JUDICIAL PROCEEDINGS PANEL

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

April 2017

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Report of the Judicial Proceedings
Since Fiscal Year 2012 Amendments Panel

Military Defense Counsel Resources and Experience in Sexual Assault Cases

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April 24, 2017

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

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

The Honorable Mac Thornberry
Chair, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

The Honorable James Mattis
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit this report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) on military defense counsel resources and experience. This report includes four recommendations on the topics of defense investigators, defense office resources and staffing, defense requests for and funding of expert witnesses and consultants, and defense counsel experience.

To assess the effects of numerous changes in law and policy on sexual assault offenses in the military, the JPP tasked the JPP Subcommittee with conducting site visits to military installations throughout the United States and Asia. From July through September 2016, JPP Subcommittee members spoke to more than 280 individuals from all of the military Services involved in the investigation, prosecution, and defense of sexual assault offenses. The JPP Subcommittee heard from defense counsel and prosecutors from all of the Services about the perceived disparity in resources and experience between defense counsel and prosecutors. The JPP Subcommittee reviewed the information gathered from these site visits, as well as information on this topic received by the JPP in public meetings, and submitted their findings and recommendations on this issue to the JPP. After deliberating on the Subcommittee's report and recommendations, the JPP adopted all of the Subcommittee's recommendations, with modifications. The JPP expresses sincere appreciation to the members of the JPP Subcommittee and everyone who contributed to this report.

The JPP looks forward to continuing its review of military judicial proceedings for sexual assault crimes and addressing other topics in future reports.

Respectfully submitted,

Elizabeth Holtzman, Chair

Barbara S. Jones

Victor Stone

Thomas W. Taylor

Patricia A. Tracey

Contents

APPENDICES:

Executive Summary

In order to assess the effects of numerous changes in law and policy on the investigation, prosecution, and defense of sexual assault offenses in the military, the Judicial Proceedings Panel (JPP) tasked the JPP Subcommittee with conducting site visits to military installations to talk to the men and women who work in the military justice system. The JPP had previously heard information on many of these law and policy changes and wanted to determine how these changes were being carried out at the installation level by investigators, prosecutors, defense counsel, and others involved in sexual assault investigation, litigation, or victim support.

From July through September 2016, members of the JPP Subcommittee visited military installations throughout the United States and Asia. They spoke to more than 280 individuals representing 25 military installations and all of the Services, including prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, commanders, investigators, and sexual assault response coordinators and other victim support personnel. These individuals spoke without attribution so that the Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have affected the military justice system. On the basis of information from these site visits, the Subcommittee elected to issue reports on several topics. The Subcommittee issued its first report to the JPP—the Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases—on December 9, 2016.

In its report on defense resources and experience, the JPP Subcommittee detailed information gathered from military installation site visits and other sources in four areas: (1) defense investigators, (2) defense office resources and staffing, (3) defense requests for and funding of experts, and (4) defense counsel experience. The Subcommittee made recommendations in each of these areas.

The JPP deliberated on the Subcommittee's report and had the opportunity to question the JPP Subcommittee members who attended the installation site visits. As a result of this deliberation, the JPP's report summarizes and adopts the information presented by the Subcommittee, provides additional information from Service responses to a JPP request for information, and adopts the Subcommittee's recommendations, with modifications.

The JPP makes four recommendations in the area of defense counsel resources and experience, several of which had—in some form—been recommended by its predecessor panel, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) in its June 2014 report to Congress. The JPP recommends that the Services provide independent defense investigators, ensure sufficient staffing and resourcing of Service defense offices, place expert witness approval and funding authority in the Service defense organizations, and ensure that lead defense counsel in sexual assault cases have sufficient litigation experience, setting a minimum tour length for defense counsel of two years.

Summary of JPP Recommendations on Military Defense Counsel Resources and Experience in Sexual Assault Cases*

***Recommendation 39*: In order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.**

- In its June 2014 report, the RSP recommended that the Secretary of Defense direct the Services to provide independent, deployable defense investigators. The RSP noted that civilian public defender offices routinely employ investigators and consider them indispensable.
    - To date, only the Navy has complied with this recommendation, hiring eight civilian defense investigators. Site visit feedback from Navy defense counsel regarding the employment of defense investigators was overwhelmingly positive.
    - The Army and Air Force are monitoring the feasibility of the Navy's defense investigator program, but the Marine Corps feels that current procedures for requesting defense investigative assistance are sufficient.
- Since the RSP made this recommendation, statutory changes have been made to the Article 32 process. Under the new Article 32 pretrial hearing process, witnesses, including the victim, testify at the Article 32 hearing far less frequently and less evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case.

***Recommendation 40*: The military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations in the long term and authorize temporary details from one Service to another to ensure expeditious disposition of allegations. Organizations that have conducted similar kinds of assessments of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit.**

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* JPP Recommendations 1–11 are included in the Judicial Proceedings Panel Initial Report 11 (Feb. 2015), *available at* http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf. JPP Recommendations 12–17 are included in the Judicial Proceedings Panel Report on Restitution and Compensation for Military Adult Sexual Assault Crimes 5 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf. JPP Recommendations 18–23 are included in the Judicial Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice 5–7 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf. JPP Recommendations 24–36 are included in the Judicial Proceedings Panel Report on Retaliation Related to Sexual Assault Offenses 5–10 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. JPP Recommendations 37–38 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses 5–6 (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf.

- In its June 2014 report, the RSP recommended that the Service Secretaries ensure that defense organizations are adequately funded and resourced.

- The Secretary of Defense approved this recommendation and referred it to the Service Secretaries for implementation. In their responses to the JPP's recent request for information, all of the Services stated that their senior-level defense counsel have training and experience comparable to or exceeding that of the prosecutors. They also stated that resourcing of defense offices is comparable to that of the prosecution.

- According to site visit feedback provided to the JPP Subcommittee, not all defense offices are adequately staffed or resourced; one defense counsel noted that his office had only one paralegal assigned to assist ten defense counsel. Testimony to the JPP from Army and Marine Corps defense leadership supports site visit feedback that these organizations are understaffed and under-resourced.

Recommendation 41: **The Secretary of Defense direct the Joint Service Committee on Military Justice to draft appropriate rules and measures, as necessary, to vest defense expert approval authority and expenditure funding in the Service defense organizations.**

- According to site visit feedback provided to the JPP Subcommittee by defense counsel and prosecutors, defense requests for expert witnesses and consultants in sexual assault cases are often denied or, if the requests are granted, defense counsel are provided a less qualified expert than that provided to the prosecution.

- Current procedures in the Manual for Courts-Martial require defense counsel to request experts from the convening authority and require them to submit a statement of reasons why the expert is necessary. Given that these requests are typically processed through the trial counsel, such statements often force defense counsel to prematurely reveal trial strategy.

- Even when defense requests for experts are granted, the expert often arrives so late in the trial process that his or her ability to assist with defense strategy is curtailed.

- Civilian public defender offices routinely maintain their own funding for experts.

***Recommendation 42*: The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set assignment policies that provide defense counsel two or more consecutive years of experience in the role, to the maximum extent feasible at the same location. Exceptions to this policy should be personally approved, on a case-by-case basis, by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.**

- There is a disparity among the Services regarding defense counsel experience requirements; the Air Force and Navy require defense counsel to have prior litigation experience, while the Army and Marine Corps have no such requirement.

- Several defense counsel on site visits told JPP Subcommittee members of their experiences defending sexual assault cases when they had very little litigation experience. All defense counsel recommended against assigning brand-new attorneys to defense counsel positions.

- In its June 2014 report, the RSP recommended that the Services permit only defense counsel with litigation experience to serve as lead defense counsel in sexual assault cases, and that defense counsel be assigned to that role for at least two years. The Secretary of Defense amended this recommendation to state that only counsel with prior litigation experience could serve as trial counsel and defense counsel in penetrative-type sexual offenses, and the minimum tour length was set at two years, to the extent practicable.

    - In response to the JPP's request for information, the Army stated that it considers litigation experience and the complexity of the case when assigning counsel, with inexperienced defense counsel typically being assigned to handle less complex cases and to assist more experienced counsel. According to the Army, its regional and senior defense counsel have the experience necessary to litigate complex cases and to help train more junior counsel. The Marine Corps also reported that it takes many factors into account when assigning defense counsel, such as the complexity of the case and the counsel's experience level. For complex cases, the senior defense counsel must consult with the regional defense counsel to ensure that the right counsel is detailed to the case. The Navy and Air Force stated that typically only experienced counsel are assigned to defense counsel billets, with more senior counsel serving as lead defense counsel in penetrative sexual assault cases.

    - With the exception of the Marine Corps, the other Services reported that defense counsel assignments are usually two years or more. The Marine Corps stated that defense counsel tour lengths are at least 18 months, which it considers adequate.

- A provision in the National Defense Authorization Act for Fiscal Year 2017 requires the Services to ensure that counsel assigned to a case have sufficient experience to successfully prosecute or defend the case. This provision also requires the Services to use a system of skill identifiers to identify experienced judge advocates so that they can provide oversight to less experienced counsel. This provision calls for a five-year pilot program to assess the feasibility of establishing a professional development program for judge advocates to ensure sufficient experience among counsel to prosecute and defend complex cases.

I. Introduction

During the first two years of its tenure, the Judicial Proceedings Panel (JPP) has had the opportunity to hear from numerous officials and experts in the military Services about legislation, policies, and practices relating to sexual assault litigation.[1] This information has been extremely valuable and has informed the JPP's findings and recommendations on a number of topics. However, in order to assess how these laws and policies are working in practice, the JPP determined that there would be value in conducting site visits to military installations to hear the opinions of those responsible for carrying them out.

The JPP tasked the JPP Subcommittee[2] with conducting these installation site visits. From July through September 2016, members of the Subcommittee visited military installations throughout the United States and Asia. They spoke to more than 280 individuals representing 25 military installations from all of the Services who are involved in investigating, litigating, and supporting sexual assault cases in the military.[3] These individuals spoke without attribution so that the Subcommittee could gain an unfiltered, candid assessment of how changes in sexual assault laws and policies have affected the military justice system. On the basis of information from these site visits, the Subcommittee elected to issue several reports on different topics. The Subcommittee issued its first report to the JPP—the Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases—on December 9, 2016.[4]

In its report on defense resources and experience, the JPP Subcommittee detailed information gathered from site visits and other sources in four areas: (1) defense investigators, (2) defense office resources and staffing, (3) defense requests for and funding of experts, and (4) defense counsel experience. The Subcommittee made recommendations in each of these areas. In this report, the JPP adopts the information presented by the Subcommittee, which is summarized here; provides additional information gathered from Service responses to a JPP request for information; and adopts the Subcommittee's recommendations, with modifications. In deliberating on and adopting the Subcommittee's report, the JPP notes the vast experience of the Subcommittee members in litigation of sexual assault cases, both in the military and civilian communities.

1 *See* Appendix A: Judicial Proceedings Panel Authorizing Statutes and Charter.

2 *See* Appendix B: Judicial Proceedings Panel Committee and Subcommittee Member Biographies.

3 *See* Appendix C: List of Installation Site Visits and Subcommittee Members in Attendance.

4 Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases (December 2016) [hereinafter Subcommittee Report], Appendix D, *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources _Final_ 20161208.pdf.

II. Defense Investigators

A. Site Visit Information. As noted in the JPP Subcommittee's report on this subject, defense counsel and trial counsel interviewed by the JPP Subcommittee on military installation site visits universally stated that defense requests for investigative support are routinely denied by convening authorities and military judges. Defense counsel also told the Subcommittee that junior paralegals, who are not trained investigators, do perform some investigative functions, but those activities reduce their availability to help prepare for trial.[5] Defense counsel noted further that their ability to conduct these investigations is limited by their demanding trial schedules and the need to avoid a conflict of interest caused by becoming a potential witness in the case.[6]

While military defense counsel are able to obtain the investigative report produced by military criminal investigative organizations (MCIOs), current practices and policies regarding sexual assault investigations limit a defense counsel's ability to develop the facts of the case. MCIO investigators told Subcommittee members during site visits that internal policies that discourage thorough questioning and follow-up interviews of victims, as well as the presence of special victims' counsel/victims' legal counsel (SVC/VLC) at every interview, have hampered their ability to interview the victim as thoroughly as they feel necessary. They noted that MCIO requests to the SVC/VLC for a follow-up interview with the victim are frequently denied, making it difficult for them to clarify potential inconsistencies in the victim's initial statement.[7]

The Subcommittee report notes that counsel informed them on site visits that the MCIOs will not investigate leads at the defense counsel's request. Defense and trial counsel told Subcommittee members of a factor compounding the problem: recent statutory changes have altered the Article 32 process from a pretrial investigation into a less robust preliminary hearing.[8] Under the old process, victims were frequently required to appear and testify at the Article 32 hearing and undergo cross-examination from defense counsel. Under the new process, victims are no longer required to—and frequently do not—appear and testify at the Article 32 hearing.[9] Trial and defense counsel interviewed by the Subcommittee during installation site visits referred to the new Article 32 process as a "paper drill," because victims and other witnesses often do not testify, and the prosecution frequently submits only written statements or other documentary evidence for review.[10] Under the new process, discovery for the defense is no longer one of the stated purposes for the Article 32 hearing.

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5 Subcommittee Report, Appendix D at 2.

6 Subcommittee Report, Appendix D at 2.

7 Subcommittee Report to the Judicial Proceedings Panel on Sexual Assault Investigations in the Military (February 2017), *available at* http://jpp.whs.mil/Public/docs/08Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.

8 National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1702(a), 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, § 531(g), 128 Stat. 3292 (2014), makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

9 *Id.*

10 Subcommittee Report, Appendix D at 2.

B. Additional Information. At the JPP's public hearing in May 2016, the Services' chiefs of defense services stated that defense requests for investigative support are rarely granted by the convening authority or military judge in sexual assault cases.[11] In fact, the Marine Corps defense representative informed the JPP that she had never seen an investigator request granted in a sexual assault case, adding that it must be "very infrequent if it happens."[12] Similarly, the Army's Chief of Trial Defense Services stated that only one in twelve requests for appointment of a defense investigator in sexual assault cases was granted.[13] The Marine Corps presenter also noted that having defense counsel conduct all of their own investigative work means that counsel are taken away from working on their case.[14] She pointed out—highlighting the disparity of resources between the prosecution and defense—that in the Marine Corps, the prosecution's complex trial team has dedicated investigators.[15] In addition, in the January 2017 JPP public meeting, a Marine Corps defense counsel told the JPP that not having defense investigators has led to trial delays.[16]

The Navy's defense presenter at the JPP's May 2016 public meeting reported that the Navy had hired eight defense investigators. As noted in the JPP Subcommittee's report, the addition of these investigators has enabled defense counsel to focus on preparing their cases for trial and obtaining needed training.[17] At the JPP's January 2017 public meeting (which had a different subject), a Navy senior defense counsel provided an update on the Navy's addition of defense investigators, stating that a defense investigator working with her had a "monumental" impact "in making up some of the differences that have been lost in the investigative process from the Article 32."[18] She told the JPP that the addition of defense investigators has resulted in cases going to trial more quickly and that the Navy could use more defense investigators than it currently employs. She also noted that the defense investigator's work had resulted in acquittals at trial.[19]

In its June 2014 report, the Response Systems to Adult Sexual Assault Crimes Panel (RSP)—the predecessor panel to the JPP—issued a recommendation that the Secretary of Defense direct the Services to provide independent, deployable defense investigators. In a December 15, 2014,

11 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Officer-in-Charge (Reserve), Defense Services Agency; COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Service; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division; and CDR Stephen Reyes, U.S. Navy, Defense Counsel Assistance Program).

12 *Transcript of JPP Public Meeting* 241 (May 13, 2016) (testimony of Col Terri Zimmerman).

13 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of COL Daniel Brookhart).

14 *Transcript of JPP Public Meeting* 198 (May 13, 2016) (testimony of Col Terri Zimmerman).

15 *Id.*

16 *Transcript of JPP Public Meeting* 190 (Jan. 6, 2017) (testimony of Major James Argentina, U.S. Marine Corps, Senior Defense Counsel) ("Despite the [Response] Systems Panel recommendation that we have independent investigators, it is not currently an asset that we have at this time, which has effected, I think, some delay in the trial when we look at trying to invest[igate] the issues of 412 and 513 . . .").

17 Subcommittee Report, Appendix D at 3.

18 *Transcript of JPP Public Meeting* 214 (Jan. 6, 2017) (testimony of LCDR Rachel Trest, U.S. Navy, Senior Defense Counsel).

19 *Id.*

memorandum regarding implementation of the RSP recommendations,[20] the Secretary of Defense referred this recommendation to the Joint Service Committee on Military Justice (JSC).[21]

The JPP sent a request for information (RFI) to the Services in December 2016 to determine the status of this RSP recommendation. To date only the Navy has implemented it, though the Army and Air Force indicate that they are monitoring the Navy's program to assess its feasibility and success. The Marine Corps believes that its current mechanisms for the defense to obtain investigative support are adequate. The following table summarizes the Services' responses.[22]

Navy	• The Navy implemented the RSP's recommendation by hiring eight defense investigators. • The program is in its second year and has resulted in uncovering exculpatory evidence, contributing to acquittals and better dispositions for defense clients. • The Navy JAG Corps is assessing the program to ensure that it has the appropriate number of investigators and they are assigned appropriately.
Army	• Paralegals are trained to perform some defense investigative functions. • Counsel can request defense investigation support from the convening authority and the military judge. • The Army is tracking the Navy's defense investigator program to assess its feasibility.
Air Force	• The Air Force is tracking implementation of the Navy's defense investigator program to assess the best course of action.
Marine Corps	• Current mechanisms for the defense to obtain investigative support are adequate. • The Manual for Courts-Martial provides procedures for the defense to request investigative support from the convening authority and the military judge. • Defense offices are provided legal clerks who can coordinate and interview witnesses, take notes during meetings, and perform other similar functions. • The accused may personally hire a defense investigator.
Coast Guard	• The Coast Guard uses defense services provided by the Navy.

The Army and Marine Corps responses correctly note that the Manual for Courts-Martial provides procedures for the defense to request investigative assistance from the convening authority and military judge.[23] But in practice, according to presentations made to the JPP by the heads of the Services' defense organizations, as well as information received from numerous trial and defense counsel interviewed during installation site visits, such requests are rarely granted.

Also, while the Army and Marine Corps RFI responses state that defense paralegals and legal clerks can perform some of these investigative functions, defense counsel assert that doing so takes these individuals away from performing their primary duty of preparing to defend Service members accused of serious offenses at courts-martial. Moreover, low staffing levels at defense offices often make

20 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 SecDef RSP Implementation Memorandum].

21 The JSC is "an inter-agency, joint body of judge advocates and advisors, dedicated to ensuring the Manual for Courts-Martial (MCM) and Uniform Code of Military Justice (UCMJ) constitute a comprehensive body of criminal law and procedure," Joint Service Committee on Military Justice, http://jsc.defense.gov/.

22 *See* Navy's response to JPP Request for Information 160 [hereinafter JPP RFI 160] (Dec. 29, 2016); Army's response to JPP RFI 160 (Jan. 4, 2017); Air Force's response to JPP RFI 160 (Dec. 30, 2016); Marine Corps' response to JPP RFI 160 (Jan. 3, 2017); Coast Guard's response to JPP RFI 160 (Jan. 3, 2017).

23 *See* Army's response to JPP RFI 160 (Jan. 4, 2017); Marine Corps' response to JPP RFI 160 (Jan. 3, 2017).

it impossible for paralegals and legal clerks to provide such assistance. A defense counsel at one installation informed the Subcommittee that an office at a large military installation with ten defense counsel had only one paralegal.[24]

C. JPP Assessment and Recommendation. It has been two and a half years since the RSP recommended that Service defense organizations be provided with independent, deployable defense investigators. This recommendation was based on information presented to the RSP from civilian defense counsel, who observed that many civilian public defender offices have defense investigators and consider them critical. The RSP also found that defense investigators are necessary to "correct an obvious imbalance of resources."[25]

Since the RSP issued that report, statutory changes have been made to the Article 32 process. Under the new Article 32 pre-trial hearing process, witnesses, including the victim, testify at the Article 32 hearing far less frequently and less evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case.

These changes to the Article 32 process, as well as the limitations of MCIO victim interviews, suggest that the need for defense investigators is even greater now than it was when the RSP made its recommendation. Members of the JPP Subcommittee reported in the December 9, 2016, JPP public meeting that their sense from the site visits was that a lack of defense investigators and other resources, especially in light of changes to the Article 32 process, has negatively affected the quality of military justice in sexual assault cases.[26]

***Recommendation 39*: In order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as reasonably needed.**

24 Subcommittee Report, Appendix D at 1.

25 Report of the Response Systems to Adult Sexual Assault Crimes Panel 38, 153 (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

26 *Transcript of JPP Public Meeting* 68 (Dec. 9, 2016) (comments of Ms. Elizabeth Holtzman, JPP Chair and JPP Subcommittee member).

III. Defense Office Staffing and Resources

A. Site Visit Information. The JPP Subcommittee reported that it repeatedly heard from prosecutors and defense counsel at installation site visits that defense offices are understaffed and under-resourced. Many defense counsel stated that these deficiencies have made it difficult to manage their caseload, more than half of which is composed of sexual assault cases. As noted above, a defense counsel at a large installation reported having only one paralegal to assist ten defense counsel with case preparation.[27]

B. Additional Information. The Services' defense leadership provided information on this and other topics to the JPP at its May 2016 public meeting. The Army's chief of trial defense services told the Panel that in 2014, he had 154 authorized defense counsel billets and that number had since gone down to 144. Yet he was unable to fill even those billets, with only 135 counsel on hand at that time.[28] Similarly, the Marine Corps defense representative at the May 2016 JPP public meeting stated that there was a disparity in resources between the defense and prosecution.[29]

In its June 2014 report, the RSP recommended that the Service Secretaries "ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case."[30] In the Secretary of Defense's December 15, 2014, memorandum regarding implementation of the RSP recommendations, this recommendation's status was listed as "Approve" and it was referred to the Service Secretaries for implementation.[31] The JPP's December 2016 RFI to the Services inquired about the status of this recommendation.

All of the Services stated that their senior-level defense counsel have training and experience comparable to or exceeding that of prosecutors. They also stated that resourcing of defense offices is comparable to that of the prosecution.[32]

C. JPP Assessment and Recommendation. The Secretary of Defense approved the RSP's recommendation that defense offices be adequately resourced and staffed and forwarded it to the Service Secretaries for action. According to the recent Service responses to the RFI, all defense offices are adequately staffed and resourced. However, reports of defense counsel from the installation site visits and information presented to the JPP at its May 2016 public meeting suggest that understaffing and under-resourcing of defense offices continue to be a problem—especially for the Army and Marine Corps.

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27 Subcommittee Report, Appendix D at 1.

28 *Transcript of JPP Public Meeting* 215 (May 13, 2016) (testimony of COL Daniel Brookhart).

29 *Transcript of JPP Public Meeting* 196 (May 13, 2016) (testimony of Col Terri Zimmerman).

30 RSP Report at 38, 163–64.

31 SecDef RSP Implementation Memorandum.

32 *See* Army's response to JPP RFI 160 (Jan. 4, 2017); Navy's response to JPP RFI 160 (Dec. 29, 2016); Marine Corps' response to JPP RFI 160 (Jan. 3, 2017); Air Force's response to JPP RFI 160 (Dec. 30, 2016); Coast Guard's response to JPP RFI 160 (Jan. 3, 2017).

The military has a great deal of experience in "doing more with less." However, as defense counsel informed Subcommittee members, sexual assault cases have grown increasingly complex, require a lot of resources to defend, and make up a much larger percentage of their caseload than in previous years. As noted by one Subcommittee member—a retired Marine Corps general officer—for many years military defense counsel have complained about a lack of resources and staffing; but as resources have diminished over the years, the defense organizations have gotten used to doing without them. On the basis both of his own experience and of information gathered from prosecutors and defense counsel during site visits, he strongly recommended additional resources and staffing for defense organizations in order to continue providing military members with world-class defense services.[33]

***Recommendation 40*: The military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an independent audit of defense staffing across all military Services to determine the optimal level of staffing for the Service defense organizations in the long term and authorize temporary details from one Service to another to ensure expeditious disposition of allegations. Organizations that have conducted similar kinds of assessments of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit.**

The JPP's recommendation on this topic was informed by the Subcommittee's presentation to the JPP discussing the reliance in the civilian sector on organizations that conduct audits of public defender offices to determine appropriate levels of staffing and resources.[34]

33 *Transcript of JPP Public Meeting* 40–44 (Dec. 9, 2016) (testimony of BGen (Ret.) James Schwenk, JPP Subcommittee member).

34 *Transcript of JPP Public Meeting* 115–16 (Dec. 9, 2016) (testimony of BGen (Ret.) James Schwenk, and Ms. Lisa Friel, JPP Subcommittee members).

IV. Defense Expert Requests and Funding

A. Site Visit Information. During the installation site visits, JPP Subcommittee members heard numerous complaints from defense counsel from all Services about their inability to get approval and funding for defense expert witnesses and consultants in sexual assault cases. In the military, defense counsel must request approval and funding for expert witnesses and consultants, prior to referral of charges, from the convening authority.[35] These requests must be accompanied by a statement providing reasons why the expert is necessary and estimating the cost of the expert.[36] If the convening authority denies the request, the defense counsel can make it again to the military judge following referral of charges. The military judge will determine whether the expert's testimony is "relevant and necessary," and whether the government has or will provide a "suitable substitute."[37]

Defense counsel told Subcommittee members that their requests for experts are frequently denied or, after approval, they are provided with a substitute that is inadequate to the task.[38] This assertion was corroborated by a number of prosecutors interviewed on site visits. Counsel pointed out that when experts are granted, they are often made available shortly before the trial date, too late to help develop a defense theory of the case or prepare the case.[39] In addition, the process of asking the convening authority to approve and fund a defense expert often forces the defense to reveal their trial strategy to the government.[40] In contrast, trial counsel are not similarly disadvantaged: they can consult with and hire experts early in the trial process, without being forced to reveal their theory of the case to the defense.

B. Additional Information. In its June 2014 report, the RSP found that public defender offices often maintain their own budgets to cover expert witnesses and consultants or can request experts through a trial judge who manages the budget.[41] They also pointed out that federal public defenders have their own funding to pay for experts.[42] In addition, the JPP Subcommittee noted that defense counsel in civilian judicial systems are able to hire confidential consulting experts and can keep this information

35 Manual for Courts-Martial, United States (2016 ed.), Rule for Court-Martial [hereinafter R.C.M.] 703(d); Article 46 of the Uniform Code of Military Justice (UCMJ) states that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]" 10 U.S.C. § 846 (UCMJ, art. 46).

36 *Id.*

37 *Id.* The Court of Appeals for the Armed Forces has held that an "adequate substitute" must have qualifications "reasonably similar" to those of the government's expert. *United States v. Warner*, 62 M.J. 114, 119 (C.A.A.F. 2005). The court stated: "The absence of such parity opens the military justice system to abuse, because the Government in general, and—as this case demonstrates—the trial counsel in particular, may play key roles in securing defense experts." The appellant's brief in this case analogizes this arrangement to "permitting a Major League baseball manager to choose the opposing pitcher in the final game of the World Series." *Id.* at 120.

38 Subcommittee Report, Appendix D at 6.

39 *Id.*

40 R.C.M. 703(d); Subcommittee Report, Appendix D at 6.

41 RSP Report at 163.

42 *Id.*

from the prosecution unless they elect to use the expert at trial, enabling the defense to get a candid assessment from the expert without it being used against their client.[43]

C. JPP Assessment and Recommendation. Both trial and defense counsel informed the Subcommittee of the difficulties and disparities involved with defense requests for experts. These requests are reportedly often denied by the convening authority, and when they are granted the defense is often given an expert not of their choosing who may not be qualified to speak to the issues at hand. Because military judges can't rule on such requests until after referral of charges—at the point when trial dates are being agreed on—the defense will not have the benefit of a needed expert consultant prior to and during the Article 32 preliminary hearing, when the consultant's expertise may be of critical value to developing a defense and to helping the defense counsel understand the complexities of the issues that tend to arise in sexual assault cases. Furthermore, military defense counsel, like their civilian counterparts, should not be required to reveal their theory of defense or defense strategies to the government so early in the process before trial, unless otherwise required by law. Providing the Service defense organizations their own source of expert funding would alleviate this problem and put the burden on defense leadership to determine how and where this budget will be spent.

***Recommendation 41*: The Secretary of Defense direct the Joint Service Committee on Military Justice to draft appropriate rules and measures, as necessary, to vest defense expert approval authority and expenditure funding in the Service defense organizations.**

43 Subcommittee Report, Appendix D at 7.

V. Defense Counsel Staffing and Experience Levels

A. Site Visit Information. Defense counsel told the Subcommittee on site visits that they generally receive adequate training. However, their comments did suggest problems in the experience level of defense counsel and the lack of uniformity among the Services. The Navy and Air Force require attorneys to have some litigation and military justice experience prior to being placed in a defense counsel billet, but the Army and Marine Corps do not have this prerequisite and allow first-tour judge advocates to serve as defense counsel in sexual assault cases.[44] Several defense counsel told Subcommittee members that in the first or second contested trial of their career, they served as second chair on a rape case; one defense counsel reported having served as lead counsel in a sexual assault case in his third trial.[45] Though these experiences were not common, they were overwhelming and uncomfortable for those counsel who had them. All defense counsel recommended against assigning brand-new attorneys to defense counsel positions.[46]

B. Additional Information. In its June 2014 report, the RSP reviewed this issue and recommended that only defense counsel with prior litigation experience serve as lead defense counsel in a sexual assault case. It also recommended a minimum tour length for defense counsel of two years.[47] In the Secretary of Defense's December 15, 2014 memorandum regarding implementation of the RSP recommendations, this recommendation was approved in part, and referred to the Services for further study.[48] The recommendation was amended by the Department of Defense so that only counsel with prior litigation experience could serve as trial counsel and defense counsel in cases involving penetrative sexual offenses, and the minimum tour length was set at two years, to the extent practicable.[49]

In response to the JPP's RFIs, the Army stated that it considers litigation experience and the complexity of the case when assigning counsel, with inexperienced defense counsel typically being assigned to handle less complex cases and to assist more experienced counsel. According to the Army, its regional and senior defense counsel have the experience necessary to litigate complex cases and to help train more junior counsel.[50] The Marine Corps also reported that it takes many factors into account when assigning defense counsel, such as the complexity of the case and the counsel's experience level. For complex cases, the senior defense counsel must consult with the regional defense counsel to ensure that the right counsel is detailed to the case.[51] The Navy and Air Force stated that typically only

44 Per a memorandum of agreement, the U.S. Coast Guard utilizes Navy defense counsel to defend their members; RSP Report at 159–60.

45 Subcommittee Report, Appendix D at 8.

46 *Id.*

47 RSP Report at 39, 160–61.

48 SecDef RSP Implementation Memorandum.

49 *Id.*

50 Army's response to JPP RFI 160 (Jan. 4, 2017).

51 Marine Corps' response to JPP RFI 160 (Jan. 3, 2017).

experienced counsel are assigned to defense counsel billets, with more senior counsel serving as lead defense counsel in penetrative sexual assault cases.[52]

With the exception of the Marine Corps, the other Services reported that defense counsel assignments are usually two years or more.[53] The Marine Corps stated that defense counsel tour lengths are at least 18 months, which it considers adequate.[54]

In the May 2016 JPP public meeting, the Army's chief of trial defense services told the Panel that 20% of attorneys assigned to a defense counsel position have no prior experience.[55] He stated that while they try to avoid assigning a new defense counsel to a sexual assault case, the realities of their staffing sometimes force these assignments, though the counsel is able to consult with more senior defense counsel.[56] He also noted that the accused's counsel in a sexual assault case may have less experience than the victim's counsel.[57] Similarly, a leader in the Marine Corps' defense organization told the JPP that the vast majority of defense counsel are serving in their first tour and are right out of law school.[58] She explained that they try to make up for this lack of experience through training and through supervision by more experienced counsel.[59] She added that defense counsel typically serve in the position for only 12 to 14 months before being reassigned.[60]

A provision in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) requires the Services to ensure that trial and defense counsel detailed to a court-martial have sufficient experience and knowledge to try the case and requires the Services to have a professional development process to ensure successful prosecution and defense of courts-martial.[61] As part of that process, the Services must use skill identifiers or experience designators for identifying judge advocates with military justice experience and skill so that they can oversee less experienced counsel.[62] The provision also requires the Services to carry out a five-year pilot program to assess the feasibility of establishing a professional development program that will lead to judge advocates with military justice expertise prosecuting and defending complex courts-martial cases.[63]

C. JPP Assessment and Recommendation. While it appears that the Services generally assign more experienced defense counsel to complex cases, such as penetrative sexual assault cases, site visit feedback indicates that in at least some instances, inexperienced, first-tour judge advocates serve as

52 Navy's response to JPP RFI 160 (Dec. 29, 2016); Air Force's response to JPP RFI 160 (Dec. 30, 2016).

53 Army's response to JPP RFI 160 (Jan. 4, 2017); Navy's response to JPP RFI 160 (Dec. 29, 2016); Air Force's response to JPP RFI 160 (Dec. 30, 2016); Coast Guard's response to JPP RFI 160 (Jan. 3, 2017).

54 Marine Corps' response to JPP RFI 160 (Jan. 3, 2017).

55 *Transcript of JPP Public Meeting* 165 (May 13, 2016) (testimony of COL Daniel Brookhart).

56 *Id.*

57 *Id.*

58 *Transcript of JPP Public Meeting* 185 (May 13, 2016) (testimony of Col Terri Zimmerman).

59 *Id.*

60 *Transcript of JPP Public Meeting* 189 (May 13, 2016) (testimony of Col Terri Zimmerman).

61 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 542, 130 Stat. 2000 (2016), Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.

62 *Id.*

63 *Id.*

defense counsel in these types of cases. First-tour judge advocates with just two prior litigated courts-martial as their only litigation or military justice experience should not serve as lead defense counsel in a sexual assault case. Counsel should have the opportunity to develop their litigation skills in less complex cases and under the supervision of more experienced counsel. The provision in the FY17 NDAA pertaining to trial and defense counsel experience, though lacking in details, apparently seeks to achieve the goal of having the most experienced military trial and defense counsel litigating the most serious sexual assault cases. It should not be left to chance and circumstance whether an accused in a sexual assault case—facing the possibility of a punitive discharge and years in confinement—gets the benefit of experienced counsel.

In order for defense counsel to build core skills and necessary experience, it is important that they have the opportunity to serve in the position for at least two years. The Panel notes that while the Marine Corps' RFI response states that 18 months in the position is sufficient, a leader in the Marine Corps defense community told the JPP in its May 2016 public meeting that defense counsel typically serve in the position for only 12 to 14 months. This is simply not sufficient time to enable defense counsel to gain the necessary experience, as defense counsel on site visits attested.

***Recommendation 42*: The military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set assignment policies that provide defense counsel two or more consecutive years of experience in the role, to the maximum extent feasible at the same location. Exceptions to this policy should be personally approved, on a case-by-case basis, by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.**

APPENDIX A: Judicial Proceedings Panel Authorizing Statutes and Charter

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".

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

1. Committee's Official Designation: The committee shall be known as the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel ("the Judicial Proceedings Panel").

2. Authority: The Secretary of Defense, as required by section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239), as modified by section 1731(b) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66), and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Judicial Proceedings Panel.

3. Objectives and Scope of Activities: The Judicial Proceedings Panel will 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 the amendments made to the UCMJ by section 541 of the National Defense Authorization Act for Fiscal Year 2012 ("the FY 2012 NDAA") (Public Law 112-81) for the purpose of developing recommendations for improvements to such proceedings.

4. Description of Duties: Section 576(d)(2) directs the Judicial Proceedings Panel to perform the following duties, with additional duties as added by section 1731(b)(1) of the FY 2014 NDAA:
   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 UCMJ that were enacted by section 541 of the FY 2012 NDAA.
   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 of the Judicial Proceedings Panel 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 UCMJ), and any instances in which prior sexual conduct was determined to be inadmissible.

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

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 the assessment conducted by the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel"), a Federal advisory committee established pursuant to section 576(a)(1) of the FY 2013 NDAA and in accordance with FACA, of the training level of military defense and trial counsel, 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 the FY 2013 NDAA.
i. Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the UCMJ in certain sexual assault cases.
j. Assess 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 UCMJ), to expressly cover a situation in which a person subject to the UCMJ 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.
k. Assess the implementation and effect of the Special Victim's Counsel for victims of sex-related offenses established by the Secretary of Defense on August 14, 2013 and codified in Section 1044e of title 10, United States Code, by the enactment of Section 1716 of the FY 2014 NDAA on December 26, 2013. The panel shall make such recommendations for modifications of section 1044e as the Judicial Proceedings Panel considers appropriate.
l. Assess 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 UCMJ), as added by section 1705 of the FY 2014 NDAA, which requires at a minimum, that upon a finding of guilt for the offenses of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit such acts, the punishment include dismissal or dishonorable discharge, except as provided for by Article 60 of the UCMJ, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the UCMJ).
m. Assess the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the UCMJ), 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 UCMJ).

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

iii. Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.

n. Consider such other matters and materials as the Judicial Proceedings Panel considers appropriate for purposes of the reports.

In conducting reviews and assessments and preparing reports, the Judicial Proceedings Panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies. The Judicial Proceedings Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it considers appropriate to carry out its duties. Upon request by the Chair of the Judicial Proceedings Panel, a department or agency of the Federal Government shall provide information that the Judicial Proceedings Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Judicial Proceedings Panel shall provide its first report, including any proposals for legislative or administrative changes it considers appropriate, to the Secretary of Defense through the Department of Defense (DoD) General Counsel (GC), and the Committees on Armed Services of the Senate and the House of Representatives, not later than 180 days after its first meeting. The Judicial Proceedings Panel shall submit subsequent reports during fiscal years 2014 through 2017.

6. Support: The DoD, through the DoD Office of General Counsel (DoD OGC), the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, shall provide staffing and resources as deemed necessary for the performance of the Judicial Proceedings Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act") (5 U.S.C. § 552b, as amended), governing federal statutes and regulations, and established DoD policies and procedures. Primary responsibility for such staffing and resourcing may not be assigned to the Sexual Assault Prevention and Response Office.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with governing DoD policies and procedures.

In addition, the Judicial Proceedings Panel's DFO is required to be in attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the DFO, the Alternate DFO, duly appointed to the Judicial Proceedings Panel according to DoD policies and procedures, shall attend the entire duration of the Judicial Proceedings Panel and any subcommittee meetings.

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

The DFO, or the Alternate DFO, shall approve all of the meetings of the Judicial Proceedings Panel as called by the Chair; shall call all meetings of its subcommittees, in coordination with the Chair; prepare and approve all meeting agendas for the Judicial Proceedings Panel and any subcommittees; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public's interest or required by governing regulations or DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with sections 576(b)(6) and (7) of the FY 2013 NDAA, the Judicial Proceedings Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Judicial Proceedings Panel not later than 60 days after the date of the appointment of all the members of the Judicial Proceedings Panel. The Judicial Proceedings Panel shall meet at a minimum once per year.

10. Duration: The Judicial Proceedings Panel shall remain in effect until terminated, as provided for and as required by section 576(c)(2)(C) of the FY 2013 NDAA; however, the charter is subject to renewal every two years.

11. Termination: According to section 576(c)(2)(C) of the FY 2013 NDAA, the Judicial Proceedings Panel shall terminate on September 30, 2017.

12. Membership and Designation: Pursuant to sections 576(b)(1)(B) and (b)(2), the Judicial Proceedings Panel shall be appointed by the Secretary of Defense and consist of five members, two of whom must have served on the Response Systems Panel.

    The members 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 Force, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Judicial Proceedings Panel.

    Members shall be appointed for the life of the Judicial Proceedings Panel, subject to annual renewals. Any vacancy on the Judicial Proceedings Panel shall be filled in the same manner as the original appointment. Panel members shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as special government employee (SGE) members. With the exception of reimbursement of official travel and per diem, Judicial Proceedings Panel members shall serve without compensation.

    The DoD GC, according to DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. § 3109 to advise the Judicial Proceedings Panel or its subcommittees; these individuals do not count toward the Judicial Proceedings Panel's total membership nor do they have voting privileges. In addition, these subject matter experts shall not participate in any deliberations dealing with

CHARTER
Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

the substantive matters before the Judicial Proceedings Panel or its subcommittees nor shall they participate in any voting.

13. Subcommittees: The Department, when necessary and consistent with the Judicial Proceedings Panel's mission and DoD policies and procedures, may establish subcommittees, task groups, or working groups to support the Judicial Proceedings Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

    These subcommittees shall not work independently of the Judicial Proceedings Panel and shall report all of their recommendations and advice to the Judicial Proceedings Panel for full deliberation and discussion. Subcommittees have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Judicial Proceedings Panel. No subcommittee or any of its members may update or report directly to the DoD or any Federal officers or employees.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Judicial Proceedings Panel. All subcommittee appointments shall be subject to annual renewal. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants pursuant to 5 U.S.C. § 3109 to serve as SGE members. Those individuals who are full-time or permanent part-time Federal employees shall be appointed pursuant to 41 C.F.R. § 102-3.130(a) as RGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of reimbursement of official travel and per diem, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Judicial Proceedings Panel and its subcommittees shall be handled according to section 2, General Records Schedule 26, and appropriate Department of Defense policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: June 24, 2014

APPENDIX B: Judicial Proceedings Panel Committee and Subcommittee Member Biographies

JUDICIAL PROCEEDINGS PANEL MEMBERS

THE HONORABLE ELIZABETH HOLTZMAN – CHAIR OF THE JPP

Elizabeth 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.

THE HONORABLE BARBARA S. JONES

Barbara Jones is a partner at the law firm Bracewell LLP. She served as a judge in the U.S. District Court for the Southern District of New York for 16 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, handled 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 40 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 victims' 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 27-year career in the Pentagon, 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 was most recently the Vice President of Homeland Security and Defense for Hewlett Packard Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various 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. She completed a distinguished 34-year naval career in 2004, retiring as a vice admiral and the most senior woman officer in the history of the U.S. Navy. As chief of the Navy's $5 billion global education and training enterprise, Admiral Tracey led a successful revolution in training technology to improve the quality, access, effectiveness, and cost of Navy training. She 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.

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE MEMBERS

THE HONORABLE BARBARA S. JONES – CHAIR OF THE JPP SUBCOMMITTEE

Barbara Jones is a partner at the law firm Bracewell, LLP. She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, where she handled 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. Prior to her nomination to the bench in 1995, Judge Jones spent more than two decades as a prosecutor. She was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan), where she supervised community affairs, handled public information, and oversaw the work of the Homicide Investigation Unit. Previously, Judge Jones served as an Assistant U.S. Attorney in the Southern District of New York, where she tried numerous organized crime cases and was Chief of the Organized Crime Strike Force in Manhattan.

THE HONORABLE ELIZABETH HOLTZMAN – CHAIR OF THE JPP

Elizabeth Holtzman, who took office as the youngest woman ever elected to Congress, served in the House of Representatives from 1973 to 1981, representing New York's 16th Congressional District. While in Congress, she served on the House Judiciary and Budget Committees and chaired the Immigration and Refugees Subcommittee. She co-founded the Congressional Women's Caucus and was elected its first Democratic chair. She subsequently was elected Brooklyn District Attorney (where she pioneered new strategies for the prosecution of rape cases)—the only woman ever elected DA in New York City. She was then elected New York City Comptroller, the only woman ever to hold that position. Ms. Holtzman was appointed by President Bill Clinton to the Interagency Working Group (on declassifying secret Nazi war crimes files), and by Secretary Hagel to the Response Systems to Adult Sexual Assault Crimes Panel. She has also been appointed to the Department of Homeland Security Advisory Committee. Ms. Holtzman is a graduate of Harvard Law School and Harvard University's Radcliffe College, *magna cum laude*. She practices law in New York City with the firm Herrick, Feinstein, LLP.

MS. LISA FRIEL

Lisa Friel is an internationally recognized expert on sexual assault. Ms. Friel has investigated and supervised complex cases involving sexual assault and harassment, human trafficking, workplace violence, child pornography, Internet predators, unlawful surveillance, theft, and fraud. Ms. Friel began her professional career at the New York County District Attorney's Office, specializing in sexual assault cases. She was the Chief of the Sex Crimes Prosecution Unit for nearly a decade and the Deputy Chief for 11 years. Supervising more than 40 assistant district attorneys, support staff, and investigators, she typically managed 300 cases and investigations at any one time.

Ms. Friel has directed thousands of investigations into allegations of sexual assault and other misconduct and has trained hundreds of law enforcement personnel throughout the world. In October 2011, following a distinguished 28-year career as a Manhattan prosecutor, Ms. Friel joined T&M Protection Resources as Vice President of the Sexual Misconduct Consulting & Investigations division. Ms. Friel and her staff developed policies and procedures, provided training workshops, and conducted sensitive investigations into a myriad of issues, including sexual misconduct (both sexual assault and sexual harassment) and domestic violence. In September 2014, Ms. Friel was appointed as T&M's Special Advisor to the NFL Commissioner, consulting on domestic violence, child abuse, and sexual assault within the National Football League. In April 2015, Ms. Friel accepted a permanent position with the NFL: an appointment by Commissioner Goodell as the NFL's Special Counsel for Investigations, where she is responsible for all investigations related to possible violations of the NFL's Personal Conduct Policy.

MS. LAURIE ROSE KEPROS

Laurie Rose Kepros is the Director of Sexual Litigation for the Colorado Office of the State Public Defender, where she trains and advises more than 700 lawyers and other staff statewide in their representation of adults and juveniles accused or convicted of sexual crimes. Ms. Kepros has personally represented thousands of criminal defendants, including many victims of sexual assault. She has tried and consulted on thousands of sexual offense cases across the state of Colorado. She has served on dozens of subcommittees of the Colorado Sex Offender Management Board and as a member of both the Sex Offense Task Force and the Sex Offense Working Group of the Sentencing Task Force of the Colorado Commission on Criminal and Juvenile Justice. Ms. Kepros was on the Board of Directors of the Colorado Criminal Defense Bar (CCDB) for 10 years and currently serves on the board of the CCDB's sister policy organization, the Colorado Criminal Defense Institute. She is a member of the Association for the Treatment of Sexual Abusers and an adjunct professor at the University of Denver School of Law. She has repeatedly testified before the Colorado legislature as a subject matter expert in sexual crime law and as an expert witness in Colorado sex offense law in federal district court. In 2012, the CCDB awarded her the Gideon Award for upholding and preserving the principles captured by *Gideon v. Wainwright*.

DEAN LISA SCHENCK (COLONEL, U.S. ARMY, RETIRED)

Dean Lisa Schenck became Associate Dean for Academic Affairs at the George Washington University Law School in 2009 after serving in the Army's Judge Advocate General's Corps for more than 25 years. She also has served as a judge, lawyer, and educator. While in the military, she was an appellate military judge on the U.S. Army Court of Criminal Appeals in 2002 and received the 2003 Judge Advocates Association Outstanding Career Armed Services Attorney Award (Army). In 2005, Dean Schenck was the first woman appointed as a Senior Judge on that court, where she served until she retired. In 2007, the Secretary of Defense also appointed her to serve concurrently as Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military as a colonel in 2008, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in Military Services.

PROFESSOR LEE SCHINASI (COLONEL, U.S. ARMY, RETIRED)

Professor Lee Schinasi began his legal career as a trial attorney for the Office of Economic Opportunity before starting a 23-year career in the Army's Judge Advocate General's Corps. His final assignment was as Dean of Academics and Vice Dean of the Army's JAGC School. Professor Schinasi attended the resident Command and General Staff College and the resident Army War College. He has served as military legal advisor to the Army's Chief of Staff for Intelligence and as Staff Judge Advocate of the 3rd Infantry Division (in Germany) and United States Army South (in Panama). Professor Schinasi is co-author of several books on evidence and litigation, including *The Military Rules of Evidence Manual, Military Evidentiary Foundations, The Florida Evidence Code Trial Book, Florida Evidentiary Foundations, Evidence in Florida, Emerging Problems under the Federal Rules of Evidence,* and *Lawyers Cooperative Practice Guide: Florida Evidence*. He received a bachelor's degree in economics and a J.D. degree from the University of Toledo. Before joining the Barry Law faculty, Professor Schinasi taught at the University of Miami School of Law. He currently teaches evidence, torts, civil procedure, and national security law.

BRIGADIER GENERAL JAMES SCHWENK, U.S. MARINE CORPS (RETIRED)

Brigadier General James Schwenk retired from the Marine Corps in 2000 and from civil service in 2014, after 49 years of federal service. As a Marine Corps judge advocate, he served as a trial counsel, defense counsel, Deputy Staff Judge Advocate, Staff Judge Advocate, Special Assistant to the General Counsel of the Navy, Head of Operational Law Branch at Headquarters Marine Corps, Deputy Director of Legal and Legislative Policy for the Office of the Assistant Secretary of Defense for Force Management and Policy, Assistant Judge Advocate General of the Navy for Military Law, and Military Assistant to the DoD General Counsel. Upon retiring from active duty, BGen Schwenk served for 14 years in the Office of the General Counsel of the Department of Defense as Senior Associate Deputy General Counsel, specializing in personnel policy, military justice, and civil support. He was the principal legal advisor for the repeal of "don't ask, don't tell" and the provision of benefits to same-sex spouses of military personnel. In addition, he was the principal legal advisor to numerous DoD working groups in the area of military personnel policy, working extensively with the White House and Congress. BGen Schwenk attended the Washington College of Law, American University, earning his J.D. in 1977.

MS. JILL WINE-BANKS

Jill Wine-Banks has a background as a corporate executive in manufacturing and telecommunications and as an attorney and not-for-profit and government leader. Ms. Wine-Banks started her career at the Department of Justice prosecuting organized crime and labor racketeering cases and then played a crucial role as an assistant special prosecutor investigating and trying the Watergate obstruction of justice case. Ms. Wine-Banks also served as the General Counsel of the United States Army. In that position, Ms. Wine-Banks dealt with environmental, procurement, Panama Canal, intelligence, military justice, and political issues, including the integration of women into basic training and West Point. After leaving the Pentagon, she was a litigation partner at Jenner and Block, the Solicitor General and Deputy Attorney General of Illinois, and later the Executive Vice President and Chief Operating Officer of the American Bar Association, the world's largest legal publisher and professional association with almost 400,000 members. That experience led to her becoming a senior corporate executive at Motorola and then Maytag, handling international business development, global operations, alliance creation and management, and government relations in Pakistan, China, Ukraine, Russia, France, Germany, Japan, and Singapore. Recently, Ms. Wine-Banks was head of career and technical education for the Chicago Public Schools and a business consultant. Ms. Wine-Banks is currently writing a book about her life and career, with a special focus on her experiences during Watergate.

APPENDIX C: List of Installation Site Visits and Subcommittee Members in Attendance

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

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

APPENDIX D: Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases

SUBCOMMITTEE OF
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

December 2016

SUBCOMMITTEE TO THE JUDICIAL PROCEEDINGS PANEL

CHAIR
The Honorable Barbara S. Jones

MEMBERS
Ms. Lisa Friel
The Honorable Elizabeth Holtzman
Ms. Laurie Kepros
Dean Lisa Schenck, Colonel (Retired), U.S. Army
Professor Lee Schinasi, Colonel (Retired), U.S. Army
Brigadier General James Schwenk, U.S. Marine Corps, Retired
Ms. Jill Wine-Banks

STAFF DIRECTOR
Captain Tammy P. Tideswell, JAGC, U.S. Navy

DEPUTY STAFF DIRECTOR
Lieutenant Colonel Patricia H. Lewis, Deputy Staff Director, JAGC, U.S. Army

CHIEF OF STAFF
Mr. Dale L. Trexler

DESIGNATED FEDERAL OFFICIAL
Ms. Maria Fried

JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995

December 8, 2016

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of military defense counsel resources and experience in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses.

This report summarizes site visit information and the Subcommittee's subsequent research, and makes findings regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military.

On the basis of the information gathered, the Subcommittee makes the following recommendations:

Recommendation 1: **The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.**

Recommendation 2: **The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.**

Recommendation 3: **The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.**

Recommendation 4: **The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.**

Military Defense Counsel Resources and Experience in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—representing 25 military installations throughout the United States and Asia, all involved in the military justice process—about the investigation, prosecution, and defense of sexual assault offenses. Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault litigation from the men and women who are investigating, litigating, and supporting those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel (SVC/VLC), paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

On the basis of the information received during these site visits, the Subcommittee determined that on several issues, it would have to undertake further research before reporting to the JPP. This report summarizes site visit information and subsequent research regarding defense investigators, the experience levels of defense counsel, and the resources available to them in the military. In producing this report, the JPP Subcommittee used information gathered from site visits, information previously presented to the JPP at a public hearing, information derived from the Report of the Response Systems to Adult Sexual Assault Crimes Panel of June 2014, and existing statutory resources.

I. INADEQUATE STAFFING AND RESOURCES FOR MILITARY DEFENSE COUNSEL

A. **Site Visit Information.** Most of the defense counsel who participated in the Subcommittee's site visits reported that they are seriously understaffed and under resourced. These accounts were corroborated by comments from prosecutors interviewed during these site visits. At many installations, counsel stressed that a lack of attorneys, paralegals, investigators, experts, and basic resources hinders their ability to handle their caseload, more than half of which, they stated, is composed of sexual assault cases. At one installation, for example, an office at a large military installation with ten defense counsel had only one paralegal.

The most urgent and frequently raised issue regarding defense resources was a persistent lack of defense investigators. Defense counsel explained that in the current system, the Military Criminal Investigative Organizations (MCIOs) will not investigate leads at their request. Even if they were to do so, the information obtained would not be protected by attorney-client or work product privileges (as it would be for independent investigators assigned to work on a traditional criminal defense team). Some defense and trial counsel also expressed concern that MCIO investigators are often unwilling to follow up on investigative leads, thereby affecting the thoroughness of the investigation. And because, as MCIO investigators told the Subcommittee, they are required to be "non-confrontational" in their interactions with victims, potential problems in a victim's statement (e.g., inconsistencies with other evidence) may not be thoroughly explored.

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

Defense counsel also noted that as a result of recent statutory changes to the Article 32 pretrial hearing process, fewer witnesses, including the victim, testify at the Article 32 hearing and less evidence is presented, making it more difficult for defense counsel to ascertain pertinent information about the government's case. The combination of this recent change in Article 32 practice and the lack of defense investigators has left defense counsel unable to investigate their cases in what they see as an appropriately effective manner.

The Navy is currently the only Service that employs defense investigators—eight of them worldwide. The other Services lack any independent budget to fund defense investigators, and defense counsel stated that they have to request funding for an investigator from the convening authority or military judge in each case in which they deem an investigator necessary.[1] Defense counsel and prosecutors agreed that these requests are routinely denied. Defense counsel consistently told Subcommittee members during the site visits that they rely on junior paralegals, who are not trained investigators, to help investigate these cases by finding and interviewing potential witnesses. As a result, these paralegals are also less available to carry out those job functions for which they have in fact been trained. Defense counsel mentioned that they do, on occasion, ask their clients to personally hire investigators and experts if the government denies their requests.

Defense counsel noted that their ability to investigate their clients' cases is limited by their demanding trial schedules and by the ethical need to avoid a conflict of interest caused by becoming a potential witness in the case—a problem that may arise if the lawyer is the only person present to conduct a witness interview. If, for example, a witness makes a statement during an interview but then testifies inconsistently at trial, the lawyer would be the only possible witness available to impeach the discrepant testimony. The practical consequence of this situation is that the lawyer becomes a witness in his or her own case, and therefore a substitute, conflict-free counsel would have to be appointed, leading to greater expense, added complication, and likely delay in the trial process, in addition to the possible negative effect on the case of replacing the original defense counsel with a new lawyer unfamiliar with the case. At the same time, if such exculpatory, impeaching testimony is unavailable to the accused, he or she may be denied the constitutional protections of confrontation, the right to present a defense, the right to receive a fair trial, and the right to due process of law. In civilian practice, this problem is largely avoided through the use of professional defense investigators who can conduct the interviews and then testify about them in court as necessary. Feedback from Navy defense counsel about the recent addition of defense investigators was very positive, and they felt it alleviated the problems noted above.

B. **Other Sources of Information Regarding Defense Investigators.** The Response Systems to Adult Sexual Assault Crimes Panel (RSP) reviewed the issue of defense investigators in its June 2014 report. The RSP found that defense requests for independent investigators made to the convening authority or military judge are routinely denied, noting that "military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources."[2] The RSP received information from a number of civilian public defenders and found that "many public defender offices have investigators on their staffs and consider them critical."[3] In fact, the former president of the National Association of Criminal Defense Lawyers told a subcommittee of the RSP, "I don't know a lawyer in the country that does sex offenses without an investigator, except in

1 *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter MCM], Rules for Courts-Martial [hereinafter R.C.M.] 703(d).

2 Report of the Response Systems to Adult Sexual Assault Crimes Panel 153 (June 2014) [hereinafter RSP Report], *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

3 *Id.* at 153.

the military. Really, there is no such thing."[4] The RSP noted that these investigators aid defense counsel in locating and interviewing potential witnesses, finding experts, and identifying services to assist the defense in complying with court-ordered treatment. Their work enables defense counsel to prepare for trial and gives attorneys "a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients."[5] The RSP concluded their review of this topic by making the following recommendation:

> **RSP Recommendation 81:** The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.[6]

As reported during the site visits, only the Navy has implemented this RSP recommendation: it has hired eight "defense litigation support specialists," more commonly known as defense investigators.[7] These defense investigators are civilians with prior law enforcement or defense experience. The Navy's Director of the Defense Counsel Assistance Program (DCAP) told the JPP that they have made it possible for defense counsel to focus on preparing for trial and getting needed training.[8] He added, however, that the Navy could use more than eight defense investigators.[9]

Also of significance regarding this issue are recent congressional changes that have dramatically altered the Article 32 process, changing it in practice from a pretrial investigation into a preliminary hearing and removing the requirement that a victim appear and testify at the hearing.[10] Prior to this statutory change, the Article 32 allowed for a "thorough and impartial investigation" of the case in which an investigating officer investigated the "truth and form of the charges."[11] Sexual assault victims were

4 *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers).

5 *Supra note 2* at 153, quoting Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" 18–19 (Nov. 6, 2013); *Transcript of RSP Public Meeting* 380–81 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia) ("But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for a while. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things—sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word 'victim.' When we talk about pre-trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent—not only a decent, but a zealous defense.").

6 *Supra note 2* at 153.

7 *Transcript of JPP Public Meeting* 208 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

8 *Transcript of JPP Public Meeting* 208–09 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

9 *Transcript of JPP Public Meeting* 213 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

10 National Defense Authorization Act for Fiscal Year 2014 [hereinafter FY 14 NDAA], Pub. L. 113-66, 127 Stat. 672 (2013) § 1702(a); National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3292 (2014) § 531(g) makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

11 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(a) and (e).

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

frequently required to appear and testify at the Article 32 investigation and were subject to cross-examination by the defense counsel.[12] One of the stated purposes of this Article 32 investigation was to "serve as a means of discovery."[13] Under the new process, the Article 32 preliminary hearing is limited to determining primarily whether there is probable cause to believe that an offense has been committed and that the accused committed the offense.[14] Victims are no longer required to testify at the Article 32 hearing,[15] and frequently do not, and it is no longer one of the stated purposes of the hearing that it serve as a means of discovery. Both trial and defense counsel interviewed during installation site visits referred to the new Article 32 process as a "paper drill," often with no witnesses being called to testify and only documentary evidence submitted. Counsel expressed the view that because of these changes to the Article 32 process, it is more vital than ever to provide additional investigative resources for defense counsel.

All of the military Services' chief defense counsel discussed the necessity of having defense investigators to relieve defense counsel and paralegals from the burden of having to conduct their own investigations. The Army Chief of Trial Defense Services noted that an informal survey of defense counsel making requests for defense investigators found that only one in twelve requests was approved in sexual assault cases.[16] One witness told the JPP that the law requires defense counsel to adequately investigate the facts of the case; otherwise, he or she could be found to be ineffective.[17] Several witnesses expressed their view that the refusal to provide defense investigators amounts to depriving the defendants of due process.[18] The Court of Appeals for the Armed Forces has not yet ruled on this specific issue[19] but has discussed an analogous resource, a mitigation specialist for a defendant in a capital case, stating that "[c]ompulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds through the Sixth Amendment, Article 46, UCMJ, 10 U.S.C. § 846 (2000), and Rule for Courts-Martial (R.C.M.) 703(d)."[20]

Some counsel noted during site visits that there is a high acquittal rate in military courts-martial for sexual assault cases—a statistic that may, on its surface, seem to undercut the need for additional resources for defense counsel. However, the ultimate result of a trial, whether conviction or acquittal,

12 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(g)(2)(A) and (h)(1)(A).

13 MCM, *supra* note 1, discussion to R.C.M. 405(a).

14 FY 14 NDAA § 1702(a).

15 *Id.*

16 *Transcript of JPP Public Meeting* 241–42 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

17 *Transcript of JPP Public Meeting* 197 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). The Supreme Court of the United States held that ineffective assistance of counsel requires the defendant to show that (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). *See Also* ABA Standards for Criminal Justice: Defense Function Standard 4-4.1 (Am. Bar Ass'n, 3d ed. 1993) on Duty to Investigate.

18 *Transcript of JPP Public Meeting* 242–43 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division).

19 *Transcript of JPP Public Meeting* 246–47 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

20 *See United States v. Kreutzer*, 61 M.J. 293, 305-06 (C.A.A.F. 2005).

is not the sole measure of whether a process was fair and indeed complied with the due process protections of the Constitution.

C. **Other Sources of Information Regarding Additional Office Staffing and Resources.** In its June 2014 report to Congress, the RSP recommended that military defense organizations be provided adequate funding resources and personnel.[21] In doing so, the RSP found that "maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system."[22]

At the May 13, 2016, public meeting of the JPP, the Army Chief of Trial Defense Services identified his biggest challenge as not having enough defense counsel, explaining that the number of defense counsel billets has gone down since the RSP met and he can't fill the ones he has.[23] A Marine Corps witness told the JPP that "there's a perception of a disparity in resources. And, with all due respect, I'd like to say it's more than a perception, it's a reality." She explained that in the Marine Corps, the prosecution has four highly qualified experts (HQEs), while the defense has only two.[24]

D. **Subcommittee Assessment and Recommendations.** Civilian public defense organizations and private defense counsel routinely rely on defense investigators to locate and interview witnesses, as well as to take other investigative steps. Their assistance enables defense counsel to properly prepare their cases and represent their clients to the best of their ability. According to information from Navy defense counsel, the addition of the eight defense investigators has been tremendously beneficial.

Given the introduction of the SVC/VLC into the MCIO victim interview process, as well as the unwillingness of MCIOs to follow up on leads from defense or trial counsel, the addition of independent defense investigators is more crucial now than it has ever been. The Subcommittee notes that the approval and funding authority for defense investigator requests is the convening authority who referred the charges to court-martial and who may have a vested interest in the outcome of the case. These requests, it should be noted, are denied more than 90% of the time.

Furthermore, as they are no longer able to cross-examine the victim at the current Article 32 hearing and have lost access to the witness testimony and other evidence formerly received at the Article 32 hearing, defense counsel are at significantly greater disadvantage than they were prior to the changes to the Article 32 process. This alteration in procedure makes adding independent defense investigators essential to the fair administration of justice.

The Subcommittee makes the following recommendations:

Recommendation 1: **The Subcommittee recommends that in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense**

21 *Supra note 2* at 38 (RSP Recommendation 82 reads: "The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.").

22 *Supra note 2* at 38.

23 *Transcript of JPP Public Meeting* 215 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services)

24 *Transcript of JPP Public Meeting* 196 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch). HQEs are highly qualified civilian attorneys employed by all Services, except the Air Force, to support litigation and the training of counsel. They serve in limited term appointments.

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

investigators under their control in sufficient numbers so that every defense counsel has access to an investigator, as needed.

Recommendation 2: **The Subcommittee recommends that the military Services immediately review Service defense organizations' staffing—defense counsel, paralegals, highly qualified experts, and administrative support personnel—and augment current levels in order to alleviate the reported understaffing. The Secretary of Defense should direct an audit conducted by an independent, outside entity of defense staffing across all military Services to determine the optimum level of staffing for the Service defense organizations in the long term.**

II. DEFENSE REQUESTS FOR EXPERTS

A. **Site Visit Information.** Defense counsel and others also complained about lack of access to and funding for expert consultants, which puts the defense at an extreme disadvantage. Defense counsel noted that they have trouble getting qualified experts. In the military, defense counsel do not have their own source of funding for witnesses and experts, but must instead request funding from the convening authority. The response to these requests is frequently outright denial or provision of an inadequate substitute for the expert requested. Defense counsel described situations in which they requested a particular expert and were instead provided someone who was deemed to be an "adequate substitute." The "adequate substitute" often lacked the specific knowledge required (for example, an expert in suggestibility in children might be replaced by a child psychologist who was a generalist). Moreover, if approval for an expert is given, it is often granted not at the outset of the case but rather on the eve of trial, when the expert is much less helpful to developing a theory of defense or assisting with preparation of the defense case. Even if defense counsel are successful in getting a qualified expert, the process of requesting the expert forces them to reveal their case or trial strategy to the government. Defense counsel do not see trial counsel receiving comparable treatment from the convening authority; instead, trial counsel can identify and recruit experts to join the prosecution at will, and readily consult with their experts before the defense receives expert assistance. Several prosecutors on the Subcommittee's site visits concurred that this is a systemic problem.

B. **Other Sources of Information.** Article 46 of the Uniform Code of Military Justice (UCMJ) states that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]"[25] Under the Rules for Courts-Martial, in every branch of Service and in every case, defense counsel must request funding from the convening authority, prior to referral of charges, for each specific expert witness or consultant needed. This request must include a complete statement of reasons why the expert is necessary and the estimated cost of employing the expert.[26] If the request is denied by the convening authority, after referral of charges, the request may be renewed before a military judge, who determines whether the expert's testimony is "relevant and necessary" and whether the government has provided or will provide an "adequate substitute."[27] This request before the military judge happens much later in the process, often close to trial, leaving inadequate time for the expert to fully assist the defense counsel in the preparation of the case.

25 10 U.S.C. § 846 (UCMJ, art. 46).

26 R.C.M. 703(d).

27 *Id.*

In applying Article 46 of the UCMJ to the issue of designation of expert consultants, the Court of Appeals for the Armed Forces has held that an "adequate substitute" must have qualifications "reasonably similar" to those of the government's expert.[28]

In comparing military defense organizations and civilian public defenders, the RSP found that some public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.[29] The RSP also found that federal public defenders have specific funding to pay for defense experts.[30] The RSP noted that federal discovery rules generally require civilian defense counsel to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel, who must request their witnesses from the convening authority, through trial counsel.[31] Civilian defense counsel also employ confidential consulting experts whose identities usually remain wholly unknown to the prosecution unless the defense elects to endorse the expert as a trial witness or otherwise injects their expertise into the litigation. This type of consulting expert is essential for defense counsel to receive a candid assessment of the evidence without fear that their investigation will develop inculpatory evidence that will be shared with and used by the government in prosecuting their client.

The Supreme Court of the United States has recognized a constitutional right to expert assistance for defendants with regard to both trial defense and sentencing defense, using the example of a mental health expert: "Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor."[32]

C. **Subcommittee Assessment and Recommendation.** Defense counsel in military organizations, like their civilian counterparts, should have separate sources of funding to employ defense experts, without having to request approval and thereby prematurely divulge their defense strategy to the government.

There is also a tension between what the defense attorney must be able to articulate to the convening authority about the expert's likely assistance and the lawyer's need to actually learn from the expert. In this regard, the relative inexperience of military defense counsel can be a particular problem: if they do not already have deep knowledge of the field, they cannot fully explain or clearly articulate why they need the expert or persuasively explain the potential prejudice to their client. Moreover, they should not have to disclose their thinking.

Recommendation 3: **The Subcommittee recommends that the Secretary of Defense direct the military Services to vest defense expert funding and approval authority in the Service defense organizations.**

28 *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). The court went on to state, "The absence of such parity opens the military justice system to abuse, because the Government in general, and—as this case demonstrates—the trial counsel in particular, may play key roles in securing defense experts." The appellant's brief in this case analogizes this arrangement to "permitting a Major League baseball manager to choose the opposing pitcher in the final game of the World Series."

29 *Supra note 2* at 163.

30 *Id.*

31 *Id.*

32 *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985).

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

III. DEFENSE COUNSEL STAFFING AND EXPERIENCE LEVELS

A. **Site Visit Information.** The Subcommittee received information from defense counsel that the training they receive is generally adequate. However, there is disparity not only in the experience levels required among the Services but also between Service-level requirements and the actual experience of defense counsel in the field. While the Navy and Air Force require prior litigation experience of attorneys being assigned to defense counsel positions, in the Army and Marine Corps first-tour judge advocates with no experience in military justice or in the civilian criminal justice system are allowed to serve as defense counsel. Though participants acknowledged that such placements are not common, the few who had them found the experience overwhelming and discomforting. Several junior counsel recounted that in the first or second contested trial of their careers, they served as second chair in a rape case; one counsel then served as lead counsel in his third trial, also involving sexual assault charges. All of these counsel recommended against assigning brand-new attorneys to defense counsel positions. The likelihood that junior counsel will represent clients in serious and complex cases early in their careers is high, because—as participants uniformly reported—sexual assault cases make up most of their caseload. Defense counsel at multiple installations related that the recent addition of HQEs to trial defense services organizations has been very helpful in mitigating the experience gap, but noted that it is unclear whether the funding for these civilian career litigators will continue. In addition, HQEs hold term positions, not permanent ones.

B. **Other Sources of Information.** The RSP reviewed experience levels of defense counsel as part of its June 2014 report to Congress. The following table from that report[33] summarizes experience and training requirements for defense counsel in each of the Services.

RSP Report Chart on Service Standards for Defense Counsel Experience and Training

Organization	Experience	Training
U.S. Army Defense Counsel	• Majority of defense counsel have prior courtroom experience. No specific minimum experience required. • Experience sitting "second chair" until supervisor deems fit to try cases as first chair.	• Graduate of the Judge Advocate Officer Basic Course. • Defense Counsel "101." • Advanced Trial Advocacy Courses.
U.S. Air Force Defense Counsel	• The Air Force is unique in that defense counsel are selected in a very competitive, best-qualified standard by the Air Force Judge Advocate General. • Most defense counsel arrive with 2 to 5 years of experience working in a base legal office, which includes time as a trial counsel in courts-martial. • New defense counsel normally have between 8 and 10 courts-martial trials before starting as a defense counsel.	• Specialized courses provided by the Air Force Judge Advocate General's School. • On-the-job training. • Group training remains a challenge because of geographic diversity of counsel and length of tours. • Out of the 19 Senior Defense Counsel regions, only 3 (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.

33 *Supra note 2* at 159–60 (slightly modified).

Organization	Experience	Training
U.S. Navy Defense Counsel	• Following their first 24-month tour handling administrative separations and other non-judicial issues, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.[34] • Military Justice Litigation Career Track officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.	• Once selected, counsel receive additional training, including a basic trial advocacy course focusing on courtroom advocacy. • Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts on forensics and psychology and very experienced civilian defense counsel.
U.S. Marine Corps Defense Counsel	• The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than 3 years of experience as an attorney. • They typically serve 18 months as defense counsel before moving to another assignment. • The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.	• Defense counsel training requirements are set forth in Marine Corps policy. Defense counsel have a basic certification under Article 27(b), the basic lawyer course at the Naval Justice School. And then, at some point, maybe not before they start their official job, but at some point early in their tour, we try to send them to our new defense counsel orientation class which is sponsored by the Naval Justice School.[35]
U.S. Coast Guard Defense Counsel	• By memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of Uniform Code of Military Justice (UCMJ) crimes. • In return, four Coast Guard judge advocates are detailed to work at various Navy DSOs on 2-year rotations, which provides another significant source of trial experience to Coast Guard judge advocates.	• Coast Guard Defense Counsel attend Navy defense training.

Noting the disparities between the Services regarding defense counsel experience and tour lengths, the RSP made the following recommendation:

> **RSP Recommendation 86:** The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as lead defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a

34 *Transcript of JPP Public Meeting* 205–06 (May 13, 2016) (testimony of CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program, that all senior defense counsel and many other defense counsel in the Navy are qualified in military justice litigation).

35 *See also Transcript of JPP Public Meeting* 186–87 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

> lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel.[36]

According to presentations by the Service trial defense chiefs during the JPP's May 2016 public meeting, little has changed in defense counsel experience levels since the RSP Report was issued in June 2014.[37]

In the Army, about 20% of attorneys assigned to a defense counsel position have no prior experience.[38] While every attempt is made to avoid assigning a brand-new defense counsel to a sexual assault case, the realities of Trial Defense Services (TDS) staffing sometimes force the assignment of inexperienced attorneys to these cases, though they are able to consult with more senior defense counsel.[39] Underscoring the point, a witness testifying before the JPP in May noted that the accused's counsel in a given sexual assault case may have less trial experience than the victim's counsel.[40]

In the Marine Corps, the "vast majority" of defense counsel are serving in their first tour and are often brand-new attorneys right out of law school.[41] Compounding the problem, Marine Corps attorneys serve as defense counsel for only 12 to 14 months before moving to another position.[42] Marine Corps Defense Services attempts to make up for this lack of experience through training (having new defense counsel sit as second chair in several courts-martial before serving as lead defense counsel) and through supervision by more experienced defense counsel.[43]

C. **National Defense Authorization Act for Fiscal Year 2017.** There is currently a provision in the National Defense Authorization Act for Fiscal Year 2017 (FY 17 NDAA), pending presidential signature, which would require the Services to ensure that trial and defense counsel detailed to a court-martial "have sufficient experience and knowledge to effectively prosecute or defend the case" and

36 RSP Report 39, 160–61.

37 *Transcript of JPP Public Meeting* 163–248 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services; Col Daniel Higgins, U.S. Air Force, Chief, Trial Defense Division; Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch; and CDR Stephen Reyes, JAGC, U.S. Navy, Director, Defense Counsel Assistance Program).

38 *Transcript of JPP Public Meeting* 165 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

39 *Transcript of JPP Public Meeting* 165–66 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services) ("[I]deally, you would not want to assign counsel to a sexual assault or any complex case until they've completed at least our DC 101 training . . . and served as a lead counsel on one or more less complex cases or at least a second chair on a more complex case. However, the realities of TDS manning and caseload often weigh against such a deliberative developmental process. In those instances where, out of necessity, defense counsel with less than ideal training and experience are assigned to defend sexual assault cases [they receive] guidance and input of their supervisor, the senior defense counsel.").

40 *Transcript of JPP Public Meeting* 216 (May 13, 2016) (testimony of COL Daniel Brookhart, U.S. Army, Chief, Trial Defense Services).

41 *Transcript of JPP Public Meeting* 185 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

42 *Transcript of JPP Public Meeting* 189 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

43 *Transcript of JPP Public Meeting* 186–88 (May 13, 2016) (testimony of Col Terri Zimmerman, U.S. Marine Corps, Reserve Counterpart to the Chief Defense Counsel, Defense Services Branch).

require the Services to have a professional development process to ensure effective prosecution and defense in all courts-martial.[44] Under this provision, the Services must use a system of skill identifiers or experience designators for "identifying judge advocates with skill and experience in military justice proceedings" to provide oversight of less experienced counsel.[45] The Services would also be required to carry out a five-year pilot program to "assess the feasibility and advisability of establishing a deliberate professional developmental process for judge advocates . . . that leads to judge advocates with military justice expertise serving as military justice practitioners capable of prosecuting and defending complex cases in military courts-martial."[46]

D. **Subcommittee Assessment and Recommendation.** Most sexual assault cases that go to trial are fully litigated, complicated, difficult cases, and they often involve Military Rule of Evidence (MRE) 412 or MRE 513 motions.[47] Since these cases are less likely than others to be plea-bargained, lawyers have a critical need to draw on trial court advocacy skills; and junior lawyers often have not yet had an opportunity to develop these skills in less serious cases. As reported by several defense counsel during Subcommittee site visits, sometimes defense counsel with little trial experience are called on to defend a Service member accused of serious sexual assault crimes.

If convicted of a sexual assault offense, the accused faces a sentence that could include a punitive discharge and months or years of confinement as well as lifetime collateral sanctions related to the sex offense registry and evolving state, local, and international policies.[48] The consequences for the accused of having inexperienced defense counsel could be catastrophic and life changing.

44 S. 2943, National Defense Authorization Act for Fiscal Year 2017, Report 114-840 (Conf. Rep.) §542, Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.

45 *Id.*

46 *Id.*

47 MCM, Military Rules of Evidence [hereinafter MRE] 412 (updated June 2016) is titled "Sex offense cases: The victim's sexual behavior or predisposition" and is the military's so-called rape shield law. MRE 513 is the psychotherapist-patient privilege rule.

48 *See generally,* ABA National Inventory of Collateral Consequences of Conviction, *available at* http://www.abacollateralconsequences.org/agreement/?from=/map/; in February 2016, President Obama signed "International Megan's Law" mandating a new passport mark and control process for individuals convicted of sex crimes. Numerous foreign countries, including Mexico and the Philippines, have already begun denying entry to U.S. citizens who have been convicted of sex crimes. The maximum punishments for sexual assault offenses specified in UCMJ, Appendix 12, are as follows:

Rape	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Sexual Assault	Dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances
Forcible Sodomy (Article 125, MCM)	Dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances
Aggravated Sexual Contact	Dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances
Abusive Sexual Contact	Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances

REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES

Recommendation 4: The Subcommittee recommends that the military Services permit only a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military Services should develop a formal process, using objective and subjective criteria, to determine when a defense counsel is qualified to serve as a lead defense counsel in a sexual assault case. In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

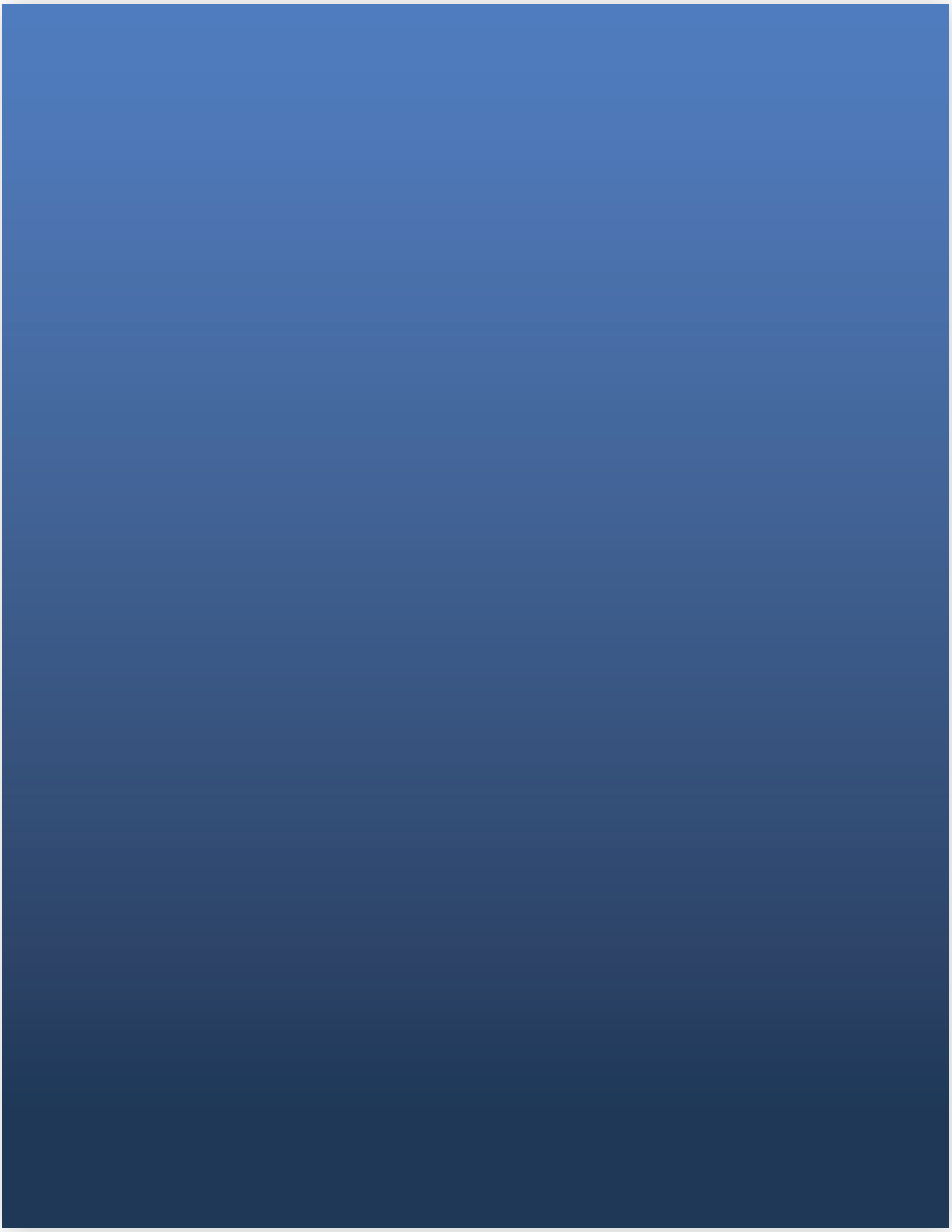
IV. CONCLUSION

There have been numerous changes to law and policy in the arena of military sexual assault litigation in recent years that have serious implications for the quality of defense afforded to those accused of sexual assault. These include the introduction of special victims' counsel/victims' legal counsel for sexual assault victims, development of a Special Victim Investigation and Prosecution capability, and introduction of a less robust Article 32, UCMJ, process that no longer serves as a discovery vehicle for defense counsel. Many of these changes were instituted with the worthy goal of benefiting victims of sexual assault, but it is important that the military justice system continue to respect the rights of the accused. In order to maintain balance in the military justice system, (1) Service defense organizations must be adequately funded and staffed, as is reportedly not the case in all of the Services; (2) defense counsel must have access to an independent funding source for expert witnesses and consultants; and (3) those serving as defense counsel in sexual assault cases must be experienced attorneys.

ENCLOSURE Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	**Naval Station Norfolk, VA**[49] **Joint Base Langley-Eustis, VA**	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	**Fort Carson, CO** Peterson Air Force Base, CO Schriever Air Force Base, CO **U.S. Air Force Academy, CO**	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	**Fort Bragg, NC** **Camp Lejeune, NC**	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	**Naval Station San Diego, CA** Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA **Camp Pendleton, CA**	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA **Joint Base Andrews, MD** **U.S. Naval Academy, MD** Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea **Camp Humphreys, South Korea** Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea **Camp Butler, Japan** Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

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



APPENDIX E: Judicial Proceedings Panel Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS PANEL STAFF

Captain Tammy P. Tideswell,
Judge Advocate General's Corps,
U.S. Navy, Staff Director

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Lieutenant Colonel Jacqueline M. Stingl,
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U.S. Department of Defense,
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Mr. Dwight Sullivan,
Senior Associate Deputy General Counsel
(Military Justice and Personnel Policy),
U.S. Department of Defense,
Alternate Designated Federal Official

APPENDIX F: Acronyms and Abbreviations

FY	fiscal year
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
JSC	Joint Service Committee on Military Justice
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
NDAA	National Defense Authorization Act
R.C.M.	Rules for Courts-Martial
RFI	request for information
RSP	Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel)
SecDef	Secretary of Defense
SVC	special victims' counsel
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
VLC	victims' legal counsel

APPENDIX G: Sources Consulted

1. LEGISLATIVE SOURCES

Enacted Statutes

10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

2. JUDICIAL DECISIONS

U.S. Court of Appeals for the Armed Forces

United States v. Warner, 62 M.J. 114 (2005)

3. RULES AND REGULATIONS

Executive Orders

Manual for Courts-Martial, United States (2016), *available at* http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957

4. MEETINGS

Public Meetings of the Judicial Proceedings Panel

Transcript of JPP Public Meeting (May 13, 2016), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20160513_Transcript_Final.pdf

Transcript of JPP Public Meeting (December 9, 2016), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20161209_Transcript_Final.pdf

Transcript of JPP Public Meeting (January 6, 2017), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20170106_Transcript_Final.pdf

Transcript of JPP Public Meeting (February 24, 2017), *available at* http://jpp.whs.mil/Public/docs/05-Transcripts/20170224_Transcript_Final.pdf

5. OFFICIAL REPORTS

a. Report of the Response Systems to Adult Sexual Assault Crimes Panel

Report of the Response Systems to Adult Sexual Assault Crimes Panel (June 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf

b. Reports of the Subcommittee of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel

Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases (December 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf

Subcommittee of the Judicial Proceedings Panel Report on Sexual Assault Investigations in the Military (February 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf

6. RESPONSES TO JUDICIAL PROCEEDINGS PANEL REQUESTS FOR INFORMATION

Army's Response to Request for Information 160 (January 4, 2017)

Navy's Response to Request for Information 160 (December 29, 2016)

Marine Corps' Response to Request for Information 160 (January 3, 2017)

Air Force's Response to Request for Information 160 (December 30, 2016)

Coast Guard's Response to Request for Information 160 (January 3, 2017)

7. MEMORANDA

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 (December 15, 2014)