 CCA LEXIS 179 (A.F. Ct. Crim. App. Mar. 20, 2014) (unpublished opinion); *United States v. Wallace*, No. NMCCA 201100300, 2012 CCA LEXIS 109 (N-M. Ct. Crim. App. Mar. 30, 2012) (unpublished opinion analyzing issue in terms of applicability of M.R.E. 608(c) to M.R.E. 513 evidence).

653 *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas, to JPP* 4 (Oct. 10, 2014); *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP to JPP* 4 n.5 of M.R.E. 513 Analysis (Oct. 24, 2014) (arguing that M.R.E. 513's uniquely explicit "constitutionally required" exception causes military judges to apply "different" standard than they would under M.R.E. 502, 503, or 504).

654 *Transcript of JPP Public Meeting* 294, 354 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP); *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Guilds to JPP* 4 n.5 of M.R.E. 513 Analysis (Oct. 24, 2014).

655 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP to JPP* 5 n.7 of M.R.E. 513 Analysis (Oct. 24, 2014) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987), and *Brady v. Maryland*, 373 U.S. 83 (1963)).

656 *Transcript of JPP Public Meeting* 300–01 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

treatment and on their willingness to cooperate with prosecutions.[657] Some presenters also noted that strengthening the psychotherapist-patient privilege would bring M.R.E. 513 in line with M.R.E. 502 (attorney-client privilege), M.R.E. 503 (clergy privilege), and 504 (spousal privilege), as well as with the psychotherapist-patient privileges recognized in thirteen civilian jurisdictions.[658]

Other presenters testifying before the JPP said that the military's psychotherapist-patient privilege should remain qualified.[659] Multiple senior defense counsel told the JPP that victims' mental health records occasionally contain evidence that is necessary to present the accused's defense and is otherwise not available.[660]

5. JPP Analysis and Recommendations on M.R.E. 513 Issues

The JPP considered the pending changes to M.R.E. 513 that were mandated by the FY15 NDAA and will take effect in June 2015. The JPP agreed that expanding the M.R.E. 513 privilege and eliminating the "constitutionally required" exception are positive steps toward protecting a victim's privacy interests.

The JPP considered laws and Service regulations that apply during an investigation of an alleged sexual assault offense. They generally keep the existence and content of mental health records private and confidential with a few exceptions, including exceptions for law enforcement purposes. Some presenters expressed concern to the JPP that mental health records were too easily located and obtained by criminal investigators, who may then turn over those records to prosecutors or defense counsel unnecessarily, without authorization or appropriate legal oversight by a legal advisor for the medical facility or by a military judge. The JPP's review makes clear that Service guidance and common practice among investigators is not uniform across DoD.

The JPP deliberated about whether these Service regulations and guidance regarding the release of mental health records for law enforcement purposes should be revised or standardized. Numerous presenters told the JPP that mental health records are sometimes obtained by criminal investigators and prosecutors in advance of hearings or proceedings and that this practice may chill victims' willingness to participate in sexual assault prosecutions. The JPP believes that the release of mental health records, or even the acknowledgment that mental health records exist, pierces the psychotherapist-patient privilege and constitutes a serious invasion of privacy. The Secretary of Defense should issue specific, uniform guidance to ensure that mental health records are neither sought from a medical treatment facility by investigators or military justice practitioners nor acknowledged or released by medical

657 *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas to JPP* 5 (Oct. 10, 2014); *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders to JPP* para. 9 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 266-67 (Oct. 10, 2014) (testimony of Ms. Petersen); *Attachment to Written Statement of Ms. Petersen to JPP* paras. 9, 10 (Oct. 10, 2014) (describing unnamed civilian victim's experience during Article 32 investigation); *Written Statement of Ms. Petersen and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* 6 of M.R.E. 513 Analysis (Oct. 24, 2014).

658 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* 2 of M.R.E. 513 Analysis (Oct. 24, 2014) (footnote omitted); *see also* National Crime Victim Law Institute (NCVLI), *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, Violence Against Women Bull., at 3 (June 2011) (arguing against pretrial disclosure of victims' records, citing lack of constitutional requirement that defendants receive pretrial access to victims' privileged materials).

659 *See, e.g., Transcript of JPP Public Meeting* 242–43 (Oct. 10, 2014) (testimony of Prof. Clifford S. Fishman, Catholic University School of Law); *id.* at 432–33 (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel).

660 *See, e.g., Transcript of JPP Public Meeting* 438–39 (Oct. 10, 2014) (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel); *id.* at 443–44 (testimony of Maj Matthew Powers, U.S. Marine Corps, Senior Defense Counsel).

treatment facility personnel until a military judge or Article 32 hearing officer has ordered their production. The JPP intends to continue to assess this issue in order to provide additional comments and recommendations.

The JPP also considered the modifications in the FY15 NDAA that will change how military judges review motions to produce mental health records at trial. Current practice, which may produce records more readily for *in camera* inspection, may also deter victim participation. Changes to M.R.E. 513 in the FY15 NDAA will require military judges to follow clear standards at initial hearings and permit judges to conduct *in camera* reviews of records only after a moving party has met its burden at the initial hearing and an examination of the information is necessary to rule on the production or admissibility of protecting records or communications.[661] The modification incorporates requirements and procedural standards that are similar to those described in *United States v. Klemick* to ensure that *in camera* review is necessary. In addition, the FY15 NDAA removed the "constitutionally required" exception from M.R.E. 513. The JPP will continue to monitor how M.R.E. 513 matters are addressed by military judges in light of the FY15 NDAA changes.

661 FY15 NDAA, Pub. L. No. 113-291, § 537(4), 128 Stat. 3292 (2014).

APPENDIX A: Judicial Proceedings Panel Authorizing Statutes

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—
The Secretary of Defense shall establish a panel 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 amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125

Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice),and any instances in which prior sexual conduct was determined to be inadmissible.

(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.

(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.

(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.

(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall conduct the following:

(A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

(B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.

(C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

(D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:

(i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.

(ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).

(iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

(2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

(a) ADDITIONAL DUTIES IMPOSED.—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall perform the following additional duties:

(1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.

(2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—

(A) users of and personnel staffing the Department of Defense Safe Helpline; and

(B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.

(b) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

(f) DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting "annually" thereafter" after "reports".

APPENDIX B: Judicial Proceedings Panel Members

HONORABLE ELIZABETH HOLTZMAN – CHAIR

Ms. Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at the law firm Zuckerman Spaeder LLP. She served as a judge in the U.S. District Court for the Southern District of New York for sixteen years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering, and terrorism. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent forty years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victim and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a twenty-seven-year career in the Pentagon, as, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey is the Vice President of Homeland Security and Defense for HP Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various government agencies, including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. In 2006, after thirty-four years in the U.S. Navy, she retired as the first female vice admiral. As Chief of the Navy's $5 billion global education and training enterprise, she led a successful revolution in training technology to improve the quality, access, and effectiveness of Navy training while lowering its cost. Admiral Tracey graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a fellowship with the Chief of Naval Operations' Strategic Studies Group.

APPENDIX C: Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

Lieutenant Colonel Kyle Green,
U.S. Air Force, Staff Director

Lieutenant Colonel Kelly McGovern,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Mr. Roger Capretta, Supervising Paralegal

Ms. Julie Carson, Legislative Analyst

Ms. Janice Chayt, Investigator

Ms. Alice Falk, Editor

Lieutenant Colonel Glen Hines,
U.S. Marine Corps, Attorney

Ms. Laurel Prucha Moran, Graphic Designer

Mr. Douglas Nelson, Attorney

Mr. Matt Osborn, Attorney

Ms. Meghan Peters, Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Meghan Tokash, Attorney

Ms. Sharon Zahn, Senior Paralegal

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried,
Designated Federal Official

Mr. William Sprance,
Alternate Designated Federal Official

Major Jacqueline M. Stingl,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Alternate Designated Federal Official

APPENDIX D: Presenters at the JPP Public Meetings

MEETING	PRESENTERS
August 7, 2014 **Public Meeting of the JPP at the The George Washington University Law School, Washington, D.C.**	• Mr. Dwight Sullivan, Office of the General Counsel, Department of Defense • Ms. Carol E. Tracy, Women's Law Project • Mr. John Wilkinson, Æquitas • Ms. Charlene Whitman, Æquitas • Professor Stephen Schulhofer, NYU School of Law, American Law Institute (by phone) • Captain Christian Reismeier, U.S. Navy, Chief Judge, Department of the Navy • Mr. William Cassara, Attorney-at-Law, Augusta, Georgia • Colonel (Ret) Timothy Grammel, U.S. Army, former Trial Judiciary Circuit Judge • Colonel Gary M. Jackson, U.S. Air Force, Staff Judge Advocate, Headquarters Air Force Global Strike Command

MEETING	PRESENTERS
September 19, 2014 **Public Meeting of the JPP at the Holiday Inn Arlington at Ballston**	• Ms. Teresa Scalzo, Highly Qualified Expert, U.S. Navy Trial Counsel Assistance Program • Mr. E. J. O'Brien, Highly Qualified Expert, U.S. Army Trial Defense Services • Mr. Ronald White, former Highly Qualified Expert for the U.S. Army Trial Defense Services • Professor Rachel VanLandingham, Southwestern Law School • Professor Victor Hansen, New England School of Law, Boston • Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program • Lieutenant Colonel Chris Thielemann, U.S. Marine Corps, Regional Trial Counsel • Lieutenant Commander Ryan Stormer, U.S. Navy, Trial Counsel Assistance Program • Major Mark Rosenow, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination • Colonel Terri Zimmermann, U.S. Marine Corps, Officer-in-Charge (Reserve), Defense Services Organization • Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel • Commander Jason Jones, U.S. Navy, Defense Service Office • Major Frank Kostik, U.S. Army, Senior Defense Counsel • Congresswoman Lois Frankel (D-22nd FL) • Congresswoman Jackie Speier (D-14th CA) • Ms. Elisha D. Morrow, former U.S. Coast Guard Sailor • Captain Steven Andersen, U.S. Coast Guard, Commanding Officer, Legal Services Command • Colonel Polly Kenny, U.S. Air Force, Staff Judge Advocate, Air Education and Training Command • Lieutenant Colonel James Varley, U.S. Army, Government Appellate Division • Lieutenant Colonel Michael Sayegh, U.S. Marine Corps, Staff Judge Advocate, Training Command • Major Melanie Mann, U.S. Marine Corps, Military Justice Officer • Colonel Michael Lewis, U.S. Air Force, Chief, Military Justice Division • Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development • Captain Robert Crow, U.S. Navy, Director, Criminal Law Division (OJAG Code 20) • Lieutenant Colonel John Kiel, U.S. Army, Criminal Law Division, Office of the Judge Advocate General • Captain (Ret) Stephen McCleary, U.S. Coast Guard, former Chief of Military Justice

MEETING	PRESENTERS
October 10, 2014 **Public Meeting of the JPP at the Holiday Inn Arlington at Ballston**	• Mr. William Barto, U.S. Army, Director, Advocacy Training and Programs, Criminal Law Division, Office of the Judge Advocate General • Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development • Ms. Jennifer Long, Director, Æquitas • Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (WA) Prosecuting Attorney's Office • Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender • Professor Clifford Fishman, Catholic University School of Law • Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders • Mr. Ryan Guilds, Counsel, Arnold & Porter LLP • Mr. Greg Jacob, Policy Director, Service Women's Action Network • Lieutenant Colonel Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel, Government Trial and Appellate Counsel Division • Commander Jonathan Stephens, U.S. Navy, Senior Trial Counsel, Region Legal Service Office Mid-Atlantic • Major Rebecca DiMuro, U.S. Army, Special Victim Prosecutor • Major Pete Houtz, U.S. Marine Corps, Regional Trial Counsel • Commander Steve Reyes, U.S. Navy, Director, Defense Counsel Assistance Program • Major Andrea Hall, U.S. Air Force, Senior Defense Counsel • Major Shari Shugart, U.S. Army, Senior Defense Counsel • Major Matthew Powers, U.S. Marine Corps, Senior Defense Counsel

MEETING	PRESENTERS
November 14, 2014 **Public Meeting of the JPP at the Holiday Inn Arlington at Ballston**	• Lieutenant Colonel Ryan Oakley, Deputy Director, Legal Policy, Office of the Under Secretary of Defense for Personnel and Readiness • Ms. Meg Garvin, Executive Director, National Crime Victims' Law Institute • Mr. Michael Andrews, Project Director and Managing Attorney, District of Columbia Crime Victims' Resource Center • Colonel James Robert McKee, U.S. Army, Program Manager, Special Victims' Counsel Program • Colonel Carol K. Joyce, U.S. Marine Corps, Officer in Charge, Victims Legal Counsel Organization • Captain Karen Fischer-Anderson, U.S. Navy, Chief of Staff, Victims' Legal Counsel • Lieutenant Colonel Andrea M. deCamara, U.S. Air Force, Chief, Special Victims' Counsel Division • Commander Ted Fowles, U.S. Coast Guard, Chief, Office of Special Victims' Counsel • Commander Colleen Shook, U.S. Navy, Officer in Charge, Victims' Legal Program Mid-Atlantic • Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel • Major Marc R. Tilney, U.S. Marine Corps, Regional Victims' Legal Counsel • Captain Jessie Sommer, U.S. Army, Chief, 82nd Airborne Division Legal Assistance Office and Division Special Victims' Counsel • Captain Aaron Kirk, U.S. Air Force, Special Victims' Counsel, Air Force Legal Operations Agency • Mr. Victor Stone, JPP member • Mr. James W. Boerner, Special Agent, Army Criminal Investigative Command • Mr. Mark Walker, Special Agent, IOC to the SAPR Office, Air Force Office of Special Investigations • Mr. Mike DeFamio, Supervisory Special Agent, U.S. Navy Criminal Investigative Service • Major William Babor, U.S. Air Force, Senior Defense Counsel • Lieutenant Commander Nate Gross, U.S. Navy, Senior Defense Counsel • Major Kyle Kilian, U.S. Marine Corps, Senior Defense Counsel • Captain Sarah Robbins, U.S. Army, Trial Defense Counsel • Lieutenant Colonel Scott Hutmacher, U.S. Army, Special Victim Prosecutor • Lieutenant Commander Philip J. Hamon, U.S. Navy, Senior Trial Counsel, Region Legal Service Office • Major Douglas C. Hatch, U.S. Marine Corps, Senior Complex Trial Counsel, Legal Support Section West • Captain Brent Jones, U.S. Air Force, Senior Trial Counsel, Air Force Legal Operations Agency • Lieutenant Jeffrey C. Barnum, U.S. Coast Guard, Trial Counsel

MEETING	PRESENTERS
December 12, 2014 **Public Meeting of the JPP at the Holiday Inn Arlington at Ballston**	• Colonel (Ret) Don Christensen, U.S. Air Force, President, Protect Our Defenders • Ms. Phylista Dudzinski, U.S. Air Force Sexual Assault Response Coordinator • Ms. Simone Hall, U.S. Coast Guard Sexual Assault Response Coordinator • Ms. Marie A. Brodie, U.S. Marine Corps Installation Sexual Assault Response Coordinator • Ms. Gloria M. Arteaga, U.S. Naval Sexual Assault Response Coordinator • Sergeant First Class Bridgett Joseph, U.S. Army Sexual Assault Response Coordinator • Lieutenant Commander Kelley Stevens, U.S. Coast Guard, Special Victims' Counsel and Petty Officer N.S. • Major William D. Ivins III, U.S. Marine Corps, Regional Victims' Legal Counsel-West and Ms. J.B. • Captain Christopher Mangels, U.S. Air Force, Special Victims' Counsel and Ms. R.S. • Lieutenant Kathryn DeAngelo, U.S. Navy, Victims' Legal Counsel and Airman V.T. • Captain Brian E. Stransky, U.S. Army, Operational Law Attorney and Specialist A.S. • Vice Admiral Nanette M. DeRenzi, U.S. Navy, Judge Advocate General • Lieutenant General Flora D. Darpino, U.S. Army, The Judge Advocate General • Lieutenant General Christopher F. Burne, U.S. Air Force, The Judge Advocate General • Rear Admiral Steven D. Poulin, U.S. Coast Guard, Judge Advocate General and Chief Counsel • Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development

MEETING	PRESENTERS
January 16, 2015 **Public Meeting of the JPP at the U.S. District Court for the District of Columbia, Washington, D.C.**	• Panel Deliberations (no speakers)

MEETING	PRESENTERS
January 30, 2015 **Public Meeting of the JPP at One Liberty Center, Arlington, VA**	• Panel Deliberations (no speakers)

APPENDIX E: Acronyms and Abbreviations

ACCA	Army Court of Criminal Appeals
AFOSI	Air Force Office of Special Investigations
CAAF	Court of Appeals for the Armed Forces
C.F.R.	Code of Federal Regulations
CNLSC	Commander, Naval Legal Service Command
CVRA	Crime Victims' Rights Act
DC	defense counsel
DoD	Department of Defense
EO	Executive Order
FOIA	Freedom of Information Act
F.R.E.	Federal Rules of Evidence
FY	fiscal year
HIPAA	Health Insurance Portability and Accountability Act of 1996
IO	investigating officers
JAG	Judge Advocate General
JPP	Judicial Proceedings Panel
JSC	Joint Service Committee
MCIO	military criminal investigative organization
MCM	*Manual for Courts-Martial*
M.R.E.	Military Rules of Evidence
NDAA	National Defense Authorization Act
PHI	protected health information
R.C.M.	Rules for Courts-Martial
ROI	report of investigation
RSP	Responses Systems to Adult Sexual Assault Crimes Panel
SAPRO	Sexual Assault Prevention and Response Office
SARC	sexual assault response coordinator
SES	Survivor Experience Survey
SJA	staff judge advocate
SVC	special victims' counsel
TC	trial counsel
TJAG	The Judge Advocate General
TJAGLCS	The Judge Advocate General's Legal Center and School
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
VA	victim advocate
VIS	Victim Impact Survey
VLC	victims' legal counsel
VLCO	Victims' Legal Counsel Organization
VLCP	Victims' Legal Counsel Program
VWAP	Victim and Witness Assistance Program

APPENDIX F: Sources Consulted

1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

a. Enacted Statutes

18 U.S.C. § 2242 (Sexual Abuse)

All Writs Act, 28 U.S.C. §§ 1651-1659

Crime Victims' Rights Act, 18 U.S.C. § 3771

Federal Advisory Committee Act, 5 U.S.C. App. 2

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Uniform Code of Military Justice, 10 U.S.C. §§ 801-946

b. Proposed Statutes

H.R. 430, 113th Cong. (2013), Protect Our Military Trainees Act

3. JUDICIAL DECISIONS

a. U.S. Supreme Court

Jaffee v. Redmond, 518 U.S. 1 (1996)

Rock v. Arkansas, 483 U.S. 44 (1987)

Delaware v. Van Arsdall, 475 U.S. 673 (1986)

Chambers v. Mississippi, 410 U.S. 284 (1973)

Washington v. Texas, 388 U.S. 14 (1967)

b. U.S. Court of Appeals

In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555 (2d Cir. 2005)

Kenna v. U.S. Dist. Court, 435 F.3d 1011 (9th Cir. 2006)

c. U.S. Court of Appeals for the Armed Forces

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d. U.S. Air Force Court of Criminal Appeals

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United States v. Hohenstein, No. ACM 37965, 2014 CCA LEXIS 179 (A.F. Ct. Crim. App. Mar. 20, 2014) (unpublished)

e. U.S. Army Court of Criminal Appeals

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g. State Court

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4. RULES AND REGULATIONS

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5. MEETINGS AND HEARINGS

a. Public Meetings of the Judicial Proceedings Panel

Transcript of JPP Public Meeting (Aug. 7, 2014)

Transcript of JPP Public Meeting (Sept. 19, 2014)

Transcript of JPP Public Meeting (Oct. 10, 2014)

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b. Public Meetings of the Response Systems Panel

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6. MILITARY POLICY AND GUIDANCE

a. Department of Defense

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