

SUBCOMMITTEE OF  
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON  
SEXUAL ASSAULT  
INVESTIGATIONS IN  
THE MILITARY



*February 2017*

---

# SUBCOMMITTEE TO THE JUDICIAL PROCEEDINGS PANEL

---

## CHAIR

The Honorable Barbara S. Jones

## MEMBERS

Ms. Lisa Friel

The Honorable Elizabeth Holtzman

Ms. Laurie Kepros

Dean Lisa Schenck, Colonel (Retired), U.S. Army

Professor Lee Schinasi, Colonel (Retired), U.S. Army

Brigadier General James Schwenk, U.S. Marine Corps, Retired

Ms. Jill Wine-Banks

---

## STAFF DIRECTOR

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

## DEPUTY STAFF DIRECTOR

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

## CHIEF OF STAFF

Mr. Dale L. Trexler

## DESIGNATED FEDERAL OFFICIAL

Ms. Maria Fried



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

February 17, 2017

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

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

  
Barbara S. Jones  
Subcommittee Chair

# Executive Summary

## SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY

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

On the basis of information received at the site visits, the Subcommittee identified several topics to present to the JPP and a need to conduct additional research on some of those topics. Therefore, the Subcommittee decided to issue separate reports on each of the identified subjects. The Subcommittee issued its first report in December 2016 on the subject of military defense counsel resources and experience in sexual assault cases.

This second report focuses on military sexual assault investigations and on Department of Defense (DoD) policies that place responsibility for all sexual assault investigations with the military criminal investigative organizations (MCIOs).<sup>1</sup> It reflects both comments made to Subcommittee members during site visits and the Subcommittee's independent research. The Subcommittee reviewed relevant statutes, DoD policies, the Report of the Response Systems to Adult Sexual Assault Crimes Panel (the RSP), and witness testimony provided to the JPP. The Subcommittee also collected information from DoD and the military Services through formal requests for information and received testimony from a Supervisory Criminal Investigator within the DoD Office of Inspector General in order to fully inform its recommendations to the JPP. The Subcommittee met in September, October, and December of 2016 and in January 2017 to review and deliberate on the information that it had received on the topic of investigations. The Subcommittee will continue to meet in 2017 and will publish additional reports based on information received at the site visits.

While the Subcommittee was formulating this report and its recommendations, the DoD Office of Inspector General provided the Subcommittee with an excerpt of a proposed policy change to DoD investigative policies that directly affects one of the recommendations we were reviewing. If implemented as expected in early 2017, the change would allow the MCIOs to obtain the assistance of other military law enforcement agencies in conducting sexual assault investigations, something not currently permitted but identified as an issue during the Subcommittee's site visits. The Subcommittee therefore considered the DoD proposal in making its recommendation below, with the understanding that the revised policy provided to the Subcommittee in draft will be adopted and published in the very near future.

The Subcommittee makes five recommendations about military sexual assault investigations.

---

1 MCIOs are the U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations. These organizations, which are typically responsible for investigating more serious crimes, also perform other force protection or intelligence-gathering missions.

*Recommendation 1:* Allow MCIOs to use non-MCIO resources for some sexual contact and sexual assault cases. MCIOs have substantial and sophisticated expertise in the investigation of sexual assault cases. The Subcommittee heard, however, that the MCIOs are spread too thin and their ability to investigate the penetrative and other cases requiring more investigative expertise is seriously hampered—largely because of policies that require them to investigate every case of sexual contact as well as sexual assault.

The Subcommittee believes this policy should be changed in order to ensure that MCIOs can focus on the most serious sexual assault cases. Under new policy guidance for the MCIOs developed by the Department of Defense Office of Inspector General, Service law enforcement agencies would be allowed to assist the MCIOs with sexual assault investigations, under the supervision of the MCIOs.

Therefore, the Subcommittee recommends that the policy guidance be implemented as soon as possible and that one year after its implementation, the Department of Defense Office of Inspector General assess whether this policy has been effective in ensuring that the MCIOs focus on the most serious sexual assault cases. As part of its assessment, the DoD Office of Inspector General should conduct site visits at several installations and seek information, preferably on a non-attribution basis, directly from special agents in the field.

The Subcommittee also recommends that the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of this DoD policy and make findings and recommendations to the Secretary of Defense as it deems appropriate.

*Recommendation 2:* Ensure prompt initial victim interviews. It is critical that the initial interview of the victim by MCIOs or other law enforcement agencies be conducted promptly after MCIOs receive a report of sexual assault. Yet the Subcommittee heard frequent complaints that the MCIOs' initial interviews were being substantially delayed, often because special victims' counsel or victims' legal counsel were unavailable to attend the interview.

The Subcommittee recommends that the Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault and (2) receive the training necessary to recognize the importance of a prompt victim interview by the MCIO to an effective and just prosecution.

*Recommendation 3:* Remove impediments to thorough victim interviews. The Subcommittee heard complaints from all MCIO special agents interviewed that various impediments prevented or discouraged them from conducting victim interviews that were as thorough as they consider necessary. Specifically, they felt procedures and policies discouraged or prohibited investigators from asking any question that could be perceived as “confrontational” during either the initial or the follow-up interview even when, in their professional judgment, such questions were vital to address conflicting statements given by the victim or other evidence contradicting the victim's account. They also felt investigations were impeded by policies and procedures that discouraged them from conducting follow-up interviews. The Subcommittee accordingly recommends that the Secretary of Defense identify and remove these and any other identified barriers to thorough questioning of the victim by MCIOs or other law enforcement agencies.

---

*Recommendation 4:* Examine and remove impediments to MCIO access to tangible evidence. The Subcommittee heard numerous complaints that investigators have difficulties obtaining evidence from the victim, particularly information on cellular phones or other digital devices. Investigators said the reasons that victims and/or their attorneys gave for not turning over cellular and digital devices included the financial loss to the victim when investigators retain the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone. These concerns, while legitimate, can be minimized or eliminated by modern forensic techniques for imaging and searching digital devices. Therefore, the Subcommittee recommends that the Secretary of Defense examine these problems and develop appropriate remedies that address victims' legitimate concerns and ensure that sexual assault investigations are complete and thorough.

*Recommendation 5:* Reduce delays at forensic laboratories. The Subcommittee heard complaints from MCIOs and prosecutors that the length of time it takes to obtain results from forensic laboratories' testing of evidence impedes the timely completion of sexual assault investigations. Therefore, the Subcommittee recommends that the Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure more expeditious testing of evidence by forensic laboratories.

# Sexual Assault Investigations in the Military

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals from 25 military installations in the United States and Asia involved in the military justice process; these conversations focused on the investigation, prosecution, and defense of sexual assault offenses.<sup>2</sup> Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault cases from the men and women who are investigating and litigating those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

On the basis of the information received during these site visits, the Subcommittee determined that it would have to conduct further research into several topic areas so that its recommendations to the JPP would be fully informed. The Subcommittee held meetings in September, October, and December of 2016, and in January 2017 in order to develop the information and research needed to report on issues identified at the site visits. In December 2016, the Subcommittee completed its research on the subject of military defense counsel resources and experience in sexual assault cases and issued its first report. The Subcommittee will continue to meet in 2017 to examine other issues and publish additional reports. This report summarizes site visit comments and the Subcommittee's research into military sexual assault investigations and Department of Defense (DoD) policies affecting sexual assault allegations, including policies that place responsibility for all sexual assault investigations with the military criminal investigative organizations (MCIOs).<sup>3</sup>

## I. MCIO INVESTIGATORS LACK NECESSARY DISCRETION AND RESOURCES IN HANDLING SEXUAL ASSAULT ALLEGATIONS

### A. Site Visit Information

Investigators in every military Service explained that a number of factors have stretched their resources and eliminated their discretion in investigating alleged cases of sexual assault. Perhaps the most often cited problem is that MCIOs are no longer able to refer the less serious cases to other military law enforcement agencies, even when the MCIO investigators say those other agencies have adequate training for doing so. Prior to January 2013, sexual contact offense cases, as opposed to penetrative offense cases, were generally handled by military police investigators, with some variation among the Services. With the DoD policy change in 2013, MCIOs have been required to investigate every sexual assault allegation, regardless of the severity of the alleged offense.<sup>4</sup> The pre-2013 approach allowed

---

2 A list of the installations visited and Subcommittee members participating in each site visit is enclosed with this report.

3 MCIOs include the U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations. These organizations, which are typically responsible for investigating more serious crimes, also perform other force protection or intelligence-gathering missions.

4 See Glossary, DEP'T. OF DEF. INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE [*hereinafter* DoDI 5505.18], January 25, 2013 (incorporating Change 2, June 18, 2015) ("It is DoD policy that . . .

MCIO special agents discretion to determine which offenses were more appropriately handled by military police investigators or by the accused's unit, depending on the severity of the allegation and on the victim's desire to participate in an investigation. MCIO investigators almost universally felt that the 2013 policy change has severely strained MCIO resources and undermined their ability to investigate more serious sex offenses effectively and thoroughly. At several installations, special agents reported that these difficulties have lowered morale within their organizations.

A majority of agents emphasized that investigations involving sexual contact offenses, though often less complex than a rape case, must be given the same emphasis, time, and resources as the most serious sexual assault offenses. Sexual contact cases include such cases as a touching of the shoulder or the buttocks, or an attempted kiss on the mouth.<sup>5</sup> Investigators within the MCIOs also noted that even when the reported facts of what allegedly took place make prosecution of these sexual contact offenses unlikely, they are still required to devote significant time and resources to investigate them. Further, as sexual offenses make up an increasing share of MCIOs' caseloads—investigators at one installation stated that 60%–80% of their cases involve sexual assault allegations—the bulk of their work involves intensive, lengthy investigations.

The investigators from each Service also identified other situations in which they felt that their specialized training and experience in sexual assault investigations were diverted from the most serious sex offenses. As one example, they pointed to some cases referred to MCIOs by a sexual assault response coordinator (SARC).<sup>6</sup> They said that if a SARC reports an allegation to an MCIO, the MCIO must treat the allegation as a sexual assault even if the alleged facts do not meet all of the elements of the crime (e.g., what occurred was actually a simple assault or no crime at all). Once reported by a SARC, investigators stated, it is very difficult for investigators to reclassify these incidents as non-sex offenses or noncriminal behavior, and these incidents must be fully investigated.

Another example of their lack of discretion involved sexual assaults reported by a third-party witness rather than the putative victim. In some instances, the MCIO investigators told the Subcommittee members, a third party reports an incident as a possible sexual assault and the apparent victim disagrees with this assessment, disputing either the facts alleged or the need for a criminal investigation. Special agents from the MCIOs told the Subcommittee that they are required to vigorously pursue all of these third-party reports, even if the victim does not want to cooperate or disagrees with the alleged facts. One agent highlighted a case in which he had to interview the victim's friends and family despite her express desire that the complaint not be investigated at all and that neither her friends nor family be contacted.

---

Military Criminal Investigative Organizations (MCIOs) will initiate investigations of all offenses of adult sexual assault of which they become aware, as listed in the Glossary, that occur within their jurisdiction regardless of the severity of the allegation.” “Sexual assault” is defined in the Glossary as “An intentional sexual contact characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent.” The term “sexual assault” includes aggravated sexual contact and abusive sexual contact in violation of Article 120 of the Uniform Code of Military Justice [UCMJ].).

- 5 10 U.S.C. § 920 (UCMJ, art. 120). *See infra* note 10. Sexual contact cases represent a wide range of criminal behavior and may be disposed of in a variety of ways, from a general court-martial—typically reserved for more serious offenses—to non-judicial punishment or a written admonition.
- 6 *See* U.S. DEP'T OF DEF. DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM, ¶ 4e(1) (Jan. 23, 2012) (Incorporating Change 2, Effective January 20, 2015) (“The SARC shall serve as the single point of contact for coordinating appropriate and responsive care for sexual assault victims. SARCs shall coordinate sexual assault victim care and sexual assault response when a sexual assault is reported.”).



---

In addition, investigators noted an ever-growing number of administrative requirements for sexual assault investigations, which contribute to the strain of having to investigate every reported sexual contact offense. The burdensome administrative tasks described by investigators included additional requirements for documenting investigative activity, retaining evidence, and generating duplicative internal reports within the MCIO.

## B. Other Sources of Information

### 1. *Revisions to the definition of sexual contact in Article 120, Uniform Code of Military Justice (UCMJ).*

As noted by participants on the site visits, changes made to the definition of sexual contact under Article 120 of the UCMJ in 2012 expanded the number and type of potential offenses that now fall under the purview of the MCIOs.<sup>7</sup> The 2012 version of Article 120 made the touching of *any* body part for sexual gratification a sexual offense. All offenses under this statute are punishable with up to seven years' confinement and a dishonorable discharge.<sup>8</sup> Previous versions of the statute limited sexual contact crimes to the touching of certain areas of the body—the genitalia, anus, groin, breast, inner thigh, or buttocks of any person; an unwanted touching of other areas of the body was treated as a simple assault, which is a less serious, non-sex offense.<sup>9</sup> In 2016, just four years after expanding the definition of sexual contact offenses, Congress passed legislation that will once again narrow the range of conduct considered a sexual offense.<sup>10</sup> While this law may reduce the number of sexual contact cases that the MCIOs investigate, the reduction will take place very gradually, and all offenses occurring prior to the new legislation's effective date (June 2017, at the earliest) would be governed by the broad definition now in effect. In addition, the new legislation will not solve the primary problem identified by the MCIOs: the diversion of their specialized expertise and experience from more serious sexual assault cases.

### 2. *Report of the Response Systems to Adult Sexual Assault Crimes Panel.*

The Response Systems Panel (RSP), an advisory panel succeeded by the JPP, also commented in its June 2014 report on the impact of the January 2013 DOD policy change, explaining how it significantly increased MCIOs' caseloads:

Historically, Army Criminal Investigation Command (Army CID) investigated all adult sexual assault cases for the Army, while the Naval Criminal Investigative Service (NCIS) and Air Force Office of Special Investigations (AFOSI) often referred some non-penetrative (e.g., unwanted touching) sexual assault offenses to Marine Corps Criminal

---

7 Appendix 23, Analysis of Punitive Articles, Paragraph 45, Article 120—Rape and Sexual Assault Generally, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012). This change was effective for all offenses committed on or after June 28, 2012.

8 Exec. Order No. 13740, 81 Fed. Reg. 65,175 (Sept. 22, 2016).

9 10 U.S.C. § 920(t) (Act of Jan. 6, 2007, effective Oct. 1, 2007–June 27, 2012).

10 Section 5430 of the National Defense Authorization Act for Fiscal Year 2017 defines sexual contact as “touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.” This legislative provision incorporates proposed statutory language authored by the JPP Subcommittee and adopted by the JPP in its REPORT ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE (February 2016). The effective date for this change will be designated by the President, and shall occur no later than two years after enactment of the legislation. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5430, 130 Stat. 2000 (2016).

Investigation Division (Marine Corps CID) agents and Air Force Security Forces investigators, respectively. Since the January 2013 policy change requiring that all adult sexual assault cases be investigated by the MCIOs, cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.<sup>11</sup>

After finding that the various military law enforcement agencies other than the MCIOs are also qualified to investigate sexual assault offenses, and particularly “touching offenses,” the RSP recommended (in RSP Recommendation 89) that

The Secretary of Defense direct the commanders and directors of the military criminal investigative organizations to authorize the utilization of Marine Corps Investigation Division, military police investigators, and/or security forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of a special victim unit investigator to retain oversight.<sup>12</sup>

On December 15, 2014, DoD approved this recommendation in part, referring the matter for further examination to the DoD Office of Inspector General (DoD IG), which is responsible for establishing law enforcement policies. Meanwhile, as reported above, MCIOs currently have to investigate both penetrative and contact cases, and they continue to feel that the addition of these non-penetrative (contact) cases to their already large caseloads overburdens them and reduces their ability to investigate the most serious sexual assault cases.

### 3. *Information presented to the JPP in April 2016.*

At its public meeting on April 8, 2016, the JPP heard testimony on the implementation of a Special Victim Capability within each of the military Services.<sup>13</sup> The chiefs in charge of the MCIOs testified before the JPP that they continue to investigate all reports of sexual assault, referring none of their cases to the military police or security forces.<sup>14</sup> The witnesses also described how the MCIOs have ensured that an increasing number of special agents have the training and expertise to investigate sexual assault cases.<sup>15</sup> According to a senior official in the Air Force Office of Special Investigations

---

11 REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL [*hereinafter* RSP REPORT] 117–18 (June 2014), available at [http://responsessystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsessystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf). Note that Army CID’s policy, in existence prior to DoD’s 2013 directive, still allowed them to refer less serious offenses to the military police investigators, at their discretion.

12 *Id.* at 40. In a footnote, the RSP REPORT explains that “special victim unit” is a “generic term for any unit designated to handle sexual assault and other crimes with a more vulnerable victim; police agencies use a variety of terms for these specialized units.” *Id.* at 118, n.495.

13 In the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 573, 126 Stat. 1632 (2013), Congress required DoD and the Services to implement a “Special Victim Capability”: it called for the Services to provide specially trained prosecutors, MCIO investigators, victim witness assistance personnel, paralegals, and administrative legal support personnel to collaborate in the handling of sexual assault reports. In response, DoD mandated that all sexual assault crimes (i.e., both penetrative and contact offenses) be investigated by the MCIOs, not by any other law enforcement agencies.

14 See *Transcript of JPP Public Meeting* 210, 216 (April 8, 2016) (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, Headquarters, U.S. Army Criminal Investigation Command (CID)) (testimony of Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations.) (“We open [an investigation] on all sexual assaults falling within our jurisdiction.”).

15 *Id.* at 209–10, 217 (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, U.S. Army Criminal Investigation Command (CID), and Mr. Jeremy Gauthier, U.S. Navy,

---

(AFOSI), the quality of sexual assault investigations has improved in recent years, and AFOSI is completing investigations faster than in previous years.<sup>16</sup> This assessment may be inconsistent with the reports of strained investigative resources repeated at every site visit; however, because the testimony relies in part on the DoD Inspector General’s review of MCIO investigations conducted from 2012 to 2013, it may not reflect current trends.<sup>17</sup>

#### 4. *Forthcoming changes in DoD investigative policies.*

On December 28, 2016, the Subcommittee received a letter from the DoD Acting Inspector General explaining that the Office of Inspector General has proposed revisions to DoD’s policies concerning sexual assault investigations, and that DoD is in the final stages of reviewing and updating existing policies.<sup>18</sup> The Acting Inspector General did not list all of the policy changes under consideration by DoD. However, he provided a relevant excerpt from the proposed modifications: the new policy would allow law enforcement agencies to “assist MCIOs while MCIOs investigate offenses of adult sexual assault.” This policy, in draft form, states:

- a. Only the MCIOs will conduct the formal victim interview.
- b. The investigation will be considered an MCIO investigation and the responsible MCIO will provide direct supervision of all investigative work conducted by the DoD LEA [law enforcement agency] resources.
- c. Under no circumstances may an MCIO refer an adult sexual assault investigation to an installation LEA regardless of the severity of the offense.
- d. When LEA resources assist MCIOs with sexual assault investigations, the MCIO investigator will maintain full responsibility for the investigation and assign tasks. Before assisting the MCIOs, the LEA resources will receive training on the topics required in Paragraph 3.3 [of this instruction] by a certified MCIO sexual assault investigator. Ideally the LEA resources will receive the same training and certification as outlined in DoDI 5505.19 [Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military

---

Deputy Assistant Director, Criminal Investigations and Operations Directorate, Naval Criminal Investigation Service Headquarters).

- 16 *Transcript of JPP Public Meeting 228–29* (April 8, 2016) (testimony of Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations.) (“As verified in the DoD IG 2015 assessment of the MCIO investigations in which 99 percent of our investigations collectively were found to be—that the investigations were sufficient. In the last two years we’ve also improved the median timeliness of our investigations from about 130 days on median to 75 days on median. And we’ve sustained that median 75-day turnaround time for over a year now.”) (Referring to the DEP’T OF DEF. INSPECTOR GEN., REPORT No. DODIG-2015-094, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS’ ADULT SEXUAL ASSAULT INVESTIGATIONS (March 24, 2015) [Final], *infra* note 17.).
- 17 See DEP’T OF DEF. INSPECTOR GEN., REPORT No. DODIG-2015-094, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS’ ADULT SEXUAL ASSAULT INVESTIGATIONS 1 (March 24, 2015) [Final], available at [http://www.dodig.mil/pubs/report\\_summary.cfm?id=6310](http://www.dodig.mil/pubs/report_summary.cfm?id=6310). (“We evaluated 536 Military Criminal Investigative Organization (MCIO) investigations of sexual assaults with adult victims opened on or after January 1, 2012, and completed in 2013....”).
- 18 See Letter to the Chair of the Judicial Proceedings Panel from Mr. Glenn A. Fine, Acting Inspector General, Department of Defense Office of Inspector General to the Honorable Elizabeth Holtzman, Chair, JPP (Dec. 28, 2016) (providing the JPP with DoD’s response to RSP recommendation 89 that alternate military law enforcement agencies should be allowed to assist with the investigation of non-penetrative sexual assault cases. DoD explained that it would implement RSP recommendation 89 by changing its existing policy on sexual assault investigations, DoDI 5505.18, *supra* note 4).

Criminal Investigative Organizations (MCIOs)], which is required for MCIO sexual assault investigators.<sup>19</sup>

This policy proposal implements RSP Recommendation 89 (quoted above), and includes two requirements that were not specified in the RSP recommendation: that only the MCIOs will conduct the formal victim interview and that the assisting law enforcement agencies must receive the requisite training on sexual assault investigations before they can assist the MCIOs.

### C. SUBCOMMITTEE ASSESSMENT AND RECOMMENDATIONS

The changes in 2012 to Article 120 of the UCMJ and the changes in 2013 to DoD's policies concerning sexual assault investigations have significantly increased the volume of investigations for which the MCIOs are solely responsible. Collectively, these changes and other administrative policies have generated a flood of investigative activity for strong and weak, serious and less serious cases alike. Special agents at the site visits stressed that the increase in their caseload has severely strained their investigative resources and harmed their ability to pursue the most serious sex crimes in the manner they feel is appropriate. These individuals all concurred that the increase in their workload is primarily due to DoD's mandate that MCIOs investigate all reports of sexual contact—cases that may involve a relatively simple, onetime touching of the leg or buttocks rather than more serious and violent conduct.

The Subcommittee recommends implementing the December 2016 draft changes to DoD's sexual assault investigations policy. The proposal, if implemented, will provide the MCIOs with access to needed additional resources. Although MCIOs will remain responsible for all sexual assault investigations, permitting other law enforcement agencies to assist with those investigations should ease the current strain on MCIO resources and allow the MCIOs to focus on the most serious cases.

The Subcommittee further recommends that the new policy be closely monitored and thoroughly reviewed one year after it takes effect, and that the DoD Inspector General assess the effects of the new policy on the MCIOs' ability to focus their time and effort on the most serious cases of sexual assault. Because the Subcommittee found that its field interviews of investigators were essential to understanding the effects of statutory and policy changes, it also recommends that DoD's review should similarly incorporate site visits at several installations and interviews with special agents as well as military justice practitioners. During its field interviews, DoD should allow interview participants to speak without attribution in order to fully inform DoD's evaluation of the policy's effects.

Should the DoD review find that MCIOs continue to experience strains on their resources and the diversion of their expertise from the most serious sexual assault cases, then the DoD IG might consider allowing MCIOs to transfer full responsibility for some less serious sexual assault offenses, with the approval of a supervisor, to alternative military law enforcement agencies to address the problem. The Subcommittee does not make this recommendation now, in recognition that there are inherent difficulties in such transfers, including but not limited to accurately determining the seriousness of some offenses in the early stages of an investigation. The Subcommittee believes that it is prudent to give the IG's proposed policy changes a chance to be implemented before suggesting that more extensive policy changes are needed.

The JPP, together with its Subcommittee, will reach the end of its statutory term in September 2017. Therefore, it will not be able to monitor the effects of this policy or make additional recommendations

---

<sup>19</sup> *Id.*

---

about it to the Secretary of Defense. Congress has created a successor panel—the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces<sup>20</sup>—which, the Subcommittee respectfully recommends, should continue to monitor this issue.

*Recommendation 1:* Allow MCIOs to use non-MCIO resources for some sexual contact and sexual assault cases. MCIOs have substantial and sophisticated expertise in the investigation of sexual assault cases. The Subcommittee heard, however, that the MCIOs are spread too thin and their ability to investigate the penetrative and other cases requiring more investigative expertise is seriously hampered—largely because of policies that require them to investigate every case of sexual contact as well as sexual assault.

The Subcommittee believes this policy should be changed in order to ensure that MCIOs can focus on the most serious sexual assault cases. Under new policy guidance for the MCIOs developed by the Department of Defense Office of Inspector General, Service law enforcement agencies would be allowed to assist the MCIOs with sexual assault investigations, under the supervision of the MCIOs.

Therefore, the Subcommittee recommends that the policy guidance be implemented as soon as possible and that one year after its implementation, the Department of Defense Office of Inspector General assess whether this policy has been effective in ensuring that the MCIOs focus on the most serious sexual assault cases. As part of its assessment, the DoD Office of Inspector General should conduct site visits at several installations and seek information, preferably on a non-attribution basis, directly from special agents in the field.

The Subcommittee also recommends that the advisory committee that follows the JPP, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, monitor the effects of this DoD policy and make findings and recommendations to the Secretary of Defense as it deems appropriate.

## II. CURRENT POLICIES AND PRACTICE RENDER INVESTIGATIONS LESS THOROUGH AND LESS EXPEDITIOUS THAN THEY SHOULD BE

### A. Site Visit Information

Participants in the Subcommittee’s site visits raised a number of other issues that they felt collectively hamper an investigator’s ability to conduct thorough investigations. The Subcommittee recognizes that the comments it heard depend in some measure on the military Service, location, and level of experience of the participants, and that a single anecdote does not necessarily indicate a broader trend or a widespread problem. However, the general themes identified below were raised at every site visited by the Subcommittee and were often supported by specific examples, suggesting that some systemic problems may exist that can and should be addressed.

---

20 The Secretary of Defense, pursuant to Section 546 of the National Defense Authorization Act for Fiscal Year 2015, as modified by section 537 of the National Defense Authorization Act for Fiscal Year 2016, established this nondiscretionary advisory committee. Section 546 of the FY15 NDAA provides that it shall review, on an ongoing basis, cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

*1. The initial investigatory interview of a sexual assault victim is often delayed, to the detriment of the case.*

It is important to note that since the establishment of SARCs, military investigators and military police are no longer the first people to receive sexual assault reports. MCIO investigators in all Services told the Subcommittee that today the vast majority of sexual assault reports from Service members are made to the SARC office, which then informs the MCIO of the allegation. They said that this is a relatively recent development. Most site visit participants noted that in the past, victims contacted their command, the military police (or other Service equivalent), or the MCIO to report an alleged sexual assault. While the option of reporting to MCIOs remains, the agents said that they typically do not hear from victims directly.

Investigators uniformly reported that the first interview of a victim must be scheduled through the special victims' counsel or victims' legal counsel (SVC/VLC), if the victim has already obtained counsel. If the complaining witness has not yet retained counsel and reports a sexual assault directly to the MCIO, MCIOs must notify victims of their right to SVC/VLC representation before beginning the interview.<sup>21</sup> MCIO investigators at site visits reported that victims almost always elect to meet with counsel before agreeing to be interviewed; as a result, the initial investigatory interview is delayed until an SVC/VLC can be assigned and the initial interview can be scheduled.<sup>22</sup> Several special agents indicated that finding a time when the SVC/VLC can attend the initial interview can delay the interview by weeks, or in some cases months, depending on the attorney's availability.<sup>23</sup> A majority of the agents expressed concern that this passage of time could cause them to lose valuable physical or digital evidence, as well as impair a victim's ability to clearly remember details. Moreover, other avenues of investigation cannot, for practical reasons, be identified and pursued until this initial interview is conducted.<sup>24</sup>

*2. Investigators feel discouraged from asking sexual assault victims questions that might be seen as "confrontational."*

Many senior investigators expressed a concern that they are no longer interviewing the victim in a manner that is best suited to eliciting all the facts and circumstances necessary to discover what occurred. The Subcommittee was told that investigators are now taught not to probe too deeply into

- 
- 21 See DoDI 5505.18, *supra* note 4, encl. 2.11 (requiring an MCIO investigator assigned to conduct an adult sexual assault investigation to inform a sexual assault victim of availability of legal assistance); see also DEP'T OF DEF. INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, encl. 2, para. 6(m) (Feb. 12, 2014) (requiring Service Secretaries to "[e]stablish procedures that require, upon seeking assistance from a SARC, SAPR VA, MCIO, the Victim Witness Assistance Program (VWAP), or trial counsel, that each Service member who reports that he or she has been a victim of a sexual assault be informed of and given the opportunity to . . . [c]onsult with legal assistance counsel . . .").
- 22 See also *Transcript of JPP Public Meeting 215* (April 8, 2016) (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, U.S. Army Criminal Investigation Command (CID)) ("The requirement to notify the SVC prior to interviewing the victim along with the SVC's primary duty to best represent their client's interests have on occasion been problematic. We have an example recently in which two soldiers both arrived at a CID office and both claimed to have been sexually assaulted. So we had to notify two SVCs. After the victims had talked to their SVCs they declined to make any statements to the CID which was problematic.").
- 23 Prosecutors who spoke to the Subcommittee expressed the same frustration with their attempts to schedule interviews with victims. This topic will be addressed in subsequent reports issued by the JPP Subcommittee.
- 24 A few investigators at the site visits noted that the vast majority of sexual assault cases they deal with involve "delayed" reports (witnesses did not specify the length of the delay), and that in such cases the loss of access to potential evidence could be attributed to delayed reporting rather than to the schedule of the SVC/VLC.

---

the details of a sexual assault victim's account. In addition, they are discouraged from "confronting" a complaining witness with aspects of his or her account that do not make logical sense or that conflict with other evidence, including the victim's own inconsistent statements. The investigators stated that, when done appropriately, such questioning is not insensitive and indeed is a crucial investigative practice. As one senior agent explained, in investigative circles "confrontation" is a term of art and does not entail the hostility connoted by the common use of the word. A confrontational, or clarifying, interview involves questions that invite a witness to explain new or inconsistent evidence and statements. While it is clear from the site visits that the Services differ in their approach to this technique, MCIO training, internal practices, or both give many agents the impression that they have to accept the complainant's account at face value, without thoroughly exploring discrepancies or seeking more detail in the complainant's account. One MCIO investigator described being trained to investigate the sexual assault "that did happen" and not the possibility that it did not happen. This approach was problematic, the special agent implied, because it could lead them to overlook important facts and evidence, obscuring the reality of what had occurred.

Internal MCIO policies may likewise discourage thorough questioning of sexual assault victims. Many agents explained that they are required to obtain a supervisor's approval before conducting any interview subsequent to the initial victim interview. The imposition of bureaucratic obstacles to interviewing a victim was widely viewed as a deterrent, and field agents felt dismayed that their MCIO leadership would question their determination that a subsequent interview was a critical investigative step.

### *3. SVCs/VLCs limit contact with the victim and the scope of victim interviews.*

In addition, a number of agents told Subcommittee members that SVCs/VLCs who attend the investigative interviews sometimes object to certain necessary and relevant questions or advise the victim not to answer them. Other investigators reported that the mere presence of the SVC/VLC dissuades them from asking probing questions out of fear that they will be accused of being inappropriate or being too hard on the victim. The Subcommittee heard at one site visit that an SVC/VLC objected every time an agent asked a victim what sort of resolution of the case he or she wanted, even though his training courses had taught the agent that this was an important and routine question to ask. The SVC/VLC's position was that the client's answer could later be exploited by a defense attorney on cross-examination.<sup>25</sup>

The Subcommittee was told that some SVCs/VLCs request that investigators who want to do follow-up interviews with a victim provide the questions in writing in advance of the interview, while others object to any follow-up interviews at all. Some investigators indicated that if inconsistencies in the victim's statement arise during the course of the investigation, they must ask the SVC/VLC to speak with the client to clarify the points because the SVC/VLC do not permit investigators to speak directly with the victim. The SVCs/VLCs then relay back the responses. The Subcommittee heard from SVCs/VLCs that they wanted their clients to be interviewed only one time so that defense counsel cannot claim at trial that the victim made inconsistent statements.<sup>26</sup> Investigators almost universally lamented the resulting loss of rapport-building opportunities, as well as the potential loss of information, since details about an incident are commonly gathered over time after a traumatic event such as sexual

---

25 The Subcommittee notes that while a defense attorney might portray a victim's statement to investigators in a light most favorable to the defense for various reasons, this is not a reason to curtail appropriate questioning of a victim.

26 This is a summary of the most common explanation provided at site visits by SVCs/VLCs for advising clients to agree to only one interview. The Subcommittee recognizes that other concerns, such as a victim's potential liability for collateral misconduct, may also influence the SVC's/VLC's advice to clients, if applicable to the case.

assault. Indeed, they also pointed out that follow-up interviews are the norm in the private sector during sexual assault investigations.<sup>27</sup>

**4. *Investigators experience difficulties in obtaining needed and relevant evidence from victims who file unrestricted reports of sexual assault.***

At several site visit locations, trial counsel and investigators recounted cases in which victims, on the advice of their SVC/VLC, declined to turn over potential evidence to investigators. Some SVCs/VLCs openly acknowledged that they advise clients not to turn over their cell phones to investigators even when it is likely to contain potential evidence.<sup>28</sup> Among the reasons offered for this advice were the financial loss to the victim when investigators retain the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone. Both of these problems can be minimized if not eliminated by modern forensic techniques for imaging and searching cell phones. None of the SVCs/VLCs interviewed expressed a concern that their advice or advocacy could hamper the investigation or prosecution of the case. Some SVCs/VLCs explained that their paramount concern is the victims' privacy, and they view the possibility that their advice might lower the chances for a successful prosecution as of little consequence.

Investigators stressed that the issue of searching a victim's cell phone or other digital devices for evidence frequently arises, because the victim and accused are often acquaintances who may have communicated by phone or social media around the time of the alleged offense. A victim may also have contacted a friend shortly after the incident, and those communications with an outcry witness—the person who first hears an allegation of abuse—can be critical to corroborating a complaint. In the instance of a delayed report, a witness's digital footprint often assumes greater importance because other physical evidence, such as DNA, may degrade or disappear over time. Photographs and online activity can assist agents in establishing a timeline of relevant events and provide the only corroboration of a victim's allegation. Still, investigators acknowledged that the amount and value of the evidence contained on a cell phone will vary greatly from one case to the next, depending on the facts.

Investigators explained that they continue the investigation without access to evidence on cell phones, at times with negative consequences. One agent described a case in which an SVC informed a victim that she did not have to disclose text messages she exchanged with the accused. The victim took this advice and refused to give the investigator or the prosecutor the text messages. The accused predictably gave these texts to his attorney, who confronted the victim with them while she was on the witness stand at trial. The prosecutor, having never seen these texts, had not prepared the victim for this line of cross-examination and, as a result, the victim's testimony was seriously undermined.

---

27 A number of MCIO special agents were familiar with civilian criminal investigative practice through their prior experience working for civilian law enforcement agencies, and through the training they routinely receive at federal law enforcement training centers.

28 Investigators generally need to have credible information establishing probable cause to believe that an item such as a cell phone contains evidence that corroborates a victim's statement or bears on the guilt or innocence of the accused. Investigators may obtain the item with the victim's consent or by obtaining a warrant, known in the military as a "search authorization," to seize and search the item. Military Rule of Evidence (M.R.E.) 315, Probable Cause Searches, provides that a commander, military magistrate, or military judge may issue a search authorization of persons or property under military control. M.R.E. 315(c) specifically states "a search authorization may be valid under this rule for a search of (1) the physical person of anyone subject to military law or the law of war wherever found; (2) military property of the United States or of nonappropriated fund activities of an Armed Force of the United States wherever located; (3) persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or (4) nonmilitary property within a foreign country." MANUAL FOR COURT-MARTIAL, UNITED STATES (2016 ed.), MIL. R. EVID. 315.



---

5. *Despite recent improvements in prosecutor-MCIO relationships, tensions persist and impair the thoroughness of investigations.*

Prosecutors and investigators repeatedly described tensions in their working relationships with one another. Trial counsel generally agreed that coordination on sexual assault investigations has improved, but many complained that investigators all too often decline to follow up on important leads. For their part, investigators expressed the view that many requests for additional investigative activity from trial counsel are unnecessary or are difficult for an investigative unit that is already overburdened and understaffed to execute. Some prosecutors ventured that these difficulties may be the result of internal MCIO protocols that stress timely completion of investigative tasks and pressure agents to close a case quickly. In the same vein, prosecutors noted, investigators are reluctant to reopen a closed case except to document newly received lab results or a similarly significant event.

Internal MCIO policies were not clearly defined in site visit discussions, but some agents mentioned internal deadlines of six months to close a case in one Service, and 90 days in another Service. Anecdotally, the investigators clarified that despite these guidelines, they have seen instances in which sexual contact offense investigations take one year to complete. Both investigators and trial counsel stated that before agents close a case, they have to consult with a prosecutor and a commander to make a probable cause determination and document the final decision on case disposition; thus prosecutors do have input before a case is closed. However, should subsequent developments in a case reveal the need for additional investigative steps, prosecutors described real difficulties in getting this additional investigative work completed.

6. *Cases are delayed by the length of time taken by forensic labs to test potential evidence.*

Several prosecutors and investigators raised the issue of delays caused by the time it takes for forensic lab analysis of evidence. At one installation, prosecutors reported that they typically wait six months for DNA test results. The Subcommittee members were told that DoD labs generally prioritize cases that are pending court-martial, but notifying the lab that a court-martial is pending does not necessarily result in expeditious testing. Trial counsel at one installation said that they will sometimes charge an accused just to hasten the receipt of digital or DNA evidence from the lab, even when the sum total of existing evidence may not support a successful prosecution.

Experiences at other installations varied: one location reported that a Service-specific lab could test evidence in less than 60 days, while at another, agents stated that they wait more than 90 days for lab results, and for that reason they are unable to close their cases expeditiously. By comparison, a civilian detective who participated in one site visit said that he has to wait 12–16 months for forensic testing in his civilian jurisdiction, and afterward collects a DNA swab from the defendant to confirm the results; in his observation, civilian sexual assault investigations take longer than comparable military criminal investigations.

## **B. Other Sources of Information**

### **1. MCIO structure.**

The MCIOs are generally responsible for investigating the most serious offenses committed by members of the military Services. Each Service maintains a stovepiped organization that does not answer to a military commander or to a commander's staff judge advocate (SJA). These independent law enforcement organizations receive investigative policy and guidance from the Department of

Defense Office of the Inspector General, and the MCIO in each Service establishes its own policies and protocols consistent with DoD IG directives.

*2. Information presented to the JPP in April 2016.*

The JPP examined how MCIOs and other stakeholders in the military justice process interact with SVCs/VLCs and addressed some of the issues identified above. The JPP heard testimony in its April 2016 public meeting from senior officials within each MCIO regarding the impact of SVC/VLC representation and corresponding policies on sexual assault investigations. The witnesses echoed the concerns heard by the Subcommittee members at the site visits regarding investigative delays caused by SVCs/VLCs and noted that policies continue to evolve to accommodate SVC/VLC representation.<sup>29</sup> As one senior MCIO official testified:

In regards to special victim counsel, we consider the introduction of the special victim counsel to still be a work in progress in some respects. The agents have been provided extensive guidance on how to work with the SVC. The agent has the responsibility of notifying the victim of their right to an SVC representation. The victim's SVC is allowed to be present during the interviews. The requirement to notify the SVC prior to interviewing the victim along with the SVC's primary duty to best represent their client's interests have on occasion been problematic.<sup>30</sup>

Another senior MCIO official suggested that trends in his organization are similar, explaining:

The special victim counsel program has come a long way since its inception. . . . The advent of this service has had an impact on our investigations. The coordination required to ensure all victim service personnel can attend interviews oftentimes delays the interview process. Collateral misconduct in service can impact victim disclosure and evidence collection. In some instances the victim has elected not to meet with NCIS at all which negates our ability to explain the investigative process and ensure the victim is making a fully informed decision as to their level of participation. We have maintained positive relationships, engaged early and often, and in most instances can quickly address the issues.<sup>31</sup>

JPP presenters also acknowledged that it is difficult to assess the impact of these delays on the overall quality of the investigation, and that these issues have become less pronounced over time.<sup>32</sup>

---

29 Transcript of JPP Public Meeting 220–21 (April 8, 2016) (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate, NCIS Headquarters). *Id.* at 225–27 (testimony of Mr. Kevin Poorman, U.S. Air Force, Associate Director, Criminal Headquarters, Air Force Office of Special Investigations).

30 *Id.* at 215 (testimony of Mr. Guy Surian, U.S. Army, Deputy Chief of Investigative Operations, Investigative Policy and Criminal Intelligence, U.S. Army Criminal Investigation Command (CID)).

31 *Id.* at 220–21 (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate, NCIS Headquarters).

32 *Id.* at 257–58.

---

### 3. RSP Findings and Recommendations in 2014.

In its June 2014 report the RSP made the following recommendation, which Congress enacted in part in the National Defense Authorization Act for Fiscal Year 2016 (FY16 NDAA):<sup>33</sup>

**RSP Recommendation 62:** The Secretary of Defense develop and implement policy that, when information comes to military police about an instance of sexual assault by whatever means, the first step in an investigation is to advise the victim that she or he has the right to speak with a special victim counsel before determining whether to file a restricted or unrestricted report, or no report at all.<sup>34</sup>

The FY16 NDAA specifically requires that MCIO agents advise victims of their right to an SVC or VLC before the initial interview. Congress did not adopt the portion of RSP Recommendation 62 regarding victims' being advised of the right to a SVC/VLC prior to their electing to file an unrestricted or restricted report. MCIOs ensure that investigators speak to a victim only with his or her attorney present, subject to exceptions for exigent circumstances.<sup>35</sup>

In addition to reviewing how MCIOs safeguard victims' rights and interests in the investigative process, the RSP examined the thoroughness of sexual assault investigations. On this subject, the RSP heard testimony in 2013 and 2014 from prosecutors who voiced concerns similar to those raised during the JPP Subcommittee's site visits in 2016 about the premature closing of sexual assault investigations. The RSP noted the disagreements between trial counsel and MCIOs, stating:

According to MCIO agents, investigators complete thorough investigations, following all logical leads prior to reaching any conclusions. Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary. Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review and that it is difficult to "reopen" cases for further investigation.<sup>36</sup>

On the basis of this information, the RSP recommended the following:

**Recommendation 94-A.** The Secretary of Defense should direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file that the trial counsel agrees all appropriate investigation has taken place before providing a report to the appropriate commander for a disposition decision. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists.<sup>37</sup>

---

33 National Defense Authorization Act for Fiscal Year 2016 [hereinafter FY16 NDAA], Pub. L. No. 114-92, § 534, 129 Stat. 726 (2015).

34 RSP REPORT at 32.

35 See *Transcript of JPP Public Meeting 215–25* (April 8, 2016) (testimony of Mr. Jeremy Gauthier, U.S. Navy, Deputy Assistant Director, Criminal Investigations and Operations Directorate, NCIS Headquarters).

36 RSP REPORT at 123.

37 RSP REPORT at 42.

Recommendation 94-B. To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until final disposition of the case.<sup>38</sup>

DoD did not adopt these recommendations, but they have been referred to various working groups within the military Services. At present, MCIOs have to include in each investigative report the commander's decision whether probable cause exists to believe an offense was committed, as well as the appropriate disposition for the case—and to include this information, they must either leave open or reopen cases.

Finally, the RSP's Comparative Systems Subcommittee (CSS) examined processing times at military and civilian crime lab facilities. The military's primary laboratory, the Defense Forensic Science Center (formerly the U.S. Army Criminal Investigation Laboratory), located in Forest Park, Georgia, informed the CSS that in 2014, the turnaround time for a laboratory request—the time from when the lab receives the evidence until the lab completes its analysis and sends a report to the requesting agent—was 77 days.<sup>39</sup> Witnesses noted that this time frame is dependent on several factors, such as lab resources, current caseload, and the amount of evidence to be examined in response to a request.<sup>40</sup> The JPP Subcommittee did not seek specific, updated information from military lab facilities to supplement the RSP and site visit information.

### C. Subcommittee Assessment and Recommendations

In the wake of Congress's emphasis on sexual assault cases, DoD and the MCIOs have written numerous policies designed to enhance the quality of sexual assault investigations. Unfortunately, most MCIO-specific policies are not publicly available, owing to the sensitive nature of investigative methods. However, the Subcommittee repeatedly received comments during site visits to the effect that investigators today have reduced access to evidence and to victims but are responsible for investigating a broader spectrum of misconduct than ever before. Their investigations also carry more administrative burdens, such as duplicative reports and forms, but contain less evidence, owing in part to their own internal policies and practices regarding victim interviews. Because of the strain on investigative resources, and for all of the reasons stated above, some investigators resist undertaking or are simply unable to do the additional investigative work needed to fully prepare a case for prosecution.

Further complicating the completion of a thorough investigation is a method of SVC/VLC advocacy that restricts the information that investigators and prosecutors can gather from victims. Investigators are likely to be the second or third person victims speak with about the offense, and they can talk only in the presence of the victim's attorney, who may limit the breadth of the inquiry or advise victims not to speak with investigators more than once. A victim's decision to act on the advice of his or her counsel is not inherently problematic. Rather, the problems occur when, on the advice of counsel or on their own, victims limit their participation and fail to provide investigators with evidence relevant to the investigation. Even when the SVC/VLC provides the investigator's question to the victim and communicates the response back to the investigator, the investigator loses valuable information because

---

38 *Id.*

39 RSP REPORT, ANNEX A, REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE 101 (May 2014), *available at* [http://responsesystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Annex\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Annex_Final_20140627.pdf).

40 *Id.*

---

he or she is unable to personally observe a victim's demeanor or reaction to an investigator's question. Moreover, investigators may not fully comprehend, or may have additional questions based on the written or verbal responses of an SVC/VLC who does not allow the victim to be questioned directly after the initial interview. Denying follow-up interviews therefore prevents investigators from fully exploring and understanding what could potentially become very important issues in a case.

When a victim either declines subsequent investigative interviews, or refuses to turn over relevant evidence—such as photographs, text messages, or social media information contained on the victim's cell phone—investigators and prosecutors make decisions about investigating and charging without possessing all available evidence. There is a general sense among the investigators and prosecutors interviewed at the site visits that they must press forward without a victim's full cooperation, an approach that raises concerns about not just the fairness of an investigation, but also the overall fairness of a prosecution.

The Subcommittee heard a number of reasons why victims might not cooperate with requests for evidence from the victim's cell phone, from concerns they would not have access to their phones for extended periods of time to concerns about the privacy of information in their phones not related to their case. However, the Subcommittee heard from the investigators and others that these kinds of concerns are somewhat misguided as the technology for imaging and searching cell phones has advanced to the point that both the time it takes to image a phone and the intrusion into irrelevant information have been minimized or altogether eliminated.<sup>41</sup>

Case delays take many forms, and waiting on forensic laboratory analysis was one raised by investigators and prosecutors alike during the site visits. Forensic evidence such as DNA testing and digital device examination can yield critical information, particularly in sexual assault cases, and can further guide MCIOs' investigation as well as a prosecutor's charging decisions. The Subcommittee cautions that while labs may prioritize cases pending court-martial, prosecutors should not prefer charges in order to prioritize a case for laboratory testing if the evidence already available does not support such a decision.

***Recommendation 2:*** Ensure prompt initial victim interviews. It is critical that the initial interview of the victim by MCIOs or other law enforcement agencies be conducted promptly after MCIOs receive a report of sexual assault. Yet the Subcommittee heard frequent complaints that the MCIOs' initial interviews were being substantially delayed, often because special victims' counsel or victims' legal counsel were unavailable to attend the interview.

The Subcommittee recommends that the Secretary of Defense take the necessary steps to ensure that special victims' counsel and victims' legal counsel (1) have the resources to schedule and attend the initial victim interview promptly after a report of sexual assault and (2) receive the training necessary to recognize the importance of a prompt victim interview by the MCIO to an effective and just prosecution.

---

41 See Service Responses to JPP Request for Information Set 9, Question 162 (Dec. 30, 2016). Options include requesting that the victim provide only limited consent for specific items of evidence such as photos, text messages, call logs, or app data. MCIOs can photograph text messages or make a forensic copy of select information before returning the phone to the victim. RFI responses also indicated that the MCIOs possess the expertise and technology to perform data extraction on-site using Cellebrite technology. Only if further data extraction is needed will the MCIO send the cell phone to the Defense Computer Forensic Laboratory for examination.

*Recommendation 3:* Remove impediments to thorough victim interviews. The Subcommittee heard complaints from all MCIO special agents interviewed that various impediments prevented or discouraged them from conducting victim interviews that were as thorough as they consider necessary. Specifically, they felt procedures and policies discouraged or prohibited investigators from asking any question that could be perceived as “confrontational” during either the initial or the follow-up interview even when, in their professional judgment, such questions were vital to address conflicting statements given by the victim or other evidence contradicting the victim’s account. They also felt investigations were impeded by policies and procedures that discouraged them from conducting follow-up interviews. The Subcommittee accordingly recommends that the Secretary of Defense identify and remove these and any other identified barriers to thorough questioning of the victim by MCIOs or other law enforcement agencies.

*Recommendation 4:* Examine and remove impediments to MCIO access to tangible evidence. The Subcommittee heard numerous complaints that investigators have difficulties obtaining evidence from the victim, particularly information on cellular phones or other digital devices. Investigators said the reasons that victims and/or their attorneys gave for not turning over cellular and digital devices included the financial loss to the victim when investigators retain the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone. These concerns, while legitimate, can be minimized or eliminated by modern forensic techniques for imaging and searching digital devices. Therefore, the Subcommittee recommends that the Secretary of Defense examine these problems and develop appropriate remedies that address victims’ legitimate concerns and ensure that sexual assault investigations are complete and thorough.

*Recommendation 5:* Reduce delays at forensic laboratories. The Subcommittee heard complaints from MCIOs and prosecutors that the length of time it takes to obtain results from forensic laboratories’ testing of evidence impedes the timely completion of sexual assault investigations. Therefore, the Subcommittee recommends that the Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure more expeditious testing of evidence by forensic laboratories.

# ENCLOSURE

## Installation Site Visits Attended by Members of the JPP Subcommittee

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

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

