

JUDICIAL PROCEEDINGS PANEL

REPORT ON
STATISTICAL DATA REGARDING
MILITARY ADJUDICATION OF
SEXUAL ASSAULT OFFENSES



April 2016

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*Report of the Judicial Proceedings
Since Fiscal Year 2012 Amendments Panel*

**Statistical Data Regarding Military
Adjudication of Sexual Assault Offenses**

April 2016



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The Honorable John McCain
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Washington, DC 20510

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United States Senate
Washington, DC 20510

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Washington, DC 20515

The Honorable Adam Smith
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United States House of
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Washington, DC 20515

The Honorable Ashton B. Carter
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

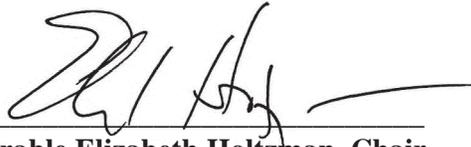
Dear Chairs, Ranking Members, and Mr. Secretary:

The National Defense Authorization Act for Fiscal Year 2013 requires the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) “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 2012, when Article 120 was amended, “for the purpose of developing recommendations for improvements to such proceedings.” We are pleased to submit this report of the JPP in connection with that requirement. This report provides and describes statistical data regarding the military’s adjudication of sexual assault offenses. It also contains two recommendations addressing the collection and analysis of adjudication information for sexual assault cases.

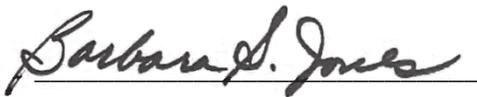
To gather information for this report, the JPP researched publicly available information and reviewed information from the Department of Defense, the military Services, and victim advocacy organizations. The JPP obtained and analyzed adjudication information for fiscal years 2012 through 2014 from courts-martial documents, the Department of Defense’s annual reports to Congress, and appellate opinions issued by the Service Criminal Courts of Appeal and Court of Appeal for the Armed Forces. The JPP also held public meetings to hear from civilian and military experts and practitioners. The JPP expresses sincere appreciation to 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,



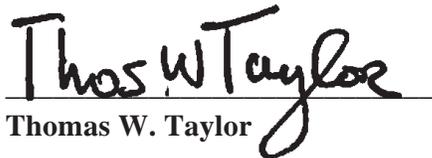
Honorable Elizabeth Holtzman, Chair



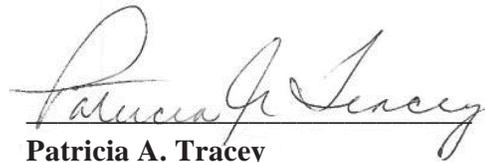
Honorable Barbara S. Jones



Victor Stone



Thomas W. Taylor



Patricia A. Tracey

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Executive Summary

REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES

Congress tasked the Judicial Proceedings Panel (JPP or the Panel) with reviewing trends in the adjudication of adult sexual assault crimes in the military. In the Fiscal Year 2014 National Defense Authorization Act, Congress specifically directed the JPP to do the following:

- (1) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, nonjudicial 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;
- (2) 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 in Federal and state criminal courts; and
- (3) 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 on appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

To complete its assessment, the JPP heard from civilian and military experts; reviewed information received from the Department of Defense (DoD), the military Services, the Department of Justice Bureau of Justice Statistics, and the United States Sentencing Commission; and reviewed publicly available information.

To conduct its analysis, the JPP sought information from court records, case documents, and other publicly available resources. Members of the JPP staff reviewed court-martial documents from the military Services for sexual assault cases that were resolved in fiscal years 2012 through 2014. Information from 1,761 court-martial cases was entered into a JPP-developed database, and the JPP coordinated with a distinguished criminologist, Dr. Cassia Spohn, to analyze the data and provide descriptive statistics concerning court-martial case characteristics, case dispositions, and case outcomes. Dr. Spohn's complete report can be found at Appendix A. To examine information about nonjudicial punishment and administrative actions, which are included in the private personnel records of individual Service members, the JPP staff reviewed information from the case synopses included in DoD's annual reports to Congress. To review appellate relief in military sexual assault cases, the JPP consulted the Service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces, and reviewed publicly available information on the respective courts' websites. The fiscal year 2012 to 2014 appellate data largely cover courts-martial tried under the 2007 Article 120, Uniform Code of Military Justice (UCMJ), and earlier statute(s). The proportion of appellate data covering offenses adjudicated under the 2012 statute will likely increase in future JPP reports.

The JPP analyzed the procedural outcomes of sexual assault adjudications from fiscal years 2012 through 2014, which may provide baseline information for trend analysis when case data in future fiscal years are scrutinized. Statistical data obtained by the JPP effectively describe certain objective aspects of military cases in the aggregate, including the number of annual prosecutions, the procedural history of cases, and the punishments imposed. However, individual case outcomes are the result of unique combinations of facts and evidence, and the appropriateness or consistency of disposition decisions or punishments cannot be evaluated solely by considering procedural data. For these reasons, the JPP provides the information gathered without offering specific recommendations.

Congress tasked the JPP to compare punishments rendered in military courts with the same in federal and state courts. No comprehensive, national data exist on sexual assault adjudications, but the JPP reviewed statistical analysis from the U.S. Sentencing Commission and publicly available state court sentencing data. Limited national data and systemic differences between the military criminal justice system and other civilian systems make comparisons inappropriate, and the JPP provides the information gathered without offering specific recommendations.

Though doing so was not a specific statutory task, the JPP considered shortcomings in the data produced and reported annually by the Services and DoD, as those issues affected the JPP's ability to gather data required to make its assessments. DoD maintains a comprehensive electronic database, called the Defense Sexual Assault Incident Database (DSAID), for recording information concerning unrestricted and restricted reports of sexual assault covered by DoD's sexual assault prevention and response policy. DoD uses DSAID to aid it in providing victim services and in compiling reports about the DoD's sexual assault prevention and response efforts. Limited data regarding the legal resolution of each reported incident are recorded in DSAID using information from the military Services' separate court-martial case management systems, but DSAID does not include sufficient detail about judicial proceedings to address the JPP's statutory tasks.

The Department of Defense should collect and analyze case adjudication data using a standardized, document-based collection model similar to systems developed by the Judicial Proceedings Panel or U.S. Sentencing Commission. Information collected from legal documents regarding dispositions, charges, outcomes, and punishments imposed in adult sexual assault cases could improve Service-level analysis and could be incorporated into DoD's reports to Congress. Because procedural data do not provide all relevant information about a case, they must be supplemented by potentially relevant case facts and evidentiary issues.

Finally, the JPP notes, as did the Response Systems Panel before it, that adjudication information for adult-victim sexual assault cases involving spouses, intimate partners, and family members of military members is not collected by the DoD Sexual Assault Prevention and Response Office. DoD policy places this category of cases within the purview of the DoD Family Advocacy Program, which provides victim services but does not monitor legal proceedings or collect case adjudication information. Therefore, judicial and disciplinary proceedings for an entire category of cases are not included in DoD's case management system or in its annual reports to Congress. The JPP recommends that DoD include these cases in the overall number of unrestricted sexual assault cases reported annually by DoD.

Recommendations on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses*

Recommendation 37: The Department of Defense collect and analyze case adjudication data using a standardized, document-based collection model, similar to systems used by the Judicial Proceedings Panel or U.S. Sentencing Commission, that incorporates uniform definitions and categories across all of the military Services.

- DoD does not collect sufficient adjudication data to fully assess how adult sexual assault cases are resolved through the military justice system.
- Other than case information entered by Service legal officers into DoD’s database, DoD does not centrally collect and manage information about military justice processing in sexual assault cases. The military Services, however, have Service-specific systems, tailored to a decentralized, command-driven military justice system, to collect and manage information for cases that occur in their Service.
- The JPP developed an electronic database, modeled on the database used by the U.S. Sentencing Commission, for collecting and analyzing information from court-martial case documents. This system was used to accumulate procedural information from court-martial documents for the data analysis in this report.
- Collecting standard information from court-martial documents regarding dispositions, charges, outcomes, and punishments imposed in adult sexual assault cases could improve Service-level analysis and could be incorporated into DoD’s reports to Congress.
- Because the Judge Advocate General’s Corps administer military justice in each of the military Services, case adjudication data could be compiled and analyzed by the Services in a manner compatible with DoD’s electronic database and congressional reporting requirements.
- At a minimum, analysis of how adult sexual assault cases are resolved through the military justice system would be improved by the collection of the following case information:
 - all sexual assault charges that were preferred and the outcome of each charge, including whether the charge was referred to court-martial, dismissed, or resolved by alternate means;
 - type of court-martial held;

* 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.

- pleas of the accused;
 - trial forum;
 - findings;
 - sentence; and
 - convening authority action on the findings and sentence.
- Because procedural data do not provide complete information about a case, they must be supplemented by potentially relevant case facts and evidentiary issues. Such information may include characteristics of the victim, the relationship between the accused and victim, whether the victim made a prompt report, whether the victim was willing to cooperate, whether the victim engaged in any risk-taking behavior around the time of the incident, and the presence of eyewitnesses or physical evidence.

Recommendation 38: The Department of Defense include legal disposition information related to all adult sexual assault complaints in one annual DoD report, changing its policy that excludes adult-victim cases that are handled by the Family Advocacy Program from Sexual Assault Prevention and Response Office reports.

- DoD SAPRO annually provides Congress with a description of the resolution of each unrestricted report of sexual assault covered by DoD's sexual assault prevention and response policy; however, that policy precludes reporting on adult sexual assault cases involving victims who are Service members' spouses, intimate partners, or family members over the age of consent under the UCMJ (16 years of age), for whom the DoD Family Advocacy Program (FAP) provides victim advocacy services.
- FAP does not collect or report case adjudication data for the sexual assault reports it receives, even when FAP provides victim advocacy services through completion of a court-martial for a sexual assault crime. Because these cases are excluded from DoD's reports on the legal resolution of sexual assault cases, it is not possible to accurately determine how many sexual assault cases are handled through the military justice system.
- Requiring sexual assault case disposition and adjudication data from FAP to be reported by DoD in its annual report to Congress would ensure a complete accounting of all adult sexual assault cases involving a military member.
- The Response Systems to Adult Sexual Assault Crimes Panel, in its June 2014 report to the Secretary of Defense, examined this issue and similarly recommended it be corrected.

I. Introduction

A. CONGRESSIONAL TASKS

In the fiscal year 2013 National Defense Authorization Act, Congress directed the Judicial Proceedings Panel (JPP, or the Panel) “to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice (UCMJ) involving adult sexual assault and related offenses” since 2012, when Article 120 was amended, “for the purpose of developing recommendations for improvements to such proceedings.” As part of this review and assessment, Congress tasked the JPP to examine how the military Services adjudicate sex offenses under the UCMJ and to compare punishments rendered in military courts with those in federal and state courts. Specifically, Congress tasked the JPP to:

- Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, nonjudicial punishments, or 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.
- 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.
- 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 when the defendant appealed following a plea agreement, if such information is available.

These issues were discussed at seven JPP public meetings from August 2015 to April 2016. The Panel heard testimony from 16 witnesses at these meetings and received information from JPP staff members on statistical data gathered in response to the congressional tasks. The JPP also requested and analyzed information from the DoD, the military Services and non-DoD governmental agencies. In addition, the JPP reviewed publicly available information and conducted legal research and analysis of relevant topics, in accordance with the Federal Advisory Committee Act of 1972. The information received and considered by the JPP is available on its website (<http://jpp.whs.mil>). The JPP is grateful to all presenters and to others who provided information and assistance as part of this review and assessment.

B. THE MILITARY JUSTICE SYSTEM

Evaluating trends in the military’s judicial response to sexual assault crimes requires a basic understanding of the military justice system and its similarities to and differences from civilian court systems.

The military justice system is designed to hold offenders accountable for criminal acts, “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of

the United States.”¹ All Service members (including National Guard in federal service and Reserve Component members on inactive-duty training) are subject to the UCMJ, which sets forth both substantive military criminal law and procedures for disposing of criminal offenses.

Historically, the military commander has been at the center of the military justice system. In order to achieve good order and discipline, commanders have different military justice tools at their disposal, and they respond to misconduct with the advice and counsel of judge advocates. A salient difference between military and civilian judicial systems is the range of options available to each. Civilian prosecutors are often limited either to taking no action on a case or pursuing a conviction at trial; in contrast, if a military convening authority determines that court-martial is not the appropriate disposition in a case, he or she has other ways to address the misconduct, such as nonjudicial punishment, administrative discharge, or other adverse administrative action.²

Determinations regarding the appropriate disposition for an offense under the UCMJ may change in response to each case’s circumstances and evidence. A case that is initially considered appropriate for low-level disciplinary action may later be elevated to court-martial; conversely, a criminal charge preferred with a view toward court-martial may instead be resolved by alternate (i.e., nonjudicial or administrative) means.

The military justice system and its components are explained and discussed more thoroughly in Sections III through VI of this report, and a more detailed comparison between the military justice system and civilian criminal courts is provided in Section VII.

1 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Preamble ¶ 3 [hereinafter MCM].

2 MCM, *supra* note 1, Rule for Courts-Martial [hereinafter R.C.M.] 306(c) (Updated Rules for Courts-Martial, June 2015, are available at <http://jsc.defense.gov/Portals/99/Documents/RCMsJun15.pdf>); National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66 [hereinafter FY14 NDAA], § 1705, 127 Stat. 672 (2013), limits court-martial jurisdiction over the offenses of rape, sexual assault, forcible sodomy, and attempts to commit these offenses to trial by general court-martial.



Obtaining Information Regarding Adjudication of Sexual Assault Offenses

A. SOURCES OF MILITARY JUSTICE INFORMATION FOR SEXUAL ASSAULT CASES

1. DoD and Service Case Information Collection and Management

Section 563 of the FY09 National Defense Authorization Act (NDAA) required the Secretary of Defense to “implement a centralized, case-level database for the collection . . . and maintenance of information regarding sexual assaults involving a member of the Armed Forces, including information, if available, about the nature of the assault, the victim, the offender, and the outcome of any legal proceedings in connection with the assault.”³ The Department of Defense was required by January 14, 2010, to implement the database, which was to “be used to develop and implement congressional reports.”⁴

To meet this requirement, DoD developed the Defense Sexual Assault Incident Database (DSAID).⁵ DSAID contains data for each unrestricted and restricted report of sexual assault covered by DoD’s sexual assault prevention and response policy. DSAID therefore includes information about sexual assault reports involving Service members and adult dependents, but it does not contain data on sexual assault cases involving victims who are Service members’ spouses, intimate partners, or adult family members.⁶

DSAID is administered by the DoD Sexual Assault Prevention and Response Office, in coordination with sexual assault response coordinators and Sexual Assault Prevention and Response (SAPR) program managers from the military Services. DSAID has three primary functions: (1) to serve as a case management system for the maintenance of data on sexual assault cases and to track support for victims in each case, (2) to facilitate program administration and management for SAPR programs, and (3) to develop congressional reports, respond to ad hoc queries, and assist in trend analysis. Information about a sexual assault case’s legal disposition and outcome that is required for congressional reporting is entered into DSAID by legal officers from the military Services.⁷

The intimate partner sexual assault cases that fall outside SAPR’s data collection policy are the responsibility of the DoD Family Advocacy Program (FAP).⁸ FAP provides important social work

3 National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417 [hereinafter FY09 NDAA] § 563.

4 FY09 NDAA § 563(d).

5 *See Transcript of JPP Public Meeting 106* (Oct. 9, 2015) (testimony of Ms. Darlene Sullivan, DSAID Program Manager, DoD SAPRO) (explaining that Service SAPR officials began using DSAID in fiscal year 2012). All transcripts of JPP public meetings are available on the JPP’s website at <http://jpp.whs.mil/>.

6 *Transcript of JPP Public Meeting 166* (Oct. 9, 2015) (testimony of Ms. Darlene Sullivan). Individuals 16 years of age and older are considered adult sexual assault victims pursuant to 10 U.S.C. § 920b(d) (art. 120b, Rape and Sexual Assault of a Child).

7 *Transcript of JPP Public Meeting 108* (Oct. 9, 2015) (testimony of Ms. Darlene Sullivan).

8 U.S. DEP’T OF DEF. INSTR. [hereinafter DoDI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES ¶2.b (Mar. 28, 2013) (Incorporating Change 2, Effective July 7, 2015); Intimate Partner is defined as “a person with whom the victim shares a child in common, or a person with whom the victim shares or has shared a common domicile.” DEP’T OF DEF. MANUAL 6400.1-M-1, DoD MANUAL FOR CHILD MALTREATMENT AND DOMESTIC ABUSE INCIDENT

services to military families and informs law enforcement of all unrestricted sexual assault allegations it receives against Service members.⁹ However, the FAP program does not collect case adjudication information, and FAP cases are not included in DSAID or reported by DoD in its annual or other reports.¹⁰ Thus the legal disposition of sexual assault allegations made by spouses or intimate partners and the number of such cases that are resolved through military judicial proceedings cannot be determined.¹¹

Other than the case information entered by Service legal officers into DSAID, DoD does not centrally collect and manage information about military justice processing in sexual assault cases. The military Services, however, have Service-specific systems, tailored to a decentralized, command-driven military justice system, to collect and manage such information for all cases that occur in their Service.

Judge advocates from each of the military Services explained that legal offices in the field use different systems for drafting routine documents, accounting for the number of military justice actions initiated in a given jurisdiction, and monitoring the progress of a court-martial.¹² Presenters and information provided by the Services highlighted the similar intents and different approaches among the Services:

- Most case management systems are used for all types of criminal cases, but the Army has added a program devoted to following sexual assault and intimate partner violence cases.¹³
- The Army also has an automated system, used by military judges and the Army’s appellate court to monitor all cases from arraignment through appellate review, that is able to “answer most questions that might arise about any court-martial.”¹⁴
- The Navy and Marine Corps plan to build on their shared military justice management system, in use since 2009, by linking their legal database with the Naval Criminal Investigative Service’s case information when they begin a sexual assault investigation.
- The Air Force has long employed a comprehensive, automated system to record the legal disposition of every criminal investigation involving an Air Force subject, including trial details such as court-martial participants and specific punishments rendered in each case.¹⁵

REPORTING SYSTEM [hereinafter DoD FAP MANUAL], C2.1.15.2.5 (Jul. 2005, Incorp. Change 1, Sept. 20, 2011).

- 9 *Transcript of JPP Public Meeting* 117 (Oct. 9, 2015) (testimony of Ms. Katherine Robertson, Family Advocacy Program Manager, DoD Office of Family Readiness Policy).
- 10 This was noted by the Response Systems Panel in its report and was the subject of RSP’s recommendation 66. REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 33 (June 2014) [hereinafter RSP REPORT], available at http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.
- 11 *Transcript of JPP Public Meeting* 118 (Oct. 9, 2015) (testimony of Ms. Katherine Robertson).
- 12 *Transcript of JPP Public Meeting* 125–49 (Oct. 9, 2015) (testimony of Col Walter Hudson, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General; Lt Col Julie Rutherford, U.S. Air Force, Air Staff Counsel, Air Force Sexual Assault Prevention and Response Office; Lt Col Angela Wissman, U.S. Marine Corps, Judge Advocate Division; Mr. Stephen McCleary, U.S. Coast Guard, Senior Military Justice Counsel and Chief Prosecutor; LCDR Stuart Kirkby, U.S. Navy, Staff Attorney, Navy Marine Corps Appellate Review Activity).
- 13 Army’s Response to JPP Request for Information 89a (Sept. 11, 2015). (“Special Victim Prosecutors (SVP) use an internal application on the JAG Corps website, JAGCNET (www.jagcnet.army.mil) to track pending special victim investigations and adverse actions within their jurisdictions. This assists the Chief of the Trial Counsel Assistance Program (TCAP) with managing the workload of SVPs in the field, among many other uses.”).
- 14 *Id.*
- 15 *Transcript of JPP Public Meeting* 131–35 (Oct. 9, 2015) (testimony of Lt Col Julie Rutherford, U.S. Air Force, Air Staff

- The Coast Guard requires prosecutors to record the progress of all courts-martial in a single database that follows the case through appellate review.
- In all of the military Services, the attorneys and paralegals assigned to a case are primarily responsible for entering and updating the information in each system contemporaneously with the action being recorded.¹⁶
- Presenters before the JPP testified that commanders and Judge Advocate General's (JAG) Corps leaders periodically query these systems for aggregate figures on sexual assault cases.¹⁷
- None of the military Services has the infrastructure necessary to centrally manage, store, or retrieve court-martial documents.¹⁸

Because DSAID and DoD SAPRO Reports exclude spouse and intimate partner sexual assaults that are the responsibility of FAP, DoD's annual reports do not fully account for all sexual assault cases in the military. DSAID should include sexual assault case adjudication and disposition data for cases involving adult victims seen through the FAP, and this information should be included in DoD's annual report to Congress.

2. DoD and Military Service Reporting on Judicial Proceedings for Sexual Assault Cases

At the close of each fiscal year, the military Services publish general military justice statistics in two public reports on criminal case management in the military: the annual report to the American Bar Association and the report of the United States Court of Appeals for the Armed Forces, which is provided to the U.S. Congress, Department of Defense, Department of Homeland Security, and the Service Secretaries. These reports generally describe how many courts-martial, appeals, and disciplinary actions the Service JAG Corps administer each fiscal year. However, they provide relatively little data specific to the adjudication of sexual assault crimes.

The DoD SAPR Office's Annual Report to Congress (SAPRO Report) provides the most comprehensive data on the adjudication of sexual assault crimes in the military.¹⁹ The SAPRO Report aggregates annual information concerning crime incidence, sexual assault response coordinator (SARC) caseloads,

Counsel, Air Force Sexual Assault Prevention and Response Office).

- 16 *Transcript of JPP Public Meeting* 129–30 (Oct. 9, 2015) (testimony of Col Walter Hudson, U.S. Army, Criminal Law Division). The Army Courts-Martial Information System (ACMIS) is not used by prosecutors; instead, military judges and appellate court judges and staff are responsible for entering court-martial data into the system. *See Army's Response to JPP Request for Information 89(a)* (Sept. 11, 2015).
- 17 *Transcript of JPP Public Meeting* 125–49 (Oct. 9, 2015) (testimony of Col Walter Hudson, U.S. Army; Lt Col Julie Rutherford, U.S. Air Force; Lt Col Angela Wissman, U.S. Marine Corps; Mr. Stephen McCleary, U.S. Coast Guard; and LCDR Stuart Kirkby, U.S. Navy). *See Services' Responses to Request for Information 89* (Sept. 11, 2015).
- 18 *See generally Services' Responses to JPP Request for Information 89(c)* (Sept. 11, 2015).
- 19 DoD SAPRO, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 [hereinafter FY12 SAPRO Report] (May 3, 2013), *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf; DoD SAPRO, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013 [hereinafter FY13 SAPRO Report] (Apr. 15, 2014), *available at* http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf; DoD SAPRO, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014 [hereinafter FY14 SAPRO Report] (Apr. 29, 2015), *available at* http://sapr.mil/public/docs/reports/FY14_Annual/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf. The U.S. Coast Guard, one of the military Services, is situated within the Dept. of Homeland Security and is not part of DoD. Thus the Coast Guard's sexual assault statistics are not included in DoD SAPRO Reports.

the military's investigative response to criminal allegations, and disciplinary actions taken against Service members accused of sexual assault offenses.²⁰

Each annual SAPRO Report includes case synopsis charts that provide limited information regarding case disposition and adjudication for every unrestricted report of sexual assault made in that year. Prior to fiscal year 2014, these case synopses in SAPRO Reports were developed and aggregated manually by Service representatives using data and information from their Service's case management systems.²¹ In January 2014, a case synopsis feature was added to DSAID, and legal officers at Service headquarters began entering that information about each case into the program. The annual report for fiscal year 2014 was the first SAPRO Report to include case synopses based on case information in DSAID.²²

SAPRO Report information regarding case disposition and adjudication is limited, and it is not especially useful for assessing how sexual assault crimes are resolved through the military judicial system. Among the many important case characteristics not included in the SAPRO Report and case synopses are the following:

- The SAPRO Report lists only the most serious offense charged and the most serious offense convicted for each case. It does not provide information about every sexual assault offense that was preferred or tried. It does not provide information about all offenses for which an accused was convicted that resulted in the sentence that was imposed.
- The SAPRO Report lists only the type of sentence in each case (i.e., whether confinement or some other punishment was imposed), and it does not indicate whether the sentence was the adjudged or approved sentence. Distinguishing between the sentence adjudged at trial by the military judge or court-martial panel and the sentence approved after the trial by the convening authority is important in assessing the clemency process.
- Case synopses do not consistently indicate the type of court-martial involved, a factor that affects how the case was processed and the maximum allowable sentence.
- Case synopses do not consistently indicate if a case involved a guilty plea or if the case was decided by a military judge or panel.
- Case synopses do not consistently indicate if a case involved a pretrial agreement, nor does it specify any terms of an agreement.

In sum, annual reports published by DoD and the Services do not provide sufficient information or detail to assess how sexual assault crimes are resolved in the military justice system.

B. OBTAINING CASE INFORMATION

DoD case management systems were not designed specifically to address the JPP's statutory tasks. To conduct the analysis necessary to fulfill the tasks assigned by Congress, more complete case information regarding the military's judicial processing of sexual assault prosecutions was required.

20 As explained above, DoD SAPRO's statistics do not routinely capture reports made by spouses or intimate partners of Service Members who are eligible for assistance under the Family Advocacy Program.

21 *Transcript of JPP Public Meeting 108* (Oct. 9, 2015) (testimony of Ms. Darlene Sullivan).

22 *Id.*

The JPP therefore had to seek information from individual court records and case documents that existing electronic management systems do not contain.²³

As one model, the JPP considered the work of the U.S. Sentencing Commission (hereinafter “Sentencing Commission”), which conducts large-scale case document data collection, entry, and analysis for federal criminal convictions. The Sentencing Commission, which is an independent agency of the judicial branch, is responsible for establishing sentencing policies and practices for the federal courts, advising Congress about the impact of federal criminal laws and policies, and collecting information on, analyzing, and researching a wide array of federal crime and sentencing issues.²⁴ A senior official of the Sentencing Commission explained to the JPP that:

[T]o facilitate the Commission’s work, Congress has required by statute that the courts provide to the Commission documents within 30 days of the entry of judgment in a case. Those documents are the indictment or other charging document, the plea agreement, if there is one, the pre-sentence investigation report, . . . the judge’s judgment and commit order and a written Statement of Reasons form, a document that’s unique in the federal system where judges are required to explain the sentences they impose.²⁵

From the court documents it receives in every case, the Sentencing Commission extracts information about sentences imposed on felony defendants. Statisticians record the data in a sophisticated database that is controlled, managed, and operated by the Sentencing Commission, and they perform the analysis necessary for the Commission’s work.²⁶

Case-based data collection enables the Sentencing Commission to accurately analyze federal criminal convictions and sentences. For the JPP to examine the adjudication of sexual assault crimes in the military, the Panel determined that a similar approach to obtain information directly from military justice case records was necessary.

Using information and individual case synopses provided in the SAPRO Reports for fiscal years 2012, 2013, and 2014, the JPP identified reports of sexual assault that were adjudicated through the military justice system or resolved by administrative disciplinary processes. The JPP then requested access to case documents from the military Services for all reported cases.²⁷ A summary of case documents and information requested and received by the JPP follows.

23 See *Transcript of JPP Public Meeting* 212 (Sept. 18, 2015) (testimony of Dr. Howard Snyder, Deputy Director, Bureau of Justice Statistics, U.S. Department of Justice) (“So, we talked about collecting data by hand, it’s great if you have the money. We talked about harvesting data, it’s great except when you harvest data, you have to extract what they have on their systems already and it may not be just what you need.”). See *Transcript of JPP Public Meeting* 262 (Sept. 18, 2015) (testimony of Mr. Glenn Schmitt, Director of the Office of Research and Data, U.S. Sentencing Commission) (“The issue is when you take data from a system that isn’t designed to be a statistical system, then there are miscodes and things that are missing, and people just make mistakes because they’re not using it for your purpose. They’re using for their other purpose—managing the flow of people in the office and whatever that might be. And so when you do that, then sometimes things are wrong or missing, and then that affects the reliability of your data.”).

24 *Transcript of JPP Public Meeting* 184–85 (Sept. 18, 2015) (testimony of Mr. Glenn Schmitt). See also information available at <http://www.ussc.gov/about>.

25 *Transcript of JPP Public Meeting* 186 (Sept. 18, 2015) (testimony of Mr. Glenn Schmitt).

26 *Transcript of JPP Public Meeting* 187 (Sept. 18, 2015) (testimony of Mr. Glenn Schmitt).

27 As explained previously, the SAPRO Reports do not include cases of sexual assault between spouses or intimate partners that are within the purview of FAP, and these cases are not individually reported or identified elsewhere. The JPP therefore could not review or assess the judicial resolution of FAP cases that were adjudicated through the military justice system or

1. Courts-Martial

The case synopses included in the annual SAPRO Reports indicate when a sexual assault charge was preferred against an accused.²⁸ For every case listed in the SAPRO Report, the JPP requested access to specified court documents in order to obtain information about the judicial processing and resolution of the case. In total, the JPP requested from the Services information about 2,353 cases that were reported in fiscal years 2012–14. The JPP received access to case documents in 2,175, or 92%, of the requested cases.²⁹ The JPP then screened case records provided by the Services to identify duplicate cases, cases with incomplete documentation, cases of sexual assault that did not involve an adult victim, cases that did not involve a sex offense, and cases whose reported year of case completion was not correct.

After screening, the JPP staff extracted information from court documents for 1,761 of the cases. Case information was entered into an electronic database that an independent criminologist, Dr. Cassia Spohn, Foundation Professor and Director, School of Criminology and Criminal Justice, Arizona State University, then analyzed. Dr. Spohn's complete statistical report concerning military sexual assault adjudication is provided at Appendix A.

2. Nonjudicial Punishment, Adverse Administrative Actions, and Administrative Discharges

Narratives included in the case synopses in the Services' Enclosures to the SAPRO Reports also indicate when sexual assault reports result in lower-level disciplinary actions, including nonjudicial punishment, adverse administrative actions, or administrative discharge. Disciplinary records from administrative proceedings against a Service member are included in the personnel file of the Service member, which are protected from disclosure by the Privacy Act. Such records are maintained in accordance with individual Service policies; the material in them varies depending on the type of disciplinary action taken, the Service affiliation, and the rank of the Service member.

Because of privacy restrictions and variations among the Services regarding the maintenance of administrative records, the JPP determined that the Services could not provide records of administrative actions for the JPP's review. Instead, the JPP used information from the case synopses and statistical data included in the SAPRO Reports, which indicate the general nature of the offense involved and the outcome of disciplinary or administrative actions in the case.

3. Appeal of Sexual Assault Convictions

Finally, in order to assess how sexual assault convictions are handled on appeal, the JPP collected and reviewed publicly available decisions from the Service Courts of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces. From the public records of the Service Courts of Criminal Appeals, the JPP identified opinions issued by the courts in fiscal years 2012–14 regarding adult sexual assault cases. Most often, appellate opinions are issued well after conviction at courts-martial. Therefore, the decisions obtained were for cases tried before 2012, and they do not correspond to the courts-martial cases reported in the 2012–14 SAPRO Reports.

other administrative disciplinary process.

28 See JPP Request for Information 65 and 66. JPP staff requested the same set of cases directly from the Coast Guard, because it is not within DoD and Coast Guard data are not included in the DoD annual report to Congress.

29 See Appendix B, Methodology, for an accounting of the 2,353 cases initially requested from the Services.

C. ANALYSIS AND USE OF ADJUDICATION DATA

A core goal of the tasks assigned to the JPP by Congress is to determine what reasonable assessments may, or should, be made based on an analysis of military justice data in military sexual assault prosecutions. Experts in civilian crime data collection and research described the value of empirical data in understanding criminal justice systems, and they also noted their limitations. One expert explained that as a starting point, “social science research offers a way of examining and understanding the operation of human social affairs; it provides points of view and technical procedures that uncover things that would otherwise escape our awareness.”³⁰

Empirical analysis of the criminal justice system has been used in the civilian community to allocate police resources to areas with higher crime rates, to develop risk assessment tools for pretrial hearings, and to support the predictive analysis necessary to determine parole release guidelines.³¹ Mr. Glenn Schmitt, Director of the Office of Research and Data, U.S. Sentencing Commission, spoke to the JPP about using criminal justice data to form policy:

Commission data is regarded as one of the most complete and accurate data sets in social science research and there are several reasons why this is. First, our data is a universe and not a sample. Because the courts are required to provide us the source materials we use, our data sets reflect the universe of federal sentencing. *As a result, we know that our data represents the true sentencing practices of the courts and our analysis can be reported to a high level of precision on a wide variety of factors. And, because of this, policy decisions supported by our data are really not subject to attack as if they were based on incorrect or insufficient information.*³² (emphasis added)

The Sentencing Commission offers detailed, current data on felony sentences, but it does not collect information about the original charges or the effect of plea bargains, if involved.³³ Therefore, information about how civilian sexual assault crimes are processed from the earliest stages of the justice process is not readily available for study. In addition, a federal practitioner noted that the federal sentencing guidelines relating to sexual abuse crimes have not been revised in accordance with the most up-to-date sentencing data gathered by the Commission.³⁴

National data on case outcomes in state courts in sexual assault cases are also limited, and specific data are difficult to obtain.³⁵ Dr. Spohn explained to the Panel that:

30 *Transcript of JPP Public Meeting* 275 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn).

31 Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep’t of Justice, Criminal Division, to the Chair of the U.S. Sentencing Commission (July 29, 2014).

32 *Transcript of JPP Public Meeting* 189–90 (Sept. 18, 2015) (testimony of Mr. Glenn Schmitt).

33 See *Transcript of JPP Public Meeting* 281 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn) (“And so those of us who use that data cannot tell whether, for example, there were plea bargains and, if so, what the nature of those plea bargains were because there’s no data on the original charges in that database, as comprehensive as it is.”). Additional information about the work of U.S. Federal courts can be found at <http://www.uscourts.gov/statistics-reports>.

34 *Transcript of JPP Public Meeting* 82–83 (Oct. 9, 2015) (testimony of Mr. Steven Grocki, Deputy Chief for Litigation, Child Exploitation, and Obscenity Section, Criminal Division, U.S. Department of Justice) (“I don’t know that within [Guideline] 2(a)(3).1 covering sexual abuse that there has actually been that many changes and adjustments over the years. The Chapter 109(a) offenses have generally not been altered or changed during the last decade or more.”) (“...that guideline, as it pertains to adult sex offenses which we talked about before, are not that commonly charged, are not that commonly sentenced within the federal system.”).

35 See *Transcript of JPP Public Meeting* 281 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn) (“So, one of the real limitations . . . is that we have no national data on case processing outcomes in sexual assault cases, or really in any kinds of cases.”).

the [Bureau of Justice Statistics] and the [National Judicial Reporting Program] data are limited; the [National Incident-Based Reporting Program] data is also limited in a number of different ways. And so what this means is that researchers who are interested in sexual assault case outcomes and case processing decisions have to collect data from individual jurisdictions. And this is costly and it's time consuming, and it requires convincing police departments, district attorneys and—to a lesser extent—court systems to cooperate and collaborate with you.³⁶

Statistical research can be used to identify theoretically relevant reasons for case outcomes, assuming that all relevant factors have been identified. Criminologists explained that multivariate research, in which “we attempt to isolate the effect of one variable on an outcome while simultaneously controlling for other factors—other theoretically relevant factors,” is the most valuable type of analysis in studying sexual assault.³⁷

However, the inherent limitation of such analysis is that factors *not* included in a given study may also be influential. Therefore, the explanatory power of a multivariate study depends on its ability to account for all likely predictors of case outcomes.³⁸ Dr. Spohn noted specific examples of variables that may have influenced case determinations and outcomes but were not available from court documents and thus not included in her assessment of military justice case data:

- the relationship between the victim and the accused;
- whether the victim was engaging in any kind of risk-taking behavior, especially drinking or using illegal drugs;
- the credibility of the victim;
- the degree of injury to the victim;
- whether the victim was willing to cooperate in the investigation and prosecution of the case;
- whether there was delay in reporting or whether the crime or the incident was immediately reported;
- whether the victim had any kind of motive to lie about the incident; and
- any indication of the presence of physical evidence or witnesses.³⁹

Dr. Spohn explained that multivariate research is helpful because it attempts to isolate variables to understand outcomes, but variables or factors such as those listed above are all components of a case

36 *Transcript of JPP Public Meeting* 280, 281 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn).

37 *See Transcript of JPP Public Meeting* 289 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn). *See also* Kathleen Daly and Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 *CRIME & JUST.* 565 (2010).

38 *See Transcript of JPP Public Meeting* 238–39 (Nov. 6, 2015) (testimony of Dr. Cassia Spohn).

39 *Transcript of JPP Public Meeting* 238–39 (Nov. 6, 2015) (testimony of Dr. Cassia Spohn).

“that we will not be able to take into consideration in trying to understand or to explain why cases were decided in one way rather than another.”⁴⁰

D. JPP ASSESSMENT AND RECOMMENDATIONS

DoD SAPRO is responsible for facilitating and coordinating sexual assault prevention and response in DoD and among the military Services. DSAID is an important resource for administering this program, and for aggregating descriptive data about sexual assault incidents. However, DoD’s adjudication data do not make possible a comprehensive understanding of how sexual assault cases are handled within the military justice system. Information collected through DSAID does not include key information regarding the legal processing of these cases.

Analyzing how cases are adjudicated through the judicial system requires more information and a different approach. The JPP developed an electronic database, modeled on the database used by the U.S. Sentencing Commission, to aggregate data directly from court-martial documents. The JPP used information compiled through this database to produce the statistical analysis in this report.

The Department of Defense should collect and analyze case adjudication data using a standardized, document-based collection model similar to systems developed by the Judicial Proceedings Panel or U.S. Sentencing Commission. This database could improve the Service-level analysis of prosecution data and inform DoD’s annual reports to Congress.

At a minimum, analysis of how adult sexual assault cases are resolved through the military justice system would be improved by the collection of the following case information:

- all sexual assault charges that were preferred and the outcome of each charge, including whether the charge was referred to court-martial, dismissed, or resolved by alternate means;
- type of court-martial held;
- pleas of the accused;
- trial forum;
- findings;
- sentence; and
- convening authority action on the findings and sentence.

Because procedural data do not provide complete information about a case, they must be supplemented by potentially relevant case facts and evidentiary issues. Such information may include characteristics of the victim, the relationship between the accused and victim, whether the victim made a prompt report, whether the victim was willing to cooperate, whether the victim engaged in any risk-taking behavior around the time of the incident, the presence of eyewitnesses, and physical evidence.

40 *Transcript of JPP Public Meeting 238–39* (Nov. 6, 2015) (testimony of Dr. Cassia Spohn).

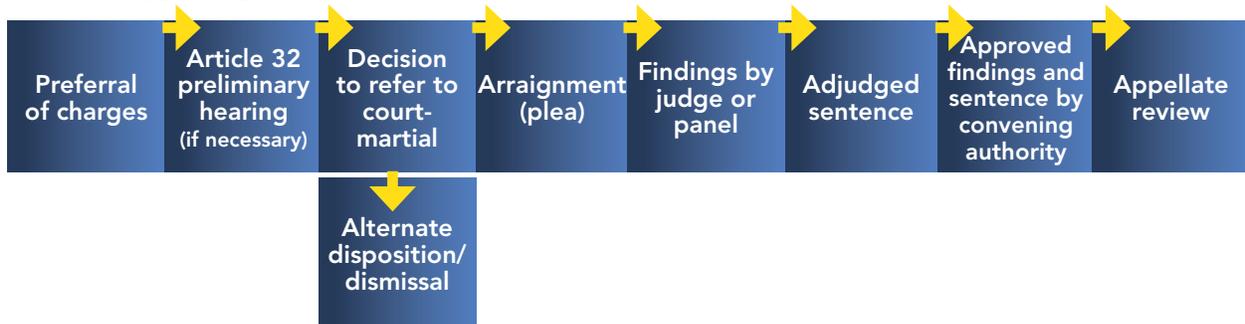
III. Sexual Assault Cases Resolved through Courts-Martial

The JPP examined the judicial response to sexual assault crimes in 1,761 cases that were completed in fiscal years 2012, 2013, and 2014 in which one or more sexual assault charges were preferred.⁴¹ These cases represent a substantial portion, but not all, of the sexual assault courts-martial tried by the military Services.⁴² The JPP asked Dr. Cassia Spohn to analyze the procedural history and outcomes for all cases. Her statistical report, provided in Appendix A, informs the JPP's presentation of data about military judicial proceedings.

A. THE COURT-MARTIAL PROCESS

Once an investigation of a sexual assault report is brought to a commander for review, he or she determines whether and how the case will be resolved through judicial proceedings in accordance with the UCMJ. The following chart illustrates the process by which a criminal offense is resolved by court-martial.

The Court-Martial Process



41 The sexual assault offenses analyzed span three versions of Article 120, UCMJ, and other statutes. They include
 Pre-Oct. 2007: Article 120
 Pre-Oct. 2007: Article 134
 1 October 2007–27 June 2012: Article 120

Article 120(1) – Rape
 Article 134 – Assault - Indecent
 Article 120(a) – Rape
 Article 120(c) – Aggravated Sexual Assault
 Article 120(e) – Aggravated Sexual Contact
 Article 120(h) – Abusive Sexual Contact
 Article 120(m) – Wrongful Sexual Contact
 Article 120(a) – Rape
 Article 120(b) – Sexual Assault
 Article 120(c) – Aggravated Sexual Contact
 Article 120(d) – Abusive Sexual Contact
 Forcible Sodomy
 Attempts to commit the above offenses

42 The JPP did not receive the complete universe of cases in which a sexual assault charge was filed throughout the military. The data were also limited to cases in which a complete set of disposition records could be identified and retrieved for analysis.

By DoD policy, all unrestricted reports of adult sexual assault offenses must be taken to a special court-martial convening authority (SPCMCA) for the initial decision on disposition.⁴³ Should the commander decide, after consulting with a judge advocate, that a court-martial is warranted, the commander initiates the court-martial process with the preferral, or swearing, of charges. Once charges are preferred, the initial disposition authority may refer the charges to a form of court-martial that he or she is authorized under the UCMJ to convene, forward the charges to a higher convening authority, dismiss the charges, or choose an alternate disposition for the case.

Certain commanders who are designated as convening authorities may convene courts-martial, provided that they have appropriate authority under the UCMJ to do so.⁴⁴ The UCMJ provides for three types of courts-martial: (1) summary court-martial, (2) special court-martial, and (3) general court-martial.⁴⁵

Summary courts-martial are a unique hybrid between nonjudicial punishment and a criminal trial, and they typically adjudicate minor misconduct or offenses that are less serious than those referred to special or general court-martial. A summary court-martial may try only enlisted members. Sentences are limited to no more than one month of confinement and do not allow for separation from service.⁴⁶ A member may object to trial by summary court-martial, in which case the member may be tried by special or general court-martial.⁴⁷

Special and general courts-martial are more like civilian criminal trials in appearance and function. A guilty verdict at a special or general court-martial results in a federal conviction. Defendants may elect to be tried by a military judge alone or by a panel of military members. Unlike in civilian criminal trials, which hold a separate sentencing hearing weeks or months after a guilty verdict, once a member is found guilty at a court-martial the court immediately moves into the sentencing proceedings. Another difference in military courts-martial is the wider range of available punishments if a member is found guilty. In addition to or as an alternative to confinement in prison, a military member may receive a punitive discharge, forfeitures of pay, a fine, reduction in pay grade, hard labor without confinement, restriction to specified limits, or a reprimand.⁴⁸

A special court-martial is functionally equivalent to a civilian misdemeanor court because confinement is limited to no more than one year, even if the maximum punishment authorized for the crime is greater than one year.⁴⁹ In addition, because a dismissal is not an authorized punishment, officers are generally not tried by special court-martial.⁵⁰

43 See U.S. DEP'T OF DEFENSE, MEMORANDUM FROM THE SECRETARY OF DEFENSE ON WITHHOLDING INITIAL DISPOSITION AUTHORITY UNDER THE UNIFORM CODE OF MILITARY JUSTICE IN CERTAIN SEXUAL ASSAULT CASES (Apr. 20, 2012). The SPCMCA is a senior commander, typically in the grade of O-6, and generally has at least 20 years of military service.

44 See MCM, *supra* note 1, R.C.M. 504.

45 10 U.S.C. § 816 (UCMJ, art. 16).

46 10 U.S.C. § 820 (UCMJ, art. 20). The limits of a summary court-martial sentence are confinement for one month, hard labor without confinement for 45 days, restriction to specified limits for two months, and forfeiture of two-thirds of one month's pay. *Id.*

47 *Id.*

48 MCM, *supra* note 1, R.C.M. 1003(b).

49 10 U.S.C. § 819 (UCMJ, art. 19). The limits of a special court-martial are a bad conduct discharge, confinement for one year, hard labor without confinement for three months, and forfeiture of pay for one year. *Id.*

50 *Id.*

A general court-martial is analogous to a civilian felony court, since the only limitations on punishment are the maximum sentences authorized for the offenses of which the member is convicted.⁵¹ Congress, in the FY14 NDAA, limited referral for penetrative sexual assault offenses (rape, sexual assault, forcible sodomy, or attempts to commit these acts) to trial by general court-martial.⁵²

If referral to a general court-martial is contemplated, the commander must first order that a preliminary hearing be conducted, pursuant to Article 32 of the UCMJ. The Article 32 preliminary hearing has evolved in form and function in recent years. Traditionally, it was a “thorough and impartial investigation” of the case in which an investigating officer, who was not necessarily a lawyer, investigated “the truth and form of the charges.”⁵³ In sexual assault cases the victim, if he or she was a military member, was typically required to appear and give testimony and was subject to cross-examination by the defense counsel.⁵⁴

Recent congressional changes have significantly altered the Article 32 process from a pretrial investigation into a preliminary hearing, and removed the requirement that a victim appear and testify at the hearing.⁵⁵ Under the new process, the Article 32 preliminary hearing is limited to determining whether there is probable cause to believe that an offense has been committed and that the accused committed the offense, determining whether the convening authority has court-martial jurisdiction over the offense and the accused, considering the form of the charges, and recommending the disposition that should be made of the case.⁵⁶ At the completion of the Article 32 hearing, the hearing officer, who is a judge advocate, prepares a report of the proceedings and forwards the report, along with his or her recommendation as to disposition, through command channels, to the general court-martial convening authority (GCMCA).

In determining whether to refer charges to a general court-martial, the GCMCA considers the Article 32 report containing the preliminary hearing officer’s recommendations as to disposition and the written pretrial advice of the GCMCA’s staff judge advocate.⁵⁷

When a court-martial convening authority refers a case to trial, a military judge arraigns the accused on the charges and presides over the court-martial proceedings.⁵⁸ The trial process that follows largely resembles that of civilian criminal courts and uses many of the same rules of procedure and evidence. However, there are meaningful differences between military and civilian criminal proceedings,

51 10 U.S.C. § 818 (UCMJ, art. 18).

52 FY14 NDAA § 1705. The NDAA provision applies to offenses committed on or after June 24, 2014. *Id.* A commander may still dispose of offenses by alternate means or dismiss charges, but if a court-martial is warranted the only type authorized for these offenses is a general court-martial.

53 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 1, R.C.M. 405(a) and (e).

54 MCM, *supra* note 1, R.C.M. 405(g)(2)(A) and (h)(1)(A).

55 FY14 NDAA § 1702(a). National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, 128 Stat. 3292 (2014) [hereinafter FY15 NDAA] § 531(g) makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

56 FY14 NDAA § 1702(a).

57 FY14 NDAA § 1702(a); 10 U.S.C. § 833, 834 (UCMJ, art. 33 and art. 34).

58 10 U.S.C. § 936 (UCMJ art. 36) (rules prescribed by the President “shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”). *See also* MCM, *supra* note 1, R.C.M. 904; Military Rule of Evidence [hereinafter M.R.E.] 1102 (Updated June 2015); Preface to the 2014 SUPPLEMENT TO THE MCM 2012 (noting “all Military Rules of Evidence were amended for stylistic reasons and to align them with the Federal Rules of Evidence.”).

including the military's procedures for plea agreements and sentencing and the convening authority's role in approving the results of a court-martial.

In civilian courts, a plea agreement involves a process in which the prosecutor and defendant arrive at an agreement whereby the defendant pleads guilty to some or all of the charges in exchange for a lower sentence recommendation or some other concession, such as a reduction in the number or severity of the charges, from the prosecutor to the judge.⁵⁹ The judge is not bound by this recommendation, however, and can choose to sentence the defendant to a longer term of confinement, though in such circumstances the judge may be required to release the defendant from the plea agreement.⁶⁰

In the military, a plea agreement is between the defendant and the convening authority, and its terms, including any specific limits on confinement, are binding on the convening authority.⁶¹ Unlike civilian court judges, a military judge is not made aware of the sentence cap agreed to by the defendant and convening authority before deciding on a sentence.⁶² The defendant in a military court ultimately receives the benefit of the lower of the two sentences (the one determined at the court-martial and the other contained in the plea agreement).⁶³

Another key difference between civilian and military courts is that the conviction and sentence announced in civilian court by the judge or jury are final, pending appeal. In the military, the findings of guilt and sentence announced by the court-martial panel (the military's version of a jury) or judge are not final and must be forwarded to the convening authority for approval. Historically, convening authorities had broad powers under Article 60 of the UCMJ to set aside or modify findings of guilt or provide clemency with regard to the sentence.⁶⁴ However, in the FY14 NDAA, Congress significantly restricted the post-conviction authority of convening authorities in serious sexual offenses by precluding them from setting aside or commuting findings of guilt.⁶⁵ The NDAA also significantly curtailed the ability of convening authorities to provide clemency from the adjudged sentence.⁶⁶

59 Fed. R. Crim. P. 11(c) and (d).

60 *Id.*

61 MCM, *supra* note 1, R.C.M. 705(a) and (b). *See also* R.C.M. 705(d)(4) (“*Withdrawal. (A) By accused.* The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.”) and R.C.M. 705(d)(4)(B) (“*By convening authority.* The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.”).

62 MCM, *supra* note 1, R.C.M. 910(f)(3).

63 MCM, *supra* note 1, R.C.M. 705(b)(2).

64 *See* 10 U.S.C. § 960 (UCMJ art. 60).

65 FY14 NDAA § 1702(b). This provision states that the convening authority may affect findings only for “qualifying offenses,” defined as those for which the maximum sentence of confinement that may be adjudged does not exceed two years; and the sentence adjudged does not include dismissal or a punitive discharge, or confinement for more than six months. *Id.*

66 *Id.* The convening authority may not disapprove, commute, or suspend an adjudged sentence that is more than six months or that includes a punitive discharge, unless (1) upon recommendation from the trial counsel, in recognition of “substantial assistance” by the accused in the investigation or prosecution of another person, including for offenses with mandatory minimum sentences; or (2) in order to honor a pretrial agreement; however, the convening authority may not commute a mandatory minimum sentence except to reduce a dishonorable discharge to a bad conduct discharge. *Id.*

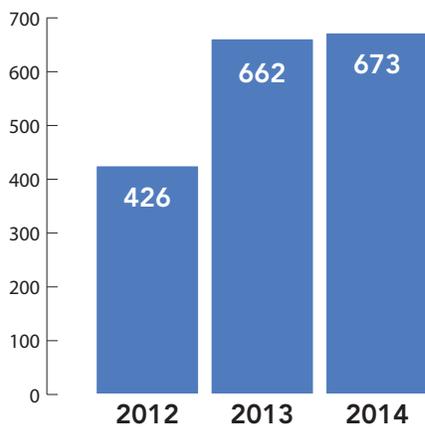
B. MILITARY JUSTICE DATA

1. Courts-Martial Case Characteristics

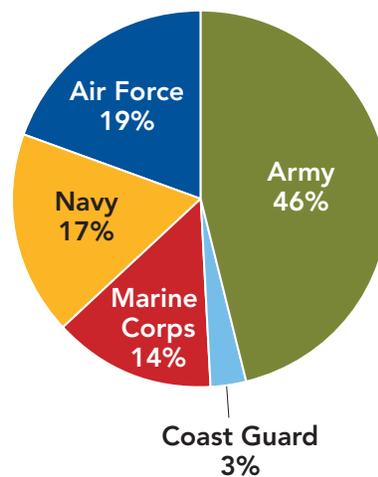
The JPP received 1,761 court-martial records from the Services for cases that involved the preferral of a sexual assault offense during fiscal years 2012 through 2014. The number of cases increased substantially from 2012 to 2013, with a slight increase again in 2014. Among the Services, the Army generated the most cases in each fiscal year. Courts-martial records indicated that the accused was usually male and the victims were most often female. In addition, the majority of the courts-martial involved one military victim, however there were several that involved civilians or multiple victims. In 72% of cases, the most serious charge that was preferred was a penetrative offense. Specific details regarding the characteristics of the data retrieved from court-martial records are described below.

- a. **Overview of Total Cases Received:** Of the 1,761 cases reviewed by the JPP, 426 (24%) were from fiscal year 2012, 662 (38%) were from fiscal year 2013, and 673 (38%) were from fiscal year 2014. The Army generated the most cases (46%), followed by Air Force (19%), Navy (17%), Marine Corps (14%), and Coast Guard (3%).⁶⁷

Adult sexual assault cases by fiscal year



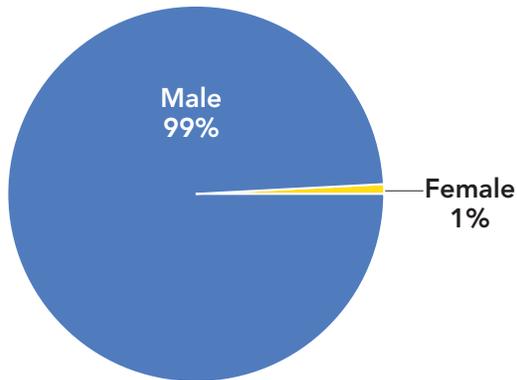
Adult sexual assault cases by military Service of the accused



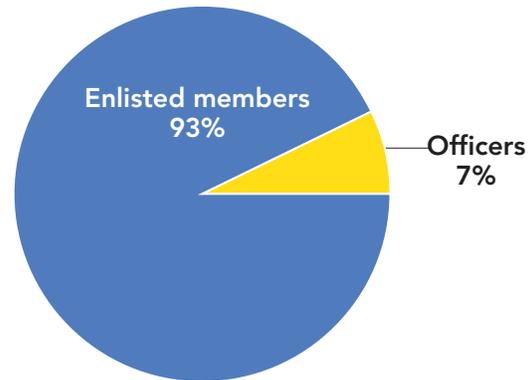
⁶⁷ In a handful of cases, a Marine Corps or Navy accused was tried by a different military Service, and the military Service that prosecuted the case provided that case to the JPP. In those instances, the JPP counted that case as belonging to the military Service that prosecuted the case. This occurred primarily in Navy and Marine Corps cases due to the fact that those Services more commonly detail or attach their Service members to the other branch for operational support.

- b. **Accused Characteristics:** The accused in nearly all cases (99%) was male. Only 11 cases involved a female accused. Most of the accused were enlisted Service members (93%) rather than officers (7%).

Adult sexual assault cases by sex of the accused

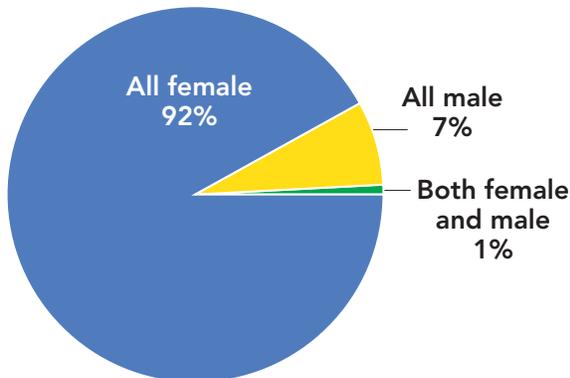


Adult sexual assault cases by rank of the accused

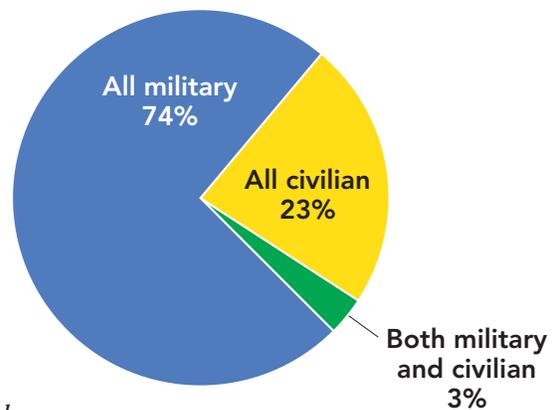


- c. **Victim Characteristics:** The victim(s) in 92% of the cases reviewed by the JPP was female, while the victim(s) was male in 7% of the cases and 1% of the cases included both female and male victims. 77% of the cases involved victims who were Service members. Most cases reviewed involved one (83%) or two (11%) victims, with the number of victims ranging from one to eleven.

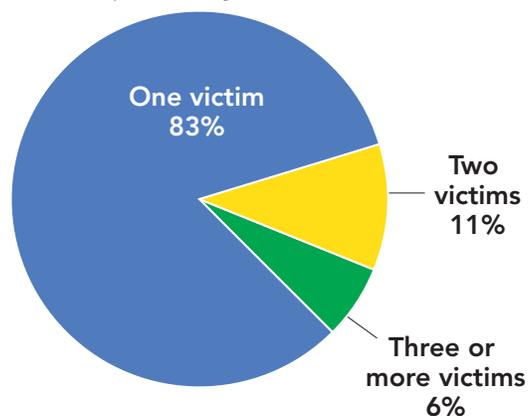
Adult sexual assault cases by sex of the victim(s)



Adult sexual assault cases by status of the victim(s)

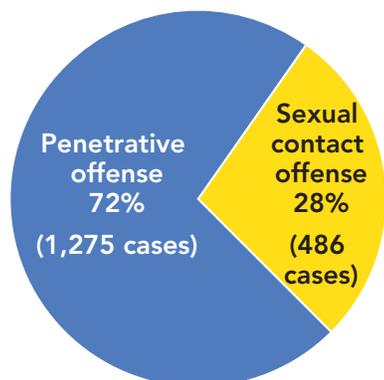


Adult sexual assault cases by number of victims per case



- d. **Characteristics Regarding the Nature of the Charges:** A penetrative offense,⁶⁸ as opposed to a contact offense, was the most serious charge preferred in 1,275 of 1,761 cases (72%). The number of charges and specifications per case ranged from 1 to 30. Just 10% of the cases involved only a single charge, but more than half of the cases (53%) involved four or fewer charges.

Adult sexual assault cases by most serious charge preferred



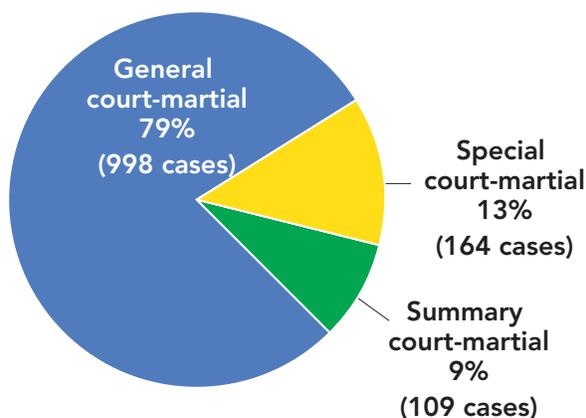
2. Disposition Decisions

Using case data from fiscal years 2012 to 2014, the JPP examined the disposition decisions for sexual assault offenses according to the type of offense charged, the year in which the case was tried, and the military Service of the accused.

In the JPP’s data for fiscal years 2012 to 2014, convening authorities referred a total of 1,271 cases to trial by general, special, or summary court-martial; thus, 72% of all preferred cases were referred to trial by court-martial. In contrast, convening authorities dismissed or resolved through alternate administrative means 492 cases, or 28% of preferred cases. In 75% of the cases that were not referred to trial, an Article 32 hearing was held prior to the decision to dismiss charges.

The total number of courts-martial increased from 2012 to 2013—from 329 in 2012 to 472 in 2013—and then declined slightly to 470 in 2014. Overall, 79% of referred cases in fiscal years 2012 to 2014 were referred to trial by a general court-martial, although the percentage of referred cases that were sent instead to special or summary courts-martial increased each year from 2012 to 2014, from 15% to 21% to 27%. The graphs below illustrate case dispositions by type of court-martial and by military Service.

Case disposition by court-martial type



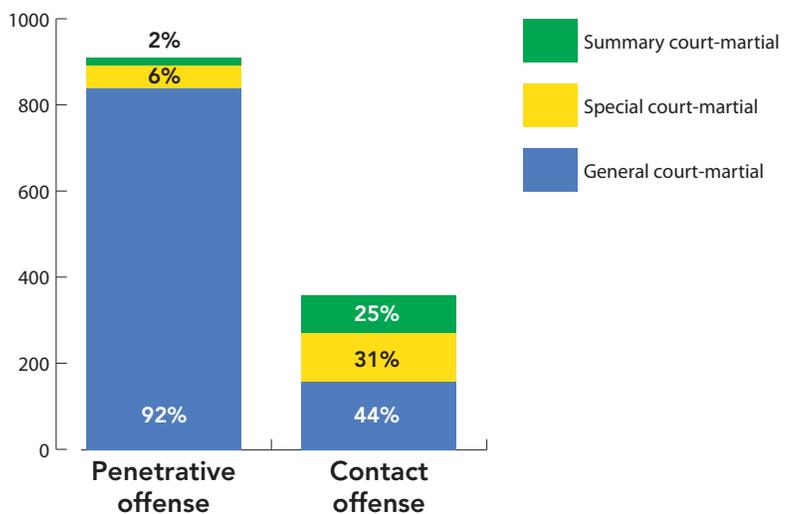
68 “Penetrative offenses” refers to offenses under Articles 120 and 125, UCMJ, involving rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses.

Table 1. Case Disposition by Military Service of the Accused

Military Service	General Court-Martial		Special Court-Martial		Summary Court-Martial	
	Number	%	Number	%	Number	%
Air Force	206	83%	35	14%	8	3%
Army	488	83%	41	7%	59	10%
Coast Guard	22	54%	14	34%	5	12%
Marine Corps	118	65%	35	19%	28	16%
Navy	164	77%	39	18%	9	4%
Total	998		164		109	

The severity of offense charged influences the type of court-martial to which a charge is referred. More than 92% of penetrative offenses were referred to trial by general court-martial, while contact offenses were referred more evenly among the three types of court-martial. The graph below illustrates case dispositions by court-martial type according to the most serious charged offense.

Case disposition by most serious offense referred to trial



Commanders may seek to resolve less severe sexual assault complaints through disciplinary action outside the judicial process.⁶⁹ Case synopsis information in annual SAPRO Reports for fiscal years 2012 to 2014 indicates that commanders initiated nonjudicial punishment for adult sexual assault offenses in 686 cases.⁷⁰ Nearly all cases initiated as nonjudicial punishment involved sexual contact offenses; very few nonjudicial punishment actions addressed rape or sexual assault offenses;⁷¹ and in no case was a Service member found to have committed a penetrative offense. More detailed information about nonjudicial punishment is provided in Part IV.

Commanders may also initiate action to involuntarily separate a military member from the Service for misconduct, including sexual assault. Information about separation actions is not uniformly reported

69 In fiscal year 2014, the Army reported imposing nonjudicial punishment in 31,689 cases involving any offense under the UCMJ; the Air Force imposed nonjudicial punishment 5,256 times; the Navy and Marine Corps issued nonjudicial punishment a combined total of 13,307 times, and the U.S. Coast Guard reported 699 cases in which nonjudicial punishment was imposed. See JOINT ANNUAL REPORT OF THE CODE COMMITTEE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR FISCAL YEAR 2014, Sections 3–6, available at http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm.

70 These numbers are taken from the Unrestricted Report Cases Synopses of the individual Service Enclosures to the DoD SAPRO Annual Reports to Congress from Fiscal Years 2012 through 2014. FY12 – FY14 SAPRO Reports, *supra* note 19.

71 In FY12, five nonjudicial punishment actions were initiated with a penetrative offense and one in FY13, though in none of these actions was the subject found to have committed a penetrative offense. No penetrative offenses were alleged in nonjudicial proceedings in FY14. FY12 – FY14 SAPRO Reports, *supra* note 19.

and is difficult to capture from statistical reports, but information from annual SAPRO Reports indicates that the military Services separated 437 personnel from service at the close of a sexual assault investigation in fiscal years 2012 through 2014. In these cases, a discharge may have been the only action taken in a case, or it may have occurred following a court-martial or nonjudicial punishment. More detailed information about adverse administrative actions and administrative separations is provided in Part V.

In the FY14 NDAA, Congress limited jurisdiction for penetrative sexual assault offenses referred to court-martial to trial by general court-martial. Data obtained by the JPP from fiscal years 2012 through 2014 indicate that this was largely the practice before the statutory requirement took effect, because the vast majority of penetrative offenses were referred to general court-martial.

Contact sexual assault charges during fiscal years 2012 to 2014 were resolved in different ways, from referral to general court-martial to nonjudicial punishment. Contact sexual assault offenses encompass a wide variety of conduct, ranging from unwanted kissing or touching of the buttocks through clothing to forcefully grabbing the genitalia of another person, causing serious bodily injury.

Without knowing more about the facts of individual cases, the JPP cannot assess the appropriateness of case disposition decisions. Specific factors in each case, including the nature of the offenses, any mitigating or extenuating circumstances, the willingness of a victim to testify, and the strength of available evidence, affect disposition decisions. It is neither possible nor appropriate to make collective assessments based solely on the general nature of charges and the forum for disposition.

This information reflects disposition decisions in cases from only three fiscal years. Collection of data in future fiscal years may provide information regarding trends or patterns in disposition decisions.

3. Adjudication Outcomes

Conviction, acquittal, and dismissal rates summarize how sexual assault prosecutions are ultimately resolved through the military justice system. The JPP examined case outcomes according to the most serious sex offense charged and the procedural point at which the military justice process concluded. The JPP considered case outcomes for all cases in which a sexual assault charge was preferred, and for all cases selected for trial by court-martial.⁷²

Table 2 illustrates case outcomes for those cases in which a sexual assault charge was preferred. The analysis of the 1,761 cases reviewed by the JPP is divided according to whether the most serious initial charge was either a penetrative offense or a contact offense. For each offense category, the table indicates whether cases resulted in conviction for a sexual offense or other offenses, acquittal, alternate disposition, or dismissal prior to trial.

72 See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 6-1 (9th ed. 2015) (“The first formal step in prosecuting a military criminal case is preferring sworn charges against an accused. . . . As a practical matter, before preferring charges, the immediate commander has already decided that a court-martial is probably the most appropriate course to take. However the final decision as to whether the charges will be tried and what level of court will try the case [i.e., referral] is left to the convening authority who ultimately exercises prosecutorial discretion.”).

Table 2. Outcomes of Adult Sexual Assault Cases from Preferral (Total for FY12–FY14)

Outcomes from preferral	Cases in which a penetrative offense was the most serious charge (1,275 total)	Cases in which a sexual contact offense was the most serious charge (486 total)
Convicted of penetrative offense	25%	N/A
Convicted of contact offense	17%	29%
Convicted of sex offense	41%	(same as above)
Convicted of non-sex offense	10%	31%
Overall conviction rate	51%	60%
Acquitted of all Charges	22%	15%
Alternate disposition	12%	17%
Dismissed without further action	16%	8%
	<i>(82% of dismissals occurred after Article 32 hearing)</i>	<i>(58% of dismissals occurred after Article 32 hearing)</i>

Table 3 illustrates case outcomes for those cases in which a sexual assault charge was referred to trial by court-martial. As previously explained, a referral decision signifies a convening authority’s decision to prosecute a case in a specified court-martial forum. The JPP analyzed the outcomes in 1,271 cases in which convening authorities referred one or more sexual assault charges to trial by general, special, or summary courts-martial from fiscal years 2012 to 2014.

Table 3. Outcomes of Adult Sexual Assault Cases Referred to Court-Martial by Most Serious Sex Offense Charged (Total for FY12–FY14)

Outcomes from referral	Penetrative offense was the most serious charged sex offense (912 cases)	Contact offense was the most serious charged sex offense (359 cases)
Convicted of penetrative offense	34%	N/A
Convicted of contact offense	23%	39%
Convicted of non-sex-offense	13%	41%
Overall conviction rate (for sex or non-sex related offense)	70%	80%
Acquitted of all charges	29%	20%

Courts-martial convictions may result from a plea of guilty by the accused to one or more charged offenses, or from a finding of guilty by the court-martial to one or more charged offenses, contrary to the accused’s plea of not guilty. The latter group comprises contested court-martial cases. In cases in which an accused was tried for a sexual assault offense in a contested trial, the accused was convicted of a sexual assault offense in 348 of 898 (39%) of cases.⁷⁴

73 MCM, *supra* note 1, R.C.M. 401(c)(1). The drafter’s discussion of this rule provides general guidance on when dismissal of a charge may be appropriate: “A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate.” *Id.*

74 This analysis includes cases in which an accused plead not guilty to all charges, and cases in which an accused pleaded guilty to some charges but not guilty to other charges (“mixed plea” cases), and a trial was held on the latter charges.

Multivariate statistical analysis of case data highlights factors that are associated with particular outcomes.⁷⁵ The multivariate research performed by Dr. Spohn using combined courts-martial data for all Services from fiscal years 2012 through 2014 revealed that conviction was more likely in cases that involved more victims and in cases that involved more charges. Conviction was less likely for a penetrative offense than for a contact offense. Finally, the data indicated that the military service and rank of the accused did not influence the likelihood of conviction or acquittal.

In their testimony to the JPP, victims' rights advocates and career prosecutors suggested that case outcomes are not a fair or effective means of gauging the effectiveness of the justice system.⁷⁶ Likewise, DoD SAPRO Reports explain that conviction rates do not assist DoD in evaluating its efforts to tackle the occurrence of sexual assault in the military.⁷⁷ The JPP agrees that without knowing more about the facts of individual cases and the judicial proceedings involved, it is not possible to assess the appropriateness of the outcome of case adjudications.

This information only reflects adjudication outcomes for cases resolved in three fiscal years. Collection of future fiscal year data may provide information regarding trends or patterns in adjudication outcomes, and the JPP will reassess its statutory task with additional information gathered in future years.

4. Punishments Rendered at Courts-Martial

The JPP examined the type and severity of punishments rendered at military courts-martial. Several factors that are unique to the military justice system influence courts-martial sentences. First, for each punitive article of the UCMJ, the President of the United States establishes whether a punitive discharge may be imposed for an offense, what type of punitive discharge may be imposed, and the maximum confinement that may be imposed.⁷⁸ Second, convening authorities must review convictions and sentences adjudged at trial, and they may modify an adjudged sentence in some circumstances, within certain limits. When a convening authority makes a final decision on sentence, he or she takes into account sentence limitations contained in a pretrial agreement and any clemency requested by the convicted Service member. The convening authority's decision is known as the "approved" sentence. The JPP reviewed both adjudged and approved sentencing information in court-martial data.

Punishment data reviewed by the JPP comprised sentences issued collectively by all types of courts-martial, but the jurisdictional limits of special and summary courts-martial also may affect sentences. Many offenses under the UCMJ authorize more than 12 months of confinement as punishment,⁷⁹ but

75 See *infra*. Appendix A.

76 See *Transcript of JPP Public Meeting* 28–30 (Nov. 14, 2014) (testimony of Ms. Meg Garvin, National Crime Victims Law Institute) ("I, to be very blunt, would not be assessing outcomes of cases. I think that is irrelevant to an analysis of whether the system is achieving procedural justice."); See also *Transcript of JPP Public Meeting* 63 (Oct. 9, 2015) (testimony of Mr. Thomas Fichter, Assistant Prosecutor and Director, Special Victim's Unit, Monmouth County Prosecutor's Office, New Jersey) ("It's very difficult, you know, I found in my practice of 25 years in dealing with a lot of survivors of sexual assault, both adult and juvenile, to actually come up with a metric. I would love to be able to say I judge my success by how long someone goes to prison, but I can't necessarily do that. There are too many variables when we're dealing with actual live victims.").

77 FY14 SAPRO Report, *supra* note 19, at 10.

78 MCM, *supra* note 1, R.C.M. 1003 and 1004. Additional punishment options include reduction in rank, forfeitures of pay and allowances, fines, restriction, hard labor with or without confinement, and death.

79 UCMJ, Appendix 12. The maximum punishments for sexual assault offenses, which were established by Executive Order 13643, May 15, 2013, 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

the maximum confinement that may be imposed by a special court-martial is 12 months, regardless of the offense(s) charged. Summary courts-martial, which are quasi-judicial proceedings, can assess no more than one month of confinement and may not punitively discharge a Service member from the military. Given these jurisdictional limits, a convening authority’s decision to refer a case to a particular type of court-martial functionally expresses a judgment as to the severity of an offense and the scope of appropriate punishment.

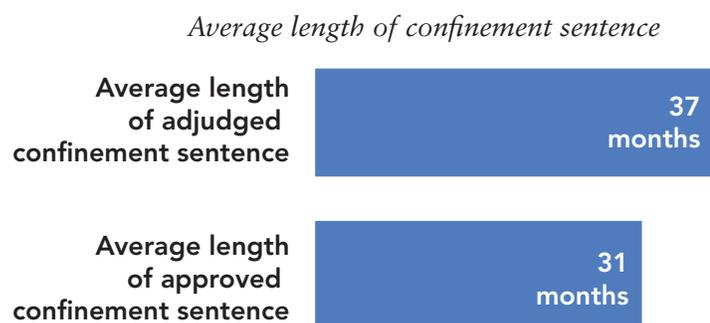
Statistical analysis indicated that the severity of the offense for which a person is convicted affects the punishment in the case. Those who were convicted of penetrative offenses were significantly more likely than those convicted of contact offenses to receive a sentence that included confinement—95% versus 68%. A Service member convicted of a penetrative offense was also more likely to receive a punitive separation than one convicted of a contact offense—91% versus 50%. The average confinement sentence imposed on someone convicted of at least one penetrative offense was 55 months, which was considerably longer than the average confinement sentence of 15 months imposed on one convicted of a contact offense.⁸⁰

The number of victims and number of charges in a case also influenced sentence severity. The military Service and rank of the accused, however, did not influence the length of the confinement sentence.

a. Reviewing Adjudged and Approved Sentences for Sexual Assault Cases

Following a court-martial conviction, a convening authority must review the conviction and sentence adjudged at trial, and the convening authority may modify an adjudged sentence in some circumstances, within certain limits. A sentence approved by a convening authority takes into account any sentence limitations that may be contained in a pretrial agreement and any clemency requested by the convicted Service member. The following bar graphs depict the combined average length of confinement of adjudged sentences and the actual length of confinement according to the approved sentence for all cases reviewed by the JPP for fiscal years 2012 to 2014.

While the average length of approved sentences was six months less than the average length of adjudged sentences, the JPP’s review indicated that in most cases, convening authorities made no changes or made relatively minor modifications to adjudged confinement based on plea agreement terms, clemency requests, or other reasons pursuant to their Article 60 powers of



Forcible Sodomy (art. 125, MCM):	allowances 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

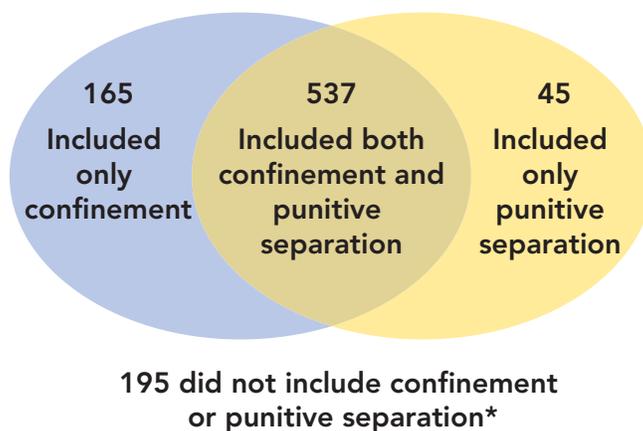
80 See *infra*. Appendix A, p. 66.

review over courts-martial. In 76% of cases reviewed, there was no change between the adjudged and approved sentence. In 92% of cases, the approved sentence reduced the adjudged sentence by one year or less.⁸¹ The JPP’s data included cases that were completed before Congress modified Article 60 of the UCMJ in the FY14 NDAA to substantially restrict the discretion of convening authorities to grant clemency in sexual assault cases.⁸²

b. Approved Sentences with Confinement and/or a Punitive Discharge

Congress modified the UCMJ in the FY14 NDAA to require imposition of a dismissal or dishonorable discharge for any Service member convicted of rape or sexual assault that occurred on or after June 24, 2014. Prior to this requirement, there was no mandatory minimum sentencing requirement for sexual assault cases. Case data from fiscal years 2012 to 2014 that were reviewed by the JPP reflect cases resolved prior to this change. The JPP reviewed 942 sexual assault cases with approved sentences. Of these cases, 702 accused received confinement, and 537 accused received both confinement and a punitive separation. In cases in which a Service member did not receive a punitive discharge as part of the court-martial sentence, the accused may have been subsequently separated from Service, on the basis of the conviction at court-martial, through an administrative disciplinary process.

*Types of punishment imposed according to the approved sentence
(942 total cases)**



**Includes data from summary courts-martial, which are not authorized to impose a punitive separation.*

Because the sentencing scheme under the UCMJ is unitary, it is not possible to assess how a particular sentence is apportioned when an accused is convicted of more than one offense. In addition, without more knowledge about the facts of individual cases and the circumstances in aggravation, mitigation, or extenuation that may have arisen in individualized sentencing proceedings, it is not possible to assess the appropriateness or consistency of punishments rendered at courts-martial.

This information only reflects sentence outcomes for cases resolved in three fiscal years. Collection of future fiscal year data may provide information regarding trends or patterns in sentences, and the JPP will reassess its statutory task with additional information gathered in future years.

81 *Transcript of JPP Public Meeting 147* (Mar. 11, 2016) (testimony of Dr. Cassia Spohn and JPP Attorney-Advisor Ms. Meghan Peters).

82 FY14 NDAA § 1702.

C. JPP ASSESSMENT REGARDING APPROPRIATENESS AND CONSISTENCY OF CASE DISPOSITIONS AND PUNISHMENTS

The Panel is mindful that statistics may provide valuable information about the judicial process. Statistical data obtained by the JPP effectively describe certain objective aspects of military cases in the aggregate, including the number of annual prosecutions, the procedural history of cases, and the punishments imposed. However, individual case outcomes are the result of unique combinations of facts and evidence, and the appropriateness or consistency of disposition decisions or punishments cannot be evaluated solely by considering procedural data. For these reasons, the JPP provides the information gathered without offering specific recommendations.

The information from courts-martial and disciplinary actions reviewed by the JPP in this report spans only three fiscal years. While these data provide summary information about judicial processing of cases during the years considered, they do not provide a sufficient basis to more broadly assess trends or patterns in decisions and punishments in sexual assault cases. The Panel will continue to collect data and will reassess its statutory task with additional information gathered in future years.

IV. Sexual Assault Cases Resolved Through Nonjudicial Punishment

To obtain case data regarding nonjudicial punishments for sexual assault offenses, the JPP reviewed data contained in the synopses of unrestricted reports given in each Service Enclosure to the SAPRO Reports for fiscal years 2012, 2013, and 2014.⁸³

A. OVERVIEW OF NONJUDICIAL PUNISHMENT

Nonjudicial punishment, a commander's disciplinary tool authorized under Article 15 of the UCMJ, is intended for minor offenses.⁸⁴ It provides commanders with "an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in Service members without the stigma of a court-martial conviction."⁸⁵ A Service member has the right to demand trial by court-martial in lieu of nonjudicial punishment, in which case proof beyond a reasonable doubt for each offense charged would be required for conviction.⁸⁶

The nonjudicial punishment process is initiated when the commander serves nonjudicial punishment paperwork on the Service member, detailing the offenses that he or she is accused of committing.⁸⁷ The member must then decide whether to accept the nonjudicial forum or demand trial by court-martial.⁸⁸ Acceptance of nonjudicial forum is not an admission of guilt, but simply an acceptance of forum.⁸⁹ If the member accepts nonjudicial punishment, he or she has the right to present information—orally, in writing, or both—in defense, extenuation, or mitigation.⁹⁰

Following the member's submission of relevant material, the commander must make a decision as to whether the member committed one or more of the offenses alleged. If the commander determines no offense was committed, the proceedings are terminated. If the commander determines one or more offenses were committed, the commander may impose punishment on the member.⁹¹ The level of that

83 Each of the military Services prepares its own Service-specific report, which is an enclosure to the DoD SAPRO Report.

84 10 USC § 815 (UCMJ, art. 15); "Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense with the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial. The decision whether an offense is 'minor' is a matter of discretion for the commander imposing nonjudicial punishment . . ." MCM, *supra* note 1, Part V, ¶1e.

85 MCM, *supra* note 1, Part V, ¶ 1c.

86 A member "attached to or embarked in a vessel" may not demand trial by court-martial in lieu of nonjudicial punishment. MCM, *supra* note 1, Part V, ¶ 3.

87 For sexual assault offenses, the special court-martial convening authority makes the decision whether court-martial charges will be preferred or whether the offense will be disposed of through some other means. U.S. DEP'T OF DEFENSE, MEMORANDUM FROM THE SECRETARY OF DEFENSE ON WITHHOLDING INITIAL DISPOSITION AUTHORITY UNDER THE UNIFORM CODE OF MILITARY JUSTICE IN CERTAIN SEXUAL ASSAULT CASES (Apr. 20, 2012), *supra* note 43.

88 MCM, *supra* note 1, Part V, ¶ 4.

89 U.S. DEP'T OF AIR FORCE INST. 51-202, NONJUDICIAL PUNISHMENT ¶3.12 (Mar. 31, 2015) [hereinafter AFI 51-202], available at http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-202/afi51-202.pdf.

90 MCM, *supra* note 1, Part V, ¶ 4.c.(1)(E).

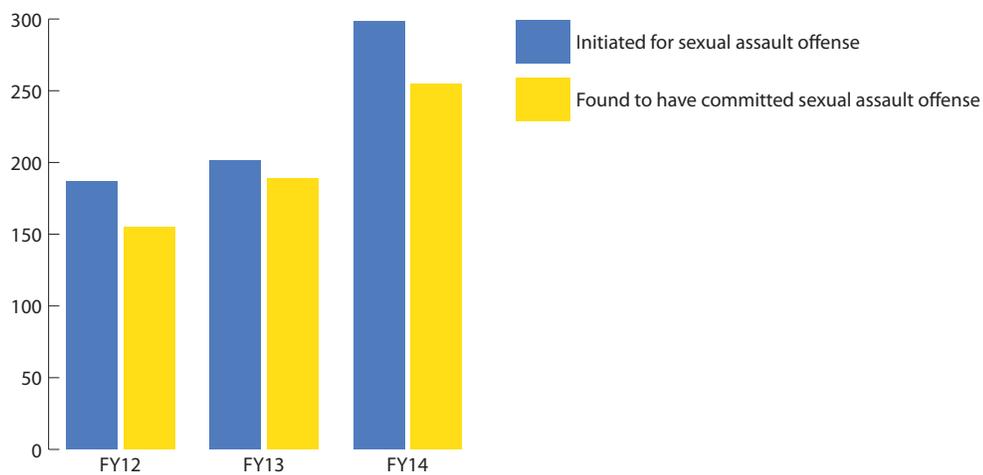
91 MCM, *supra* note 1, Part V, ¶. 4.c.(4).

punishment is dependent on the ranks of both the commander and the member, but it can include reduction in rank, restriction to specified limits, and forfeiture of pay.⁹² After the commander imposes punishment, the commander or a successor in command, within certain limitations, may suspend a portion or all of the punishment, reduce the quantity or quality of the punishment, or cancel any portion of the unexecuted punishment.⁹³ In addition, any member receiving nonjudicial punishment may appeal the findings, the punishment, or both to the next superior authority.⁹⁴ The nonjudicial punishment action may also serve as the basis for an administrative discharge.

B. DATA ON NONJUDICIAL PUNISHMENT FOR SEXUAL ASSAULT OFFENSES

Owing to the military Services’ differences in structure and mission, each Service maintains nonjudicial punishment data differently; however, all of the Services provide a case synopsis for every unrestricted adult sexual assault report in the Unrestricted Report Case Synopses in the Service Enclosures to the SAPRO Reports.⁹⁵ According to these case synopses, in fiscal years 2012 through 2014 the Services initiated nonjudicial punishment for 686 cases involving adult sexual assault offenses.⁹⁶

Nonjudicial punishment actions completed for adult sexual assault offenses, by fiscal year, based on data in annual DoD SAPRO reports



92 The maximum punishment that may be imposed via nonjudicial punishment on an officer or warrant officer is arrest in quarters for 30 days, forfeiture of one-half of one month’s pay per month for two months, and restriction to specified limits for 60 days. MCM, *supra* note 1, Part V, para. 5.a.(1)(B). Additional punishments that may be imposed on enlisted members include reduction to the lowest enlisted grade (enlisted members above the grade of E-4 may be reduced only one pay grade), correctional custody for 30 days, extra duties for 45 days, and, if imposed on a person embarked on a vessel, confinement on bread and water or diminished rations for 14 days. MCM, *supra* note 1, Part V, ¶ 5.a.(2)(B).

93 MCM, *supra* note 1, Part V, ¶ 6.

94 MCM, *supra* note 1, Part V, ¶ 7; AFI 51-202, para. 4.1; U.S. DEP’T OF ARMY, REGULATION 27-10, MILITARY JUSTICE ¶ 3-31 (OCT. 3, 2011)[hereinafter AR 27-10], *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf.

95 These reports, if taken at face value, appear to contain all of the data points and information necessary to answer the JPP’s statutory tasks regarding the types of offenses being handled through nonjudicial punishment. Because nonjudicial punishment records are covered under the Privacy Act, they were not made available to the JPP for review. In addition, many of the records from which these data were derived are filed locally at the installation level and are destroyed after two years. AR 27-10 ¶ 3-37.

96 These numbers are taken from the Unrestricted Report Cases Synopses of the individual military Service enclosures to the DoD SAPRO Annual Reports to Congress from Fiscal Years 2012 through 2014. FY12–14 SAPRO reports, *supra* note 18. While there were five cases listed in the Army’s FY12 synopses showing that nonjudicial punishment (NJP) was initiated

These actions are broken out by Service and fiscal year in Table 4, below. The U.S. Coast Guard reported separately that in fiscal year 2014, seven nonjudicial punishment actions were completed for sexual assault offenses, one for a penetrative offense, and six for contact offenses.⁹⁷

Table 4. Nonjudicial Punishment Actions Broken Out by Service and Fiscal Year, Based on Data in Annual DoD SAPRO Reports

		Initiated for penetrative offense	Initiated for contact offense	Found to have committed penetrative offense	Found to have committed contact offense	Found to have committed non-sexual assault offense	Found not to have committed any offense
Army	FY12	0	144	0	124	6	14
	FY13	0	135	0	126	5	4
	FY14	0	192	0	163	15	14
Navy	FY12	3	24	0	17	6	4
	FY13	1	37	0	35	3	0
	FY14	0	69	0	59	0	10
USMC	FY12	2	0	0	0	2	0
	FY13	0	1	0	1	0	0
	FY14	0	2	0	2	0	0
Air Force	FY12 ⁹⁸	--	14	--	--	--	--
	FY13	0	27	0	27	0	0
	FY14	0	35	0	31	0	4

Each case that was initiated as a nonjudicial punishment action for an adult sexual assault offense, as could best be discerned from the case synopses, was included in this chart, regardless of whether the case also resulted in administrative discharge. Those cases that were initiated as a court-martial action but ultimately resulted in nonjudicial punishment are accounted for separately in the court-martial data above as cases reaching an alternate disposition after a court-martial was contemplated. It should be noted, however, that in fiscal year 2014, commanders imposed nonjudicial punishment on 46 Service members for whom court-martial charge(s) for an adult sexual assault offense were initially preferred and subsequently dismissed. The nonjudicial punishments for these Service members may have been in response to any type of offense, not necessarily a sexual assault.⁹⁹ For fiscal year 2013, 26 subjects received nonjudicial punishment after having court-martial charges preferred and later dismissed. For fiscal year 2012, the number is 16.¹⁰⁰

for a penetrative offense, the Army service representative informed staff members that this was incorrect and those five cases involved only non-sexual assault offenses. These five cases were therefore removed from the total.

97 DEPARTMENT OF DEFENSE REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE Encl 5 , U.S. COAST GUARD at A-15 (2014) available at http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf.

98 The Air Force did not include NJP actions in its FY12 case summaries. It is therefore not possible to determine the breakout of its 14 reported NJP actions. FY12 SAPRO Report, *supra* note 19.

99 Nonjudicial punishment action was dismissed for six of those subjects.

100 FY14 SAPRO Report, *supra* note 19, Appendix A: Statistical Data on Sexual Assault at 26; FY13 SAPRO Report, *supra* note 19 at 81; FY12 SAPRO Report, *supra* note 19, Volume I, at 71.

Because DoD SAPRO's policy places each case into only one disposition category, determined by the most serious action taken,¹⁰¹ the numbers here are somewhat different from those contained in annual SAPRO Report summaries of unrestricted sexual assault reports closed during fiscal years 2012 through 2014. For example, if the Army determined that administrative discharge was a more serious action than nonjudicial punishment, then nonjudicial punishment actions that preceded administrative discharge would not be counted as nonjudicial punishment—they would show up only in the administrative discharge category. Because the Services do not always agree as to whether an administrative discharge or nonjudicial punishment is the more severe action, the Services' data vary.¹⁰²

The data in Table 4 show that nonjudicial punishment is used almost exclusively for contact sexual assault offenses, rather than penetrative sexual assault offenses.¹⁰³ While a penetrative sexual assault offense appears to have been initiated in a total of five nonjudicial punishment actions in fiscal year 2012, none of those cases resulted in the subject being found to have committed a penetrative sexual assault offense. In fiscal year 2013, in comparison, a penetrative sexual assault offense was initiated in only one nonjudicial punishment action and the subject was not ultimately found to have committed a penetrative offense. No nonjudicial punishments were initiated for penetrative sexual assault offenses for fiscal year 2014.¹⁰⁴

Further illustrating this point, in fiscal year 2014 all of the Air Force's nonjudicial punishment actions for sexual assault offenses involved the subject touching the victim through clothing (including the victim's buttocks or breasts) or kissing the victim without consent.¹⁰⁵ Similarly, in fiscal years 2012 through 2014 the Army's nonjudicial punishment actions for sexual assault offenses were all non-penetrative offenses, with "the vast majority" being "unwanted touching over clothing."¹⁰⁶

Unlike data for courts-martial, which can be compiled from public documents, nonjudicial punishment case documents, which are maintained as personnel records and protected under the Privacy Act, could not be reviewed by the JPP. In addition, nonjudicial punishment records are maintained according to Service regulations, often at the installation level, and typically are destroyed within two to three years. For these reasons, the JPP relied for its analysis on the data contained in the Service case synopses in

101 Actions in order of decreasing severity are court-martial, nonjudicial punishment, administrative discharge, and other administrative actions. *Transcript of JPP Public Meeting 127* (Nov. 6, 2015) (testimony of Dr. Nathan Galbreath, Senior Executive Advisor, Dep't of Defense SAPR Office); FY14 SAPRO Report, *supra* note 19 at 4.

102 *Transcript of JPP Public Meeting 127–28* (Nov. 6, 2015) (testimony of Dr. Nathan Galbreath) ("We only count one subject one time and we've kind of made an arbitrary level of severity associated with these cases. So, clearly, with court-martial being the most severe action taken, or the most serious action taken. With non-judicial punishment being the next severe action taken and then administrative discharges and then other administrative actions. Just to let you know, I don't have real good agreement between the JAG Offices as some believe that administrative discharge is a more serious action than a non-judicial punishment.").

103 Because of the variety of nonjudicial punishment options and the limitations based on the rank of the imposing commander and the member, these numbers were not further broken down into types of punishments imposed. It is also important to note that the evaluations of the nonjudicial punishment actions were based on whether a sexual assault offense was charged or whether the member was found guilty of a sexual assault offense. The data from the case synopses do not fully and accurately detail other non-sexual assault charges that may have also been charged in the nonjudicial punishment action. Therefore, it is difficult to gauge the severity of punishment without knowing the full scope of the charged offenses.

104 The FY14 NDAA § 1705 limits court-martial jurisdiction for rape, rape of a child, sexual assault, sexual assault of a child, forcible sodomy, or attempts to commit these acts to trial by general court-martial. This provision is effective for offenses committed on or after June 24, 2014.

105 FY14 SAPRO Report, *supra* note 19, Encl. 3: Department of the Air Force.

106 FY12–14 SAPRO Reports, *supra* note 19, Army enclosures.

annual DoD SAPRO Reports. These case synopses appeared to contain all relevant data necessary to determine the number of sexual assault cases resolved through nonjudicial punishment, but the accuracy of nonjudicial punishment data in this report is contingent on the accuracy of data provided in the SAPRO Reports.

As noted in the JPP's discussion about case dispositions in Part III of this report, contact sexual assault offenses were resolved through different adjudication methods, from referral to general court-martial to nonjudicial punishment. The JPP's data indicate that the Services initiated nonjudicial punishment in 686 sexual assault cases from fiscal years 2012 through 2014. These cases were primarily for contact offenses. Without knowing the facts of each of the individual cases, the JPP cannot draw conclusions as to the appropriateness or consistency of these disposition decisions. The JPP will continue to evaluate nonjudicial punishment data in future reports.



Adverse Administrative Actions and Administrative Discharges for Sexual Assault Offenses

The adverse administrative action data and administrative discharge data used in this section were taken from the Department of Defense Annual Report on Sexual Assault in the Military for fiscal years 2012, 2013, and 2014, together with the individual Service annexes to these reports.

A. OVERVIEW OF ADVERSE ADMINISTRATIVE ACTIONS AND ADMINISTRATIVE DISCHARGES

1. Adverse Administrative Actions

Commanders may use adverse administrative actions to correct a member's behavior when a court-martial or nonjudicial punishment is not available as an option or is deemed not appropriate.¹⁰⁷ Adverse administrative actions may include reprimands, counseling sessions, and other corrective actions.¹⁰⁸ They may also include denial of reenlistment for enlisted members, negative evaluation reports, removal from the promotion list, and other ancillary administrative actions. These actions often occur in conjunction with other disciplinary actions rather than in isolation. They are intended not to serve as punishment of the member, but rather to correct the member's behavior and document it so that it can be considered in the future when the member seeks promotion, a new assignment, and reenlistment. Administrative actions may also be used for acts that are not offenses under the UCMJ.¹⁰⁹ Adverse administrative actions sometimes precede administrative discharge of the member.

2. Administrative Discharges

Administrative discharge is essentially the removal of a member from the military. There are a variety of reasons for which a military member can be discharged, some voluntary and many involuntary. For purposes of this report dealing with sexual assault, we will be discussing only administrative discharge for misconduct.¹¹⁰

The types of service characterization that may be awarded to a military member being administratively discharged are honorable, general (under honorable conditions), and under other than honorable conditions.¹¹¹ Department of Defense policy states that the service characterization for an enlisted

107 MCM, *supra* note 1, R.C.M. 306(c)(2).

108 "Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges." MCM, *supra* note 1, R.C.M. 306(c)(2).

109 MCM, *supra* note 1, Part V, ¶ 1.g.

110 There are a number of subsets of misconduct under DoD and Service regulations for enlisted members, but the two most relevant for members accused of sexual assault are Commission of a Serious Offense and Civilian Conviction. DoD INSTRUCTION 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS Encl. 3, ¶ 10.a(3) and (4)(Jan. 27, 2014)(Incorporating Change 1, Effective Dec. 4, 2014)[Hereinafter DoDI 1332.14], *available at* <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>. For officers, the subsets of misconduct relevant to sexual assault are Serious or recurring misconduct, punishable by military or civilian authorities; or final conviction for rape, sexual assault, forcible sodomy, or an attempt to commit one of those offenses. DoD DIRECTIVE 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS encl. 2, ¶ 2.a and 2.g (Nov. 25, 2013)[hereinafter DoDD 1332.30], *available at* <http://www.dtic.mil/whs/directives/corres/pdf/133230p.pdf>.

111 DoDD 1332.30, Glossary; DoDI 1332.14, Enclosure 4, ¶ 3.b(2). *Honorable* is defined as follows: "When the quality of

military member discharged for misconduct will normally be under other than honorable conditions—the worst available for an administrative separation.¹¹² The type of service characterization a military member receives may prevent that member from reentering the military and collecting disability or other benefits from the Department of Veterans Affairs; it may also hinder civilian employment opportunities.¹¹³

The due process afforded a military member being administratively discharged depends on whether the member is an officer or enlisted member, the number of years of service, and the proposed discharge service characterization. If a member has six or more years of service or is being recommended for the service characterization of under other than honorable conditions, the member is entitled to have his or her case presented to an administrative discharge board or, if the member is an officer, to a Board of Inquiry.¹¹⁴ All other members can be discharged through a shorter notification procedure.¹¹⁵

In the FY13 NDAA, Congress directed the Service Secretaries to establish policies requiring administrative discharge processing of military members who received a court-martial conviction for rape, sexual assault, forcible sodomy, or attempts to commit one of these offenses, but who did not receive a punitive discharge at trial.¹¹⁶ The Services have since updated or are in the process of updating their regulations to include this policy, and, in many cases, have even gone beyond this requirement.

Air Force regulations governing enlisted personnel and officers require commanders to initiate discharge of a member who has been determined to have committed a sexual assault offense,¹¹⁷ or to submit a waiver.¹¹⁸ The Navy mandates discharge processing for members found to have committed

the Service member's service generally has met the standards of acceptable conduct and performance of duty for military personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate." *General (Under Honorable Conditions)* is defined as follows: "When a Service member's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as general (under honorable conditions) is warranted when the negative aspects of the Service member's conduct or performance of duty outweigh positive aspects of the Service member's conduct or performance of duty." *Under Other Than Honorable Conditions* is defined as follows: "When separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of Service members. Or, when separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of Service members." *Id.*

112 DoDI 1332.14, Enclosure 3, ¶ 10.c. The service characterization of an officer discharged for misconduct may be characterized as "Honorable, General (Under Honorable Conditions), or Under Other Than Honorable Conditions." DoDD 1332.30, Enclosure 7, para. 2. In addition, when the sole basis for separation of an enlisted member is commission of a serious offense that resulted in a court-martial conviction in which a punitive discharge was authorized but was not imposed, the member's service may not be characterized as under other than honorable conditions. DoDI 1332.14, Enclosure 4, ¶ 3.b(3)(d).

113 38 C.F.R. § 3.12 (2016).

114 DoDI 1332.14, Enclosure 3, ¶ 10.d and Enclosure 5, ¶ 2.a(7); DoDD 1332.30, Enclosure 6, ¶ 1.a and Glossary.

115 DoDI, 1332.14, Enclosure 3, ¶ 10.d and Enclosure 5, ¶ 2.a(7); DoDD 1332.30, Enclosure 6, ¶ 1.a and Glossary. It should be noted that the separation authority for officer members, regardless of whether the case goes to a Board of Inquiry, is the Service Secretary or his or her designee. DoDD 1332.30, Enclosure 6, ¶ 2.

116 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013).

117 For purposes of these regulations, sexual assault includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, or attempts to commit these offenses. U.S. DEP'T OF AIR FORCE INST. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN ¶5.55 (July 9, 2004 incorp. through Change 7, July 2, 2013) [hereinafter AFI 36-3208], available at http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3208/afi36-3208.pdf; U.S. DEP'T OF AIR FORCE INST. 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS ¶3.3.3.1 (June 9, 2004 incorp. through Change 7, July 2, 2013)[hereinafter AFI 36-3206], available at http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3206/afi36-3206.pdf.

118 A commander may submit a request for waiver of discharge processing if the commander believes that the member meets

sexual misconduct, “based on reliable evidence.”¹¹⁹ Similarly, the Marine Corps mandates discharge processing following the “first substantiated incident”¹²⁰ or attempted incident of sexual misconduct.¹²¹ The policies of the Air Force, Navy, and Marine Corps do not require that the member receive a court-martial conviction prior to mandatory administrative discharge processing; instead, they require just that the member was found to have committed the offense. These policies apply to contact sexual assault offenses as well as to penetrative sexual assault offenses. Army policy more closely aligns with the statute: it mandates administrative discharge processing for members convicted of a sex offense whose conviction did not result in a punitive discharge or dismissal at a court-martial.¹²² The Army also includes contact sexual assault offenses, not just penetrative offenses.

certain retention criteria, as laid out in AFIs 36-3208 and 36-3206, *supra* note 117, as follows:

- A member found to have committed sexual assault or sexual assault of a child will be discharged unless the member meets all of the following criteria:
- (a) The conduct surrounding and including the sexual assault or sexual assault of a child is a departure from the member’s usual and customary behavior;
 - (b) The conduct surrounding and including the sexual assault or sexual assault of a child under all circumstances is not likely to recur;
 - (c) The sexual assault or sexual assault of a child did not involve the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person;
 - (d) The sexual assault or sexual assault of a child was not committed by (1) using force causing or likely to cause death or grievous bodily harm to any person; (2) threatening or placing the other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (3) first rendering the other person unconscious; or (4) administering to the other person by force or threat of force, or without the knowledge or consent of the person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the other person to appraise or control conduct;
 - (e) The sexual assault or sexual assault of a child was not the result of an abuse of rank, grade, authority or position; and
 - (f) Under the particular circumstances of the case, the member’s continued presence in the Air Force is consistent with the interest of the Air Force in maintaining proper discipline, good order, leadership, and morale. (Noncommissioned officers have special responsibilities by virtue of their status; fulfill an integral role in maintaining discipline; and, therefore, must exhibit high standards of personal integrity, loyalty, dedication, devotion to duty and leadership.)

The regulation also states that the board or the separation authority must consider the impact of the sexual assault on the victim and the views of the victim on retention.

119 Sexual misconduct includes rape, sexual assault, stalking, forcible sodomy, or “any sexual misconduct that could be charged as a violation or an attempt to violate [Articles 120, 120a, 120b, or 120c of the UCMJ].” U.S. DEP’T OF NAVY, MILPERSMAN 1910-142, ENLISTED ADMINISTRATIVE SEPARATIONS—SEPARATION BY REASON OF MISCONDUCT—COMMISSION OF A SERIOUS OFFENSE (May 31, 2013), *available at* <http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-142.pdf>; U.S. DEP’T OF NAVY, MILPERSMAN 1910-233, ENLISTED ADMINISTRATIVE SEPARATIONS—MANDATORY SEPARATION PROCESSING (July 11, 2013), *available at* <http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1910-233.pdf>; These policies apply to enlisted members, but the same policy applies to officers, though the regulation covering Navy officer administrative separations has not yet been updated to reflect this policy. DoD SAPRO FY13 Report, Encl. 3, Department of the Navy.

120 An incident is considered substantiated when there has been a court-martial or civilian court conviction, nonjudicial punishment, or “when a commander determines, based on a preponderance of the evidence, that an incident or attempted incident of sexual misconduct has occurred.” U.S. MARINE CORPS ORDER 1900.16, SEPARATION AND RETIREMENT MANUAL §6210 ¶ 4.d; §4103 ¶ 3.d (Nov. 26, 2013)[hereinafter USMC Order 1900.16], *available at* <http://www.marines.mil/Portals/59/Publications/MCO%20%201900.16.pdf>.

121 Sexual misconduct includes conduct that could form the basis of a violation of Article 120, UCMJ. This includes rape, sexual assault, aggravated sexual contact, and abusive sexual contact. USMC Order 1900.16, §6210, ¶ 4.b. and §4103, ¶ 3.b.

122 U.S. DEP’T OF ARMY, DIRECTIVE 2013-21, INITIATING SEPARATION PROCEEDINGS AND PROHIBITING OVERSEAS ASSIGNMENT FOR SOLDIERS CONVICTED OF SEX OFFENSES ¶ 3 (Nov. 7, 2013), *available at* http://armypubs.army.mil/epubs/pdf/ad2013_21.pdf.

Finally, it should be noted that the FY14 NDAA mandates the punitive discharge or dismissal of a member upon conviction at a general court-martial of a penetrative offense or attempt to commit a penetrative offense.¹²³ This mandate would presumably reduce the number of administrative discharge actions in sexual assault cases.

B. DATA ON ADVERSE ADMINISTRATIVE ACTIONS FOR SEXUAL ASSAULT OFFENSES

According to DoD,¹²⁴ in fiscal year 2012, commanders took adverse administrative action against military members for sexual assault offenses in 65 cases;¹²⁵ 83 cases in fiscal year 2013,¹²⁶ and 123 cases in fiscal year 2014.¹²⁷

C. DATA ON ADMINISTRATIVE DISCHARGES FOR SEXUAL ASSAULT OFFENSES

As was true of the nonjudicial punishment data, the JPP's sole source of data on administrative discharges is the Department of Defense Annual Report on Sexual Assault in the Military, together with the individual Service annexes to this report.¹²⁸ The DoD annual reports provide valuable data regarding sexual assault; however, the administrative discharge data have some significant limitations.

This paragraph references 42 U.S.C. § 16911 and AR 27-10 to define "sex offense." 42 U.S.C. § 16911 falls under the Sex Offender Registration and Notification subchapter and defines "sex offense" in a number of ways, to include "a criminal offense that has an element involving a sexual act or sexual contact with another;" 42 U.S.C. § 16911(5)(A). In addition, AR 27-10 at ¶ 24-2, discusses offenses requiring sex offender registration and includes rape, aggravated sexual assault, forcible sodomy, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses. Note that the regulation was written prior to the 2012 revisions to Article 120, UCMJ.

123 FY14 NDAA, § 1705. This provision takes effect for offenses committed on or after June 24, 2014.

124 This information was taken entirely from the Department of Defense Annual Reports on Sexual Assault in the Military. The JPP did not have access to the actual adverse administrative action documents, because there is no central repository for them and because they fall under the Privacy Act. The types of administrative actions taken are not specified: among the possible actions is a letter of reprimand, bar to reenlistment, administrative reduction in rank, removal from promotion list, or a negative performance appraisal.

125 This number is broken down by Service as follows: Army-56; Navy-8; Marine Corps-1; and Air Force-0. The Army stated that these were all non-penetrative offenses and "the vast majority an unwanted touch over the clothing." FY12 SAPRO Report, *supra* note 19, Encl. 1: Department of the Army at 41; FY12 SAPRO Report, *supra* note 19, Encl. 2: Department of the Navy at 2 and 24; FY12 SAPRO Report, *supra* note 19, Encl. 3: Department of the Air Force at 6.

126 This number is broken down by Service as follows: Army, 55; Navy, 26; Marine Corps, 2; and Air Force, 0. The Army stated that these were all non-penetrative offenses and "the vast majority an unwanted touch over the clothing." FY13 SAPRO Report, *supra* note 19, Encl. 2: Department of the Army at 46; FY13 SAPRO Report, *supra* note 19, Encl. 3: Department of the Navy at 5 and 20; FY13 SAPRO Report, *supra* note 19, Encl. 4: Department of the Air Force at 12.

127 This number is broken down by Service as follows: Army, 73; Navy, 15; Marine Corps, 16; and Air Force, 19. The Army stated that these were all non-penetrative offenses and "the vast majority an unwanted touch over the clothing." FY14 SAPRO Report, *supra* note 19, Encl. 1: Department of the Army at 64; FY14 SAPRO Report, *supra* note 19, Encl. 2: Department of the Navy, Navy Summary of Unrestricted Sexual Assault Reports Closed During Fiscal Year 2014 Involving Service Members, Section H and Sexual Assault Statistical Report Data Call for Sexual Assault in the Military, ¶ 2.2; the Air Force stated that fourteen of the cases involved unwanted touching over clothing, or a hug or kiss on the cheek. In three of the cases, the victim declined to participate in the military justice process. In the final two cases, the evidence was deemed insufficient to proceed to court-martial or nonjudicial punishment, but the subject's conduct was determined to be inappropriate. FY14 SAPRO Report, *supra* note 19, Encl. 3: Department of the Air Force at 26.

128 The Privacy Act prohibits personal information of the members involved from being disclosed to the public. The Privacy Act of 1974, 5 U.S.C. §552a.

As previously noted in Section IV, the DoD annual reports and Service enclosures capture disposition data for sexual assault offenses by order of severity of the action taken; moreover, an offense can be placed into only one disposition category, even if more than one action was taken.¹²⁹ For example, if a member was court-martialed for a sexual assault offense, this is the disposition that would be noted in the report. If the member received a punitive discharge as part of his or her court-martial sentence, there would be no further action necessary to remove the member from the military. But if the member did not receive a punitive discharge as part of the court-martial sentence, based on Service policies on sexual assault, the member would likely be processed for administrative discharge.¹³⁰ However, because the administrative discharge was not the primary disposition, the discharge might not be noted in the report, especially if the discharge took place after the fiscal year reporting period was over.¹³¹

While the Services note in the case summaries the fact that a court-martial, nonjudicial punishment action, or adverse action was subsequently followed by an administrative discharge of the member, these data may not be noted if the primary disposition (e.g., court-martial, nonjudicial punishment) occurred later in the fiscal year, as the member’s unit may not have completed the administrative discharge process by the end of the fiscal year. Even if the administrative discharge process were initiated during the reporting period, the process can be lengthy in cases in which the member is entitled to an administrative discharge board hearing. In such cases, the Services may not have reported the administrative discharge in their numbers, as the action was not yet complete.

The Services collectively reported the total number of cases that DoD classified as administrative discharge cases. Beginning with the fiscal year 2014 report, the military Services also noted the characterization of Service issued upon discharge. These data are presented in Tables 5 and 6.¹³²

Table 5. Reports of Administrative Discharges in Adult Sexual Assault Offenses Based on DoD SAPRO Annual Reports

Fiscal year	Administrative discharges
2012	65
2013	143
2014	229 ¹³³

129 Actions in order of decreasing severity are court-martial, nonjudicial punishment, administrative discharge, and other administrative actions. *Transcript of JPP Public Meeting 127* (Nov. 6, 2015) (testimony of Dr. Nathan Galbreath); FY14 SAPRO Report, *supra* note 19 at 4.

130 An enlisted member cannot be administratively discharged for an offense that resulted in a court-martial acquittal. DoDI 1332.14 at Encl. 4, ¶ 1.c(1).

131 Dr. Nathan Galbreath told the JPP:

We only count one subject one time and we’ve kind of made an arbitrary level of severity associated with these cases. So, clearly, with court-martial being the most severe action taken, or the most serious action taken. With nonjudicial punishment being the next severe action taken and then administrative discharges and then other administrative actions. Just to let you know, I don’t have real good agreement between the JAG Offices as some believe that administrative discharge is a more serious action than a nonjudicial punishment.

Transcript of JPP Public Meeting 127–28 (Nov. 6, 2015) (testimony of Dr. Nathan Galbreath).

132 FY12–14 SAPRO Reports, *supra* note 19.

133 This includes 17 administrative discharge proceedings that were pending at the end of the fiscal year.

Table 6. Information Regarding Fiscal Year 2014 Characterization of Administrative Discharges Related to Adult Sexual Assault Offenses, Based on Data in Annual DoD SAPRO Reports¹³⁴

Types of discharge	Total number
Under other than honorable conditions	107
General	76
Honorable	11
Uncharacterized ¹³⁵	18
Pending	17

The military Services reported more administrative discharges each year from fiscal year 2012 to 2014. Slightly more than half of the individuals who were reported as discharged from the military in the fiscal year 2014 report received the least favorable characterization of Service, “under other than honorable conditions.” Discharge and characterization totals may not include cases in which commanders imposed other adverse administrative or nonjudicial actions prior to separation, due to DoD’s method of accounting for cases.

As was the case for data regarding nonjudicial punishment, the JPP did not have access to administrative discharge case documents from the military Services, as they are personnel records protected under the Privacy Act. The JPP instead relied on information included in the SAPRO Reports for fiscal years 2012 to 2014 and case synopses from the Service enclosures included in each report. The JPP could not validate information provided in the SAPRO Reports or case information included in the Service synopses.

The number of administrative discharges significantly increased from fiscal year 2012 to 2014. As noted above regarding courts-martial and nonjudicial punishment, without knowing the facts of each individual administrative discharge, the JPP cannot provide a meaningful analysis of whether these actions were appropriate or consistent. The JPP will continue to monitor these data in future reports.

134 Administrative discharge characterization data were not available for fiscal years 2012 and 2013.

135 Uncharacterized discharges may be given for entry level separations for members with six months or less of service, unless characterization under other than honorable conditions is warranted by the circumstances of the case. DoDI 1332.14 at Encl 4, ¶ 3.c(1).

VI. Appellate Review of Sexual Assault Convictions

The JPP was also tasked with reviewing and evaluating court-martial convictions for adult sexual assault offenses in the year covered by the most recent report of the Judicial Proceedings Panel and to examine 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.

For this report, the JPP reviewed the opinions archived on the public websites of the Service Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces (CAAF) for fiscal years 2012 through 2014.

A. OVERVIEW OF THE MILITARY APPELLATE PROCESS

Under the UCMJ, an accused convicted by a court-martial is entitled to an automatic review of his or her trial. Because there is no common law right to appeal, the accused's right must derive from statutory or regulatory sources.¹³⁶ In the military, the statutory provisions are contained in UCMJ Articles 64 through 76.¹³⁷

Following a court-martial conviction, the case is first reviewed by the convening authority—that is, the commander who referred the accused's case to trial.¹³⁸ Until recently, the convening authority had broad clemency powers under Article 60 of the UCMJ to act on a case after trial, powers not always shared with military appellate courts. For example, the convening authority could, subject to some limitations, suspend all or a portion of the adjudged sentence, a power not possessed by either the Service Courts of Criminal Appeals or CAAF. However, as discussed in Section III of this report, in the FY14 NDAA, Congress substantially restricted the convening authority's powers and thus limited the ability of a convicted Service member to obtain relief from the convening authority.¹³⁹

The military justice system features three levels of appellate review to which an accused may appeal a court-martial conviction. The first level consists of the four military Service Courts of Criminal Appeals (Air Force, Army, Coast Guard, and Navy-Marine Corps). The Courts of Criminal Appeal, which are located in the Washington, DC, area, consist of senior judge advocates, who are usually active duty officers or reserve officers on active duty.¹⁴⁰ Under Article 66 of the UCMJ, all cases in which

¹³⁶ SCHLUETER, *supra* note 72 at § 17-1.

¹³⁷ *See generally* 10 U.S.C. § 864 - 876 (UCMJ, art. 64 - 76).

¹³⁸ *See* 10 U.S.C. § 860 (UCMJ, art. 60).

¹³⁹ The convening authority may not disapprove, commute, or suspend an adjudged sentence that is more than six months or that includes a punitive discharge, unless (1) upon recommendation from the trial counsel, in recognition of “substantial assistance” by the accused in the investigation or prosecution of another person, including for offenses with mandatory minimum sentences; or (2) in order to honor a pretrial agreement; however, the convening authority may not commute a mandatory minimum sentence except to reduce a dishonorable discharge to a bad conduct discharge. FY14 NDAA §1702(b).

¹⁴⁰ SCHLUETER, *supra* note 72, at § 17-15.

the approved sentence includes death, a punitive discharge, or confinement for one year or more are forwarded to the Service Courts of Criminal Appeals for appellate review.¹⁴¹

The second level of appellate review is CAAF, which sits as a civilian appellate forum in Washington, DC, and is composed of five judges appointed by the President.¹⁴² CAAF reviews all cases involving a sentence to death and cases reviewed by the Service Courts of Criminal Appeals that are forwarded to CAAF by the Judge Advocate Generals. In all other cases reviewed by the Service Courts, CAAF review is discretionary.¹⁴³ The third level of review is petition to the United States Supreme Court, though this review is subject to statutory limitations.¹⁴⁴

Not all military members who receive a court-martial conviction are entitled to appellate review at the Service Courts of Criminal Appeals. As noted, appeal to the Service appellate courts is automatic under Article 66 of the UCMJ when the approved sentence includes death, a punitive discharge, or one or more years of confinement. For courts-martial convictions that don't meet these criteria, the UCMJ provides for lesser forms of post-trial review.

Article 69(a) of the UCMJ provides for review by the Service Judge Advocate General for general courts-martial convictions that don't meet the criteria for review by the Service appellate courts under Article 66.¹⁴⁵ The Judge Advocate General has the power to modify or set aside the findings, sentence, or both, for these cases.¹⁴⁶ In addition, the UCMJ also grants to the Service Judge Advocates General the power to modify or set aside the findings or sentence for summary, special, or general courts-martial convictions not reviewed by the Service appellate courts on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.¹⁴⁷

Article 64 of the UCMJ provides for automatic review by a judge advocate in all summary courts-martial convictions and special courts-martial convictions in which the approved sentence includes confinement for less than one year and does not include a bad conduct discharge. The judge advocate, in the written review, provides conclusions as to whether the court had jurisdiction over the accused and the offense, whether the charges and specifications stated an offense, and whether the sentence was within the limits prescribed by law, and responds to each allegation of error made by the accused.¹⁴⁸ If the judge advocate determines that corrective action should be taken, he or she then forwards the review to the general court-martial convening authority, who may disapprove the findings or sentence; remit, commute, or suspend the sentence; or order a rehearing on the findings or sentence.¹⁴⁹

Finally, exhaustion of review through these channels does not necessarily end the review of a court-martial. There are additional avenues of review available to the convicted Service member, including

141 10 U.S.C. § 866 (UCMJ, art. 66).

142 SCHLUETER, *supra* note 72, at § 17-16.

143 *See* 10 U.S.C. § 867 (UCMJ, art. 67).

144 *See* 10 U.S.C. § 867a (UCMJ, art. 67a).

145 *See* 10 U.S.C. § 869(a) (UCMJ, art. 69(a)).

146 *Id.*

147 *See* 10 U.S.C. § 869(b) (UCMJ, art. 69(b)).

148 *See* 10 U.S.C. § 864(a) (UCMJ, art. 64(a)).

149 *See* 10 U.S.C. § 864 (UCMJ, art. 64).

internal military administrative review of the proceedings and external collateral review by the federal courts.¹⁵⁰

B. APPELLATE ACTION ON COURT-MARTIAL CONVICTIONS FOR SEXUAL ASSAULT OFFENSES

The JPP reviewed the published and unpublished opinions of the Service Courts of Criminal Appeals from fiscal years 2012 through 2014, which can be found on the courts' public websites, and found 256 opinions that included conviction on one or more charges of adult sexual assault offenses.¹⁵¹ Of these opinions, the Service Courts of Criminal Appeals set aside an adult sexual assault charge or specification, or granted relief on the sentence of a case involving an adult sexual assault offense, in 34 cases.¹⁵² Table 7 shows these cases by military Service and by fiscal year.

Table 7. Adult Sexual Assault Cases on Appeal: Conviction Set Aside or Sentence Reduced at Service Courts of Criminal Appeals

	FY12	FY13	FY14	Total
Air Force	0	2	3	5
Army	3	3	14	20
Marine Corps	1	2	2	5
Navy	1	1	0	2
Coast Guard	0	2	0	2
TOTAL	5	10	19	34

The appellate courts' reasons for granting relief in these cases varied. The most common justifications were significant post-trial case processing delays, unreasonable multiplication of charges (e.g., the court determined on appeal that an accused had unreasonably been charged in multiple ways for the same offense), and factual insufficiency, a remedy available in military courts of criminal appeal. Other reasons include faulty jury instructions, lack of personal jurisdiction over the accused, unlawful command influence, confrontation clause denial, and improper determination of a lesser included offense. Owing to the length of time from adjudication of a court-martial to appellate review, the fiscal year 2012 to 2014 appellate data largely cover courts-martial tried under the 2007 Article 120, UCMJ, and prior statute(s). The 2012 statute applies to offenses committed on or after June 28, 2012, making it unlikely that many cases tried under this statute reached appellate review by fiscal year 2014. Appellate decisions for fiscal year 2015 and beyond will likely cover courts-martial adjudicated under the 2012 statute. The JPP will assess these decisions in future reports.

The JPP was also tasked to assess appellate actions in cases involving a pretrial agreement. Table 8 shows the number of cases in which guilty pleas pursuant to a pretrial agreement in adult sexual

¹⁵⁰ SCHLUETER, *supra* note 72, at § 17-18.

¹⁵¹ This number includes only the published and unpublished opinions and does not include the cases in which the appellate courts affirm the findings and sentence without an opinion. <https://www.jagcnet.army.mil/ACCA#>; <http://afcca.law.af.mil/content/opinions.php%3Ftabid=3.html>; http://www.jag.navy.mil/courts/opinion_archive.htm; http://www.uscg.mil/legal/cca/Court_of_Criminal_Appeals_Opinions/Court_of_Criminal_Appeals_Opinions.asp.

¹⁵² This number includes cases in which the appellate court overturned a conviction for a sexual assault charge or reduced the sentence imposed for all offenses, including a sexual assault offense; however, where the appellate courts reduced a sentence or authorized a rehearing on sentence solely based on its decision to set aside a conviction for a non-sexual assault offense, then the case was not counted as granting relief on a sexual assault offense.

assault offenses were set aside or sentences were reduced on appeal by the Service Courts of Criminal Appeals. The six cases all involved technical errors made in the initial charging of the case, such as unreasonable multiplication of charges (i.e., the same sexual assault charged as two different types of assault), or involved unreasonable post-trial case processing delays.

Table 8. Relief Granted by Service Courts of Criminal Appeals Following a Guilty Plea

	FY12	FY13	FY14	Total
Air Force	0	0	0	0
Army	0	0	6	6
Marine Corps	0	0	0	0
Navy	0	0	0	0
Coast Guard	0	0	0	0
TOTAL	0	0	6	6

Finally, Table 9 shows the number of cases involving adult sexual assault offenses in which CAAF granted relief to the appellant from fiscal years 2012 to 2014.¹⁵³ CAAF’s reasons for granting relief varied: two cases involved errors by the military judge in admitting witness testimony, one case involved multiplicity of charges, one case involved improper admission of prior misconduct, and one case involved improper jury instructions.

Table 9. Relief Granted by United States Court of Appeals for the Armed Forces (CAAF)

	FY 12	FY13	FY14	Total
Air Force	0	0	2	2
Army	0	0	1	1
Marine Corps	1	1	0	2
Navy	0	0	0	0
Coast Guard	0	0	0	0
TOTAL	1	1	3	5

The Service Courts of Criminal Appeals set aside sexual assault convictions or reduced sentences in cases involving an adult sexual assault charge in 34 cases from fiscal years 2012 to 2014. In only 6 of these 34 cases in which relief was granted did the accused plead guilty to the sexual assault offense. While the JPP was tasked with determining the number of times a defendant appealed following a plea agreement, it is important to note that under Article 66 of the UCMJ, appeal is automatic in cases in which the approved sentence includes a punitive discharge or one year or more of confinement: no action on the part of the Service member is required. During this same time period, there were only five cases involving an adult sexual assault offense in which CAAF granted relief.

¹⁵³ In each of these published opinions, relief consisted of setting aside a charge or specification, as opposed to granting relief on a term of confinement without setting aside any charge of conviction.

VII. Military, Federal, and State Data on Sexual Assault Adjudications

A. FELONY SEXUAL ASSAULT PROSECUTIONS IN STATE AND FEDERAL COURTS

The statutory tasks require that the JPP examine federal and state sentencing data concerning sexual assault crimes. The JPP heard testimony and received submissions from officials from the United States Sentencing Commission and the Bureau of Justice Statistics, as well as criminologists summarizing the most current data collected from civilian criminal courts. While academic analysis of crime phenomena is prolific, there is little comprehensive statistical information measuring the disposition or outcome of sexual assault cases in the civilian community.¹⁵⁴

The Sentencing Commission collects detailed information on felony sentences issued by the U.S. District Courts. These data are used in amending the federal sentencing guidelines, in publicizing the sentences for federal felons, and in shaping federal criminal law and policies. However, because the overwhelming majority of rape and sexual assault prosecutions are carried out in state courts, the Sentencing Commission reports relatively few sexual assault cases each year.¹⁵⁵

In response to a request for information regarding sentences for federal sexual abuse offenses, the Sentencing Commission compiled data for the JPP from fiscal years 2012 through 2014, identifying 116 cases that involved adult victims of sexual abuse.¹⁵⁶ The JPP requested that the Commission narrow its study to cases in which the offenders had no prior criminal history so that they might be analogous to those convicted in military courts-martial, the vast majority of whom have no prior criminal history. The Commission found only nine such cases. In an effort to provide more data, the Commission expanded its search to include cases in which the federal offender had been convicted of low-level crimes; 94 offenders met that criterion.¹⁵⁷ Table 10 summarizes the sentencing information provided to the JPP by the Sentencing Commission.

154 *Transcript of JPP Public Meeting* 280–81 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn), 294–96 (testimony of Dr. James Lynch, Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

155 U.S. SENTENCING COMMISSION'S 2015 ANNUAL SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. Statistic from Sentencing Commission's quarterly report, available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2015/sourcebook-2015>.

156 The Sentencing Commission provided information concerning sentences imposed for offenses described in Title 18, United States Code, sections 2241(a) and (b), 2242, and 2244(a) and (b). The Commission does not regularly record the age of the victim in any case, but undertook a special coding project to ascertain the age of the victim(s) in these cases. See Letter to the JPP Staff Director from the Director of the Office of Research and Data at the U.S. Sentencing Commission, Mr. Glenn R. Schmitt, dated December 10, 2015, available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20160122/03_USSC_Response_JPP_SpecialRequest.pdf.

157 The Sentencing Commission explained its rationale for expanding the search by pointing to the policy that “persons may be allowed to enlist in the military despite the fact of prior low-level convictions for such crimes as public disorder, underage alcohol use, or traffic crimes in which no person was injured. We thought it might be helpful, therefore, to expand our analysis to include cases in which the federal offender had been convicted of similar low-level crimes.” *Id.*

Table 10. U.S. Sentencing Commission Data on Sentences for Federal Sex Abuse Convictions

Offense of conviction in FY12–14:	9 offenders with no prior criminal history	Sentence	94 offenders with (low-level) criminal history	Average sentence
18 U.S.C. § 2241(a) Aggravated sexual abuse	1 offender	Life	25 offenders	156 months (median 121 months)
18 U.S.C. § 2242 Sexual abuse	2 offenders	36–70 months	30 offenders	84 months (median 78 months)
18 U.S.C. § 2244(a) Abusive sexual contact	4 offenders	12–26 months (average 22 months)	34 offenders	31 months (median 24 months)
18 U.S.C. §2244(b) Sexual contact without permission	2 offenders	12 months; 30 months	8 offenders	32 months (median 24 months)

The Bureau of Justice Statistics, an agency of the U.S. Department of Justice, compiles and analyzes a wide array of federal and state crime data, from survey research on crime incidence to the Bureau of Prisons data on post-conviction recidivism.¹⁵⁸ Officials periodically survey 75 urban jurisdictions for arrest, prosecution, and sentencing data in several specific crime categories. The most recent analysis was conducted in 2009 and included data on forcible rape arrests.¹⁵⁹ Statistics from that study are summarized in Table 11.

Table 11. Bureau of Justice Statistics Data from State Courts in Large Urban Counties (May 2009)

Cases involving an arrest charge of forcible rape	
Overall conviction rate for any offense	68%
Conviction rate for rape	35%
Acquittals	3%
Dismissals	24%
Sentence included confinement	89% (5% in jail)
Mean confinement sentence	142 months

Jurisdiction-specific research provides a wealth of detail about the criminal justice process and informs our understanding of the complex nature of sexual assault crimes. Experts explained, however, that the results from one jurisdiction may not be generalizable or applicable to another jurisdiction, and they emphasized the difficulty of obtaining nationally representative data in order to conduct a comparative study.¹⁶⁰

158 *Transcript of JPP Public Meeting 195–203* (Sept. 18, 2015) (testimony of Dr. Howard Snyder).

159 U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, 34 (December 2013). Related research based on 2002 data can be referenced in: U.S. Department of Justice, Bureau of Justice Statistics, *Profile of Intimate Partner Violence Cases in Large Urban Counties* (2009).

160 Dr. Cassia Spohn told the JPP:

Another limitation of jurisdiction-specific research is that the results of our research may not be generalizable. And so, even though we conduct research in some of the largest jurisdictions in the United States, we cannot necessarily say that what we find in Los Angeles or New York City or Philadelphia or any other city really is the same—are the same patterns or outcomes that we would find in other jurisdictions.

B. CONTRASTING APPROACHES TO SENTENCING IN THE MILITARY AND CIVILIAN JUSTICE SYSTEMS

The military judicial system has many fundamental differences from its civilian counterparts, ranging from the exercise of prosecutorial discretion by commanders to adversarial sentencing procedures and aggregate sentencing.¹⁶¹ Experts offering testimony to the JPP stressed the importance of understanding the procedures used in each justice system in order to identify any “decision points that are comparable”¹⁶² before drawing conclusions or embarking on any empirical study.

Several aspects of the sentencing phase of the military judicial process are unique.¹⁶³ The military justice system follows a unitary sentencing system: sentences are imposed in the aggregate, without a specific punishment or term of confinement being designated for a particular offense. As a result, if the defendant has been convicted of more than one crime, there is no way to assess how much weight the sentencing authority gave to any individual crime.¹⁶⁴ Sentencing hearings are adversarial in nature and immediately follow the announcement of findings.¹⁶⁵ Military sentences may be assessed by either a judge or a member panel, at the defendant’s election, whereas in federal courts and most state jurisdictions only judges can decide punishment, even when a jury decides guilt in the findings phase of trial. For most military offenses the range of a sentence stretches from no punishment to the maximum established by the President, rather than being arranged by sentencing guidelines or mandatory minimum punishments.¹⁶⁶ The only sentencing limitation in sexual assault cases now requires that Service members convicted of certain offenses receive a punitive discharge.¹⁶⁷

In the federal system, as noted above, sentencing occurs in an entirely separate hearing, often months after conviction.¹⁶⁸ Practitioners in the federal and state system commented that while the overarching purposes of sentencing are somewhat similar in the federal and military systems, the information

Transcript of JPP Public Meeting 283 (Sept. 18, 2015) (testimony of Dr. Cassia Spohn).

161 In enacting the UCMJ, Congress endeavored to balance the need for the commander to maintain discipline within the ranks against the desire to make the military justice system fairer for those accused of offenses. This dual purpose of ensuring both justice and discipline distinguishes the military justice system from civilian systems. *See generally* SCHLUETER, *supra* note 72 at § 1-1.

162 *Transcript of JPP Public Meeting 296–97* (Sept. 18, 2015) (testimony of Dr. James P. Lynch) (“The second thing if you want to do a comparable study is . . . you’re going to have to get decision points that are comparable. The military process is somewhat different, at least in the reports that I read and there are more actors involved and there’s more decision points made and how those actually square up to the decision points and the processing in the civilian system, someone’s going to have to deal with that, I think, so that you get those points.”) (“The civilian justice system has a very limited number of things that they can do so that—and that will affect every other decision in the process. If my choice is to send you to prison or to let you go, that constrains a lot of things in the system. If I have the option of taking your pension, of demoting you, of doing a whole bunch of other things, then you should have a philosopher around to see how things are going to square up in terms of sentencing area and so on.”).

163 RSP REPORT, *supra* note 10, at 136–45 (providing a detailed description of how sentencing procedures in the military and civilian sectors differ, including a table that highlights the dissimilarities between the systems.).

164 *See* Colonel James E. Baker, *Is Military Justice Sentencing On the March? Should It Be? And If So, Where Should It Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FEDERAL SENTENCING REPORTER 72 (Dec. 2014).

165 *See Transcript of JPP Public Meeting 37–38* (Oct. 9, 2015) (testimony of Hon. Frank D. Whitney, United States Chief District Judge, Western District of North Carolina).

166 *See* SCHLUETER, *supra* note 72 at § 16-2.

167 *See* 10 U.S.C. § 856 (UCMJ, art. 56), as amended by FY14 NDAA § 1705(a).

168 *Transcript of JPP Public Meeting 34–35* (Oct. 9, 2015) (testimony of Mr. Steven J. Grocki).

available to the sentencing authorities may vary.¹⁶⁹ Federal judges receive a presentencing report, prepared by the probation office, that contains very detailed information about the offense, the offender, and the victim.¹⁷⁰ By contrast, evidence offered at military sentencing is limited to the matters of aggravation, extenuation, and mitigation specified in the rules for courts-martial.¹⁷¹

One expert providing comparative analysis observed how procedural distinctions between the two systems can explain differences observed in punishment data:

I think we have to keep in mind that there are other kinds of punishments that can be imposed in the military system with punitive separation, restitution, fines and forfeitures and, in many cases, those punishments, a sort of a cornucopia of punishments were imposed in the military cases.¹⁷²

Other experts emphasized the distinctiveness of the military's option to impose a punitive discharge:

That is first and foremost what is sought by the prosecution side. And so when looking at confinement as a comparative measure between the two systems that you have to account for that. And it's going to be difficult to account for that, because if it's a panel doing the sentencing, I mean it's very difficult to know how much weight they placed on the punitive discharge, how much they may have reduced the confinement term because they did get a punitive discharge. So looking across to the federal system, all you're going to see is confinement. And so that comparative measure is going to be difficult I think to make.¹⁷³

As mentioned above, prosecutors and judges explained to the JPP that federal sentencing guidelines, much like statutory schemes for grading offenses at the state level, do not apply in the military. The Federal Sentencing Guidelines grade offenses on a point system that corresponds to a range of months of confinement. In sexual assault cases, adjustments are made to the range based on several factors, including the age of the victim, whether a weapon was used or serious injury resulted, and other special circumstances surrounding the assault. The criminal history of the offender also has a significant influence on sentencing in state and federal courts. At the same time, presenters noted, a lack of detail across state data that is publicly available makes the influence of criminal history impossible to discern.¹⁷⁴

C. JPP ASSESSMENT

Limited national data and systemic differences between the military criminal justice system and other civilian systems make comparisons of civilian and military punishments in sexual assault crime convictions inappropriate. Federal sentencing information is comprehensive, but the number of adult victim sexual assault cases prosecuted in the federal system was insufficient to allow for reasonable

169 *Transcript of JPP Public Meeting* 34–35 (Oct. 9, 2015) (testimony of Mr. Steven J. Grocki).

170 Fed. R. Crim. P. 32(d).

171 MCM, *supra* note 1, R.C.M. 1001(b)(4), (c), (d), and (f); MCM, *supra* note 1, R.C.M. 1001A.

172 *Transcript of JPP Public Meeting* 124 (Jan. 22, 2016) (testimony of Dr. Cassia Spohn).

173 *Transcript of JPP Public Meeting* 40–41 (Oct. 9, 2015) (testimony of Hon. Frank D. Whitney).

174 *Transcript of JPP Public Meeting* 125, 145 (Jan. 22, 2016) (testimony of Dr. Cassia Spohn).

comparison with courts-martial outcomes for similar offenses. In addition, federal sentencing statistics are also heavily influenced by the federal sentencing guidelines, which do not exist in the military system.

Conversely, data from state courts, where the vast majority of civilian sexual assault cases are tried, are categorized in very broad terms and collected infrequently. State criminal statutes also vary widely, and rules for sentencing differ from one state to the next. The JPP shares the perspective of a criminologist who observed that “it’s very difficult even to compare outcomes across jurisdictions in the civilian system because they vary so much on many, many dimensions.”¹⁷⁵

The JPP considered other distinctions between the military justice system and civilian jurisdictions that bolster the view that comparison of sentence outcomes is not appropriate:

- Definitions of offenses and delineations between severe and minor offenses vary widely in military, federal, and state sexual assault statutes.
- The Manual for Courts-Martial provides a maximum sentence for each criminal offense, which is then combined with all offenses of conviction to produce a total maximum sentence in each case.
- Because the military justice system uses a unitary sentencing procedure, it is not possible to determine what portion of a sentence is attributed to specific offenses in any case involving more than one charge.
- Military panel (jury) and judge sentencing occurs immediately after findings in a court-martial, and sentencing procedures in military justice provide for the prosecution to present matters in aggravation and defense to present matters in extenuation and mitigation; there is usually a delay in sentencing in civilian jurisdictions, which provides time for a probation officer to prepare a presentencing report for the judge’s consideration.
- Civilian jurisdictions often apply sentencing guidelines that account for the offense, the offender’s criminal history, the relevant characteristics of the victim, and a host of aggravating and mitigating factors beyond the scope of the military’s sentencing rules.
- The military has more punishment options than do civilian courts, including confinement, punitive discharge, reduction in rank, forfeitures, fines, and hard labor without confinement; these options are not comparable to the sentence results in civilian jurisdictions.

¹⁷⁵ *Transcript of JPP Public Meeting 68* (Mar. 11, 2016) (testimony of Dr. Cassia Spohn).

Judicial Proceedings Panel

Federal Advisory Committee



Adjudication of Sexual Assaults Reported in the Military Services

Dr. Cassia Spohn

JPP Staff Member

Foundation Professor and Director

School of Criminology and Criminal Justice

Arizona State University

Data

The Judicial Proceedings Panel (JPP) is tasked with reviewing and evaluating the response to sexual assault cases in the military. In 2014 and 2015, JPP staff requested that the military services provide documents for cases involving a preferred charge of sexual assault that were completed in fiscal years 2012, 2013, and 2014. JPP staff worked with WHS Sharepoint contractors to develop a comprehensive database that would allow staff to analyze case information extracted from the documents provided by the military services. JPP staff entered the data obtained from the documents and the database was then converted to an EXCEL file and imported into SPSS (Statistical Package for the Social Sciences) for analysis.

The database includes 1,761 cases, all of which involve at least one charge of a penetrative (i.e., rape, aggravated sexual assault, sexual assault, forcible sodomy and attempts to commit these offenses) or contact (i.e., aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses) sexual offense.

Case Characteristics, Case Dispositions, and Case Outcomes

The characteristics of the sexual assault cases, their dispositions, and outcomes are presented in Tables 1 and 2. As shown in Table 1, there were more cases in which sexual assault charges were preferred in FY2013 and FY2014 than in FY2012 (this is the fiscal year assigned by SAPRO). In terms of the military service of the accused, almost half (46.2%) of the cases were from the Army, 19.4% were from the Air Force, 17.3% were from the Navy, 14.0% were from the Marine Corps, and 3.1% were from the Coast Guard. Most of the accused were enlisted service members (93.2%) rather than officers (6.8%) and all but 11 (1750 or 99.4%) were male.

The number of victims in the case ranged from 1 to 11; most cases involved either one (82.9%) or two (10.9%) victims, and the mean number of victims was 1.28. Although most victims (92.0%) were female, there were 127 cases (7.2%) in which the victim(s) were male and 14 cases (0.8%) in which there were both female and male victims. Nearly three fourths (73.8%) of the cases involved victims who were members of military services.

The number of charges and specifications per case ranged from 1 to 30; very few cases (10.1%) involved only a single charge but more than half of the cases (52.9%) involved four or fewer charges. The mean number of charges and specifications was 5.77. In 72.4% (N = 1275) of the cases the most serious charge was a penetrative offense and in 27.6% (N = 486) cases the most serious charge was a contact offense. Of the 1275 individuals charged with a penetrative offense, 312 (24.5%) were convicted of a penetrative offense. Of the 486 individuals charged with a contact offense, 140 (28.8%) were convicted of a contact offense.

**TABLE 1
SEXUAL OFFENSES: CASE CHARACTERISTICS**

	N	%
Fiscal Year Assigned by SAPRO		
2012	426	24.2
2013	662	37.6
2014	673	38.2
Military Service of the Accused		
Air Force	342	19.4
Army	814	46.2
Coast Guard	54	3.1
Marine Corps	247	14.0
Navy	304	17.3
Rank of Accused		
Enlisted	1641	93.2
Officer	120	6.8
Sex of Accused		
Male	1750	99.4
Female	11	0.6
Sex of Victim(s)		
All Female	1619	92.0
All Male	127	7.2
Female and Male	14	0.8
Status of Victim(s)		
All Military	1296	73.8
All Civilian	407	23.2
Military and Civilian	54	3.1
Number of Victims (mean) [range: 1 - 11]	1.28	
Number of Charges and Specifications (mean) [range: 1 - 30]	5.77	
Accused Charged with Penetrative Offense ^a		
Yes	1275	72.4
No	486	27.6
Number of Penetrative Offenses Charged		
0	486	27.6
1	544	30.9
2	409	23.2
3	176	10.0
4	79	4.4
5 or more	67	3.8
Accused Convicted of Penetrative Offense		
Yes	312	24.5
No	963	75.5
[Not Charged with Penetrative Offense]	[486]	
Accused Charged with Contact Offense ^b		
Yes	486	27.6
No	1275	72.4
Accused Convicted of Contact Offense		
Yes	140	28.8
No	346	71.2
[Not Charged with Contact Offense]	[1275]	

^aAccused was charged with at least one count of rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses.

^bThe most serious offense with which the accused was charged was aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses.

Descriptive data on the dispositions and outcomes of the sexual assault cases are presented in Table 2. Most (78.6%) of the cases that went to a court-martial proceeding were disposed as a result of a general court-martial; 12.8% were disposed as a result of a special court-martial and 8.6% were disposed as a result of a summary court-martial. In terms of the type of trial forum, 42.0% of the cases were adjudicated by a military judge, 49.1% were handled by a panel of military members, and 8.9 percent were adjudicated by a summary court-martial officer. Article 32 hearings were held in most (72.4%) of the cases; the accused waived the hearing in 5.3% of the cases and an Article 32 hearing was not held in 22.2% of the cases.

For each type of case (i.e., penetrative and contact offenses) we determined whether the accused was convicted of at least one charge of that type, convicted of another type of charge, received an alternative disposition of some type, was acquitted of all charges, or whether all charges were dismissed without further action.

Among individuals charged with penetrative offenses, we found that 24.5% were convicted of at least one penetrative offense, 16.7% were convicted of at least one count of a sexual contact offense, and 10.0% were convicted of a non-sex offense only. The overall conviction rate for those charged with at least one penetrative offense was therefore 51.2% (24.5% + 16.7% + 10.0%). Among those charged with a penetrative offense who were not convicted, 11.8% received an alternative disposition, 21.6% were acquitted of all charges, and 15.5% had all charges dismissed without further action. The case outcomes for those charged with contact offenses were somewhat different. For example, 59.7% of these individuals were convicted of a sexual contact offense (28.8%) or a non-sex offense (30.9%). Of those who were not convicted, 17.1% received an alternative disposition, 15.0% were acquitted of all charges, and 8.2% had all charges dismissed without further action.

We also calculated conviction and acquittal rates for cases that were referred to trial. Among individuals referred to trial for penetrative offenses, 34.3% were convicted of penetrative offenses, 23.4% were convicted of sexual contact offenses, 13.4% were convicted of non-sex offenses, and 28.9% were acquitted of all charges. Among those referred to trial for sexual contact offenses, 39% were convicted of sexual contact offenses, 41.5% were convicted of non-sex offenses, and 19.5% were acquitted of all charges. The overall conviction rates for cases referred to trial were therefore 71.1% for penetrative offenses and 80.5% for contact offenses.

Table 2 also presents data on the type and length of the sentence imposed on those who were convicted. Focusing on the approved sentence, 74.5% were sentenced to confinement, 61.7% were given a punitive separation, and 57% received both confinement and punitive separation. The mean sentence (approved sentence) of confinement was 30.56 months; the range was from less than one month (recorded as 0 months) to 780 months (i.e., life in prison).

TABLE 2
SEX OFFENSES: CASE DISPOSITIONS AND CASE OUTCOMES

	N	%
Type of Court-martial		
General Court-martial	998	78.6
Special Court-martial	164	12.9
Summary Court-martial	109	8.5
Not Applicable	[490]	
Type of Trial Forum		
Military Judge	514	42.0
Panel of Military Members	600	49.1
Summary Court-martial Officer	109	8.9
Not Applicable	[539]	
Article 32 Hearing Held		
Yes	1260	72.4
Waived	93	5.3
No	387	22.2
[Unknown]	[21]	
Accused Charged with Penetrative Offense (N = 1275)		
Convicted of Penetrative Offense	312	24.5
Convicted of Sexual Contact Offense	213	16.7
Convicted of Non-Sex Offense	128	10.0
Alternative Disposition	150	11.8
Acquitted of All Charges	275	21.6
All Charges Dismissed Without Further Action <i>(After Article 32 Hearing)</i>	197 (159)	15.5 (82.4)
Accused Charged with Sexual Contact Offense (N = 486)		
Convicted of Sexual Contact Offense	140	28.8
Convicted of Other Charge	150	30.9
Alternative Disposition	83	17.1
Acquitted of All Charges	73	15.0
All Charges Dismissed Without Further Action <i>(After Article 32 Hearing)</i>	40 (19)	8.2 (57.6)
Accused Referred to Trial for Penetrative Offense (N = 912)		
Convicted of Penetrative Offense	313	34.3
Convicted of Sexual Contact Offense	213	23.4
Convicted of Non-Sex Offense	122	13.4
Acquitted	264	28.9
Accused Referred to Trial for Contact Offense (N = 359)		
Convicted of Sexual Contact Offense	140	39.0
Convicted of Non-Sex Offense	149	41.5
Acquitted	70	19.5
Approved Sentence Included Confinement		
Yes	702	74.5
No	240	25.4
[Not convicted, dismissed, alternative disposition]	[819]	
Approved Sentence Included Punitive Separation		
Yes	582	61.7
No	360	38.2
[Not convicted, dismissed, alternative disposition]	[819]	
Approved Sentence Included Confinement + Punitive Separation		

Yes	537	57.0
No	405	42.9
[Not convicted, dismissed, alternative disposition]	[819]	
Length of Adjudged Confinement Sentence, in Months (mean) [range = .12 to 780.00 (i.e., life in prison)]	37.14	
Length of Approved Confinement Sentence, in Months (mean) [range = 0.00 to 780.00 (i.e., life in prison)]	30.56	

Analyzing Dispositions, Outcomes, and Sentences

Descriptive data on case dispositions and case outcomes provide information regarding what happened in these sexual assault cases. In order to understand why cases were disposed as they were, it is necessary to conduct bivariate and multivariate analyses of the factors associated with case dispositions and case outcomes. Bivariate analysis is designed to determine if two variables are related (or correlated); it attempts to determine if one variable (the independent variable—for example, the accused’s military service) is a statistically significant predictor of another variable (the dependent variable—for example, whether the accused was convicted). If there is a statistically significant relationship between the variables, we can conclude that the independent variable is related to, associated with, or predictive of the dependent variable. In multivariate analysis, one controls for several independent variables simultaneously. With this type of analysis, one can isolate the effect of one variable (e.g., the military service of the accused) while controlling for or holding constant other theoretically relevant variables (e.g., the fiscal year, the seriousness of the offense, and the characteristics of the case, the accused, and the victim).

In that sections that follow, we examine bivariate relationships between relevant independent variables and the type of case disposition and several indicators of case outcomes.

Factors Associated with Type of Disposition. JPP staff posed a number of questions regarding the disposition of Art. 120 sexual offenses, asking whether dispositions varied by the type of offense charged, the fiscal year or by the accused’s military service. As shown in Table 3, there are statistically significant differences in dispositions based on all three of these factors. Cases in which the accused was charged with a penetrative offense were significantly more likely than those in which the accused was charged with a contact offense to be disposed at a general court-martial; by contrast, cases involving contact offenses were substantially more likely than those involving penetrative offenses to be disposed at a special or summary court-martial. Disposition via general court-martial declined and disposition via special and summary court-martials increased from 2012 to 2013 to 2014. Cases from the Army, Air Force and, to a lesser extent, the Navy were more likely than cases from the Marine Corps or Coast Guard to be disposed at a general court-martial. There also were differences across the military services in the use of special and summary court-martials.

**TABLE 3
DISPOSITION OF SEXUAL OFFENSES**

Most Serious Type of Offense Charged	General Court Martial		Special Court-martial		Summary Court-martial	
	N	%	N	%	N	%
Accused charged with penetrative offense	840	92.1	52	5.7	20	2.2
Accused charged with contact offense only	158	44.0	112	31.2	89	24.8

Differences in disposition by type of offense statistically significant; $P \leq .05$

Year	General Court-martial		Special Court-martial		Summary Court-martial	
	N	%	N	%	N	%
2012	280	85.1	25	7.6	24	7.3
2013	374	79.2	60	12.7	38	8.1
2014	344	73.2	79	16.8	47	10.0

Differences in disposition by year statistically significant; $P \leq .05$

Military Service	General Court-martial		Special Court-martial		Summary Court-martial	
	N	%	N	%	N	%
Air Force	206	82.7	35	14.1	8	3.2
Army	488	83.0	41	7.0	59	10.0
Coast Guard	22	53.7	14	34.1	5	12.2
Marine Corps	118	65.2	35	19.3	28	15.5
Navy	164	77.4	39	18.4	9	4.2

Differences in disposition by military service statistically significant; $P \leq .05$.

Factors Associated with Case Outcomes. JPP staff were asked to determine whether there were differences in the outcomes of sexual offenses based on the fiscal year, the military service of the accused, whether the accused was an enlisted member or an officer, and the gender and status of the victim. Because preliminary analyses revealed that outcomes varied depending on whether the accused was charged with a penetrative or contact offense, we conducted separate analyses for each type of offense.

When we examined the relationship between case outcomes and the fiscal year of the case, we found that outcomes varied significantly over time for penetrative offenses but not for contact offenses (see Table 4). Offenders charged with penetrative offenses were less likely to be convicted in 2014 than in 2012 (the

overall conviction rate declined from 59.4% in 2012 to 43.7% in 2014); conversely, these cases were more likely to be dismissed without further action in 2014 (19.1%) than in 2012 (9.3%). These patterns were not observed for those charged with contact offenses.

**TABLE 4
OUTCOMES OF SEXUAL OFFENSES BY FISCAL YEAR**

Accused Charged with Penetrative Offense(s)

	Convicted of Penetrative Offense	Convicted of Sexual Contact Offense	Convicted of Non-Sex Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
2012 (N = 323)	27.2% (88)	18.6% (60)	13.6% (44)	22.3% (72)	9.0% (29)	9.3% (30)
2013 (N = 497)	27.0% (134)	15.3% (76)	10.7% (53)	18.9% (94)	12.1% (60)	16.1% (80)
2014 (N = 455)	20.0% (91)	16.9% (77)	6.8% (31)	24.0% (109)	13.2% (60)	19.1% (87)

* Differences in outcome by year statistically significant; $P \leq .05$

Accused Charged with Contact Offense(s) Only

	Convicted of Contact Offense	Convicted of Other Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
2012 (N = 103)	36.9% (38)	22.3% (23)	11.7% (12)	20.4% (21)	8.7% (9)
2013 (N = 165)	27.9% (46)	30.3% (50)	17.0% (28)	17.6% (29)	7.3% (12)
2014 (N = 218)	25.7% (56)	35.3% (77)	15.1% (33)	15.1% (33)	8.7% (19)

Differences in outcome by year not significant.

The results of the analysis of the relationship between case outcomes and the military service of the accused are presented in Table 5. As these results show, there were significant differences in outcomes by military service for penetrative offenses (because of small cell sizes, we could not calculate statistical significance for cases involving contact offenses). For cases in which the most serious charge was a penetrative offense, the overall conviction rate (i.e, convicted of a penetrative offense + convicted of a contact offense + convicted of a non-sex offense) was 61.7% for the Coast Guard, 55.1% for the Army, 51.7% for the Marine Corps, 47.3% for the Navy and 44.2% for the Air Force. The odds of being convicted of a penetrative offense were highest for the Army (28.0%), lowest for the Marine Corps (16.9%). The likelihood that the accused would be acquitted of all charges was lowest for the

Marine Corps (8.8%) and highest for the Air Force (26.1%); by contrast, the likelihood that the case would be dismissed without further action was lowest for the Army (9.0%) and highest for the Coast Guard (26.5%). The services also differed in their use of alternative dispositions.

**TABLE 5
OUTCOMES OF SEXUAL OFFENSES BY MILITARY SERVICE OF ACCUSED**

Accused Charged with Penetrative Offense(s)

	Convicted of Penetrative Offense	Convicted of Sexual Contact Offense	Convicted of Non-Sex Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
Army (N = 592)	28.0% (166)	17.1% (101)	10.0% (59)	19.6% (116)	16.4% (97)	9.0% (53)
Air Force (N = 264)	24.2% (64)	11.7% (31)	8.3% (22)	26.1% (69)	10.6% (28)	18.9% (50)
Navy (N = 212)	22.7% (47)	16.9% (35)	7.7% (16)	24.2% (50)	4.8% (10)	23.7% (49)
Coast Guard (N = 34)	17.6% (6)	23.5% (8)	20.6% (7)	8.8% (3)	2.9% (1)	26.5% (9)
Marine Corps (N = 178)	16.9% (30)	21.3% (38)	13.5% (24)	20.8% (37)	7.3% (13)	20.2% (36)

Differences in outcomes by military service statistically significant; $P \leq .05$

Accused Charged with Contact Offense(s) Only

	Convicted of Contact Offense	Convicted of Other Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
Army (N = 222)	31.1% (69)	29.3% (65)	11.3% (25)	24.3% (54)	4.1% (9)
Air Force (N = 78)	32.1% (25)	25.6% (20)	30.8% (24)	7.7% (6)	3.8% (3)
Navy (N = 97)	24.7% (24)	25.8% (25)	16.5% (16)	16.5% (16)	16.5% (16)
Coast Guard (N = 20)	25.0% (5)	55.0% (11)	5.0% (1)	0.0% (0)	15.0% (3)
Marine Corps (N = 69)	24.6% (17)	42.0% (29)	10.1% (7)	10.1% (7)	13.0% (9)

Cannot calculate statistical significance due to cells with counts less than 5.

The results of the analysis of case outcomes by the status of the accused are presented in Table 6. Although the results are not identical for either type of offense, the differences by the status of the accused are not statistically significant. (This may reflect the relatively small number of cases involving accused individuals who were officers.)

**TABLE 6
OUTCOMES OF SEXUAL OFFENSES BY ACCUSED'S STATUS**

Accused Charged with Penetrative Offense(s)

	Convicted of Penetrative Offense	Convicted of Sexual Contact Offense	Convicted of Non-Sex Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
Officer (N = 85)	20.0 % (17)	16.5% (14)	18.8% (16)	24.7% (21)	10.6% (9)	9.4% (8)
Enlisted (N = 1190)	24.9% (296)	16.7% (199)	9.4% (112)	21.3% (254)	11.8% (140)	15.9% (189)

Differences in outcomes by status of accused not statistically significant

Accused Charged with Contact Offense(s) only

	Convicted of Contact Offense	Convicted of Other Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
Officer (N = 35)	17.1 % (6)	37.1% (13)	11.4% (4)	25.7% (9)	8.6% (3)
Enlisted (N = 451)	29.7% (134)	30.4% (137)	15.3% (69)	16.4% (74)	8.2% (37)

Differences in outcomes by status of accused not statistically significant

Table 7 presents the results of the analysis of the relationship between outcomes of sexual offenses and the gender and status of the victim. Because many cases involved more than one victim, there were some cases in which the victims were both females and males and both members of the military services and civilian. Consequently, we differentiated between cases in which all of the victims were female, cases in which all of the victims were male, and cases in which there were both female and male victims; however, there were too few cases involving both female and male victims to analyze. We similarly differentiated between cases in which all of the victims were members of the military services, cases in which all of the victims were civilians, and cases in which there were both military and civilian victims.

TABLE 7
OUTCOMES OF SEXUAL OFFENSES BY GENDER AND STATUS OF THE VICTIM

Accused Charged with Penetrative Offense(s)

	Convicted of Penetrative Offense	Convicted of Sexual Contact Offense	Convicted of Non-Sex Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
Victim(s) Gender						
All Females (N = 1216)	24.6% (299)	16.4% (199)	10.0% (122)	21.8% (265)	11.5% (140)	15.7% (191)
All Males (N = 52)	23.1% (12)	25.0% (13)	7.7% (4)	17.3% (9)	15.4% (8)	11.5% (6)
Males and Females (N = 7)						
Victim(s) Status						
Military (N = 898)	23.2% (208)	14.8% (133)	10.5% (94)	22.8% (205)	12.0% (108)	16.7% (150)
Civilian (N = 331)	26.0% (86)	20.8% (69)	8.8% (29)	19.3% (64)	11.8% (39)	13.3% (44)
Military and Civilian (N = 43)	44.2% (19)	25.6% (11)	11.6% (5)	11.6% (5)	2.3% (1)	4.7% (2)

Differences in outcomes by gender of victim not statistically significant

Differences in outcomes by status of victim statistically significant; $P \leq .05$

Accused Charged with Contact Offense(s) Only

	Convicted of Contact Offense	Convicted of Other Offense	Acquitted of all Charges	Alternative Disposition	Case Dismissed without Further Action
Victim(s) Gender					
All Females (N = 403)	26.8% (108)	30.8% (124)	16.4% (66)	17.4% (70)	8.7% (35)
All Males (N = 75)	37.3% (28)	33.3% (25)	8.0% (6)	16.0% (12)	5.3% (4)
Males and Females (N = 7)					
Victim(s) Status					
Military (N = 398)	28.6% (114)	31.4% (125)	14.6% (58)	16.6% (66)	8.8% (35)
Civilian (N = 76)	25.0% (19)	27.6% (21)	19.7% (15)	22.4% (17)	5.3% (4)
Military and Civilian (N = 11)					

Differences in outcomes by gender of victim not statistically significant

Differences in outcomes by status of victim not statistically significant

As shown in Table 7, the differences by the status of the victim were significant, but only for cases in which the accused was charged with a penetrative offense. There were no significant differences based on the gender of the victim for either penetrative or contact offenses. For cases in which the accused was charged with a penetrative offense, the overall conviction rate was substantially higher for cases involving both military and civilian victims (81.4%) than for cases involving only civilian victims (55.6%) or only military victims (48.5%). Cases involving military victims were more likely to result in an acquittal or dismissal (39.5%) than cases involving civilian victims (32.6%) or cases involving military and civilian victims (16.3%).

Factors Associated with Sentences. The results of the bivariate analyses of sentences are presented in Tables 8 through 11. The dependent variables analyzed are whether the offender was sentenced to a term of confinement, whether the offender received a punitive separation, whether the offender received both confinement and a punitive separation, and the length of the confinement sentence.

For each of these outcomes, the results are the same. None of the outcomes were affected by the fiscal year of case disposition, the military service of the accused, the rank of the accused, or the gender of the victim. By contrast, each outcome was affected by the type of conviction charge, the status of the victim, the type of court-martial, and the type of trial forum. Not surprisingly, sentences varied by the type of conviction charge. Those who were convicted of penetrative offenses were significantly more likely than those convicted of contact offenses to receive a confinement sentence (95.2% versus 67.6%), to receive a punitive separation (90.7% versus 50.4%), and to receive both confinement and punitive separation (88.2% versus 44.6%). The confinement sentences imposed on those convicted of penetrative offenses also were considerably longer than the sentences imposed on those convicted of contact offenses (54.8 months versus 14.67 months). Regarding the status of the victim, cases involving both military and civilian victims were more likely to receive a confinement sentence, a punitive separation, and both confinement and punitive separation; the mean sentence imposed on those whose victims were both military and civilian was also substantially longer than the mean sentence imposed on those whose victims were either military or civilian.

Sentences also varied by the type of court-martial and the type of trial forum. Accused individuals whose cases were disposed at a general court-martial and those adjudicated by a military judge were more likely than other types of cases to receive confinement, punitive separation, and both confinement and punitive separation. These individuals also received longer sentences than those whose cases were disposed by special or summary courts-martial or by a panel of military members or a summary court-martial officer.

TABLE 8
FACTORS ASSOCIATED WITH SENTENCE OF CONFINEMENT

	No Confinement		Confinement	
	N	%	N	%
Year of Disposition (NS)				
2012	56	22.1	197	77.9
2013	89	24.9	268	75.1
2014	96	29.1	234	70.9
Military Service of Accused (NS)				
Army	124	27.0	335	73.0
Air Force	27	16.7	135	83.3
Navy	34	23.1	113	76.9
Coast Guard	12	32.4	25	67.6
Marine Corps	44	32.6	91	67.4
Type of Conviction Charge ($P \leq .05$)				
Penetrative Offense	15	4.8	298	95.2
Contact Offense	43	32.4	94	67.6
Rank of Accused (NS)				
Officer	18	27.3	48	72.7
Enlisted	223	25.5	651	74.5
Gender of Victim(s) (NS)				
All Females	223	26.3	625	73.7
All Males	18	22.0	64	78.0
Females and Males	0	0.0	10	100.0
Status of Victim(s) ($P \leq .05$)				
All Military	188	28.0	484	72.0
All Civilian	47	21.2	175	78.8
Military and Civilian	6	13.0	40	87.0
Type of Court-martial ($P \leq .05$)				
General Court-martial	128	18.3	573	81.7
Special Court-martial	40	30.3	92	69.7
Summary Court-martial	70	70.0	30	30.0
Type of Trial Forum ($P \leq .05$)				
Military Judge	62	14.0	382	86.0
Panel of Military Members	96	25.7	277	74.3
Summary Court-martial Officer	70	70.0	30	30.0

TABLE 9
FACTORS ASSOCIATED WITH PUNITIVE SEPARATION SENTENCE

	No Punitive Separation		Punitive Separation	
	N	%	N	%
Year of Disposition (NS)				
2012	99	39.1	154	60.9
2013	129	36.0	229	64.0
2014	135	40.8	196	59.2
Military Service of Accused (NS)				
Army	173	37.6	287	62.4
Air Force	56	34.6	106	65.4
Navy	57	38.8	90	61.2
Coast Guard	20	54.1	17	45.9
Marine Corps	57	41.9	79	58.1
Type of Conviction Charge ($P \leq .05$)				
Penetrative Offense	29	9.3	284	90.7
Contact Offense	69	49.6	70	50.4
Rank of Accused (NS)				
Officer	25	37.9	41	62.1
Enlisted	338	35.9	538	64.1
Gender of Victim(s) (NS)				
All Females	326	38.4	524	61.6
All Males	35	42.7	47	57.3
Females and Males	2	20.0	8	80.0
Status of Victim(s) ($P \leq .05$)				
All Military	276	41.0	397	59.0
All Civilian	79	35.4	144	64.6
Military and Civilian	8	17.4	38	82.6
Type of Court-martial ($P \leq .05$)				
General Court-martial	185	26.3	518	73.7
Special Court-martial	74	56.1	58	43.9
Summary Court-martial	100	100.0	0	0.0
Type of Trial Forum ($P \leq .05$)				
Military Judge	119	26.7	327	73.3
Panel of Military Members	125	33.5	248	66.5
Summary Court-martial Officer	100	100.0	0	0.0

TABLE 10
FACTORS ASSOCIATED WITH SENTENCE OF CONFINEMENT & PUNITIVE SEPARATION

	Not Sentenced to Confinement and Punitive Separation		Sentence to Confinement and Punitive Separation	
	N	%	N	%
Year of Disposition (NS)				
2012	112	44.3	141	55.7
2013	142	39.7	216	60.3
2014	154	46.5	177	53.5
Military Service of Accused (NS)				
Army	198	43.0	262	57.0
Air Force	63	38.9	99	61.1
Navy	62	42.2	85	57.8
Coast Guard	22	59.5	15	40.5
Marine Corps	63	46.3	73	53.7
Type of Conviction Charge ($P \leq .05$)				
Penetrative Offense	37	11.8	276	88.2
Contact Offense	77	55.4	62	44.6
Rank of Accused (NS)				
Officer	32	48.5	34	51.5
Enlisted	376	42.9	500	57.1
Gender of Victim(s) (NS)				
All Females	368	43.3	482	56.7
All Males	38	46.3	44	53.7
Females and Males	2	20.0	8	80.0
Status of Victim(s) ($P \leq .05$)				
All Military	313	46.5	360	53.5
All Civilian	85	38.1	138	61.9
Military and Civilian	10	21.7	36	78.3
Type of Court-martial ($P \leq .05$)				
General Court-martial	224	31.9	479	68.1
Special Court-martial	79	59.8	53	40.2
Summary Court-martial	100	100.0	0	0.0
Type of Trial Forum ($P \leq .05$)				
Military Judge	135	30.3	311	69.7
Panel of Military Members	153	41.0	220	59.0
Summary Court-martial Officer	100	100.0	0	0.0

TABLE 11
FACTORS ASSOCIATED WITH LENGTH OF CONFINEMENT SENTENCE

	Mean Sentence
Year of Disposition (NS)	
2012	30.20
2013	34.39
2014	26.49
Military Service of Accused (NS)	
Army	32.99
Air Force	32.32
Navy	27.19
Coast Guard	11.91
Marine Corps	28.37
Type of Conviction Charge (P ≤ .05)	
Penetrative Offense	54.80
Contact Offense	14.67
Rank of Accused (NS)	
Officer	14.50
Enlisted	31.53
Gender of Victim(s) (NS)	
All Females	32.29
All Males	13.88
Females and Males	30.00
Status of Victim(s) (P ≤ .05)	
All Military	26.73
All Civilian	34.59
Military and Civilian	60.16
Type of Court-martial (P ≤ .05)	
General Court-martial	36.45
Special Court-martial	4.01
Summary Court-martial	0.78
Type of Trial Forum (P ≤ .05)	
Military Judge	27.08
Panel of Military Members	38.50
Summary Court-martial Officer	0.78

Results of the Multivariate Analysis

We used logistic regression to analyze several binary outcome variables (that is, variables, such as whether the accused was convicted of a penetrative offense (coded 1) or not (coded 0)) that are coded 1 or 0. We used ordinary least squares (OLS) regression to analyze the length of the confinement sentence, which is an interval variable. These types of analysis are used to identify the statistically significant predictors of the outcomes. The analysis simultaneously controls for all of the variables in the analysis; therefore, if a particular variable affects the outcome, it does so while holding all of the other variables in the model constant. For example, the number of victims is a significant predictor of whether the offender was charged with and convicted of a penetrative offense; this is net of the effects of the fiscal year in which the case was completed, the military service of the accused, the accused's rank, the accused's gender, whether all victims were female, whether all victims were military, and the number of charges.

For the categorical variable (military service of the accused), the values for the included category are compared to that of the reference category (army). The *negative coefficient* for the Coast Guard in Table 12 indicates that those from the Coast Guard were significantly *less likely* than those from the Army to be convicted of a penetrative offense.

Variables that are statistically significant predictors of outcomes are indicated with an asterisk. In the tables, B is the logistic regression coefficient, SE is the standard error, and Exp(B) is the odds ratio.

The results of the analysis of two indicators of the likelihood of conviction—whether the accused was charged with and convicted of a penetrative offense and whether the accused was convicted of at least one charge (i.e., a penetrative offense, a contact offense, or a non-sex offense) are presented in Table 15. Conviction of a penetrative offense was about half as likely if the accused was in the Coast Guard rather than the Army; stated another way, individuals who were in the Army were twice as likely as those in the Coast Guard to be convicted of a penetrative offense. There were no differences in the likelihood of conviction between the Army and the other military services. Conviction for a penetrative offense also was affected by the number of victims; as the number of victims increased, the likelihood of conviction also increased. Variables that did not affect the likelihood of conviction for a penetrative offense were the rank of the accused, the gender and status of the victim, and the number of charges.

The statistically significant predictors of conviction for at least one charge are the fiscal year (conviction was less likely in 2014 than in earlier years), the gender of the victim (those who assaulted females were less likely to be convicted), the number of victims (cases with more victims had higher odds of conviction), the number of charges (cases in which the accused faced more charges had higher odds

of conviction), and whether the accused was charged with a penetrative offense (conviction was less likely if the most serious charge was a penetrative offense rather than a contact offense). The likelihood of conviction for any charge was not affected by the military service of the accused, the rank of the accused, or the status of the victim.

TABLE 12
LOGISTIC REGRESSION ANALYSIS: LIKELIHOOD OF CONVICTION

Accused Convicted of a Penetrative Offense			
	B	SE	Exp(B)
Fiscal Year	-.140	.088	0.87
Military Service of the Accused			
Army (reference category)			
Air Force	-.163	.177	0.85
Navy	-.195	.193	0.82
Coast Guard	-.873	.477	0.42
Marine Corps	-.633*	.228	0.53
Accused Rank (Enlisted)	.357	.285	1.43
Female Victim(s)	.087	.342	1.09
Military Victim(s)	-.126	.151	0.88
Number of Victims	.343*	.104	1.41
Number of Charges	.026	.015	1.03
Accused Convicted of At Least One Charge			
	B	SE	Exp(B)
Fiscal Year	-.174*	.068	0.84
Military Service of the Accused			
Army (reference category)			
Air Force	-.168	.139	0.85
Navy	-.193	.144	0.82
Coast Guard	.076	.327	1.08
Marine Corps	-.053	.160	0.95
Accused Rank (Enlisted)	.001	.203	1.00
Female Victim(s)	-.436*	.209	0.64
Military Victim(s)	-.186	.122	0.84
Number of Victims	.400*	.112	1.51
Number of Charges	.139*	.016	1.15
Accused Charged with Penetrative Offense	-.332*	.117	0.72

* P ≤ .05

Table 13 presents the results of two additional indicators of case outcomes: (1) whether the accused was acquitted of all charges and (2) whether all charges were dismissed without further action. Recall from Table 2 that 21.6% (N = 275) of those charged with penetrative offenses and 15.0% (N = 73) of those charged with contact offenses were acquitted of all charges; 15.5% (N = 197) of those charged with penetrative offenses and 8.2% (N = 40) of those charged with contact offenses had

all charges dismissed without further action. As shown in Table 16, compared to individuals who were in the Army, those in the Air Force were 1.55 times more likely to be acquitted. In addition, acquittal was less likely if there were more victims and more charges; it was 1.44 times more likely if the most serious charge against the accused was a penetrative offense. The odds of that the case would be dismissed without further action were affected by the military service of the accused, the number of charges preferred, and whether the accused was charged with a penetrative offense. Compared to individuals in the Army, the odds of case dismissal were higher for individuals in the Air Force, Navy, Coast Guard, and Marine Corps. Case dismissal was less likely if there were more filed charges; it was 2.4 times more likely if the most serious charge was a penetrative offense.

TABLE 13
LOGISTIC REGRESSION ANALYSIS OF ACQUITTALS AND DISMISSALS

Accused Acquitted of All Charges			
	B	SE	Exp(B)
Fiscal Year	-.010	.083	0.99
Military Service of the Accused			
Army (reference category)			
Air Force	.438*	.159	1.55
Navy	.190	.173	1.21
Marine Corp	-.636	.539	0.53
Coast Guard	.140	.200	1.15
Accused Rank (Enlisted)	-.120	.241	0.89
Female Victim(s)	.548	.294	1.73
Military Victim(s)	.132	.149	1.14
Number of Victims	-.329*	.164	0.72
Number of Charges	-.128*	.022	0.88
Accused Charged with Penetrative Offense	.367*	.150	1.44
Case Dismissed without Further Action			
	B	SE	Exp(B)
Fiscal Year	.166	.102	1.18
Military Service of the Accused			
Army (reference category)			
Air Force	.509*	.210	1.66
Navy	1.09*	.204	2.98
Marine Corps	1.59*	.422	4.92
Coast Guard	1.08*	.229	2.95
Accused Rank (Enlisted)	.415	.355	1.51
Female Victim(s)	.478	.357	1.61
Military Victim(s)	.209	.185	1.23
Number of Victims	-.038	.178	0.96
Number of Charges	-.190*	.030	0.83
Article 32 Hearing Held	.068	.104	1.08
Accused Charged with			

Penetrative Offense	.865*	.227	2.37
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* $P \leq .05$

The results of the logistic regression analysis of the likelihood of confinement and the results of the ordinary least square regression analysis of the length of the confinement sentence are presented in Table 14. The strongest predictor of the odds of a confinement sentence (based on the odds ratio) is whether the accused was convicted of a penetrative offense; those who were convicted of a penetrative offense were 11.8 times more likely than those convicted of a contact offense or a non-sex offense to be sentenced to confinement. Cases involving military rather than civilian victims had lower odds of confinement, as did cases that were disposed at a summary court-martial. The only variables affecting the length of the confinement sentence were the type of conviction charge (those convicted of penetrative offenses got longer sentences), the number of victims (those with more victims received more severe sentences), and the number of charges (those with more preferred charges received more severe sentences). As the B values in the table indicate, those convicted of penetrative offenses received sentences that were more than 43 months longer than the sentences imposed on other offenders.

TABLE 14
LOGISTIC AND OLS REGRESSION ANALYSIS OF CONFINEMENT
AND LENGTH OF CONFINEMENT

Approved Sentence Included Confinement			
	B	SE	Exp(B)
Year Case Disposed	-.145	.143	0.86
Military Service of the Accused			
Army (reference category)			
Air Force	.673	.350	1.96
Navy	.060	.321	1.06
Coast Guard	-.653	.555	0.52
Marine Corps	-.084	.314	0.92
Accused Rank (Enlisted)	.436	.401	1.55
Female Victim(s)	-.856	.594	0.42
Military Victim(s)	-.531*	.256	0.59
Number of Victims	.278	.216	1.32
Number of Charges	.080*	.027	1.09
Accused Convicted of Penetrative Offense	2.46*	.298	11.76
Length (in months) of Approved Confinement Sentence			
	B	Beta	T-value
Year Case Disposed	-.492	-.006	-0.14
Military Service of the Accused			
Army (reference category)			
Air Force	1.89	.011	0.26
Navy	3.06	.017	0.39
Coast Guard	-22.27	-.055	-1.33
Marine Corps	-2.01	-.010	-0.24
Accused Rank (Enlisted)	11.97	.045	1.11
Female Victim(s)	5.89	.020	0.46
Military Victim(s)	-6.59	-.045	-1.10
Number of Victims	9.67	.146	3.06*
Number of Charges	2.11	.193	4.00*
Accused Convicted of Penetrative Offense	43.32	.324	7.82*

*P ≤ .05

Summary

Descriptive Data on Case Characteristics and Case Outcomes. The military service with the most cases during the 2012 to 2014 fiscal years was the Army, followed by the Air Force, the Navy, the Marine Corps, and the Coast Guard. The typical accused was a male enlisted member and the typical victim was a female member of the military services. Most cases involved multiple charges and in almost three fourths of the cases the most serious charge was a penetrative offense. More than three fourths of the cases that went to a court-martial went to a general court martial. The overall conviction rate for individuals charged with penetrative offenses was somewhat lower than the rate for individuals charged with contact offenses. Dismissal of the case without further action was more common for individuals charged with penetrative rather than contact offenses. A large majority of those who were convicted received a term of confinement and the average sentence was about two and a half years,

Bivariate Analyses. The results of the bivariate analysis, which address the relationships between case disposition and case outcomes and a single independent variable, revealed that the type of disposition (i.e., whether the case was disposed by general court-martial, special court-martial, or summary court-martial) varied by fiscal year, the type of offense charged, and the military service of the accused. With very few exceptions, case outcomes did not vary by the fiscal year the case was disposed, the status of the accused, or the gender or status of the victim. Sentences consistently were affected by the type of conviction charge, the status of the victim, the type of court-martial, and the type of trial forum.

Multivariate Analyses. Because the multivariate analyses control simultaneously for relevant characteristics of the case, the accused, and the victim, the results of these analyses provide more nuanced findings regarding the factors that affect case outcomes. Although there are some exceptions, outcomes in the Article 120 cases examined in this study were affected primarily by legally relevant factors, especially whether the accused was charged or convicted of at least one count of a penetrative offense. Those who were charged with penetrative offenses were less likely than those charged with contact offenses or non-sex offenses to be convicted of at least one charge, were more likely to be acquitted of all charges, and were more likely to have the case dismissed without further action. On the other hand, if the accused was convicted of a penetrative offense, he/she was more likely to be sentenced to confinement and faced a substantially longer sentence than those convicted of contact or non-sex offenses. Other variables that consistently affected outcomes were the number of victims and the number of charges. Outcomes generally did not vary by the fiscal year, the rank or gender of the accused (but gender of the accused did affect conviction likelihood), the gender or status of the victim (but victim gender did affect the likelihood of conviction and victim status did influence the odds of a confinement sentence).

APPENDIX B: Methodology

This appendix discusses the methodology employed by the JPP to obtain and analyze adjudication data relating to sexual assault offenses.

I. REVIEWING DOD'S AND THE MILITARY SERVICES' SEXUAL ASSAULT CASE TRACKING SYSTEMS

As a preliminary step, the JPP identified and reviewed the systems that currently exist within DoD and the military Services for tracking sexual assault offense case information.

In February 2014, DoD Sexual Assault Prevention and Response Office (SAPRO) implemented the Defense Sexual Assault Incident Database (DSAID), a centralized, case-level database for collecting and managing information on sexual assault cases.¹ DSAID contains data for each restricted and unrestricted report of sexual assault covered by DoD's sexual assault prevention and response policy.² However, DSAID does not include data on sexual assault cases involving spouses, intimate partners, or dependents under the age of 18, as such cases are covered by the military's Family Advocacy Program.³

Sexual assault response coordinators (SARCs) at each military installation are responsible for entering reported sexual assaults covered by SAPR policy into the database. SAPRO coordinates with the military criminal investigative organization (MCIO) to record in DSAID additional information regarding the Service member under investigation. Once the criminal investigation is complete, a SAPR legal officer at each military Service headquarters accesses a specific module in DSAID to report the legal action taken in a case. The adjudication data include the results of cases for each victim; thus if one court case involves multiple victims, the case outcome is repeated in the data entries for every victim associated with that case.

Since FY14, DoD SAPRO has used the information entered in DSAID by all three stakeholders (SARCs, MCIOs, and legal officers) to generate data for its annual report to Congress. Each SAPRO Report contains case synopsis charts that provide general information on case disposition and adjudication for every unrestricted report of sexual assault made in that year, including information on the most serious sexual assault offense charged, the finding of guilt or not guilty with respect to the most serious offense charged, and occasionally the sentence and type of court-martial proceeding. Published reports remove personally identifying information from the legal disposition data: they contain simply the most serious sexual assault offense investigated or charged, as well as a summary of the outcome at court-martial or other disciplinary proceeding.

While the data contained in the FY14 DoD SAPRO Report are based on the information entered into DSAID, previous annual DoD reports were based on information collected directly from case lists or

1 32 C.F.R. § 105.15.

2 DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEFENSE SEXUAL ASSAULT INCIDENT DATABASE (DSAID) 3 (Oct. 9, 2015), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20151009/04_DSAID_Presentation_Data_Flow.pdf.

3 *Id.* The Coast Guard is not part of DoD, and its case adjudication data are not included in DSAID or DoD SAPRO's reports to Congress.

spreadsheets generated within each military Service. These lists were designed to fulfill specific DoD and congressional reporting requirements. The Services provided information using DoD's reporting criteria, but the JPP staff observed differences in how each military Service interpreted or applied DoD's reporting criteria from year to year.

A. Limitations of DoD Statistical Reports on Sexual Assault Cases

Although the annual SAPRO Reports contain the most comprehensive compilation of sexual assault court-martial data available, the JPP staff also identified limitations and inaccuracies in their data. The SAPRO Reports do not provide a full chronology of the cases initiated by every sexual assault report. Instead, they present a snapshot of the number of allegations received in the reporting period, the number of investigations pending from the current or any prior years, and the number of cases concluded or resolved through court-martial or other disciplinary measures within the same reporting period. As a result, these data cannot be used to perform any trend or pattern analysis.

The SAPRO Reports also lack detailed information about case adjudications and dispositions.⁴ Among other things, the reports do not contain:

- information about all offenses prosecuted;
- information about the amount of confinement assessed and whether the confinement term was adjudged at trial or approved by the convening authority pursuant to a plea agreement;
- information about the accused's plea;
- information about the forum (i.e., whether the accused was tried before a military judge or panel);
- information about the terms of plea agreements, even when the terms result in a modification of the adjudged sentence; and
- information on the convening authority's action on a case, which can result in a modification of the court-martial findings and sentence.⁵

In addition, in the FY14 SAPRO Report, case adjudication data were aggregated differently than in the FY12 and FY13 SAPRO Reports. In the FY12 and FY13 SAPRO Reports, a case involving multiple victims and one subject was counted once. In the FY14 report, however, a case involving multiple victims in a single court-martial was counted multiple times. The way in which cases are classified by military Service has also changed with the implementation of DSAID. Previously, case dispositions were associated with a particular military Service on the basis of the Service affiliation of the subject or victim. However, beginning in FY 2014, the Service associated with a case refers to the Service affiliation of the SARC handling the case.⁶ It is unclear how this change affects the Services' reporting of adjudication data in their separate enclosures to the DoD report. Because of these changes, data

4 FY14 SAPRO Report, APPENDIX A at 1 (Apr. 29, 2015).

5 *But see Transcript of JPP Public Meeting* 161 (Nov. 6, 2015) (testimony of Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPR Office) (explaining that DoD considers a case "closed" when the convening authority takes action on the court-martial findings and sentence).

6 FY14 SAPRO Report, APPENDIX A at 7, Statistical Data on Sexual Assault ("This shift provides valuable insight into the resources each Service expends to respond to reports of sexual assault.").

from the FY12 and FY13 SAPRO Reports cannot be accurately compared with those from the FY14 SAPRO Report.⁷

Finally, while reviewing the underlying case records, the JPP staff identified numerous inaccuracies in the court-martial data contained in the SAPRO Reports. Several cases included in the SAPRO Reports involved child-victim cases, non-sexual assault cases, cases involving spouses and intimate partners outside the scope of SAPR policy, or cases still pending trial. Yet all of these cases were reported in the SAPRO Reports as completed, adult-victim sexual assault cases, and the final case results of pending trials were not included in subsequent years' reports. In addition, the JPP identified instances in which the SAPRO Reports contained incorrect or inconsistent case information about the most serious offense charged, the disciplinary action received, and the number of victims involved in a case.

B. Service Case Management Systems

Although legal officers from the Services input limited adjudication information into DSAID, the Services also maintain individual systems for collecting and managing case adjudication and prosecution information.

Service	System	Description
Army	Military Justice Online	Used to create, process, and certify all administrative and courts-martial documents and military justice reports.
	Army Courts-martial Information System	Used to monitor, track, and document general and special courts-martial from trial termination through appellate review.
	Special Victim Prosecutors Application	Used to track pending special victim investigations and adverse actions.
Air Force	Automated Military Justice Administration and Management System	Used to track and process all military justice cases from investigation through convening authority action.
	Web-based Administrative Separation System	Used to track administrative discharge processing for enlisted personnel.
Navy and Marine Corps	Military Justice Case Management System	Used to track cases from pretrial through case disposition, including trial and appeal or alternate disposition.
Coast Guard	Law Manager	Used to track and monitor cases in which court-martial charges are preferred from investigation through trial and the appellate process.
	Direct Access	Used to track information about sexual assault matters when court-martial charges are not preferred.

1. Army

Military Justice Online (MJO) is the Army's platform for creating, processing, and certifying all administrative and courts-martial documents. MJO is used to develop monthly reports on military justice actions and civil felony convictions processed by each installation. Detailed information about individual cases is tracked and maintained locally by individual staff judge advocate offices. The Army Courts-Martial Information System (ACMIS) is a management system administered by the

⁷ *Id.* at 6, 10–11 (“Unrestricted reports were previously recorded as the number of sexual assault cases, as organized by the MCIOs. Thus, one case did not necessarily correspond to one victim’s report. Starting in FY 2014, DSAID accounts for each individual report of sexual assault, such that each report corresponds to one victim”). *See also* Figure 3, APPENDIX A, comparing the number of cases reported according to the previous “victim-driven” accounting method and the “case-driven” accounting method.

Clerk of Court for the Army Criminal Court of Appeals to monitor, track, and document general and special courts-martial from trial termination through appellate review. The Special Victim Prosecutors application is an internal program used to manage workload and track pending special victim investigations and military justice actions.⁸

2. Air Force

The Automated Military Justice Administration and Management System (AMJAMS) is the Air Force's case management system for tracking and processing all military justice cases from investigation through convening authority action. AMJAMS case information includes background information on the allegations, charges preferred and referred, important dates and significant case events, and updates on case status. Appellate decisions are also annotated in AMJAMS. AMJAMS can be used to generate data and processing reports to assess the health of the military justice system. The Air Force uses the Web-Based Administrative Separation Program to track administrative discharge processing for enlisted personnel.⁹

3. Navy and Marine Corps

The Military Justice Case Management System (CMS) is the primary military justice data management system for the Navy and Marine Corps. CMS covers cases from the pretrial phase through final resolution, including trial and appeal or alternate disposition. CMS is intended to provide commanders and staff judge advocates with the insight and oversight necessary to meet legal requirements for the timely processing and post-trial review of courts-martial.¹⁰

4. Coast Guard

The Coast Guard's Law Manager database is used to track and monitor cases in which court-martial charges are preferred from investigation through trial and the appellate process. For sexual assault matters in which court-martial charges are not preferred, information concerning the matter is collected by the member's servicing personnel office and entered into the Coast Guard's human resources database known as Direct Access.¹¹

The JPP determined that it could not rely on the existing military justice tracking systems to fulfill its tasks for two overarching reasons. First, the systems do not uniformly track information across all of the military Services. Second, not all of the systems can perform the complex search queries necessary to obtain the information needed to accurately and completely analyze sexual assault court-martial trends.

8 Army's Response to JPP Request for Information 89(a) (Sept. 11, 2015).

9 Air Force's Response to JPP Request for Information 89(a) (Sept. 11, 2015).

10 Navy's and Marine Corps' Responses to JPP Request for Information 89(a) (Sept. 11, 2015).

11 Coast Guard's Response to JPP Request for Information 89(a) (Sept. 11, 2015).

II. JPP METHODOLOGY FOR OBTAINING AND ANALYZING MILITARY JUSTICE CASE INFORMATION

A. COURT-MARTIAL DATA

1. *Identifying Documents to Request from the Services*

Given the limitations of the existing systems and reports, the JPP determined that it needed to collect sexual assault case records directly from the Services. The JPP drew on the work of the U.S. Sentencing Commission to help it determine what information it needed to request from the Services. The U.S. Sentencing Commission receives the following information from federal district courts within 30 days of entry of judgment on a case:

- judgment and commitment order;
- Statement of Reasons form explaining the judge’s sentence;
- plea agreement, if any;
- indictment or other charging document;
- presentence investigation report; and
- any other information deemed helpful.¹²

The U.S. Sentencing Commission uses this information to conduct its analysis of federal criminal convictions and sentences.

The JPP decided to follow a similar approach to obtain information about military justice cases involving sexual assault offenses. Using the Sentencing Commission’s procedures as guidance, the JPP identified 11 pieces of information necessary to conduct a thorough analysis of military justice cases, along with 9 relevant case documents containing this information. The information and corresponding documents identified by the JPP are listed in the following table:

Information needed	Documents
1. All offenses charged	1. Charge sheet
2. Article 32 investigating officer recommendation	2. Article 32 investigating officer’s report
3. Staff judge advocate pretrial advice	3. Staff judge advocate’s pretrial advice
4. Court-martial type (general, special, or summary)	4. Record of trial
5. Pleas to each charge	5. Report of result of trial form
6. Motions (including MRE 412/513)	6. Pretrial agreements
7. Guilty and not guilty findings	7. Master index of exhibits
8. Forum (judge alone or panel members)	8. All court-martial orders
9. Pretrial agreement (terms and sentence limitations)	9. Protective orders
10. Sentence	
11. Clemency	

¹² *Transcript of JPP Public Meeting 186* (Sept. 18, 2015) (testimony of Mr. Glenn Schmitt, Director of the Office of Research and Data, U.S. Sentencing Commission).

The JPP also considered how the different trial processing requirements in different circumstances affect the information available in trial records. First, there is no requirement to complete a verbatim court-martial transcript in cases in which the accused was acquitted or received a sentence that did not include a punitive discharge or confinement for longer than six months. Such cases often include a shortened, summarized transcript. Second, because records of proceedings related to M.R.E. 412 and M.R.E. 513 are sealed by military judges, access to certain relevant facts is limited. Third, not all cases will contain the same documents, because various forums have different procedures and thus require different types of documentation. For example, an Article 32 hearing and a staff judge advocate's written pretrial advice are not required in every case.

2. Requesting and Collecting Court-Martial Case Documents

The JPP identified a total of 2,353 cases listed in the annual SAPRO Reports for fiscal years 2012 to 2014 in which the case synopsis indicated that a sexual assault charge was preferred. The JPP staff provided the Services with the listing of case numbers assigned to cases included in each Service's section of the SAPRO Report and requested that the Services provide the accused's name (court-martial case name) and the location where the case records were maintained.

The Services, however, encountered challenges in identifying cases based on the SAPRO Report case numbers. In many instances for fiscal years 2012 and 2013, the Services were unable to identify the accused's name by using the case number assigned by DoD SAPRO; instead, the Services searched their individual military justice tracking systems, using additional data from the SAPRO Reports to match listed cases with accused Service members.

For fiscal year 2014 cases, the Services faced different challenges in identifying court cases by using case numbers from the fiscal year 2014 SAPRO Report. Because that report contained aggregate statistics that were computed in DSAID without the identifying information associated with each case, the Service JAG Corps could not identify which cases had been included in those statistics. Therefore, the Services were unable to match the cases listed in the SAPRO Report with offender names or their case numbers. Instead, the Services supplied listings of case names that they believed had been included in the SAPRO Report. As a result, the number of cases identified by the Services did not precisely match the number of cases reported in the fiscal year 2014 SAPRO Report.¹³

Data for the U.S. Coast Guard are not included in annual DoD SAPRO Reports. Therefore, to obtain data for Coast Guard cases, the JPP requested that the Coast Guard identify all cases with at least one preferred charge of sexual assault that was completed at the trial level or resulted in an alternate disposition for fiscal years 2012 to 2014.¹⁴

Using SAPRO Report case listings, the JPP requested case names and record locations for 2,353 cases for fiscal years 2012 to 2014. The Services identified 2,360 cases by case name. The table below indicates the cases requested by the JPP and those identified by the Services for each fiscal year.

13 For example, while the FY14 SAPRO Report identifies 384 cases in which a sexual assault offense was preferred in the Army in FY 2014, the Army provided the JPP staff with a case list consisting of 381 such cases. Similar discrepancies existed in the Air Force's and Marine Corps' cases lists (Air Force: 135 identified, 132 provided; Marine Corps: 170 identified, 171 provided).

14 JPP Request for Information Set 1, Attachment 6.

	FY12	FY13	FY14	Total
Requested based on SAPRO case lists	612	865	876	2,353
Identified by the Services in response to the JPP staff's request	624	865	871	2,360

For all requested cases, the JPP asked for access to several specified case documents.¹⁵ For cases whose record of trial was located at the installation, the military Services' headquarters or field offices provided available requested case documents. For cases whose record of trial was stored or archived within the National Capital Region, including records located at the National Archives and Record Administration in Suitland, Maryland, and at the Service Criminal Courts of Appeals, the military Services provided the JPP staff with access to the record, and the JPP staff scanned relevant case records. The table below captures, by Service and fiscal year, the number of cases for which the JPP obtained case documents and the number of cases identified by the Services.

	FY12			FY13			FY14		
	Identified	Received	%	Identified	Received	%	Identified	Received	%
Army	422	388	92%	445	415	93%	381	320	84%
Air Force	54	54	100%	169	169	100%	132	131	99%
Navy	99	91	92%	110	98	89%	175	145	83%
Marines	29	28	97%	113	109	96%	171	167	98%
Coast Guard	20	20	100%	28	28	100%	12	12	100%

3. Documenting Information About Courts-Martial for Panel Analysis

The JPP reviewed each case file obtained to ensure that cases fell within the scope of the JPP's mandate and could be included in the JPP's analysis. Of the 2,175 cases received, the JPP eliminated 414 cases from analysis because the cases were duplicative of other cases already identified, the case documents did not indicate a sexual assault offense, the case had not yet been completed, or the case record was missing or incomplete.

The JPP staff developed an electronic database to record information for 1,761 cases from fiscal years 2012 through 2014. The staff entered case information into the database for each case, including the Service, fiscal year, case number, case location, rank and gender of the accused, and status (civilian vs. military) and gender of all victims. The staff also entered specific procedural information, as applicable, including information about every charge preferred, the Article 32 proceeding, pretrial advice, pretrial agreement, referral of charges, the outcome for each offense, and forms of punishment that were imposed.

Using information contained in the JPP's database, Dr. Cassia Spohn, Foundation Professor and Director of the School of Criminology and Criminal Justice at Arizona State University, analyzed the

15 The JPP sought the following documents for every identified case: (1) charge sheet; (2) Article 32 investigating officer's report; (3) staff judge advocate's pretrial advice; (4) record of trial; (5) report of the result of trial; (6) pretrial agreement; (7) master index of exhibits; (8) all court-martial orders; and (9) protective orders.

procedural history and outcomes of all cases. Dr. Spohn’s statistical report is provided as Appendix A, above. The JPP staff tabulated additional court-martial data to inform the JPP’s analysis.

B. NONJUDICIAL PUNISHMENT AND ADVERSE ADMINISTRATIVE ACTIONS

The JPP also identified cases listed in the annual SAPRO Reports for fiscal years 2012 to 2014 whose case synopsis indicated that the accused received a lower-level disciplinary measure, including nonjudicial punishment, adverse administrative actions, or administrative discharge. The JPP initially planned to seek access to nonjudicial punishment and administrative action records, but the staff learned through consultation with representatives from the military Services that disciplinary records from administrative proceedings could not be made available. Documents from administrative actions are included in the personnel files of Service members and are protected from disclosure by the Privacy Act. In addition, these records are maintained locally at the installation level for only a limited time. Nonjudicial punishment records, for example, are destroyed within two to three years, depending on Service regulations. Administrative discharge records are maintained locally for a short time following a discharge, and then records are sent to the National Personnel Records Center in St. Louis, Missouri, where they are subject to Privacy Act disclosure restrictions.

Instead, the JPP used the case synopses included in the annual SAPRO Reports to collect information on nonjudicial punishment, including the nature of the offense involved and the outcome. The JPP used the raw numbers provided in the military Services’ enclosures to the DoD SAPRO Reports for administrative actions and administrative discharges.

In total, the JPP identified 686 cases involving nonjudicial punishment, 271 cases involving adverse administrative action, and 437 cases involving administrative discharge from fiscal years 2012 through 2014. The table below gives the number of cases by fiscal year.

	FY12	FY13	FY14
Nonjudicial punishment	192	246	338
Adverse administrative action	65	83	123
Administrative discharge	65	143	229

C. APPELLATE CASES

Congress also tasked the JPP to review and evaluate court-martial convictions for sexual assault cases that were reduced or set aside on appeal. To address this task, the JPP reviewed the published and unpublished opinions on the public websites of the U.S. Court of Appeals for the Armed Forces and the Service Courts of Criminal Appeals. The JPP did not review short form affirmances from the Army, merits opinions from the Air Force, or summary dispositions from the Navy and Marine Corps, as these actions did not grant relief to the appellant and the JPP could not determine, from the documents, the types of offenses that were reviewed by the courts. In total, the JPP reviewed 256 written opinions from the Service Courts of Criminal Appeals in which the appellant was convicted at trial of at least one adult sexual assault offense at trial.

APPENDIX C: Judicial Proceedings Panel Authorizing Statutes

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.— The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

(1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible.

- (F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
 - (G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
 - (H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.
 - (I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.
 - (J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.
- (3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.
- (e) AUTHORITY OF PANELS.—
- (1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.
 - (2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.
- (f) PERSONNEL MATTERS.—
- (1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.
 - (2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.
 - (3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

- (1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “judicial proceedings panel”, shall conduct the following:
- (A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one’s position in the chain of command of the other person to gain access to or coerce the other person.
 - (B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.
 - (C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).
 - (D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
 - (i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
 - (ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).
 - (iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.
- (2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

- (a) **ADDITIONAL DUTIES IMPOSED.**—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “judicial proceedings panel”, shall perform the following additional duties:
- (1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.
 - (2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—
 - (A) users of and personnel staffing the Department of Defense Safe Helpline; and
 - (B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.
- (b) **SUBMISSION OF RESULTS.**—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

- (f) **DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL** – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually” thereafter” after “reports”.

APPENDIX D: Judicial Proceedings Panel Members

HONORABLE ELIZABETH HOLTZMAN – JPP CHAIR

Ms. Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at the law firm Zuckerman Spaeder LLP. She served as a judge in the U.S. District Court for the Southern District of New York for sixteen years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering, and terrorism. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent forty years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victim and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

PROFESSOR THOMAS W. TAYLOR

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a twenty-seven-year career in the Pentagon he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)

Pat Tracey is the Vice President of Homeland Security and Defense for HP Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various government agencies, including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. In 2006, after thirty-four years in the U.S. Navy, she retired as the first female vice admiral. As Chief of the Navy's \$5 billion global education and training enterprise, she led a successful revolution in training technology to improve the quality, access, and effectiveness of Navy training while lowering its cost. Admiral Tracey graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a fellowship with the Chief of Naval Operations' Strategic Studies Group.

APPENDIX E: Staff Members and Designated Federal Officials

JUDICIAL PROCEEDINGS

PANEL STAFF

Colonel Kyle Green,
U.S. Air Force, Staff Director

Lieutenant Colonel Kelly McGovern,
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Ms. Julie Carson, Attorney and Legislative
Analyst

Ms. Janice Chayt, Investigator

Ms. Alice Falk, Editor

Ms. Nalini Gupta, Attorney

Lieutenant Colonel Glen Hines,
U.S. Marine Corps, Attorney

Mr. Kirtland Marsh, Attorney
(October 2015-March 2016)

Ms. Laurel Prucha Moran, Graphic Designer

Mr. Matt Osborn, Attorney
(August 2014 - October 2015)

Ms. Meghan Peters, Attorney

Ms. Terri Saunders, Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Tiffany Williams, Supervising Paralegal

Ms. Sharon Zahn, Senior Paralegal
(December 2013-March 2016)

CONSULTANT

Dr. Cassia C. Spohn, Foundation Professor and
Director, Arizona State University School of
Criminology and Criminal Justice

DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried, Designated Federal Official

Mr. William Sprance,
Alternate Designated Federal Official

Major Jacqueline M. Stingl,
Alternate Designated Federal Official

Mr. Dwight Sullivan,
Alternate Designated Federal Official

APPENDIX F: Judicial Proceedings Panel Public Meetings Addressing Statistical Data

MEETINGS	PRESENTERS AND DELIBERATIONS On Statistical Data Regarding Military Adjudication of Sexual Assault Offenses
<p>August 6, 2015</p> <p>Public Meeting of the JPP</p> <p>The George Washington University Law School, Washington, D.C.</p>	<ul style="list-style-type: none"> • JPP Staff presentation and Panel discussion on proposed plan to review and evaluate court-martial statistical data
<p>September 18, 2015</p> <p>Public Meeting of the JPP</p> <p>Holiday Inn Arlington at Ballston, Arlington, Virginia</p>	<ul style="list-style-type: none"> • Mr. Glenn R. Schmitt, Director, Office of Research and Data at the United States Sentencing Commission • Dr. Howard N. Snyder, Deputy Director, Statistical Programs Division, Bureau of Justice Statistics, United States Department of Justice • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice • Dr. James P. Lynch, Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland • Major General Camille M. Nichols, U.S. Army, Director, Department of Defense Sexual Assault and Prevention and Response Office • Dr. Nathan W. Galbreath, Senior Executive Advisor, Department of Defense Sexual Assault Prevention and Response Office

MEETINGS	PRESENTERS AND DELIBERATIONS On Statistical Data Regarding Military Adjudication of Sexual Assault Offenses
<p>October 9, 2015</p> <p>Public Meeting of the JPP</p> <p>Holiday Inn Arlington at Ballston, Arlington, Virginia</p>	<ul style="list-style-type: none"> • Hon. Frank D. Whitney, United States Chief District Judge, Western District of North Carolina [By telephone] • Mr. Steven J. Grocki, Deputy Chief for Litigation, Child Exploitation and Obscenity Section, Criminal Division, United States Department of Justice • Mr. Thomas F. Fichter, Assistant Prosecutor, Monmouth County Prosecutor’s Office and Director, Special Victim’s Unit, Monmouth, New Jersey • Ms. Darlene Sullivan, Defense Sexual Assault Incident Database (DSAID) Program Manager, Department of Defense Sexual Assault Prevention and Response Office (SAPRO) • Ms. Katherine E. Robertson, Family Advocacy Program (FAP) Manager, Department of Defense Office of Family Readiness Policy • Colonel Walter M. Hudson, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General • Lieutenant Colonel Julie L. Rutherford, U.S. Air Force, Air Staff Counsel, Air Force Sexual Assault Prevention and Response Office • Lieutenant Colonel Angela B. Wissman, U.S. Marine Corps, Branch Head, Judge Advocate Division’s Military Justice Branch, Headquarters, U.S. Marine Corps • Mr. Stephen P. McCleary, U.S. Coast Guard (Retired), Senior Military Justice Counsel and Chief Prosecutor, Office of Military Justice, Office of the Judge Advocate General • Lieutenant Commander Stuart Kirkby, U.S. Navy, Staff Attorney, Navy-Marine Corps Appellate Review Activity
<p>November 6, 2015</p> <p>Public Meeting of the JPP</p> <p>Holiday Inn Arlington at Ballston, Arlington, Virginia</p>	<ul style="list-style-type: none"> • Dr. Nathan W. Galbreath, Senior Executive Advisor, Department of Defense Sexual Assault Prevention and Response Office • JPP Staff presentation and Panel discussion on research methodology used to obtain and examine information about the adjudication of sexual assault crimes • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice

MEETINGS	PRESENTERS AND DELIBERATIONS On Statistical Data Regarding Military Adjudication of Sexual Assault Offenses
<p>January 22, 2016</p> <p>Public Meeting of the JPP</p> <p>Holiday Inn Arlington at Ballston, Arlington, Virginia</p>	<ul style="list-style-type: none"> • JPP Staff presentation • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice
<p>March 11, 2016</p> <p>Public Meeting of the JPP</p> <p>Holiday Inn Arlington at Ballston, Arlington, Virginia</p>	<ul style="list-style-type: none"> • JPP Staff presentation • Panel deliberations and review of draft report • Dr. Cassia Spohn, Foundation Professor and Director, Arizona State University School of Criminology and Criminal Justice (by phone)
<p>April 8, 2016</p> <p>Public Meeting of the JPP</p> <p>Holiday Inn Arlington at Ballston, Arlington, Virginia</p>	<ul style="list-style-type: none"> • Panel deliberations and report approval

APPENDIX G: Acronyms and Abbreviations

CAAF:	Court of Appeals for the Armed Forces
DoD:	Department of Defense
DSAID:	Defense Sexual Assault Incident Database
FAP:	Family Advocacy Program
FY:	fiscal year
GCMCA:	general court-martial convening authority
JAG:	Judge Advocate General
JPP:	Judicial Proceedings Panel
NDAA:	National Defense Authorization Act
SAPR:	Sexual Assault Prevention and Response
SAPRO:	Sexual Assault Prevention and Response Office
SARC:	sexual assault response coordinator
SPCMCA:	special court-martial convening authority
UCMJ:	Uniform Code of Military Justice

APPENDIX H: Sources Consulted

1. LEGISLATIVE SOURCES

a. Enacted Federal Statutes

5 U.S.C. App § 2 (Federal Advisory Committee Act)

5 U.S.C. § 552a (Privacy Act)

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

18 U.S.C. § 2241(a) (Aggravated Sexual Abuse)

18 U.S.C. § 2242 (Sexual Abuse)

18 U.S.C. § 2244(a) (Abusive Sexual Contact)

18 U.S.C. § 2244(b) (Sexual Contact without Permission)

42 U.S.C. § 16911 (Sex Offender Registration and Notification, relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators)

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2. RULES AND REGULATIONS

a. Executive Orders

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b. United States Code of Federal Regulations

38 C.F.R. § 3.12 (2016) (Character of discharge)

c. Department of Defense

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DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (Mar. 28, 2013) (Incorporating Change 2, Effective July 7, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>

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d. Services

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U.S. DEP'T OF AIR FORCE, INSTRUCTION 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (July 9, 2004) (Incorporating through Change 7, Effective July 2, 2013), *available at* http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3208/afi36-3208.pdf

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3. MEETINGS AND HEARINGS

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Transcript of JPP Public Meeting (Sept. 18, 2015)

Transcript of JPP Public Meeting (Oct. 9, 2015)

Transcript of JPP Public Meeting (Nov. 6, 2015)

Transcript of JPP Public Meeting (Jan. 22, 2016)

Transcript of JPP Public Meeting (Mar. 11, 2016)

4. OFFICIAL POLICY STATEMENTS

Department of Defense

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b. Other Government Reports

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c. Response Systems Panel Report

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d. Other Reports

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6. RESPONSES TO JPP REQUESTS FOR INFORMATION

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7. BOOKS, BOOKLETS, AND FILMS

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8. JOURNAL ARTICLES

James E. Baker, *Is Military Justice Sentencing on the March? Should it be? And if so, Where should it Head? Court-Martial Sentencing Process, Practice, and Issues*. 27 *FEDERAL SENTENCING REPORTER* 72 (Dec. 2014)

Kathleen Daly and Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 *CRIME & JUST.* 565 (2010)

9. LETTERS AND E-MAILS

Letter from Mr. Glenn R. Schmitt, Director of the Office of Research and Data at the U.S. Sentencing Commission, to Colonel Kyle Green, JPP Staff Director (December 10, 2015)

Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, Criminal Division, to the Chair of the U.S. Sentencing Commission (July 29, 2014)

