ANNEX TO

REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

ANNEX A: Report of the Comparative Systems Subcommittee
ANNEX B: Report of the Role of the Commander Subcommittee
ANNEX C: Report of the Victim Services Subcommittee

June 2014
Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel

May 2014

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Report of the Comparative Systems Subcommittee

On September 23, 2013, the Secretary of Defense established this Subcommittee to support the Response Systems Panel in its duties under Section 576(d)(1) of the National Defense Authorization Act for Fiscal Year 2013. The Secretary established nine objectives for the Subcommittee to address relating to the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice). This Subcommittee has completed its review and submits to the Response Systems Panel its report with our assessment, recommendations, and findings.

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
# TABLE OF CONTENTS

**EXECUTIVE SUMMARY** .................................................. 1

I. **ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS** ........ 11

II. **LEGISLATION AND POLICY RELATING TO THE INVESTIGATION, PROSECUTION AND DEFENSE OF SEXUAL ASSAULT CASES** ........ 39
   A. **RECENT LEGISLATION** ........................................ 39
   B. **PROPOSED LEGISLATION** .................................... 42

III. **SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS** ........ 45
    A. Survey Types and Methodologies ............................ 45
    B. Public Health vs. Crime Victimization Surveys ........ 55
    C. Best Practices for Meaningful Comparison ............... 58
    D. Studying Recent Trends in Military Reporting .......... 63

IV. **OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT** ........................................... 65
    A. The Victim Centric Multidisciplinary Approach ........ 65
    B. The Special Victim Capability in the Military .......... 66
    C. The Personnel who Participate in the Response Systems to Sexual Assault 67
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS . . . . . . . . . . 71

A. Introduction 71
B. Organizational Structure of MCIOs and Special Victim Units 72
C. Selection and Experience 75
D. Investigator Training 76
E. Collateral Misconduct and Victim Reporting 83
F. Comparing Procedures, Policies, Protocols & Oversight 90
G. Sexual Assault Forensic Examinations 102

VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES. . . . . 109

A. Overview – Basic Military Lawyer Training, Selection, and Certification Standards 110
B. Specialized Sexual Assault Training for Civilian and Military Prosecutors 113
C. Training for Civilian and Military Defense Counsel 126
D. Military Judge Training and Assessment of Counsel’s Advocacy Skills 139

VII. PROSECUTION AND DEFENSE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 141

A. Organization of Prosecution Offices and the Multidisciplinary Approach 141
B. Defense Counsel Organizational Structure & Resource Requirements 153
C. Victims’ Rights and Special Victim Counsel Impact on the Judicial Process 159
D. Initial Disposition and Charging Decisions 163
E. The Military Judge’s Role in the Military Justice System 180
F. Referral of Sexual Assault Cases in the Military 188
G. Plea Negotiations 192
H. Military Panel Selection and Voir Dire 195
I. Character Evidence 196
J. Prosecution and Conviction Rates 200
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Secretary of Defense established the Comparative Systems Subcommittee (CSS or Subcommittee) to compare the investigation, prosecution, defense, and adjudication of sexual assault cases in the military and civilian systems and to make recommendations to the Response Systems to Adult Sexual Assault Crimes Panel (RSP). The Subcommittee included four members of the RSP as well as six experts with extensive knowledge of military or civilian criminal justice. Collectively, the Subcommittee had more than 188 years of military service and 326 years of criminal justice experience; it was supported by a staff with current knowledge of military justice and experience in investigation, training, prosecution, and defense.

SUBCOMMITTEE MISSION STATEMENT

Assess and compare military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under 10 U.S.C. Section 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

Responsibility of the Subcommittee

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the Secretary of Defense to establish the RSP “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under Section 920 of Title 10, United States Code (Article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.” The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) included several additional requirements for the RSP study. The Secretary of Defense also requested the RSP to consider the impact of imposing mandatory minimums for sexual assault offenses.

1 The members of the Comparative Systems Subcommittee are: Dean Elizabeth Hillman, the Honorable Barbara Jones, BG (Ret) Malinda Dunn, BG (Ret) John Cooke, Mr. Harvey Bryant, COL (Ret) Stephen Henley, COL (Ret) Dawn Scholz, COL (Ret) Larry Morris, Ms. Rhonnie Jaus, and Mr. Russell Strand, see Appendix B, Members and Staff of the Comparative Systems Subcommittee, infra.


4 Letter from the Acting General Counsel of the Department of Defense to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), currently available at http://responsesystemspanel.whs.mil.
On September 23, 2013, the Secretary of Defense established three subcommittees—Role of the Commander, Comparative Systems, and Victim Services to assist the RSP in accomplishing the many areas Congress directed it to assess in twelve months. He established several objectives for the Subcommittee, such as comparing military and civilian justice systems, assessing the effectiveness of the investigation, prosecution, and adjudication of adult sexual assault crimes, and considering other matters, as appropriate.\(^5\) The FY14 NDAA included additional requirements for RSP study that were assigned to the Subcommittee.\(^6\) Although the original legislation required the analysis to span from 2007-2011, the Subcommittee members expanded their review through April 2014, because Congress passed and the President has approved numerous legislative changes to the military justice system and the Secretary of Defense imposed several initiatives to respond to sexual assault in the military in the last three years. The Subcommittee’s terms of reference were updated to reflect all of the comparative systems taskings.\(^7\)

In total, the Subcommittee was tasked with nine objectives for analysis in support of the RSP mission:\(^8\)

- Assess the effectiveness of military systems, including the administration of the UCMJ, for the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.
- Compare military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes.
- Examine advisory sentencing guidelines used in civilian courts in adult sexual assault cases to assess whether it would be advisable to promulgate sentencing guidelines for use in courts-martial, and study the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses.
- Compare and assess the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, to the training level of prosecution and defense counsel for similar cases in the Federal and State court systems.
- Assess and compare military court-martial conviction rates for adult sexual assault crimes with those in the Federal and State courts for similar offenses and the reasons for any differences.
- Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.
- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

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\(^{7}\) Appendix A, CSS Revised Terms of Reference, infra.

EXECUTIVE SUMMARY

• Assess how the name, if known, and other necessary identifying information of an alleged offender collected as part of a restricted report could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel only for the purposes of identifying individual subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report in those cases in order to facilitate increased prosecutions, particularly of serial offenders.

• Assess opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

Assessment Methodology

Since June 2013, RSP and Subcommittee members have held and attended 35 days of hearings—including public meetings, Subcommittee meetings, preparatory sessions, and site visits—with more than 380 different presenters. Presenters included sexual assault victims; current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims’ counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocate Generals from each of the Services; current and former military justice officials and experts from Allied nations; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners and emergency physicians; first responders; chaplains; and current United States Senators.9 The Subcommittee and staff visited installations of the U.S. Army, Navy, Air Force, and Marine Corps, and civilian agencies and offices across the country, soliciting information in a non-attribution environment from personnel in the field so that it did not have to rely only on the briefings of senior military leaders to assess the impact of new training and programs like the Special Victims Counsel (SVC).10

The Panel and Subcommittee submitted more than 150 Requests for Information (RFIs) to the Secretary of Defense and Service Secretaries. The RFIs focused on the role of the commander, comparing military and civilian investigative, prosecution, defense, and adjudication systems, and victim services. To date, DoD and the Services have submitted more than 620 pages of narrative responses and more than 15,000 pages of information in response to these requests.11 The Panel and Subcommittee also requested input from eighteen Victim Advocacy Organizations.

9 See Appendix D, Presentations before the Subcommittee and Response Systems Panel, infra.

10 Subcommittee members completed five site visits, with two to three members participating on each site visit. The Subcommittee used the site visits as an opportunity to gather information from various locations around the country and among the separate Services to present to the full Subcommittee and the RSP. On November 14, 2013, two Subcommittee members traveled to Georgia to see the DoD crime lab, the Defense Forensic Science Center, and the Georgia Bureau of Investigations lab. In December 2013, two separate groups of two to three subcommittee members spoke with Army personnel at Fort Hood, Texas and Air Force members at Joint Base San Antonio. From February 5–6, 2014, two Subcommittee members went to Washington to interview Naval personnel at Naval Base Kitsap, Army and Air Force personnel at Joint Base Lewis-McChord, as well as visit the civilian multidisciplinary facility, Dawson Place, in Snohomish County. On February 20, 2014, two Subcommittee members spoke with civilian personnel at another consolidated facility in Pennsylvania, the Philadelphia Sexual Assault Response Center (PSARC), while two other members went to Norfolk, Virginia to see firsthand how justice occurs on a Naval ship and speak with Sailors and Marines stationed there. Members also traveled to the Marine Corps Base at Quantico, Virginia for a site visit on March 5, 2014.

The Subcommittee collected and analyzed existing studies of military and civilian sexual assault, and assessed legislation as it was adopted or proposed. The Subcommittee used the data collected by the Joint Services Committee Sexual Assault Subcommittee (JSC-SAS) as a reference for recent information about investigation, prosecution, defense, and adjudication in civilian jurisdictions. The JSC-SAS traveled to more than twenty civilian jurisdictions in 2013, gathering information and conducting interviews of law enforcement, prosecutors, public defenders, victims’ attorneys, and victim advocates for an independent panel to complete a comparative analysis. In addition, the Subcommittee considered: publicly available information, documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids, videos, and planning documents, and information submitted by the public.

During the RSP and Subcommittee meetings, the Subcommittee engaged in fact-finding and deliberation sessions to craft recommendations that integrate the data it collected with the Subcommittee members’ insight and experiences. Using transcripts of RSP and Subcommittee hearings and prior deliberation sessions and relying on the information collected during this study, members engaged in extensive deliberation before endorsing these recommendations.

Overview

The scope of this study was broad. The information the Subcommittee gathered addressed a wide range of issues and topics, occasionally overlapping with the other two RSP subcommittees, the Role of the Commander and Victim Services Subcommittees. The Subcommittee’s task was particularly difficult because there is no universal effective civilian response to sexual assault.

Our task was made more difficult by the absence of any single set of effective civilian responses to sexual assault. In the civilian sector, dozens of federal, state, and county authorities, and legions of non-governmental organizations, work together to meet the needs of victims and bring offenders to justice. Likewise, there is no single military response system, despite the existence of a uniform criminal code (the UCMJ) and a coordinated effort under the leadership of DoD Sexual Assault Prevention and Response Office (SAPRO). Each branch of Service—Army, Navy, Air Force, Marine Corps, and Coast Guard—relies on its own personnel infrastructure, training programs, disciplinary strategies, and criminal justice system in responding to sexual assault. Four different Service-specific military courts hear courts-martial appeals. There are one and a half million active-duty Service members subject to the UCMJ, and the approximately 1.1 million members of the Reserve and Guard who also serve, live and work at a wide variety of military installations located within and

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12 Appendix D, Presentations before the Subcommittee and RSP, infra.
14 Id. at 2.
15 The agendas, minutes, and transcripts of RSP and Subcommittee meetings are available at http://responsesystemspanel.whs.mil/.
17 The Services responded to 154 Requests for Information detailing each Service’s capabilities and response to sexual assault.
18 The U.S. Court of Criminal Appeals for the Armed Forces reviews decisions from the intermediate appellate courts of the Services: the Army Court of Criminal Appeals, Navy–Marine Corps Court of Criminal Appeals, Air Force Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals.
without the United States, in rural and urban communities, with populations that range from a few hundred to tens of thousands. Since no single structure of victim advocacy or criminal justice can meet the needs of such diverse populations and institutions, we followed the lead of other experts and focused on assessing the core principles of effective response to sexual assault rather than describing an optimal structure for that response.

The Subcommittee found both commonalities and wide disparities in the ways that civilian and military justice systems define and reckon with sexual assault. The very acts that constitute “sexual assault” vary across civilian and military jurisdictions; however, the military definition is more all-encompassing than most. The unique requirements and mission of the Armed Forces result in distinct differences in how military and civilian institutions and jurisdictions investigate and prosecute crime. For instance, mission requirements, career paths, and the length of tours of duty lead to greater personnel turnover in military positions than among many civil sector equivalents. Similarly, the imperative for good order and discipline leads the military to criminalize a much broader range of acts for Service members than for civilians. In many instances, the Subcommittee deemed such structural differences sufficient to justify military, and even Service-specific, practices that do not correspond closely to civilian practices, recognizing that commanding officers need flexibility to fulfill the demand for responses across the full range of military units and installations. In other instances, the Subcommittee recommended changes where the gap between current civilian and military practices is too large, and the impact on effectiveness too great.

The Subcommittee recommends dozens of changes, from small realignments of existing processes to more significant structural changes. Several themes emerged that suggest the direction in which these recommendations point:

- Collect crime victimization data to increase the value of comparative analysis;
- Standardize terms, reporting, and investigative processes to improve the accuracy of cross-Service comparisons and optimize investigative techniques;
- Train and collaborate with civilian experts and other Service branches to leverage experience and address personnel turnover in key positions;
- Support, communicate with, and involve victims throughout the criminal justice process to improve victim satisfaction and encourage reporting;
- Balance an emphasis on effective prosecution with resources for defense counsel to protect both the rights of the accused and the legitimacy of military justice; and
- Grant military judges authority closer to that of civilian judges to enhance fairness, confidence, and efficiency.

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20 For the full text of Article 120, UCMJ, see Part VII, Section D, Table 12, infra.
21 See, e.g., 10 U.S.C. § 892 (UCMJ art. 92) (Failure to obey order or regulation); see also 10 U.S.C. § 934 (UCMJ art. 134) (Fraternization).
22 See Part VII, Section A, infra.
The analysis, findings, and recommendations are divided into chapters in this report. The Subcommittee's recommendations are characterized briefly in this executive summary and set forth in detail, with related discussion and findings, in the report text.

Victimization Surveys and the Use of Statistics

In order to focus efforts to address and eliminate military sexual assault, DoD must first define the scope of the problem accurately by developing a military crime victimization survey in coordination with experts at the Bureau of Justice Statistics (BJS). This survey should track crime victimization data using the UCMJ's definitions of crime to measure the number of incidents of sexual assault in the military. DoD should seek to improve the quality of its surveys by focusing on improving response rates and allowing independent research professionals to analyze DoD data and processes.

The DoD Workplace and Gender Relations Survey of Active Duty Members (WGRA) was designed as a public health survey to “research attitudes and perceptions about gender-related issues, estimate the level of sexual harassment and unwanted sexual contact, and identify areas where improvements are needed.”[23] The information was intended to be used to formulate policies “to improve the working environment.”[24] Even though data extrapolated from the WGRA include a wide range non-criminal behavior, the numbers are often misused to represent the number of incidents of criminal sexual assault in the military.

The Secretary of Defense should create an expert advisory panel to consult with RAND as it develops and administers the 2014 WGRA.[25] DoD should seek to improve the quality of its surveys by focusing on improving response rates and allowing independent research professionals to analyze DoD data and processes.

Special Investigators and Sexual Assault Investigations

Personnel assigned to military special victim units (SVU) should be carefully selected to ensure they possess the competence and commitment to investigate sexual assault cases. When possible, the Services should utilize civilians as supervisory investigators to promote continuity. Congress should appropriate centralized funds for training investigators on the best practices in sexual assault cases to include topics such as: avoiding victim blaming and potential biases, inaccurate perceptions of victim behavior, and current policies and procedures.

The practices and procedures among the Services military criminal investigative organizations (MCIOs) need to be standardized to ensure investigators are following the law and all investigators are following the same processes. The interaction between the SVU Investigator, trial counsel or specially trained prosecutor, commander, and Initial Disposition Authority (IDA) in sexual assault cases must be consistent to ensure the quality of completed investigations. Once completed, all reports should be reviewed by the military prosecutor and presented to the IDA in sexual assault cases. Formalizing procedures and standards of proof at each decision point will help ensure cases remain open throughout the justice process and reduce conflation and confusion of various definitions for terms such as unfounded, substantiated, and probable cause.

23 Department of Defense 2012 Workplace and Gender Relations Survey of Active Duty Members Survey Instrument 2 (2012) [hereinafter 2012 WGRA Survey], currently available at http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140411_CSS/03d_DMDC_WorkPlace_PublicRelations_Survey_2012.pdf. (The DoD acronym for the Workplace Gender Relation Survey for active duty personnel is “WGRA.” The “WGRS” refers to DoD’s survey of both active duty and Reservists.)

24 Id.

The Subcommittee proposes a step-by-step process for investigators and trial counsel to follow that increases the standard of proof at each milestone in the process. This process requires some modification to each of the Service’s current practice. The MCIOs, in consultation with the trial counsel in the case, should determine whether a case is “unfounded” a term narrowly defined, according to the Uniform Crime Reporting (UCR) standard, as false or baseless.\textsuperscript{26} The Army should sustain, and the other Services should start, documenting coordination between the investigator and trial counsel prior to presenting the case file to the IDA. MCIO investigators should annotate their coordination with the trial counsel to reflect that the prosecutor agrees that a thorough investigation has been completed prior to presenting the report to the IDA. The Subcommittee anticipates this progression in the decision making process will improve the consistency of communication, clear up confusion regarding standards and definitions, and result in the Services being able to compare data such as prosecution rates.

Victims’ fear of punishment for collateral misconduct is a known barrier to reporting. Therefore, the Subcommittee makes three recommendations intended to ameliorate this fear. Investigators stated that reading victims their rights under Article 31 of the UCMJ for minor misconduct during an interview has a chilling effect, so some (such as NCIS investigators) do not advise victims of their rights, continue with the interview, and refer the minor misconduct to commanders because they believe they only investigate felony level crimes. Until there is an exception to the law, all investigators need to provide victims with the requisite Article 31 rights warning. Second, the Secretary of Defense should establish a list of qualifying offenses so that victims will be aware that they can be granted immunity for minor misconduct if they report a serious crime. Finally, Congress and the Secretary of Defense should create a process to expedite grants of immunity for collateral misconduct and assess whether changes in the law are necessary to minimize this barrier to reporting.

Training and Experience Levels of Prosecutors, Defense Counsel, and Military Judges

Congress specifically tasked the RSP to assess the training of military trial and defense counsel. The Subcommittee reviewed and compared the Services’ and civilian training programs as well as the experience of both civilian and military prosecutors and defense counsel in sexual assault cases. While some military counsel may not always have as much experience as their civilian counterparts at large, urban prosecution offices that specialize in sexual assault cases, the three to five year experience level of counsel trying sexual assault cases was comparable with many civilian offices across the country. The Subcommittee found robust training of military counsel in sexual assault prosecution and defense.

Collaboration and innovation are necessary to sustain and continue to improve sexual assault training for counsel. The Secretary of Defense should create a working group to share best practices and expertise as well as optimize the specialized sexual assault training for prosecutors. Adequate resourcing is imperative to sustaining this training. Therefore, the Services should maintain or increase funding for travel to conferences and the development of the training programs at their respective Judge Advocate General schools.

Increasing the experience level of attorneys trying sexual assault cases is a challenge in the military due to personnel turnover, professional progression, and tour lengths, particularly for defense counsel. The Services should continue to systemically leverage highly qualified expert civilian attorney (HQEs) and Reserve component attorneys’ experience and expertise to assist military counsel. The Services should consider models, such as the Navy’s Military Justice Litigation Career Track (MJLCT), as a way to develop counsel’s expertise in sexual assault cases and retain that experience among the officer Corps. The Services should also consider adopting the Navy’s practice of quarterly judicial evaluations of the advocacy skills of trial and defense counsel.

\textsuperscript{26} Federal Bureau of Investigation, Uniform Crime Reporting Handbook (2004).
which are helpful in evaluating the effectiveness of sexual assault training for attorneys and provide a unique perspective of counsels’ advocacy skills in the courtroom.

Military judges receive consolidated training at the Army’s The Judge Advocate General’s Legal Center and School. The Subcommittee believes military judges are prepared through training and experience to implement the Subcommittee’s recommendations to increase their role in the military justice system.

**Prosecuting and Defending Sexual Assault Cases**

The best practice to responding to and prosecuting sexual assault reports in both the military and civilian sectors is a multidisciplinary approach. As of January 2014, all of the Services implemented the Special Victim Capability, mandated in the FY13 NDAA, which consists of a specially trained prosecutor (special victim prosecutor or “SVP”), a special victim unit investigator, victim witness liaison, and paralegal. The personnel, who are part of the sexual assault response, are sometimes consolidated into one facility in effective fashion, especially if sufficient resources and experience among personnel exist in one location. In general, the Services would benefit by co-locating special victim prosecutors and investigators whenever practicable. This would enhance communication and ensure prosecutors become involved in sexual assault cases early in the case, which significantly contributes to building a positive relationship with the victim in these complex cases.

Military defense counsel fall within a stovepipe organization and operate independently of the command and prosecution structure. However, they generally are required to rely on the convening authority and other funding sources outside the defense structure for resourcing, which may impede their ability to zealously represent clients. The Subcommittee recommends the Secretary of Defense direct the Services to provide independent, deployable investigators to increase the efficiency and effectiveness of the defense mission and the fair administration of justice. Additionally, the Subcommittee recommends changing witness and resource production mechanisms and procedures so defense counsel no longer are required to request witnesses, experts, and evidence through trial counsel and/or the convening authority.

The Subcommittee recommends enhancing the role of military judges to increase efficiency and fairness in the military justice system. Military judges usually become involved when the convening authority refers the case to court-martial. The Subcommittee recommends increasing the authority of military judges beginning at either preferral of charges or imposition of pretrial confinement, whichever is earlier, to rule on motions regarding witnesses, experts, evidence, victims’ rights issues, issue subpoenas for defense counsel, and other pre-trial matters. A majority of the Subcommittee also recommends that military judges preside over Article 32 preliminary hearings, as military judges, rather than as hearing officers, and that the military judge’s ruling that the government failed to establish probable cause should be binding and result in dismissal of charges without prejudice.\(^\text{27}\) If the government establishes probable cause, the charges should be forwarded to the convening authority for an appropriate disposition.

Congress also tasked the RSP to compare civilian and military conviction rates of sexual assault cases. This proved to be a difficult task for several reasons. First, the offenses that fall within Article 120, UCMJ span a wide range of conduct whereas many civilian jurisdictions only refer to or compare data for felony-level crimes such as rape. Second, state jurisdictions are not required to publish this data; very few sexual assault cases are tried in federal court. The military publishes the disposition of sexual assault reports, but this data is not compiled by offense. Third, procedures in the civilian sector and among the Services vary on how to account for cases throughout the process, so the data is not truly comparable. In some civilian jurisdictions, the responding

\(^{27}\) *See Part IX, infra for COL(R) Morris and COL(R) Scholz’s separate statement which recommends further study rather than recommending this change at this time.*
police officer or a detective can unfound and close a case before a prosecutor ever receives it, so the civilian prosecution rate does not account for of all reported sexual assaults. In contrast, the Military Services are required to track every reported sexual assault through disposition, although the Services measure prosecution rates differently.

Similar to the difficulties in comparing prosecution and conviction rates, publicly available sentencing data in DoD’s annual reports to Congress are not useful to validly assess sentencing practices in sexual assault cases. Based on Congressional reporting requirements, the Services provided a detailed synopsis of every sexual assault case from report to final disposition. However, the data is not broken down by offense and the sentencing information does not reflect whether a judge or panel members (jury) adjudged the sentence. Therefore, the Subcommittee recommends the Secretary of Defense direct the Service Secretaries to provide more detailed sentencing data that accounts for the offenses of which the accused was convicted, whether the case was resolved by guilty plea or contested trial, and whether sentencing was by panel members or a military judge. The Subcommittee also recommends the Services follow the Navy’s recent practice of publishing sentencing outcomes to increase transparency and promote confidence in the military justice systems.

The Subcommittee also recommends that military judges should be the sole sentencing authority in sexual assault and other non-capital cases. Forty-four states and the federal criminal justice system all require judges, not juries, to impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. This change has the potential to improve sentencing consistency and fairness without the imposition of sentencing guidelines because of the advantage in experience and expertise that military judges have over panel members. It will also reduce the administrative burden of panel member sentencing and help to minimize the perception of command influence. The Subcommittee also recommends eliminating the military’s unitary sentencing practice which adjudges one aggregate sentence as a total for all offenses of which an accused is convicted, rather than enumerating a sentence for each specific offense.

The Secretary of Defense also tasked the RSP to consider the feasibility and impact of imposing sentencing guidelines in sexual assault cases. Twenty states, the District of Columbia, and the federal system use some form of sentencing guidelines. After hearing from representatives from the Department of Justice, the U.S. Sentencing Commission, the Virginia and Pennsylvania state sentencing commissions, and reviewing numerous written materials regarding sentencing guidelines, the Subcommittee concluded a proper assessment would require more time, resources, data, and expertise than are available to the Subcommittee. There are numerous policy and structural issues involved prior to deciding whether to adopt sentencing guidelines, ranging from identifying whether sentencing disparity in sexual assault or other cases is a problem in the military, determining what the appropriate guideline model should be and whether it would apply to all offenses or be carefully tailored to sexual assault offenses, and formulating a commission or agency to develop, maintain and manage amendments to the sentencing guidelines.

The Subcommittee recommends against further mandatory minimum sentences in sexual assault cases. Congress recently imposed the mandatory imposition of a dishonorable discharge or dismissal for the most serious types of sexual assault offenses, and the Judicial Proceedings Panel is directed to assess this change. Some victim advocate organizations told the Subcommittee that mandatory minimum sentences may deter reporting, especially in the small, close-knit military community, because the victim does not want to feel personally responsible for the specific sentence imposed. Congress tasked the Judicial Proceedings Panel to

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28 This measure was not unanimously endorsed by the Subcommittee’s members; two of the ten Subcommittee members voted against this recommendation. See Part IX, infra for COL(R) Morris and Col(R) Scholz’s separate statement. BG(R) Dunn non-concurs in part; she believes there should be the option of panel members sentencing for military related crimes.
The Subcommittee also reviewed clemency opportunities in the military. In light of recent changes to Article 60 of the Uniform Code of Military Justice and the convening authority’s power to grant post-trial relief, one potential unintended consequence may be that the convening authority can no longer provide relief from forfeiture of pay to dependents of convicted Service members. Meaningful post-trial relief may also effectively be foreclosed for convicted Service members who do not receive a punitive discharge or confinement for more than one year.

Conclusion

The Subcommittee submits this report and its findings and recommendations to the RSP to further improve DoD’s response systems to adult sexual assault crimes. Despite the efforts of many dedicated service providers and scholars, research into sexual violence remains relatively thin, and reliable data all too scarce. Moreover, the number of changes made in recent years, in both civilian and military response systems, makes assessing the impact of individual measures difficult. None occurred in isolation. Because most sexual assaults are not reported to authorities, understanding even the extent of this problem, whether in the Armed Forces or in civilian institutions and jurisdictions, is fraught with potential for error. This Report characterizes the differences between military and civilian response systems, assesses the rationales that support those differences, and recommends ways to close the gap between the systems we aspire to have and the imperfect but fast evolving systems currently in place. The jury—and the court-martial panel—remains out on what the ultimate answers are to the question of how we can stop sexual assault.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

Develop a DoD Crime Victimization Survey to Measure the Scope of Criminal Sexual Conduct in the Military

**Recommendation 1:** The Secretary of Defense direct the development and implementation of a military crime victimization survey, in coordination with the Bureau of Justice Statistics, that relies on the best available research methods and provides data that can be more readily compared to other crime victimization surveys than current data.

**Finding 1-1:** The DoD Workplace and Gender Relations Survey of Active Duty Members (WGRA) is an unbounded, prevalence survey that utilizes a public health methodological approach. The National Crime Victimization Survey (NCVS) is a bounded, incidence survey that takes a justice system response methodological approach. The two surveys cannot be accurately compared.

**Recommendation 2:** The Secretary of Defense direct that military crime victimization surveys use the Uniform Code of Military Justice's (UCMJ) definitions of sexual assault offenses, including: rape, sexual assault, forcible sodomy, and attempts to commit these acts.

**Finding 2-1:** The definition of “unwanted sexual contact” used in the 2012 WGRA does not match the definitions used by the DoD Sexual Assault Prevention and Response Office (SAPRO) or the UCMJ, making it more helpful as a public health assessment than an assessment of crime.

**Finding 2-2:** The DoD SAPRO evaluates the scope of unreported sex offenses by contrasting prevalence data of unwanted sexual contact extrapolated from the WGRA with reported sexual assault incidents and sexually based crimes under the UCMJ. The variances in definitions lead to confusion, disparity, and inaccurate comparisons of reporting rates within DoD. While the wide range of behaviors described in the 2012 WGRA are appropriate subjects of a public health survey, the WGRA’s broad questions do not enable accurate or precise determination of sexual assault crime victimization.

**Finding 2-3:** Crime victimization surveys must be designed to mirror law enforcement reporting practices and legal definitions of crimes so that data can be analyzed, compared, and evaluated in order to assess the relative success of sexual assault prevention and response programs.

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*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
Using the WGRA Data for Public Health Assessment Purposes Only

**Recommendation 3:** Congress and the Secretary of Defense rely on the WGRA for its intended purpose—to assess attitudes, identify areas for improvement, and revise workplace policies as needed—rather than to estimate the incidence of sexual assault within the military.

**Finding 3-1:** Surveying and collecting data on sexual assault victimization is challenging and costly. There are two primary approaches to surveying sexual assault. The first is a public health approach, which casts a broad net to assess the scope of those injured by coercive sexual behavior. The second is a criminal justice approach, which seeks to account for unreported incidences of criminal sexual misconduct and seeks to measure the scope of unreported sexual offenses.

**Finding 3-2:** The DoD WGRA is a valuable public health survey, but it is not intended to, and does not accurately measure the incidence of criminal acts committed against Service members.

Response Rates and Reliability of Survey Data

**Recommendation 4:** The Secretary of Defense seek to improve response rates to all surveys related to workplace environments and crime victimization in order to improve the accuracy and reliability of results.

**Finding 4-1:** In 2012, the Defense Manpower Data Center (DMDC) sent the WGRA to 108,000 active duty Service members. Approximately 23,000 survey recipients, or 24 percent, responded. 24 percent is considered a low response rate when compared to the 67-75 percentages at Service Academies and rates of other civilian public health surveys. When the response rate is below 80 percent, the Office of Management and Budget (OMB) requires an agency to conduct an analysis of nonresponse bias. As a result, the WGRA data is at greater risk for bias in the sampling and, therefore, less reliable. One of the reasons for the low response rate may be survey fatigue.

Survey Data Transparency

**Recommendation 5:** The Secretary of Defense direct that raw data collected from all surveys related to workplace environments and crime victimization be analyzed by independent research professionals to assess how DoD can improve responses to military sexual assault. For example: the survey’s non-response bias analysis plan should be published so that independent researchers can evaluate it; the spectrum of behaviors included in “unwanted sexual contact” should be studied to inform targeted prevention efforts; and environmental factors such as time in service, location, training status, and deployment status should be analyzed as potential markers for increased risk.

**Finding 5-1:** The 2012 WGRA collected a large amount of data that is useful as public health information and can be analyzed to provide DoD leadership with better insight into areas of concern, patterns and trends in behavior, and victim satisfaction. If used correctly, this data can aid leaders in better evaluating readiness, assessing the health of the force, identifying patterns and trends in behavior, directing efforts in prevention of and response to sexual assault and sexual harassment across the force, and assessing victim satisfaction.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Finding 5-2: The Centers for Disease Control and Prevention (CDC) conducts a public health survey called the National Intimate Partner and Sexual Violence Survey (NISVS) to measure the prevalence of contact sexual violence. In 2010, the NISVS was designed and launched with assistance from the National Institute of Justice and the DoD. NISVS includes a random sample of active duty women and female spouses of active duty members. The NISVS revealed that the overall risk of contact sexual violence is the same for military and civilian women, after adjusting for differences in age and marital status.

Improving the 2014 WGRA Surveys

Recommendation 6: The Secretary of Defense direct the creation of an advisory panel of qualified experts from the Bureau of Justice Statistics and the National Academy of Sciences’ Committee on National Statistics (CNSTAT) to consult with RAND, selected to develop and administer the 2014 WGRA, and any other agencies or contractors that develop future surveys of crime victimization or workplace environments, to ensure effective survey design.

Finding 6-1: RAND Corporation will develop, administer, collect, and analyze data for the 2014 WGRA. RAND has partnered with Westat, the same company the Bureau of Justice Statistics uses, for survey expertise assistance.

SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

Organizational Structure of MCIOs and Special Victim Units

Recommendation 7: The Secretary of Defense direct commanders and directors of the Military Criminal Investigative Organizations (MCIOs) to require Special Victim investigators not assigned to a dedicated Special Victim Unit (SVU) coordinate with a senior SVU agent on all sexual assault cases.

Finding 7-1: Large civilian police agencies and MCIOs have SVUs comprised of specially trained investigators experienced in responding to sexual assaults. Smaller locations without an SVU often have a specially trained detective to investigate sexual assaults and the ability to coordinate with larger offices for assistance and guidance.

Finding 7-2: Unlike patrol officers in many civilian jurisdictions, military patrol officers (military police) have no discretion regarding the handling of sexual assault reports. Military police must immediately report all incidents of sexual assault to the MCIO. The MCIO assigns cases to investigators who meet specified training requirements.

Finding 7-3: While MCIOs technically follow DoD’s requirement to assign sexual assault cases to specially trained investigators, the investigators located at smaller installations, are not dedicated SVU investigators, specializing in sexual assault. There is no requirement for the non-SVU, school trained agent to coordinate with the SVU investigator supporting the Special Victim Capability.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Investigator Selection and Training

**Recommendation 8:** The Secretary of Defense direct MCIO commanders and directors to carefully select and train military investigators assigned as investigators for SVUs, and whenever possible, utilize civilians as supervisory investigators. MCIO commanders and directors ensure that military personnel assigned to an SVU have the competence and commitment to investigate sexual assault cases.

**Finding 8-1:** A best practice in civilian investigative agencies with SVUs is careful interview and selection of applicants in an effort to ensure those investigators with biases or a lack of interest in investigating sexual assault cases are not assigned, as well as reassigning those who experience “burn out.”

**Finding 8-2:** A best practice in the military is the assignment of civilian investigators to supervise the SVU enhancing the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.

**Finding 8-3:** Military requirements and flexibility in personnel assignments may result in an agent who did not volunteer being assigned to support a SVU or act as the lead agent on a sexual assault investigation.

**Finding 8-4:** Both military and civilian agencies recognize the possibility of bias in their officers and investigators.

**Recommendation 9-A:** Congress appropriate centralized funds for training of sexual assault investigation personnel. The Secretary of Defense direct the Service Secretaries to program and budget funding, as allowed by law, for the MCIOs to provide advanced training on sexual assault investigations to a sufficient number of SVU investigators.

**Recommendation 9-B:** The Secretary of Defense direct commanders and directors of the MCIOs to continue training of all levels of law enforcement personnel on potential biases and inaccurate perceptions of victim behavior. The Secretary of Defense direct the MCIOs to also train investigators against the use of language that inaccurately or inappropriately implies consent of the victim in reports.

**Finding 9-1:** Military investigators have more robust and specialized training in sexual assault investigations compared to their civilian counterparts. The Military Services require investigators assigned to SVUs to have advanced training, but the courses vary in content and emphasis.

**Finding 9-2:** A best practice in both military and civilian agencies is to provide training to address potential biases and inaccurate perceptions of victim behavior, preparing officers and investigators to effectively respond to and investigate sexual assault.

**Finding 9-3:** The MCIOs face a continual challenge of ensuring adequate funding is available to send investigators to advanced sexual assault investigation training courses.

**Finding 9-4:** The MCIOs have a working group for sexual assault training issues.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Finding 9-5: In civilian and military law enforcement communities, sometimes, bias in the terms used in documenting sexual assaults that inappropriately or inaccurately imply consent of the victim in the assault can be possible.

Collateral Misconduct

Finding 10-1: The majority of the civilian police agencies contacted during the Subcommittee’s research reported they did not routinely pursue action for minor criminal behavior on the part of a victim reporting a sexual assault. They do not interrupt a victim interview to advise the victim of his or her rights for minor offenses.

Finding 10-2: The Secretary of Defense acknowledges that a victim’s fear of punishment for collateral misconduct is a significant barrier to reporting in the policy regarding collateral misconduct. MCIO investigators interviewed reported that the requirement to stop a victim interview to advise the victim of his or her rights under Article 31(b) of the UCMJ for minor misconduct collateral to the alleged sexual assault can make the victim reluctant to continue the interview and may hinder investigation of a reported sexual assault.

Finding 10-3: Under current DoD policy, commanders have discretion to defer action on victims’ collateral misconduct until final disposition of the case, bearing in mind any potential speedy trial and statute of limitations concerns, while also taking into account the trauma to the victim and responding appropriately, so as to encourage reporting of sexual assault and continued victim cooperation.

Finding 10-4: All of the MCIOs document information on the misconduct in the case file which is provided to the victim’s commander for action. However, the MCIOs do not follow the same practices regarding the legal requirement to advise Service members of their rights under Article 31 of the UCMJ for minor collateral misconduct discussed during an interview. NCIS investigators do not read victims reporting a sexual assault their rights for minor collateral misconduct, because NCIS only investigates felony level crimes.
Finding 10-5: For the last ten years, DoD policy documents use the following list of offenses to illustrate the most common collateral misconduct in many reported sexual assaults: “underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders.”

Finding 10-6: The Military Services do not support automatic immunity for minor collateral misconduct because it may create a plausible argument the victim had a motive to fabricate the allegation and could detract from good order and discipline within the unit.

Gleaning Information from Restricted Reports

Recommendation 11: The Secretary of Defense direct SAPRO to develop policy and procedures for Sexual Assault Response Coordinators (SARCs) to input information into the Defense Sexual Assault Incident Database (DSAID) on alleged sexual assault offenders identified by those victims who opt to make restricted reports. These policies should include procedures on whether to reveal the alleged offender’s personally identifying information to the MCIOs when there is credible information the offender is identified or suspected in another sexual assault.

Finding 11-1: DoD has a sexual assault case management database, DSAID, but does not currently input data on alleged offenders identified by the victim making a restricted report, as current policy prohibits collecting and storing that information. This database has the capability of obtaining information from restricted reports that could be used to identify allegations against repeat offenders.

Changes to Restricted Reporting to Encourage Victims to Speak to MCIO Investigators

Recommendation 12: The Secretary of Defense direct DoD SAPRO, in coordination with the Services and the DoD IG, to change restricted reporting policy to allow a victim who has made a restricted report to provide information to an MCIO agent, with a victim advocate and/or special victim counsel present, without the report automatically becoming unrestricted and triggering a law enforcement investigation. This should be a voluntary decision on the part of the victim. The policy should prohibit MCIOs from using information obtained in this manner to initiate an investigation or title an alleged offender as a subject, unless the victim chooses, or changes, his or her preference to an unrestricted report. The Secretary of Defense should require this information be provided the same safeguards as other criminal intelligence data to protect against misuse of the information.

Finding 12-1: Some civilian police agencies allow a police officer or detective to contact a sexual assault victim without automatically triggering an investigation. The report is only investigated if the victim chooses an investigation following a discussion with the detective.

Finding 12-2: DoD policy currently provides that a victim who makes a restricted report of sexual assault cannot provide information to an MCIO investigator without the report becoming unrestricted.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Milestones in the Investigative Process Including Case Determinations and Reports

Recommendation 13: The Secretary of Defense direct the Service Secretaries to standardize the process for determining a case is unfounded. The decision to unfound reports should shift from the commander to the MCIOs, who in coordination with the trial counsel, apply the Uniform Crime Reporting (UCR) standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.

Finding 13-1: While DoD uses the same definition to unfound an allegation of sexual assault as the FBI’s UCR Handbook, used by all civilian law enforcement agencies, the Subcommittee heard evidence that the standard is incorrectly applied and the Military Services use different definitions.

Finding 13-2: The Army Criminal Investigation Command (CID) unfounds an allegation of sexual assault if its investigation determines the report was false or the trial counsel provides an opinion there is no probable cause to believe the subject of the investigation committed the offense, prior to providing the investigation to the Initial Disposition Authority (IDA) for action. In the Navy, Coast Guard, and Air Force, the IDA determines whether to unfound an allegation.

Recommendation 14-A: The Secretary of Defense 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 because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.

Recommendation 14-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 either final disposition of the case or a determination that the allegations are unfounded.

Finding 14-1: The Army follows a different procedure than the other Services. Army trial counsel provide an opinion on whether there is probable cause the suspect committed the offense to the investigating agent prior to presenting a case to the commander for a disposition decision. The trial counsel’s opinion as to probable cause is reflected in the case file. In FY12, the trial counsel, acting in coordination with CID, determined that 25 percent of the cases involving sexual assault allegations, 118 out of 476 cases, lacked probable cause and the cases were closed. In contrast, the other Services’ MCIOs present all cases to the commanders who consult with the supporting trial counsel to determine the appropriate disposition of each case.

Finding 14-2: Some trial counsel reported that MCIOs are not always responsive to their specific investigative requests and MCIOs do not always coordinate completed investigations with senior trial counsel prior to issuing their final reports.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
MCIO Caseload

**Recommendation 15:** The Secretary of Defense direct the commanders and directors of the MCIOs to authorize the utilization of Marine Corps Criminal Investigation Division (CID), military police investigators, or Security Forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of an SVU investigator to retain oversight.

**Finding 15-1:** DoD policy now requires that specially trained and selected MCIO investigators be assigned as the lead investigators for all sexual assault cases, which has substantially increased the MCIOs’ case loads. As a result, Marine Corps CID investigators cannot handle any sexual assaults in violation of Article 120 of the UCMJ, including those involving an allegation of an unwanted touching with no intent to satisfy a sexual desire.

Pretext Phone Calls and Text Messages

**Recommendation 16:** The Secretary of Defense direct the DoD Inspector General (IG) and the DoD Office of General Counsel to review the Military Services’ procedures for approving MCIO agent requests to conduct pretext phone calls and text messages as well as establish a standardized procedure to facilitate MCIOs’ use of this investigative technique, in accordance with law.

**Finding 16-1:** Numerous civilian police agencies indicated that the timely use of pretext phone calls and texts were a valuable tool in sexual assault investigations, and while procedures vary, obtaining approval was not, with few exceptions, difficult or time-consuming.

**Finding 16-2:** Civilian and military investigators and prosecutors stated that the use of pretext calls and texts were a valuable investigative tool. Each Service, however, requires different procedures to approve recorded pretext phone calls and text messages, based on differing interpretations of the legal standards for pretext calls. The military procedures can take several days to receive approval and the tactic becomes untimely.

Forensic Evidence & Examinations

**Recommendation 17:** The Secretary of Defense should exempt DNA examiners, and other examiners at the Defense Forensic Science Center (DFSC), from future furloughs, to the extent allowed by law.

**Finding 17-1:** DNA and other examiners at the DDFSC/United States Army Criminal Investigation Laboratory (USACIL) were not exempted from Federal government furloughs in 2013, which resulted in delays processing evidence and conducting DNA analysis in sexual assault cases.

**Recommendation 18:** The Secretaries of the Military Services direct their Surgeons General to review the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) requirement that all military treatment facilities with a 24-hour, seven-days-a-week emergency room capability maintain a Sexual Assault Nurse Examiner (SANE) and provide recommendations on the most effective way to provide Sexual Assault Forensic Examinations (SAFE) at their facilities.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Finding 18-1: In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFE. Not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim’s hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

Finding 18-2: The provisions of the FY14 NDAA which require all military treatment facilities with a 24 hour, seven days a week emergency room capability maintain a SANE, is overly prescriptive. Depending on the location, many civilian medical facilities have more experienced SANEs than are typically located on a military installation and also serve as the community’s center of excellence for SAFEs.

Recommendation 19: The Secretary of Defense direct the appropriate agency to eliminate the requirement to collect plucked hair samples as part of a SAFE.

Finding 19-1: Many civilian agencies no longer collect plucked hairs as part of a SAFE kit because there is little, if any, probative value to that material. The Director of DFSC/USACIL agrees there is no need to collect these samples.

Recommendation 20: The Secretary of Defense direct the Military Services to create a working group to coordinate the Services’ efforts, leverage expertise, and consider whether a joint forensic exam course open to all military and DoD practitioners, perhaps at the Joint Medical Education and Training Center, or portable forensic training and jointly designed refresher courses would help to ensure a robust baseline of common training across all Services.

Finding 20-1: The Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities; however, the Military Services instituted different programs and developed guidelines independently.

Oversight and Review of Sexual Assault Investigations

Recommendation 21: The Secretary of Defense direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits.

Finding 21-1: Outside agencies conduct audits of investigations in several civilian police agencies the Subcommittee examined as a means to ensure transparency and confidence in the police response to sexual assault.

Finding 21-2: There is currently no procedure for an entity outside DoD to review sexual assault investigations to ensure cases are appropriately investigated and classified.
TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

Establish a DoD Judge Advocate General Sexual Assault Joint Training Working Group

**Recommendation 22-A:** The Secretary of Defense direct the establishment of a DoD judge advocate criminal law Joint Training Working Group to optimize sharing of best practices, resources, and expertise for prosecuting adult sexual assault cases. The working group should produce a concise written report, delivered to the Service Judge Advocate Generals (TJAGs) at least annually, for the next five calendar years.

The working group should identify best practices, strive to eliminate redundancy, consider consolidated training, and monitor training and experience throughout the Military Services. The working group should review training programs such as: the Army’s Special Victim Prosecutor (SVP) program; the Navy’s Military Justice Litigation Career Track (MJLCT); the Highly Qualified Expert (HQE) programs used for training in the Army, Navy, and Marine Corps; the Trial Counsel Assistance and Defense Counsel Assistance Programs (TCAP and DCAP); the Navy’s use of quarterly judicial evaluations of counsel; and any other potential best practices, civilian or military.

**Recommendation 22-B:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should sustain and broaden the emphasis on developing and maintaining shared resources, expertise, and experience in prosecuting adult sexual assault crimes.

**Finding 22-1:** Currently, all Military Services send members to training courses and Judge Advocate Generals (JAG) Corps schools of the other Services. The Military Services also informally share resources, personnel, lessons for training, and collaborate on some training. This enables counsel to share successful tactics, strategies, and approaches, but is not formalized and has not led to the clarification of terms and processes that would enhance comparability and efficiency.

Sexual Assault Training for JAGs

**Recommendation 23:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps sustain or increase training of judge advocates in order to maintain the expertise necessary to litigate adult sexual assault cases in spite of the turnover created by personnel rotations within the JAG Corps of each Military Service.

**Finding 23-1:** There are no national or state minimum training standards or experience for civilian prosecutors handling adult sexual assault crimes. Though each civilian prosecution office has different training practices, most sex crime prosecutor training occurs through supervised experience handling pretrial motions, trials, and appeals.

**Finding 23-2:** Civilian sex crimes prosecutors usually have at least three years of prosecution experience, and often more than five. Experience can also be measured by the number of trials completed, though there is no uniform minimum required number of trials to be assigned adult sexual assault cases. Some prosecutors in medium to large offices have caseloads of at least 50-60 cases, and spend at least two days per week in court.
Finding 23-3: All the Military Services have specially-trained and selected lawyers who serve as lead trial counsel in sexual assault crimes cases. Defense counsel handling adult sexual assault cases in all the Military Services are also trained; many previously served as trial counsel.

**Recommendation 24:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps study the Navy’s Military Justice Litigation Career Track (MJLCT) to determine whether this model, or a similar one, would be effective in enhancing expertise in litigating sexual assault cases in his or her Service.

Finding 24-1: Trial counsel in all the Military Services generally have more standardized and extensive training than some of their civilian counterparts, but fewer years of prosecution and trial experience. The Military Services all use a combination of experienced supervising attorneys, systematic sexual assault training, and smaller caseloads to address experience disparities. Additionally, the Navy has developed the MJLCT for its attorneys.

**Military Defense Counsel**

**Recommendation 25:** The Secretaries of the Military Services direct that current training efforts and programs be sustained to ensure that military defense counsel are competent, prepared, and equipped.

Finding 25-1: Defense counsel handling adult sexual assault cases in all the Military Services receive specialized training.

**Recommendation 26:** The Secretary of Defense direct the Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as defense counsel as well as set the minimum tour length of defense counsel at two years or more so that defense counsel can develop experience and expertise in defending complex adult sexual assault cases.

Finding 26-1: Defense experience is difficult to develop due to tour lengths, which are as short as 12-18 months, and the relatively low number of courts-martial in the military today.

Finding 26-2: Not all military defense counsel possess trial experience prior to assuming the role of defense counsel.

**Recommendation 27:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps review military defense counsel training for adult sexual assault cases to ensure funding of defense training opportunities is on par with that of trial counsel.

Finding 27-1: Some defense counsel told the Response Systems Panel and the Subcommittee that because they do not have independent budgets, their training opportunities were insufficient and unequal to those of their trial counsel counterparts.
Civilian Experts to Assist Military Counsel

**Recommendation 28:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps continue to fund and expand programs that provide a permanent civilian presence in the training structure for both trial and defense counsel. The Military Services should continue to leverage experienced military Reservists and civilian attorneys for training, expertise, and experience to assist the defense bar with complex cases.

**Finding 28-1:** Experienced civilian advocates play an important role training both prosecution and defense counsel in the Army, Air Force, Navy, and Marine Corps. Given the attrition and transience of military counsel, civilian involvement in training ensures an enduring base level of experience and continuity, and adds an important perspective. Civilian expert advocate participation also adds transparency and validity to military counsel training programs.

Sustaining Funding of Training for Military Judges

**Recommendation 29:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should continue to fund sufficient training opportunities for military judges and consider more joint and consolidated programs.

**Finding 29-1:** Military judges participate in joint training at the Army’s Judge Advocate General’s Legal Center and School. The recommendations for an enhanced role of military judges noted elsewhere in this report may necessitate increased funding for training of judges.

Measuring the Effectiveness of Attorney Training

**Recommendation 30:** The Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps consider implementing a system similar to the Navy’s quarterly evaluations of counsel’s advocacy to ensure effective training of counsel.

**Finding 30-1:** Military judges in the Navy prepare quarterly evaluations of counsel’s advocacy that are forwarded to the Chief Judge of the Navy for review and shared with the Trial Counsel Assistance Program (TCAP) for use in training plans. The other Military Services do not similarly measure and assess performance following advanced training.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

PROSECUTION & DEFENSE OF SEXUAL ASSAULT CASES

Organizational Structure of Prosecutor Offices and Co-location Models

**Recommendation 31-A:** The Service Secretaries direct that TJAGs and MCIOs work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victims’ prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the Subcommittee does not recommend that the SARC, victim advocate, Special Victim Counsel or other victim support personnel be merged with the offices of prosecutors and investigators.

**Recommendation 31-B:** The Secretary of Defense assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces in order to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses.

**Finding 31-1:** The organizational structures of civilian prosecution offices vary. Some civilian prosecutors specialize in sexual assault cases for their entire careers or rotate through sex crime units specializing for a few years, whereas others do not specialize and handle all felony level crimes. The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases.

**Finding 31-2:** Consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize additional trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also pierce privileges for military victim advocates or cause other perception problems.

**Special Victim Capability**

**Recommendation 32-A:** The Service Secretaries continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases.

**Recommendation 32-B:** The Secretary of Defense and Service Secretaries should not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special prosecutors to handle every case undermines effective prevention, investigation, and prosecution.

**Recommendation 32-C:** The Secretary of Defense should direct the Directive-Type Memorandum (DTM) 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of “covered offenses” accurately reflect specific offenses currently listed in Article 120 of the UCMJ.
Recommendation 32-D: The Secretary of Defense require standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service’s organizational structure.

Finding 32-1: The Military Services have implemented the Special Victim Capability (SVC) Congress mandated in the FY13 NDAA and the Subcommittee is optimistic about this approach.

Finding 32-2: Using the definitions in the UCMJ will clarify responsibilities and improve resource allocation. The generic terms in the DTM could be interpreted to exclude some current offenses that should be counted as sexual assaults or include conduct that is not a specific offense in the UCMJ.

Recommendation 33: The Service Secretaries continue to assess and meet the need for well-trained prosecutors to support the Services’ Special Victim Capabilities, especially if there is increased reporting.

Finding 33-1: DoD has dedicated an immense amount of resources to combat sexual assault. DoD did not authorize any additional personnel to the individual Services specifically to meet the requirement for special prosecutors within the Special Victim Capability, although the Services may have obtained additional personnel prior to the Congressional mandate.

Finding 33-2: The Military Services fully fund special prosecutors’ case preparation requirements.

Metrics for Measuring the Impact of Prosecutors within the Special Victim Capability

Recommendation 34: The Secretary of Defense assess the Special Victim Capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics to include measurements such as the victim “drop-out” rate, rather than conviction rates, as a measure of success. Congress should consider more than conviction rates to measure the effectiveness of military prosecution of sexual assault cases, which often pose inherent challenges.

Finding 34-1: DoD established five evaluation criteria “to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel.” In addition to the DoD criteria, the Army uses the victim “drop out” rate to also measure the effectiveness of the SVP program. Since the Army established the SVP program in 2009, only 6% of sexual assault victims “dropped out” or were unable to continue to cooperate in the investigation and prosecution of the case. In contrast, in 2011, prior to implementing the specially trained prosecutors or victims’ counsel, the Air Force suffered from a 29% victim drop-out rate.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Prosecutors’ Initial Involvement in Sexual Assault Cases

**Recommendation 35:** The Secretary of Defense maintain the requirement for an investigator to notify the legal office of an unrestricted sexual assault report within 24 hours, and for the special prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established early in the process to insert the prosecutor into the investigative process and to ensure that the special victim prosecutor contacts the victim or the victim’s counsel as soon as possible after an unrestricted report.

**Finding 35-1:** When prosecutors become involved in sexual assault cases early, including meeting with the victim, there is a greater likelihood the victim will cooperate in the investigation and prosecution of the alleged offender.

**Finding 35-2:** Military special prosecutors told the Subcommittee they are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. DoD established timelines to ensure military prosecutors’ early involvement in sexual assault investigations. MCIOs inform the legal office within 24 hours of learning of a report, and the special prosecutor coordinates with the investigator within 48 hours. There is no current requirement for the prosecutor to meet with the victim as soon as possible.

Defense Counsel for Sexual Assault Cases

**Recommendation 36-A:** The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.

**Recommendation 36-B:** The Military Services continue to provide experienced defense counsel through regional defense organizations and from personnel with extensive trial experience and expertise in the Reserve component.

**Finding 36-1:** Maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system.

**Finding 36-2:** DoD did not establish defense capabilities analogous to the Special Victim Capability in the military trial defense organizations.

**Finding 36-3:** Unlike many civilian public defender offices, military defense counsel organizations generally do not maintain their own budget and instead, receive funding from the convening authority, their Service legal commands, or other sources.

**Finding 36-4:** Neither civilian public defenders nor military defense counsel specialize in sexual assault cases; instead both attempt to use the most experienced attorneys to try more complex cases, including sexual assaults. The Military Services’ regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault.
Independent Investigators for the Defense in Sexual Assault Cases

**Recommendation 37:** The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.

**Finding 37-1:** Many civilian public defender offices have investigators on their staffs, and consider them critical to the defense function. Military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel stated both convening authorities and military judges routinely deny the requests.

**Finding 37-2:** Military defense counsel need independent, deployable defense investigators in order to zealously represent their clients and correct an obvious imbalance of resources. Defense investigators are such a basic and critical defense resource, the Subcommittee finds they are required for all types of cases, not just sexual assault cases.

Metrics for Defense Counsel

**Recommendation 38:** The Secretary of Defense direct the Services to assess military defense counsel’s performance in sexual assault cases and identify areas that may need improvement.

**Finding 38-1:** There are currently no requirements for the Military Services to measure military defense counsel’s performance trying sexual assault cases; the Subcommittee is unaware of any effort on the Services’ part to do so.

Victims’ Rights and the Impact of Special Victim Counsel on the Judicial Process

**Recommendation 39:** The Service Secretaries ensure trial counsel comply with their obligations to afford military crime victims the rights set forth in Article 6b of the UCMJ and DoD policy by, in cases tried by courts-martial, requiring military judges to inquire, on the record, whether trial counsel complied with statutory and policy requirements.

**Finding 39-1:** As established by Congress and the Military Services, military crime victims have the right to confer or consult with trial counsel at several points in the judicial process. These requirements mirror the discussions civilian prosecutors routinely engage in with victims in sexual assault cases. In some civilian jurisdictions, the trial judge asks the prosecutor, on the record, if he or she has conferred with the victim and to present the victim’s opinions to the court, even if the victim’s opinions diverge from the government’s position.

**Recommendation 40:** In addition to assessing victim satisfaction with Special Victim Counsel, the Service Secretaries direct assessments by Staff Judge Advocates, prosecutors, defense counsel, and investigators in order to evaluate the effects of the Special Victim Counsel Program on the administration of military justice.

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
Finding 40-1: Military trial and defense counsel, SARC’s, and victim advocate personnel reported to the Subcommittee that they have positive working relationships with Special Victim Counsel. However, some counsel foresee potential issues such as privilege, confidentiality, or delays when the government and victim’s interests do not align.

Recommendation 41: Congress should not enact Section 3(b) of the Victims Protection Act (VPA), which requires the Convening Authority to give “great weight” to a victim’s preference where the sexual assault case be tried, in civilian or military court. The Military Services do not have control over the civilian justice system, and jurisdiction must be based on legal authority, not the victim’s personal preferences, so this decision should remain within the discretion of the civilian prosecutor’s office and the Convening Authority.

Finding 41-1: The decision whether civilian or military authorities will prosecute a case is routinely negotiated when they share jurisdiction. The Subcommittee did not receive evidence of problems with coordination between civilian prosecutors and military legal offices. In fact, the opposite appears to be true. There appears to be significant coordination and cooperation between military and civilian authorities with concurrent jurisdiction.

Finding 41-2: Section 3(b) of the VPA would provide the victim the opportunity to express a preference, which should be afforded great weight in the determination whether to prosecute an offense by court-martial or by a civilian court. If the civilian jurisdiction declines to prosecute, the victim must be informed. Jurisdiction, however, is based on legal authority, not necessarily the victim’s preferences.

The Scope of Article 120 of the UCMJ

Recommendation 42: The Judicial Proceedings Panel consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120.

Finding 42-1: Military and civilian jurisdictions categorize crimes referred to generically as “sexual assault” in different ways. Criminal sexual conduct under Article 120 of the UCMJ spans a broad spectrum from minor non-penetrative touching of another person’s body, with no requirement to gratify any person’s sexual desire, to penetrative offenses accomplished by force. In contrast, “sexual assault” in civilian jurisdictions is generally classified as either a penetrative offense or a contact offense with intent to gratify the sexual desires of some person.

Charging Discretion in Sexual Assault Cases

Finding 42-2: Both civilian and military prosecutors exercise broad discretion in drafting sexual assault charges. Although in military sexual assault cases, special or general court-martial convening authorities determine how to dispose of an allegation, military prosecutors determine the proper charges, draft the charges for the commander, and recommend appropriate disposition.
Factors Considered in Disposition Decisions for Sexual Assault Cases

**Finding 42-3**: There is a non-exclusive list of factors military commanders should consider when deciding how to dispose of an allegation, including whether to charge a Service member with an offense. Civilian prosecutors also consider a variety of factors in determining whether or not to charge a citizen with a criminal offense, many of which are similar to military factors. Ultimately, both military and civilian authorities determine how to dispose of an allegation based upon the specific facts of each case. However, the minimum threshold in the military to charge a Service member with an offense does not take into account the provability of the charges, which differs from civilian jurisdictions.

**Finding 42-4**: Section 1708 of the FY14 NDAA orders a non-binding provision in the Manual for Courts-Martial amended to “strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense,” but does not prohibit the commander from considering this factor, so the change is unlikely to affect charging or disposition decisions in sexual assault or other cases.

Alternate Disposition Options in the Military Compared to the Civilian Sector

**Finding 42-5**: Civilian prosecutors face the same type of initial disposition decisions as trial counsel and convening authorities, ranging from taking no action to going forward with a view towards trial. Civilian prosecutors can choose options other than trial, but those are usually uniquely tailored to the specific circumstances of the case.

**Finding 42-6**: The UCMJ and military regulations provide several clear options for alternate dispositions. If a special or general court-martial convening authority consults with his or her legal advisor and decides that a sexual assault allegation does not warrant trial by court-martial because there is insufficient evidence of sexual assault,29 other adverse options such as nonjudicial punishment, separation from the Service, or letters of reprimand, may be used for related misconduct when appropriate. Commanders very rarely choose nonjudicial punishment or other administrative adverse actions to dispose of penetrative sexual assault offenses. The misperception that commanders use options other than courts-martial to dispose of allegations of penetrative offenses may be due to the breadth of conduct categorized as “sexual assault” under the UCMJ.

INCREASING THE MILITARY JUDGE’S ROLE IN THE MILITARY JUSTICE SYSTEM

Making the Military Judge Available at Preferral or Pretrial Confinement

**Recommendation 43-A**: Military judges should be involved in the military justice process from preferral of charges or imposition of pretrial confinement, whichever is earlier, to rule on motions regarding witnesses, experts, victims’ rights issues, and other pre-trial matters.

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29 See Part V, Section F, Recommendation 14-A, supra. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.
The Secretary of Defense recommend the Congress enact legislation to amend the UCMJ, the President enact changes to the Manual for Courts-Martial, and Service Secretaries implement appropriate regulations to increase the authority of military judges over the pre-trial process to enhance fairness, efficiency, and public confidence.

**Recommendation 43-B:** The Service Secretaries assess additional resources necessary to carry out the changes increasing the authority of the military judge, including whether a cadre of designated magistrates or judges should perform these functions.

**Finding 43-1:** Civilian judges or magistrates control the proceedings in preliminary matters from the time of indictment or arrest of the defendant, whichever is earlier, while military judges do not usually become involved until a convening authority refers charges to a court-martial which can cause or result in inefficiencies in the process and ineffective or inadequate remedies for the government, accused, and victims.

**Finding 43-2:** Giving military judges an enhanced role in pre-trial proceedings would affect the prosecution of all cases, not only sexual assaults.

**Defense Requests for Witnesses, Evidence or Other Matters**

**Recommendation 43-C:** Military judges should rule on defense requests for witnesses, experts, documents or other evidence, such as testing of evidence, or other pre-trial matters. The defense counsel would no longer be required to request witnesses or other evidence through the trial counsel or convening authority and would be allowed an *ex parte* procedure in appropriate circumstances.

**Finding 43-3:** Military defense counsel are currently required to submit requests for witnesses, experts, and resources through the trial counsel and staff judge advocate to the convening authority. Depending on Service practice, the trial counsel, as the representative of the convening authority in a court-martial, may determine whether to grant or deny defense witness requests, other than expert witness requests which require the convening authority’s personal decision. Additionally, if the convening authority denies the request, the defense counsel must wait until the case is referred to submit the request to the military judge. No similar practice is found in civilian jurisdictions.

**Finding 43-4:** This practice requires defense counsel to disclose more information to the trial counsel sooner than their civilian counterparts in public defender offices, requires them to reveal confidential information about defense witnesses and theory of the case in order to justify the requests, and stymies defense counsel’s duty and ability to provide constitutionally effective representation to their clients.

**Finding 43-5:** Military trial counsel request and obtain resources and witnesses without notifying the defense or disclosing a justification and, in most instances, without a specific request for the convening authority’s personal decision. This leads to a perception that trial counsel have unlimited access to obtain witnesses and resources and that the process for obtaining witnesses and other evidence is imbalanced in favor of the government.
Subpoena Power

**Recommendation 43-D:** The Secretary of Defense propose amendments to the Manual for Courts-Martial (MCM) and the UCMJ to authorize the military judge to issue subpoenas to secure witnesses, documents, evidence, or other assistance to effectively carry out additional duties recommended, with ex parte procedures as appropriate, that will allow the defense the opportunity to subpoena witnesses through the military judge, without disclosing information to the trial counsel or convening authority to the President and Congress, accordingly.

**Finding 43-6:** Some public defenders have subpoena power. Military defense counsel do not have subpoena power. In contrast, military trial counsel have nationwide subpoena power with rare judicial oversight.

Article 32 Preliminary Hearing

**Recommendation 43-E:** The Secretary of Defense propose amendments to the MCM and UCMJ to increase the authority of the military judge over the Article 32 preliminary hearing to the President and Congress, accordingly. Military judges should preside over preliminary hearings in their capacity as military judges, not as hearing officers. The military judge's finding that the government failed to establish probable cause should be binding and result in dismissal of charges without prejudice. A finding that the government established probable cause should be forwarded to the appropriate convening authority for his or her decision on an appropriate disposition of the charges.

**Finding 43-7:** In Section 1702 of the FY14 NDAA, Congress enacted substantial changes to the Article 32 pretrial investigation, transforming it, in some respects, into a preliminary hearing, and establishing that crime victims may not be compelled to testify at the proceeding. This may result in additional requests to depose victims and other witnesses.

Depositions as a Substitute for the Victim’s Article 32 Testimony

**Recommendation 43-F:** The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.

**Finding 43-8:** Subcommittee site visits revealed varying approaches to victim testimony before trial in civilian jurisdictions. In Philadelphia, for example, victims must testify at preliminary hearings with limited exceptions; in Washington State, either party may request to interview material witnesses under oath before trial.

Review of Referral Decisions

**Recommendation 44-A:** Congress repeal FY14 NDAA, Section 1744, which requires a Convening Authority's decision not to refer certain sexual assault cases be reviewed by a higher GCMCA or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judges advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 44-B:** Congress not enact Section 2 of the VPA, which would require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the SJA's recommendation against referral or the convening authority's decision not to refer one of these sexual assault cases. The SJA is the GCMCA's legal advisor on military justice matters; there is no evidence that inserting the senior trial counsel into the process will enhance the fair administration of military justice.

**Finding 44-1:** FY14 NDAA, Section 1744, and pending language in the VPA, may place inappropriate or illegal pressure to aggressively prosecute sexual assault cases by requiring the higher GCMCA, or in some cases, the Service Secretary review the convening authority's decision not to refer a case with an allegation of rape, sexual assault, forcible sodomy, or attempts to commit those offenses. The FY14 NDAA proposes two scenarios that would require higher review. (1) If both the staff judge advocate and convening authority agree the case should not be referred to court-martial, the next higher level convening authority will review the case file; (2) If the staff judge advocate recommends referral to court-martial and the convening authority decides not to refer the case to court-martial the Service Secretary would review the case file. The VPA, Section 2, adds to this elevated review by requiring the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the SJA's recommendation against referral or the convening authority's decision not to refer one of these sexual assault cases.

**Finding 44-2:** The potential impact of establishing an elevated review of the convening authority's decision not to refer certain sexual assault cases is deterring the convening authority from exercising his/her independent professional judgment when making the decision whether to refer a case. The elevated review may impose inappropriate or illegal pressure on staff judge advocates to recommend, and convening authorities to refer sexual assault cases. Convening authorities are better positioned to make informed prosecutorial decisions because they have the advice of their SJA, and are less removed from the alleged perpetrator, victim, and the impact of the offense on the unit and good order and discipline than a higher level GCMCA or Service Secretary. The Service Secretaries lack both an established criminal law support structure and the experience and training to make these difficult prosecutorial decisions.

**Written Declination Procedures**

**Recommendation 45:** If Congress does not repeal FY14 NDAA Section 1744, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction declination statements or letters. The Department of Defense should coordinate with the Department of Justice, or with state jurisdictions that are more familiar with the sensitive nature of sexual assault cases, to develop a standard format for use by all Services. Any such form should require a sufficient explanation without providing too much detail so as to ensure the written reason for declination to prosecute does not jeopardize the possibility of a future prosecution or contain victim-blaming language.

**Finding 45-1:** If a victim makes an allegation of rape, sexual assault, forcible sodomy, or attempts of those offenses, and the convening authority decides not to refer the allegation to court-martial, Section 1744(e)(6) of the FY14 NDAA requires a superior authority review of the non-referral decision by examining the case file, which must include a written statement explaining the convening authority’s decision not to refer any charges for trial by court-martial. DoD has not published any guidance to date as to what that declination memorandum must contain or what entity must write the letter.
Finding 45-2: Civilian offices vary in their practices for recording decisions to decline cases. If prior to indictment, the common procedure is for the prosecutor to send the case back to the investigator to be closed. If the prosecutor declines a case after indictment, some offices informally include a note in the file, others complete a standard form, but none provide lengthy written justifications. When civilian government offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect.

Finding 45-3: There are no formal requirements for military investigators, judge advocates, or commanders to provide written opinions or justifications when declining to pursue criminal cases in the military, including allegations of sexual assault, at any stage in the trial process. Staff Judge Advocates provide written advice to the convening authority prior to his or her decision whether to refer a case to general court-martial. In the past, if a convening authority dismissed charges or declined to prosecute a case after referral, the convening authority generally did not write a justification or declination statement.

Plea Negotiations

Recommendation 46: The Judicial Proceedings Panel should study whether the military plea bargaining process be modified because it departs from civilian practice and may undermine victim confidence when the accused receives a sentence lower than the pretrial agreement.

Finding 46-1: In civilian jurisdictions, most plea agreements between the prosecutor and defendant are for an agreed upon sentence and the judge accepts or rejects that agreement entirely. There are some jurisdictions where the plea deal consists of an agreement to a sentence within a range; the judge then determines the exact sentence within that range.

Finding 46-2: In the military justice system, the accused may negotiate a pretrial agreement (plea bargain) with the convening authority, through the staff judge advocate, that places a limit or “cap” on the maximum sentence the accused will serve in exchange for a guilty plea. The sentencing authority does not know the agreed limit prior to adjudging the sentence. The accused gets the benefit of whichever is lower, the adjudged sentence or the cap agreed to with the convening authority. Historically, this practice developed based on the special nature of the role of the convening authority and clemency opportunities. Other changes in the system, including the role of Special Victims’ Counsel and increased protection for victim’s rights may raise the question of whether the plea agreement process should be tailored to be more similar to the majority of civilian jurisdictions.

Finding 46-3: In most military sexual assault cases, the accused pleads not guilty due to both evidentiary challenges and issues in proving sexual assault beyond a reasonable doubt and the requirement to register as a sex offender if convicted. In fiscal year (FY) 2013, the accused pled not guilty in 70% of the Army’s sexual assault cases and 77% of the Navy’s sexual assault cases.

Finding 46-4: Some civilian defense attorneys are using sex offender risk assessments at various stages of proceedings. Evidence demonstrates that sex offender risk assessments can be used as a tool to help promote rehabilitation and prevent recidivism by identifying appropriate therapy. Defense attorneys sometimes use risk assessments when negotiating a plea bargain with the government.
Military Panel Selection & Voir Dire

**Recommendation 47-A:** Judge advocates with knowledge and expertise in criminal law should review sexual assault preventive training materials to ensure the materials neither taint potential panel members (military jurors) nor present inaccurate legal information.

**Recommendation 47-B:** The military judiciary ensure that military judges continue to appropriately control the line of questioning during voir dire to decrease the difficulty in seating panels. Military judges should continue to exercise their authority to control the scope of questioning during voir dire, which both allows counsel to gain the information required to exercise challenges intelligently and the court to seat a fair and impartial panel. By taking a more active role, the military judge can ensure there are no preconceived notions, prejudices, impressions or misleading questions from counsel.

**Finding 47-1:** Evidence presented to the Subcommittee reveals that it is increasingly difficult to seat military panel members in sexual assault cases because of their exposure to sexual assault prevention programs that lead some prospective panel members to draw erroneous legal conclusions, such as the idea that consuming one alcoholic drink makes consent impossible.

**Character Evidence**

**Recommendation 48:** Enacting Section 3(g) of the VPA may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time.

**Finding 48-1:** Civilian and military rules of evidence about introducing character evidence in criminal trials are nearly identical. The rules of evidence in both military and civilian jurisdictions permit relevant character evidence at trial. The military courts have consistently ruled that a Service member's good military character may be admissible as a pertinent character trait.

**Finding 48-2:** There may be a misperception surrounding the manner by which character evidence may be introduced in courts-martial. The use of character evidence in courts-martial has led to implications that a well-decorated military member will be given deference due to his or her military medals and career.

**Finding 48-3:** Congress attempted to eliminate the consideration of the accused's military service by adjusting the factors commanders should consider when making disposition decisions. Section 1708 of the FY14 NDAA ordered a non-binding provision in the Manual for Courts-Martial amended to “strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense,” but it does not actually prohibit the commander from considering this factor. The change may not affect charging or disposition decisions in sexual assault or other cases.

**Finding 48-4:** Section 3(g) of the VPA proposes to modify Military Rule of Evidence 404(a), regarding the character of the accused. The provision attempts to prevent the use of the accused's general military character from being admissible to show the probability of the accused's innocence. However, the proposal exempts evidence of military character when relevant to an element of an offense for which the accused has been charged, and relevant character evidence will continue to be admissible as long as the attorneys lay the proper foundation. While Section 3(g) of the VPA may increase victim confidence by attempting to eliminate the
“Good Soldier Defense,” the Subcommittee does not anticipate that it will result in any significant change to current practice at trial.

Prosecution and Conviction Rates

**Recommendation 49-A:** The Secretary of Defense direct the Service Secretaries to use a single, standardized methodology to calculate prosecution and conviction rates. The Subcommittee recommends a methodology, based on the current Army model, which will provide accurate and comparable rates by tracking the number and rates of acquittals and alternate dispositions in sexual assault cases. Figure 13 illustrates the Subcommittee’s suggested methodology.

**Recommendation 49-B:** Once the Military Services standardize definitions, procedures, and calculations for reporting prosecution and conviction rates in sexual assault cases, the Secretary of Defense direct a study of prosecutorial decision making in sexual assault cases by a highly qualified expert in the field. The Secretary of Defense direct the study to assess the following:

- the rate at which the Services unfound sexual assault reports using the Uniform Crime Reporting definition and the characteristics of such cases in order to determine whether any additional changes to policies or procedures are warranted;

- the rate at which referral of cases to courts-martial against the advice of the Article 32 investigating or hearing officer resulted in acquittal or conviction (unless and until our recommendation to make the Article 32 decision-maker a military judge whose probable cause decision is binding is implemented); and

- the role victim cooperation plays in determining whether to refer or not refer a case to court-martial, and whether the case results in a dismissal, acquittal or conviction.

**Finding 49-1:** There are no standardized methods that DoD and the Military Services currently use to calculate prosecution or conviction rates in sexual assault or other cases. The Military Services use different procedures and definitions, making meaningful comparisons of prosecution and conviction rates for sexual assault across the Military Services impracticable. In the absence of a standardized methodology, any attempt to compare military prosecution or conviction rates for sexual assault among the Services or between military and civilian jurisdictions is apt to be misleading.

**Change Congressional Reporting Requirements**

**Recommendation 50:** Congress enact legislation to amend Section 1631(b)(3) of the FY11 NDAA and the related provisions in FY12 NDAA and FY13 NDAA to require the Service Secretaries provide the number of “unfounded cases,” those cases that were deemed false or baseless, as well as a synopsis of all other unrestricted reports of sexual assault with a known offender within the military’s criminal jurisdiction. Eliminating the requirement to provide information about “substantiated cases” will result in DoD and the Services providing information that more accurately reflects the disposition of all unrestricted reports of sexual assault within the military’s jurisdiction.
I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Finding 50-1: DoD and the Military Services must comply with several mandates to report sexual assault data to multiple sources, including Congress, with each report containing different requirements, calculations, and definitions.

Finding 50-2: Section 1631 of the FY11 NDAA mandates an annual report to Congress with a full synopsis of “substantiated cases” of sexual assaults committed against Service members. The term “substantiated” is not otherwise used by DoD or the Services through the investigative or disposition decision process in sexual assault cases, resulting in confusion and inaccuracy in the reports to Congress.

Caution when Comparing Prosecution Rate and Conviction Rate Statistics

Recommendation 51: Congress and the Secretary of Defense should not measure success solely by comparing military and civilian prosecution and conviction rates.

Finding 51-1: Civilian and military prosecution rates are not comparable because of differences in the systems including civilian police discretion to dispose of a case and the alternate dispositions that apply only to the military. Various jurisdictions also use different definitions, procedures, and criteria throughout the process.

Finding 51-2: National data collection in the UCR traditionally focused on forcible rape of women, although beginning in January 2013, the definition of rape was expanded to include gender-neutral nonconsensual penetrative offenses. The UCR also collects data and some other sex offenses which some civilian police agencies may classify as assault. In contrast, DoD includes data on all reported penetrative and contact sexual offenses ranging from unwanted touching to rape.

ADJUDICATION OF SEXUAL ASSAULT CASES

The Need for Viable Sentencing Data and Transparency

Recommendation 52: The Secretary of Defense direct the Service Secretaries to provide sentencing data, categorized by offense type, particularly for all rape and sexual assault offenses under Article 120 of the UCMJ, forcible sodomy under Article 125 of the UCMJ, or attempts to commit those acts under Article 80 of the UCMJ, into a searchable DoD database, in order to: (1) conduct periodic assessments, (2) identify sentencing trends or disparities, or (3) address other relevant issues. This information should also be available to the public.

Finding 52-1: Sentencing data in the different Services is not easily accessible to the public. The Military Services use different systems to internally report data from installations around the world. If the Services’ software programs and data fields (in DSAID, for example) are modified to include sentencing information, it would not be overly burdensome for the Services to provide this data to DoD.

Recommendation 53: The Secretary of Defense direct the Military Services to release sentencing outcomes on a monthly basis to increase transparency and promote confidence in the system.
Finding 53-1: The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all Special and General Courts-Martial to the Navy Times on a monthly basis.

**Judge Alone vs. Panel Members Sentencing**

**Recommendation 54:** The Secretary of Defense recommend amendments to the MCM, the UCMJ, and Service regulations, respectively, to make military judges the sole sentencing authority in sexual assault and other cases in the military justice system.

Finding 54-1: In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. There are six states that allow jury sentencing in felony cases. The military retains an option for sentencing by panel members at the accused's request.

**Unitary Sentencing Practice**

**Recommendation 55:** The Secretary of Defense recommend amendments to the MCM and UCMJ to impose sentences which require the sentencing authority to enumerate the specific sentence awarded for each offense and to impose sentences for multiple offenses consecutively or concurrently to the President and Congress, respectively.

Finding 55-1: The military system uses a unitary or aggregate sentence provision for multiple specifications (counts) of conviction. In other words, a sentence is adjudged as a total for all offenses, rather than by specific offense. However, the FY14 NDAA changes to Article 60 restrict the convening authority's ability to set aside or commute findings of guilt, and specifically exclude offenses under Article 120(a) or 120(b), Article 120b, or Article 125 of the UCMJ even though convictions for these offenses often occur with convictions for other non-sexual offenses. Thus, the practice of awarding a sentence as a total, rather than specified by each offense of conviction, makes the convening authority's ability to act on these additional specifications unclear, obscures the punitive consequences of specified offenses, and makes accountability for sexual assault difficult to ascertain.

**Sentencing Guidelines**

**Recommendation 56:** The Subcommittee does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time. Rather, the Subcommittee recommends: (1) enhancing the military judge's role in the military justice system, including in sentencing decisions, (2) data collection and analysis, and (3) sentencing for specific offenses instead of unitary sentencing.

Finding 56-1: There are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President, exercising his authority under the UCMJ, establishes a maximum punishment for each offense. In contrast, the federal system, twenty states, and the District of Columbia use some form of a sentencing guideline system.
Finding 56-2: Sentencing guidelines are often complex and may require substantial infrastructure to support them, including sentencing commissions which study, develop, implement and amend the guidelines over time. For instance, to formulate baseline recommendations for federal sentencing guidelines, the United States Sentencing Commission collected and examined data from 100,000 cases that had been sentenced in federal courts—10,000 of which it studied in “great detail.” Twenty-four states and the District of Columbia currently have sentencing commissions.

Finding 56-3: A proper analysis of sentencing guidelines would require the appropriate time and resources to: (a) gather the data and rationale to support such a recommendation, (b) determine the form the guidelines should take, (c) and assess whether the military should adopt sentencing guidelines in sexual assault or other cases.

Finding 56-4: A proper assessment of whether the military should adopt some form of sentencing guidelines in sexual assault or other cases requires in depth study beyond the time and resources of the Subcommittee.

Finding 56-5: The Subcommittee heard no empirical evidence of whether inappropriate sentencing disparities exist in sexual assault or other courts-martial. After gathering evidence and testimony from federal and state experts in sentencing guidelines, the Subcommittee recognized that a complete study would involve a comprehensive comparison to federal and state sentencing guidelines to determine whether they would be appropriate in the military justice system, and if so, what guideline model to follow.

Finding 56-6: There are numerous complicated policy and structural issues to factor into such a decision, including:

- The overarching goals in current state and federal sentencing guidelines vary based on the method of development, articulated purposes, structure, and application. Some common objectives include reducing sentencing disparities, achieving proportionality in sentencing, and protecting public safety.
- There are two approaches used in creating sentencing guidelines: (1) a descriptive approach, which is data-driven and used to achieve uniformity, and (2) a prescriptive approach, which is used to promote certain sentences.
- Different entities oversee sentencing guidelines in the state and federal systems, with some choosing judicial agencies and others choosing legislative agencies.
- The flexibility of sentencing guidelines varies widely in the states, ranging from mandatory to presumptively applicable to completely discretionary.
- Additional details include: (1) whether a worksheet or structured form is required, (2) whether the commission regularly reports on guidelines compliance, (3) whether compelling and substantial reasons are required for departures,(4) whether written rationales are required for departures, and (5) whether there is appellate review of defendant or government based challenges related to sentencing guidelines.
- The actual prison sentences defendants serve in jurisdictions with sentencing guidelines also varies depending on laws affecting parole and other “truth in sentencing” issues.
Mandatory Minimum Sentences

**Recommendation 57:** Congress not enact further mandatory minimum sentences in sexual assault cases at this time.

**Finding 57-1:** Mandatory minimum sentences remain controversial. Testimony and other evidence the Subcommittee gathered from civilian prosecutors, civilian defense counsel, and two victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting.

**Finding 57-2:** Mandatory minimum sentences may decrease the likelihood of resolving cases through guilty pleas, especially if the mandatory minimum sentences are perceived as severe. In the FY14 NDAA, Congress tasked the JPP to examine mandatory minimums over a period of years. The JPP will be better positioned to further analyze the potential impact of mandatory minimum sentences on military sexual assault offenses.

**Finding 57-3:** Very few military offenses currently require mandatory minimum sentences. A DoD-directed study of military justice in combat zones recently recommended review of “whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence.”

Clemency Opportunities and Changes to Article 60

**Recommendation 58:** Congress should amend Section 1702(b) of the FY14 NDAA to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures.

**Finding 58-1:** In civilian jurisdictions, each State has its own rules for handling clemency matters, but many provide the Governor with the power to pardon criminals and commute sentences as the final act after the person convicted exhausts the judicial appellate process. The convening authority normally exercises clemency authority under the recently amended Article 60 of the UCMJ after the findings and sentence of a court-martial, before appellate review. The scope of appellate review varies by the length of sentence approved.

**Finding 58-2:** The impact of the changes to Article 60 of the UCMJ are not fully known at this time. However, one potential unintended consequence may be that the convening authority may no longer provide relief from forfeitures of pay to dependents of convicted Service members. Another unclear application of the amendments is the convening authority’s ability to grant clemency in cases in which there are convictions for both Article 120 and other offenses, because of the unitary nature of the sentence.

**Finding 58-3:** Post-trial relief may be effectively foreclosed for convicted Service members who do not receive punitive discharges or confinement for more than one year. Those Service members have limited access to appellate review, with the only avenue a review by the Office of The Judge Advocate General pursuant to Article 69 of the UCMJ.
II. LEGISLATION AND POLICY RELATING TO THE INVESTIGATION, PROSECUTION AND DEFENSE OF SEXUAL ASSAULT CASES

A. RECENT LEGISLATION


The FY12 NDAA\(^1\) included eight provisions intended to improve sexual assault prevention and response in the Armed Forces. The Subcommittee provided analysis and comment on one of those provisions, Section 541, which overhauled the organization of sex-related offenses under the UCMJ.

Table 1

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<th>Section</th>
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| Section 541. Reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice.  
  - Effective June 28, 2012 (180 days after enactment of the Act).  
  - Amended Article 120 of the Uniform Code of Military Justice for the offenses of rape, sexual assault, and other sexual misconduct by dividing Article 120 into three separate articles: (1) offenses of rape, sexual assault, and aggravated or abusive sexual contact of any person; (2) sexual offenses against children under age 16; and (3) other nonconsensual sexual misconduct offenses. | Part VII, Section D, 1.  
See recommendation 42 |


The FY13 NDAA\(^2\) included twelve provisions intended to improve sexual assault prevention and response in the Armed Forces. The Subcommittee considered five of those provisions. Unless otherwise noted, the statutory section was effective immediately:

Table 2

<table>
<thead>
<tr>
<th>Section</th>
<th>Report Discussion</th>
</tr>
</thead>
</table>
| Section 570. Armed Forces Workplace and Gender Relations Surveys.  
  - Added additional content to the survey and set out required timeframe for administering the surveys. | Part III.  
See recommendations 1 – 6. |

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Section 572(a)(2). Requires administrative discharge if convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged.

- Effective June 2, 2013 (180 days after enactment of the Act).

Section 573. Establishment of special victim capabilities within the Military Departments to respond to allegations of certain special victim offenses.

- Effective December 2, 2013 (one year after enactment of the Act).


The FY14 NDAA included 36 provisions intended to improve sexual assault prevention and response in the Armed Forces, including many changes to the processes and systems for investigating, prosecuting, and adjudicating adult sexual assault crimes. The Subcommittee considered 17 statutory requirements. Unless otherwise noted, the provisions were effective immediately:

Table 3

<table>
<thead>
<tr>
<th>Section</th>
<th>Report Discussion</th>
</tr>
</thead>
<tbody>
<tr>
<td>- No later than December 26, 2014 (one year after enactment of the Act), the Secretary of Defense and Secretary of Homeland Security prescribe regulations for implementation; and Secretary of Defense recommend to the President changes to MCM to implement.</td>
<td></td>
</tr>
<tr>
<td>Section 1702 (a). Revision of Article 32, Uniform Code of Military Justice.</td>
<td>Part V, Section F, See recommendation 14-A.</td>
</tr>
<tr>
<td>Section 1702 (b). Revision of Article 60, Uniform Code of Military Justice.</td>
<td>Part VIII, Section F. See recommendation 58.</td>
</tr>
<tr>
<td>- Effective June 26, 2014 (180 days after enactment of the Act).</td>
<td></td>
</tr>
</tbody>
</table>

3 Id. at §§ 1701-1709, 1711-1716, 1721-1726, 1731-1735, 1741-1747, 1751-1753.
## II. LEGISLATION AND POLICY RELATING TO THE INVESTIGATION, PROSECUTION AND DEFENSE OF SEXUAL ASSAULT CASES

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Part</th>
<th>See Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1705</td>
<td>Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial.</td>
<td>VIII, E</td>
<td>57.</td>
</tr>
<tr>
<td>1708</td>
<td>Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in discussion of rule on initial disposition of offenses.</td>
<td>VII, D</td>
<td>42-3.</td>
</tr>
<tr>
<td>1716</td>
<td>Requires Special Victims’ Counsel be made available to sexual assault victims.</td>
<td>VII, C</td>
<td>40.</td>
</tr>
<tr>
<td>1725</td>
<td>Qualifications and Selection of SAPR Personnel and SANEs.</td>
<td>V, G</td>
<td>18 and 20.</td>
</tr>
<tr>
<td>1731(a)(D)</td>
<td>Additional duties for RSP – Assessment of offender database from restricted reports.</td>
<td>V, E, 2</td>
<td>11.</td>
</tr>
<tr>
<td>1731(a)(E)</td>
<td>Additional duties for RSP – Assessment of Clemency opportunities in the military justice system.</td>
<td>VIII, F</td>
<td>58.</td>
</tr>
<tr>
<td>1732</td>
<td>Review of Investigative Practices of MCIOs, including recommending founded/unfounded.</td>
<td>V, F</td>
<td>13, 14-A, and 14-B.</td>
</tr>
</tbody>
</table>

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
Section 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.

- Requires the Secretaries of the Military Departments to review all cases under Articles 120(a), 120(b), 125, and attempts thereof, where the staff judge advocate (SJA) recommends referral and the convening authority declines to refer charges to court-martial. Requires review by the next superior commander authorized to exercise general court-martial convening authority when both the SJA recommends not referring charges and the convening authority does not refer charges.

- Requires written statement explaining the reasons for convening authority’s decision not to refer such charges for trial by court-martial.

Section 1752. Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the UCMJ through courts-martial.

Part VII, Section D. See findings 42-1, 42-2, 42-4, 42-5, and related discussion.

Section 1753. Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.

Part VII, Section D. See finding 42-1, 42-2, 42-4, 42-5, and related discussion.

B. PROPOSED LEGISLATION

Notwithstanding the passage of the FY14 NDAA and its 36 reforms to the military justice system and the Department of Defense sexual assault prevention and response programs, concern over the handling of sexual assault cases in the U.S. military has not abated. Just days before he signed the FY14 NDAA into law, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress made with respect to sexual assault prevention and response.4 This report is due to the President by December 1, 2014. The President indicated he will consider additional reforms to the military justice system if significant improvements are not achieved by that time.5 Even in light of the many recent legislative and policy actions to address sexual assault in the U.S. military, lawmakers continue to propose additional measures to improve the sexual assault prevention and response activities of the U.S. military.

1. Victims Protection Act of 2014

On January 14, 2014, Senator Claire McCaskill filed the Victims Protection Act of 2014 (VPA), which attempts to provide additional enhancements to the sexual assault prevention and response activities of the Armed Forces. On March 10, 2014, the Senate unanimously passed the VPA and it was sent to the House of Representatives for consideration.6 The Subcommittee considered three provisions contained in the VPA.

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5 Id.
6 While the VPA is not likely to receive a vote in the House of Representatives, four parts of the VPA were incorporated into the FAIR Military Act, filed by Congressman Mike Turner (R-OH) and Congresswoman Niki Tsongas (D-MA); also, at least two of the VPA sections were incorporated into the Fiscal Year 2015 National Defense Authorization Act markup conducted by the House Armed Services Committee on May 7, 2014.
Table 4

| Section 2. Inclusion of senior trial counsel determinations on referral of cases to trial by courts-martial in cases reviewed by Secretaries of Military Departments. | Part VII, Section F. See recommendation 44-B. |
| Section 3(b). Consultation with victims regarding preference in prosecution of certain sexual offenses. | Part VI, Section C, 3. See recommendation 41. |
|  |  |
| *This provision was incorporated into the FY15 NDAA as passed by the HASC.* |
| Section 3(g). Modification of Military Rules of Evidence relating to admissibility of general military character toward probability of innocence. | Part VII, Section I. See recommendation 48. |
| *This provision is mirrored in Section 4 of the FAIR Military Act as well as the FY15 NDAA as passed by the HASC.* |

The VPA passed the Senate during the same time period that Senator Kirsten Gillibrand (D-NY) sought a vote on the Military Justice Improvement Act of 2013 (MJIA), which would remove commanders from prosecutorial decisions for most major offenses under the UCMJ. While the MJIA was unable to overcome the 60 vote threshold to proceed to a vote, the proposal was supported by a majority of Senators (55). This level of support demonstrates the seriousness with which lawmakers take the issue of sexual assault in the Armed Forces.

2. FAIR Military Act

Attention on the military’s handling of sex-related offenses is under comparable scrutiny in the House of Representatives. On April 10, 2014, Congressman Mike Turner (R-OH) and Congresswoman Niki Tsongas (D-MA) filed the FAIR Military Act. This proposal includes four provisions from the VPA as well as an additional duty for the Judicial Proceedings Panel to assess the use of mental health records by defense during preliminary hearings and courts-martial proceedings.

Even as this report is being written, members of Congress continue to offer legislation to improve the military’s handling of sexual assault offenses and hold the military accountable.


12 Id. at §§ 2-6.

13 On May 7, 2014, the House Armed Services conducted its mark-up of the FY15 NDAA. During this debate, many amendments were filed relating to the issue of sexual assault in the military. For example, Congresswoman Jackie Speier (R-CA) filed two amendments that would have removed commanders from prosecutorial decisions. The first amendment was akin to the MJIA and would have taken all major non-military crimes outside the chain of command; the measure failed by a vote of 13-49. The second amendment would have removed commanders for only sexual assault-related offenses and failed on a closer vote, 28-34. In addition, Congressman Mike Turner (R-OH) filed an amendment to require a mandatory minimum sentence of dismissal or dishonorable discharge and confinement for two years for a member of the military convicted by court-martial of a sex-related offense. This amendment was adopted into the HASC bill. Other items included in the HASC-passed FY15 NDAA include: Inspector General to review all members of the Armed Forces who were discharged after making unrestricted report of sexual assault; Secretary of Defense brief to the HASC on implementation of sexual assault provisions included in FY12, 13 and 14 NDAA; Secretaries of Military
Departments must consider the attitudes toward handling sexual assault allegations when evaluating a commanding officer’s job performance; consultation with victims of sexual assault regarding victims’ preference for prosecution of offense by court-martial or civilian court; modification of Military Rules of Evidence relating to admissibility of general military character toward probability of innocence; confidential review of characterization of terms of discharge of members of the Armed Forces who are victims of sexual offenses; permit interlocutory appeal of Military Rule of Evidence 513 (psychotherapy-patient privilege) and Military Rule of Evidence 412 (rape shield) rulings, in line with the rights of civilian victims under the Crime Victims’ Rights Act; and elimination of exception to psychotherapist-patient privilege under subparagraph (d)(8) of Military Rule of Evidence 513.
III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

A. SURVEY TYPES AND METHODOLOGIES

The Subcommittee studied crime reporting and crime survey statistics from both the DoD and civilian jurisdictions. In doing so, the Subcommittee reviewed three major victim surveys and two crime reports: the DoD Workplace and Gender Relations Survey of Active Duty Members (WGRA); the National Intimate Partner and Sexual Violence Survey (NISVS); the National Crime Victimization Survey (NCVS); the Uniform Crime Report (UCR); and the DoD Annual Report to Congress. Some criminal acts are more difficult to assess in surveys, and rape and sexual assault are among the most challenging. Sexual offenses are often more difficult to assess because the personal nature of the crime lends itself to various issues, including divergent opinions of criminal behavior, reluctance to disclose personal experiences, inaccurate recollection, or respondent sensitivity. Crime victimization surveys, particularly with regard to rape and sexual assault, are also extremely difficult to validate because they are created to uncover events never reported to law enforcement. As a result, sources of information about prevalence and incident rates require careful attention before relying on their conclusions to assess the extent of sexual assault, whether among military or civilian populations.

Table 5 below summarizes the types of surveys and reports used in the civilian sector and in the military to assess the extent of the problem of sexual assault in society. Each of these surveys and reports will be described in further detail following the chart.

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44 Transcript of RSP Comparative Systems Subcommittee Meeting 9 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

45 See generally id. at 5-115.

46 Id. at 25.
## Table 5

<table>
<thead>
<tr>
<th>Survey or Report</th>
<th>Population</th>
<th>Survey Design</th>
<th>Measures</th>
<th>Definition of Rape/Sexual Assault</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workplace and Gender Relations Survey (WGRS)</td>
<td>Active Duty (WGRA) and Reserve (WGRR) Service Members in the Department of Defense, (^{48}) Conducted as web-based self-reporting computer survey, confidential but not anonymous.</td>
<td>Public Health</td>
<td>Prevalence (^{49})</td>
<td>Unwanted Sexual Contact defined as intentional sexual contact that was against a person's will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body.</td>
</tr>
<tr>
<td>National Intimate Partner and Sexual Violence Survey (NISVS)</td>
<td>National survey of non-institutionalized men and women age 18 and over in the United States. Conducted random telephone dialing.</td>
<td>Public Health</td>
<td>Prevalence</td>
<td>Five types of sexual violence were measured in NISVS. These include acts of rape (forced penetration), and types of sexual violence other than rape.</td>
</tr>
<tr>
<td>National Crime Victimization Survey (NCVS)</td>
<td>In-person interviews with a nationally representative sample of U.S. households, conducted by U.S. Census Bureau at six-month intervals for three years. All household members age 12 and older are interviewed.</td>
<td>Criminal Justice</td>
<td>Incidence</td>
<td>Forced sexual intercourse including both psychological coercion as well as physical force. Forced sexual intercourse means penetration by the offender(s). [Rape] includes attempted rapes, male as well as female victims, and both heterosexual and homosexual rape. Attempted rape includes verbal threats of rape.</td>
</tr>
</tbody>
</table>

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47 See generally Transcript of RSP Public Meeting 11-85 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University; Transcript of Comparative Systems Subcommittee Meeting 4-117 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

48 Does not include Coast Guard members. See 10 U.S.C. § 481 (2013).

49 "The incidence rate refers to the measure of the total number of incidents (or events) that occurred in a given period. It counts the total number of incidents or victimizations; it does not count the number of individual victims. In epidemiology, this rate is often referred to as the ‘event rate.’ Incidence rates are generally calculated over a specific time period, such as 12 months. The prevalence rate refers to the number of victims. It counts the number of individuals who have been victimized at least once; it does not count the total number of incidents . . . in epidemiology, the term incidence rate is often used to measure the number of ‘first time events,’ which is what we are calling the prevalence rate." The National Academy of Sciences Committee on National Statistics, Report on Estimating the Incidence of Rape and Sexual Assault 1 n.1 (2014) [hereinafter NAS Report], available at http://www.nap.edu/catalog.php?record_id=18605.
### III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

<table>
<thead>
<tr>
<th>Dataset</th>
<th>Description</th>
<th>Incidence Calculation</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Uniform Crime Report (UCR)</strong></td>
<td>Launched in 1929, collects information reported to law enforcement agencies on the following crimes: murder and non-negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. Covers all victims of crime (age immaterial).</td>
<td>Non-Survey Data Actual criminal justice statistical reporting</td>
<td>(Old Definition): The carnal knowledge of a female forcibly and against her will. Rapes by force and attempts or assaults to rape, regardless of the age of the victim, are included. Statutory offenses (no force used—victim under age of consent) are excluded. (New Definition): Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.</td>
</tr>
<tr>
<td><strong>DoD Annual Report to Congress (DoD SAPRO Report)</strong></td>
<td>Each fiscal year, the Department of Defense Sexual Assault Prevention and Response Office submits a data call to the Military Departments for statistical and case synopsis information on sexual assault crimes. SAPRO reports information obtained through restricted and unrestricted reports to Sexual Assault Response Coordinators and MCIOs across the Services.</td>
<td>Non-Survey Data Actual sexual assault reports collected through Defense Sexual Assault Incident Database (DSAID) and Law Enforcement Reports</td>
<td>Sexual assault is an overarching term that encompasses a range of contact sexual offenses between adults, prohibited by the UCMJ and characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, which are all terms which only came into effect in the latest version of Article 120, effective June 28, 2012, forcible sodomy, and attempts to commit these offenses.</td>
</tr>
</tbody>
</table>

1. **Workplace and Gender Relations Survey of Active Duty Members (WGRA)**

The Defense Manpower Data Center (DMDC) administers the Workplace and Gender Relations Survey to both active and Reserve members of the Armed Forces every two years, as established in Title 10 of the U.S. Code. The Coast Guard is not included in the survey population. DMDC administered the WGRA in 1995.

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50 The definition change was effective in January 2013. See CJIS, supra note 42, at 2.


52 See id.
2002, 2006, 2010, and 2012, and included questions about “unwanted sexual contact” in 2006, 2010, and 2012, which were designed to “calculate annual prevalence rates . . . of unwanted sexual contact, unwanted gender-related behaviors (i.e., sexual harassment and sexist behavior), and gender discriminatory behaviors and sex discrimination” over the course of twelve months. The WGRA is a Web-based, self-report survey.

DMDC began including questions about “unwanted sexual contact” in the WGRA in 2006 in order to assess the overall prevalence of sexual assault in the military. Prevalence is a measure of “the number of people in a population who experienced at least one event of interest.” The purpose of the 2012 WRGA was stated as:

Information collected in this survey will be used to research attitudes and perceptions about gender-related issues, estimate the level of sexual harassment and unwanted sexual contact, and identify areas where improvements are needed. This information will assist in the formulation of policies which may be needed to improve the working environment.

For the most recent WGRA, DMDC sent surveys to a sample population of 108,000 active duty Service men and women from September to November 2012. DMDC received completed surveys from 22,792 individuals, and defined “completed” as those surveys in which the respondents answered 50 percent or more of the survey questions. The DoD SAPRO reported an overall weighted response rate of 24 percent, extrapolated survey results for the total active duty population and estimated there were approximately 26,000 victims of unwanted sexual contact in 2012.

The WGRA included a total of 94 questions on all facets of job satisfaction and gender relations, including a number of questions regarding unwanted gender-related behaviors, gender discriminatory behaviors, and “unwanted sexual contact” the respondents experienced during the preceding 12 months. DoD SAPRO defined “unwanted sexual contact” in the 2012 WGRA as “intentional sexual contact that was against a person’s will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body.” The behavior surveyed ranged from unwanted touching to rape. While intended to capture certain acts prohibited by the Uniform Code of Military Justice (UCMJ), this definition does not specifically track any particular criminal conduct.

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54 Id.


57 2012 WGRA Survey at 2.

58 2012 Survey Note, supra note 52, at 1.

59 2012 WGRA Survey, supra note 42, at 12 (Question 32). The specific question asked of survey recipients was as follows:

In the past 12 months, have you experienced any of the following intentional sexual contacts that were against your will or occurred when you did not or could not consent where someone...

- Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
- Attempted to make you have sexual intercourse, but was not successful?
- Made you have sexual intercourse?
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

Following a positive response to whether a survey participant experienced unwanted sexual contact in the previous twelve months, subsequent questions in the 2012 WGRA ask respondents about why they did or did not report the crime to a military authority. The 2012 WGRA estimated that 66 percent of women who indicated they experienced unwanted sexual contact in the previous year did not report to military authorities, while 76 percent of men did not report. The top reasons selected by women for not reporting were: not wanting anyone to know (70%), feeling uncomfortable making a report (66%), and thinking the report would not be kept confidential (67%). The top reasons selected by men were: fear of punishment for infractions/violations (22%), feeling report would not be believed (17%), and thinking performance evaluation or chance for promotion would suffer (16%).

Since the introduction of sexual assault questions in 2006, the WGRA has been both widely cited and widely criticized as DoD continues to combat the military sexual assault problem. The Subcommittee heard from a number of national experts who specialize in developing surveys to assess and analyze crime reporting trends, as well as DoD personnel who continue to refine the WGRA and study and analyze the resulting data. In order to understand the extent of the crime problem, researchers must find a way to measure sexual violence incidence and prevalence in the most accurate way possible. Experts have conducted studies on survey purpose, design, methodology, phraseology in survey questions, and other variables in an effort to explain “why such widely diverging estimates of the level of rape occur. Ultimately, there is no precise way of knowing whether the survey results are an accurate representation of the reality of criminal behavior. In fact, one expert testified that survey approach alone could result in reporting rates that are ten times higher than would be found through alternate survey approaches.

60 Transcript of RSP Role of the Commander Subcommittee Meeting 59-60 (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); see also DoD SAPRO PowerPoint Presentation to Role of the Commander Subcommittee at 9 (Oct. 23, 2013) [hereinafter DoD SAPRO Oct. 2013 PowerPoint Presentation].

61 Id.

62 Id.


64 See Transcript of RSP Comparative Systems Subcommittee Meeting 8-9 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).


66 See Transcript of RSP Public Meeting 96 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University).

67 See Transcript of RSP Comparative Systems Subcommittee Meeting 157 (Apr. 11, 2014) (testimony of Dr. Allen Beck, Bureau of
The WGRA data also aggregates data that would be useful if differentiated, including which offenders in unreported offenses are subject to military jurisdiction. Of 6.1 percent of women who reported experiencing unwanted sexual contact in the 2012 survey, 18 percent indicated that the offender was not a DoD member.68 Nine percent indicated the offender was affiliated with DoD, but was not a military member.69 Another seven percent indicated the offender was a spouse or significant other, but the report did not note whether any of those seven percent were military or DoD affiliated.70 Of one point two percent of men who reported experiencing unwanted sexual contact, twenty-two percent indicated that the offender was not a DoD member. Twenty-five percent indicated the offender was DoD affiliated, but was not another military member.71 Another 13 percent of men who reported experiencing unwanted sexual contact indicated the offender was a spouse or significant other, but again, the report did not note whether any of those 13 percent were military or DoD affiliated.72

Despite this uncertainty, DoD has relied on the WGRA to estimate that about 26,000 active duty members (of a total active duty force of about 1.4 million) experienced unwanted sexual contact in the time period the survey covered, or 6.1 percent of women (12,100) and 1.2 percent of men (13,900). Forty-five percent of the women and 19 percent of the men who reported unwanted sexual contact in the WGRA also experienced unwanted sexual contact prior to entering the military.73 Yet, according to one sexual violence survey expert, the design used in the WGRA is “not the optimum design for assessing levels of rape and sexual assault.”74

2. National Intimate Partner and Sexual Violence Survey

Also designed to capture prevalence of sexual violence, the Centers for Disease Control and Prevention (CDC) began conducting the NISVS in 2010.75 The NISVS is an ongoing, national telephone survey conducted by random digit dial (RDD)76 that collects information on experiences of sexual violence, stalking, and intimate partner violence for men and women over age 18 in the United States.77 The NISVS is intended to assess the prevalence and characteristics of sexual violence, stalking, and intimate partner violence, risk factors for experiencing these forms of violence, patterns displayed by certain perpetrators, and the health consequences...
associated with these forms of violence. The CDC uses a broad definition of sexual violence that includes rape, sexual coercion, unwanted sexual contact, and non-contact unwanted sexual experiences.

3. National Crime Victimization Survey

The NCVS, administered continuously since 1972, is conducted by the U.S. Census Bureau for the Department of Justice Bureau of Justice Statistics (BJS). The NCVS is a national survey of randomly selected households which is administered to all members age 12 and older residing in a selected household. Once selecting a household, the Census Bureau surveys the residents every six months for a period of three years, and the BJS reports incidence of crime victimization on an annual basis. The NCVS is not limited to sexual violence, but surveys “nonfatal personal crimes (rape or sexual assault, robbery, aggravated and simple assault, and personal larceny) and household property crimes (burglary, motor vehicle theft, and other theft) both reported and not reported to police.” The sexual violence surveyed includes rape and sexual assault.

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78 Id.

79 Rape is defined as any completed or attempted unwanted vaginal (for women), oral, or anal penetration through the use of physical force (such as being pinned or held down, or by the use of violence) or threats to physically harm and includes times when the victim was drunk, high, drugged, or passed out and unable to consent. Rape is separated into three types, completed forced penetration, attempted forced penetration, and completed alcohol or drug facilitated penetration.

- Among women, rape includes vaginal, oral, or anal penetration by a male using his penis. It also includes vaginal or anal penetration by a male or female using their fingers or an object.
- Among men, rape includes oral or anal penetration by a male using his penis. It also includes anal penetration by a male or female using their fingers or an object.
- Being made to penetrate someone else includes times when the victim was made to, or there was an attempt to make them, sexually penetrate someone without the victim’s consent because the victim was physically forced (such as being pinned or held down, or by the use of violence) or threatened with physical harm, or when the victim was drunk, high, drugged, or passed out and unable to consent.
- Among women, this behavior reflects a female being made to orally penetrate another female’s vagina or anus.
- Among men, being made to penetrate someone else could have occurred in multiple ways: being made to vaginally penetrate a female using one’s own penis; orally penetrating a female’s vagina or anus; anally penetrating a male or female; or being made to receive oral sex from a male or female. It also includes female perpetrators attempting to force male victims to penetrate them, though it did not happen.

- Sexual coercion is defined as unwanted sexual penetration that occurs after a person is pressured in a nonphysical way. In NISVS, sexual coercion refers to unwanted vaginal, oral, or anal sex after being pressured in ways that included being worn down by someone who repeatedly asked for sex or showed they were unhappy; feeling pressured by being lied to, being told promises that were untrue, having someone threaten to end a relationship or spread rumors; and sexual pressure due to someone using their influence or authority.

- Unwanted sexual contact is defined as unwanted sexual experiences involving touch but not sexual penetration, such as being kissed in a sexual way, or having sexual body parts fondled or grabbed.

- Non-contact unwanted sexual experiences are those unwanted experiences that do not involve any touching or penetration, including someone exposing their sexual body parts, flashing, or masturbating in front of the victim, someone making a victim show his or her body parts, someone making a victim look at or participate in sexual photos or movies, or someone harassing the victim in a public place in a way that made the victim feel unsafe.


81 Id.

82 The BJS defines rape as, “forced sexual intercourse including both psychological coercion as well as physical force. Forced sexual intercourse means penetration by the offender(s), [Rape] includes attempted rapes, male as well as female victims, and both heterosexual and homosexual rape. Attempted rape includes verbal threats of rape. Sexual assault is defined by the BJS as, “A wide range of victimizations, separate from rape or attempted rape. These crimes include attacks or attempted attacks generally involving unwanted sexual contact between victim and offender. Sexual assaults may or may not involve force and include such things as
In contrast to prevalence surveys like the WGRA and the NISVS, incidence surveys such as the NCVS capture the number of criminal events, rather than the number of people affected by crime.\textsuperscript{83} By conducting survey interviews every six months, the BJS can isolate criminal events and determine whether or not those events were reported to the police. In doing so, the NCVS attempts to get at the “dark figure” of crime; that is, underreporting of crime not captured in law enforcement statistics.\textsuperscript{84} In 2011, the response rate for the NCVS was 88\%.

\textbf{4. Uniform Crime Report}

The UCR is a main source of national crime data that captures crimes reported to the police by the victim or a third party. State and local police departments collect and report crime data to the Federal Bureau of Investigation (FBI) for consolidation and reporting.\textsuperscript{86} “The program’s primary objective is to generate reliable information for use in law enforcement administration, operation, and management; however, its data have over the years become one of the country’s leading social indicators. Criminologists, sociologists, legislators, municipal planners, the media and other students of criminal justice use the data for varied research and planning purposes.”\textsuperscript{87} The UCR captures data for eight serious crimes: criminal homicide, forcible rape,\textsuperscript{88} robbery, aggravated assault, burglary, larceny-theft (non-motor vehicle), motor vehicle theft, and arson.\textsuperscript{89}

Comparing the UCR and the NCVS, “[T]he UCR provides a measure of the number of crimes reported to law enforcement agencies throughout the country . . . the NCVS is the primary source of information on the characteristics of criminal victimization and on the number and types of crimes not reported to law

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\textsuperscript{83} BJS PowerPoint Presentation, supra note 55, at 13.

\textsuperscript{84} Transcript of RSP Public Meeting 13 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, \& Society, American University); see also Transcript of RSP Comparative Systems Subcommittee Meeting 25 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland); id. at 124 (testimony of Dr. William J. Sabol, Acting Director, Bureau of Justice Statistics).

\textsuperscript{85} NaS RePoRt, supra note 48, at 4.

\textsuperscript{86} Transcript of RSP Public Meeting 12-13 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, \& Society, American University).


\textsuperscript{88} Prior to January 2013, the UCR defined forcible rape as, “The carnal knowledge of a female forcibly and against her will. Rapes by force or attempts or assaults to rape, regardless of the age of the victim, are included. Statutory offenses (no force used—victim under age of consent) are excluded.” Beginning in January 2013, the UCR definition of forcible rape is “[p]enetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” U.S. Dep’t of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program: Reporting Rape in 2013, at 2 (Apr. 2014), available at http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/reporting-rape-in-2013-revised.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

enforcement authorities." The NCVS also summarizes the reasons that victims give for reporting or not reporting.

5. DoD Annual Report to Congress (SAPRO Report)

Each fiscal year, DoD SAPRO submits a data call to the Military Departments for statistical and case synopsis information on sexual assault crimes, and compiles the information in an annual report to Congress. SAPRO reports information obtained through restricted and unrestricted sexual assault reports to SARCs and MCIOs across the Services. Restricted reporting allows a victim to confidentially access medical care and victim advocacy services without initiating an official investigation or command notification. Unrestricted reporting grants similar access, but the report is also referred to an MCIO and the command is notified. SAPRO released its latest annual report to Congress, covering information for fiscal year 2013, on May 1, 2014.

The term “sexual assault,” as used by DoD SAPRO, is “[i]ntentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority when the victim does not or cannot consent. The term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, nonconsensual sodomy (forced oral or anal sex), or attempts to commit these acts.” This definition differs from the offense of “sexual assault” defined in the current version of Article 120 of the UCMJ in effect since June 28, 2012.

Crime Victimization Surveys

Crime victimization surveys developed, in large part, to identify the gap in underreporting of criminal behavior. When surveying incidence and prevalence of criminal conduct, there are two typical approaches, the “public

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91 Id.


93 Id. at 17-18.

94 See FY13 SAPRO Annual Report, supra note 63.

95 The Department’s sexual assault reporting statistics include data about contact sexual crimes against active duty members. This data does not include sexual assaults against non-military spouses or intimate partners. Those cases are referred to the Family Advocacy Program. See id. at 62. For further discussion of Family Advocacy Programs, see the Report of the Victim Services Subcommittee to the Response Systems Panel, supra note 15.


97 Article 120 defines sexual assault as follows: (1) "committing a sexual act upon another person by—(A) threatening or placing that other person in fear; (B) causing bodily harm to that other person; (C) making a fraudulent representation that the sexual act serves a professional purpose; or (D) inducing a belief by any artifice, pretense, or concealment that the person is another person; (2) committing a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or (3) committing a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct." MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 45.a.(b) [2012] [hereinafter MCM], available at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.
health” approach, and the “criminal justice” approach.\textsuperscript{98} Prevalence surveys are typically used in a public health approach to surveying a certain population, whereas incidence surveys are more often used when analyzing the criminal justice response.\textsuperscript{99} Public health surveys, such as the NISVS conducted by the CDC, evaluate the characterization of physical and mental health damage to the victim. They normally have little fidelity regarding the accuracy of events, because there is little or no follow-up to distinguish timeline, definitions, or whether the reported behavior actually falls within the intended survey parameters.\textsuperscript{100} Criminal justice surveys, like the NCVS, are designed to determine whether a well-defined, specified criminal event falls into the time period captured by the survey, and are normally used for comparison with actual arrest and conviction statistics.\textsuperscript{101} There is not extensive research and development in the area of crime victimization survey methodology, but rather, surveys evolved over time through experimental survey techniques.\textsuperscript{102}

Inconsistency in survey variables creates a profound barrier to comparing sexual violence survey data from diverse sources. Since the early 1980s, victim surveys continued to evolve to include more precise definitions of the types of behaviors the surveys intended to capture. Some developments involved utilizing legal status as a basis for developing measures of rape; including more graphic, behaviorally specific language to cue respondents to recall victimization experiences, and asking about a wide variety of conduct.\textsuperscript{103} Researchers soon learned that survey data could change based on the initial described purpose of the survey, the questions asked, how questions are phrased, the “cues” used, the mode by which the survey is administered (in-person, telephonic, or computer-based), and the period of time the survey referenced.\textsuperscript{104} Response rates are also a regular source of criticism in survey research, particularly with regard to crime victimization surveys.\textsuperscript{105} Low response rates, while not uncommon, can indicate a number of biases or other problems with the survey instrument.\textsuperscript{106}

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98 See Transcript of RSP Comparative Systems Subcommittee Meeting 120 (Apr. 11, 2014) (testimony of Dr. William J. Sabol, Acting Director, Bureau of Justice Statistics).

99 See id.

100 See id. at 30 (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics, and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

101 See id. at 118 (testimony of Dr. William J. Sabol, Acting Director, Bureau of Justice Statistics, regarding comparison of NCVS data to actual crimes to determine number of unreported crimes).

102 Id. at 14 (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

103 Fisher, supra note 64.

104 See generally BJS PowerPoint Presentation, supra note 55; James P. Lynch, “Measuring Rape and Sexual Assault in Self-Report Surveys” (Apr. 11, 2014) (PowerPoint Presentation to RSP Comparative Systems Subcommittee); Fisher, supra note 64.

105 One way that surveyors attempt to counteract low response rates is to increase sample size. The sample is the number of people selected to complete a survey, and the percentage of responses received is the response rate. See generally Transcript of RSP Comparative Systems Subcommittee Meeting 33-35 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics, and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

106 Id. at 47.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

B. PUBLIC HEALTH VS. CRIME VICTIMIZATION SURVEYS

Using Crime Victimization Survey Data to Assess Crime Rather than Public Health Survey Data

**Recommendation 1:** The Secretary of Defense direct the development and implementation of a military crime victimization survey, in coordination with the Bureau of Justice Statistics, that relies on the best available research methods and provides data that can be more readily compared to other crime victimization surveys than current data.

**Finding 1-1:** The DoD Workplace Gender Relations Survey of Active Duty Members (WGRA) is an unbounded, prevalence survey that utilizes a public health methodological approach. The National Crime Victimization Survey (NCVS) is a bounded, incidence survey that takes a justice system response methodological approach. The two surveys cannot be accurately compared.

**Discussion:** The CDC conducted the first NISVS in 2010. Though spearheaded by the CDC, the National Institute of Justice and the DoD helped to design and launch the survey. As a result, the NISVS included a random sample of active duty women and female spouses of active duty military members. After adjusting NISVS data and other national studies on sexual assault prevalence, DoD concluded that “the risk of sexual contact, sexual violence, is about the same in the national population for women and also the female military population, whether you measure in the past year, the past three years or at the lifetime.”

**Campus Sexual Assault Study**

- 19% of college women experienced a sexual assault (attempted or completed oral, anal, vaginal penetration or sexual contact without consent) at some point in their 4-year college career
- 21% of active duty women (ages 18-24) experienced USC (attempted or completed oral, anal, vaginal penetration or sexual contact without consent) at some point in their military career (DMDC, 2012)

**Drug-facilitated, Incapacitated, and Forcible Rape: A National Study**

- 0.9% of U.S. women (all ages) and 5.2% of U.S. college women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey

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107 2010 NISVS SUMMARY REPORT, supra note 42, at 1.
108 Id.
110 Data provided by DoD SPRO. See, e.g., DoD SPRO Powerpoint Presentation to RSP 60 (Jun. 27, 2013).
• About 3.5% of active duty women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey (DMDC, 2012)

DoD compared the studies because the campus and incapacitation studies considered areas of concern for DoD researchers. Unwanted sexual contact in the military generally involves 18 to 24 year-old Service members who are close in rank and off-duty, but on military installations.113 The victim and offender typically know each other, and the assault involves alcohol.114 While the study populations in the campus study and incapacitation study were not identical to the population of females in the military, once adjusted for age and gender, the data reflects generally similar prevalence rates for active duty and civilian women.

The differences become increasingly problematic when public health survey data, like that from the WGRA, is used as criminal justice data. Survey experts who spoke to the Subcommittee referred to unreported crimes as the “dark figure.”115 Sometimes used to refer to the “underreporting” gap between incidence of criminal acts and actual criminal reports,116 the dark figure may also indicate the unknown population that experiences criminal activity but never reports the crime, whether through law enforcement, surveys, or other channels. The WGRA and NISVS data do not reflect incidence in a specific period of time. The method of defining a time period and ensuring that events are accurately captured within the desired time frame is known as “bounding” a survey. The WGRA is an unbounded survey, meaning there are no mechanisms in place to disregard events that are reported outside the specified time period.117

DoD’s misuse of public health survey data to estimate crime victimization data is not unique. As previously noted, BJS and the CDC conduct national surveys intended to illuminate prevalence and incidence rates in sexual assault crimes.118 Other organizations, including academic institutions, also survey sexual assault within certain communities or organizations. Some critics of the WGRA argue that these organizations, including colleges, have “similar” populations to the military, and can provide a direct comparison. There are a number of problems with this premise, some of which were addressed in the 2013 United States Commission on Civil Rights (USCCR) Report on Sexual Assault in the Military.119 Because each organization employs a separate

113 Transcript of RSP Role of the Commander Subcommittee Meeting 22 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Director DoD SAPRO).
114 Id.
115 See Transcript of RSP Public Meeting 13 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University); see also Transcript of RSP Comparative Systems Subcommittee Meeting 25 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland); id. at 124 (testimony of Dr. William J. Sabol, Acting Director, Bureau of Justice Statistics).
116 Transcript of RSP Public Meeting 13 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University); see also Transcript of RSP Comparative Systems Subcommittee Meeting 118 (Apr. 11, 2014) (testimony of Dr. William J. Sabol, Acting Director, Bureau of Justice Statistics).
117 See Transcript of RSP Role of the Commander Subcommittee 24-25 (Oct. 23, 2013) (testimony of Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center).
119 United States Commission on Civil Rights, Report on Sexual Assault in the Military 8–10 (Sept. 2013) [noting that “[t]he military environment is unlike college/university settings and even other civilian settings for a variety of reasons”), available at http://www.usccr.gov/
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

Survey methodology and approach, even surveys with similar approaches are not comparable. Experts throughout the field agree that surveying and measuring sexual assault is extremely challenging. In short, there is no consensus among researchers regarding how to develop an optimal measure for measuring sexual victimization, and the field of survey research continues to develop.

A tailored crime victimization survey, carefully designed with best practices from the BJS, could improve the accuracy of DoD’s estimates of sexual assault underreporting. The NCVS has been criticized in recent years for possibly underestimating rape and sexual assault because it is an omnibus crime survey which does not focus specifically on sexual assault, and other surveys report larger incidence of sexual violence. Recently, the National Academy of Sciences (NAS) National Research Council studied the NCVS to determine how well it assessed national crime victimization in the areas of rape and sexual assault. “The NCVS is an omnibus victimization survey . . . it has a broad mandate and focus to include a wide array of different types of victimizations, including both crimes against people and crimes against property.” The NAS released its report in 2014, making several findings and recommendations for best practices to improve the NCVS. The NAS concluded that “it is likely that the NCVS is undercounting rape and sexual assault victimization,” but that the NCVS “as an omnibus crime survey is efficient in measuring the many types of criminal victimizations across the United States, but it does not measure the low incidence events of rape and sexual assault with the precision needed for policy and research purposes.” As a result, the NAS recommended the BJS “should develop an independent survey – separate from the [NCVS] - for measuring rape and sexual assault.” Likewise, DoD should develop an independent crime victimization survey – separate from the WGRA public health survey to measure the scope of the problem of sexual assault crimes in the military.

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120 Id. (describing how variables in studies and surveys make comparison challenging, even among similar populations).
121 Bureau of Justice Statistics, Special Report on Female Victims of Sexual Violence, 1994–2010, at 2 (Mar. 2013), available at http://www.bjs.gov/index.cfm?ty=pbdetail&tid=4594; see e.g., Transcript of RSP Public Meeting 11-34 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University); see generally Transcript of RSP Comparative Systems Subcommittee Meeting (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland; and Dr. William J. Sabol, Acting Director, and Dr. Allen Beck, Bureau of Justice Statistics).
123 NAS Report, supra note 48, at 3.
124 Id. at 16.
125 NAS Report, supra note 48.
126 Id. at 4–5.
127 Id. at 162.
C. BEST PRACTICES FOR MEANINGFUL COMPARISON

Survey Design and Definitions for Meaningful Data Analysis

**Recommendation 2:** The Secretary of Defense direct that military crime victimization surveys use the Uniform Code of Military Justice’s (UCMJ) definitions of sexual assault offenses, including: rape, sexual assault, forcible sodomy, and attempts to commit these acts.

**Finding 2-1:** The definition of “unwanted sexual contact” used in the 2012 WGRA does not match the definitions used by the DoD Sexual Assault Prevention and Response Office (SAPRO) or the UCMJ, making it more helpful as a public health assessment than an assessment of crime.

**Finding 2-2:** The DoD SAPRO evaluates the scope of unreported sex offenses by contrasting prevalence data of unwanted sexual contact extrapolated from the WGRA with reported sexual assault incidents and sexually based crimes under the UCMJ. The variances in definitions lead to confusion, disparity, and inaccurate comparisons of reporting rates within DoD. While the wide range of behaviors described in the 2012 WGRA are appropriate subjects of a public health survey, the WGRA’s broad questions do not enable accurate or precise determination of sexual assault crime victimization.

**Finding 2-3:** Crime victimization surveys must be designed to mirror law enforcement reporting practices and legal definitions of crimes so that data can be analyzed, compared, and evaluated in order to assess the relative success of sexual assault prevention and response programs.

**Discussion:** In order to meaningfully analyze survey data, survey design should employ questions using consistent definitions of criminal activity. The definition of unwanted sexual contact DMDC used in the 2012 WGRA is “intentional sexual contact that was against a person’s will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body.”

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128 2012 WGRA Survey, supra note 42, at 12. Question 32 asks, “In the past 12 months, have you experienced any of the following intentional sexual contacts that were against your will or occurred when you did not or could not consent where someone . . .
   • Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
   • Attempted to make you have sexual intercourse, but was not successful?
   • Made you have sexual intercourse?
   • Attempted to make you perform or receive oral sex, anal sex, or penetration by a finger or object, but was not successful?
   • Made you perform or receive oral sex, anal sex, or penetration by a finger or object?
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In 2009, DTF-SAMS noted that the discrepancy in definitions was detrimental to any meaningful analysis, noting, “Unfortunately, survey definitions of unwanted sexual contact do not precisely match the legal definition of sexual assault and Service-wide surveys are conducted too infrequently to offer useful comparisons.” Yet the “terms, questions, and definitions of ‘unwanted sexual contact’ have been consistent throughout all of the

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128 2012 WGRA Survey, supra note 42, at 12. Question 32 asks, “In the past 12 months, have you experienced any of the following intentional sexual contacts that were against your will or occurred when you did not or could not consent where someone . . .
   • Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
   • Attempted to make you have sexual intercourse, but was not successful?
   • Made you have sexual intercourse?
   • Attempted to make you perform or receive oral sex, anal sex, or penetration by a finger or object, but was not successful?
   • Made you perform or receive oral sex, anal sex, or penetration by a finger or object?

129 Id. at 1, 12.

III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

WGRA surveys since 2006. In June 2013, the Senate Armed Services Committee (SASC) Report on the FY14 NDAA noted that “[u]sing the imprecise terms ‘sexual assault’ and ‘unwanted sexual contact’ to refer to a range of sexual offenses creates confusion about the types of unwanted sexual acts that are being perpetrated against members of the military.” The SASC then directed the DoD to “modify language used in the annual SAPRO report and the WGRS to clearly report the number of instances of each type of unwanted sexual act, to include rape, sexual assault, forcible sodomy, and attempts to commit those acts.”

A 2014 report from the National Academy of Sciences (NAS) looked at the NCVS and how legal definitions and context may have impacted survey results. The report noted, “because the [BJS] focuses specifically on criminal victimization, these definitions need to conform as much as possible to existing legal definitions.” The NAS Report recommended that uniform definitions of rape and sexual assault for the national survey include certain commonalities. The commonalities the report developed are:

- The victimization is not restricted by gender: both males and females can be victimized, and the offender can be either male or female.
- “Rape” involves a broad range of penetrations, including penetration of the vagina, anus, or mouth, and with a penis, tongue, fingers, or another object.
- The purpose is for sexual arousal or degradation.
- The offender uses force or threat of force, against either the victim or another person.
- The victim does not consent to the sexual activity or does not have the capacity to consent.
- “Sexual assault” includes a fairly wide range of victimizations that involve unwanted non-penetration sexual contact.

Data from the 2012 WGRA indicates that of the 1.2 percent of men and 6.1 percent of women who experienced unwanted sexual contact, 57 percent of women and 15 percent of men indicated experiencing attempted or completed sexual intercourse, anal, or oral sex. Another 32 percent of women and 51 percent of men indicated experiencing non-penetrative, unwanted sexual touching, while 10 percent of women and 34 percent of men indicated experiencing some unspecified behavior. A crime victimization survey with questions specifically designed to capture certain behaviors would provide better fidelity in the breadth and depth of the military sexual assault problem.

133 Id. at 120.
134 NAS REPORT, supra note 48, at 23.
135 Id. at 33.
Like the NISVS, the WGRA does not include follow-up interviews or other “second-staging” to confirm that an event reported by a respondent meets the intended definition within the WGRA parameters.\(^{137}\) This is typical of public health surveys, which are less concerned with the event, and more concerned with the impact on the individual.\(^{138}\) Conversely, the NCVS, currently in redesign to better conform to the latest developments and best practices in crime victimization incidence surveys, includes follow-on interviews during which the interviewer clarifies responses, timelines, and reported behaviors to ensure an accurate accounting of crime incidence.\(^{139}\) The NCVS interview technique has moved away from presenting a respondent with legal definitions, but rather, developed clear, concise questions regarding the underlying behavior that may constitute a criminal act. Known as “cues,” these well-developed, behavior-centered questions direct the respondent to recall specific events that constitute elements of criminal acts, rather than relying on the respondent’s classification of criminal or non-criminal acts.\(^{140}\)

In a survey which takes a public health approach, use of crime-based behavioral cues may be less important. Whether or not a reported behavior constitutes a criminal act may be immaterial to the survey and/or the respondent, who was greatly impacted by an event. As a public health survey, the WGRA can capture prevalence of behavior that emotionally impacts a respondent, retaliation for reporting, evaluating known barriers to reporting, assessing satisfaction with victim services, or other public health concerns. This data can continue to inform DoD leadership on education, behavioral health, or prevention efforts, for example. When looking at incidence of criminal conduct, narrowly defining behaviors that constitute criminal acts within specified bounded time periods is crucial to the accuracy of the survey data.\(^{141}\)

**Restricting the Use of WGRA Data as a Public Health Assessment, rather than as a Measure of Crime in the Military**

**Recommendation 3:** Congress and the Secretary of Defense rely on the WGRA for its intended purpose—to assess attitudes, identify areas for improvement, and revise workplace policies as needed—rather than to estimate the incidence of sexual assault within the military.

**Finding 3-1:** Surveying and collecting data on sexual assault victimization is challenging and costly. There are two primary approaches to surveying sexual assault. The first is a public health approach, which casts a broad net to assess the scope of those injured by coercive sexual behavior. The second is a criminal justice approach, which seeks to account for unreported incidences of criminal sexual misconduct and seeks to measure the scope of unreported sexual offenses.

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138 See Transcript of RSP Comparative Systems Subcommittee Meeting 29–30 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

139 See id. at 58–59.

140 See id.

141 See generally id. at 27–28.
III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

**Finding 3-2:** The DoD WGRA is a valuable public health survey, but it is not intended to, and does not accurately measure the incidence of criminal acts committed against Service members.

**Discussion:** The DoD has spent significant time, money, and manpower developing, administering, and analyzing data in efforts to combat sexual assault. The data collected from the WGRA has been used, among other ways, to identify an underreporting gap between estimated prevalence of unwanted sexual contact and actual incidence of restricted and unrestricted sexual assault reports. Several experts explained to the Subcommittee that while misuse of the WGRA data for incidence reporting comparisons is problematic, there is still a great deal of information that can be gleaned from the prevalence data collected. One expert explained that the DoD could analyze data previously collected for additional patterns and information to inform crime victimization concerns.

As the expert explained, there are three categories in which the data could be useful. The first involves breaking out the data by the “type” of unwanted sexual contact to determine whether any trends in behaviors emerge that might indicate how well the military is doing at combating certain behaviors – from sexual harassment to unwanted touching and forcible rape. Second, DoD should evaluate prevalence rates to determine who is at the greatest risk for unwanted sexual contact in order to more specifically target prevention and education efforts. The last category of data would evaluate victim satisfaction or dissatisfaction with the system and how it contributes to actual reporting of events.

**Reliability Based on Response Rates**

**Recommendation 4:** The Secretary of Defense seek to improve response rates to all surveys related to workplace environments and crime victimization in order to improve the accuracy and reliability of results.

**Finding 4-1:** In 2012, the Defense Manpower Data Center (DMDC) sent the WGRA to 108,000 active duty Service members. Approximately 23,000 survey recipients, or 24 percent, responded. 24 percent is considered a low response rate when compared to the 67-75 percentages at Service Academies and rates of other civilian public health surveys. When the response rate is below 80 percent, the Office of Management and Budget (OMB) requires an agency to conduct an analysis of nonresponse bias. As a result, the WGRA data is at greater

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142 See generally Transcript of RSP Role of the Commander Subcommittee Meeting 174–175 (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); DoD SAPRO Oct. 2013 PowerPoint Presentation, supra note 59.


144 See generally Transcript of RSP Comparative Systems Subcommittee Meeting (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland; and testimony of Dr. William J. Sabol, Acting Director, and Dr. Allen Beck, Bureau of Justice Statistics); see also Transcript of RSP Public Meeting 29–33 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University).

145 Transcript of RSP Public Meeting 29 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University).

146 Id. at 29–30.

147 Id. at 31–32.

148 Id. at 32–33.
risk for bias in the sampling and, therefore, less reliable. One of the reasons for the low response rate may be survey fatigue.

**Discussion:** There are a number of biases that finite data analysis can identify, one of which is known as an avidity bias. The avidity bias explains that, “persons interested in the survey or more engaged in the topic of the survey may be more likely to respond than those with less interest in it.”\(^\text{149}\) Non-response studies often compare the respondents to the overall sample population in order to detect what biases, if any, exist.\(^\text{150}\)

One way DoD attempts to counter the low response rate to the WGRA is through weighting.\(^\text{151}\) Weighting is the process of separating respondents into sub-categories and adjusting their responses up to reach a representative proportion of the total population.\(^\text{152}\) Weighting also assumes that “any kind of bias is going to be related to the [weighting] characteristics that they use to weight it up.”\(^\text{153}\) In other words, if there are biased responses not related to the categories used to weight responses, those biases may be over (or under) represented in the weighted numbers. “It’s a matter of pursuing the data in greater detail, I think, and try to do various adjustments and yet when you have a low response rate, it’s very difficult to rule out certain bias.”\(^\text{154}\) Low response rates may result in prejudicial bias, and for any government survey with an anticipated response rate of less than 80 percent, the OMB requires a bias-analysis plan prior to authorizing the survey.\(^\text{155}\) DoD has not shared the data or methods used to weight or impute non-response bias, so the Subcommittee cannot draw any conclusions as to the weighting process’ validity.

Increasing response rates will likely benefit the overall survey process. DoD administers surveys at the Military Service Academies every two years with an average response rate of between 67 and 75 percent.\(^\text{156}\) While still lower than the OMB 80 percent standard, it is significantly higher than the WGRA 24 percent response rate. DoD admits that this provides a “better drill down capability at the Military Service Academies.”\(^\text{157}\) The WGRA is also an online survey, and “web-based surveys are kind of akin to mail-in surveys, they tend to have a lower response rate than in-person or telephone surveys.”\(^\text{158}\) DoD also acknowledges that there are a number of surveys that Service members are asked to complete, and some of that “survey fatigue” may contribute to lower

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149  **BJS PowerPoint Presentation, supra** note 55, at 6.

150  **Transcript of RSP Comparative Systems Subcommittee Meeting 47** (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

151  **See Transcript of RSP Public Meeting 127-32** (June 27, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO).

152  **See generally Transcript of RSP Comparative Systems Subcommittee Meeting 82-86** (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland).

153  **Id.** at 85.

154  **See id.** at 152 (testimony of Dr. Allen Beck, Bureau of Justice Statistics).

155  **BJS PowerPoint Presentation, supra** note 55, at 6.

156  **See Transcript of RSP Public Meeting 121** (June 27, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO, explaining survey administration at Service Academies) “[W]e round everybody up in a room and sit them down . . . . They can get up and leave if they want to, but most of the time they’ll at least participate and fill [the survey] out.”

157  **See id.**

158  **Id.** at 16 (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University).
III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

response rates. While response rates are important, over-surveying a population with multiple or lengthy surveys will likely erode the overall response rate and reliability of the data. “I think ultimately it is about communicating respect to your respondents, and if you just kind of drill them on question after question after question, I think that’s a real sign of disrespect, and respondents pick up on that.”

D. STUDYING recent trends in military reporting

Using Existing Data from Prior WGra Reports

Recommendation 5: The Secretary of Defense direct that raw data collected from all surveys related to workplace environments and crime victimization be analyzed by independent research professionals to assess how DoD can improve responses to military sexual assault. For example: the survey’s non-response bias analysis plan should be published so that independent researchers can evaluate it; the spectrum of behaviors included in “unwanted sexual contact” should be studied to inform targeted prevention efforts; and environmental factors such as time in service, location, training status, and deployment status should be analyzed as potential markers for increased risk.

Finding 5-1: The 2012 WGRA collected a large amount of data that is useful as public health information and can be analyzed to provide DoD leadership with better insight into areas of concern, patterns and trends in behavior, and victim satisfaction. If used correctly, this data can aid leaders in better evaluating readiness, assessing the health of the force, identifying patterns and trends in behavior, directing efforts in prevention of and response to sexual assault and sexual harassment across the force, and assessing victim satisfaction.

Finding 5-2: The Centers for Disease Control and Prevention (CDC) conducts a public health survey called the National Intimate Partner and Sexual Violence Survey (NISVS) to measure the prevalence of contact sexual violence. In 2010, the NISVS was designed and launched with assistance from the National Institute of Justice and the DoD. NISVS includes a random sample of active duty women and female spouses of active duty members. The NISVS revealed that the overall risk of contact sexual violence is the same for military and civilian women, after adjusting for differences in age and marital status.

Discussion: Public health surveys and prevalence reporting is beneficial, as information from the WGRA survey is also used to estimate and assess the scope of sexual assault behaviors and concerns throughout DoD. In the 2012 WGRA, DMDC received 22,792 completed surveys, which represented a weighted response rate of 24 percent. Survey results from 2012 indicated 6.1 percent of female respondents and 1.2 percent of male respondents said they experienced “unwanted sexual contact” in 2012. The rate for females in the 2012 WGRA was statistically significantly higher than results from the 2010 WGRA, when 4.4 percent of female

159 See generally id. at 122-123 (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO).
161 Transcript of the RSP Role of the Commander Subcommittee Meeting 55-56 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, DoD SAPRO).
respondents indicated unwanted sexual contact.\textsuperscript{164} This estimate represented a 34 percent increase from the 2010 WGRA survey estimate of 19,300, but a 24 percent decrease from the 2006 WGRA survey estimate of 34,200.\textsuperscript{165}

Sexual violence is a “major public health problem,” according to the NISVS, and sexual assault survivors often experience “physical injury, mental health consequences such as depression, anxiety, low self-esteem, suicide attempts, and other health consequences.”\textsuperscript{166} Recognizing these trends as a factor of prevalence, not incidence, provides DoD a public health resource and insight into the overall readiness and health of the force, and provides a planning consideration for things like behavioral health services.

**Suggested Improvements for the 2014 WGRA Survey**

**Recommendation 6:** The Secretary of Defense direct the creation of an advisory panel of qualified experts from the Bureau of Justice Statistics and the National Academy of Sciences’ Committee on National Statistics (CNSTAT) to consult with RAND, selected to develop and administer the 2014 WGRA, and any other agencies or contractors that develop future surveys of crime victimization or workplace environments, to ensure effective survey design.

**Finding 6-1:** RAND Corporation will develop, administer, collect, and analyze data for the 2014 WGRA. RAND has partnered with Westat, the same company the Bureau of Justice Statistics uses, for survey expertise assistance.

**Discussion:** An accurate assessment of the “dark figure” of underreported crime is critical in assessing the success of DoD SAPR programs, victim services, and justice response. In an effort to improve the WGRS, the Secretary of Defense directed a non-DoD entity assess and conduct the 2014 WGRS.\textsuperscript{167} In response, DoD contracted with the RAND Corporation, a federally funded research and development center. RAND, in turn, subcontracted with Westat, a civilian research firm also used by BJS, to “deploy and administer the survey.”\textsuperscript{168} DoD considered a number of prior criticisms of the current WGRS, and instituted changes for the 2014 WGRS in order to combat some of those issues. For instance, the 2014 WGRS will include a larger survey sample, where 100 percent of female Service members and 25 percent of male Service members will have the opportunity to take the survey, with a total sample population of approximately 500,000 people, or nearly one-third of the total force.\textsuperscript{169} RAND will also review current WGRS methodology and attempt to increase response rates and reduce non-response bias. The Subcommittee again encourages transparency in any imputation or weighting done by RAND and DoD.

\textsuperscript{164} Id.

\textsuperscript{165} Transcript of the RSP Role of the Commander Subcommittee Meeting 55–56 (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); DoD SAPRO Oct. 2013 PowerPoint Presentation, supra note 59, at 9.

\textsuperscript{166} Transcript of RSP Public Meeting 52 (June 27, 2013) (testimony of Ms. Delilah Rumburg, Executive Director, Pennsylvania Coalition Against Rape).

\textsuperscript{167} See DoD SAPRO, “2014 DoD Workplace and Gender Relations Survey (WGRS)” (Apr. 9, 2014), currently available at http://responsesystemspanel.whs.mil/.

\textsuperscript{168} See id.

\textsuperscript{169} See id.
IV. OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT

A. THE VICTIM CENTRIC MULTIDISCIPLINARY APPROACH

The best practice in both the civilian sector and military community is to take a multidisciplinary approach to responding to incidents of sexual assault. This requires communication and cooperation of law enforcement personnel, medical professionals, victim advocates and victims’ counsel, prosecutors, paralegals, and other agencies in the community who provide support to sexual assault victims. Some civilian communities have created a Sexual Assault Response Team made up of various response personnel, including a single coordinator for victim support services, non-profit victim advocates, law enforcement representatives, prosecutors (who may also have victim advocates within their offices), and medical personnel. Figure 1 depicts how the military’s response system is centered on the victim. The participants include: (1) the command and unit leadership, (2) the Sexual Assault Response Coordinator (SARC) and victim advocate, (3) the Special Victim Counsel and legal assistance counsel provided by the military, (4) medical care and behavioral health services personnel, chaplains, and social services on and off post, (5) and those who are part of the Special Victim Capability, the Special Victim Unit Investigator, Special Victim Prosecutor, and the Victim Witness Liaison who works in concert with the SJA and prosecutor’s office.

Figure 1. The Multidisciplinary Approach to Victim Support

This diagram is an adaptation from a similar graphic provided by the Marine Corps in response to Request for Information 21. See Marine Corps’ Response to Request for Information 21 (Nov. 21, 2013), at 400419, currently available at http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q21.pdf.
B. THE SPECIAL VICTIM CAPABILITY IN THE MILITARY

“The [Special Victim Capability (SVC)] represents a multidisciplinary, coordinated approach to victim support and offender accountability.”\(^{171}\) DoD policy states that “[a]t a minimum, the SVC will provide for specially trained prosecutors, victim witness assistance personnel, paralegals, and administrative legal support personnel who will work collaboratively with specially trained MCIO investigators.”\(^{172}\) It also requires that the “[d]esignated Special Victim Capability personnel will collaborate with local Military Department SARCs, sexual assault prevention and response victim advocates (SAPR VAs), family advocacy program managers (FAPMs), and domestic abuse victim advocates (DA VAs) during all stages of the investigative and military justice process to ensure an integrated capability, to the greatest extent possible.”\(^{173}\)

While funding and requirements are legislated, implementation of Special Victim Capabilities is left for each Service to tailor programs to specific needs of their Service culture. “The Department’s collective capability is presented uniquely in each Military Service,”\(^{174}\) as established in the table below:\(^{175}\)

<table>
<thead>
<tr>
<th>Army</th>
<th>23 Special Victim Prosecutors dedicated to handling sexual assault and family violence cases. Army SVPs work with CID special investigators and Special Victim Unit (SVU) investigative teams at over 65 installations worldwide to investigate and prosecute special victim offenses. The Army has also retained several Highly Qualified Experts (HQEs) who have served as civilian criminal prosecutors to provide training, mentorship, and advice to judge advocates and CID special investigators across the globe.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air Force</td>
<td>16 Senior Trial Counsel, including 10 who are members of the SVU, working alongside 24 Air Force Office of Special Investigations (AFOSI) special investigators located at 16 Air Force installations with a high number of reported sexual offenses. The Air Force has also established a reach-back capability situated at Joint Base Andrews, Maryland, which is comprised of the AFOSI Sexual Assault Investigation and Operations Consultant and the JAG Corps SVU Chief of Policy and Coordination, who provide expert assistance for investigators and judge advocates in the field.</td>
</tr>
</tbody>
</table>

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\(^{173}\) Id.

\(^{174}\) Id., at 8-9.

\(^{175}\) Data for the chart was provided by the Services. See Services’ Response to Request for Information 50 (Nov. 21, 2013).
IV. OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Navy

9 regional-based Senior Trial Counsel who collaborate with Naval Criminal Investigative Service (NCIS) special investigators to investigate, review, and prosecute special victim cases. The Navy has also created a Trial Counsel Assistance Program (TCAP) with case review and prosecution reach-back and support. TCAP attorneys can also be detailed to prosecute complex cases. The Navy also has several civilian and highly qualified expert positions, through which civilian attorneys with extensive prosecution experience provide assistance to trial counsel in complex and sexual assault cases and specialized training.

Marine Corps

Specially qualified, geographically-assigned Complex Trial Teams led by a seasoned Regional Trial Counsel providing the special victim prosecutorial expertise and support. The Marine Corps has also established HQE positions, through which civilian attorneys with extensive litigation and court-martial experience provide assistance to trial counsel in complex and sexual assault litigation. Marine Corps judge advocates will also team with NCIS special investigators in special victim cases. Furthermore, the Marine Corps recently increased the opportunity for its judge advocates to receive graduate-level education in criminal law.

C. THE PERSONNEL WHO PARTICIPATE IN THE RESPONSE SYSTEMS TO SEXUAL ASSAULT

1. The Need for Standardized Terminology

The Subcommittee recognizes the importance of the Services maintaining the discretion to implement the SVC to meet the structure of their force and resource requirements. However, there are fundamental aspects of the system which should be standardized, including nomenclature of personnel positions created by the Special Victim Capability. Like civilian jurisdictions which vary naming conventions from jurisdiction to jurisdiction, each Service uses varied terms to describe its personnel. Naming of victim advocate and support personnel, prosecuting attorneys, attorneys who represent victims in the criminal process, police department sexual assault investigators, and in-house investigators should be standardized across DoD to prevent confusion, redundancy, and inefficiency.

For the purpose of this report, the Subcommittee uses the following nomenclature to refer to civilian and military personnel:

- **SART** – Sexual Assault Response Team. An Interagency team of individuals working to provide services for the community by offering specialized sexual assault intervention services. In the military, this will include the SARC, victim advocate, special victim counsel, and medical personnel to include SANEs.

- **SARC** – Sexual Assault Response Coordinator. The individual who coordinates and refers victims to the appropriate services.

- **SANE** – Sexual Assault Nurse Examiner. SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform sexual assault exams.\(^{176}\)

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

• **SAMFE** – Sexual Assault Medical Forensic Examiner. SAMFEs are medical personnel who are clinically trained to perform a sexual assault exam, and who have obtained an additional forensic certification to collect forensic evidence from sexual assault victims. Often, the SAMFE is a SANE nurse who has completed the forensic certification.

• **Victim Advocate** – the initial advocate providing assistance to the victim whose only allegiance is to the victim. He/she is available to provide support throughout the process.

• **Victim Coordinator** – an individual providing victim support from the law enforcement agency through the investigative process.

• **Victim Witness Liaison** – an individual providing victim support from the prosecutor’s office through the prosecution of the case.

• **Special Victim Counsel** – victim attorney.\(^\text{177}\)

• **Special Victim Prosecutor** – the military prosecutor specifically trained for special victim crimes, to include adult sexual assault cases.\(^\text{178}\)

• **Special Victim Unit Investigator** – military investigator specializing in special victim crimes, to include adult sexual assault cases.\(^\text{179}\)

• **Detective** – Civilian Law enforcement based investigator, assigned to conduct investigations subsequent to a patrol officer’s first response.

• **Investigator** – A trained criminal investigator employed by the prosecution or defense office to provide investigative support specifically for that office.

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\(^{177}\) The Navy and Marine Corps refer to this person as Victim Legal Counsel.

\(^{178}\) The Air Force and Navy refers to this person as Senior Trial Counsel. The Marines use Complex Trial Teams for serious sexual assault case and rely on the Regional Trial Counsel to provide the support for the Special Victim Capability.

\(^{179}\) DoD uses the term Special Victim Unit Investigator to refer to the MCIO agent or investigator supporting the Special Victim Capability. The MCIOs refer to the military personnel as agents, and civilians are agents or investigators based on their hiring status. For the purpose of this report, we will use the DoD term investigator.

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*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
IV. OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT

2. Comparing Civilian and Military Sexual Assault Response System Personnel

Figure 2

Primary Personnel Responsibilities in Civilian Sexual Assault Response

- Emergency Response & Reporting
  - EMT/Medical & Hospital Personnel
  - Police Department
  - SAMFE Support
  - Victim Advocate*

- Law Enforcement Response & Investigation
  - Detectives from Local PDs
  - Special Victim Units or Detectives*
  - Victim Coordinator

- Prosecutorial and Attorney Support
  - Prosecutors
  - Victim-Witness Liaison
  - Victim Attorney (in few jurisdictions)
  - Victim Advocate
  - Defense Counsel (appointed if not requested earlier)

Primary Personnel Responsibilities in Military Sexual Assault Response

- Emergency Response & Reporting
  - EMT/Medical & Hospital Personnel
  - MP/MCIO
  - SAMFE Support
  - SARC/VA*
  - Command Support*

- Law Enforcement Response & Investigation
  - Special Victim Unit Investigator (MCIO)
  - Other MCIO personnel as required

- Prosecutorial and Attorney Support
  - Special Victim Prosecutor/Paralegal
  - Victim-Witness Liaison
  - Defense Counsel (appointed if not requested earlier)
  - Special Victim’s Counsel (if Requested)*

* Annotated personnel, once involved, may remain involved in the case processing through each phase.
A. INTRODUCTION

Each of the Military Services has separate police and investigative agencies to respond to crimes committed on military installations and by military members. Police patrols on an installation have a safety, security, and law enforcement mission. MCIOs investigate felony level offenses committed on a military installation or by a Service Member in any jurisdiction. The Service MCIOs are: the Army Criminal Investigation Command (CID); the Naval Criminal Investigative Service (NCIS); and the Air Force Office of Special Investigations (AFOSI). The Coast Guard Investigative Service (CGIS) is not formally considered an MCIO as it falls under the Department of Homeland Security, but does provide the same function and capability. Therefore, for the purposes of this report it is treated as an MCIO.

The MCIOs operate under a separate chain of command from the installation leadership and do not require approval in conducting their investigations from any authority outside their independent chain of command. Commanders are forbidden to impede or interfere with investigations or the investigative process.180

The Military Services have worked to improve their investigation and law enforcement response to sexual assault following recent reviews of the military’s efforts against sexual assault in the military and Service academies.181 The military law enforcement community responded by developing specialized teams to handle sexual assault investigations and advanced training to prepare these investigators for this task.182 As one civilian expert testified, “DOD ha[s] done an incredible amount of work in a short amount of time combating sexual assault and violence against women . . . We have never seen that kind of change in a civilian community and I just wish more people would recognize that fact.”183

On January 25, 2013, DoD directed that “MCIOs will initiate investigations of all offenses of adult sexual assault of which they become aware . . . that occur within their jurisdiction, regardless of the severity of the allegation.”184 Specially trained MCIO investigators, not a victim’s immediate commander or chain of command,

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182 DTFSMS, supra note 130, at 88.
184 DoDI 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE ¶ 3.a (Jan. 25, 2013).
conduct investigations of every unrestricted sexual assault reported. A commander of a victim or alleged offender may not conduct an internal investigation or delay reporting to the MCIO in order to determine whether the report is credible and must report all allegations to an MCIO upon first learning of the allegation. Investigators must further ensure a SARC is notified as soon as possible to ensure system accountability and the victim’s access to services.

Allegations of military sexual assault are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. For example, if a Service member is accused of committing a sexual assault in the civilian community, not on a military installation, civilian law enforcement authorities have primary jurisdiction over the investigation and the MCIO provides assistance, as requested. In other cases, an alleged assault may occur in an area on a military installation where there is both federal and civilian criminal jurisdiction. In these instances, the MCIO must inform the civilian jurisdiction, which may accept investigative responsibility if the MCIO declines, or the civilian agency and the MCIO may conduct the investigation jointly.

**B. ORGANIZATIONAL STRUCTURE OF MCIOS AND SPECIAL VICTIM UNITS**

**Recommendation 7:** The Secretary of Defense direct commanders and directors of the Military Criminal Investigative Organizations (MCIOS) to require Special Victim investigators not assigned to a dedicated Special Victim Unit (SVU) coordinate with a senior SVU agent on all sexual assault cases.

**Finding 7-1:** Large civilian police agencies and MCIOS have SVUs comprised of specially trained investigators experienced in responding to sexual assaults. Smaller locations without an SVU often have a specially trained detective to investigate sexual assaults and the ability to coordinate with larger offices for assistance and guidance.

**Finding 7-2:** Unlike patrol officers in many civilian jurisdictions, military patrol officers (military police) have no discretion regarding the handling of sexual assault reports. Military police must immediately report all

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185 *Id.* at encl. 2, ¶ 6.

186 DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* encl. 5, ¶ 3.h(1) (Mar. 28, 2013). DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. See *id.* at encl. 4, ¶ 4.

187 *Id.* at encl. 2, ¶ 1.

188 For offenses committed by a Service Member off a military installation the MCIO will conduct a joint investigation if the local law enforcement allows them to participate.

189 DoDI 5525.07, *Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes* encl. 2, ¶ 3b (June 18, 2007). If the offense is committed on a military installation with exclusive federal jurisdiction by individuals not subject to the UCMJ the MCIO will notify the Federal Bureau of Investigation.

190 DoDI 5505.18 ¶ 3.c(3).

191 Special Victim Unit (SVU) is used as 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.

192 *See infra* Sections C and D.
incidents of sexual assault to the MCIO. The MCIO assigns cases to investigators who meet specified training requirements.

Finding 7-3: While MCIOs technically follow DoD’s requirement to assign sexual assault cases to specially trained investigators, the investigators located at smaller installations, are not dedicated SVU investigators, specializing in sexual assault. There is no requirement for the non-SVU, school trained agent to coordinate with the SVU investigator supporting the Special Victim Capability

Discussion

In many large civilian jurisdictions, SVUs are organized and detailed to investigate sexual assault. The SVU is typically a specialized unit designated to investigate adult sexual assault crimes, and is normally a subdivision of the detective or major crimes division. These units typically also investigate domestic violence and child abuse cases. In smaller civilian police agencies, there may be too few investigators available to specialize.

Currently, there are SVUs throughout the Services at installations with the highest military populations. NCIS has used Family and Sexual Violence (F&SV) teams at locations with large populations for some time, starting in Norfolk, Virginia, in 1996. Army CID was authorized to hire civilian investigators and began organizing SVUs in 2009, and now has 21 SVU civilian investigators at 19 locations. AFOSI was given the authorization and funding to hire investigators to fill Sexual Assault Investigator positions in 2010, and has 24 investigators assigned to 18 locations. NCIS has 104 investigators dedicated to F&SV at eight locations, recently authorizing the addition of 54 new investigators. Within this cadre of investigators, NCIS has created Adult Sexual Assault Program (ASAP) teams to conduct sexual assault investigations at its four locations with the highest troop density.

CGIS does not have designated SVUs because it considers all investigators capable of conducting sexual assault investigations. Fifteen investigators are trained and designated as Family and Sexual Violence

193 Members of the Subcommittee visited several jurisdictions nationwide to assess best practices in investigation and prosecution procedures. Prior to those visits, the Joint Service Committee-Sexual Assault Subcommittee (JSC-SAS) was tasked to identify civilian best practices in the investigation, prosecution, and adjudication of sexual assaults that might be considered for inclusion in the military systems. The report relies on its findings, as well as the Subcommittee’s site visits.


197 Air Force’s Response to Request for Information 50 (Nov. 21, 2013).


199 See Transcript of RSP Public Meeting 184-88 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, Deputy Assistant Director, Naval Criminal Investigative Service (NCIS)).
Investigators (FSVI), acting as specialists for reports of family and sexual violence. CGIS works closely with local law enforcement agencies, which may respond initially when a CGIS agent is unavailable.200

The military and civilian systems differ on the initial police response to a report of sexual assault. Historically, in many jurisdictions, a civilian police officer responding to a reported sexual assault would determine how to document the call.201 There could be no documentation at all, documentation as a nonsexual offense, or documentation as a sexual assault. If the officer did not believe the individual was a victim of a sexual assault, it was not documented as such and no follow-up occurred.202

In several major cities, the responding officers dismissed a high percentage of incidents reported as sexual assault in 911 calls. In the remaining cases where the responding officer submitted a report of sexual assault to a detective, detectives often dismissed a high percentage of incidents referred to them before presenting the cases to the prosecutor.203 More recently, some of these structures have changed.

Several civilian agencies have increased their vigilance of initial reports to decrease the mishandling of sexual assault cases.204 In some jurisdictions, patrol officers still retain some discretion, but a supervising officer generally must review their decisions and officers consult with detectives who decide how to classify the complaint.205 For example, in Baltimore, Maryland a patrol officer cannot dismiss a sexual assault complaint without an SVU detective’s approval.206 Other civilian agencies have similar, or even more restrictive, protocols.207

Military police patrol officers who receive or respond to a sexual assault report must contact the MCIO.208 Responding military police patrols have a very limited role in sexual assault investigations. A responding patrol officer will remain with the victim, ensure evidence is not destroyed, assess the victim’s need of immediate medical attention, and obtain only enough information to determine the identity and location of the alleged assailant, if the victim can identify him or her.209 Patrol officers do not conduct detailed interviews of victims or obtain statements. If possible, patrol officers may identify other witnesses and will document the victim’s

200 See id. at 192-98 (testimony of Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Investigative Service).
201 See id. at 275 (testimony of Sergeant Liz Donegan, Austin Police Department).
202 MARYLAND COALITION AGAINST SEXUAL ASSAULT, BALTIMORE CITY SEXUAL ASSAULT RESPONSE TEAM, ANNUAL REPORT 2 (Oct. 2011) [hereinafter MCASA].
203 Id.; see also Joanna Walters, Investigating Rape in Philadelphia: How One City’s Crisis Stands to Help Others, THE GUARDIAN (July 2, 2013).
205 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014) (on file at RSP) (interview with Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County).
206 MCASA, supra note 202, at 8.
207 See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff’s Office); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC) (Feb. 20, 2014) (on file at RSP).
208 DODI 5505.18 ¶ 2.c. Section 1742 of the FY14 NDAA codifies this requirement.
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

emotional and physical condition, which the patrol officer briefs to the responding MCIO investigators. The MCIO agent may direct the patrol officer to provide assistance with scene security, crime scene searches, or other tasks.210

At smaller installations where there is no SVU, MCIO investigators may not be as experienced as more seasoned special victim investigators who are imbedded in SVUs at larger, busier jurisdictions. While fully qualified, additional oversight from a senior SVU investigator will ensure that the investigating MCIO agent has thoroughly investigated the allegation, preserved evidence when possible, and safeguarded the rights of both the victim and the accused. Ensuring oversight will likely increase the accuracy, reliability, and completeness of the investigation, resulting in stronger prosecutions and convictions in appropriate cases.

C. SELECTION AND EXPERIENCE

Recommendation 8: The Secretary of Defense direct MCIO commanders and directors to carefully select and train military investigators assigned as investigators for SVUs, and whenever possible, utilize civilians as supervisory investigators. MCIO commanders and directors ensure that military personnel assigned to an SVU have the competence and commitment to investigate sexual assault cases.

Finding 8-1: A best practice in civilian investigative agencies with SVUs is careful interview and selection of applicants in an effort to ensure those investigators with biases or a lack of interest in investigating sexual assault cases are not assigned, as well as reassigning those who experience “burn out.” 211

Finding 8-2: A best practice in the military is the assignment of civilian investigators to supervise the SVU enhancing the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.

Finding 8-3: Military requirements and flexibility in personnel assignments may result in an agent who did not volunteer being assigned to support a SVU or act as the lead agent on a sexual assault investigation.

Finding 8-4: Both military and civilian agencies recognize the possibility of bias in their officers and investigators. 212

Discussion

In both military and civilian investigative agencies the response to a sexual assault can be impaired by the prejudices and biases of the responding police and investigators. This could result in a failure to aggressively follow-up on a complaint or inappropriate disposition of cases. Military and civilian agencies with SVUs

210 Services’ Responses to Request for Information 53 (Nov. 21, 2013).

211 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff’s Office); see also Transcript of RSP Comparative Systems Subcommittee Meeting 341–42 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

212 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 83 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, U.S. Army Military Police School (USAMPS)); see also note 215, infra.
recognize detectives assigned to those units should have both the capability and commitment to investigate sexual assaults.\textsuperscript{213}

Ideally, experienced investigators are voluntarily assigned to SVUs.\textsuperscript{214} Military and civilian agencies recognize the need to assign detectives who have a desire to work sexual assault cases to SVUs.\textsuperscript{215} The MCIOs created civilian SVU team chief and investigator positions, and carefully filled them with specifically selected investigators.\textsuperscript{216}

On April 17, 2014, the Secretary of Defense directed the DoD Inspector General to “evaluate standards and criteria for screening, selection, training, and as applicable, certifying, of [MCIO] investigators who conduct criminal investigations, to include supporting the DoD Special Victim Capability.”\textsuperscript{217} The Secretary’s directive is intended to ensure the Military Departments are properly screening and selecting military criminal investigative personnel, in addition to other sexual assault response and prevention personnel.\textsuperscript{218} Service recommendations for criteria and standards for screening and selection are due to the Secretary of Defense by May 30, 2014, following publication of this report.

D. INVESTIGATOR TRAINING

**Recommendation 9-A:** Congress appropriate centralized funds for training of sexual assault investigation personnel. The Secretary of Defense direct the Service Secretaries to program and budget funding, as allowed by law, for the MCIOs to provide advanced training on sexual assault investigations to a sufficient number of SVU investigators.

**Recommendation 9-B:** The Secretary of Defense direct commanders and directors of the MCIOs to continue training of all levels of law enforcement personnel on potential biases and inaccurate perceptions of victim behavior. The Secretary of Defense direct the MCIOs to also train investigators against the use of language that inaccurately or inappropriately implies consent of the victim in reports.

**Finding 9-1:** Military investigators have more robust and specialized training in sexual assault investigations compared to their civilian counterparts. The Military Services require investigators assigned to SVUs to have advanced training, but the courses vary in content and emphasis.

\textsuperscript{213} See, e.g., \textit{id. at 342} (testimony of Major Martin Bartness, Baltimore Police Department).

\textsuperscript{214} See, e.g., \textit{id. at 343}.

\textsuperscript{215} See, e.g., \textit{id. at 342}.

\textsuperscript{216} See, e.g., \textit{Transcript of RSP Public Meeting 91–92} (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command (CID)).

\textsuperscript{217} U.S. Dept’ of Def., \textit{Memorandum from the Secretary of Defense on Sensitive Position Screening in Support of Sexual Assault Prevention and Response} (Apr. 17, 2014).

\textsuperscript{218} \textit{Id.}
Finding 9-2: A best practice in both military and civilian agencies is to provide training to address potential biases and inaccurate perceptions of victim behavior, preparing officers and investigators to effectively respond to and investigate sexual assault.

Finding 9-3: The MCIOs face a continual challenge of ensuring adequate funding is available to send investigators to advanced sexual assault investigation training courses.

Finding 9-4: The MCIOs have a working group for sexual assault training issues.

Finding 9-5: In civilian and military law enforcement communities, sometimes, bias in the terms used in documenting sexual assaults that inappropriately or inaccurately imply consent of the victim in the assault can be possible.

Discussion

The Subcommittee examined sexual assault investigation training in both the MCIOs and civilian agencies. In general, civilian and military law enforcement investigators receive initial training on skills and knowledge for general crimes; these are transferable to sexual assault investigations. In addition, the MCIOs and a few civilian agencies provide specialized training for sexual assault investigations.

A study by a police research group revealed that 85% of the civilian police agencies responding to a survey indicated they have sexual assault training curricula for investigators or detectives. A few, like the Los Angeles Police Department (LAPD), also require specialized training for sexual assault detectives. LAPD requires its sexual assault detectives to attend the Major Assault Crimes 40-hour school which has an 8-hour block dedicated to sexual assaults. Further, sexual assault detectives must attend a 40-hour Sexual Assault Investigations course. Many civilian police agencies, however, rely instead on “on-the-job” training to teach SVU detectives how to investigate sexual assaults. A number of civilian agencies require new detectives to attend a class to transition them from patrol officers to investigations. These classes train the officers on the administrative requirements of being a detective with little, if any, specialized instruction. Some agencies send their investigators to classes on interviewing victims. A number of the civilian agencies interviewed stated they utilize on-line training or training events.

MCIOs consist of both military and civilian investigators. With the exception of Marine Corps CID investigators working for NCIS, NCIS consists entirely of civilian investigators. Military and civilian agent applicants may attend their Service’s criminal investigations training course without previously graduating.

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219 PERF, supra note 204, at 2.


221 Id.

222 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 342 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

223 End Violence Against Women International (EVAWI) developed the OnLine Training Institute (OLTI) to provide training on the criminal justice response to sexual assault.

224 The International Association of Chiefs of Police (IACP) offers Sexual Assault Training to police agencies throughout the United States and worldwide. The IACP offers 3.5-day training courses for senior leaders based and first line supervisors. See IACP, “Violence Against Women - VAW,” at http://www.theiacp.org/Violence-Against-Women.
from a police academy. Army and Marine Corps investigators complete the 15-week CID Special Agent course at the United States Army Military Police School as part of their training. Navy, Air Force, and Coast Guard investigators attend the 11-week Criminal Investigator Training Program at the Federal Law Enforcement Training Center (FLETC). After the general course, Navy and Coast Guard investigators attend the NCIS Special Agent Basic Training Program for an additional nine weeks. Similarly, Air Force investigators attend the AFOSI Specific Agent Basic Training Course for an additional eight weeks.

These training programs include some sexual assault training in their curriculum. The CID Special Agent course contains 16 hours of training specifically addressing sexual assault. The NCIS add-on course uses a sexual assault case in their “continuing case” practical application of skills scenario. This practical exercise allows the students to apply their investigative skills in every aspect of an investigation. The AFOSI add-on course has a 30-hour sexual assault practical exercise.

In 2009, the Army’s Military Police School (USAMPS) developed a Special Victim Unit Investigations Course, which is now 80 hours. MCIO investigators and judge advocates from all of the Military Services attend the course, a major focus of which is the use of the Forensic Experiential Trauma Interview, which is a trauma informed interview technique based on neuroscience research designed specifically for trauma and high stress victims. The students review real cases and participate in several videotaped interviews which are critiqued. All CID investigators assigned to an SVU must attend the course. It has been identified as a core requirement for all CID investigators; therefore, all investigators should be scheduled to attend this course at some time early in their career. Investigators at offices with no SVU also attend this course so that trained investigators are available at all locations. Investigators who complete the course are given an identifier as an SVU agent. CID requires Senior SVU investigators also attend the Domestic Violence Intervention Course, Child Abuse Prevention and Investigation Course, and the Advanced Crime Scene Course before being identified as Senior SVU investigators.

NCIS Adult Sexual Assault Program team special investigators and first line supervisors must attend the Advanced Adult Sexual Violence Training Program, a two-week advanced course collaboratively created by NCIS and Army CID.

225 See Transcript of RSP Comparative Systems Subcommittee Meeting 75 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, USAMPS).
226 See, e.g., id. at 120 (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation (AFOSI)).
227 See id. at 75 (testimony of Ms. Donna Ferguson, USAMPS).
228 See id. at 139-40 (testimony of Mr. Robert Vance, NCIS).
229 See id. at 120-22 (testimony of Mr. Kevin Poorman, AFOSI).
230 See id. at 86 (testimony of Ms. Donna Ferguson, USAMPS); see also Transcript of RSP Public Meeting 64-109 (Dec. 11, 2013) (testimony of Mr. Russell Strand, USAMPS). Mr. Strand explained that FTI is a trauma informed interview technique that allows the victim to discuss the incident as a three-dimensional event instead of reducing the narrative to a series of one-dimensional questions.
231 See Transcript of RSP Public Meeting 210 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).
232 Army personnel with specialized training are given skill identifiers indicating their qualifications for assignments.
233 See Transcript of RSP Public Meeting 210 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).
234 DoD and Services’ Responses to Request for Information 75 (Nov. 21, 2013).
AFOSI developed an eight-day Sexual Crimes Investigations Training Program (SCITP) modeled on the Army’s Special Victim Unit Investigator’s Course. AFOSI also sends its investigators to a ten-day Advanced General Crimes Investigations Course and the five-day Advanced Sexual Assault Litigation Course (ASALC) at the Air Force Judge Advocate General’s School which they attend with judge advocates.

The Defense Forensic Science Center also provides training for investigators from all of the Services. It offers a one-week Special Agent Laboratory Training Course in which investigators come to the lab to learn firsthand the capabilities of the various lab divisions. Investigators also learn information to assist in crime scene processing and evidence collection.

While advanced sexual assault training courses are available to MCIO investigators, resources are not always available to send a sufficient number of investigators to the training courses given the increased workload and agent turnover. Additionally, Congress has not specifically set aside money for sexual assault investigator training, leading to concerns that with waning resources within the military, the Services may cut money for training. Because this training is essential to the military responses to sexual assault, it is critical that funding be sustained for investigators, who are often the first responders to a report of sexual assault.

In 2012, the DoD Inspector General’s Office (IG) conducted an evaluation of the MCIOs’ sexual assault investigation training. It found that although each MCIO provided initial baseline training, periodic refresher training, and advanced sexual assault investigation training, the training hours varied for each. At the time of the evaluation, AFOSI had not initiated its SCITP. The DoD IG recommended that the MCIOs form a working group to review its baseline, periodic refresher, and advanced training to leverage training resources and expertise. The MCIOs currently have an active working group on sexual assault training.

236 See Transcript of RSP Comparative Systems Subcommittee Meeting 123-24 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).
237 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) / U.S. Army Criminal Investigation Laboratory (USACIL) (Nov. 14, 2013) (on file at RSP) (interview of Ms. Lauren Reed, Director, USACIL).
238 See Transcript of RSP Public Meeting 237 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID); see also id. at 245 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, NCIS).
239 See id. at 90 (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS).
241 See Transcript of RSP Public Meeting 98 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).
Table 7

<table>
<thead>
<tr>
<th>AGENCY</th>
<th>Basic Agent Course Location</th>
<th>Follow-on Basic Agent Training*</th>
<th>Advanced SA Training Course</th>
<th>Additional Training for SVUI</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Military Investigators</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Army CID</td>
<td>CIDSAC, USAMPS, Fort Leonard Wood, MO (16 weeks)</td>
<td>None</td>
<td>SVUIC, USAMPS (2 weeks)</td>
<td>DVIC, USAMPS CAPIT, USAMPS ACSC, USAMPS</td>
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<tr>
<td>NCIS</td>
<td>CITP, FLETC, Glynco, GA (11 weeks)</td>
<td>NCIS SABTP, FLETC, Glynco, GA (9 weeks)</td>
<td>AASVTP, FLETC (2 weeks)</td>
<td></td>
</tr>
<tr>
<td>AFOSI</td>
<td>CITP, FLETC, Glynco, GA (11 weeks)</td>
<td>AFOSI SABTC FLETC, Glynco, GA (8 weeks)</td>
<td>SCITP, FLETC (8 days)</td>
<td>AGCSC 10 days ASALC, AFJAGS, 5 days</td>
</tr>
<tr>
<td>CGCIS</td>
<td>CITP, FLETC, Glynco, GA (11 weeks)</td>
<td>NCIS SABTP, FLETC, Glynco, GA (9 weeks)</td>
<td>SVUIC, USAMPS</td>
<td></td>
</tr>
<tr>
<td>Marine CID</td>
<td>CIDSAC, USAMPS, Fort Leonard Wood, MO (16 weeks)</td>
<td>None, attend MPIC and OJTed before attending CIDSAC</td>
<td>SVUIC</td>
<td></td>
</tr>
<tr>
<td><strong>Civilian Law Enforcement Agencies (CSS Visits/Presentations)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FBI</td>
<td>FBI Academy, Quantico VA (20 weeks)</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Los Angeles, CA PD</td>
<td>Major Assault Crimes (40 hours) **</td>
<td>NA</td>
<td>*** Sexual Assault Investigations (40 hours)</td>
<td>Sexual assault conferences</td>
</tr>
<tr>
<td>Fairfax, VA PD</td>
<td>None **</td>
<td>NA</td>
<td>***Shadow experienced Detective</td>
<td>Interview course Webinars Conferences</td>
</tr>
<tr>
<td>Philadelphia, PA PD</td>
<td>Detective Course (3 weeks) **</td>
<td>NA</td>
<td>***On the job training (OJT), 2 weeks internal training</td>
<td>Share training opportunities</td>
</tr>
</tbody>
</table>

V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

<table>
<thead>
<tr>
<th>Location</th>
<th>Training Type</th>
<th>Interview Techniques</th>
<th>Brought in external trainers, national conferences, cross-train with partners. Interview schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arlington, VA PD</td>
<td>**</td>
<td>NA</td>
<td>Interview techniques</td>
</tr>
<tr>
<td>Falls Church, VA PD</td>
<td>** Investigations training</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>Baltimore, MD PD</td>
<td>** Academy has a basic investigators course.</td>
<td>NA</td>
<td>40 hours from external providers. OJT</td>
</tr>
<tr>
<td>Virginia Beach, VA PD</td>
<td>**</td>
<td>NA</td>
<td>*** Check off sheet for OJT</td>
</tr>
<tr>
<td>Austin, TX PD</td>
<td>**</td>
<td>NA</td>
<td>*** OJT internal training</td>
</tr>
<tr>
<td>Ashland, OR PD</td>
<td>**</td>
<td>NA</td>
<td>No info provided</td>
</tr>
<tr>
<td>Snohomish County, WA Sheriff’s Office</td>
<td>**</td>
<td>NA</td>
<td>*** teamed with a senior investigator</td>
</tr>
</tbody>
</table>

Civilian Law Enforcement Agencies (JSC-SA Visits)243

<table>
<thead>
<tr>
<th>Location</th>
<th>Training Type</th>
<th>Interview Techniques</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maricopa County, AZ</td>
<td>**</td>
<td>Interview training</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>**</td>
<td>Special Training</td>
</tr>
<tr>
<td>Athens, GA</td>
<td>**</td>
<td>Forensic Interviewing, other training</td>
</tr>
<tr>
<td>Grand Rapids, MI</td>
<td>**</td>
<td>Forensic Interviewing</td>
</tr>
</tbody>
</table>

*The MCIOs and civilian police agencies have a probationary period 243**
*Will previously have attended and graduated from a police academy.*
***Must have previous detective experience then apply for SVU.*

**Discussion**

Even the best screened, selected, and trained law enforcement personnel sometimes allow personal biases to influence the manner in which they handle sexual assault reports.244 Civilian and military law enforcement agencies recognize the need to address potential biases or factually inaccurate perceptions of victim behavior.

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243 Only those agencies that commented on training of investigators are listed.
(commonly referred to as “rape myths”) held by their officers and investigators to ensure proper reporting and investigation of sexual assaults.\textsuperscript{245} One of the primary ways to address this issue is through training.\textsuperscript{246}

For example, some civilian agencies discovered their officers and investigators were using language to describe the incident that could give the inappropriate or inaccurate impression that the acts were consensual.\textsuperscript{247} Civilian experts report that relatively few law enforcement professionals have sufficient training to write effective reports of sexual assaults.\textsuperscript{248} One such expert noted, “[w]e use the language of consensual sex all the time to describe assaultive acts. We talk about victims having sex with their perpetrators. We talk about victims performing oral sex on their perpetrators. And we don’t think of the word picture that creates, which does not in any way show the reality of the crime.”\textsuperscript{249}

A prime example of the potential for training to reverse biases and improve law enforcement is Baltimore, Maryland. In 2010, the Baltimore Police Department (BPD) reportedly had the highest rate of unfounded sexual assault cases in the nation.\textsuperscript{250} As a result, BPD took steps to change the culture of its patrol officers and investigators in responding to and documenting reports of sexual assault.\textsuperscript{251} These steps include sexual assault specific training and oversight by external agencies which periodically review BPD’s sexual assault investigations to ensure they are properly investigated as free from bias as possible.

The MCIOs, too, recognize this concern, and are trying to mitigate potential biases through training and policy.\textsuperscript{252} Army CID has issued guidance about the use of language that may tend to infer consent and required investigators to completed the End Violence Against Women International (EVAWI) online course entitled “Effective Report Writing: The Language of Non-Consensual Sex” as part of its annual refresher training in FY 2013.\textsuperscript{253} The other Services do not have specific policies on this subject, but all stated they train investigators on eliminating bias in investigations, particularly regarding victim behaviors.\textsuperscript{254}

Sexual assault investigations are often factually complex, emotionally charged, and rely on careful preservation of evidence to ensure just and legally defensible convictions. Accordingly, the Services must continue to select, train, and develop highly qualified professional investigators for these cases.

\textsuperscript{245} See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 123-24 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

\textsuperscript{246} PERF, supra note 204, at 2.

\textsuperscript{247} See, e.g., Transcript of RSP Public Meeting 278 (Dec. 11, 2013) (testimony of Sergeant Liz Donegan, Austin Police Department).


\textsuperscript{250} MCASA, supra note 202, at 2.

\textsuperscript{251} Id., Appendix l.

\textsuperscript{252} See e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 103 (Nov. 19, 2013)(Testimony of Mr. Guy Surian, Army CID).

\textsuperscript{253} Army’s Response to Request for Information 134 (Apr. 14, 2014).

\textsuperscript{254} Services’ Responses to Request for Information 134 (Apr. 14, 2014).
E. COLLATERAL MISCONDUCT AND VICTIM REPORTING

1. Collateral Misconduct

**Recommendation 10-A:** The Secretary of Defense direct the standardization of policy regarding the requirement for MCIO investigators to advise victim and witness Service members of their rights under Article 31(b) of the UCMJ for minor misconduct uncovered during the investigation of a felony to ensure there is a clear policy, that complies with law, throughout the Services.

**Recommendation 10-B:** The Secretary of Defense promulgate a list of qualifying offenses for which victims of sexual assault can receive immunity from military prosecution for minor collateral misconduct leading up to, or associated with, the sexual assault incident.

**Recommendation 10-C:** Congress and the Secretary of Defense examine whether: (a) Congress should amend Article 31(b) of the UCMJ to add an exemption to the requirement for rights advisement to a Service member who, as a result of a report of a sexual assault, is suspected of minor collateral misconduct and provide a list of what violations should qualify for this exception, (b) a definition or procedure for granting limited immunity should be implemented in the future, or (c) other legislation or policy should be adopted to address the issue of collateral misconduct by military victims of sexual assault.

**Finding 10-1:** The majority of the civilian police agencies contacted during the Subcommittee’s research reported they did not routinely pursue action for minor criminal behavior on the part of a victim reporting a sexual assault. They do not interrupt a victim interview to advise the victim of his or her constitutional rights for minor offenses.

**Finding 10-2:** The Secretary of Defense acknowledges that a victim’s fear of punishment for collateral misconduct is a significant barrier to reporting in the policy regarding collateral misconduct. MCIO investigators interviewed reported that the requirement to stop a victim interview to advise the victim of his or her rights under Article 31(b) of the UCMJ for minor misconduct collateral to the alleged sexual assault can make the victim reluctant to continue the interview and may hinder investigation of a reported sexual assault.255

**Finding 10-3:** Under current DoD policy, commanders have discretion to defer action on victims’ collateral misconduct until final disposition of the case, bearing in mind any potential speedy trial and statute of limitations concerns, while also taking into account the trauma to the victim and responding appropriately, so as to encourage reporting of sexual assault and continued victim cooperation.

**Finding 10-4:** All of the MCIOs document information on the misconduct in the case file which is provided to the victim’s commander for action. However, the MCIOs do not follow the same practices regarding the legal requirement to advise Service members of their rights under Article 31 of the UCMJ for minor collateral misconduct discussed during an interview. NCIS investigators do not read victims reporting a sexual assault their rights for minor collateral misconduct, because NCIS only investigates felony level crimes.

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255 See, e.g., Transcript of RSP Public Meeting 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).
**Finding 10-5:** For the last ten years, DoD policy documents use the following list of offenses to illustrate the most common collateral misconduct in many reported sexual assaults: “underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders.”256

**Finding 10-6:** The Military Services do not support automatic immunity for minor collateral misconduct because it may create a plausible argument the victim had a motive to fabricate the allegation and could detract from good order and discipline within the unit.

**Discussion**

“Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting sexual assault because of the victim’s fear of punishment.”257 According to DoD reporting statistics, 23% of respondents who did not report their sexual assaults cited fear that they or others would be punished for collateral misconduct as a reason for not reporting that they were sexually assaulted.258 DoD addressed the issue of “collateral misconduct” in a 2004 directive-type memorandum (DTM), in which “fear of punishment for some of the victim’s own actions leading up to or associated with the sexual assault incident,” was identified as a “significant” barrier to reporting.259 Victim advocates reported to the RSP and Subcommittee that victims are sometimes afraid to report their assault for fear of being punished.260 The president of Protect Our Defenders, a victim’s advocacy group, told the panel that in her experience working with victims, that “[victims] are often inappropriately threatened with collateral misconduct, and if they go forward, [they are] targeted with a barrage of minor infractions as a pretext to force them out of the Service.”261 A victim who testified before the RSP confirmed this concern, and relayed her personal story that the threat of being charged with collateral misconduct deterred her from reporting her sexual assault while on active duty.262 Previous studies on sexual assault in the military also cite that the threat of punishment of a victim’s own misconduct is a barrier to reporting.263

There are two legal principles in military justice that contribute to the artificial barrier to reporting. The first is the statutory requirements of Article 31 of the UCMJ.264 The second is a lack of automatic immunity that

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256 dodi 6495.02 encl. 5, ¶ 7.
257 Id. at encl. 5.
259 U.S. Dep’t of Def., Directive-Type Memorandum 11–063, Collateral Misconduct in Sexual Assault Cases (Nov. 12, 2004) (cancelled by DoD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013)).
260 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (JBLM) (Feb. 5, 2014) [on file at RSP] (interviews of Victim Advocates).
261 See Transcript of RSP Public Meeting 325–326 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).
262 See, e.g., Transcript of RSP Public Meeting 68–71 (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, who explained that she was warned her report would result in a charge of dereliction of duty for leaving her weapon in a combat zone).
264 Article 31, UCMJ, states as follows:
   (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
   (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation an advising him that he does not have to make any
appears in some civilian jurisdictions for minor misconduct in sexual assault cases. Article 31 provides Service members a greater protection from self-incrimination than the U.S. Constitution and civilian case law provide. During an investigator’s interview with Service member victims, if at any time the investigator reasonably suspects he or she committed an offense under the UCMJ, the investigator must stop the interview and advise the victim of his or her rights under Article 31(b). Civilian investigators, conversely, have greater discretion than MCIO investigators in deciding whether to advise any crime victim, particularly a sexual assault victim, of his or her rights under the Fifth Amendment.

Civilian law enforcement interviews follow Fifth Amendment law established by *Miranda v. Arizona*,\(^{265}\) which only requires law enforcement personnel to warn an individual of the rights to remain silent and obtain counsel during a custodial interrogation. Military culture, however, is unique. The principles of integrity and obedience to orders that are inherent in military culture create a uniquely coercive environment which has historically supported extension of Article 31 protections to any member suspected of an offense, regardless of the member’s custody status. Since most victim interviews are non-custodial, meaning the victim is free to terminate the interview and leave the police station at any time, a *Miranda* warning is not required, even if a civilian law enforcement officer believes the victim may have committed a crime. Under the UCMJ, however, the Article 31 warning is not discretionary – meaning law enforcement officials are legally required to stop an interview and appropriately warn a Service member once the law enforcement official has reasonable suspicion that the Service member committed a UCMJ violation. MCIOs consistently identify that the requirement “to advise victims of their rights for collateral misconduct . . . chill[s] a relationship between the investigator and the victim.”\(^{266}\)

Concerns about collateral misconduct are seen as a complication in the investigative process, as well as a barrier to reporting.\(^{267}\) Interrupting an interview for a rights warning can have a negative impact on the investigator’s ability to build trust and rapport with the victim and can cause victims to terminate the interview, although special victim counsel – who are often present at the interviews – did not report this occurred. NCIS investigators who spoke to the Subcommittee stated that NCIS has an unwritten policy that investigators will not read victims Article 31(b) rights for minor collateral misconduct, regardless of the law’s requirements.\(^{268}\) The NCIS investigators justify the policy by noting that minor offenses, such as drinking and fraternization,
are outside the “felony-level” purview of NCIS. 269 However, the Navy provided no empirical evidence that this practice increases reporting; rather, investigators noted anecdotally that the practice improves their ability to establish a rapport and more thoroughly investigate cases from victims who have already chosen to report.

The other legal principle impacting the handling of collateral misconduct is immunity from criminal liability. Civilian police agencies report that their offices routinely take no action for minor violations committed by the reporting victim. For example, in Philadelphia, the District Attorney’s Office policy is to not charge victims for low level drug use or possession or alcohol violations. The District Attorney’s Office will sometimes grant immunity for other offenses, such as prostitution. 270 Civilian grants of immunity are normally approved by the prosecutor. 271 In the military justice system, grants of immunity are processed under Rule for Courts-Martial 704, and while the misconduct could include more serious violations of the UCMJ, typical violations include minor infractions, such as underage drinking, breaking curfew and other military-specific offenses. 272

Under Rule for Courts-Martial 704, only a General Court-Martial Convening Authority can grant immunity from prosecution by court-martial, and the authority to grant immunity may not be delegated. 273 The Services do not support a military-wide immunity policy for victims who may have committed some collateral misconduct. 274 The Services argue that granting blanket immunity “could provide defense counsel with further fodder to support tactics to challenge the credibility of victims.” 275 A civilian defense attorney told the RSP that, “not prosecuting that collateral misconduct is the best gift any prosecutor or convening authority could ever give me as a defense counsel,” because she would be able to highlight the immunity to impeach a victim’s credibility and the veracity of the report. 276 The Services further cited the lack of empirical evidence that the policy would increase reporting and expressed concern regarding the potential for issues at trial and increased false reporting. 277 Previous reports on sexual assault in the military also expressed concern that blanket immunity could undermine discipline and have the unintended consequence of causing alienation of the victim, especially if others are held accountable for similar misconduct. 278

269 See Navy’s Response to Request for Information 64 (Nov. 21, 2013). NCIS further stated “In the majority of NCIS sexual assault investigations, the victim’s collateral misconduct does not rise to the felony level. Often, the misconduct is a status offense such as underage drinking or adultery or other minor UCMJ violation. That said, if misconduct is uncovered by the investigator during the course of the investigation, that information will be included in the NCIS investigative report and available for a commander to decide a course of action.” See also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014); (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap (Feb. 5, 2014) (same).


271 See generally id.

272 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 167 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI); see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP) (testimony of investigators); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA (Dec. 13, 2013) (on file at RSP) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base Lewis-McChord (JBLM) (Feb. 5, 2014) (on file at RSP) (same).

273 See MCM, supra note 97, R.C.M. 704(b)(3).

274 DoD and Services’ Responses to Request for Information 141 (Apr. 11, 2014).

275 Army’s Response to Request for Information 141 (Apr. 11, 2014).

276 Transcript of RSP Public Meeting 357 (Nov. 8, 2013) (testimony of Ms. Bridget Wilson, Attorney, San Diego, California).

277 DoD and Services’ Responses to Request for Information 141 (Apr. 11, 2014).

278 See, e.g., DTFMSA, supra note 181, at 28 (June 2005); TFRCV, supra note 263, at 28.
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

2. Gleaning Information from Restricted Reports

**Recommendation 11:** The Secretary of Defense direct SAPRO to develop policy and procedures for Sexual Assault Response Coordinators (SARCs) to input information into the Defense Sexual Assault Incident Database (DSAID) on alleged sexual assault offenders identified by those victims who opt to make restricted reports. These policies should include procedures on whether to reveal the alleged offender’s personally identifying information to the MCIOs when there is credible information the offender is identified or suspected in another sexual assault.

**Finding 11-1:** DoD has a sexual assault case management database, DSAID, but does not currently input data on alleged offenders identified by the victim making a restricted report, as current policy prohibits collecting and storing that information. This database has the capability of obtaining information from restricted reports that could be used to identify allegations against repeat offenders. 

**Discussion**

The FY14 NDAA requires the RSP to make “an assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators.” There is a concern that incidents reported through the restricted reporting option may allow possible serial offenders to go undetected. The DoD uses the DSAID, a secure, web-based tool to gather information to compile sexual assault statistics for required reports to Congress and to support Service SAPR program management. DSAID contains information input by SARCs about both restricted and unrestricted sexual assault reports involving members of the Armed Forces. However, current DoD policy prohibits inputting personal identifying information of the alleged offender in a restricted report.

DoD recognizes that gathering criminal intelligence is a “fundamental and essential element” of the duties of law enforcement. The MCIOs have existing databases which track criminal intelligence information not associated with an ongoing investigation. The information in these databases is only accessible to investigators and authorized personnel within the MCIO and may only be shared with authorized law enforcement agencies. However, there is a concern that placing information from a restricted report into an MCIO’s criminal intelligence database “could result in proactive or inadvertent actions by investigators searching that database that could jeopardize the confidentiality of a restricted report.”

DoD policy allows for the release of information from a restricted report when the release is “necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person; for

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279 DoDI 6495.02 encl. 4, ¶ 4.
281 DoDD 6495.01 encl. 2, ¶ 1.f[5].
282 DoDI 6495.02 encl. 4, ¶ 4.
283 DoDI 5525.18, Law Enforcement Criminal Intelligence (CRIMINT) in DoD ¶ 3 (Oct. 18, 2013).
284 Id.
example, multiple reports involving the same alleged suspect (repeat offender) could meet this criteria.\footnote{286} However, the Subcommittee has received no evidence on what, if any, impact this may have on victim confidence in the confidentiality associated with restricted reporting.

3. Changes to Restricted Reporting to Encourage Victims to Speak to MCIO Investigators

**Recommendation 12:** The Secretary of Defense direct DoD SAPRO, in coordination with the Services and the DoD IG, to change restricted reporting policy to allow a victim who has made a restricted report to provide information to an MCIO agent, with a victim advocate and/or special victim counsel present, without the report automatically becoming unrestricted and triggering a law enforcement investigation. This should be a voluntary decision on the part of the victim. The policy should prohibit MCIOs from using information obtained in this manner to initiate an investigation or title an alleged offender as a subject, unless the victim chooses, or changes, his or her preference to an unrestricted report. The Secretary of Defense should require this information be provided the same safeguards as other criminal intelligence data to protect against misuse of the information.

**Finding 12-1:** Some civilian police agencies allow a police officer or detective to contact a sexual assault victim without automatically triggering an investigation. The report is only investigated if the victim chooses an investigation following a discussion with the detective.

**Finding 12-2:** DoD policy currently provides that a victim who makes a restricted report of sexual assault cannot provide information to an MCIO investigator without the report becoming unrestricted.\footnote{287}

**Discussion**

Sexual assault is one of the most underreported crimes in both the military and civilian sector.\footnote{288} The DoD and the Services have focused significant effort on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and . . . a bridge to accountability where offenders can be held appropriately accountable.”\footnote{289}

One model employed by a civilian police agency which appeared before the RSP permits sexual assault victims to speak with law enforcement personnel without triggering an investigation, allowing investigators to document information for criminal intelligence purposes.\footnote{290} Ashland, Oregon began a pilot program in January 2013 that provides victims three reporting options to provide information to the police.\footnote{291} They can 1) report

\footnote{286} DoDI 6495.02 encl. 4, ¶ 5.b(2).\footnote{287} Id. at encl. 4.\footnote{288} Transcript of RSP Public Meeting 25 (Dec. 11, 2013) (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS); see also PERF, supra note 204, at 8.\footnote{289} Transcript of RSP Public Meeting 108–09 (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).\footnote{290} See Transcript of RSP Public Meeting 320–21 (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department).\footnote{291} Vickie Aldous, Police Want to Hear from Sexual Assault Victims, Ashland Daily Tidings (Dec. 20, 2012). These reporting options were initiated as a pilot project on January 1, 2013. See also Transcript of RSP Public Meeting 327 (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department, that previous changes in reporting practices resulted in a forty percent increase in reported offenses from 2009–2012). Deputy Chief Falls provided anecdotal information that the changes from the pilot
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

online anonymously; 2) participate in a partial investigation in which they provide a statement to the police and evidence is collected, but no interviews of witnesses or potential suspect would be accomplished without the victim’s consent; or 3) participate in a complete investigation. Only in a full investigation would the case be coordinated with the District Attorney’s Office or an arrest made.

In another model, used in Grand Rapids, Michigan, a sexual assault victim has reporting options in addition to a fully restricted report and a fully unrestricted report. The victim has the following additional options:

- Direct-Anonymous Reporting – Victim can meet with law enforcement, but not provide name, address, date of birth, or other identifying information. Information about the offender may or may not be provided.
- Indirect-Anonymous Reporting – Victim may file a written report without meeting with law enforcement. The report can include as much or as little information as the victim chooses to share.

Under current DoD policy, a military member or adult dependent of a military member has two options in reporting a sexual assault. The victim can file a restricted report, which allows him or her to confidentially disclose the assault to a SARC, VA, or healthcare personnel, and receive healthcare treatment, counseling services, the assignment of a SARC and VA, the assignment of a Special Victim Counsel, and the option to have a SAFE performed. This option maximizes support services available to the victim without requiring him or her to choose between accessing support services or retaining privacy. The victim can also file an unrestricted report, which still allows the victim to access all of these services, but triggers a criminal investigation by MCIO investigators and command notification. A victim who chooses to file a restricted report may convert his or her report to an unrestricted report at any time; however, a victim who files an unrestricted report may not convert to a restricted report.

Allowing victims, on a voluntary basis, to talk to investigators without committing to participating in an investigation would give the victim “time to build trust with the law enforcement officer and to consider all of the implications of participating in reporting, investigating, or prosecuting the case before making a decision whether to proceed. For the law enforcement agency, this type of reporting can help gain intelligence about the local incidence and perpetration of all sexual violence in the community, as well as build trust and credibility with populations vulnerable to assault.” The victim should be offered the opportunity to have his or her SARC, VA, or Special Victim Counsel present during any conversation with the investigator to guard against real or perceived coercion to file or not file an unrestricted report.

292 See id.
293 See id.
295 DoDI 6495.02 encl. 4.
296 Id.
297 Id.
298 Id.
299 Sabrina Garcia & Margaret Henderson, Options for Reporting Sexual Violence, Developments Over the Past Decade, FBI LAW ENFORCEMENT BULLETIN (May 2010).
F. COMPARING PROCEDURES, POLICIES, PROTOCOLS & OVERSIGHT

1. Milestones in the Investigative Process Including Case Determinations and Reports

**Recommendation 13:** The Secretary of Defense direct the Service Secretaries to standardize the process for determining a case is unfounded. The decision to unfound reports should shift from the commander to the MCIOs, who in coordination with the trial counsel, apply the Uniform Crime Reporting (UCR) standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.

**Finding 13-1:** While DoD uses the same definition to unfound an allegation of sexual assault as the FBI’s UCR Handbook, used by all civilian law enforcement agencies, the Subcommittee heard evidence that the standard is incorrectly applied and the Military Services use different definitions.

**Finding 13-2:** The Army Criminal Investigation Command (CID) unfounds an allegation of sexual assault if its investigation determines the report was false or the trial counsel provides an opinion there is no probable cause to believe the subject of the investigation committed the offense, prior to providing the investigation to the Initial Disposition Authority for action. In the Navy, Marines, Coast Guard, and Air Force, the IDA determines whether to unfound an allegation.300

**Discussion**

Both civilian and military law enforcement agencies issue reports to document investigations and results. The “incident clearance reason”301 entered into the Defense Incident-Based Reporting System (DIBRS) and National Incident Based Reporting System (NIBRS) is the last report entered by military investigators and is critical to the collection of accurate data. DIBRS is a repository for information collected electronically from supporting Military Service criminal records management systems for the Services’ use.302 Similarly, civilian law enforcement agencies enter incident and arrest information into NIBRS.

Civilian police agencies follow the FBI’s UCR incident clearance guidance regarding unfounding a complaint: “Occasionally, an agency will receive a complaint that is determined through investigation to be false or baseless…. The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with prosecution, or the failure to make an arrest does not unfound a legitimate offense. Also, the findings of a coroner, court, jury, or prosecutor do not unfound offenses or attempts that law enforcement investigations establish to be legitimate.303

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300 This information is a summary of the information the Services provided in response to Request for Information 66. See Services’ Responses to Request for Information 66 (Nov. 21, 2013), currently available at http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q66.pdf.


302 Id.

V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

DoD does not use a standard definition for “founded” or “unfounded” as those terms specifically relate to sexual assault offenses.\(^{304}\) DoD policy defines an unfounded case, for purposes of DIBRS, as

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\text{a complaint that is determined through investigation to be false or baseless. In other words, no crime occurred. If the investigation shows that no offense occurred nor was attempted, procedures dictate that the reported offense must be coded “unfounded.” The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with prosecution, or the failure to make an arrest DOES NOT unfound a legitimate offense.}\(^{305}\)
\]

DoD’s Annual SAPRO Report for FY12 uses a different definition of “unfounded.” That report states “When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense, or the offense was improperly reported or recorded as a sexual assault, the allegations against the subject are considered to be unfounded.”\(^{306}\) While conceptually, the various DoD definitions meet the same intent as the “false or baseless” definition of unfounded used in the UCR, the Services apply the term inconsistently or use additional or different definitions.

The RSP specifically requested that each of the Services provide information regarding Service-specific use of the terms “founded” and “unfounded.” The Air Force, Navy, and Marine Corps all use a “false or baseless” standard to unfound an allegation, allowing the accused’s commander, in consultation with a judge advocate, to make the final determination.\(^{307}\) However, the Navy and Marine Corps consider “false or baseless,” to include any case where the allegations “do not meet all the legal elements of any of the SAPR sexual assault offenses.”\(^{308}\) The Army defines an unfounded offense as, “a determination, made in consultation with the supported prosecutor that a criminal offense did not occur. A lack of evidence to support a complaint or questioning of certain elements of a complaint is not sufficient to categorize an incident as unfounded.”\(^{309}\) Conversely, the Army’s definition of a “founded” offense relies on a probable cause determination\(^{310}\) made by the investigating agent and supporting prosecutor that an offense was committed and the accused committed the offense.\(^{311}\)

\(^{304}\) See DoD Response to Request for Information 59, dated Nov. 21, 2013.
\(^{305}\) DoDM 7730.47-M-V1 at 83.
\(^{306}\) FY13 SAPRO ANNUAL REPORT, supra note 63, at 66. This report also defines unfounded as “false or baseless.”
\(^{307}\) Transcript of RSP Public Meeting 268-69 (Dec. 11, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University); see also Air Force Response to Request for Information 39 (at attached Powerpoint slides) (Nov. 21, 2013); Services’ Responses to Request for Information 59 (Nov. 21, 2013).
\(^{308}\) Navy and Marine Corps’ Responses to Request for Information 59 (Nov. 21, 2013).
\(^{309}\) Army’s Response to Request for Information 58 (Nov. 21, 2013).
\(^{310}\) The Subcommittee notes that as a matter of law, the Army’s process of “founding” an offense through a probable cause determination made by a member subject to the Code prior to even preferral of charges may invade the independent discretion and legal province of both the accuser and the Article 32 investigating officer. When preferring charges, an accuser must swear that he or she has personal knowledge of, or has investigated, the matters set forth, and that they are true to the best of his or her knowledge. See 10 U.S.C. § 832 (UCMJ art. 30). Once charges are preferred and an investigation under Article 32, UCMJ, is ordered, it is the duty of the investigating officer to, in part, determine whether “reasonable grounds exist to believe that the accused committed the offenses alleged.” See MCM, supra note 97, R.C.M. 405(1)(H)(I). The Article 32 investigating officer’s conclusion, by definition, is also a probable cause determination. See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining probable cause). In civilian practice, a similar probable cause determination is used for issuance of an arrest warrant incident to a prosecutor’s charging decision. While it is unlikely that a “founding” determination has ever influenced the conclusion of an Article 32 investigating officer, the probable cause determination made prior to preferral of charges is, at the very least, premature.
\(^{311}\) Army Response to Request for Information 58, 59, and 66, dated Nov. 21, 2013; See also Transcript of RSP Public Meeting 221-
One of the reasons for unfounding military cases may be that the MCIOs must initiate an investigation in all reported sexual assaults. It may not be evident that a case is false or baseless at the time of the report; however, investigation may subsequently reveal the wrong suspect was named, the allegations were fabricated, or the incident does not constitute a criminal offense.\textsuperscript{312}

\begin{mdframed}
\textbf{Recommendation 14-A:} The Secretary of Defense 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 because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.\textsuperscript{313}

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\textbf{Recommendation 14-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 either final disposition of the case or a determination that the allegations are unfounded.

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\textbf{Finding 14-1:} The Army follows a different procedure than the other Services. Army trial counsel provide an opinion on whether there is probable cause the suspect committed the offense to the investigating agent prior to presenting a case to the commander for a disposition decision. The trial counsel’s opinion as to probable cause is reflected in the case file. In FY12, the trial counsel, acting in coordination with CID, determined that 25 percent of the cases involving sexual assault allegations, 118 out of 476 cases, lacked probable cause and the cases were closed. In contrast, the other Services’ MCIOs present all cases to the commanders who consult with the supporting trial counsel to determine the appropriate disposition of each case.

\textbf{Finding 14-2:} Some trial counsel reported that MCIOs are not always responsive to their specific investigative requests and MCIOs do not always coordinate completed investigations with senior trial counsel prior to issuing their final reports.\textsuperscript{314}

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\textbf{Discussion}

The civilian sector and each of the Military Services follow different procedures for how MCIO investigators interact with trial counsel/special victim prosecutors and commanders to review an investigation and determine the merits of the case. Standardizing the procedure for all the Services will ensure consistency, including the “unfounding” definition described in the recommendation above, and permit effective review

\textsuperscript{22} (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army, discussing role of prosecutor in founding and unfounding offenses).

\textsuperscript{312} DTFMSA, supra note 181, at 16.

\textsuperscript{313} FY14 NDAA, Pub. L. No. 113–66, § 1702(a)(3), 127 Stat. 672 (2013) (“The preliminary hearing shall be limited to the purpose of determining whether there is probable cause to believe an offense has been committed and whether the accused committed it.”)

\textsuperscript{314} See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap (Feb. 5, 2014) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA (Dec. 13, 2013) (same).
of investigative outcomes. The chart below illustrates the disparity in procedure and application among the Services, as well as the Subcommittee’s recommended process:

**Table 8**

Comparison of Procedures to Review Investigations Prior to a Disposition Decision

<table>
<thead>
<tr>
<th>Air Force, Navy, Marines, CG</th>
<th>Army</th>
<th>CSS Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfounded determinations are not done by AFOSI or NCIS investigators.</td>
<td>Army CID investigators make the determination whether a case is Unfounded, in consultation with a judge advocate, before closing a case.</td>
<td>The MCIO agent, in consultation with a judge advocate, should make the determination whether a case is unfounded. Unfounded is defined as false or baseless.</td>
</tr>
<tr>
<td>AFOSI or NCIS investigators do not determine that a case is founded, substantiated, or that probable cause exists. Therefore, no annotation is made in the case file.</td>
<td>Army CID investigators contact a judge advocate, who provides an opinion as to whether or not probable cause exists, prior to presenting the case to the commander. Army CID investigators annotate the judge advocate’s opinion in the case file, and if probable cause exists, the case file is presented to the commander for a disposition decision.</td>
<td>The MCIO agent contact a judge advocate to review the investigation. The judge advocate provides an opinion that appropriate investigation is complete and the MCIO agent reflects that opinion in the case file. The report of investigation is then presented to the commander and judge advocate.</td>
</tr>
<tr>
<td>FY12: 100% Cases presented to commander</td>
<td>FY12: 75% Cases presented to commander 25% Cases determined to lack probable cause</td>
<td>Present all cases to commander, unless determined to be unfounded, which means false or baseless</td>
</tr>
</tbody>
</table>

Civilian police departments follow a variety of different procedures to decide whether an offense is unfounded. In some jurisdictions, cases that the detective believes are not strong enough to support prosecution never reach the prosecutor.\(^{315}\) Some departments reported the investigator could make that decision with the approval of a supervisor while others require the prosecutor’s approval in any case in which a subject was previously arrested or arraigned for the offense.\(^{316}\) Departments may also consider a case closed and the investigation complete when it is referred to the prosecutor.\(^{317}\) Cases may be closed or placed in a suspended status if the

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316 See, e.g., id. at 357-58 (testimony of Lieutenant Mark Kidd, Fairfax Police Department, and Detective Lanis Geluso, Virginia Beach Police Department).

victim makes it clear he or she does not want to cooperate further. Likewise, unsolved cases are usually inactive, but not closed. 318

One best practice in civilian law enforcement agencies requires the detective to remain assigned to the case after the case is transferred to the prosecutor. 319 For example, in Philadelphia, detectives and investigative staff assigned to the case will continue to be involved after the case goes to the prosecutor and will complete follow-up work the prosecutor requests. 320 Another civilian best practice is for the supervisor of the Special Victim Unit to review all unfounded cases, and if the percentage of cases that are unfounded rises above a certain baseline average, the supervisor takes a closer look at patterns and investigative practices to ensure only those cases that are false or baseless are unfounded. 321 For example, the Philadelphia SVU uses nine percent as a benchmark, and does an in depth review if the unfounded rate goes into the double digits. 322 The Baltimore police department adopted a similar practice after discovering “more than 30 percent of the cases investigated each year were determined by officers to be false or baseless... five times the national average.” 323 Both Philadelphia and Baltimore detectives said this required culture change as to how to measure success – they had to accept a lower number of closed, unfounded cases, and adjust to having a higher number of open cases.

In the Army, the commander does not have a role in making the determination to unfound a case because Army CID makes the decision to unfound after coordinating with trial counsel. 324 However, in the Air Force, the Navy, and the Coast Guard the determination to unfound a case is made by the commander, not by the MCIO. 325 AFOSI and NCIS advised that once a case is initiated they do not make any case determination decisions, but instead report their investigative findings to the action commander. 326

MCIO investigators are required to engage in timely and ongoing coordination with the prosecution, the SARC, and the commanders of the offender and victim. 327 In the military, the Special Victim Capability requires initial and continuous coordination with the Special Victim Prosecutor. 328 However, there is no specific requirement for a final coordination for a review of legal sufficiency. While there appears to be initial coordination

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318 See Transcript of RSP Comparative Systems Subcommittee Meeting 389 (Nov. 19, 2013) (testimony of Detective Lanis Geluso, Virginia Beach Police Department).

319 JSC-SAS Report, Appendices C-P (Sept. 2013) [on file at RSP].

320 Id., Appendix M, at 2.

321 See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC (Feb. 20, 2014) (on file at RSP) (interview with Captain John Darby).

322 Id.

323 MCASA at 2.


325 Id. at 180, 245, 250.

326 Services’ Responses to Request for Information 58 (Nov. 21, 2013).

327 See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap (Feb. 5, 2014) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBAA (Dec. 13, 2013) (same).

requirements, procedures and standards differ among the Services for opining about the investigation and presenting the case to the commander for disposition decision.

Army CID is required to coordinate reports of investigation with the trial counsel to determine if there is probable cause that an offense was committed, that the subject committed the offense, and to determine if there is sufficient evidence to support action.\textsuperscript{329} The trial counsel issues an opinion to the investigator/agent which is reflected in the case file.\textsuperscript{330} In FY12, the Army trial counsel, acting in coordination with CID, determined that 25 percent of the cases involving sexual assault allegations, 118 out of 476 cases, lacked probable cause and the cases were closed and never reviewed by a commander for a disposition decision. The Subcommittee recommends this communication between trial counsel and the investigator continue, but limiting the trial counsel’s official opinion that appears in the case file to whether the investigation has been exhausted and a determination that the case file is ready to present to the commander. This prevents the prosecutor from making a premature probable cause determination and the MCIO from closing cases prior to providing them to a commander to review.

The Subcommittee concluded that neither the trial counsel nor MCIO should be permitted to make a dispositive determination that no probable cause exists, and have that annotated in the investigative case file. The members acknowledge that the prosecutor may opine on its existence. A trial counsel may tell an investigator that further investigation is needed in order for the government to establish probable cause. Also, a commander making the disposition decision may want the trial counsel’s opinion whether the prosecutor believes probable cause exists in the case. However, neither the trial counsel nor the investigator should make a dispositive determination of probable cause because that is the purview of either the convening authority, a military judge, or at the Article 32 preliminary hearing.

The other Services do not filter cases for lack of probable cause; instead all cases are presented to commanders, who consult with the supporting trial counsel, to determine the appropriate disposition of each case. However, unlike the Army, there is no requirement that the agent formally coordinate with the trial counsel or annotate

\textsuperscript{329} See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP).
\textsuperscript{330} See Army Response to Request for Information 66 (Nov. 21, 2013).
in the case file that coordination has been completed.\textsuperscript{331} AFOSI may informally coordinate with trial counsel, but the only written requirement is that AFOSI cannot close a case until the General Court-Martial Convening Authority (GCMCA) provides written notification that he or she is aware of the final disposition in the sexual assault cases.\textsuperscript{332}

In cases where MCIOs are the lead investigative agency, DoD policy states that MCIOs may not close a sexual assault investigation without written disposition data from the subject’s commander.\textsuperscript{333} The MCIO investigators the Subcommittee spoke to believe the investigators complete thorough investigations, following all logical leads prior to reaching any conclusions.\textsuperscript{334} Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary.\textsuperscript{335} Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review and it is difficult to “reopen” cases for further investigation. A best practice employed by the Coast Guard in case classification describes cases as “open,” “open – pending adjudication,” “closed – based on final adjudication.” Cases should also be closed if the MCIO in consultation with the SVP/TC determine the report is unfounded because it is false or baseless.

The Subcommittee recommends the following procedures and standards as milestones throughout the investigative process with the channels of communication clearly established and the level of proof incrementally increasing throughout the process:

- MCIO investigators open an investigation upon receipt of an unrestricted report
- MCIO notifies and makes appropriate coordination with the Special Victim Prosecutor, Initial Disposition Authority (IDA) commander (Special Court-Martial Convening Authority in the rank of 0-6 or higher), and SARC, in accordance with DoD Special Victim Capability requirements\textsuperscript{336}
- MCIO titles subject based on some credible information that the subject committed an offense under the UCMJ.
- When an agent believes he/she exhausted the investigation, the agent coordinates with the SVP or trial counsel to review the case file. If the SVP/trial counsel agrees, the SVP/trial counsel issues an opinion that “all appropriate investigation has taken place” which is reflected in the case file.


\textsuperscript{332} Air Force’s Response to Request for Information 67 (Nov. 21, 2013); see also U.S. Dep’t of the Air Force, Memorandum from the Undersecretary of the Air Force on General Court-Martial Convening Authority (GCMCA) Review in Certain Sexual Assault Cases (June 17, 2013).

\textsuperscript{333} DoDI 5505.18 encl. 2, ¶ 5.

\textsuperscript{334} See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA (Dec. 13, 2013) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM (Feb. 5, 2014) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014) (same).

\textsuperscript{335} See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP).

\textsuperscript{336} DTM 14-003 requires initial notification within 24 hours and consultation within 48 hours.
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

- A copy of the case file is provided to the IDA and SVP/trial counsel. The case remains in an “Open – Pending Adjudication” status.

- The SVP or TC assesses evidence in the case and prepares a recommendation for the commander. SVP or TC conducts a legal analysis to determine if there is sufficient evidence to pursue adverse action and then develops a recommendation for appropriate disposition. The IDA consults with the SVP or TC prior to making the initial disposition decision.

- The IDA decides to prefer charges, selects an alternate disposition, sends to lower commander for disposition or takes no action. The standard to prefer charges is personal knowledge and belief in the truth of the charges, that the crime occurred, and the accused committed that offense.

- If appropriate disposition of the case may include a general court-martial, an Article 32 preliminary hearing must occur, one of the purposes of which is to determine whether there is probable cause, which is “a reasonable belief a crime occurred and the accused committed that offense.”

- The MCIO will continue to provide support and the case will remain in an “Open – pending adjudication” status. The standard to close an investigation will be the commander’s final adjudication of the case, or a determination by the MCIO in conjunction with the SVP/trial counsel that the case is unfounded, which can occur at any time throughout the investigative process.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

2. MCIO Caseload

**Recommendation 15:** The Secretary of Defense direct the commanders and directors of the MCIOs to authorize the utilization of Marine Corps Criminal Investigation Division (CID), military police investigators, or Security Forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of an SVU investigator to retain oversight.

**Finding 15-1:** DoD policy now requires that specially trained and selected MCIO investigators be assigned as the lead investigators for all sexual assault cases, which has substantially increased the MCIOs’ case loads. As a result, Marine Corps CID investigators cannot handle any sexual assaults in violation of Article 120 of the UCMJ, including those involving an allegation of an unwanted touching with no intent to satisfy a sexual desire.

**Discussion**

In January 2013, DoD policy began requiring that all adult sexual assault cases be investigated by the MCIOs. Army CID historically investigated all adult sexual assault cases, but NCIS and AFOSI often used Marine Corps CID agents and Air Force Security Forces investigators, respectively, to investigate some of the non-penetrative (e.g., unwanted touching) sexual assault offenses. Since the policy change, the sexual assault cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.

Fully accredited Marine Corps CID agents are trained at the MCIO level, and many are SVUIC trained. The Marine Corps CID argues its investigators are fully qualified to handle sexual assault investigations, especially the “touching offenses.” AFOSI similarly argues that Security Forces investigators, traditionally responsible for investigating non-penetrative cases, could effectively continue to investigate these types of offenses, under the supervision of a trained AFOSI agent. AFOSI and NCIS find that the additional caseload has been detrimental to other felony investigations.

3. Pretext Phone Calls and Text Messages

**Recommendation 16:** The Secretary of Defense direct the DoD Inspector General (IG) and the DoD Office of General Counsel to review the Military Services’ procedures for approving MCIO agent requests to conduct pretext phone calls and text messages as well as establish a standardized procedure to facilitate MCIOs’ use of this investigative technique, in accordance with law.

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338 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 137 (Nov. 19, 2013) (testimony of Mr. Robert Vance, NCIS).
339 DoDI 5505.18 ¶ 3.a. Section 1742 of the FY14 NDAA codifies this requirement.
340 See Transcript of RSP Comparative Systems Subcommittee Meeting 80 (Nov. 19, 2013) (testimony of Mr. Guy Surian, Army CID).
341 See id. at 137 (testimony of Mr. Robert Vance, NCIS); see also id. at 255 (testimony of Mr. Kevin Poorman, AFOSI).
342 See id. at 172-73 (testimony of Chief Warrant Officer 5 Shannon Wilson, U.S. Marine Corps).
343 See id. at 173.
344 See id. at 256 (testimony of Mr. Kevin Poorman, AFOSI).
345 See, e.g., id. at 187.
**Finding 16-1:** Numerous civilian police agencies indicated that the timely use of pretext phone calls and texts were a valuable tool in sexual assault investigations, and while procedures vary, obtaining approval was not, with few exceptions, difficult or time-consuming.

**Finding 16-2:** Civilian and military investigators and prosecutors stated that the use of pretext calls and texts were a valuable investigative tool. Each Service, however, requires different procedures to approve recorded pretext phone calls and text messages, based on differing interpretations of the legal standards for pretext calls. The military procedures can take several days to receive approval and the tactic becomes untimely.

**Discussion**

Pretext phone calls are a commonly used investigative tool in which a victim of an offense calls or texts the alleged offender and attempts to elicit incriminating statements from him or her. Unbeknownst to the suspect, an investigator is present with the victim during the phone call and typically records it.346

A senior civilian with Army CID told the RSP that cumbersome and time consuming requirements to obtain approval of pretext phone calls and text messages hampered sexual assault investigations.347 Some NCIS investigators, on the other hand, told the RSP they obtained approval within a few hours. NCIS has procedures in place which expedites the processing of requests for pretext phone calls.348 An AFOSI representative advised they experienced varying degrees of difficulty in obtaining permission to conduct pretext phone calls and text messages.349

In contrast, a civilian detective in the LAPD who spoke to the RSP did not experience the same difficulty in obtaining permission for pretext calls and texts.350 He and other civilian investigators emphasized the importance of pretext phone calls to corroborate the victim’s complaint and potentially lead to incriminating or exculpatory statements by the suspect.351

**Recommendation 17:** The Secretary of Defense should exempt DNA examiners, and other examiners at the Defense Forensic Science Center (DFSC), from future furloughs, to the extent allowed by law.

**Finding 17-1:** DNA and other examiners at the DDFSC/United States Army Criminal Investigation Laboratory (USACIL) were not exempted from Federal government furloughs in 2013, which resulted in delays processing evidence and conducting DNA analysis in sexual assault cases.

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346 Authorization and requirements for use of Interception of Wire, Electronic, and Oral Communications for Law Enforcement are governed by a DoD Instruction that is not publicly available. U.S. Dep’t of the Army Reg. 190-53, Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes (Nov. 3, 1986) details the requirement for approval of the use of electronic intercept and recording communications.

347 See, e.g., Transcript of RSP Public Meeting 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID). The Army requires a memorandum through CID Command to the Army General Counsel 48 hours before the interception.

348 See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Station Kitsap (Feb. 5, 2014) (on file at RSP).

349 See, e.g., Transcript of RSP Comparative System Subcommittee Meeting 168 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

350 See, e.g., Transcript of RSP Public Meeting 262 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department).


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The Response Systems Panel has not yet considered or deliberated on the contents of this report.


**Discussion**

Some members of the Subcommittee obtained information about crime laboratory operations while visiting DFSC/USACIL and the Headquarters of the Georgia Bureau of Investigations (GBI) laboratory in Atlanta, Georgia. The DFSC/USACIL is a fully accredited facility that provides forensic laboratory services to the MCIOs, other DoD investigative agencies, and other Federal law enforcement agencies. DFSC/USACIL is nationally certified, fully funded, and staffed appropriately to ensure fast turnaround times for DNA analysis and other forensic analysis in sexual assault cases.352

The “turnaround time” for a laboratory request at DFSC/USACIL— the time the lab receives evidence until the lab completes its analysis and sends a report to the requesting agent —is currently 77 days.353 MCIO investigators send all evidence examination requests for a case to the lab at one time; most requests require multiple examinations involving different divisions within the facility.354 Examiners routinely coordinate directly with the case investigators, prosecutors, and defense attorneys to discuss the probative value of requested examinations.355

MCIO investigators, SARCs, VAs, and other sexual assault support personnel were exempt from federal government furloughs in the summer of 2013 and the “government shutdown” in October 2013. This exemption facilitated continued investigation of sexual assault cases. However, DFSC/USACIL leadership informed the Subcommittee that their personnel were not exempt from these furloughs, which created backlogs at the lab and increased the turnaround time for DNA processing.356

The GBI is a fully accredited system of laboratories throughout Georgia, which provides forensic support to law enforcement agencies. Investigators may only submit a limited number of items for processing at the lab at one time.357 If the item submitted does not provide useful information, the investigator may submit a second item for the lab to examine. For example, an investigator may submit the SAFE kit containing DNA samples from the victim and suspect. If the lab does not find any DNA in the kit, the investigator may then submit items of the victim’s clothing. Personnel at GBI informed Subcommittee members that the lab has a 30-day turnaround time. However, this timeframe is only for the lab’s examination of a single forensic process from a piece of evidence, not the total time necessary for numerous examinations in a single case.358

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352 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) (Nov. 14, 2013) (on file at RSP) (interview of Dr. Jeff Salyards, Executive Director, DFSC).


354 Id.

355 Id.

356 Id.

357 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Georgia Bureau of Investigation (GBI) (Nov. 14, 2013) (on file at RSP) (interviews of GBI personnel).

358 Id.
G. SEXUAL ASSAULT FORENSIC EXAMINATIONS

**Recommendation 18:** The Secretaries of the Military Services direct their Surgeons General to review the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) requirement that all military treatment facilities with a 24-hour, seven-days-a-week emergency room capability maintain a Sexual Assault Nurse Examiner (SANE) and provide recommendations on the most effective way to provide Sexual Assault Forensic Examinations (SAFE) at their facilities.

**Finding 18-1:** In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFE. Not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim’s hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

**Finding 18-2:** The provisions of the FY14 NDAA which require all military treatment facilities with a 24 hour, seven days a week emergency room capability maintain a SANE, is overly prescriptive. Depending on the location, many civilian medical facilities have more experienced SANEs than are typically located on a military installation and also serve as the community’s center of excellence for SAFEs.

**Discussion**

The FY14 NDAA requires every military installation medical treatment facility (MTF) with an emergency department that operates 24 hours per day, seven days a week to have at least one assigned SANE.\footnote{FY14 NDAA, Pub. L. No. 113-66, § 1725, 127 Stat. 672 (2013).} DoD policy requires timely, accessible, and comprehensive healthcare for victims of sexual assault, including a SAFE Kit.\footnote{DoDI 6495.02 encl. 7} Healthcare providers conducting a forensic exam must be trained in accordance with the current version of the Department of Justice, Office on Violence Against Women’s “A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents.”\footnote{Id.} Victims can choose to have a SAFE kit conducted regardless of whether they choose restricted or unrestricted reporting. The National Protocol developed by the Department of Justice identifies a number of clinical and educational programs through which medical providers can be qualified to conduct forensic examinations. Compliance with this protocol should dictate the level of qualification for service providers, and is not limited to SANE certification. The protocol notes:

SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform these exams. Some nurses have been certified as SANEs—Adult and Adolescent (SANE–A) through the International Association of Forensic Nurses (IAFN). Others are specially educated and fulfill clinical requirements as forensic nurse examiners (FNEs), enabling them to collect forensic evidence for a variety of crimes. The terms [SAFE] and “sexual assault examiner” (SAE) are often used more broadly to denote a health care provider (e.g., a physician, physician assistant, nurse, or nurse practitioner) who has been specially educated and completed clinical requirements to perform this exam.\footnote{See OVW, supra note 176, at 59 (footnote omitted); see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA [Feb. 6, 2014] (on file at RSP) [interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).}
The Navy established policy to provide forensic exam capabilities around the globe. All Navy medical facilities must be capable of performing SAFEs, or are required to execute memoranda of understanding with local civilian medical facilities to provide the capability. This also encourages relationships and reciprocity between law enforcement agencies and medical centers. In Virginia Beach, detectives coordinate with NCIS and the SANE at the Naval Medical Center Portsmouth. If a victim files a delayed report with civilian authorities in Virginia Beach, detectives know that the local civilian forensic examiners will not collect a SAFE kit after 72 hours has passed. The Naval Medical Center Portsmouth will collect SAFE kits up to six weeks after an alleged assault, and civilian detectives will take victims to that facility for an exam, when necessary.

The Air Force has a limited number of facilities that conduct SAFEs, but rely on other MTFs in close proximity or civilian providers to supplement the capability. While the Army has some military medical facilities with trained SANEs, other facilities have contracts with civilian providers to respond to the base to perform the exams, or rely solely on the same civilian facilities used regionally by the civilians for exams. In some cases this may require a drive of 30 minutes or more. Some victims also choose to not be seen in a military medical facility, and prefer to have the exam conducted off a military installation.

SANEs in civilian medical facilities typically have more experience in conducting forensic exams because they see more sexual assault victims over the course of a year than SANEs on most military installations. For example, Inova, a hospital in northern Virginia, saw approximately 700 sexual assault victims last year, of which only 12 were military cases. Some state laws require a SANE to conduct a specified number of exams annually in order to maintain certification, which is challenging at military facilities given the relatively low volume of exams conducted. Regardless of the location or whether the SAFE exam is performed on or off a military installation, all military installations have established protocols and procedures, often supplemented by memoranda of agreement with local hospitals, to ensure eligible personnel can be adequately supported and examined while forensic evidence is preserved.


364 See Transcript of RSP Comparative Systems Subcommittee Meeting 386 (Nov. 19, 2013) (testimony of Detective Lanis Geluso, Virginia Beach Police Department).

365 Id. at 251 (testimony of Colonel Todd Poindexter, Chief of Clinical Operations, U.S. Air Force).

366 Id. at 303-04 (testimony of Ms. Carol L. Haig, Army Sexual Assault Clinical Provider, Officer of the Surgeon General).

367 Id. at 275-83 (testimony of Dr. Sue Rotolo, INOVA Hospital).

368 Id.

369 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP) (interview of representatives from Scott and White Hospital).
Recommendation 19: The Secretary of Defense direct the appropriate agency to eliminate the requirement to collect plucked hair samples as part of a SAFE.

Finding 19-1: Many civilian agencies no longer collect plucked hairs as part of a SAFE kit because there is little, if any, probative value to that material. The Director of DFSC/USACIL agrees there is no need to collect these samples.

Discussion

Interviews with lab personnel and leadership from DFSC/USACIL and GBI reveal the probative value of taking plucked pubic hairs as part of a SAFE examination is negligible. The military and civilian medical forensic examiners interviewed on site visits and who appeared before the Subcommittee overwhelmingly stated the taking of plucked hairs was of little value to the case.

Current Department of Justice Protocols for the collection of hair samples from victims and subjects in a sexual assault investigation notes that many jurisdictions do not routinely collect plucked head and pubic references samples. The protocol further suggests that “jurisdictions should evaluate the necessity of routinely collecting hair samples based on discussions of how often such evidence is actually useful or used in the jurisdiction.”

Recommendation 20: The Secretary of Defense direct the Military Services to create a working group to coordinate the Services’ efforts, leverage expertise, and consider whether a joint forensic exam course open to all military and DoD practitioners, perhaps at the Joint Medical Education and Training Center, or portable forensic training and jointly designed refresher courses would help to ensure a robust baseline of common training across all Services.

Finding 20-1: The Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities; however, the Military Services instituted different programs and developed guidelines independently.

Discussion

FY14 NDAA requires that the curriculum and other components of the program for certification of Sexual Assault Nurse Examiners-Adult/Adolescent, utilize the most recent guidelines and standards as outlined by the Department of Justice, Office on Violence Against Women, in the National Training Standards for Sexual Assault Medical Forensic Examiners. Each Service has established its own programs to implement this common mandate. The Navy’s training protocol consists of a minimum of 14.5 hours of standardized training, including 11.5 hours of DVD training that corresponds with the Department of Justice national protocol for care of adult victims of sexual assault, and three additional hours of Navy training. The Navy...

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370 Id.; see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014) (on file at RSP) (interview with Ms. Paula Newman-Skomski, Nurse Practitioner, Providence Intervention Center for Assault and Abuse).

371 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, DFSC/USACIL (Nov. 14, 2013) (on file at RSP) (interview of Dr. Jeff Salyards, Executive Director, DFSC).

372 See, e.g., id.

373 OVW, supra note 176, at 71.

374 FY14 NDAA, Pub. L. No. 113-66, § 1725(b), 127 Stat. 672 (2013); see also OVW, supra note 176.
is also creating supplemental training videos.\textsuperscript{375} Air Force policy requires healthcare personnel performing forensic examinations to attend a three day forensic sexual assault course and complete one case/mock exam.\textsuperscript{376} Forensic Nurse Examiner’s initial training includes attendance at a five-day course and three cases/mock exams. Refresher training is also required to maintain certification. The Army sexual assault medical forensic examiner training educates health care providers to conduct SAFEs through a 60-hour training program that includes 40 hours of classroom training and 20-plus hours of skilled practicums. The Army is reviewing and updating the needed course content and is considering putting it in a formalized schoolhouse at the Army Medical Department Center and School.\textsuperscript{377}

The International Association of Forensic Nurses has specific requirements to become a SANE or a SAFE. Required initial training is 40 hours of outlined material and clinical requirements. SANE training follows the DOJ national guidelines.\textsuperscript{378} Not all civilian agencies require their nurses performing forensic examinations be certified as a SANE, but they must have the required training as a forensic examiner. They receive 40 hours of training but are not required to sit for the national exam. They also do 12 hours of continuing education annually.\textsuperscript{379}

Oversight and Review of Sexual Assault Investigations

\section*{Recommendation 21:} The Secretary of Defense direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits.

\section*{Finding 21-1:} Outside agencies conduct audits of investigations in several civilian police agencies the Subcommittee examined as a means to ensure transparency and confidence in the police response to sexual assault.

\section*{Finding 21-2:} There is currently no procedure for an entity outside DoD to review sexual assault investigations to ensure cases are appropriately investigated and classified.

\section*{Discussion}

Several civilian police departments conducted audits of their closed case files to determine whether they were unfounding too many cases after facing criticism of their handling of sexual assault cases.\textsuperscript{380} Additionally, a criminal justice expert who has written and studied policing and prosecuting sexual assault cases reviewed

\begin{itemize}
  \item \textsuperscript{375} See Transcript of RSP Comparative Systems Meeting 251 (Nov. 19, 2013) (testimony of Commander Kristie Robson, Department Head of Clinical Programs, Bureau of Medicine and Surgery, U.S. Navy).
  \item \textsuperscript{376} U.S. DEP’T OF THE AIR FORCE, INSTR. 44-102, MEDICAL CARE MANAGEMENT ¶ 16.5.6 (Jan. 20, 2012).
  \item \textsuperscript{377} See Transcript of RSP Comparative Systems Subcommittee Meeting 308 (Nov. 19, 2013) (testimony of Ms. Carol L. Haig, Chief, Women’s Health Service).
  \item \textsuperscript{378} Id. at 290 (testimony of Dr. Sue Rotolo, Sexual Assault Nurse Examiner).
  \item \textsuperscript{379} Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).
  \item \textsuperscript{380} MCASA, supra note 202; see also Joanna Walters, Investigating Rape in Philadelphia: How One City’s Crisis Stands to Help Others, \textit{The Guardian} (July 2, 2013); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC (Feb. 20, 2014) (on file at RSP); Transcript of RSP Comparative Systems Subcommittee Meeting 339 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).
\end{itemize}
sexual assault case files from the Los Angeles Police Department and the Los Angeles Sheriff’s Office and found that a significant number of cases were inappropriately unfounded or inappropriately closed through clearance by exceptional means. In the FBI’s UCR Program, law enforcement agencies can clear, or close, a case by arrest or exceptional means which is explained as:

In certain situations, elements beyond law enforcement’s control prevent the agency from arresting and formally charging the offender. When this occurs, the agency can clear the offense exceptionally. Law enforcement agencies must meet the following four conditions in order to clear an offense by exceptional means. The agency must have:

- Identified the offender.
- Gathered enough evidence to support an arrest, make a charge, and turn over the offender to the court for prosecution.
- Identified the offender’s exact location so that the suspect could be taken into custody immediately.
- Encountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging, and prosecuting the offender.

Within civilian police departments, more senior investigators or patrol officers typically review case files. This is also true in the military. Each MCIO also has an internal Inspector General and policies regarding the review of sexual assault cases. Additionally, DoD IG reviews MCIO cases on a periodic basis.

The DoD IG is responsible for developing policy for the MCIOs to oversee sexual assault investigations, and provide oversight of sexual assault training within the DoD investigative community. In June 2011, the Government Accounting Office (GAO) completed a review of the extent of DoD IG oversight over the MCIOs’ investigation of sexual assault. The GAO found that DoD IG had not “performed these responsibilities, primarily because it believes it has other, higher priorities.” The GAO found “no evidence of Inspector

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381 Cassia Spohn & Katherine Tellis, Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff’s Department, and the Los Angeles County District Attorney’s Office (Feb. 2012), available at https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf.


383 The FBI provided the following examples of exceptional circumstances: death of the offender, victim’s refusal to cooperate with the prosecution after the offender has been identified, or denial of extradition because the offender committed a crime in another jurisdiction and is being prosecuted for that offense. Id.

384 See, e.g., Transcript of RSP Comparative System Subcommittee Meeting 188 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

385 See, e.g., id. at 53 (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).

386 DoDI 6495.02 encl. 2, ¶ 5.


388 Id. at 1.
V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

General oversight at the Service level for any of the 2,594 sexual assault investigations that DOD reported the Services completed in fiscal year 2010.”

Following the GAO Report, in 2011 the DoD IG established a Violent Crimes Division to provide recurring investigative training and oversight of violent crimes, such as homicide, suicide, sexual assault, child abuse, and serious domestic violence. The objective was to provide regular and recurring oversight to evaluate the quality of violent crime investigations and training and recommend improvements. In July 2013, DoD IG completed an evaluation of MCIO sexual assault investigations. The evaluation did not apply external standards for case quality but did study the adequacy of MCIO investigations of adult sexual assaults in accordance with DoD, Service, and MCIO policies and procedures.

389 Id.
390 See, e.g., Transcript of RSP Comparative System Subcommittee Meeting 8 (Nov. 19, 2013) (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).
391 DoD IG July 2013 Report, supra note 331
392 Id. at 5.
INTRODUCTION

The Subcommittee’s assessment and comparison of the training levels of military counsel to those of their civilian counterparts concentrated on gathering information to determine whether military counsel are providing competent representation in adult sexual assault cases. Overall, the Subcommittee found that military trial counsel and defense counsel are competently representing their clients in adult sexual assault cases.

The Subcommittee’s tasks included examining the importance of training and experience in defending or prosecuting adult sexual assault crimes. However, this assessment and comparison of “training” and “experience” is inherently complicated because a significant portion of training for trial practitioners is supervised experience. In addition, there appears to be no uniform agreement in the military or civilian systems on a requisite minimum level of training or experience for adult sexual assault cases.

The evidence the Subcommittee considered revealed the ingredients of an effective sex crimes prosecutor or defense counsel are not limited to the number of trials completed. Many factors affect a meaningful assessment of competent representation, including attorney caseloads, time for trial preparation, level and sophistication of support staff, and collateral duties. Likewise, a good prosecutor must have the interpersonal and emotional skills required to successfully build rapport with victims, collaborate with law enforcement investigators, and cooperate with experts and other witnesses. These competencies, and the training for them, are not easily subjected to tidy assessments, though practitioners in both systems recognized their importance. Similarly, defense counsel identified interpersonal skills of interviewing clients, working with defense investigators, and having an evenhanded approach to adverse witnesses as crucial to success.

Consequently, there is no checklist to measure competent training with a guarantee of effective representation. Nonetheless, after carefully examining the training programs and curriculum of the Services and civilian systems, the Subcommittee did identify several promising practices. These include using experienced civilian practitioners as trainers, collaborating among the Services, and creating programs in the Services designed to foster enduring expertise. Consistent feedback from experienced supervisory counsel, judges, and victims is another important tool for ensuring counsel on both sides maintain effective representation.
A. OVERVIEW – BASIC MILITARY LAWYER TRAINING, SELECTION, AND CERTIFICATION STANDARDS

In all Services, the basic legal training curricula train judge advocates (JAGs) in a breadth of subjects, including basic trial advocacy, trial procedure, and criminal law. In addition, each Service’s curriculum has a specific focus on litigating adult sexual assault cases that begins in the basic legal training courses. A more detailed overview of the training curriculum for each Service appears below and in the appendices.

1. Basic Lawyer Training – Army

In the Judge Advocate Officer Basic Course (JAOBC), new judge advocates learn the military justice system through lecture, seminar, and practical exercise instruction. The ten-and-a-half-week course prepares them to provide military justice advice and to serve as counsel in courts-martial and administrative board proceedings. Classes cover almost all areas of criminal law and procedure and students participate as trial counsel and/or defense counsel in two moot court exercises. The course uses a sexual assault case scenario, which emphasizes key aspects of sexual assault cases such as victim-witness programs, victim behavior, and related evidentiary rules.

The Army JAG Corps trains and certifies all judge advocates for assignment as trial counsel, which includes the ability to prosecute sexual assault cases. As detailed below, all trial counsel complete the JAOBC trial advocacy training, the New Prosecutor/Essential Strategies in Sexual Assault Prosecution Course, and the Intermediate Trial Advocacy Course. All of these training courses employ a sexual assault prosecution scenario.

2. Basic Lawyer Training – Air Force

All Air Force judge advocates receive trial advocacy training and preparatory moot court experience during their nine-week initial training course, the Judge Advocate Staff Officer Course (JASOC). This training

394 See Services’ Responses to Request for Information 1(d) (Nov. 1, 2013); Services’ Responses to Request for Information 75(b) and 75(c) (Dec. 19, 2013).
396 See id.
397 “The attorney strength of the Active Army (AA) JAGC at the end of 2013 was 1,970 (including general officers). This total does not include 88 officers attending law school while participating in the Funded Legal Education Program (FLEP).” ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2012 TO SEPTEMBER 30, 2013, at 49 [hereinafter CAAF FY13 ANNUAL REPORT], available at http://www.armfor.uscourts.gov/newcaaf/annual/FY13AnnualReport.pdf.
398 Army’s Response to Request for Information 1(d) (Nov. 1, 2013).
399 Id.
400 Id.
401 DoD SVC REPORT, supra note 171, at 18.
402 Id. at 315-16.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

includes 130 hours of military justice instruction, including a fact scenario that is usually based on a sexual assault case.403 JAGs must graduate from JASOC, serve effectively as trial or assistant trial counsel, and be recommended by a supervisory Staff Judge Advocate (SJA) and military judge to become certified as trial and defense counsel, a prerequisite to serving as lead counsel in sexual assault cases.404 All new judge advocates receive extensive trial advocacy training, pass graded exams, and undergo realistic courtroom-based exercises before being certified as competent to perform their duties by The Judge Advocate General (TJAG) of the Air Force.405

3. Basic Lawyer Training – Navy/Marine Corps/Coast Guard

“Improving the quality and increasing the availability of military justice and trial advocacy training was a cornerstone of the JAG’s agenda for FY13.”406

In the ten-week Basic Lawyer Course (BLC), the initial training course for all judge advocates in the Navy, Marine Corps, and Coast Guard, 57 percent of the curriculum pertains to military justice.407 Attorneys must complete the course to be certified to try cases.408

During the BLC, judge advocates receive extensive training on several topics related to sexual assault.409 Students study the related rules of evidence and sexual assault criminal provisions under Articles 120 and 125 of the UCMJ.410 They also learn how to advise convening authorities about sexual assault issues, and study victim and witness assistance programs.411 Students learn about victims’ rights, how to provide legal assistance to sexual assault victims, and the role of the victim’s legal counsel in the process.412 One of the final milestones of the BLC is a mock trial judged and graded by sitting military judges of the Navy, Marine Corps, and Coast Guard.413 For the mock trial, 50 percent of the students are assigned a sexual assault case and are required to write and litigate Military Rule of Evidence 412 motions.414 Students not assigned as counsel are assigned witness roles, introducing them to many of the same issues.415

403 Id. at 317.
405 Id.
406 CAAF FY13 ANNUAL REPORT, supra note 397, at 57.
409 Id.
410 Id. Article 120 is the military’s sexual assault statute; Article 125 is the military’s sodomy statute.
411 Transcript of RSP Comparative Systems Subcommittee Meeting 344 (Jan. 7, 2014) (testimony of Lieutenant Commander Justin McEwan, U.S. Navy); see also Navy’s Response to Request for Information 1(d) (Nov. 1, 2013).
413 Id. at 345.
414 Military Rule of Evidence 412 is the military’s “rape shield” provision.
Recommendation 22-A: The Secretary of Defense direct the establishment of a DoD judge advocate criminal law Joint Training Working Group to optimize sharing of best practices, resources, and expertise for prosecuting adult sexual assault cases. The working group should produce a concise written report, delivered to the Service Judge Advocate Generals (TJAGs) at least annually, for the next five calendar years.

The working group should identify best practices, strive to eliminate redundancy, consider consolidated training, and monitor training and experience throughout the Military Services. The working group should review training programs such as: the Army’s Special Victim Prosecutor (SVP) program; the Navy’s Military Justice Litigation Career Track (MJLCT); the Highly Qualified Expert (HQE) programs used for training in the Army, Navy, and Marine Corps; the Trial Counsel Assistance and Defense Counsel Assistance Programs (TCAP and DCAP); the Navy’s use of quarterly judicial evaluations of counsel; and any other potential best practices, civilian or military.

Recommendation 22-B: The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should sustain and broaden the emphasis on developing and maintaining shared resources, expertise, and experience in prosecuting adult sexual assault crimes.

Finding 22-1: Currently, all Military Services send members to training courses and Judge Advocate Generals (JAG) Corps schools of the other Services. The Military Services also informally share resources, personnel, lessons for training, and collaborate on some training. This enables counsel to share successful tactics, strategies, and approaches, but is not formalized and has not led to the clarification of terms and processes that would enhance comparability and efficiency.

Discussion

Existing collaboration among the Services is a promising practice. Witnesses told the Subcommittee that the Service JAG schools collaborate in creating their curricula and sending members to be faculty and students at the schools of other Services.416 However, the information received does not appear to demonstrate any synchronized effort in creating, funding, and growing programs—as evidenced by the varying names and acronyms used to describe similar programs.417 As noted elsewhere in this report, this can create confusion, duplication of effort, and a lack of clarity and credibility to those outside of the system.

The Subcommittee identified a working group as an effective means of showing progress and development and ensuring that initiatives and promising practices are disseminated throughout the Services to avoid duplication and continue improving training practices.

416 See, e.g., id. at 353-58 (testimony of Colonel Ken Theurer, U.S. Air Force); id. at 355-56 (testimony of Lieutenant Commander Justin McEwan, U.S. Navy).

417 See, e.g., Recommendations 32-D, 49-A, and 49-B, and accompanying discussions, infra.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

B. SPECIALIZED SEXUAL ASSAULT TRAINING FOR CIVILIAN AND MILITARY PROSECUTORS

**Recommendation 23:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps sustain or increase training of judge advocates in order to maintain the expertise necessary to litigate adult sexual assault cases in spite of the turnover created by personnel rotations within the JAG Corps of each Military Service.

**Finding 23-1:** There are no national or state minimum training standards or experience for civilian prosecutors handling adult sexual assault crimes. Though each civilian prosecution office has different training practices, most sex crime prosecutor training occurs through supervised experience handling pretrial motions, trials, and appeals.

**Finding 23-2:** Civilian sex crimes prosecutors usually have at least three years of prosecution experience, and often more than five. Experience can also be measured by the number of trials completed, though there is no uniform minimum required number of trials to be assigned adult sexual assault cases. Some prosecutors in medium to large offices have caseloads of at least 50-60 cases, and spend at least two days per week in court.

**Finding 23-3:** All the Military Services have specially-trained and selected lawyers who serve as lead trial counsel in sexual assault crimes cases. Defense counsel handling adult sexual assault cases in all the Military Services are also trained; many previously served as trial counsel.

**Discussion**

1. **Overview of Civilian Prosecutor Sexual Assault Training and Experience**

Criminal jurisdictions often hire new prosecutors with little or no prosecutorial experience, but many have previous experience as a law clerk or intern. In large offices and jurisdictions around the country, new prosecutors will generally spend two to three years prosecuting misdemeanor offenses to gain experience in motions practice, managing a large caseload, cross-examining the accused, and preparing and presenting testimony of victims, witnesses and experts. Some prosecutors continue to gain experience working in units preparing grand jury testimony and prosecuting juvenile or less serious felony offenses for another one to three years. Afterward, prosecutors with about five to ten years of prosecution experience may be selected for sex crimes units. However, there are variations throughout the United States. For example, in the Philadelphia District Attorney’s Office, counsel begin working in the Family Violence and Sexual Assault Section Trial Division after two and one-half years at the office and normally depart the unit and DA’s office after five years.

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418 See, e.g., Transcript of RSP Public Meeting 432 (Dec. 12, 2013) (testimony of Ms. Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office) (“The very, very minimal amount of experience is three years, and normally our entry level is at five or six years of prosecuting statements. . . . I want to know how many statements you’ve taken from defendants, how many search warrants have you done, how many DNA cases have you put on, how many fingerprint experts have you put on, how many defendants have you cross-examined, how many jury trials have you had, how many judge trials you’ve had[,]”); see also id. at 460 (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia) (“Similar to what Martha just said, we have the same type of system where in order to get into that unit, people have to wait for a vacancy. They have to apply. We review their experience similar to what Martha said with DNA, with vulnerable victims.”).

419 See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC 5-6 (Feb. 20, 2014) (“There are 20 full time prosecutors in the DA’s family and sexual assault unit. They have four new attorneys who handle domestic violence cases, preliminary hearings, misdemeanors, and nonjury trials. There are 18 ‘major level’ prosecutors with 2.5-5 years [of] experience. The major level prosecutors handle felony domestic violence, child cases, and all adult sexual assault cases. The most senior attorney in the office
2. Civilian Training

In many large prosecution offices, instead of formal classroom training, funding limitations and prioritization of case work require a civilian prosecutor’s primary source of training to be supervised on-the-job courtroom work, supplemented by topical seminars taught by senior prosecutors within the office. However, training in civilian prosecutors’ offices also varies by office size.

In larger jurisdictions, prosecutors typically progress through a few weeks of formal training involving classroom and seminar instruction. Training programs will cover criminal law, criminal procedure, evidence, and ethics, and usually place substantial emphasis on developing trial practice (courtroom) skills. The core training of prosecutors, including those who later become sex crimes prosecutors, occurs in a supervised progression through a series of assignments, beginning with misdemeanors and moving through general felony crimes. During this progression, prosecutors work with senior colleagues and supervisors to learn that handles sex crimes has 7 years [of] experience and six attorneys have 5 years [of] experience.”

The Executive Office of United States Attorneys (EOUSA) categorizes offices into four types based upon attorney staffing levels – extra-large (greater than or equal to 100 attorneys), large (between 45 and 99.9 attorneys), medium (between 25 and 44.9 attorneys), and small (less than 25 attorneys). The term "large" here generally means greater than or equal to 100 attorneys. See EOUSA, Resource Management of United States Attorneys’ Offices (Audit Report 03-03) ch. 3 (Nov. 2008), available at http://www.justice.gov/oig/reports/EOUSA/a0903.pdf.

See, e.g., Transcript of RSP Public Meeting 459 (Dec. 12, 2013) (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia) (“Supervisors observe every felony trial and give support during the trial, and then feedback after the trial”); see also id. at 431 (testimony of Ms. Martha Bashford that Manhattan District Attorney’s Office has 60 sex crimes prosecutors); id. at 487 (testimony of Ms. Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, that San Diego County District Attorney’s Office has 300 prosecutors).

See, e.g., Transcript of RSP Comparative Systems Subcommittee 96 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, Director of Programs and Director National Center for the Prosecution of Violence Against Women, Program Manager, National Criminal Justice Academy, National District Attorneys Association (NDAA)) (describing impact office size has on training requests to NDAA and experience levels of prosecutors).

See, e.g., Written Statement of Mr. Bill Montgomery, Maricopa County Attorney, to RSP (submitted Dec. 12, 2013) (“Sex crimes prosecutors undergo specific training in their first year of assignment, learning how to address issues such as how suspects and victims of sex assault should be interviewed, how DNA is collected and analyzed, why DNA may not be present in a case, and the issues surrounding mixed DNA samples. Prosecutors are also trained on investigation protocols, the importance of confrontation calls, and the use of multidisciplinary teams housed at family advocacy centers to provide one-stop services for sex assault victims to address medical exams, investigative interviews, counseling, and service referrals.”); see also Transcript of RSP Comparative Systems Subcommittee Meeting 128-29 (Jan. 7, 2014) (testimony of Ms. Viktoria Kristiansson, AEquitas) (“When I was a prosecutor in Philadelphia, all prosecutors were offered the same training: a mandatory week-long orientation; mandatory weekly meetings, unless you missed them because you were in court which happened at least 50 percent of the time . . . .”).

See, e.g., Transcript of RSP Public Meeting 432 (Dec. 12, 2013) (testimony of Ms. Martha Bashford, New York County District Attorney’s Office) (“We provide ongoing substantive training. For our new people, we do the sexual assault laws, evidentiary rules specific to sex crimes. But we also continue to train our most senior people. We bring in outside speakers. We just did training on adolescent interview techniques.”).

See, e.g., id. at 456 (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia) (“In my office, when you start out as a prosecutor, you’re required to spend your first few years going through various rotations, to develop different skills, and to learn how to investigate and prosecute different types of cases. Your training in the office usually starts out with a stint of between six and nine months in the appellate division. After that, you’re sent to one of the misdemeanor sections, and my section is one of...”)

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VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

witness preparation, how to conduct investigations and advise investigators, grand jury practice, how to handle pretrial and trial motions, and the handling of judge and jury trials as lead and assisting (second) counsel. Some prosecutors also train in the appellate section. Civilian prosecutors are able to gain substantial trial experience in this process. For instance, jury trial prosecutions for driving under the influence of alcohol or domestic violence can introduce newer prosecutors to working with experts, victims, and reluctant witnesses.

Ongoing classroom-style instruction and focused continuing education courses occur in some jurisdictions through in-house training from senior attorneys. Prosecutors may also attend annual or topical seminars hosted by organizations such as the National District Attorneys’ Association (NDAA) and AEQuitas. Some state agencies such as the National Association of Prosecutor Coordinators and the New York Prosecutors Training Institute also provide topical or annual training.

Prosecutors seeking admission to sex crimes units in large jurisdictions typically must have five or more years of experience, and may be required to apply and interview concerning their experience, skill, and personal fit for the unit. Some civilian prosecutors identified turnover and burnout as challenges they face in seeking to build expertise and continuity through training and experience. To counteract this, some offices train their attorneys on vicarious trauma.

the misdemeanor sections.

426 See, e.g., id. at 432 (testimony of Ms. Martha Bashford, New York County District Attorney’s Office); id. at 456–58 (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia).

427 Id. 456 (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia).

428 See, e.g., id. at 458 (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia, that prosecutors handling misdemeanor domestic violence and child abuse cases would prosecute about 30 bench (judge) misdemeanor trials before beginning misdemeanor sexual assault cases; in that role, they would prosecute another 15–20 misdemeanor sexual assault bench trials).


430 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 106, 142 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA), see also id. at 124 (testimony of Ms. Viktoria Kristiansson, AEQuitas).

431 See, e.g., id. at 94 (testimony of Ms. Candace Mosley, NDAA, describing topical courses provided to prosecutors); see also id. at 131–32 (testimony of Ms. Viktoria Kristiansson, AEQuitas, describing training methods and options).


433 See, e.g., Transcript of RSP Public Meeting 432 (Dec. 12, 2013) (testimony of Ms. Martha Bashford, New York County District Attorney’s Office) (“The very, very minimal amount of experience is three years, and normally our entry level is at five or six years of prosecuting statements. . . . I want to know how many statements you’ve taken from defendants, how many search warrants have you done, how many DNA cases have you put on, how many fingerprint experts have you put on, how many defendants have you cross-examined, how many jury trials have you had, how many judge trials you’ve had[,]”); see also id. at 460 (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia) (“Similar to what Martha just said, we have the same type of system where in order to get into that unit, people have to wait for a vacancy. They have to apply. We review their experience, we review their experience similar to what Martha said with DNA, with vulnerable victims.”).

434 See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014) (discussing comments from local prosecutors regarding burnout) (on file at RSP); see also Transcript of RSP Public Meeting 468–69 (Dec. 12, 2013) (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia) (discussing efforts taken to prevent against “secondary trauma”).
3. Civilian Prosecutors’ Offices Organization

Of the jurisdictions appearing before the Subcommittee, a majority have specialized units that prosecute sexual assault crimes. Smaller prosecution offices, which comprise the majority of jurisdictions in the United States, do not have specialized units but instead assign sexual assault cases to attorneys with specialized training. In several large jurisdictions, such as the New York boroughs, it is common for supervisors to work in the sex crimes bureau for twenty years or more. These attorneys develop extensive expertise that may be difficult to replicate. In contrast, in some jurisdictions such as Snohomish County, Washington, or Dover, Delaware, prosecutors rotate from one specialty unit to another on a cycle of approximately three years.

4. National Training of Civilian Prosecutors

National training organizations, such as the NDAA and AEquitas, offer tailor-made courses and national training events. However, in recent years, after the NDAA withdrew from the National Advocacy Center (NAC), which also trains federal prosecutors, these courses are offered less frequently. Additionally, the NDAA could no longer afford scholarships or tuition reimbursement. Although the NDAA recently began offering similar courses in a training facility in Utah this year, funding still limits course availability. Moreover, large caseloads and lack of attorney staffing in many offices may prevent civilian prosecutors from attending such training courses, even when offered for free or at discounted rates. Likewise, civilian prosecutors identified challenges of funding, time, and receiving permission to attend.

To address these challenges, organizations such as the NDAA and AEquitas have started conducting more on-site training courses and telephonic case consultations, and also producing webinar recordings. Currently, NDAA also focuses on responding to requests for assistance, and assisting prosecutors in their learning in

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435 The jurisdictions from which prosecutors testified are: San Diego, CA; Manhattan, NY; Maricopa County, AZ; and Washington, DC. Additional information gathered covers 13 other jurisdictions listed infra in Appendix G, as well as civilian prosecutors Subcommittee members interviewed during site visits to: Fort Hood, Texas (Bell County, Texas District Attorney’s Office); Quantico, VA (U.S. Attorney’s Office, Eastern District of Virginia); and Everett, WA (Snohomish County, Washington District Attorney’s Office).

436 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 95-96 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA); see also Appendix G, infra.

437 See id.

438 See id.

439 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 94 (Jan. 7, 2014) (testimony of Ms. Candace Mosely, NDAA, describing topical courses provided to prosecutors); id. at 131-32 (testimony of Ms. Viktoria Kristiansson, AEquitas, describing training methods and options).

440 Id. at 111-12 (testimony of Ms. Candace Mosley, NDAA).

441 Id.; see also National District Attorneys Association, “All Upcoming Courses,” at http://www.ndaa.org/upcoming_courses.html.

442 Transcript of RSP Comparative Systems Subcommittee Meeting 112 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA); see also id. 124-25, 142-44 (testimony of Ms. Viktoria Kristiansson, AEquitas).

443 Id. at 106-07 (testimony of Ms. Candace Mosley, NDAA) (“I have had domestic violence conferences where I could give a full scholarship for transportation costs, lodging at the hotel, the conference was free, could reimburse some transportation. And I had people turn it down because they couldn’t afford to be out of their offices.”); see also id. at 124-25 (testimony of Ms. Viktoria Kristiansson, AEquitas, describing three challenges as “overwhelming caseloads”; “budget cuts”; and training conducted by people who are “not experts on adult learning principles and knowledgeable of the relevant sexual assault research”).

444 Id. at 101 (testimony of Candace Mosley, NDAA); see also id. at 131-32, 134 (testimony of Ms. Viktoria Kristiansson, AEquitas); see also AEquitas, “Webinar Recordings,” at http://www.aequitasresource.org/webinar-recordings.cfm.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

preparation for trials. Similarity, the NDAA maintains online courses and an online listserv to facilitate specialization and learning communities.

5. Federal Sex Crimes Prosecution

State, rather than federal, prosecutors handle most violent crimes. In forty-eight Federal Judicial Districts, Department of Justice (DOJ) attorneys prosecute crimes that occur on Indian land. However, the total number of sexual assault cases that the DOJ prosecutes is a small fraction of the number of sexual assault cases nationwide. DOJ’s NAC in Columbia, South Carolina trains DOJ attorneys on advocacy skills, legal administration, and substantive legal subjects, including violent crime (primarily on Indian Country).

6. Military Prosecutor Advanced/Specific Sexual Assault Training

“Our counsel are almost continuously in training. And I think it is critical that they stay in training. If those dollars are cut, that is where the damage is going to come from to any prosecution or any defense.”

Prosecuting and defending sexual assault crimes is a priority in all of the Military Services, and judge advocate training reflects this emphasis. Each Service focuses on teaching judge advocates to litigate adult sexual

446 Id. at 115.
447 For federal jurisdiction to apply, an offense must occur on a federal reservation, in a federal prison, or otherwise within the special maritime or territorial jurisdiction of the United States; otherwise, sexual offenses are state crimes. Sexual assaults prosecuted by the federal government are those that occur on Native American lands, military installations, national parks, and territorial property. The U.S. Attorney’s Office for the District of Columbia is one exception, because its Superior Court Division prosecutes all crimes that occur in the District of Columbia, including all violent crime. That Division is akin to a typical district attorney’s office. See, e.g., Transcript of RSP Public Meeting 453 (Dec. 12, 2013) (testimony of Ms. Kelly Higashi, U.S. Attorney’s Office for the District of Columbia).
453 See Services’ Responses to Request for Information 1(d) (Nov. 1, 2013); Services’ Responses to Request for Information 75(b) (Dec. 19, 2013); Transcript of RSP Public Meeting 412-13 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, Trial Counsel
assault cases beginning in basic judge advocate training. In addition, the Services have created specialized programs for sexual assault prosecution and training, such as: the Army’s SVP program; the use of civilian HQEs in the Army, Navy, and Marine Corps; the Air Force’s Special Victims Unit (SVU); and the Navy’s MJLCT.

Federal sequestration in 2013 affected the training budget of military counsel, which resulted in cancellation of some training courses. However, it is imperative to maintain emphasis on training counsel to handle complex cases, given turnover and personnel rotations of the military.

Furthermore, the Services ensure experienced senior attorneys, with extensive training and trial experience, supervise military prosecutors and defense counsel handling adult sexual assault cases in all Services. The Services also ensure military prosecutors and defense counsel have smaller caseloads than their civilian counterparts to enable sufficient preparation time for trials.

454 See Services’ Responses to Request for Information 1(d) (Nov. 1, 2013).

455 Id.

456 CAAF FY13 ANNUAL REPORT, supra note 397, at 65 (Annual Report of the Judge Advocate General of the Navy); see also, e.g., id. at 57 (“Due to Congressional Continuing Resolutions, Service restrictions on conference attendance, and sequestration, external funding from DoD did not materialize. As a result, some planned military justice courses were curtailed and others were offered online in lieu of in-person training.”); id. at 126 (Report of The Judge Advocate General of the Air Force) (“Travel and Reservist man-day restrictions, which were the result of ongoing sequestration of appropriations during much of FY2013, required cancellation of scheduled TRIALS programs at Los Angeles AFB, CA; Atlanta, GA; MacDill AFB, FL; and Joint Base Langley-Eustis, VA. Aside from the cancelled TRIALS programs, sequestration also caused cancellation of other FY2013 courses devoted, at least in part, to instruction in military justice. These were the Joint Military Judges Annual Training (previously known as the Inter-Service Military Judges Seminar), the Annual Survey of the Law (for Reserve and Air National Guard judge advocates), one offering of GATEWAY, and several offerings of the Intermediate Sexual Assault Litigation Course.”).

457 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 209–10 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers (NACDL), comparing sexual assault cases to other cases and describing them as being “as complicated as any white collar case that I have”); see also Transcript of RSP Public Meeting 353–60 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender, describing complexity of sexual assault cases and importance of having experienced counsel defend them); id. at 432 (testimony of Ms. Martha Bashford, New York County District Attorney’s Office) (“The very, very minimal amount of experience is three years, and normally our entry level is at five or six years of prosecuting statements.”).

458 Army’s Response to Request for Information 75(b) (Dec, 19, 2013) (“Staff Judge Advocates are entrusted with the responsibility for ensuring that any trial counsel assigned to any case, whether sexual assault or another offense, are qualified to do so. Technical supervision and oversight is provided to trial counsel through a Senior Trial Counsel, Chief of Justice, Deputy Staff Judge Advocate and reach back expertise from the Trial Counsel Assistance Program[,]”); Air Force’s Response to Request for Information 75(b) (Dec, 19, 2013) (describing certification process and noting that only certified judge advocates may be detailed even to non-penetrative sexual assault cases); Navy’s Response to Request for Information 75(b) (Dec, 19, 2013) (stating that all trial counsel assigned sexual assault cases are supervised by Senior Trial Counsel (judge advocates with a rank of O–4 or above), and the cases are typically detailed only to “core attorneys”—i.e., judge advocates with at least one full tour of experience); Marine Corps’ Response to Request for Information 75(b) (Dec, 19, 2013) (stating that only Special Victim Qualified Trial Counsel are detailed to sexual assault cases).

459 See Services’ Responses to Request for Information 75(b) (Dec. 19, 2013); see also Services’ Responses to Request for Information
However, despite significant efforts by the Services to train and prepare practitioners, a continuing challenge throughout the Services is the ability to build and retain specialized litigation experience for military prosecutors and defense counsel.\(^{460}\) This pertains specifically to adult sexual assault cases, which experienced attorneys characterized as among the most complex cases.\(^{461}\) For example, while training, supervision, and caseloads address most experience challenges, the Subcommittee received information from two witnesses about a lack of experienced defense counsel in the Marine Corps.\(^{462}\)

As discussed below, the Services have attempted to overcome litigation experience challenges through a combination of training and supervision. Additionally, the Navy’s Military Justice Litigation Career Track specifically seeks to build corporate litigation expertise and experience in the Military.

a. Army

**Trial Counsel Assistance Program and Highly Qualified Experts**

The Army’s Trial Counsel Assistance Program (TCAP), created in 1982, which oversees training for all Army trial counsel, is composed of five O-3 (captain) training officers; an O-5 (lieutenant colonel) deputy; a lieutenant colonel chief; and two HQEs, civilians with more than 30 years of combined prosecution experience between them.\(^{463}\) The Chief of TCAP also supervises the Army’s 23 SVPs, who focus specifically on prosecuting cases involving adult sexual assault, domestic violence, and those cases where children are victims.\(^{464}\)

TCAP provides litigation instruction to judge advocates newly appointed as trial counsel.\(^{465}\) Within the first six months of assuming duties, trial counsel attend the five-day “new prosecutor” course.\(^{466}\) The first two-and-a-half days cover basic prosecution, and the latter half, called Essential Strategies for Sexual Assault Prosecution, focuses on the nuanced aspects of prosecuting sexual assault.\(^{467}\) TCAP’s training regime, with the Army’s Legal Center and School providing the instruction, aims to increase the expertise of trial counsel and lay a foundation for them to later serve as experienced and capable defense counsel, chiefs of military justice (i.e., supervisory trial counsel), SVPs, deputy SJAs, and SJAs.\(^{468}\)

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\(^{460}\) See, e.g., Transcript of RSP Public Meeting 407 (Dec. 12, 2013) (testimony of Colonel Don Christensen, U.S. Air Force, describing Air Force’s consideration of career track “so that we can get more litigation experience”).

\(^{461}\) See, e.g., id. at 209-10 (testimony of Ms. Lisa Wayne, NACDL).


\(^{463}\) Transcript of RSP Public Meeting 412 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

\(^{464}\) Id.

\(^{465}\) Id.; see also Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

\(^{466}\) Transcript of RSP Public Meeting 412 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

\(^{467}\) Id.

\(^{468}\) Id. at 412-14.
TCAP also provides ongoing assistance throughout a prosecutor’s tenure via a 24-hour-a-day, 7-day-a-week help line, and by offering training opportunities on site and at the JAG School throughout the year.\[^{469}\] Additionally, TCAP provides in-depth training to individual trial counsel and assistance with specific cases, and occasionally details a trial counsel to a specific case at the request of a local SJA.\[^{470}\] Further, TCAP regularly brings in experts from the civilian community (HQEs) as part of its overall plan to build on the experience of the individual attorney and the expertise found throughout the JAG Corps.\[^{471}\]

**Army Special Victim Prosecutor Program and Training**

“\[^{472}\]**Preventing sexual assault and domestic violence and prosecuting these complex crimes, whether they occur in the civilian or in the military community, is a difficult task requiring time, resources and expertise[,] but the SVP Program has proven over the last four years to be a significant step towards success.\[^{472}\]**

"Preventing sexual assault and domestic violence and prosecuting these complex crimes, whether they occur in the civilian or in the military community, is a difficult task requiring time, resources and expertise[,] but the SVP Program has proven over the last four years to be a significant step towards success.\[^{472}\]"

In 2009, the Army created the SVP program.\[^{473}\] The SVPs’ primary mission is to develop and litigate special victim cases within their geographic area of responsibility.\[^{474}\] SVPs are individually selected from the Army’s most experienced trial lawyers based on demonstrated court-martial experience, experience with sexual assault and special victim cases, general expertise in criminal law, and interpersonal skill in handling sensitive victim cases.\[^{475}\] Although both prosecution and defense experience is not required for selection, it is preferred.\[^{476}\] The 23 SVPs distributed across the Army serve both their installation and their geographic area of responsibility, and are typically assigned to their position for three years.\[^{477}\]

In addition to the criminal law training that all Army JAGs receive at The Judge Advocate General’s School, SVPs undergo specialized training at military and civilian courses, and spend two weeks with a civilian district attorney’s office observing how civilian sexual assault units function.\[^{478}\] SVPs also receive specialized training on care and interviewing techniques for special victims.\[^{479}\] The secondary mission of SVPs is to develop sexual

\[^{469}\] Id. at 413. The Army’s JAG School is located in Charlottesville, VA. See U.S. Dep’t of the Army, “JAGCNet,” at https://www.jagcnet.army.mil/.
\[^{470}\] Transcript of RSP Public Meeting 413 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).
\[^{471}\] Id. at 414.
\[^{472}\] Id. at 421-22.
\[^{473}\] Id. at 414; Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).
\[^{474}\] Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).
\[^{475}\] Transcript of RSP Public Meeting 414, 416 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army); see also Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).
\[^{476}\] Army’s Response to Request for Information 75(c) (Dec. 19, 2013).
\[^{477}\] Army’s Response to Request for Information 1(d) (Nov. 1, 2013). Of the current 23 SVPs, two are lieutenant colonels, 10 are majors, and 11 are senior captains. Army’s Response to Request for Information 75(c) (Nov. 1, 2013).
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

assault and family violence training programs for investigators and trial counsel in their area of responsibility using local, state, and federal resources in conjunction with information TCAP and the Army JAG School provide.480

Additional Skill Identifier Program

The Army designed the Additional Skill Identifier (ASI) Program to help identify and sustain military justice expertise and to assist in the selection of personnel for key military justice positions.481 Under this program, judge advocates are awarded varying degrees of military justice skill identifiers depending on their level of expertise. 482 The Army instituted the ASI program for military justice in 2008 and revised it in 2011.483

b. Air Force Special Victims Unit Program and Training484

Senior Trial Counsel (STC), the Air Force's senior level prosecutors, litigate the Air Force's most difficult cases, including the vast majority of sexual-assault prosecutions.485 Judge Advocates selected to serve as STC typically have at least three years of experience.486 A subset of STC are members of the Special Victims Unit (SVU-STC), who specialize in the prosecution of sexual assault and family violence cases.487

Since the SVU-STC’s establishment in April of 2012, the Air Force has seen a 75 percent conviction rate in Article 120 cases.488 Colonel Don Christensen, head of the Air Force SVU, testified:

My special victim unit is made up of ten very dedicated prosecutors who have demonstrated that they have the ability to try our toughest cases. All of them have come from at least one assignment prior to becoming special victims’ prosecutors. And once they become a senior trial counsel, they have to demonstrate that they can excel for at least a year before they’re entitled to become special victims’ prosecutors.489

480 Id.

481 CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy); Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

482 To date, the Army has awarded skill identifiers to 1005 judge advocates: 558 basic, 226 senior, 145 experts, and 76 master skill. CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy); Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

483 CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy); Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

484 Air Force’s Response to Request for Information 1(d) (Nov. 1, 2013).


486 Air Force’s Response to Request for Information 1(d) (Nov. 1, 2013); Air Force’s Response to Request for Information 75(c) (Dec. 19, 2013).


488 Id. at 404-05.

489 Id. at 406.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
After the basic JAG training course, Air Force lawyers selected for litigation positions attend the Trial and Defense Advocacy Course (TDAC) and the Advanced Trial Advocacy Course (ATAC). The Advanced Sexual Assault Litigation Course (ASALC), implemented in 2013, incorporates material focused on sexual assault, domestic violence, and child abuse. All SVU-STC attend this course annually. SVU JAGs also continuously attend various advanced training courses.

c. Navy

“The training of effective litigators takes both actual training and experience. We are a young law firm. ... [I]ust by the nature of our businesses we’ll always be on the short end when it comes to experience. We make up for that in training. We probably do more training than any other group of lawyers on the planet.”

Military Justice Litigation Career Track (MJLCT)

**Recommendation 24:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps study the Navy's Military Justice Litigation Career Track (MJLCT) to determine whether this model, or a similar one, would be effective in enhancing expertise in litigating sexual assault cases in his or her Service.

**Finding 24-1:** Trial counsel in all the Military Services generally have more standardized and extensive training than some of their civilian counterparts, but fewer years of prosecution and trial experience. The Military Services all use a combination of experienced supervising attorneys, systematic sexual assault training, and smaller caseloads to address experience disparities. Additionally, the Navy has developed the MJLCT for its attorneys.

**Discussion**

The Navy’s Military Justice Litigation Career Track (MJLCT) provides a structure for developing and maintaining a cadre of judge advocates who specialize in court-martial litigation. Judge advocates who exhibit both an aptitude and a desire to further specialize in litigation may apply for inclusion in the MJLCT. Once selected, MJLCT officers spend most of their career in litigation-related billets as trial counsel, defense

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490 Air Force's Response to Request for Information 75(c) (Dec. 19, 2013).
491 Air Force's Response to Request for Information 1(d) (Nov. 1, 2013); Air Force's Response to Request for Information 75(c) (Dec. 19, 2013).
492 Id.
493 See Air Force's Response to Request for Information 1(d) (Nov. 1, 2013). These courses include Trial and Defense Advocacy (Air Force); Advanced Trial Advocacy (Air Force); Advanced Sexual Assault Litigation (Air Force); Prosecuting Complex Cases (Navy); Intermediate Trial Advocacy (Department of Justice); Criminal Law Advocacy Course/Prosecuting Sexual Assaults (Army); Special Victims Unit Course (Army); Sex Crimes Investigation Training Program (Air Force); Prosecuting Alcohol-Fueled Sexual Assaults (Navy); and National District Attorneys Association Sexual Assault Prosecution. Id.
495 Navy's Response to Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013).
counsel, and military judges.\textsuperscript{497} In the course of a typical military career, a MJLCT officer will advance from Specialist I to Specialist II to Expert.\textsuperscript{498} Most MJLCT officers also receive an advanced law degree (a Master of Laws or LL.M.) in trial advocacy or litigation from a civilian institution.\textsuperscript{499} These officers are then required to complete a follow-on tour in a courtroom intensive billet with leadership requirements.\textsuperscript{500}

The general MJLCT career progression is as follows.\textsuperscript{501}

Table 9

<table>
<thead>
<tr>
<th>Designation</th>
<th>Years of Experience</th>
<th>Time Limit to Advance (Years)</th>
<th>Members (jury) Trials Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specialist I</td>
<td>4</td>
<td>N/A</td>
<td>5</td>
</tr>
<tr>
<td>Specialist II</td>
<td>10</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>Expert</td>
<td>16</td>
<td>7</td>
<td>20</td>
</tr>
</tbody>
</table>

**Navy Trial Counsel Assistance Program and Highly Qualified Experts**

TCAP oversees training for Navy trial counsel.\textsuperscript{502} It provides on scene and online training to prosecutors in a variety of specialized areas and then monitors effective training completion to ensure world-wide capability in a variety of court-martial skills.\textsuperscript{503} TCAP conducts annual mobile training; installation site-visits with training sections on special victim crimes and process inspection; live online training; and interactive web-based training (sponsored by TCAP and conducted by subject matter experts).\textsuperscript{504} TCAP also inspects and critiques local training plans to ensure senior prosecutors have developed a robust weekly or bi-weekly training program for junior litigators.\textsuperscript{505}

\textsuperscript{497} Id.
\textsuperscript{498} Id.
\textsuperscript{499} Navy’s Response to Request for Information 1(d) (Nov. 1, 2013); Navy’s Response to Request for Information 75(c) (Dec. 19, 2013).
\textsuperscript{500} Id.
\textsuperscript{501} CAAF FY13 Annual Report, supra note 397, at 77–78 (Annual Report of the Judge Advocate General of the Navy); see also Navy’s Response to Request for Information 1(d) (Nov. 1, 2013); Navy’s Response to Request for Information 75(c) (Dec. 19, 2013).
\textsuperscript{502} Id.
\textsuperscript{503} CAAF FY13 Annual Report, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).
\textsuperscript{504} Navy’s Response to Request for Information 1(d) (Nov. 1, 2013).
\textsuperscript{505} CAAF FY13 Annual Report, supra note 397, at 70–71 (Annual Report of the Judge Advocate General of the Navy).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Navy relies on its STC and TCAP to supervise sexual assault prosecutions.\textsuperscript{506} Eight of nine STC and all uniformed TCAP personnel are members of the MJLCT.\textsuperscript{507} Five of nine STC have received their LL.M. in litigation or trial advocacy from a civilian law school.\textsuperscript{508}

To further refine the JAG Corps’ litigation capabilities, in 2012 the Navy established an externship program and assigned two mid-level career officers to work in the sex crimes units in the Office of the State Attorney in Jacksonville, Florida, and the San Diego District Attorney's Office in San Diego, California.\textsuperscript{509} These six-week clinical training externships enable officers to gain practical experience and insight into how civilian prosecutors’ offices manage a high volume of sexual assault cases.\textsuperscript{510}

In May 2013, the Navy hired an HQE to work with TCAP.\textsuperscript{511} The HQE has 17 years of experience as a prosecutor and as an instructor and course coordinator for the NDAA.\textsuperscript{512}

d. Marine Corps\textsuperscript{513}

**Force Restructuring and Trial Counsel Requirements**

In 2012, the Marine Corps entirely restructured its criminal justice offices by creating Complex Trial Teams (CTT) to oversee sexual assault prosecutions, consult with prosecutors on complex cases, and develop training programs (in conjunction with TCAP).\textsuperscript{514} Only trial counsel certified as Special Victim Qualified Trial Counsel (SVTC) may be assigned sexual assault cases in the Marine Corps.\textsuperscript{515} To qualify for certification as an SVTC, a judge advocate must: (1) be a General Court-Martial Qualified trial counsel; (2) receive a written recommendation from the Regional Trial Counsel that the judge advocate possesses the requisite expertise to try a special victim case; (3) demonstrate to the satisfaction of an O-6 level Legal Services Support Section Officer-in-Charge that the judge advocate possesses the requisite expertise, experience, education, innate ability, and disposition to competently try special victim cases; (4) prosecute a contested special or general court-martial in a special victim case as an assistant trial counsel; and (5) attend an intermediate-level trial advocacy training course for the prosecution of special victim cases.\textsuperscript{516}

\textsuperscript{506} Navy’s Response to Request for Information 1(d) (Nov. 1, 2013). According to the Navy’s Response to this RFI, as of December 2013, all STCs, all TCAP personnel, and a majority of trial counsel had successfully completed the Army Special Victims Unit Investigations Course (an intensive two-week course exploring the neurobiology of sexual trauma and focusing on investigative techniques unique to these cases). All STCs and a large majority of trial counsel had also attended Prosecuting Alcohol Facilitated Sexual Assaults (PAFSA) and all prosecution offices had completed a nine-hour online course of lectures on special victims’ offenses by the end of January 2014. \textit{Id.}

\textsuperscript{507} \textit{Id.}

\textsuperscript{508} \textit{Id.}

\textsuperscript{509} \textit{Id.; Navy’s Response to Request for Information 75(c) (Dec. 19, 2013).}

\textsuperscript{510} \textit{Id.}

\textsuperscript{511} \textit{Id.; CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).}

\textsuperscript{512} \textit{CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).}

\textsuperscript{513} Marine Corps’ Response to Request for Information 1(d) (Nov. 1, 2013).

\textsuperscript{514} \textit{Id.}

\textsuperscript{515} \textit{Id.}

\textsuperscript{516} \textit{Id.}
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

Marine Corps Trial Counsel Assistance Program

Since 2010, the Marine Corps has relied on TCAP to provide training to trial counsel.\(^{517}\) Marine Corps TCAP frequently answers questions from prosecutors in the field, and also maintains a website for trial counsel to share motions and best practices throughout the Marine Corps.\(^{518}\) TCAP’s secondary mission is to conduct training, which it does in conjunction with Navy TCAP.\(^{519}\) Every Marine trial counsel goes through a prosecuting sexual assault course that includes a mix of experts on subjects such as toxicology, DNA, and forensic psychology.\(^{520}\) In addition, because the Marine Corps has rapid turnover, regional trial counsel and the senior trial counsel instruct courses to ensure that trial counsel are implementing best practices.\(^{521}\) TCAP also conducts monthly conference calls with regional trial counsel to discuss and disseminate best practices.\(^{522}\) As with the other Services, TCAP works with NDAA and the TCAPs of fellow Services to locate and distribute best practices.\(^{523}\)

Marine Corps Highly Qualified Experts

The Marine Corps recently hired three HQEs to assist in all sexual assault cases; two are assigned to the prosecution.\(^{524}\) The primary job of the HQEs is to train trial counsel to prosecute sexual assault cases.\(^{525}\) Trial counsel must consult with their regional HQE within ten days of being detailed to any sexual assault case.\(^{526}\) In addition to attending training conducted by the HQEs, every trial counsel attends a week-long intensive training course on prosecuting sexual assault cases coordinated by the Marine Corps TCAP, and quarterly training provided by the Regional Trial Counsel.\(^{527}\)

e. Coast Guard

“We rely very heavily on the Navy and the Army Trial Counsel Assistance Program to assist our folks. But one of the big challenges that we face is experience. When you only put on 11 trials, Service-wide, in a year, you’re not going to have very many people with an extensive amount of trial experience.”\(^{528}\)

Through a long-standing Memorandum of Understanding with the Navy, Coast Guard judge advocates gain trial experience through assignment to Navy offices around the country.\(^{529}\) Over the last eight years, Coast

\(^{517}\) Id.


\(^{519}\) Id.

\(^{520}\) Id.

\(^{521}\) Id.

\(^{522}\) Id.

\(^{523}\) Id.

\(^{524}\) Marine Corps’ Response to Request for Information 1(d) (Nov. 1, 2013).

\(^{525}\) Id.; Transcript of RSP Public Meeting 427-30 (Dec. 12, 2013) (testimony of Major Mark Sameit, U.S. Marine Corps).

\(^{526}\) Marine Corps’ Response to Request for Information 1(d) (Nov. 1, 2013).

\(^{527}\) The Marine Corps has requested an additional HQE for TCAP. See CAAF FY13 Annual Report, supra note 397, at 108-09 (Marine Corps Annual Military Justice Report for Fiscal Year 2013).

\(^{528}\) Transcript of RSP Public Meeting 409-10 (Dec. 12, 2013) (testimony of Captain Stephen McCleary, U.S. Coast Guard).

\(^{529}\) Coast Guard’s Response to Request for Information 1(d) (Nov. 1, 2013).
Guard judge advocates gained experience as prosecutors with the Marine Corps at Marine Corps Base Quantic, Camp Lejeune, and Camp Pendleton. The Coast Guard also has close working relationships with the Army and Navy TCAPs. Beginning in FY 2013, Coast Guard Judge Advocates began attending the Army’s Special Victim Investigator Unit course. In addition, two Coast Guard judge advocates completed the Prosecuting Alcohol Facilitated Sexual Assault Cases course at the Naval Justice School in FY 2013.

C. TRAINING FOR CIVILIAN AND MILITARY DEFENSE COUNSEL

**Recommendation 25:** The Secretaries of the Military Services direct that current training efforts and programs be sustained to ensure that military defense counsel are competent, prepared, and equipped.

**Finding 25-1:** Defense counsel handling adult sexual assault cases in all the Military Services receive specialized training.

1. **Overview of Defense Counsel Training Assessment and Comparison**

In assessing training and experience levels of military defense counsel, the Subcommittee compared civilian approaches and examined best and promising practices. Based on comments of experienced civilian counsel, the Subcommittee paid particular attention to the minimum level of experience necessary to competently represent those accused of sexual assault crimes. Given the complexity of these cases and potential consequences resulting from conviction, including sex offender registration, the Subcommittee determined that a best practice in defending those accused of adult sexual assault crimes is to require some litigation experience.

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530 *Id.*
531 *Id.*
532 *Id.*
533 *Id.*
534 See, e.g., *Transcript of RSP Public Meeting* 362 (Dec. 12, 2013) (testimony of Ms. Amy Muth, The Law Office of Amy Muth); *id.* at 372 (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department); see also *id.* at 353-60 (testimony of Ms. Laurie Rose Kepros, Colorado Office of the State Public Defender, describing complexity of sexual assault cases and importance of having experienced counsel defend them).
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

2. Civilian Defense Counsel Training and Experience

There are no minimum training or experience criteria, nationally or within most states, for counsel defending sex crimes.535 Classroom and course training varies widely, and is limited by funding.536 Training often occurs during supervised experience with client interactions, pretrial motions, and trial work.537

As with civilian prosecutor training, sustained defense counsel training occurs on the job, with in-house seminars or through supervisor mentoring.538 Intensive defense counsel training for specialized topics such as DNA and forensics is usually offered in smaller groups of 20 or 30 lawyers.539 Some topics identified as necessary for effective civilian defense counsel training include: forensics, including integrity of evidence, chain of custody, and misidentification; drug and alcohol effects on perception and memory; and mental health issues.540

Public defenders handling adult sexual assault crimes generally have at least three years of experience, and often more than five.541 However, defense counsel in private practice tend to have more experience handling adult sexual assault cases because some choose to specialize in this area.542 Public defender offices are often not organized into specialized sex crimes units.543 Thus, many experienced defense counsel handle various types of crimes. Caseloads for defense counsel vary, but are often not as large as those of civilian prosecutors. Most defense counsel have caseloads of about 10-30 cases.544

535 In the state of Washington, for example, the minimum qualifications to do public defense contract work for sex crimes are to be a lawyer for one year and have done at least one felony trial and another trial with the assistance of another attorney. Transcript of RSP Public Meeting 362 (Dec. 12, 2013) (testimony of Ms. Amy Muth, The Law Office of Amy Muth).

536 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 267 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, former President, NACDL, and Training Director of Colorado State Public Defender System, discussing funding and pay differences between prosecutors and defense counsel) (“We [Colorado] are well-funded because it is a state system. So, it is dictated geographically. It is dictated by county. If you go to the south, the disparity is incredible. In the federal system, it is pretty equal in terms of the federal defenders and the United States Attorney Office. And so, really, it is dictated geographically. If you are in a rich jurisdiction, you have pretty equal funding. If you are in a poor county or a rural county, it is not at all.”).

537 See, e.g., id. at 203, 261-64 (testimony of Ms. Yvonne Younis, Defender’s Association of Philadelphia).

538 Id. at 203 (“[M]ost of my training is very one-on-one or small group training within the office[].”).

539 Id. at 210-14 (testimony of Ms. Lisa Wayne, NACDL and Colorado State Public Defender System).

540 Id. at 210-14, 258-59.

541 See, e.g., Transcript of RSP Public Meeting 372 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department, stating that, after 20 years of experience, he believes that attorneys should not be defending sexual assault cases until they have at least three years of experience, and should do them alone only after at least five years).


543 See, e.g., Transcript of RSP Public Meeting 378-80 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia); id. at 336-37 (testimony of Mr. Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon); id. at 375-76 (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department); see also Transcript of RSP Comparative Systems Subcommittee Meeting 201-02 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender’s Association of Philadelphia).

544 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 411 (Jan. 7, 2014) (testimony of Mr. Neal Puckett, Highly Qualified Expert, Defense Counsel Assistance Program, U.S. Navy); Services’ Responses to Request for Information 145(c) (Apr. 11, 2014).
3. Civilian Defense Counsel Training Schools

Although some national defense organizations are not as large or well-funded as those of the prosecution, a number of training schools exist. The National Association of Criminal Defense Lawyers (NACDL) is a professional defense association that sponsors training and continuing legal education courses, and provides legal education publications and webcasts.545 Likewise, the National Legal Aid and Defenders Association (NLADA) offers training courses for defense counsel.546 The National Criminal Defense College (NCDC) is a not-for-profit corporation in Macon, Georgia that conducts seminars and training sessions for criminal defense lawyers.547 The Trial Lawyers College is a training school for defense counsel, with courses focusing on topics such as death penalty defense, trial practice, and the components of advocacy.548

Some states have organized group training for their attorneys.549 For instance, the New York State Defender Association (NYSDA) Defender Institute offers an annual intensive trial advocacy course.550 Likewise, the Oregon Criminal Defense Lawyers Association (OCDLA) provides CLE training for defense attorneys.551 Similarly, the California Public Defender Association (CPDA) offers annual courses in basic and intermediate trial advocacy.552

4. Advanced Training of Military Defense Counsel

“The backdrop of this, in terms of what we think is good training and best practices, I have to be very honest that I think that the military does a lot right. And the scrutiny that has come upon the military, in many ways, is politically driven and not really based in fact.”553

a. Training for Army Defense Counsel Handling Adult Sexual Assault Cases

Established in 2007, Army DCAP is staffed by five experienced trial practitioners, military and civilian, including two civilian HQEs.554 DCAP provides training, resources and assistance for defense counsel worldwide.555 Both HQEs are former military judges and experienced trial practitioners with over 40 years of combined military justice experience.556

545 NACDL, at http://www.nacdl.org/.
546 NLADA, at http://www.nlada100years.org/.
547 NCDC, at http://www.ncdc.net/. It has courses covering trial practice skills. Each year, the NCDC presents two sessions of the summer Trial Practice Institute on the campus of Mercer Law School in Macon, Georgia. The Institute also holds seminars on specialized topics at other times of the year and in other locations. Id.
548 The Trial Lawyers College, at http://www.triallawyerscollege.org/AboutTLC.aspx.
549 See, e.g., Virginia Indigent Defense Commission, at http://www.indigentdefense.virginia.gov/training.htm. Once a year, the Virginia Commission convenes a Public Defender Conference that provides six hours of training, including one hour of legal ethics. Id.
552 See CPDA, at http://www.claraweb.us/.
554 Id. at 310.
555 Id. at 310–11.
556 Id. at 311.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

“DCAP is available around the clock for case consultation. During Fiscal Year 2013, DCAP received over 2,000 inquiries from defense counsel in the form of emails, phone calls and in-person inquiries during training events.”

The majority of defense counsel come to Trial Defense Services (TDS), the organization to which all defense counsel are assigned, with prior military justice experience, including time in the courtroom. At a minimum, they are graduates of the JAOBC, where they have been trained to serve as the second chair in all phases of a court-martial. Once assigned to TDS, defense counsel undergo further training from introductory courses such as Defense Counsel 101 and advanced trial advocacy courses such as the Sexual Assault Training Advocacy Course.

Besides formal training, supervisory defense counsel continuously monitor the training status of each defense counsel and adjust based on individual development. In addition, defense counsel routinely “reach back” to DCAP for advice on individual cases.

b. Training for Air Force Defense Counsel Handling Adult Sexual Assault Cases

The Air Force criminal defense network is broadly divided into three regions worldwide. In total, there are 187 attorneys and paralegals assigned, serving at 69 operating locations worldwide with 85 area defense counsel (base level counsel) and 19 senior defense counsel.

Most base offices have only one defense counsel and one paralegal assigned, and are responsible for defense services at that installation. The Air Force is unique in that defense counsel are selected in a very competitive, best-qualified standard by the Air Force Judge Advocate General. Most defense counsel arrive with two to five years of experience working in a base legal office, which includes time as a trial counsel in courts-martial. New defense counsel typically have tried between eight and 10 courts-martial trials before starting as a defense counsel.

558 Id.
559 Id.
560 Army’s Response to Request for Information 1(d) (Nov. 1, 2013); Army’s Response to Request for Information 75(c) (Dec. 19, 2013).
561 Id.
562 Id.; see also Transcript of RSP Public Meeting 310–11 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, U.S. Army).
564 Id.
565 Id.
566 Id.
567 Id.
568 Id.
569 Id.
In the Air Force, Area Defense Counsel (ADC) receive initial training as defense counsel at the Defense Orientation Course (DOC). The DOC is held twice a year in an attempt to catch the incoming defense counsel and defense paralegals as they are coming into their jobs. It is primarily taught by the Trial Defense Division, the organization to which all Air Force defense counsel and defense paralegals are assigned. DOC is a combined course with defense counsel and defense paralegals focusing primarily on how to run a defense office, and the legal issues which they can anticipate encountering during their tenure.

In 2013, for the first time, the Air Force initiated a litigation training course specific to prosecuting and defending sexual assault cases. Air Force defense counsel participated in two different levels of courses, the intermediate sexual assault litigation course and the advanced sexual assault litigation course.

The Air Force also relies heavily on on-the-job training. However, on-the-job training for geographically separated counsel proves complicated. Out of the 19 Senior Defense Counsel regions, only three (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.

A senior counsel in the Trial Defense Division told the RSP that the Air Force struggles to maintain a specialized training regimen because of the limited time that defenders remain in the position, usually only 18 to 24 months for an area defense counsel and 24 to 36 months for a senior defense counsel.

c. Training for Navy Defense Counsel Handling Adult Sexual Assault Cases

At the beginning of their careers, all Navy judge advocates that assist in prosecuting or defending courts-martial must complete special Professional Development Standards (PDS), which are checklists of tasks and skills required to progress to greater responsibility. Those judge advocates who exhibit both an aptitude and a desire to further specialize in litigation may apply for inclusion in the MJLCT, which is previously described in more detail.

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570 Air Force’s Response to Request for Information 1(d) (Nov. 1, 2013).
572 Id.
573 Id.
574 Id.
575 Id.
576 Id.
577 Id.
578 Id.
579 Id.
580 Navy’s Response to Request for Information 1(d) (Nov. 1, 2013).
581 Id.
582 Id.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

After basic training at the JAG school, Navy lawyers go to Region Legal Service Offices (RLSO).583 There, lawyers perform legal assistance work (wills, powers of attorneys, etc.) and begin to experience trial and defense counsel work.584 However, they are not assigned cases, though they can help write motions and conduct research.585 During their first 24 months, judge advocates begin advocacy training representing Sailors, Marines, and Coast Guardsmen at administrative separation boards.586

Following their first 24-month tour, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.587 DSOs are located in Washington, DC; Norfolk, Virginia; San Diego, California; and Yokosuka, Japan.588 At the DSOs, counsel receive additional training, which includes a basic trial advocacy course focusing on courtroom advocacy.589 Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts from forensics and psychology and very experienced civilian defense counsel.590

Because attorneys enter the Navy with a range of legal experience from their time before military service, MJLCT officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.591 Also, when appropriate, more experienced defense counsel are assigned as co-counsel to junior defense counsel to ensure continued training and supervision.592

Navy Defense Counsel Assistance Program (DCAP)

In conjunction with the Naval Justice School (NJS) in Newport, Rhode Island, Navy DCAP coordinates and provides training for defense counsel. DCAP also provides ongoing training to current and prospective defense counsel worldwide, through on-site command visits and online training.593 When resources permit, defense counsel also attend civilian courses at the National Association of Criminal Defense Lawyers, Gerry Spence College, and others.594

583 Transcript of RSP Public Meeting 304-09 (Dec. 12, 2013) (testimony of Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy).
584 Id.
585 Id.
586 Id.
587 Id.
588 Id.
589 Id.
590 Id.
591 Id.
592 Id.
593 CAAF FY13 ANNUAL REPORT, supra note 397, at 68 (Annual Report of the Judge Advocate General of the Navy).
In the Navy, defense counsel are also provided on-the-job training. Sexual assault cases are typically detailed to “core attorneys” assigned to a DSO. A DSO core attorney is a judge advocate that has completed at least one full tour of duty prior to assuming the duties of a defense counsel. Detailing of counsel is within the discretion of the DSO Commanding Officer (an O-6 Judge Advocate), who takes into consideration such matters as competence, experience and training, existing caseload, and availability of counsel, as well as case specifics and opportunities for training of counsel. A Commanding Officer may detail one or more counsel to a particular case and will often detail both an experienced defense counsel and a less-experienced defense counsel to a case to provide the opportunity for practical mentoring. Additionally, uniformed members of DCAP may also be detailed to cases.

Additionally, Navy and Marine Corps judges complete quarterly evaluations on counsel. These evaluations provide DCAP with the Judiciary’s opinion on courtroom performance of defense counsel in all aspects of litigation. DCAP uses this feedback to track trends and identify areas for training, and then monitor subsequent evaluations to ensure the training has improved the practice. Evaluations of the Judiciary, along with any DCAP remarks, are provided to the leadership of the DSOs for their use in mentoring and further developing individual defense counsel.

Finally, DCAP created and monitors an internet site where defense counsel post, download, and share resources involving sexual assault litigation as well as a “discussion board” where defense counsel anywhere in the world can receive nearly instantaneous assistance with any issue from DCAP and the defense bar at large. Monitoring this discussion board also provides DCAP the opportunity to measure performance and determine future training requirements.

595 Id. at 306–09.
596 Navy’s Response to Request for Information 75(d) (Dec. 19, 2013).
597 Id.
598 Id.
599 Id.
600 Id.
601 Navy’s Response to Request for Information 1(d) (Nov. 1, 2013).
602 Id.
603 Id.
604 Id.
605 Id.
606 Id.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

d. Training for Marine Corps Defense Counsel Handling Adult Sexual Assault Cases

The Chief Defense Counsel (CDC) of the Marine Corps is designated as the Officer-in-Charge (OIC) of the Defense Services Organization (DSO). The DSO established formal defense counsel training programs after it was formed in 2011. Defense counsel training requirements are set forth in Marine Corps policy.

The vast majority of the Marine Corps’ 72 defense counsel are first-tour judge advocates with less than three years of experience as an attorney. They typically serve 18 months as defense counsel before moving to another assignment. The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.

At a minimum, each defense counsel must attend two Continuing Legal Education (CLE) training events each year. The DSO has an annual CLE training event that every defense counsel and enlisted support staff member attends, in addition to monthly training conducted by the Senior Defense Counsel (usually a Major/O-4 or experienced Captain/O-3) at the local Branch Office and quarterly training by the Regional Defense Counsel (usually a Lieutenant Colonel/O-5 or experienced Major/O-4). Curriculum topics addressed during individual training events vary depending on identified needs within the DSO, but range from practical exercises such as mock cross-examinations and opening statements/closing arguments to more academic classes on new developments in the law.

Established in 2011, DCAP is staffed by the Officer-in-Charge and an HQE, a retired civilian public defender from San Diego with over 30 years of experience. The DCAP provides telephone and email assistance for defense counsel, and operates a SharePoint website with an online database of motions.

c. Training for Coast Guard Defense Counsel Handling Adult Sexual Assault Cases

By longstanding memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of crimes under the UCMJ. In return,
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Recommendation 26: The Secretary of Defense direct the Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as defense counsel as well as set the minimum tour length of defense counsel at two years or more so that defense counsel can develop experience and expertise in defending complex adult sexual assault cases.

Finding 26-1: Defense experience is difficult to develop due to tour lengths, which are as short as 12-18 months, and the relatively low number of courts-martial in the military today.

Finding 26-2: Not all military defense counsel possess trial experience prior to assuming the role of defense counsel.

Discussion

Military defense counsel in all the Services tend to have more standardized and extensive course training than their civilian counterparts to compensate for a relative lack of experience. Like their prosecution counterparts, defense counsel receive training, oversight, and mentoring from senior counsel.

5. Civilian Defense Counsel Experience and Career Progression

Criminal defense counsel career progression varies by jurisdiction, and is often less standardized than that of civilian prosecutors. As with prosecutors, new defense counsel in larger public defense organizations frequently go through internal training programs for one to three weeks covering procedure, evidence, ethics, and trial practice, along with basic motions and other litigation topics. For example, in the Alaska Public Defender Agency, there is a two-week “new lawyer” intensive trial practice course. Similarly, in Colorado, newer defense attorneys attend an intensive, seven-day course in which they bring their own case to use for learning.

Afterward, as with prosecutors, public defense counsel are assigned to defend misdemeanor or juvenile cases, often for two to three years. During this time, defense counsel may gain experience with judge (bench)

620 Id.
622 Services’ Responses to Request for Information 1(d) (Nov. 1, 2013); Services’ Responses to Request for Information 75(c) (Dec. 19, 2013).
623 See, e.g., Transcript of RSP Public Meeting 377 (Dec. 12, 2013) (testimony of Mr. James Whitehead, District of Columbia Public Defender’s Office) (“Typically our attorneys are straight out of law school, or had just clerked from local or federal judges, or have very little litigation experience. . . . We put them through a 10-week training involving substantive training as well as skills that culminates in kind of a mock trial with judges at the end.”).
625 Transcript of RSP Public Meeting 350 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Colorado Office of the State Public Defender).
626 See, e.g., id. at 363–64 (testimony of Ms. Amy Muth, The Law Office of Amy Muth); see also id. at 377–79 (testimony of Mr. James Whitehead, District of Columbia Public Defender’s Office).
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

Juvenile defense work allows defense counsel to become familiar with issues of procedure, evidence, and trial practice in many serious cases (including sexual assault, robbery, arson, and homicide) without the same stakes; if convicted, many juveniles receive only probation, or a term of confinement until they reach age 18 or 21, depending on when the court's jurisdiction ends.627

Next, defense counsel typically begin defending basic felony crimes.628 As counsel progress in experience, expertise, and credibility, they begin to work as second-chair counsel with senior colleagues on more serious felony crimes such as aggravated assault, robbery, sexual assault, and homicide.629 Senior attorneys handle the most serious cases, such as sex offenses.630

“[T]he way we teach it is ... if you would not give that lawyer a homicide case, you can’t give him a rape case. It is very serious.”631

Some civilian defense counsel identified turnover and burnout as challenges they face in seeking to build expertise and continuity through training and experience.632 One defense counsel stated: “And just like all public defense systems throughout this country, there is a turnover issue, right? And there is always going to be a turnover issue. It’s something that we have to live with. I practiced in the Public Defender Department in Hawaii for 10 years and now in New Mexico for 10 years, and that’s just part of what we have to deal with.”633 To avoid burnout, some offices do not have specialized sections, but instead divide serious felony cases among their most experienced defense counsel.634

627 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 203 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender’s Association of Philadelphia) (“[B]efore our attorneys get their first rape jury cases, rape cases, and I did the math on this and I think it is pretty accurate, they have tried over between 1200 and 1400 trials ... Now, those are judge trials.”).

628 See, e.g., Transcript of RSP Public Meeting 378 (Dec. 12, 2013) (testimony of Mr. James Whitehead, District of Columbia Public Defender’s Office).

629 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 204 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender’s Association of Philadelphia).


631 Id., Appendix C, at 5.

632 Transcript of RSP Comparative Systems Subcommittee Meeting 204 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender’s Association of Philadelphia).

633 See, e.g., Transcript of RSP Public Meeting 375-76 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department).

634 Id. at 371; see also, e.g., id. at 350-51 (testimony of Ms. Laurie Rose Kepros, Colorado Office of the State Public Defender) (“Similar to some of the other people you’re hearing from right now, we have a lot of turnover. We’re a public defender’s office. That is where people go to get some experience, and sometimes unfortunately they move on. So we are constantly training new people and so we’re very sensitive to those challenges.”).

635 See, e.g., id. at 336 (testimony of defense attorney Mr. Lane Borg, Metropolitan Public Defenders, Portland, Oregon, describing division of office); id. at 337 (“I think it does damage and trauma to people to make them only prosecute sex crimes or only defend sex crimes. I think it’s good to get to do other things.”); see also id. at 375-76 (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department) (“W[e find that attorneys burn out on these cases because they’re so emotionally driven and [because of] the impact on our clients.”).
6. Military Defense Counsel Experience Level

Counsel interviewed during site visits and at meetings stated that defense counsel tour lengths may range from 12-24 months. Some defense counsel said they were assigned adult sexual assault cases during their first tour of duty, when they had no prior litigation experience.

**Recommendation 27:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps review military defense counsel training for adult sexual assault cases to ensure funding of defense training opportunities is on par with that of trial counsel.

**Finding 27-1:** Some defense counsel told the Response Systems Panel and the Subcommittee that because they do not have independent budgets, their training opportunities were insufficient and unequal to those of their trial counsel counterparts.

**Discussion**

During site visits and RSP and Subcommittee meetings, defense counsel, and HQEs, particularly in the Marine Corps, voiced concerns about training budget funding inequities between prosecutors and defense counsel. Defense counsel from the Air Force, Army, and Navy also mentioned inequities in funding generally between the prosecution and defense, but did not emphasize them with respect to training specifically. However, all Services provided details about their training budgets, as noted below.

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636 Id. at 321, 325 (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps); Transcript of RSP Comparative Systems Subcommittee Meeting 426-27 (Jan. 7, 2014) (testimony of Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Norfolk, VA (Feb. 20, 2013) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (same).

637 Id.

VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

Table 10

Trial and Defense Counsel Annual Training Spending By Service\(^639\)

<table>
<thead>
<tr>
<th>Service</th>
<th>Army</th>
<th>Navy</th>
<th>Air Force</th>
<th>Marine Corps(^640)</th>
<th>Coast Guard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense Has Own Budget?</td>
<td>No</td>
<td>No(^641)</td>
<td>Yes</td>
<td>Unclear(^642)</td>
<td>No. See Navy budget.</td>
</tr>
<tr>
<td>Annual Defense/ DCAP Budget</td>
<td>DCAP $377,178.96</td>
<td>N/A</td>
<td>$350,000 for other than litigation travel</td>
<td>DSO access to $250,000 SAPR/SVC training funds</td>
<td>See Navy budget.</td>
</tr>
<tr>
<td>Annual Trial Counsel Budget</td>
<td>TCAP $468,734.64</td>
<td>N/A</td>
<td>TCAP $250,000 SAPR/SVC training funds</td>
<td>See Navy budget.</td>
<td></td>
</tr>
<tr>
<td>Annual Average Spending Per Defense Counsel</td>
<td>$1033.36 per counsel(^643)</td>
<td>Not provided.</td>
<td>$1870</td>
<td>$3,125 per defense counsel</td>
<td></td>
</tr>
<tr>
<td>Annual Average Spending Per Trial Counsel</td>
<td>$1407.61 per counsel</td>
<td>Not provided.</td>
<td>$2105 (per STC)(^644)</td>
<td>$2,778 per trial counsel</td>
<td></td>
</tr>
</tbody>
</table>

7. Highly Qualified Experts

**Recommendation 28:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps continue to fund and expand programs that provide a permanent civilian presence in the training structure for both trial and defense counsel. The Military Services should continue to leverage experienced military Reservists and civilian attorneys for training, expertise, and experience to assist the defense bar with complex cases.

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639 Services' Response to Request for Information 146 (Apr. 11, 2014).

640 Marine Corps’ Response to Request for Information 146 (Apr. 11, 2014) (explaining number for FY 13).

641 But see Navy’s Response to Request for Information 146 (Apr. 11, 2014) (explaining that Naval Justice School administers funding and quota allotments for both trial and defense counsel, and that Defense Service Offices each receive about $10,000 annually for personnel training).

642 But see Marine Corps’ Response to Request for Information 146 (Apr. 11, 2014) (stating that Office of Chief Defense Counsel has budget to fund travel and training for leaders of Defense Services Organization (DSO) and that DSO leaders had access to $250,000 in funds for sexual assault training programs in FY 13—the same amount provided to TCAP).

643 But see Army’s Response to Request for Information 146 (Apr. 11, 2014) (listing "$2,500" as another per capita spending amount for defense counsel, with alternative calculation and discussion).

644 But see Air Force’s Response to Request for Information 146 (Apr. 11, 2014) (discussing figures in context).
Finding 28-1: Experienced civilian advocates play an important role training both prosecution and defense counsel in the Army, Air Force, Navy, and Marine Corps. Given the attrition and transience of military counsel, civilian involvement in training ensures an enduring base level of experience and continuity, and adds an important perspective. Civilian expert advocate participation also adds transparency and validity to military counsel training programs.

a. Army Highly Qualified Experts (HQEs)

Experienced civilian HQEs in the Army supplement and support the TCAP and DCAP components, as well as some experienced litigation experts serving in similar civilian positions. Most HQEs have criminal law experience of 20-30 years, which often includes work in both civilian and military practice. Working in tandem with TCAP and DCAP, the HQEs provide continuity for training, a different viewpoint, and significant specialized expertise in adult sexual assault litigation.

Established in 2007, Army DCAP is staffed by five experienced trial practitioners, military and civilian, including two HQEs. DCAP provides training, resources and assistance for defense counsel worldwide. Both HQEs are former military judges and experienced trial practitioners with over 40 years of combined military justice experience. Created in 1980, the Army’s TCAP oversees training for all Army trial counsel. TCAP is composed of five O-3 (captain) training officers; an O-5 (lieutenant colonel) deputy; a lieutenant colonel chief; and two highly-qualified experts (HQEs), who are civilians with more than 30 years of combined prosecution experience between them.

b. Navy Highly Qualified Experts (HQEs)

In May 2013, the Navy hired an HQE to work with TCAP. The HQE has 17 years of experience as a prosecutor, as well as experience as an instructor and course coordinator for the NDAA.

c. Marine Corps Highly Qualified Experts (HQEs)

The Marine Corps recently hired three HQEs to assist in all sexual assault cases; two are assigned to the prosecution. The primary job of the HQEs is to train trial counsel to prosecute sexual assault cases. Trial counsel must consult with their regional HQE within ten days of being detailed to any sexual assault case.

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645 CAAF FY13 ANNUAL REPORT, supra note 397, at 55, 68 (Annual Report of the Judge Advocate General of the Navy); id. at (Marine Corps Annual Military Justice Report for Fiscal Year 2013); see also, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 411 (Jan. 7, 2014) (testimony of Mr. Neal Puckett, Highly Qualified Expert, Defense Counsel Assistance Program, U.S. Navy).


647 Id. at 310–11.

648 Id. at 311.


650 Navy’s Response to Request for Information 1(d) (Nov. 1, 2013); Navy’s Response to Request for Information 75(c) (Dec. 19, 2013); CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

651 CAAF FY13 ANNUAL REPORT, supra note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

652 Marine Corps’ Response to Request for Information 1(d) (Nov. 1, 2013).

653 Id.
VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

D. MILITARY JUDGE TRAINING AND ASSESSMENT OF COUNSEL’S ADVOCACY SKILLS

**Recommendation 29:** The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should continue to fund sufficient training opportunities for military judges and consider more joint and consolidated programs.

**Finding 29-1:** Military judges participate in joint training at the Army’s Judge Advocate General’s Legal Center and School. The recommendations for an enhanced role of military judges noted elsewhere in this report may necessitate increased funding for training of judges.

**Discussion**

Military judges, both trial and appellate, are selected based on their legal experience, military service record, and exemplary personal character, including sound ethics and good judgment.654 Once selected, military judges from all Services attend a three-week Military Judge Course at the Army JAG School in Charlottesville, Virginia, which covers judicial philosophy, case management, and specific scenarios.655 All judges must successfully complete this course before their respective Service TJAGs will certify them to be judges.656

The Military Judge Course includes substantive criminal law and procedure, practical exercises designed to simulate trial practice, and scenarios focusing on appropriate factors for consideration in reaching appropriate sentences.657 The entire course is designed around a sexual assault case.658 The chief trial judges of all Services collaborate to create the Military Judge Course curriculum, and all Services provide instructors.659 Experienced senior military judges grade the capstone exercise, which is a mock trial over which student military judges must preside.660 Military Judges also attend the week-long Joint Military Judge Annual Training (JMJAT).661 Navigating over sexual assault cases is a major focus of both courses.662 In both courses, military judges participate in training seminars regarding sentencing, including for sexual assault cases.663

Depending on funding, judges also attend Joint Military Judges Training, in conjunction with the National Judicial College.664 Trial judges for all Services historically attended the JMJAT.665 However, the 2013 course...

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654 Army’s Response to Request for Information 147 (Apr. 11, 2014).
655 Id.
656 Id.
657 Id.
658 Id.
659 Id.
660 Id.
661 Id.
662 Id.
663 Id.
664 Id.
was postponed due to the impact of sequestration and the continuing resolution in Congress. On odd-numbered years, the training is held at the Air Force JAG School, and on even-numbered years it is hosted by the Navy and Marine Corps, in conjunction with the National Judicial College (NJC) at Reno Nevada. JMJAT is the vehicle for discussing current topics of judicial training interest, such as the new Article 120, the impact of command influence in sexual assault cases, advanced evidence, sentencing methodology, and judicial ethics. All members of the trial judiciary participate in these classes, which will be completed during FY 14. Successful completion of NJC curriculum leads to a professional certificate, and potentially a Master’s or doctorate degree.

**Recommendation 30:** The Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps consider implementing a system similar to the Navy’s quarterly evaluations of counsel’s advocacy to ensure effective training of counsel.

**Finding 30-1:** Military judges in the Navy prepare quarterly evaluations of counsel’s advocacy that are forwarded to the Chief Judge of the Navy for review and shared with the Trial Counsel Assistance Program (TCAP) for use in training plans. The other Military Services do not similarly measure and assess performance following advanced training.

**Discussion:** Navy and Marine Corps judges complete quarterly evaluations on counsel. These evaluations provide the Judiciary’s opinion on courtroom performance of counsel in all aspects of litigation. This feedback identifies trends and areas for training, which training supervisors then monitor to ensure training is working. In the Navy, evaluations of the Judiciary, along with any DCAP remarks, are provided to the leadership of the DSOs for their use in mentoring and further developing individual defense counsel. Based on the information gathered, the Subcommittee did not see evidence of this practice in the other Services.

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666 CAAF FY13 ANNUAL REPORT, supra note 397, at 65 (Annual Report of the Judge Advocate General of the Navy).
667 Id.; see also Services’ Responses to Request for Information 147 (Apr. 11, 2014).
668 Id.
669 Id.
671 Navy’s Response to Request for Information 1(d) (Nov. 1, 2013).
672 Id.
673 Id.
674 Id.
VII. PROSECUTION AND DEFENSE

A. ORGANIZATION OF PROSECUTION OFFICES AND THE MULTIDISCIPLINARY APPROACH

A victim-centered and offender focused response to the prosecution of sexual assault is predicated on the need to protect the victim’s safety, privacy and well-being while holding offenders accountable. The goal of this approach is to decrease re-victimization by ensuring the survivor is treated with compassion and respect. The myths and misinformation surrounding the crime of sexual assault, along with the tendency of the defense and jurors to focus on the victims’ actions, present unique challenges in the successful prosecution of the crime of sexual assault.675

1. Co-locating Prosecutors, Investigators, and Victim Support Personnel

Recommendation 31-A: The Secretaries of the Military Services direct that TJAGs and MCIOs work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victims’ prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the Subcommittee does not recommend that the SARC, victim advocate, Special Victim Counsel or other victim support personnel be merged with the offices of prosecutors and investigators.

Recommendation 31-B: The Secretary of Defense assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces in order to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses.

Finding 31-1: The organizational structures of civilian prosecution offices vary. Some civilian prosecutors specialize in sexual assault cases for their entire careers or rotate through sex crime units specializing for a few years, whereas others do not specialize and handle all felony level crimes.676 The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership’s philosophy for assigning these complex cases.677

677 See generally id.
Finding 31-2: Consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize additional trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also pierce privileges for military victim advocates or cause other perception problems.

Discussion

The organizational structure of civilian prosecution offices varies greatly. Many of the large, urban offices the Subcommittee studied had sex crime units with attorneys who stay in that unit for several years and develop a specialty for such cases. There are, however, some large jurisdictions that do not specialize and assign sexual assault cases to attorneys who do several different types of felony cases. One county prosecutor explained that he requires attorneys to rotate through the sex crimes unit every two to three years to avoid burnout. Most of the prosecutors in medium size and smaller jurisdictions are assigned cases based on their experience level rather than a specific expertise. Regardless of the structure of the prosecution office or level of specialization, all of the civilian offices studied emphasized the importance of the relationship between the prosecutor’s office, the police department, investigators, and victim advocates in sexual assault cases.

The Subcommittee studied four types of co-location models used in some civilian and military jurisdictions.

678 See generally id.

679 See, e.g., id.; see also, Transcript of RSP Comparative Systems Subcommittee Meeting 95-96 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA). Ms. Mosley testified as follows:

[O]ne of the things that I was asked was the relative level of experience of prosecutors handling these [sexual assault] cases. . . [It] is just so varied. I mean, you would think that, obviously, promising practices would dictate that it would be a more seasoned prosecutor who has had some experience, has a certain number of trials and felonies, had maybe chiefed or supervised somebody in the misdemeanor division before going to a felony. But many offices across the country many people think are large urban offices and they are not. Many of the prosecutors that we have seen that come to training are in two- and three-person offices. There are, obviously, some that are very structured like New York and Houston, and Dallas, and large urban areas. But the majority of prosecutors’ offices out there for state and local prosecutors are these smaller offices in rural areas. So, we get technical assistance requests constantly from a person who doesn’t have trial experience and they have got the felony.


681 Transcript of RSP Comparative Systems Subcommittee Meeting 183 (Jan. 7, 2014) (testimony of Mr. Mark Roe, Snohomish County); see also id. at 183 (testimony of Ms. Candace Mosley, NDAA) (“There are prosecutors who only want to do sexual assault cases for their entire career and then there are some that shouldn’t be in there for a long period of time. It really does, it depends on the individual, their passions.”); id. at 186 (commentary of Ms. Rhonnie Jaus). Ms. Jaus stated as follows:

I also think it was unrealistic for them to conclude the other prosecutors that there was very little burn [out]. I think that is crazy. I have been doing this as a prosecutor for 30 years. I ran the sex crimes division for like 25. There is burnout. People get burned out. I mean, it is crazy to think they don’t. People leave the job. Not everyone stays or else there would never be any movement. But I think that some people are, as Candace [Mosley] is saying, [there are prosecutors who] are incredibly committed and passionate, but there are people who do burn out and I think that it is the same as the military.


683 See generally id.; see supra Part I (discussing co-location).
The Dawson Place in Everett, Washington and Joint Base Lewis-McChord (JBLM) model combines all personnel who respond to a sexual assault allegation, including victim advocates, mental health personnel, SANEs, investigators, and prosecutors.684

The Philadelphia and Austin model includes: detectives/investigators, SANE and medical personnel, an office for a prosecutor who works there part time, and SVU law enforcement personnel work closely with the local victim advocacy agency.685

The Arlington, Virginia and Fort Hood, Texas model either has investigators and prosecutors in the same location686 or have the investigators provide an office for the prosecutor to work out of on a routine basis.687

The Marine Base Quantico, Virginia model co-locates all victim services support personnel, including the SARC, victim advocate, and special victim counsel in the military.688

Figure 5

1. Dawson Place, Everett, WA and JBLM
- Victim Advocate
- SANE/SAFE Support
- Special Victim Counsel (military)
- Investigator
- Prosecutor
- Victim Witness Liaison

2. Philadelphia, PA & Austin TX
- Partnership with Victim Advocate
- SANE/SAFE Support
- Investigator
- Victim Coordinator
- Prosecutor

3. Arlington, VA & Ft. Hood, TX
- Investigator
- Prosecutor
- Victim Witness Liaison

4. Marine Base Quantico, VA
- SARC
- Victim Advocate
- Special Victim Counsel

The Dawson Place and JBLM model is a “one-stop shop,” providing all necessary resources to respond to a sexual assault victim. This approach coordinates services to avoid victims feeling like they are on a “scavenger

684 Dawson Place; Everett, Washington; and Joint-Base Lewis-McChord share this structure. See JSC-SAS Report, Appendix P [Sept. 2013] (on file at RSP); see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base Lewis-McChord (JBLM) [Feb. 5, 2014] (same).


687 Id., Appendix M; see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX [Dec. 10, 2013] (on file at RSP).

One civilian facility, Dawson Place in Everett, Washington, includes investigators, SANEs, and/or victim advocate agencies and mental health personnel in a single location to increase communication among the stakeholders, minimize victim travel, and enhance the multidisciplinary approach in child and young adult sexual assault cases. The Army recently established a similar facility at JBLM in Washington called the Sexual Assault Response Center. It houses the SARC, victim advocates, special victim counsel, IG, special victim investigator and special victim prosecutor. The primary differences between the two facilities are that Dawson Place performs sexual assault forensic exams and its services are mostly offered to children who are sexual abuse victims.

While these models appear to work well, there are potential drawbacks to co-locating these services. Co-locating victim services personnel with law enforcement and prosecution officials could create a misperception that victim services are aligned with, or a part of, the prosecution team – and do not operate independently. This misperception has several potentially deleterious effects: First, although the intent of this consolidation model is to support the victim, these arrangements may actually deter reporting if victims perceive victim services are tied to, or working with, investigators or prosecutors. Second, victim services personnel who work too closely with prosecutors may not be perceived as independent medical providers, but rather as extensions of law enforcement. And third, the victim advocate-victim privilege, which generally ensures that communications between victims and advocates remain confidential, may be degraded or lost if confidential statements are made in the presence of, or disclosed to prosecutors. Accordingly, if larger

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689 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA [Feb. 6, 2014] (on file at RSP).
690 Id.
691 At JBLM, the Army created a consolidated facility with representatives from the CID, SVP, SARC, VA, the special victim counsel, and sexual assault care coordinator. The sexual assault forensic exam takes place at Madigan Army Medical Center located on JBLM. Victims are not required to go to the consolidated facility for services. The facility is arranged so that a victim who makes a restricted report to the SARC or VA will not come into contact with those on the criminal justice side (investigators and prosecutors) unless the victim decides to convert his or her report to an unrestricted one. See id.
692 For example, while visiting Dawson Place, Subcommittee members observed a multidisciplinary meeting where both the SANE and victim advocate offered solutions to the prosecutor to deal with a witness cooperation problem in a pending case unrelated to the services they provided to the victim. See id.
693 In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a), “[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim.” MCM, supra note 97, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule “when admission or disclosure of a communication is constitutionally required.” Id., M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. Therefore, to avoid possible litigation of this issue, it is necessary to build a Chinese wall between the victim advocate and prosecutor. Cf. Transcript of RSP Public Meeting 231 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York). The Joint Service Committee’s analysis indicates “constitutionally required” exception would be satisfied only in extraordinary circumstances, where the accused could show harm of constitutional magnitude if such communication was not disclosed. The JSC states, In drafting the “constitutionally required” exception, the Committee intended that the communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless.

See id. at A22-46.
VII. PROSECUTION AND DEFENSE

military installations adopt this model, any multidisciplinary meetings between victim services personnel, the prosecutor, and investigator should be limited to topics related to victim support and ensuring the victim remains informed and engaged in the process, but should not include discussions about case details.

The Philadelphia Sexual Assault Response Center (PSARC) in Pennsylvania and the Austin Police Department (PD) Special Victim Unit (SVU) in Texas offer a second model. These investigation facilities provide working space for prosecutors and investigators. Moreover, both the Philadelphia and Austin police departments provide office space for specialized sex crimes prosecutors to work with investigators at least one day per week reviewing cases and assisting with investigations. The District Attorneys’ Offices also ensure that a prosecutor is on call to respond to questions about sexual assault cases, as needed.

Both PSARC and Austin PD SVU personnel have gone to great lengths to strengthen their relationships with victim advocate agencies. PSARC partnered with Women Organized Against Rape (WOAR) and other local victim advocate agencies to gain victim confidence and encourage victims to utilize their resources. Austin PD provides an office for victim advocates from SafePlace – a local rape crisis center – to work at the SVU.

The PSARC facility’s capacity to perform SANE exams is unique in that Drexel University provides PSARC’s SANE support and other medical assistance to victims, regardless of whether they wish to file a police report. Austin PD has a SANE Coordinator on-call 24 hours a day to arrange for forensic exams at one of eight local hospitals.

On most, if not all, military installations, a full time SANE would be unnecessary because not enough sexual assaults are reported within the first 96 hours of an incident to require a nurse to be physically located at a consolidated sexual assault center. However, it may be useful to provide appropriate space, supplies and equipment for SANE forensic exams in facilities housing investigators and prosecutors. This would support currently existing arrangements between military installations and civilian forensic examiners who provide SAFE services. Further, such arrangements would increase communication between prosecutors, investigators, and forensic examiners while easing the burden on victims by limiting the need to travel to a military hospital or off base civilian facility. Consequently, the PSARC model may be the best means of increasing communication while avoiding misperceptions or conflicts of interest.

Arlington, Virginia, and Fort Hood, Texas, use a third model of co-location in which Special Victim Unit Investigators (SVUI) and Special Victim Prosecutors (SVP) share the same building. This model is easier to adopt for medium to small jurisdictions because it requires fewer resources, but yields the positive results associated with investigators and prosecutors working closely together.

The victim support personnel at Marine Base Quantico, Virginia, offered a fourth model that involves co-locating the SARC, victim advocate, and Special Victim Counsel. The Subcommittee considered this model, but did not look for similar civilian examples because victim support services are outside this

694 In Philadelphia, investigators work with Women Organized Against Rape (WOAR) and in Austin, a representative from the victim advocate agency, SafePlace, has an office at the police department. See JSC-SAS Report, Appendix M, N (Sept. 2013) (on file at RSP).

695 Id., Appendix M.


697 See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014) (on file at RSP).
Subcommittee’s Terms of Reference. However, based on the information received, this is a positive step by the Marine Corps, especially when there are so many resources and service providers offered to sexual assault victims. Victims could find and access all of the different services available to them under one roof.

In general, the Subcommittee determined that it may be helpful for all of the victim service partners to work in a consolidated facility, as the Marine Corps is doing at Quantico, but victim services must remain independent and separate from the investigators and prosecutors.

2. Special Prosecutors in the Military’s Special Victim Capability

**Recommendation 32-A:** The Service Secretaries continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases.

**Recommendation 32-B:** The Secretary of Defense and Service Secretaries should not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special prosecutors to handle every case undermines effective prevention, investigation, and prosecution.

**Recommendation 32-C:** The Secretary of Defense should direct the Directive-Type Memorandum (DTM) 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of “covered offenses” accurately reflect specific offenses currently listed in Article 120 of the UCMJ.

**Recommendation 32-D:** The Secretary of Defense requires standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service’s organizational structure.

**Finding 32-1:** The Military Services have implemented the Special Victim Capability (SVC) Congress mandated in the FY13 NDAA and the Subcommittee is optimistic about this approach.

**Finding 32-2:** Using the definitions in the UCMJ will clarify responsibilities and improve resource allocation. The generic terms in the DTM could be interpreted to exclude some current offenses that should be counted as sexual assaults or include conduct that is not a specific offense in the UCMJ.

**Discussion**

Section 573 of the FY13 NDAA required the Military Services to implement fully a Special Victim Capability (SVC) – e.g., specialized prosecutors, investigators, victim witness liaisons, and paralegals – by January 2014.698

Most of the Services established aspects of these capabilities prior to Congress’s mandate, which enabled the Services to formalize and fully staff the initiative by the January 2014 deadline. DoD’s policy document (DTM

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

VII. PROSECUTION AND DEFENSE

14-003 effects Congress’s requirements by including timelines for special prosecutors’ involvement in reported sexual assaults, criteria to measure effectiveness, and other standards.699

The SVC strives to provide a level of prosecution expertise through specialization in complex sex-related cases, while recognizing that every Judge Advocate is not a subject matter expert in sexual assault prosecution. Therefore, the Services have established various ways to meet the requirement for a specialized prosecution capability that can assist or take the lead in sexual assault cases. Each Service designed a different approach to meet the SVC requirement based on the resources and structure of the separate Services’ installation legal offices.700

However, pursuant to DoD policy, “covered offenses” – which includes “sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ,”701 – are required to be resolved using the SVC, including special victim prosecutors. Accordingly, the prosecutors and investigators of the SVC are required to handle cases beyond Article 120 offenses. The Subcommittee recommends changing the definition of “covered offenses” in this new DTM to coincide with offenses in the UCMJ.702 The generic list of covered offenses inaccurately represents the cases that the SVC was designed to support. If literally adhered to, the “covered offenses” exclude large categories of sex-related offenses, including rape.

The Army refers to its special prosecutors as Special Victim Prosecutors; the Air Force’s as Special Victims Unit Senior Trial Counsel; the Navy’s as Region Senior Trial Counsel and the Marines Corps’ as Complex Trial Teams. The DTM refers to these positions as specially trained prosecutors. There is no reason for the variation in titles; this Subcommittee recommends standardizing them.

The Military Services provided the details of the various special prosecutor programs within the SVC, depicted below.703

Table 11

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<th>Army</th>
<th>Special Victim Prosecutors (SVP):</th>
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<td>Army</td>
<td>The core of this team now includes 23 SVPs working with 21 Sexual Assault Investigators (SAI) and 28 Special Victim NCOs. They are located at 19 installations across the globe and trained in the unique aspects of investigating and prosecuting sexual assault cases. These teams have geographic areas of responsibility to ensure coverage Army-wide, including all deployed forces in theater.</td>
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700 See DoD and Services’ Responses to Request for Information 50 (Nov. 21, 2013).

701 U.S. Dep’t of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support 12 (Feb. 12, 2014) (defining covered offenses as “[t]he designated criminal offenses of sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ”).

702 The listing of covered offenses does not accurately reflect offenses under the UCMJ. “Sexual assault” is a specific offense under the UCMJ rather than an omnibus description of offenses. “Domestic violence” and “child abuse” are not specific offenses under the UCMJ; instead, violations commonly referred to by those terms are incorporated into other offenses. See generally MCM, supra note 97, pt. IV.

703 Information contained in the table is based on DoD and Services’ Responses to Request for Information 50 (Nov. 21, 2013).
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

| Air Force | **Special Victims Unit (SVU) Senior Trial Counsel (STC):**
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<td>There are currently 16 STC. Of these 16, an elite team of 10 are part of the Air Force’s SVU, specializing in the prosecution of particularly difficult cases including sexual assault, crimes against children, and homicides. Two of these SVU-STC serve additional roles. One acts as a liaison to the Defense Computer Forensics Laboratory, ensuring expeditious analysis of forensic evidence (particularly in child pornography cases) and providing expert consultation to local trial counsel on issues of digital evidence. The other, the SVU Chief of Policy and Coordination, serves numerous roles: 1) liaison with HQ AFOSI to improve JA-AFOSI teaming at the HQ and local level; 2) expert reach-back capability to local JA offices; and 3) leads training of JAGs worldwide in all aspects of sexual assault prosecution.</td>
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| Navy | **Region Senior Trial Counsel (STC)**
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<td>Each of the nine Region Legal Service Offices (RLSO) is required to have trial counsel trained and certified to prosecute and provide oversight of special victim cases. The core of the prosecution capability is each Region’s STC. These Navy JAG Corps prosecutors are board-selected as Military Justice Litigation Career Track (MJLCT) officers based on their significant litigation experience, aptitude, and training; they are detailed to their positions by the Judge Advocate General. STC either personally prosecute or oversee the prosecution of special victim cases.</td>
</tr>
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</table>

| Marines | **Regional Trial Counsel (RTC) and Complex Trial Teams (CTT)**
| --- | --- |
| | The Marine Corps Special Victim Capability operates through regional Legal Services Support Sections (LSSS) with the goal of having the right counsel detailed to the right case at the right time. The Marine Corps legal community is organized into four LSSSs—National Capital Region, East, West, and Pacific—each responsible for a particular region. The LSSS region in which a joint base is located is responsible for providing legal support to any Marine Corps convening authority at that base. Existing arrangements with the Navy at certain installations allow for Navy personnel to prosecute Marine cases. Each LSSS is supervised by a colonel judge advocate and contains a RTC office with a CTT capability. Each RTC office is supervised by an experienced lieutenant colonel. A highly qualified expert (HQE), an experienced civilian prosecutor, supports the lieutenant colonel in leading two CTT military prosecutors, two experienced military criminal investigators, a legal administrative officer, and paralegal support. The HQEs, resident in the RTC Office, have significant experience in complex criminal litigation as successful trial-level prosecutors on sexual assault cases. A HQE’s primary job is to train trial counsel (TC) to prosecute sexual assault cases. TC must consult with his or her regional HQE within ten days of being detailed to any sexual assault case.
VII. PROSECUTION AND DEFENSE

3. Sustaining the Special Victim Prosecutor Capability

**Recommendation 33:** The Service Secretaries continue to assess and meet the need for well-trained prosecutors to support the Services’ Special Victim Capabilities, especially if there is increased reporting.

**Finding 33-1:** DoD has dedicated an immense amount of resources to combat sexual assault. DoD did not authorize any additional personnel to the individual Services specifically to meet the requirement for special prosecutors within the Special Victim Capability, although the Services may have obtained additional personnel prior to the Congressional mandate.

**Finding 33-2:** The Military Services fully fund special prosecutors’ case preparation requirements.

**Discussion**

In the years leading up to the Congressional requirement for a SVC, the Services established programs that centralized specially trained prosecutors for complex cases. For example, the Army obtained eighteen authorizations for SVPs beginning in 2009.704 The Air Force maintained sixteen STC worldwide – ten of these designated as STC-SVUs to comply with the Congressional SVC mandate.705 The Navy established its career litigation track in 2007, which enabled it to meet the SVC requirement for specialized prosecutors,706 and in 2012, the Marine Corps completely reorganized its legal community by developing regional Complex Trial Teams.707 The FY13 NDAA requirement to establish a SVC within each Service did not significantly impact overall JAG manpower requirements as the Services were already developing these capabilities, and, depending on the Service, may have already received additional authorizations for personnel. A Marine witness told the RSP, that, “while we haven’t increased the numbers of people who are prosecuting these cases, we’ve definitely improved the way that we do business.”708

The Subcommittee concluded it is “reasonable to think that in a time of scarce resources, right on the horizon, that it may be difficult to maintain this kind of capability in each of the different Services with the global reach and standardization process that the SVC capability and the NDAA is trying to find.”709 Therefore, DoD and the Services need to ensure continued resources dedicated to this capability.

**Recommendation 34:** The Secretary of Defense assess the Special Victim Capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics to include measurements such as the victim “drop-out” rate, rather than conviction rates, as a measure of success. Congress should consider more than conviction rates to measure the effectiveness of military prosecution of sexual assault cases, which often pose inherent challenges.

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705 Id. at 158 (testimony of Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force).
706 Id. at 148-50 (testimony of Captain Jason Brown, Military Justice Officer, Marine Corps Headquarters, U.S. Marine Corps).
707 Id. at 146.
708 Id.
709 Id. at 174–75 (comments of Dean Elizabeth Hillman, RSP Member).
Finding 34-1: DoD established five evaluation criteria “to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel.” In addition to the DoD criteria, the Army uses the victim “drop out” rate to also measure the effectiveness of the SVP program. Since the Army established the SVP program in 2009, only 6% of sexual assault victims “dropped out” or were unable to continue to cooperate in the investigation and prosecution of the case. In contrast, in 2011, prior to implementing the specially trained prosecutors or victims’ counsel, the Air Force suffered from a 29% victim drop-out rate.

Discussion
The Subcommittee is cautiously optimistic about the success of the SVC to hold offenders appropriately accountable. The Army provided information to demonstrate improvements in its ability to prosecute complex cases since it established the Special Victim Prosecutor program in 2009. Colonel Michael Mulligan, Chief of the Army’s Criminal Law Division, stated, “[s]ince these efforts started, the Army has seen an over 100 percent increase in prosecutions, convictions, and sentences.” In addition, “The program is now being expanded. It will now include dedicated paralegal and Special Victim Witness Liaisons to these prosecutors to better resource them . . . .”

The FY13 NDAA required the Secretary of Defense to prescribe common criteria for measuring the effectiveness and impact of the SVC from investigative, prosecutorial, and victim perspectives. The DoD and the Services will assess the SVC by reviewing the following measures:

- Percentage of SVC cases preferred, compared to overall number of courts-martial preferred in each fiscal year;
- Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor;
- Compliance with DoD Victim Witness Assistance Program reporting requirements to ensure SVC legal personnel consult with and regularly update victims as required;
- Percentage of specially-trained prosecutors and other legal support personnel who receive additional and advanced training in SVC topic areas; and

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710 DoD SVC Report, supra note 171, at 10.
713 Id. at 231.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

VII. PROSECUTION AND DEFENSE

Special prosecutors, and now Special Victim Counsel, are trained to prevent victim fatigue and to ensure victims remain informed. Evidence indicates that these programs have thus far been effective. For example, since the Army established its SVP program in 2009, only 6% of the victims in sexual assault cases have dropped out or otherwise stopped cooperating with the prosecution.\(^7\) By comparison, in 2011, the Air Force—which at the time did not have an SVP program—had a 29% victim drop-out rate.\(^8\) Considering the correlation between implementation of the SVP program and a reduced victim drop-out rate, it is reasonable to conclude that SVPs may abrogate a primary cause of victim drop-out: their belief that “the process is very intimidating and the odds of success are very low.”\(^9\) Nonetheless, in order to assess the long-term effectiveness of these programs, the Services should track the percentage of cases in which the victim declines to cooperate after filing an unrestricted report. This additional data could reflect the effectiveness of both the special prosecutor and Special Victim Counsel.

4. Prosecutors’ Initial Involvement in Sexual Assault Cases

**Recommendation 35:** The Secretary of Defense maintain the requirement for an investigator to notify the legal office of an unrestricted sexual assault report within 24 hours, and for the special prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established early in the process to insert the prosecutor into the investigative process and to ensure that the special victim prosecutor contacts the victim or the victim’s counsel as soon as possible after an unrestricted report.\(^7\)

**Finding 35-1:** When prosecutors become involved in sexual assault cases early, including meeting with the victim, there is a greater likelihood the victim will cooperate in the investigation and prosecution of the alleged offender.

**Finding 35-2:** Military special prosecutors told the Subcommittee they are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. DoD established timelines to ensure military prosecutors’ early involvement in sexual assault investigations. MCIOs inform the legal office within 24 hours of learning of a report, and the special prosecutor coordinates with the investigator within 48 hours. There is no current requirement for the prosecutor to meet with the victim as soon as possible.

**Discussion**

Studies show that the longer prosecutors wait to interview sexual assault victims, the higher the probability that those victims will not cooperate.\(^7\) Prosecutors in the Manhattan District Attorney’s office stated that it is

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\(^7\) U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT 9 (Feb. 12, 2014).


\(^7\) Id.

\(^7\) See supra Part IV, Section F(1).

\(^7\) See, e.g., OVW, supra note 176, at 51 (“Some victims . . . are unable to make a decision about whether they want to report or be
“critical” to involve the prosecutor in the investigation as early as possible. They explained that “an attorney who ‘rides’ on a case will take the case from start to finish.” Some of the other large urban prosecution offices have “ride-a-long” programs and established protocols for notifying prosecutors as soon as serious sexual assaults are identified by investigators and for facilitating the investigator through much of the process. For instance, the Queens County District Attorney’s Office established one of the first Ride-a-long programs in the Special Victims Bureau. There, “a prosecutor will work with officers before probable cause to arrest develops.” Police contact the on-call prosecutor who responds to the report of a serious sex offense, such as first degree/forcible rape, crimes against children, etc. This early action assists the Assistant District Attorney in collecting potentially perishable evidence - such as text messages, cell site info, GPS data, phone records, alternative light sources, etc. - early in the investigation. Special Victim police and prosecutors work hand-in-hand and have developed a good working relationship over time.

In the “Riding Program” model, the prosecutor will arrive at the hospital, meet with the detective, read the detective’s paperwork, obtain background information, and then sit down with the complainant. The prosecutor will work to establish rapport, put the victim at ease, and complete a forensic interview. In non-crisis cases, the strong preference is to complete the interview at the prosecutor’s office. It should be noted that under this model investigators’ initial interviews and the prosecutor’s discussions with victims remain separate in order to preserve the neutrality of the investigative process.

The prosecutor’s early involvement in the case can also facilitate proper understanding by the police of the relevant legal requirements for establishing probable cause. The Subcommittee received evidence that it is critical that an investigator knows the legal definitions and required elements of proof of sexual assault offenses in order to focus the physical evidence collection properly. In addition, the prosecutor can focus investigative efforts on gathering additional corroborating evidence to assist the government in meeting its legal obligation to prove the offense beyond a reasonable doubt.

SVC affords military prosecutors comparable early access to witnesses and evidence afforded attorneys in ride-along program jurisdictions. DoD policy requires investigators to notify the legal office within 24 hours of an unrestricted sexual assault allegation, and special prosecutors must consult investigators within 48 hours of the report. Although there is no specified time for the prosecutor to interview the victim, The Subcommittee involved in the criminal justice system in the immediate aftermath of an assault. Pressuring these victims to report may discourage their future involvement. Yet, they can benefit from support and advocacy, treatment, and information that focuses on their well-being. . . . Victims who are recipients of compassionate and appropriate care at the time of the exam are more likely to cooperate with law enforcement and prosecution in the future.

723 See id.
724 See id.
725 See id.
726 See id.
727 See id.
728 JSC-SAS Report, Appendix K-3, at 2 (Sept. 2013) (on file at RSP) [stating that through the use of the “riding program,” Manhattan Assistant DAs “will become involved with a case early enough that they can help build the case by working alongside investigators to identify and properly preserve evidence at the beginning of a case”).
729 See U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT (Feb. 12, 2014).
730 See id.
found that Army SVPs are on-call and try to interview the victim early in the process. The military special prosecutors appear to follow the same procedures as prosecutors in large offices with well-established programs.

**B. DEFENSE COUNSEL ORGANIZATIONAL STRUCTURE & RESOURCE REQUIREMENTS**

I urge this panel to look at our clients as people, some of whom stand falsely accused. Our clients, like victims of sexual assault and other crimes, are real people, impacted by decisions and recommendations this panel will make.731

“Army defense counsel [play a] critical role in ensuring the integrity and constitutional sufficiency of our military justice system.”732 Defense counsel from the Services informed the RSP that the mission of the Defense Services is to provide independent and world-class representation in a zealous, ethical, and professional manner thereby ensuring the military justice system is both fair and just.733

With media attention focused on sexual assaults in the military, on college campuses, or in civilian jurisdictions almost every day, victims’ rights are front and center. There is increasing pressure to “hold offenders accountable.” It is crucially important that the military justice system remains balanced and respects the rights of the accused, particularly the presumption of innocence.

As one defense counsel told the RSP:

[I]t’s relatively easy to stand up for beliefs when it’s the popular thing or the in vogue thing. It’s relatively easy to be pro-victim or anti-crime. But it can be quite another to be against the injustice done to accused, especially when they are already considered guilty by society, by the media, by their unit and by their commander, all prior to trial.734

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733 See *id. at 292* (“The mission of the U.S. Army Trial Defense Service is to provide independent, professional, and ethical defense services to soldier.”); *id. at 305* (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) (“The Marine Corps Defense Services Organization provides zealous, ethical, and effective defense counsel services to Marines and sailors who are facing administrative, nonjudicial, and judicial actions in order to protect and promote due process, statutory and constitutional rights, thereby ensuring the military justice system is both fair and just.”); *id. at 310–11* (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force) (“Our charge is to further the Air Force’s mission by providing America’s airmen with independent, world-class representation in a zealous, ethical, and professional manner.”); see also Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System, The Champion* (June 2012) (noting that roles of military defense attorney and public defender are critical to ensure accused’s “Sixth Amendment right to counsel . . . [and that] the procedural protections which exist on paper, are actually applied”); *Transcript of RSP Public Meeting* 313 (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency) (noting that military defense counsel, in particular, ensure the fair administration of the military justice system, which assists in maintaining good order and discipline and ultimately strengthens the national security of the United States).

734 *Transcript of RSP Public Meeting* 333 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps); see also *Transcript of RSP Public Meeting* 303–304 (Nov. 8, 2013) (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) (“As persons dedicating ourselves to the military, to the law, for the betterment of military law, we must likewise never forget that the Marines and sailors defended by the DSO are not attackers, victimizers, assailants, rapists, or any other...
As required by law and policy, the Military Services provide military defense counsel, free of charge, to Service members facing potential court-martial, nonjudicial punishment, administrative separation, and similar adverse action. Defense counsel perform a wide range of duties, including: (1) representing Service members before tribunals and other administrative bodies – e.g., at courts-martial, Article 32 hearings, lineups, administrative separation boards, and disciplinary and adjustment boards; (2) counseling Service members under investigation or prior to being subject to punitive or negative administrative action – e.g., those suspected of offenses, pending nonjudicial punishment under Article 15 of the UCMJ, subject to Summary Court-martial (at which Service members are not entitled to be represented by counsel), recommended for administrative separation; and (3) other legal services as determined by the Services.

1. Military Trial Defense Structure and Budget

**Recommendation 36-A:** The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.

**Recommendation 36-B:** The Military Services continue to provide experienced defense counsel through regional defense organizations and from personnel with extensive trial experience and expertise in the Reserve component.

**Finding 36-1:** Maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system.

**Finding 36-2:** DoD did not establish defense capabilities analogous to the Special Victim Capability in the military trial defense organizations.

**Finding 36-3:** Unlike many civilian public defender offices, military defense counsel organizations generally do not maintain their own budget and instead, receive funding from the convening authority, their Service legal commands, or other sources.

**Finding 36-4:** Neither civilian public defenders nor military defense counsel specialize in sexual assault cases; instead both attempt to use the most experienced attorneys to try more complex cases, including sexual assaults. The Military Services’ regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault.

VII. PROSECUTION AND DEFENSE

Discussion

All of the Services organize the provision of trial defense services by geographic region. Military defense counsel are assigned to separate and independent organizations that are not under the supervision or control of their clients’ commanders. This organizational structure ensures the independence of military defense counsel, both in fact and perception.

An Army defense counsel stated to the RSP that, “[s]ervice members deserve the best possible representation, and this means that we must continue to resource the defense function even in today’s constrained budget environment.” He explained that,

[In representing an accused Service member, the defense counsel is confronted with the tremendous resources of the command, military law enforcement, and prosecutors. It can be a lonely and often uphill struggle for the defense to gain access to the witnesses, evidence, and resources needed to properly defend a soldier and ensure a fair trial.]

Congress, DoD and the Services have dedicated significant resources in recent years to prosecuting sexual assault cases, including establishing the SVC. There is not a similar requirement for “special victim defenders,” solely dedicated to defending those accused of sexual assault offenses. Neither civilian public defenders offices nor military defense services have attorneys dedicated to specializing in sexual assault cases; rather, both use their most experienced attorneys to handle complex cases, including sexual assaults. Instead of developing new positions for specialized defense counsel, DoD and the Services should focus on a training and resource structure that ensures defense organizations and counsel can function effectively.

Some public defender offices maintain their own budgets or request experts through a trial judge who manages the budget. In the federal system, there is specific funding to pay for defense witness travel and experts for Federal Defender organizations. Federal discovery rules generally require the defense to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel. Military defense counsel must request their witnesses through the trial counsel.

736 See generally Transcript of RSP Public Meeting 291-396 (Nov. 8, 2013) (testimony of military defense organization personnel, including Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army; Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast, U.S. Navy; Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps; Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force; and Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard); see also id. at 315 (noting that “trial defense services for Coast Guard members accused of violating the Uniform Code of Military Justice are actually provided by the Navy, pursuant to the terms of a Memorandum of Agreement”).

737 Id. at 299 (testimony of Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army).

738 Id. at 294.

739 Transcript of RSP Public Meeting 336, 362-63 (Dec. 12, 2013) (testimony or Mr. Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon) (“We don’t divide ourselves in terms of like a sexual crimes unit. We divide among major felonies, minor felonies and misdemeanors. And you work your way up based on state guidelines for experience.”); id. at 362 (testimony of Ms. Amy Muth, Attorney-at-Law, Law Offices of Amy Muth) (“Specific to sex crime cases there are minimum standards of qualifications. You need to have been a lawyer for at least a year. You need to have done at least one felony trial and another trial with the assistance of another attorney.”).

740 See, e.g., id. at 374, 382 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department; and Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

741 Id.
Some military defense counsel requested their own budget to attain further independence during an interview with the Subcommittee. However, the Subcommittee does not recommend requiring the Services to establish separate budgets for military defense organizations at this time.

2. Defense Investigators

**Recommendation 37:** The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice. 742

**Finding 37-1:** Many civilian public defender offices have investigators on their staffs, and consider them critical to the defense function. Military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel stated both convening authorities and military judges routinely deny the requests.

**Finding 37-2:** Military defense counsel need independent, deployable defense investigators in order to zealously represent their clients and correct an obvious imbalance of resources. Defense investigators are such a basic and critical defense resource, the Subcommittee finds they are required for all types of cases, not just sexual assault cases.

**Discussion**

Public defenders have conveyed the importance of employing their own investigators, who typically assist the defense in locating and interviewing witnesses, finding appropriate experts, and finding services to assist the defense in complying with court ordered treatment or services. 743 The investigators’ involvement and contributions permit the defense counsel to prepare for trial and may assist in reaching alternate dispositions in cases. 744 Investigators can “give[] attorneys a fighting chance to develop facts and other evidence that is

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742 Id. at 327 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps); see also Transcript of RSP Comparative Systems Subcommittee Meeting 221-30 (Mar. 11, 2014).

743 See generally JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP); Charles D. Stimson, “Sexual Assault in the Military: Understanding the Problem and How to Fix It” (Nov. 6, 2013) (noting “the best public defender offices in the country have full-time criminal investigators”); Transcript of RSP Comparative Systems Subcommittee Meeting 230 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL) (“I don’t know a lawyer in the country that does sex offenses without an investigator, except in the military. Really, there is no such thing.”).

744 James Whitehead told the RSP:

> But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for awhile. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things -- sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word “victim.” When we talk about pre-trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent -- not only a decent, but a zealous defense.
VII. PROSECUTION AND DEFENSE

rarely provided to them by the government and is crucial for the proper representation of their clients” and “contribute to the efficient disposition of cases.” One public defender from the Washington D.C. Public Defender’s Office told the RSP, “[I]t’s surprising to hear about the lack of investigators involved when we’re trying to uphold the Constitution here and try to give our clients the utmost in representation and being zealous.”

One military defense counsel illustrated the comparative point to the RSP:

Congress has provided investigators for the adequate representation of Federal indigent defendants. And virtually every state and Federal public defender’s office has in-house investigators. For example, in the central branch of the San Diego Public Defender’s Office, 80 attorneys are supported by 16 investigators. In the [Marine Defense Services Organization], we have 72 defense counsel, but not a single defense investigator.

Many civilian defense attorney offices have investigators on staff. Military defense counsel repeatedly told the Subcommittee that having their own investigators was crucial. One civilian defense counsel stated “I can’t tell you how many cases pre-indictment I have had dismissed because my investigator got out and did the ground work that the cops couldn’t do, that law enforcement didn’t have the resources to do it right . . . .” Likewise, another civilian defense counsel told the Subcommittee that, in her experience in four public defender offices – spanning urban, rural, state, and Federal jurisdictions – investigators were “an integral part of the office.”

Civilian defense investigators have a variety of backgrounds and training; most have criminal justice training or education. Others have a law enforcement background or are former private investigators. But this is not always the case. For example, the Bronx Public Defenders office, as a matter of policy, does not hire former police officers as investigators. Defense attorneys sometimes find that police detectives are more intimidating and not as approachable for defendants, their families, or other witnesses as others who do not possess a law enforcement background.

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745 Stimson, supra note 743, at 18-19.


747 Id. at 326 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

748 See e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 226-28 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL).

749 Id. at 229.

750 See, e.g., id. at 438 (testimony of Ms. Kathleen Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County).

751 See generally JSC-SAS REPORT, Appendix C-P (Sept. 2013) (on file at RSP).

752 See generally id.

753 See generally id., Appendix K.

754 See id.
During Subcommittee member site visits, military defense counsel repeatedly requested that the Services provide independent investigators to defense offices. Although military defense counsel can request the MCIO follow-up on defense leads, defense counsel told the RSP and Subcommittee that requests to the MCIOs are routinely denied. In addition, any information the MCIO agent obtains at the behest of the defense is not protected by the attorney-client or work-product privileges. Accordingly, the prosecutor would also have access to the information, placing the military defense counsel in the untenable position of requesting investigative assistance that might lead to additional incriminating evidence for the prosecutor to use against the accused.755

The alternative – military defense counsel conducting his or her own case investigations – is equally unsatisfactory.756 This places an additional burden on counsel that is untrained in investigative techniques and lacking investigative assets. Further, it may place defense counsel in ethically compromising circumstances if he or she becomes the only witness to exculpatory or inconsistent statements.757 A civilian defense counsel currently working as an HQE expressed the concern that the large number of resources available to military prosecutors and the addition of the Special Victim Counsel for victims, has put “an incredible amount of weight on one side of the scales without comparable resourcing on the other side.”758

The Subcommittee identified several potential ways DoD could fulfill the requirement to provide defense investigators. One would create MCIO positions within the defense counsel offices759 and ensure the investigators’ evaluation and supervisory chains remain within the military trial defense organizations.760 Investigators could “unplug” from the parent MCIO for an assignment, “plug” into the defense system, then “unplug” to resume work for the MCIO.761 This would mirror JAG Corps attorneys who serve as both prosecutors and defense counsel, although always in different assignment tours. Another option is to hire civilian investigators as full time government employees or hire contractors to work for the defense.762 Some public defenders offices hire former law enforcement personnel who get narrow-purpose credentials issued to them to perform the investigative functions for the defense.763

755 Information learned during site visits at Fort Hood, Naval Base Kitsap, JBLM, and Quantico. See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM (Feb. 5, 2014) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014) (same).

756 Lisa Wayne told the RSP, “you all [don’t] assign investigators to the defense. And that doesn’t make sense. You can’t be effective. You cannot provide effective assistance of counsel to your client without an investigator.” Transcript of RSP Comparative Systems Subcommittee Meeting 229 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL).

757 Lisa Wayne explained, “We never interview witnesses on our own in civilian practice. It is unethical. The ABA Standards are clear on that. That is like a number one rule in civilian practice is never making yourself a witness in a case.” Id. at 242.

758 Id. at 439 (testimony of Ms. Kathleen Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County). Lisa Wayne reiterated this point when she said, “[Prosecutors] are there with their investigators and the victim’s advocates and all their resources. So, there has to be, obviously, the balance. And it is incredible to me that you could ever do these cases without an investigator.” Id. at 231 (testimony of Ms. Lisa Wayne, NACDL).


760 Transcript of Comparative Systems Subcommittee Meeting 220-23 (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member).

761 Id. at 222.

762 Id. (comments of Mr. Russ Strand, Subcommittee Member).

763 Id. (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member).
3. Measuring the Effectiveness of Military Defense Counsel

**Recommendation 38:** The Secretary of Defense direct the Services to assess military defense counsel’s performance in sexual assault cases and identify areas that may need improvement.

**Finding 38-1:** There are currently no requirements for the Military Services to measure military defense counsel’s performance trying sexual assault cases; the Subcommittee is unaware of any effort on the Services’ part to do so.

**Discussion**

It is difficult for civilian or military defense counsel to measure success in defending those accused of sexual assault offenses. Just as conviction rates are not an accurate or desirable measure of prosecution success, acquittal rates are also not an accurate or desirable measure of defense success. Instead, a favorable plea agreement, negotiated sentence, or agreement to dispose of a case through alternate means for a client may be an accomplishment. Additionally, high acquittal rates in military sexual assault cases may indicate that the staff judge advocates are recommending, and convening authorities are referring, cases that do not warrant trial by court-martial.

Therefore, in addition to the metrics designed to measure the success of the special prosecutors and special victim counsel, the Subcommittee recommends that the Secretary of Defense develop systemic tools to measure the defense of those accused in sexual assault cases.

C. VICTIMS’ RIGHTS AND SPECIAL VICTIM COUNSEL IMPACT ON THE JUDICIAL PROCESS

1. Trial Counsel Role in Ensuring Military Crime Victim Rights

**Recommendation 39:** The Service Secretaries ensure trial counsel comply with their obligations to afford military crime victims the rights set forth in Article 6b of the UCMJ and DoD policy by, in cases tried by courts-martial, requiring military judges to inquire, on the record, whether trial counsel complied with statutory and policy requirements.

**Finding 39-1:** As established by Congress and the Military Services, military crime victims have the right to confer or consult with trial counsel at several points in the judicial process. These requirements mirror the discussions civilian prosecutors routinely engage in with victims in sexual assault cases. In some civilian jurisdictions, the trial judge asks the prosecutor, on the record, if he or she has conferred with the victim and to present the victim’s opinions to the court, even if the victim’s opinions diverge from the government’s position.

**Discussion**

The FY14 NDAA included the following provisions to enhance victim protections:

1. Added Article 6b to the UCMJ setting forth military crime victims’ rights;
2. Codified the requirement for Special Victims’ Counsel;
3. Narrowed the scope of Article 32 hearings and gave military victims the option not to testify;

4. Required higher level review of a commander’s decision not to refer a sexual assault charge to court-martial;

5. Gave victims a right to participate in the post-trial clemency process; and

6. Prohibited convening authorities from considering information about a victim’s character that was not admitted at trial during the post-trial review process.764

The trial counsel, as the representative of the government and convening authority in a military sexual assault prosecution and court-martial, is charged with affording victims certain rights throughout the judicial process. In December 2013, DoD articulated specific requirements to ensure victims receive appropriate notifications and have the opportunity to confer with the trial counsel. Specifically, the new DoD instruction states that the trial counsel must consult with the victim and obtain his or her views concerning:

- The decision to pursue charges against the suspected offender;
- The decision not to prefer charges;
- Dismissal of charges;
- Disposition of the offense if other than court-martial;
- Pretrial restraint or confinement, particularly an accused’s possible release from any pretrial restraint or confinement;
- Pretrial agreement (PTA) negotiations, including PTA terms;
- Plea negotiations;
- Discharge or resignation in lieu of court-martial; and
- Scheduling of judicial proceedings, including changes or delays, of each pretrial hearing pursuant to Article 32, UCMJ, and each court proceeding that the victim is entitled or required to attend.765

Congress also enacted legislation that codified specific rights for military crime victims.766 DoD policy already provided victims many of the protections now statutorily required, although “[c]odifying common practices

764 See Letter from the Assistant Secretary of Defense for Legislative Affairs to the Honorable Carl Levin, Chair, Senate Armed Services Committee (undated) [hereinafter DoD VPA Letter] (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014), currently available at http://responsesystemspanel.whs.mil/index.php/home/materials. For further analysis of the Victims Protection Act, see the Victim Services Subcommittee’s Report to the Response Systems Panel, supra note 16.

765 Lieutenant Colonel Ryan Oakley, Deputy Director, Office of Legal Policy, Personnel & Readiness, Supplemental Information Provided to Response Systems Panel on Sexual Assault on Department of Defense Victim and Witness Assistance (citing to DoDI 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES ¶ 6.3 (June 4, 2004) (noting DOD issuance is currently being revised and will implement new FY14 NDAA provisions)).

766 FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013). For further analysis of the amendments to Article 6b, UCMJ, see the
into legal mandates enhances the credibility of the system while increasing victims’ confidence that their rights will be protected.\textsuperscript{767}

One easily implemented procedural safeguard to ensure trial counsel comply with their obligations and victims are afforded the rights Article 6b of the UCMJ and other policy provisions is to modify the Services’ compendiums of pattern military jury instructions and other matters such as scripts for guilty plea inquiries\textsuperscript{768} known as “Benchbooks.”\textsuperscript{769} Modifications to the Benchbooks would provide checks and balances in the system to ensure trial counsel are properly consulting with the victim without disrupting the court-martial procedure, or the military judge could order timely remedial actions as authorized by law. This colloquy could also include attaching a document to the record of trial reflecting whether the victim was afforded all his or her rights. These simple steps are similar to current requirements to reflect, on the record, that the accused was aware of, and afforded, a number of constitutional, statutory, or other rights, and can help ensure that the trial counsel complies with all his or her obligations to victims and avoid litigation on those issues.

2. Assessment of Special Victim Counsel by the SJA, Trial and Defense Counsel

**Recommendation 40:** In addition to assessing victim satisfaction with Special Victim Counsel, the Service Secretaries direct assessments by Staff Judge Advocates, prosecutors, defense counsel, and investigators in order to evaluate the effects of the Special Victim Counsel Program on the administration of military justice.

**Finding 40-1:** Military trial and defense counsel, SARC, and victim advocate personnel reported to the Subcommittee that they have positive working relationships with Special Victim Counsel. However, some counsel foresee potential issues such as privilege, confidentiality, or delays when the government and victim’s interests do not align.

**Discussion**

Although the Special Victim Counsel Programs in the Services are still in their early stages, the trial and defense counsel the Subcommittee interviewed during site visits did not report any significant issues with Special Victim Counsel impacting the administration of justice or maintenance of good order and discipline. Each of the Services have established Special Victim Counsel Program Managers who share best practices and

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\textsuperscript{767} Stimson, \textit{supra} note 743, at 6; see DoD VPA Letter, \textit{supra} note 764 (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014). For further analysis of the Victims Protection Act and amended Article 6b, UCMJ, see the Victim Services Subcommittee’s Report to the Response Systems Panel, \textit{supra} note 16.

\textsuperscript{768} Inquiry into the providence of the accused is required in guilty pleas before military courts-martial. \textit{See United States v. Care}, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

\textsuperscript{769} The Military Judge’s Benchbook serves as a supplement to the Uniform Code of Military Justice, opinions of appellate courts, other departmental publications dealing primarily with trial procedure, and similar legal reference material. The pamphlet sets forth pattern instructions and suggested procedures applicable to trials by general and special court-martial. It has been prepared primarily to meet the needs of military judges. It is also intended as a practical guide for counsel, staff judge advocates, commanders, legal specialists, and others engaged in the administration of military justice. In the Army, the benchbook is DA Pamphlet 27-9, The Military Judges’ Benchbook, and it is available at https://www.jagcnet.army.mil/Portals/USArmyJ. nsf/6065c91f137aff3685256cbbf0079f732/2e6ba83d745c6dfe7852579c300487713.
discuss issues or concerns as they arise. Over time, court decisions should resolve many issues regarding the counsel and military crime victims’ rights.770

The SVC program managers of the respective SVC programs regularly reach out to one another via email and telephone to communicate SVC issues and exchange lessons learned/best practices generated by their respective Services. On a more formal basis, the SVC program managers meet monthly to discuss a variety of SVC program issues.771

3. Choice of Venue and the Victims Protection Act (VPA) of 2014, Section 3(b)

Recommendation 41: Congress should not enact Section 3(b) of the Victims Protection Act (VPA), which requires, which requires the Convening Authority to give “great weight” to a victim’s preference where the sexual assault case be tried, in civilian or military court. The Military Services do not have control over the civilian justice system, and jurisdiction must be based on legal authority, not the victim’s personal preferences, so this decision should remain within the discretion of the civilian prosecutor’s office and the Convening Authority.

Finding 41-1: The decision whether civilian or military authorities will prosecute a case is routinely negotiated when they share jurisdiction. The Subcommittee did not receive evidence of problems with coordination between civilian prosecutors and military legal offices. In fact, the opposite appears to be true. There appears to be significant coordination and cooperation between military and civilian authorities with concurrent jurisdiction.

Finding 41-2: Section 3(b), would provide the victim the opportunity to express a preference, which should be afforded great weight in the determination whether to prosecute an offense by court-martial or by a civilian court. If the civilian jurisdiction declines to prosecute, the victim must be informed. Jurisdiction, however, is based on legal authority, not necessarily the victim’s preferences.

Discussion

Consulting with victims, whenever practical, is very important to ensure victims’ rights are protected throughout the military justice process. However, jurisdiction is based on legal authority, not victim preference. The Military Services have no authority over civilian jurisdictions or prosecution decisions.772 The decision of whether civilian or military authorities will prosecute a particular case is routinely negotiated between the entities sharing jurisdiction. Neither the Subcommittee nor the RSP heard evidence of problems with coordination between civilian prosecutors and military legal offices.

The DoD’s position on this issue is:

With regards to Section 3(b), the Department of Defense is committed to ensuring that victims are treated with fairness, dignity, and respect. This includes consulting with victims throughout the process and taking their preferences into account whenever appropriate. Requiring convening

770 Army’s Response to Request for Information 144 (April 2014).

771 Id. “The last meeting took place at Marine Corps CID Headquarters in Quantico, Virginia on 4 April 2014 and involved Army CID, AF OSI, and NCSI to discuss best practices for collecting evidence when an SVC was involved in the case.” Id.

772 Transcript of RSP Comparative Systems Subcommittee Meeting 632 (Apr. 11, 2014) (Subcommittee deliberations).
authors to give “great weight” to a victim’s preference about whether an alleged sexual assault should be tried in military or civilian court, however, would prove difficult because the Department does not have authority over civilian criminal justice systems. For example, placing the military prosecution apparatus on hold while a civilian prosecutor decides whether to exercise jurisdiction in the case could result in significant delay, which is inconsistent with both the cause of justice and military readiness. Additionally, the military and civilian justice systems often share concurrent jurisdiction. In such cases, military prosecution would not preclude prosecution of the same offense in a civilian court if that is preferred by the victim.773

If the sexual assault incident occurs outside a military installation, the local District Attorney’s office has jurisdiction over the crime. If the suspect is a Service member, there is concurrent civilian and military jurisdiction. If the offense happens on a military installation in the United States, the federal U.S. Attorney’s office has jurisdiction. Again, if the suspect is a Service member, there is concurrent jurisdiction with the military.

The Subcommittee members received evidence that in the civilian sector, state courts try the majority of sexual assault cases. In fact, in FY12, there were only 121 sexual assault cases tried in the federal system, most of which occurred on Native American reservations.774 One Assistant U.S. Attorney (AUSA) informed Subcommittee members that the leadership in his office was accustomed to federal fraud cases, and therefore, due to fact they were not familiar with the challenges of sexual assault cases, declined to prosecute a case he believed should have gone to trial. Therefore, federal prosecutors may not always be better at handling sexual assault cases than military attorneys and U.S. Attorney offices may have less training or experience in sexual assault cases than state or military prosecutors. Therefore, a victim may not realize that a request to have the case prosecuted in a civilian jurisdiction may not always be in his/her best interest. The Victims Protection Act of 2014, Section 3(b), should not be enacted and the decision should remain between the civilian prosecutor’s office and the Convening Authority.

D. INITIAL DISPOSITION AND CHARGING DECISIONS

Civilian prosecutors near military installations sometimes take military sexual assault cases to trial and other times reject military cases that are then referred to court-martial. Subcommittee members heard evidence on this when trial counsel interviewed by Subcommittee members on site visits stated that their offices have taken cases declined by civilian jurisdictions.775 Further, in response to a request for information by the RSP, the Services confirmed the military does take some of the cases declined by civilian jurisdictions.776

773 See DoD VPA Letter, supra note 764 (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014).

774 Transcript of RSP Comparative Systems Subcommittee Meeting 198 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission).

775 Trial counsel at multiple installations (Fort Hood, Naval Base Kitsap, JBLM, and Quantico) cited anecdotally cases that were prosecuted in military jurisdictions following declination by civilians. See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM (Feb. 5, 2014) (same); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014) (same).

776 Services’ Responses to Request for Information 41(k) (Nov. 21, 2013). The Services explained they do not usually collect this data, but some were able to provide information based on a data sampling:

- The U.S. Army does not specifically collect the requested data. However, on 6 November 2013, The Judge Advocate General of the Army provided the Chair of the Response Systems Panel a non-exhaustive sampling of 79 cases, in which an Army
There is a broad range of military sexual assault offenses which criminalize some conduct that is not prohibited in civilian jurisdictions. The military also has uniquely military crimes common in military sexual assault cases such as disobedience to orders or fraternization. At its core, the military justice system is designed to achieve justice and to help enforce good order and discipline in the Armed Forces. Therefore, the military justice system may pursue a case that civilian prosecutors decline.

To compare civilian and military prosecution and defense systems, and understand why some cases are pursued by the military or civilian jurisdictions, it is critical to understand what conduct constitutes a crime, the level of discretion is there in drafting charges within criminal statute, the considerations by the prosecutorial authority in assessing the case, and the options of alternate dispositions or trial. All of these aspects are discussed below.

1. The Scope of Article 120 of the UCMJ

Recommendation 42: The Judicial Proceedings Panel consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120.

Finding 42-1: Military and civilian jurisdictions categorize crimes referred to generically as “sexual assault” in different ways. Criminal sexual conduct under Article 120 of the UCMJ spans a broad spectrum from minor non-penetrative touching of another person’s body, with no requirement to gratify any person’s sexual desire, to penetrative offenses accomplished by force. In contrast, “sexual assault” in civilian jurisdictions is generally classified as either a penetrative offense or a contact offense with intent to gratify the sexual desires of some person.

commander chose to prosecute an off-post offense that the civilians either declined to prosecute or could not prosecute. The cases included allegations made by 97 victims, and resulted in a 78% conviction rate. The Air Force does not formally track this data point. However, in response to a similar request received through the office of the Chairman of the Joint Chiefs of Staff, the Air Force provided a non-exhaustive list of 10 sexual assault cases in which an Air Force commander elected to pursue court-martial charges after the local civilian authorities declined to prosecute. The Air Force has a policy of maximizing jurisdiction of offenses allegedly committed by Air Force members IAW AFI 51-201, Administration of Military Justice, para. 2.6

- From February 2010 through June 2013 the Marine Corps prosecuted 28 cases involving sexual misconduct that civilian jurisdictions declined to prosecute. The Marine Corps obtained convictions for Article 120 offenses in 14 of those cases and convictions for other misconduct in five additional cases.
- From 2012-2013, the Coast Guard took taken military justice action in 12 cases involving adult and child sexual assault crimes after civilian law enforcement declined to prosecute. The breakdown of those cases are: (5) Guilty at court-martial; (2) Acquitted; (2) Pending, (2) Dismissed after Art. 32, (1) NJP.


778 10 U.S.C. § 920 (UCMJ art. 120).


The Response Systems Panel has not yet considered or deliberated on the contents of this report.
VII. PROSECUTION AND DEFENSE

Discussion

What constitutes criminal sexual conduct varies widely from state to state.780 Some states, such as New York, require penetration (however slight), while other states consider any unwanted or unsolicited sexual touching an offense. Many states have classes of offenses which are generally based on the level of violence, harm to the victim, and/or intimidation of a victim through threats of harm to self or loved ones.781 The seriousness of the offense increases when the perpetrator is in a position of trust such as a teacher, guardian or other person of authority.

In comparison, “[t]he [UCMJ] criminalizes various forms of unwanted sexual contact and includes a broader range of conduct than is generally understood in common usage of the term ‘sexual assault’ or as typically used in civilian criminal statutes.”782 The table below divides Article 120 of the UCMJ into four parts which demonstrates the statute’s complete spectrum of sex-related offenses.

780 Id.

781 Id.

### Table 12

<table>
<thead>
<tr>
<th>Article 120</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Art. 120(a)</strong></td>
<td>Any person subject to this chapter who commits a sexual act upon another person by -</td>
</tr>
<tr>
<td><strong>Rape</strong></td>
<td>(1) using unlawful force against that other person;</td>
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<td></td>
<td>(2) using force causing or likely to cause death or grievous bodily harm to any person;</td>
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<td></td>
<td>(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;</td>
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<td>(4) first rendering that other person unconscious; or</td>
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<td>(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;</td>
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<td></td>
<td>is guilty of rape and shall be punished as a court-martial may direct.</td>
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<tr>
<td><strong>Art. 120(b)</strong></td>
<td>Any person subject to this chapter who -</td>
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<tr>
<td><strong>Sexual Assault</strong></td>
<td>(1) commits a sexual act upon another person by -</td>
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<td></td>
<td>(A) threatening or placing that person in fear;</td>
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<td></td>
<td>(B) causing bodily harm to that other person;</td>
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<td></td>
<td>(C) making a fraudulent representation that the sexual act serves a professional purpose; or</td>
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<td></td>
<td>(D) inducing a belief by any artifice, pretense, or concealment that the person is another person;</td>
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<td></td>
<td>(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or</td>
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<td></td>
<td>(3) commits a sexual act upon another person when the other person incapable of consenting to the sexual act due to -</td>
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<td></td>
<td>(A) impairment by any drug, intoxicant, or other similar substance and that condition is known or reasonably should be known by the person; or</td>
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<td></td>
<td>(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;</td>
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<td>is guilty of a sexual assault and shall be punished as a court-martial may direct.</td>
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<tr>
<td><strong>Art. 120(c)</strong></td>
<td>Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.</td>
</tr>
<tr>
<td><strong>Aggravated Sexual Contact</strong></td>
<td></td>
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<tr>
<td><strong>Art. 120(d)</strong></td>
<td>Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.</td>
</tr>
<tr>
<td><strong>Abusive Sexual Contact</strong></td>
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</tr>
</tbody>
</table>
VII. PROSECUTION AND DEFENSE

Both the character of the conduct (defined as “sexual act” or “sexual contact”) and the level of force impact the severity of the charge under the UCMJ. 783 “Sexual contact” offenses, including aggravated and abusive sexual contact, involve the touching, or causing someone to touch, (either directly or through clothing) a person’s genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, humiliate, or degrade that person. 784 The term “sexual contact” also includes touching or causing someone to touch any body part, if done with the intent to arouse or gratify the sexual desire of any person. 785 The term “sexual act” describes conduct that includes “contact between the penis and the vulva or anus or mouth,” where contact occurs upon “penetration, however slight.” 786 “Sexual act” also includes the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object if done with the intent to abuse, humiliate, harass, degrade, or arouse/gratify the sexual desire of any person. 787 The degree of force can range from non-physical (threats, fear, fraud) to physical (simple assault, unwanted touching, incapable of consent) to a high degree of force (great bodily harm, fear of death, rendering unconscious, drugging). 788 Article 120 offenses, then, can range from a slap on the buttocks to degrade a co-worker to forced anal penetration after drugging.

The Army’s chart, below, explains how the degree of force and the conduct, being a sexual act versus contact, influence a charging decision. 789 To use the chart:

• First determine the amount of force used, either a high degree of force or low degree of force.
• Next assess whether the conduct constituted a “sexual act” or “sexual contact.”
• Then follow the bold or dotted lines to determine the applicable offense according to Article 120.

By using the chart, a high degree of force coupled with a sexual act, could constitute rape. A high degree of force that involved a contact offense results in aggravated sexual contact. A low degree of force, coupled with a sexual act, results in a charge of sexual assault. A low degree of force in an act of sexual contact results in abusive sexual contact.

783 10 U.S.C. § 920 (UCMJ art. 120). For explanation, see Army’s Response to Request for Information 50, at 202232-36 (Nov. 21, 2013).
784 10 U.S.C. § 920 (UCMJ art. 120).
785 Id.
786 Id.
787 Id. For explanation, see Army’s Response to Request for Information 50, at 202232-36 (Nov. 21, 2013).
788 10 U.S.C. § 920 (UCMJ art. 120).
789 Army’s Response to Request for Information 50, at 202232 (Nov. 21, 2013).
2. Charging Discretion in Sexual Assault Cases

Finding 42-2: Both civilian and military prosecutors exercise broad discretion in drafting sexual assault charges. Although in military sexual assault cases, special or general court-martial convening authorities determine how to dispose of an allegation, military prosecutors determine the proper charges, draft the charges for the commander, and recommend appropriate disposition.

Discussion

Both military authorities and civilian prosecutors exercise “tremendous discretion over the decision” to refer a case to trial.790 In the civilian system, the singular power prosecutors wield over the decision whether to initiate criminal charges against a citizen has been harshly criticized for decades.

"The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous . . . While the prosecutor at his best is one of the beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst."791

Normally, in the military justice system, “[e]ach commander has discretion to dispose of offenses by members of that command.”792 The Secretary of Defense issued a policy on April 20, 2102, withholding the initial authority to dispose of sexual assault offenses to commanders who have Special Court-Martial Convening Authority and are in the grade of O-6 and above.793 These commanders, also called the “initial disposition authority,” consult with military trial counsel and Staff Judge Advocates before determining how to proceed on a case; they rely on their legal expertise to determine and draft appropriate charges for the commander to consider.794 In this respect, trial counsel exercise broad discretion when determining appropriate charges in sexual assault and other cases.

3. Factors Considered in Disposition Decisions for Sexual Assault Cases

Finding 42-3: There is a non-exclusive list of factors military commanders should consider when deciding how to dispose of an allegation, including whether to charge a Service member with an offense. Civilian prosecutors also consider a variety of factors in determining whether or not to charge a citizen with a criminal offense, many of which are similar to military factors. Ultimately, both military and civilian authorities determine how to dispose of an allegation based upon the specific facts of each case. However, the minimum threshold in the military to charge a Service member with an offense does not take into account the provability of the charges, which differs from civilian jurisdictions.

Finding 42-4: Section 1708 of the FY14 NDAA orders a non-binding provision in the Manual for Courts-Martial amended to “strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense,”795 but does not prohibit the commander from considering this factor, so the change is unlikely to affect charging or disposition decisions in sexual assault or other cases.

Discussion

The decision to charge a person with a criminal offense, in particular a sexual assault offense, is a complex one requiring military and civilian prosecutors to weigh many factors. In the Military, commanders consider many factors when determining how to dispose of an allegation of wrongdoing, including whether to prefer charges against the Service member. The Discussion to Rule for Courts-Martial 306 provides a non-exclusive,
non-binding list of factors commanders should consider, to the extent they are known when determining disposition of an offense. These factors include: 796

- the nature and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline;
- when applicable, the views of the victim as to disposition;
- existence of jurisdiction over the accused and the offense;
- availability and admissibility of evidence;
- the willingness of the victim and others to testify;
- cooperation of the accused in the apprehension or conviction of others;
- possible improper motives or biases of the person(s) making the allegations;
- availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
- appropriateness of the authorized punishment to the particular accused or offense;
- the character and military service of the accused (to be deleted); and
- other likely issues. 797

Additional “factors must be taken into consideration and balanced, including, to the extent practicable . . . any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.” 798

Previously, the Discussion of Rule for Court-Martial 306, listed the character and military service of the accused as factors the commander should consider when determining case disposition. 799 But, with the enactment of Section 1708 of the FY14 NDAA, Congress directs the Discussion be amended by striking “the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.” 800 However, the amendment but does not prohibit the commander from considering this factor so the change is unlikely to affect charging or disposition decisions in sexual assault or other cases.

For federal court cases, the United States Attorney’s Manual states that, “the attorney for the government should initiate or recommend Federal prosecution if he/she believes that the person’s conduct constitutes

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796 MCM, supra note 97, R.C.M. 306; Navy’s Response to Request for Information 67 (Nov. 21, 2013).
797 See MCM, supra note 97, R.C.M. 306 disc.
798 Id.
799 Id., R.C.M. 306.
a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction . . . unless, in his/her judgment, prosecution should be declined because:

- No substantial Federal interest would be served by prosecution;
- The person is subject to effective prosecution in another jurisdiction; or
- There exists an adequate non-criminal alternative to prosecution.\textsuperscript{801}

In determining whether to decline prosecution because “no substantial federal interest would be served” federal prosecutors “should weigh all relevant considerations,” including:

- Federal law enforcement priorities;
- The nature and seriousness of the offense, including the actual or potential impact of the offense on the community and on the victim;
- The deterrent effect of prosecution;
- The person’s culpability, both in the abstract and compared to others involved in the offense;
- The person’s criminal history or lack thereof;
- The person’s willingness to cooperate;
- The person’s personal circumstances;
- The probable sentence and whether it justifies the time and effort of prosecution, including whether the person has previously been prosecuted in another jurisdiction for the same or closely related offense.\textsuperscript{802}

Some States publish charging criteria which indicate that prosecutors should only go forward if they believe there is a likelihood they will prevail at trial. In Colorado, for instance, “[t]his decision-making process is guided by legal and ethical standards that require a reasonable belief that the charge or charges can be proven to a jury, unanimously, beyond a reasonable doubt, after considering reasonable defenses.”\textsuperscript{803}

There are no legislative or judicial guidelines about charging, and a decision not to file charges ordinarily is immune from review. According to the Supreme Court, “So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion.”\textsuperscript{804}


\textsuperscript{802} Id.


In a study of civilian prosecutorial decision making in sexual assault cases, the authors concluded:

The fact that the “prosecutor controls the doors to the courthouse” may be particularly important in cases in which the credibility of the victim is a potentially important issue, such as sexual assault cases. Studies of the charging process conclude that prosecutors attempt to avoid uncertainty by filing charges in cases in which the odds of conviction are good and by rejecting charges in cases for which conviction is unlikely. These studies suggest that although prosecutors’ assessments of convictability are based primarily on legal factors such as the seriousness of the offense, the strength of evidence in the case, and the culpability of the defendant, legally irrelevant characteristics of the suspect and victim also come into play. In fact . . . “the character and credibility of the victim is a key factor in determining prosecutorial strategies, one at least as important as ‘objective’ evidence about the crime or characteristics of the defendant.”

The study further elaborated on the “legally irrelevant characteristics of the suspect and victim” civilian prosecutors considered, and concluded:

legally irrelevant victim characteristics did influence the decision to charge in cases in which the victim and the suspect were acquaintances, relatives, or intimate partners. In these types of cases, prosecutors’ anticipation of a consent defense and downstream orientation toward judges and juries apparently leads them to scrutinize more carefully the victim’s character and behavior. Evidence that challenges the victim’s credibility or fosters a belief that she was not entirely blameless increases uncertainty about the outcome of the case and thus reduces the odds of prosecution. Notwithstanding the rape law reforms promulgated during the past three decades, victim characteristics continue to influence charging decisions in at least some sexual assault cases.

4. Alternate Disposition Options in the Military Compared to the Civilian Sector

Finding 42-5: Civilian prosecutors face the same type of initial disposition decisions as trial counsel and convening authorities, ranging from taking no action to going forward with a view towards trial. Civilian prosecutors can choose options other than trial, but those are usually uniquely tailored to the specific circumstances of the case.

Finding 42-6: The UCMJ and military regulations provide several clear options for alternate dispositions. If a special or general court-martial convening authority consults with his or her legal advisor and decides that a sexual assault allegation does not warrant trial by court-martial because there is insufficient evidence of sexual assault, other adverse options such as nonjudicial punishment, separation from the Service, or letters of reprimand, may be used for related misconduct when appropriate. Commanders very rarely choose nonjudicial punishment or other administrative adverse actions to dispose of penetrative sexual assault offenses. The
misperception that commanders use options other than courts-martial to dispose of allegations of penetrative offenses may be due to the breadth of conduct categorized as “sexual assault” under the UCMJ.

Discussion

According to the Department of Justice’s United States Attorney’s Manual, the prosecutor should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or
5. Decline prosecution without taking other action.809

Military convening authorities have many tools available to address lower level offenses that may not be available in civilian jurisdictions. The President, through the Rules for Courts-Martial, directs that offenses under the UCMJ “should be disposed of in a timely manner at the lowest appropriate level of disposition . . . .”810 Potential appropriate dispositions include: no action or dismissal of charges; administrative action (counseling, admonition, reprimand, administrative withholding of privileges, etc.); nonjudicial punishment; forwarding to a superior or subordinate authority for disposition; or preferral and/or referral of charges.811

In response to a request for information from the RSP, the Military Services provided the following responses to demonstrate when they believed alternate dispositions to courts-martial may be appropriate.812

• The Army stated that, “[e]very case requires the commander, upon the advice of his judge advocate, to carefully weigh the benefits and risks of every potential disposition.”813 After “reviewing the facts of a case, considering the wishes of the victim, and evaluating the likelihood of a conviction in a criminal proceeding, there would be scenarios where—as an evidentiary matter—an administrative proceeding would be a prudent disposition.”814

• The Navy stated, “alternative dispositions provide commanders with a tool to enforce good order and discipline, terminate a [Service member’s] active duty status, or establish an adverse record for a member who has committed misconduct but whose actions cannot be proven beyond a reasonable doubt at court-martial. These alternative forms of disposition are also beneficial to the command and the victim in that

810 See MCM, supra note 97, R.C.M. 306(b).
811 Navy’s Response to Request for Information 67 (Nov. 21, 2013); MCM, supra note 97, R.C.M. 306.
812 DoD and Services’ Responses to Request for Information 70 (Dec. 19, 2013).
814 Id.
they offer swift and efficient resolution, when appropriate, at that level, whereas courts-martial cases often take several months to adjudicate.\textsuperscript{815}

- The Coast Guard stated that the “benefits to the government to obtain an alternative disposition to courts-martial are largely to do with maintaining discipline in the ranks, and, to a degree, deterrence. Utilizing alternatives within the toolbox of disposition allows commanders to swiftly enforce discipline rooted in the principles of justice, provides immediate and public consequences, and strengthens command authority.”\textsuperscript{816}

Some of the Services provided other instances when alternatives to courts-martial may be appropriate to include:\textsuperscript{817}

- When the member has already been convicted in a civilian court or is pending lengthy civilian criminal court proceedings;

- When the victim declines to participate in the proceeding, is unwilling to testify, or would prefer a more expeditious resolution of the matter. This occurs in some instances because the initial report may have become unrestricted against the victim’s desires or circumstances change in the victim’s life and he or she no longer wants to pursue a report of sexual assault. In these instances, if there is surrounding minor misconduct by the accused that can be proven without the victim’s testimony, an alternate disposition allows the commander to adjudicate the surrounding minor misconduct without forcing the victim to undergo the stresses of a trial against his or her will.

- When the government has concerns about a victim’s credibility, availability, or durability, as well as the overall impact on the victim.

- When there is significant doubt that material evidence might be admissible at trial, or insufficient evidence exists to meet the standard of proof of “beyond a reasonable doubt” to convict at court-martial. In these situations, allowing the convening authority to impose an alternative disposition to court-martial is a tool to hold the offender accountable without a court-martial and to potentially separate the offender from the Service. While it is not common to pursue administrative separation in lieu of a criminal conviction for a sexual offense, there are occasions where it may be appropriate due to the lower burden of proof for administrative proceedings, which require proof by a preponderance of evidence. Therefore, after reviewing the facts of a case, considering the wishes of the victim, and evaluating the likelihood of a conviction in a criminal proceeding, there would be scenarios where, as an evidentiary matter, an administrative proceeding would be a prudent disposition.

- When the Service member is accused of a relatively minor offense which does not warrant a trial by court-martial.\textsuperscript{818}

Potential consequences for Service members who face alternate dispositions include loss of rank, wages, and liberty. In addition, the Service member may depart the military with a characterization of discharge that is derogatory in nature, which deprives him or her of any veteran’s benefits associated with any prior honorable

\textsuperscript{815} Navy’s Response to Request for Information 70 (Dec. 19, 2013).
\textsuperscript{816} Coast Guard’s Responses to Request for Information 70 (Dec. 19, 2013).
\textsuperscript{817} See Services’ Responses to Request for Information 70 (Dec. 19, 2013).
\textsuperscript{818} DoD and Services’ Responses to Request for Information 70 (Dec. 19, 2013).
military service, regardless of the nature of prior service, including serving in combat operations. The Services provided the following information in response to a request from the RSP and in DoD SAPRO reports regarding alternate dispositions used in sexual assault cases.

**FY12 DISPOSITION OF DOD SEXUAL ASSAULT CASES**

The DOD SAPRO report for FY12, explains that there were:

- 1,714 military subjects in sexual assault cases reviewed for possible disciplinary action;
- 1,124 of those cases had evidence-supported commander action;
- 880 of those were determined to be sexual assault offenses;
- Of the 880 sexual assault offense cases:
  - 594 court-martial charges were preferred (Initiated),
  - 158 received nonjudicial punishment (Article 15, UCMJ),
  - 63 received administrative discharges, and
  - 65 categorized as other adverse administrative action.

Figure 7

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819 Coast Guard’s Response to Request for Information 70 (Dec. 19, 2013).

820 See Part VII, Section J, Recommendations 49-A and 49-B, *infra* (providing Subcommittee’s recommendation to further standardize reporting requirements for sexual assault allegations, including number of cases resulting in alternate dispositions rather than prosecution, and distinguishing between penetrative or non-penetrative offenses to gain understanding of commanders’ use of alternate dispositions). Currently, the Services provide a detailed case-by-case synopsis of all sexual assault allegations from report to final disposition. However, when requested to provide numbers of alternate dispositions, results were mixed and some of the Services referred us to several other reports they provide DoD. The results the RSP received regarding alternate dispositions used in sexual assault cases are provided below.

FY13 DISPOSITION OF DOD SEXUAL ASSAULT CASES

The DOD SAPRO report for FY13, explains that there were:

- 2,149 military subjects in sexual assault cases reviewed for possible disciplinary action
- 1,569 of those cases had evidence-supported commander action
- 1,187 of those were determined to be sexual assault offenses
- Of the 1,187 sexual assault offense cases:
  - 838 court-martial charges were preferred (Initiated)
  - 210 received nonjudicial punishment (Article 15, UCMJ)
  - 56 received administrative discharges
  - 83 categorized as other adverse administrative action.822

Figure 8

<table>
<thead>
<tr>
<th>2,149 Possible SA Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>580 Lacked Evidence</td>
</tr>
<tr>
<td>1,569 Commander Action</td>
</tr>
</tbody>
</table>

- Commander Action Precluded
- Commander Declined (Unfounded)
- 382 Non-Sexual Assault
- 1,187 Sexual Assault Offenses
- 83 Other Adverse Action
- 56 Admin Discharge
- 210 NJP (Art. 15)
- 838 Charges Preferred

822 FY13 SAPRO ANNUAL REPORT, supra note 63, at 79 (Table 4: Military Subject Dispositions in FY13) (May 2014).
VII. PROSECUTION AND DEFENSE

Number of cases involving sexual assault allegations resulting in Nonjudicial Punishment in FY08-FY13

Figure 9

<table>
<thead>
<tr>
<th>Army</th>
<th>Air Force</th>
<th>Navy</th>
<th>Marines</th>
<th>Coast Guard</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY12: 117 cases</td>
<td>FY12: 14</td>
<td>FY12: 14</td>
<td>FY12: 16 cases with SA allegations, but only two involved a contact sex offense</td>
<td>2012 = 22</td>
</tr>
<tr>
<td>- none of these cases involve penetration</td>
<td>FY11: 2</td>
<td>FY11: 2</td>
<td>FY11 = 11</td>
<td>2011 = 11</td>
</tr>
<tr>
<td>FY11: 103</td>
<td>FY10: 19</td>
<td>FY10: 19</td>
<td>FY10 = 9</td>
<td>2010 = 9</td>
</tr>
<tr>
<td>FY10: 179</td>
<td>FY09: 15</td>
<td>FY09: 15</td>
<td>FY09 = 18</td>
<td>2009 = 18</td>
</tr>
<tr>
<td>FY09: 277</td>
<td>FY08: 67</td>
<td>FY08: 67</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FY08: 121</td>
<td></td>
<td></td>
<td>FY08: NA</td>
<td></td>
</tr>
</tbody>
</table>

See Services’ Responses to Request for Information 41(d) (Nov. 21, 2013). The Army stated this information is contained in the FY12 Annual Report to Congress on Sexual Assault.

- The Army explained that commanders imposed nonjudicial punishment in 117 cases for sexual assault crimes, all involving non-penetrative offenses. The vast majority of cases involved an unwanted touch over the clothing.
- The Air Force referred the RSP to DoD’s annual SAPR report.
- The Navy stated that they do not track a specific metric of this data.
- The Marine Corps explained that of 16 cases, only 2 involved contact sex offenses.

See FY13 SAPRO Annual Report, supra note 63, at 227 (Army); id. at 691 (Air Force); id. at 534 (Navy); id. at 584 (Marines); FY12 SAPRO Annual Report, supra note 43, Vol. I, at 190 (Army); id. at 479 (Navy); id. at 531 (Marines); id. at 631 (Air Force); Department of Defense, Annual Report on Sexual Assault in the Military: Fiscal Year 2011 [hereinafter FY11 SAPRO Annual Report] encl. 1, at 41 (Army) (Apr. 2012), available at http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; id. at 487 (Air Force); id. at 322 (Navy); id. at 362 (Marines). Department of Defense, Annual Report on Sexual Assault in the Military: Fiscal Year 2010 encl. 1, encl. 1, at 1 (Army) (Mar. 2011), available at http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; id. at 573 (Air Force); id. at 414 (Navy); id. at 458 (Marines); Department of Defense, Fiscal Year 2009 Annual Report on Sexual Assault in the Military Tab A, at 29-30 (Army) (Mar. 2010), available at http://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf; id. at Tab C, Att./Tab 2, at 1 (unnumbered) (Air Force); id. at Tab B, Att. 4, at 2-3 (unnumbered) (Navy); id. at Tab B, Att. 4, at 14-15 (Marines). Department of Defense, FY08 Annual Report on Sexual Assault in the Military [hereinafter FY08 SAPRO Annual Report] Tab 4, at 30 (Army), available at http://www.sapr.mil/public/docs/reports/dod_fy08_annual_report_combined.pdf; id. at 230 (Air Force); id. at 182-83 (Navy). FY08 was the first year that data was provided at the Service level in the SAPRO Annual Reports.
Number of Cases involving allegations resulting in an officer’s resignation in lieu of court-martial (RILO), FY07-FY13.  

Figure 10

<table>
<thead>
<tr>
<th>Army</th>
<th>Air Force</th>
<th>Navy</th>
<th>Marines</th>
<th>Coast Guard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total: 10</td>
<td>Total: 1</td>
<td>Total: 5</td>
<td>Total: 1</td>
<td>Total: 1</td>
</tr>
<tr>
<td>FY13: 4</td>
<td>FY13: 1</td>
<td>FY13: 0</td>
<td>FY13: 1</td>
<td>Data from FY07-13</td>
</tr>
<tr>
<td>FY12: 4</td>
<td>FY12: 0</td>
<td>FY12: 0</td>
<td>FY12: 0</td>
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<tr>
<td>FY11: 1</td>
<td>FY11: 0</td>
<td>FY11: 0</td>
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<td>FY10: 1</td>
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<td>FY10: 2</td>
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<tr>
<td>FY09: 0</td>
<td></td>
<td>FY09: 2</td>
<td></td>
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<td>FY08: 0</td>
<td></td>
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<tr>
<td>FY07: 0</td>
<td></td>
<td>FY07: 1</td>
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</tbody>
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824 See Services’ Responses to Request for Information 41(f) [Nov. 21, 2013]; FY13 SAPRO ANNUAL REPORT, supra note 63, at 227 (Army); id. at 534 (Navy); id. at 584 (Marines); id. at 691 (Air Force); FY12 SAPRO ANNUAL REPORT, supra note 43, Vol. I, at 190 (Army); id. at 631 (Air Force); id. at 479 (Navy); id. at 531 (Marines); id. at 631 (Air Force); see also FY14 NDAA, Pub. L. No. 113-66, § 1753, 127 Stat. 672 (2013) (providing sense of Congress on discharges in lieu of court-martial for sex-related offenses). Officers may submit a voluntary request for discharge in lieu of court-martial. The characterization of service is normally under Other than Honorable Conditions, but may be characterized as General under Honorable conditions or Honorable. Requests are forwarded for decision to the Secretary concerned, who acts as separation authority for officers in each Service.
Number of Cases involving allegations resulting in an enlisted member's administrative discharge in lieu of court-martial, FY07-FY13

Figure 11

<table>
<thead>
<tr>
<th>Army</th>
<th>Air Force</th>
<th>Navy</th>
<th>Marines</th>
<th>Coast Guard</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY12: 53</td>
<td>FY12: 6</td>
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<td>FY12: 2</td>
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</tr>
<tr>
<td>FY08: 19</td>
<td>FY11: 6</td>
<td>FY08: 8</td>
<td></td>
<td></td>
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<tr>
<td>Ch. 10 Post arraignment:</td>
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<tr>
<td>• FY13: 21</td>
<td></td>
<td></td>
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<tr>
<td>• FY12: 30</td>
<td></td>
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<tr>
<td>• FY11: 17</td>
<td></td>
<td></td>
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<tr>
<td>• FY10: 13</td>
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<tr>
<td>• FY09: 10</td>
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<tr>
<td>• FY08: 5</td>
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<tr>
<td>• FY07: 11</td>
<td></td>
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</tbody>
</table>

825 Services' Responses to Request for Information 41(g) (Nov. 21, 2013); FY13 SAPRO ANNUAL REPORT, supra note 63, at 227 (Army); id. at 691 (Air Force); id. at 534 (Navy); id. at 584 (Marines); FY12 SAPRO ANNUAL REPORT, supra note 43, Vol. I, at 190 (Army); id. at 631 (Air Force); id. at 479 (Navy); id. at 531 (Marines); FY08 SAPRO REPORT, supra note 823, at Tab 4, at 30 (Army); id. at 230 (Air Force); id. at 182-83 (Navy); see also FY14 NDAA, Pub. L. No. 113-66, § 1753, 127 Stat. 672 (2013) (providing sense of Congress on discharges in lieu of court-martial for sex-related offenses). Enlisted members may also submit a voluntary request for discharge in lieu of court-martial. The characterization of service is normally under Other than Honorable Conditions, but may be characterized as General under Honorable Conditions or Honorable. Requests are forwarded for decision to the General Court-Martial Convening Authority, who acts as separation authority for officers in each Service when a discharge characterization of Other than Honorable is considered.
E. THE MILITARY JUDGE’S ROLE IN THE MILITARY JUSTICE SYSTEM

1. Overview of the Proposal to Increase the Military Judge’s Role

**Recommendation 43-A:** Military judges should be involved in the military justice process from preferral of charges or imposition of pretrial confinement, whichever is earlier, to rule on motions regarding witnesses, experts, victims’ rights issues, and other pretrial matters.

The Secretary of Defense recommend the Congress enact legislation to amend the UCMJ, the President enact changes to the Manual for Courts-Martial, and Service Secretaries implement appropriate regulations to increase the authority of military judges over the pre-trial process to enhance fairness, efficiency, and public confidence.

**Recommendation 43-B:** The Service Secretaries assess additional resources necessary to carry out the changes increasing the authority of the military judge, including whether a cadre of designated magistrates or judges should perform these functions.

**Finding 43-1:** Civilian judges or magistrates control the proceedings in preliminary matters from the time of indictment or arrest of the defendant, whichever is earlier, while military judges do not usually become involved until a convening authority refers charges to a court-martial which can cause or result in inefficiencies in the process and ineffective or inadequate remedies for the government, accused, and victims.

**Finding 43-2:** Giving military judges an enhanced role in pre-trial proceedings would affect the prosecution of all cases, not only sexual assaults.

**Discussion**

The military justice system has evolved from a disciplinary system run by operational commanders into a “sophisticated legal system which has placed increasing power in the military judiciary with the intent to achieve justice and thus order and discipline.”

A military judge could resolve a number of issues if he or she is involved in the military justice matters from the time of preferral or imposition of pretrial confinement. Inserting the military judge at an earlier stage could streamline the judicial process, resolve pretrial issues that arise before referral, and institute procedures for defense counsel to represent their clients without revealing their case strategy to the prosecutor and convening authority when requesting resources and witnesses.

In 2004, The Judge Advocate General for the Army directed a study which included a detailed analysis and recommendation to insert the military judge earlier in the military justice process.

When the UCMJ was enacted, an independent judiciary did not exist. Judges were overlays on the UCMJ’s preexisting landscape. While the role of the military judge is not likely ever to extend as far as that of his civilian counterparts, a supervisory role earlier in the military justice process . . . is not


incompatible with, and will likely enhance, the fairness and efficiency of our system. Legal decisions regard an accused's constitutional and statutory rights [and victim's rights] should be made by judges.828

The Army study provided this concise summary of the proposed change:829

Although the court-martial itself does not come into existence prior to referral, every case has a life of its own that begins at the time of the alleged offense, and significant legal issues arise prior to referral. This proposal recognizes that a military judge could play an important supervisory role in the military justice process prior to referral of charges. While commanders and convening authorities will continue to make all critical decisions in the case: preferral, level of referral,[be responsible for] funding witnesses and experts, and clemency, this proposal will relieve the Special Court-Martial Convening Authorities (SPCMCA) and General Court-Martial Convening Authorities (GCMCA) from the burden of making essentially judicial decisions on other matters. In addition, the proposal permits the accused to obtain pre-referral relief from illegal pretrial punishment in violation of Article 13 or from illegal pretrial confinement.

The Army study provided the following rationales for and against involving the military judge earlier in the process:830

Table 13

<table>
<thead>
<tr>
<th>The Pro's</th>
<th>The Con's</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provides for neutral judicial supervision of critical pre-trial procedural aspects of the case. This is more in line with federal civilian practice, following the mandate of Article 36(a) of the UCMJ which states that the President ...</td>
<td>Significantly increases the duties and responsibilities of military judges and may require an increase in the size of the military trial judiciary.</td>
</tr>
<tr>
<td>Responds to criticism that the military justice system has no meaningful oversight mechanism for overzealous commanders [trial counsel] and Staff Judge Advocates.</td>
<td>Could be perceived as taking authority and control of the military justice system away from the command.</td>
</tr>
<tr>
<td>Streamlines the judicial process by permitting the military judge to take control of the process upon preferral of charges or imposition of restraint.</td>
<td>Will require significant MCM amendments.</td>
</tr>
<tr>
<td>Effectively eliminates the need for collateral investigations, including IG investigations, into the administration of military justice.</td>
<td>Will require a cultural change in approaching cases.</td>
</tr>
<tr>
<td>Permits an accused the opportunity to obtain real and meaningful pre-trial relief for Article 13 violations and illegal pretrial confinement.</td>
<td>May be perceived as giving military judges too much power.</td>
</tr>
<tr>
<td>Imposes more realistic penalties and swifter process on offenders.</td>
<td></td>
</tr>
</tbody>
</table>

The 2004 Army study proposed statutory changes, which can serve as a starting point for future proposals to involve the military judge earlier in the process. his proposal could be re-written to protect newly enacted

828 Id., Executive Summary, at 3.


830 Id.
statutory rights of victims as well as the constitutional and statutory rights of the accused. The Subcommittee’s modifications to the Army study’s proposed statutory changes are shown in brackets below.

**UCMJ Article 26a. Supervisory Authority of the Military Judge**

(a) Upon preferral of charges, imposition of pretrial restraint [confinement], or illegal pretrial punishment, the military judge shall assume overall supervisory responsibility for preserving the statutory and constitutional rights of the accused [and the statutory rights of crime victims].

(b) For good cause shown, the military judge may order persons subject to the [UCMJ] to comply with provisions of this Code, the Constitution of the United States, and other applicable legal authority related to preserving the statutory and constitutional rights of the accused [and the statutory rights of crime victims]. Personnel who violate these orders shall be subject to contempt proceedings under Article 48 of this code.

(c) Upon preferral of charges or imposition of pretrial restraint [confinement], the military judge shall exercise overall judicial supervisory authority for all procedural aspects of the case. Under such procedural regulations as may be prescribed by the Secretary concerned, this shall include, but not be limited to, the authority to review confinement decisions of military magistrates, to issue search authorizations, direct the scientific testing of evidence, order inquiry into the mental capacity or mental responsibility of the accused, and to issue no-contact orders and other protective orders as appropriate.

The Army’s 2004 report provided the following initial assessment of necessary changes to the UCMJ (statutory) and the Rules for Courts-Martial (executive order).832

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831 The Subcommittee proposes that the military judge should be more accessible for counsel at the time of preferral of charges or pretrial confinement, not pretrial restraint. If military judges were available at the time of pretrial restraint, there would be a possibility that it would open the floodgates for motions any time a commander imposed a restriction on a Service member’s liberty.

832 See id. The left column lists the areas in which the statute will expand the authority of the military judge. The right column lists the corresponding UCMJ articles and Rules for Courts-Martial that would need to be examined and/or amended in light of the new authority. Some of these changes, such as contempt provisions, occurred subsequent to the Army study.
Table 14

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<thead>
<tr>
<th>Expanded Authority</th>
<th>Affected Articles and RCMs</th>
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<tbody>
<tr>
<td>1. Illegal Pretrial Punishment</td>
<td>UCMJ Art. 13</td>
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<td>RCM 304</td>
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<tr>
<td>2. Pretrial Confinement</td>
<td>UCMJ Art.10</td>
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<td></td>
<td>RCM 305</td>
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<td>3. No-Contact Orders</td>
<td>Article 13a or 14a (proposed)</td>
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<td></td>
<td>RCM 304a or 305a</td>
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<tr>
<td>4. Inquiries into Mental Capacity</td>
<td>RCM 706</td>
</tr>
<tr>
<td>5. Contempt Power (amended after the Study)</td>
<td>UCMJ Art. 48, Art. 98, and Art. 66</td>
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<td>RCM 801</td>
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<td>RCM 809</td>
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<td>6. Detailing Military Judge</td>
<td>R.C.M. 503</td>
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<td>7. Responsibilities of Military Judge</td>
<td>R.C.M. 801</td>
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Additional statutory or other changes may be necessary to implement this significant change to the current practice and to include victim rights as well, recognizing these are changes that would affect more than sexual assault cases. The Subcommittee’s analysis below addresses the specific findings and issues that led to this recommendation, and contains additional rationale that support the military judge becoming involved earlier in the process.

2. Defense Requests for Witnesses, Evidence or Other Matters

**Recommendation 43-C:** Military judges should rule on defense requests for witnesses, experts, documents or other evidence, such as testing of evidence, or other pre-trial matters. The defense counsel would no longer be required to request witnesses or other evidence through the trial counsel or convening authority and would be allowed an *ex parte* procedure in appropriate circumstances.

**Finding 43-3:** Military defense counsel are currently required to submit requests for witnesses, experts, and resources through the trial counsel and staff judge advocate to the convening authority. Depending on Service practice, the trial counsel, as the representative of the convening authority in a court-martial, may determine whether to grant or deny defense witness requests, other than expert witness requests which require the convening authority’s personal decision. Additionally, if the convening authority denies the request, the defense counsel must wait until the case is referred to submit the request to the military judge. No similar practice is found in civilian jurisdictions.

**Finding 43-4:** This practice requires defense counsel to disclose more information to the trial counsel sooner than their civilian counterparts in public defender offices, requires them to reveal confidential information about defense witnesses and theory of the case in order to justify the requests, and stymies defense counsel’s duty and ability to provide constitutionally effective representation to their clients.
Finding 43-5: Military trial counsel request and obtain resources and witnesses without notifying the defense or disclosing a justification and, in most instances, without a specific request for the convening authority’s personal decision. This leads to a perception that trial counsel have unlimited access to obtain witnesses and resources and that the process for obtaining witnesses and other evidence is imbalanced in favor of the government.

Discussion

Military defense counsel repeatedly pointed out to the RSP and Subcommittee the imbalance in current practices that require them to reveal information and strategy to the trial counsel in order to obtain witnesses, experts, and other resources in all cases.

The defense must request witnesses or documents through the prosecutor, providing a justification, which the prosecutor can deny. The defense counsel may take the issue up with the military judge, but not in an ex parte process. Instead, the prosecutor is present when the defense counsel explains to the military judge how the witness or evidence is relevant to the defense case. On the other hand, the prosecutor is not required to provide an explanation to the defense before issuing a subpoena to secure witnesses helpful to the government.833

If the trial counsel or, in the case of a request for expert employment, the convening authority, denies the request, the defense counsel can file a motion to compel the government to produce the witness(es). The judge may order that the government produce the witness. While the military judge does not control the convening authority’s budget, the judge may abate the proceedings if the government declines to produce the witness.

This practice creates a valid perception that the government can get whatever it wants in terms of resources, experts and evidence to prove its case, regardless of the cost. In many instances, the trial counsel - as representative of the convening authority in a case - decides the witnesses he or she deems necessary without any requirement to obtain the convening authority’s decision. Additionally, defense counsel are not privy to trial counsel requests for witnesses or resources.834 In order to correct this perceived imbalance, military defense counsel requested that they receive subpoena power and independent budgets.835

A civilian defense counsel who appeared before the RSP noted the flaw requiring defense counsel to go through the government for requests in the military justice system.836 She stated,

And getting back to the independence that the military does not have right now, if they want to hire an expert, they have to go up a chain of command and it can be denied pretty readily. If I want to hire an expert in New Mexico, I hire him, right? And I don’t see any reason why somebody who’s charged with one of these crimes in our military branches should have any less protection and representation.837


834 See generally MCM, supra note 97, R.C.M. 703.

835 See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014) [on file at RSP].


837 Id.
Current rules in the Manual for Courts-Martial create this imbalance. The trial counsel “shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution,” with no requirement for synopses of testimony to demonstrate relevance, and no requirement for any higher approval. The defense, on the other hand, must submit a written list of witnesses the defense requests the government produce to the trial counsel. Along with the request, defense counsel also must provide a synopsis of the testimony that the witness is expected to give, either “to show its relevance and necessity” if the witness is for the merits of the case or interlocutory questions, or “the reasons why the witness’ personal appearance will be necessary” if the witness is for pre-sentencing proceedings. If the trial counsel denies defense witness requests, the defense may petition the military judge to compel the witness’ appearance.

The rules in the MCM would have to be changed, and should allow, in certain circumstances, for the defense counsel to submit the request ex parte. In some jurisdictions, such as New York, defense requests for witnesses can be ex parte. In Virginia, defense requests are not an ex parte proceeding, except in a capital murder case.

The Subcommittee considers this practice a barrier to effective defense at courts-martial and recommends the military judge as the appropriate authority to decide resource requests for the defense, and when appropriate, to hear motions and rule on both government and defense requests for witnesses and experts. Allowing the judge to become the decision maker for defense witness and expert requests would correct an obvious imbalance. In addition, amending current practice would eliminate many pretrial issues that consume pretrial motion litigation and would increase the efficiency of the court-martial process and overall interests of justice.

3. Subpoena Power

Recommendation 43-D: The Secretary of Defense propose amendments to the Manual for Courts-Martial (MCM) and the UCMJ to authorize the military judge to issue subpoenas to secure witnesses, documents, evidence, or other assistance to effectively carry out additional duties recommended, with ex parte procedures as appropriate, that will allow the defense the opportunity to subpoena witnesses through the military judge, without disclosing information to the trial counsel or convening authority to the President and Congress, accordingly.

838 MCM, supra note 97, R.C.M. 703(c)(1).

839 See id., R.C.M. 703(c)(2)(A); see also Transcript of RSP Public Meeting 332 (Nov. 8, 2013) (testimony of Mr. David Court, Law Offices of Court & Carpenter, Stuttgart, Germany) (“I agree with the elimination of the requirement that the defense seek the production of witnesses through the trial counsel.”).

840 MCM, supra note 97, R.C.M. 703(c)(2)(B).

841 New York State Criminal Procedure Law, Article 620, permits a party to apply for a material witness order and the opposing party is not entitled to notice of or to participate in the proceeding.

842 Transcript of Comparative Systems Subcommittee Meeting 254-55 (Mar. 11, 2014) (commentary of Mr. Harvey Bryant, Subcommittee Member).
Finding 43-6: Some public defenders have subpoena power. Military defense counsel do not have subpoena power. In contrast, military trial counsel have nationwide subpoena power with rare judicial oversight.

Discussion

“The defense does not enjoy the independent right to subpoena witnesses or documentary evidence. Instead, the defense must request witnesses or documents through the prosecutor, providing a justification, which the prosecutor can deny.” Some military defense counsel who spoke to members on the Subcommittee site visits requested subpoena power. Many states provide the defense counsel with subpoena power. However, the Subcommittee concluded that military judges should serve as the subpoena issuing authority. This change would require amendments to current practice. Similar to the other recommendations for the military judge to become involved before referral, this should be considered as a systemic change for all cases.

4. Article 32 Preliminary Hearing

Recommendation 43-E: The Secretary of Defense propose amendments to the MCM and UCMJ to increase the authority of the military judge over the Article 32 preliminary hearing to the President and Congress, accordingly. Military judges should preside over preliminary hearings in their capacity as military judges, not as hearing officers. The military judge’s finding that the government failed to establish probable cause should be binding and result in dismissal of charges without prejudice. A finding that the government established probable cause should be forwarded to the appropriate convening authority for his or her decision on an appropriate disposition of the charges.

Finding 43-7: In Section 1702 of the FY14 NDAA, Congress enacted substantial changes to the Article 32 pretrial investigation, transforming it, in some respects, into a preliminary hearing, and establishing that crime victims may not be compelled to testify at the proceeding. This may result in additional requests to depose victims and other witnesses.

843 For discussion, see Transcript of RSP Public Meeting 373 (Dec. 12, 2013) (testimony of Mr. Porter, Training Director for the State of New Mexico Public Defender Department). Mr. Porter stated,

     I’ve learned from military counsel here they don’t have the subpoena power and in order to actually get a subpoena you have to go seek it through the government. That’s not the case in I think most states and in New Mexico an individual attorney has the subpoena power. They don’t even have to go to the court to issue a subpoena.


846 Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014); (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap (Feb. 5, 2014) (same); see Navy’s Response to Request for Information 137 (Apr. 11, 2014).

847 See Transcript of RSP Comparative Systems Subcommittee Meeting 234-35 (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris and Brigadier General (Ret.) Malinda Dunn, Subcommittee Members, regarding military judges serving as “check” on subpoena authority).

848 Current practice allows a subpoena to be signed by a summary court-martial officer, a trial counsel of a special or general court-martial, the president of a court of inquiry, or a deposition officer. See MCM, supra note 97, R.C.M. 703(e).
VII. PROSECUTION AND DEFENSE

Discussion

There are similarities between the military’s traditional Article 32 pretrial investigation and a civilian preliminary hearing. “In both a civilian preliminary hearing and an Article 32 hearing, the accused is present, represented by counsel, and may cross-examine government witnesses and call witnesses on his [or her] own behalf. The government, in both settings, must put on enough evidence to establish probable cause to believe that the defendant committed the alleged crimes.”

There are two major differences between the military’s Article 32 hearing and the civilian preliminary hearing. First, the military’s Article 32 hearing, prior to the FY14 NDAA, served as a discovery tool for defense. Second, unlike a civilian preliminary hearing, the investigating officer’s decision is not binding; instead, it is only a recommendation to the convening authority.

In a civilian preliminary hearing, a judge rules on whether the government has met the probable cause standard and, if it has, binds the case over for trial. In an Article 32 hearing, an Investigating Officer (IO) hears the evidence and then prepares a written recommendation to the Convening Authority as to whether probable cause exists to believe that the accused committed crimes with which he is charged and, if such cause exists, opines on the charges. Investigating Officers are Judge Advocates, but not necessarily military trial judges. The Convening Authority may act on the IO’s recommendations, but is not required to do so.

Section 1702(a) of the FY14 NDAA changed the Article 32 investigation to a preliminary hearing with the narrower objectives of determining whether probable cause exists to believe 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 in the case. An alleged victim may not be compelled to testify and the investigating officer will declare him or her unavailable at the hearing if he or she declines to participate.

The practical effect of this change is that, when the victim declines to testify, the investigating officer will consider other evidence, such as statements or, perhaps, hearsay in lieu of testimony and will not be able to assess the victim’s credibility. “The accused is still allowed to submit evidence and cross-examine witnesses, but the victim does not have to testify. If the victim does elect to testify, the cross-examination is restricted to the limited purpose of the hearing.”

The amendments to Article 32 will not take effect until December 26, 2014; the Subcommittee is unable to assess the full impact of those changes. However, it is clear that the changes narrow investigative and discovery opportunities for military defense counsel.

849 Stimson, supra note 777, at 3.
850 Id. (citing FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013)).
851 Stimson, supra note 777, at 3.
852 Id. (citing FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013)).
853 Id. (citing FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013)).
854 Transcript of RSP Public Meeting 309 (Nov. 8, 2013) (testimony of Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast, U.S. Navy) ["[T]he Article 32, as a thorough investigation with the right of discovery, should be maintained. I believe that a preliminary hearing under Rule 5.1 of the Federal Rules of Criminal Procedure is an inadequate substitute. I think it’s still a good idea to have a thorough investigation with the right of discovery."]
A majority of the Subcommittee’s assessment is that military judges should preside as judges, not as hearing officers, at all Article 32 hearings. Moreover, the military judge’s determination that probable cause is lacking should be binding, resulting in dismissal of the charges without prejudice. This is logical considering that a judge examined the evidence and found it is insufficient to conclude there is a reasonable belief a crime occurred and that the accused committed it. In cases where the judge finds probable cause, the convening authority retains discretion on how to dispose of the allegation.

5. Depositions as a Substitute for the Victim’s Article 32 Testimony

**Recommendation 43-F:** The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.

**Finding 43-8:** Subcommittee site visits revealed varying approaches to victim testimony before trial in civilian jurisdictions. In Philadelphia, for example, victims must testify at preliminary hearings with limited exceptions; in Washington State, either party may request to interview material witnesses under oath before trial.

Some defense counsel told the Subcommittee they intended to request depositions of victims. Under current practice, “[a] convening authority who has the charges for disposition, or after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.” Depositions may be ordered where witnesses are unavailable at the Article 32 proceeding. The Subcommittee recommends the Judicial Proceedings Panel assess the impact of the changes to the Article 32 process on deposition practice.

F. REFERRAL OF SEXUAL ASSAULT CASES IN THE MILITARY

1. Review of Referral Decisions

**Recommendation 44-A:** Congress repeal FY14 NDAA, Section 1744, which requires a Convening Authority’s decision not to refer certain sexual assault cases be reviewed by a higher GCMCA or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judge advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice.

**Recommendation 44-B:** Congress not enact Section 2 of the VPA, which would require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the SJA’s recommendation against referral or the convening authority’s decision not to refer one of these sexual assault cases. The SJA is the GCMCA’s legal advisor on military justice matters; there is no evidence that inserting the senior trial counsel into the process will enhance the fair administration of military justice.

855 MCM, supra note 97, R.C.M. 702(b).

856 See id., R.C.M. 702(a) disc.
Finding 44-1: FY14 NDAA, Section 1744, and pending language in the VPA, may place inappropriate or illegal pressure to aggressively prosecute sexual assault cases by requiring the higher GCMCA, or in some cases, the Service Secretary review the convening authority’s decision not to refer a case with an allegation of rape, sexual assault, forcible sodomy, or attempts to commit those offenses. The FY14 NDAA proposes two scenarios that would require higher review. (1) If both the staff judge advocate and convening authority agree the case should not be referred to court-martial, the next higher level convening authority will review the case file; (2) If the staff judge advocate recommends referral to court-martial and the convening authority decides not to refer the case to court-martial the Service Secretary would review the case file. The VPA, Section 2, adds to this elevated review by requiring the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the SJA’s recommendation against referral or the convening authority’s decision not to refer one of these sexual assault cases.

Finding 44-2: The potential impact of establishing an elevated review of the convening authority’s decision not to refer certain sexual assault cases is deterring the convening authority from exercising his/her independent professional judgment when making the decision whether to refer a case. The elevated review may impose inappropriate or illegal pressure on staff judge advocates to recommend, and convening authorities to refer sexual assault cases. Convening authorities are better positioned to make informed prosecutorial decisions because they have the advice of their SJA, and are less removed from the alleged perpetrator, victim, and the impact of the offense on the unit and good order and discipline than a higher level GCMCA or Service Secretary. The Service Secretaries lack both an established criminal law support structure and the experience and training to make these difficult prosecutorial decisions.

Discussion

Commanders stressed repeatedly to the Subcommittee and the RSP that they were able to exercise independent judgment, with the advice and counsel of their Staff Judge Advocates, in deciding whether to refer a sexual assault case to court-martial. However, the Subcommittee recognizes that recent legislation subjects each convening authority who opts not to refer a case to trial to additional scrutiny, through which a superior authority essentially second-guesses his or her decision to make an alternative disposition of the potential charges. Unlawful command influence becomes a much greater issue in this atmosphere. While we understand the intent behind elevated review—to ensure every report of a sexual assault is taken seriously-- as a meaningful goal, we do not see the one-way ratchet toward prosecution as serving either the needs of victims or the search for justice. Rather than pushing the decision further up the chain of command, the processes that support that decision should continue to be improved in ways that are already occurring and that are recommended elsewhere in this Report.

2. Written Declination Procedures

Recommendation 45: If Congress does not repeal FY14 NDAA Section 1744, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction declination statements or letters. The DoD should coordinate with the Department of Justice, or with state jurisdictions that are more familiar with the sensitive nature of sexual assault cases, to develop a standard format for use by all Services. Any such form should require a sufficient explanation without providing too much detail so as to ensure the written reason for declination to prosecute does not jeopardize the possibility of a future prosecution or contain victim-blaming language.
Finding 45-1: If a victim makes an allegation of rape, sexual assault, forcible sodomy, or attempts of those offenses, and the convening authority decides not to refer the allegation to court-martial, Section 1744(e)(6) of the FY14 NDAA requires a superior authority review of the non-referral decision by examining the case file, which must include a written statement explaining the convening authority’s decision not to refer any charges for trial by court-martial. DoD has not published any guidance to date as to what that declination memorandum must contain or what entity must write the letter.

Finding 45-2: Civilian offices vary in their practices for recording decisions to decline cases. If prior to indictment, the common procedure is for the prosecutor to send the case back to the investigator to be closed. If the prosecutor declines a case after indictment, some offices formally include a note in the file, others complete a standard form, but none provide lengthy written justifications. When civilian government offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect.

Finding 45-3: There are no formal requirements for military investigators, judge advocates, or commanders to provide written opinions or justifications when declining to pursue criminal cases in the military, including allegations of sexual assault, at any stage in the trial process. Staff Judge Advocates provide written advice to the convening authority prior to his or her decision whether to refer a case to general court-martial. In the past, if a convening authority dismissed charges or declined to prosecute a case after referral, the convening authority generally did not write a justification or declination statement.

Discussion

FY14 NDAA Section 1744 requires the Secretary to review all cases under Articles 120(a), 120(b), 125, and attempts of such offenses when the SJA recommends referral, but the convening authority declines to refer charges. If the SJA and convening authority agree charges should not be referred, this provision also requires the next superior commander authorized to exercise general court-martial convening authority review the decision. This superior convening authority will then review the case file and included written declination statement.

857 Section 1744(e)(6) of the FY14 NDAA requires a written statement explaining the reasons for the convening authority’s decision not to refer any charges for trial by court-martial. FY14 NDAA, Pub. L. No. 113-66, § 1744(e)(6), 127 Stat. 672 (2013).


859 See Transcript of RSP Comparative Systems Subcommittee Meeting 299-301 (Apr. 11, 2014) (Subcommittee deliberations discussing alternate disposition options for civilian criminal offenses).

860 10 U.S.C. § 834 (UCMJ art. 34); MCM, supra note 97, R.C.M. 604 (2012).

861 See Services’ Responses to Request for Information 69 (Nov. 21, 2013) (stating consistently that there is no formal written requirement but that they each follow general policies requiring communication between SJA and Convening Authorities). If the charges are forwarded to the general court-martial convening authority, the staff judge advocate must provide written advice on the legal sufficiency of the charges and a recommended disposition as to the charges pursuant to Article 34, UCMJ and R.C.M. 406. The general court-martial convening authority can then refer the charges to a court-martial or dismiss the charges and no further written documentation is required. Additionally, R.C.M. 604 contemplates a written declination for cases that have been withdrawn and are re-referred. Withdrawal does not automatically require written justification; however, in the event that the charges are later referred to another court-martial, the discussion to Rule for Court-Martial 604 suggests that the reasons for the withdrawal and later referral should be included in the record of the later court-martial.

862 See FY14 NDAA, Pub. L. No. 113-66, § 1744(e)(6), 127 Stat. 672 (2013). The case file must include: the preferal of charges, reports of investigation, the written advice of the staff judge advocate to the convening authority, a written statement explaining the reasons for the convening authority’s decision not to refer any charges for trial by court-martial, and certification of compliance with victim
This is a change to the previous practice which required no written justification for declining cases. Prior to referral to general court-martial, the staff judge advocate must provide written advice on the legal sufficiency of the charges, evidence, and jurisdiction, as well as recommend a disposition of the charges, pursuant to Article 34 of the UCMJ and Rule for Court Martial 406. Prior to the adoption of Section 1744 of FY14 NDAA, the general court-martial convening authority could then refer the charges to a court-martial, return the charges to a subordinate commander for action, or dismiss the charges, with no requirement for further documentation.

Several civilian jurisdictions, including the DOJ, document the declination decision in writing. When the DOJ closes a case without prosecution, the case file reflects the action taken and rationale. In civilian jurisdictions that utilize this procedure, it is considered a best practice to limit the details of declination, protect the privacy of the individuals, avoid victim blaming language, and preserve the possibility of future prosecution. Similarly, the convening authority’s declination should reflect these best practices and may generally be standardized in these cases. The U.S. Attorneys’ Manual cites three reasons for declining to prosecute a case: (1) no substantial Federal interest would be served by prosecution, (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution. Standard boilerplate language, similar to DOJ’s, could be helpful for convening authorities who believe it is in the military’s best interest to decline a case and could serve as the basis in the newly required declination memorandum, with the option of providing additional explanation when appropriate.

The civilian practice of limiting the written justification for declining cases is beneficial for several reasons. For example, a case may not proceed to trial if a victim no longer wishes to participate or has insufficient evidence. If the victim later chooses to cooperate or additional evidence becomes available, a lengthy written justification for originally declining the case may hamper the prosecution of the case. To alleviate that concern, in some circumstances the DOJ provides a written declination letter that is limited to the basic, overarching reason for declining the case, rather than including specific factual details. While some criticize the letters for their lack of detail, DOJ has explained that brevity protects the privacy of the parties involved and preserves the possibility of future prosecution. Similarly, in military justice practice, detailed declination memos could impact other adverse administrative actions which the commander may take in lieu of court-martial or make information publicly discoverable through the Freedom of Information Act, causing further trauma to a victim. Prosecutors in several civilian offices also explained how their declination procedures have evolved. It is considered a best practice for prosecutors to coordinate with investigators to ensure that when cases are closed without prosecution, documentation annotating reasons for declining a case does not contain any victim blaming language or information which could jeopardize future proceedings. Therefore, DoD should standardize the contents of the declination memo.

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rights and the victim statements.

863 See Services’ Responses to Requests for Information 69 (Nov. 21, 2013) (stating consistently that there is no formal written requirement but that they each follow general policies requiring communication between SJA and Convening Authorities).

864 See U.S. ATTORNEYS’ MANUAL, supra note 801, at 9-2.001.

865 See generally JSC-SAS REPORT, Appendix C-P (Sept. 2013) (on file at RSP).

866 See U.S. ATTORNEYS’ MANUAL, supra note 801, at 9-2.001.

867 See id. at 9-2.020; see also JSC-SAS REPORT, Appendix G (Sept. 2013) (on file at RSP).
Civilian prosecution offices often conduct internal reviews of individual prosecutor’s declination memos to see if they agree or disagree with the decision not to prosecute. This is substantially different from elevating review of the decision not to refer to the Service Secretary. Secretarial review would place an inordinate amount of pressure on a commander, jeopardizing the independent discretion of the convening authority. Therefore, commanders would need to ensure a case would be legally and factually sufficient to refer to trial even prior to preferral, or refer potentially unsupported charges to court-martial in order to avoid high level scrutiny.

The legislation may have been well intended to provide additional supervision over commanders declination decisions, however, it may have the unintended consequence of putting even more pressure on commanders to refer cases that, for a variety of reasons, may not be appropriate for trial. Additionally, the proposal to have senior trial counsel override the SJA and convening authority is inappropriate and akin to an Assistant U.S. Attorney going directly to the Attorney General. We agree with the DoD position, “that elevating this review to the level of the Service Secretary is not warranted where a staff judge advocate has reviewed the case thoroughly, consulted closely with the assigned military trial counsel, and recommended non-referral.”

G. PLEA NEGOTIATIONS

**Recommendation 46:** The Judicial Proceedings Panel should study whether the military plea bargaining process be modified because it departs from civilian practice and may undermine victim confidence when the accused receives a sentence lower than the pretrial agreement.

**Finding 46-1:** In civilian jurisdictions, most plea agreements between the prosecutor and defendant are for an agreed upon sentence and the judge accepts or rejects that agreement entirely. There are some jurisdictions where the plea deal consists of an agreement to a sentence within a range; the judge then determines the exact sentence within that range.

**Finding 46-2:** In the military justice system, the accused may negotiate a pretrial agreement (plea bargain) with the convening authority, through the staff judge advocate, that places a limit or “cap” on the maximum sentence the accused will serve in exchange for a guilty plea. The sentencing authority does not know the agreed limit prior to adjudging the sentence. The accused gets the benefit of whichever is lower, the adjudged sentence or the cap agreed to with the convening authority. Historically, this practice developed based on the special nature of the role of the convening authority and clemency opportunities. Other changes in the system, including the role of Special Victims’ Counsel and increased protection for victim’s rights may raise the question of whether the plea agreement process should be tailored to be more similar to the majority of civilian jurisdictions.

**Finding 46-3:** In most military sexual assault cases, the accused pleads not guilty due to both evidentiary challenges and issues in proving sexual assault beyond a reasonable doubt and the requirement to register as a

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868 [Stimson, supra note 777, at 4.](#)

869 [See MCM, supra note 97, R.C.M. 401 disc.](#)

870 [Transcript of RSP Comparative Systems Subcommittee Meeting 386-87 (Apr. 11, 2014) (commentary of Colonel (Ret.) Stephen Henley).](#)

871 [See DoD VPA Letter, supra note 764 (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014).](#)
sex offender if convicted. In fiscal year (FY) 2013, the accused pled not guilty in 70% of the Army’s sexual assault cases and 77% of the Navy’s sexual assault cases.

**Finding 46-4:** Some civilian defense attorneys are using sex offender risk assessments at various stages of proceedings. Evidence demonstrates that sex offender risk assessments can be used as a tool to help promote rehabilitation and prevent recidivism by identifying appropriate therapy. Defense attorneys sometimes use risk assessments when negotiating a plea bargain with the government.

**Discussion**

“As in the civilian community, the military justice system depends heavily on the ability of a convening authority and an accused to enter into a pretrial agreement. Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation.”

872

The process for military plea agreements and plea hearings differs from most civilian jurisdictions. Below is an explanation of plea process in military:

[A] pretrial agreement -- the military equivalent of a plea bargain -- is an agreement between the accused Service member and the officer who convened the court-martial. During a judge-alone guilty plea with a pretrial agreement, a military judge conducts a “providence inquiry” to ensure the defendant is really guilty, and announces a sentence without knowing the punishment limitations of the pretrial agreement between the defendant and the officer convening the court-martial. If the military judge (or the members in a members’ sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant “beats the deal” and receives only what the sentencing authority has adjudged. On the other hand, if the judge sentences the defendant to more confinement time than contained in the agreement, the excess is typically either suspended or disapproved. A military judge is not permitted to remedy a pretrial agreement he perceives as too lenient but may make a clemency recommendation to the Convening Authority to reduce an adjudged sentence.873 [sic]

Subcommittee members expressed concerns that if the military plea process was changed to be more like civilian pleas, that the number of plea deals would decrease, or the amount of confinement time would be lower than current average deals because mitigation and extenuation would already be factored into the calculated sentence. Some of the members believe that this sentencing determination allows the judge to reflect the community’s interest in adjudging an appropriate sentence and acting as a balance on command authority.

If the plea process is changed to be more streamlined and binding between the parties, as found in many civilian jurisdictions, the need for a lengthy sentencing proceedings for guilty pleas would diminish and could


873 Colin A. Kisor, The Need for Sentencing Reform in Military Courts-martial, 58 NAVAL L. REV. 39, 46 (2009) [referring to R.C.M. 910(f)(3) and 1106(d)(3)]; see also the Services’ Responses to Request for Information 68 (Nov. 21, 2013). The Air Force explained in response to Request for Information 68, “The accused will get the benefit of the lesser sentence, regardless of whether it was adjudged or in the PTA. If the sentence adjudged by the military judge or members exceeds the limits of the PTA, the convening authority may only approve the lesser sentence agreed to in the PTA. If the adjudged sentence is less than the PTA cap, only the adjudged sentence may be approved.”
improve judicial economy. It also could increase victim confidence in the system because the victim would know the accused would be sentenced to the terms of the agreement.

As shown in the statistics below, many sexual assault cases are contested. Testimony indicated that this is usually because a conviction would require sex offender registration and evidence in cases is often weak. Therefore, adjustments to the mechanics of military plea deals may not have a significant impact on the majority of sexual assault cases.

Subcommittee members concluded that a change to the plea process is not necessary at this time. Based on the current system, the trial counsel and special victim counsel should help manage the victim’s expectations. Counsel should explain that the judge could sentence the defendant to a lower sentence; the pretrial agreement is the maximum sentence that the accused could receive.

Figure 12

Number of sexual assault cases in FY11-13 that were guilty pleas vs. contested trials

<table>
<thead>
<tr>
<th>Service</th>
<th>FY13</th>
<th>FY12</th>
<th>FY11</th>
<th>FY10</th>
<th>FY09</th>
<th>FY08</th>
<th>FY07</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army</td>
<td>401</td>
<td>310</td>
<td>242</td>
<td>239</td>
<td>196</td>
<td>173</td>
<td>198</td>
</tr>
<tr>
<td></td>
<td>70%</td>
<td>69%</td>
<td>68%</td>
<td>65%</td>
<td>70%</td>
<td>65%</td>
<td>66%</td>
</tr>
<tr>
<td>Air Force</td>
<td>data not yet provided</td>
<td>data not yet provided</td>
<td>data not yet provided</td>
<td>data not yet provided</td>
<td>data not yet provided</td>
<td>data not yet provided</td>
<td>data not yet provided</td>
</tr>
<tr>
<td>Navy</td>
<td>57 of 77 cases contested, 77% contested</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marines</td>
<td>FY12: 21 guilty pleas</td>
<td>FY13: 36 guilty pleas</td>
<td></td>
<td>Need total number to determine % contested</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coast Guard</td>
<td>FY13: 2 of 9 contested, 22 % contested</td>
<td>FY12: 4 of 7 contested, 57 % contested</td>
<td>FY11, 4 of 9 contested, 44 % contested</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

See Services’ Responses to Request for Information 41 (Nov. 21, 2013). Prior to FY13, several of the Services did not track the number of sexual assault cases that were guilty pleas versus contested trials.

Services’ Responses to Request for Information 41h, dated Nov. 21, 2013. The Army was the only Service that tracked this data prior to FY 2013. The percentage of contested Army cases includes those cases that were mixed pleas and fully contested because the sexual assault offense charge is usually the contested charge. The complete breakdown of the Army numbers are:
VII. PROSECUTION AND DEFENSE

H. MILITARY PANEL SELECTION AND VOIR DIRE

**Recommendation 47-A:** Judge advocates with knowledge and expertise in criminal law should review sexual assault preventive training materials to ensure the materials neither taint potential panel members (military jurors) nor present inaccurate legal information.

**Recommendation 47-B:** The military judiciary ensure that military judges continue to appropriately control the line of questioning during voir dire to decrease the difficulty in seating panels. Military judges should continue to exercise their authority to control the scope of questioning during voir dire, which both allows counsel to gain the information required to exercise challenges intelligently and the court to seat a fair and impartial panel. By taking a more active role, the military judge can ensure there are no preconceived notions, prejudices, impressions or misleading questions from counsel.

**Finding 47-1:** Evidence presented to the Subcommittee reveals that it is increasingly difficult to seat military panel members in sexual assault cases because of their exposure to sexual assault prevention programs that lead some prospective panel members to draw erroneous legal conclusions, such as the idea that consuming one alcoholic drink makes consent impossible.

**Discussion**

The heavy emphasis on sexual assault prevention training has permeated the ranks and, in some instances, influenced the pool of panel members. For example, some counsel stated that a common misperception among Service members is that a person cannot legally consent to sexual activity if he or she has consumed even one alcoholic beverage. This concern can be addressed in two ways. First, JAG officers in each Service should review current and future sexual assault training for Service members to ensure accurate information is disseminated. Second, military judges must diligently regulate voir dire so that voir dire is not abused to give false impressions or misstate the law to potential panel members.876

Motions for appropriate relief based on allegations of unlawful command influence or sexual assault and sexual harassment training have increased.877 During training for senior leaders, the convening authority or other senior official discusses the seriousness of offenses and an expectation of offender accountability, potentially compromising this pool routinely needed to serve as panel members.878 Each of the Services provided a representative sampling of defense motions to dismiss or motions for other appropriate relief based on

<table>
<thead>
<tr>
<th>Army</th>
<th>FY07</th>
<th>FY08</th>
<th>FY09</th>
<th>FY10</th>
<th>FY11</th>
<th>FY12</th>
<th>FY13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cases Arraigned:</td>
<td>198</td>
<td>173</td>
<td>196</td>
<td>239</td>
<td>242</td>
<td>310</td>
<td>401</td>
</tr>
<tr>
<td>Guilty Plea Cases:</td>
<td>68</td>
<td>60</td>
<td>59</td>
<td>82</td>
<td>77</td>
<td>95</td>
<td>122</td>
</tr>
<tr>
<td>Mixed Plea Cases:</td>
<td>35</td>
<td>18</td>
<td>22</td>
<td>18</td>
<td>38</td>
<td>43</td>
<td>39</td>
</tr>
<tr>
<td>Fully Contested:</td>
<td>95</td>
<td>95</td>
<td>115</td>
<td>139</td>
<td>127</td>
<td>172</td>
<td>240</td>
</tr>
</tbody>
</table>

876 See Services’ Responses to Request for Information 78 (Dec. 19, 2013) (detailing each Service’s specific procedures for panel member selection process at trial, to include challenges and voir dire, between military judge, prosecution, and defense counsel).

877 See Services’ Responses to Request for Information 84 (Dec. 19, 2013).

878 See Army’s Response to Request for Information 84 (Dec. 5, 2013), specifically the Defense Motion to Dismiss in United States v. Oscar.
unlawful command influence or tainted panel pools to the RSP. It showed that panel member \textit{voir dire} has resulted in dismissal of a number of potential panel members for bias in sexual assault cases.

While determining whether a member should be disqualified for bias, the military judge must closely monitor the \textit{voir dire} questioning so that qualified panel members are not misled or misinformed, as “[t]he nature and scope of the examination of members is within the discretion of the judge.” The discussion following Rule for Court-Martial 912(d) notes that “the opportunity for \textit{voir dire} should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use \textit{voir dire} to present factual matters which will not be admissible or to argue the case.” Article 41 of the UCMJ and Rule for Court-Martial 912 place control of \textit{voir dire} with the military judge rather than counsel, who determines form and manner of \textit{voir dire}, sets deadlines for service on the court of written \textit{voir dire}, collects questions for the panel member questionnaires, establishes time limits for the questioning of witnesses, and sets other limits based on the individual requirements of the case itself. While military judges have continued to monitor \textit{voir dire}, greater diligence must be exercised to prevent the unnecessary tainting of the pool of panel members.

I. CHARACTER EVIDENCE

\textbf{Recommendation 48:} Enacting Section 3(g) of the VPA may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time.

\textbf{Finding 48-1:} Civilian and military rules of evidence about introducing character evidence in criminal trials are nearly identical. The rules of evidence in both military and civilian jurisdictions permit relevant character evidence at trial. The military courts have consistently ruled that a Service member’s good military character may be admissible as a pertinent character trait.

\textbf{Finding 48-2:} There may be a misperception surrounding the manner by which character evidence may be introduced in courts-martial. The use of character evidence in courts-martial has led to implications that a well-decorated military member will be given deference due to his or her military medals and career.

\textbf{Finding 48-3:} Congress attempted to eliminate the consideration of the accused’s military service by adjusting the factors commanders should consider when making disposition decisions. Section 1708 of the FY14 NDAA ordered a non-binding provision in the Manual for Courts-Martial amended to “strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense,” but it does not actually prohibit the commander from considering this factor. The change may not affect charging or disposition decisions in sexual assault or other cases.

\textbf{Finding 48-4:} Section 3(g) of the VPA proposes to modify Military Rule of Evidence 404(a), regarding the character of the accused. The provision attempts to prevent the use of the accused’s general military character

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880 See Services’ Responses to Request for Information 84 (Dec. 19, 2013).
882 \textit{Id.}, R.C.M. 912(d), see also Air Force’s Response to Request for Information 78 (Dec. 19, 2013).
from being admissible to show the probability of the accused's innocence. However, the proposal exempts
evidence of military character when relevant to an element of an offense for which the accused has been
charged, and relevant character evidence will continue to be admissible as long as the attorneys lay the proper
foundation. While Section 3(g) of the VPA may increase victim confidence by attempting to eliminate the
“Good Soldier Defense,” the Subcommittee does not anticipate that it will result in any significant change to
current practice at trial.

Discussion

“What is commonly referred to as the ‘Good Soldier Defense’ refers to an accused Service member’s
introduction of evidence of good military character in an attempt to convince the military judge or members
that he did not commit the offense for which he is charged.”884 The Supreme Court has recognized that evidence of
the character of the accused “alone, in some circumstances, may be enough to raise a reasonable doubt of
guilt.”885 While it is not an affirmative defense, character evidence of the accused may be admissible during
not only the sentencing, but also the merits phase of a court-martial, creating a perception that high rank and
decorated service will protect a Service member from conviction.886 That perception is especially harmful to
increasing the confidence of victims of sexual assault.

Military Rules of Evidence (MRE) 404 and 405 mirror the Federal Rules of Evidence (FRE) 404 and 405
about character evidence.887 Parallel provisions of the MREs are automatically amended 18 months following
changes to the FREs unless there is an executive order to the contrary.888 Both MRE 404(a) and FRE 404
prohibit the admissibility of character evidence to prove that a person acted in conformity with that trait, except
when the character trait is pertinent to the alleged offense.889 The key difference is the court’s interpretation of
this exception for pertinent traits. Prior to 1921, the Manual for Courts-Martial simply stated that the rules of
evidence at courts-martial would be the same as those used by the federal district courts.890 The first edition “to
specifically provide for the introduction of character evidence was the 1928 Manual.”891 It stated, “The accused
may introduce evidence of his own good character, including evidence of his military record and standing, in
order to show the probability of his evidence.”892 Over time, military courts essentially created the term “Good
Soldier Defense” by interpreting MRE 404(a)(1) as permitting “good military character” as a pertinent trait for

885 Id. at 119 (citing Michelson v. United States, 335 U.S. 469, 476 (1948)).
(1999) (describing court-martial of Gene McKinney, highest-ranking enlistee in U.S. Army who was accused of sexual harassment,
and others in which character evidence played prominent role); Katz & Sloan, supra note 884, at 119.
887 See MCM, supra note 97, M.R.E 404 (Character evidence; Crimes or Other Acts), as amended by Executive Order 12473 (effective Dec. 1, 2012).
888 See id., M.R.E 405 (Methods of providing character), as amended by Executive Order 12473 (effective Dec. 1, 2012).
889 See id., M.R.E 404, 405, as amended by Executive Order 12473 (effective Dec. 1, 2012); see also Fed. R. Evid. 404, 405.
890 See 10 U.S.C. § 936 (UCMJ art. 136); U.S. DEP’T OF DEF., DIRECTIVE 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON
MILITARY JUSTICE (May 3, 2003); see also Joint Service Committee, “Executive Summary of Proposed Amendments: Military Rules of
892 See Katz & Sloan, supra note 884, at 122 n.23.
893 See id.
894 Id. at 122 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 113b (1928)).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
character evidence.895 Just as in civilian courts, the military court requires “a nexus between the defendant’s good military character and the offense with which he is charged, but [the military courts have] been quite liberal in finding such a nexus.”896 Relevance, and therefore, admissibility, of the Good Soldier Defense has been based on the rationale that “there are additional considerations, not present in civilian courts, which military judges must take into account.”897

Courts-martial are part of a disciplinary scheme relied upon to maintain good order among troops, to preserve the obedience and conformity deemed necessary to successful military action, and to eliminate from the military those individuals who pose a risk to other [Service members] or to national security itself . . . [A] broader variety of acts are deemed criminal under military law than under civilian criminal codes . . . The good soldier defense takes advantage of this special military context by emphasizing an accused’s loyalty to the Armed Forces and military performance. The defense counters wrongdoing with proof that an accused has been a “good soldier” during [his]/her military career.898

There are generally four arguments for and against the Good Soldier Defense.899

Table 15

<table>
<thead>
<tr>
<th>For</th>
<th>Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>The military is a unique society and the separate nature of military life justifies a system of military justice with considerations that differ from its civilian counterpart.</td>
<td>Good character defense is not available under civilian society's evidentiary rules, and thus should not be available in the military</td>
</tr>
<tr>
<td>Unique nature of certain military offenses that make character evidence especially relevant to their adjudication</td>
<td>The Good Soldier Defense, as applied, creates unique gender discrimination problems in sex-offense cases</td>
</tr>
<tr>
<td>Service members are constantly observed by their peers and superiors, so there is a strong foundation on which these people can base testimony regarding the military character of the accused</td>
<td>The Good Soldier Defense should be abolished because there is no specific, uniform standard of what constitutes a good soldier</td>
</tr>
</tbody>
</table>

895 United States v. Court, 24 M.J. 11 (C.M.A. 1987); United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985); United States v. Kahakauwila, 19 M.J. 60 (C.M.A. 1984); United States v. McNeill, 17 M.J. 451 (N-M. C.M.R. 1984); United States v. Piatt, 17 M.J. 442 (C.M.A. 1984); United States v. Clemons, 16 M.J. 44 (C.M.A. 1984). For an explanation of the evolution of the Good Soldier Defense, see Katz & Sloan, supra note 884, at 122–28; see also Lieutenant Colonel Paul A. Capofari, Military Rule of Evidence 404 and Good Military Character, 130 Mil. L. Rev. 171, 175 (1990) (“Courts-martial always have been receptive to character evidence offered by the accused, and the accused always was permitted to offer general character [evidence] not only as to a specific trait, but also as to one’s general good character as a soldier.”).

896 See Katz & Sloan, supra note 884, at 128.

897 See id. at 134.

898 See Katz & Sloan, supra note 884, at 134 (citing Hillman, supra note 886, at 894-900).

899 The summary of these arguments are derived from Katz & Sloan, supra note 884, at 134–54, and Hillman, supra note 886.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
VII. PROSECUTION AND DEFENSE

Regardless of the opinions regarding the theory of the Good Soldier Defense, written responses from the Services and interviews with defense counsel reflected the belief that the Good Soldier Defense is not a useful approach for the defense, especially in sexual assault cases. They explained that the judge or panel members may think such a decorated Service member should have never put himself or herself in the circumstances that led to the allegations in the first place. Also, “[a]n accused Service member who introduces evidence of good military character must be aware that this defense can also serve as an avenue for the prosecution to introduce negative character evidence that might not otherwise have been admissible at trial.” The Supreme Court has identified this trade-off by stating that ‘the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.”

In recent years, statute and policy have eroded the practical use of the Good Soldier Defense. In FY14 NDAA, Congress first eliminated the consideration of the accused’s character and military service from the list of factors for a commander to consider in the initial disposition decision of offenses. Currently, Senator McCaskill’s VPA proposes modifications to MRE 404(a) to clarify that evidence of general military character of accused, the Good Soldier Defense, is not admissible to demonstrate the probability of innocence of the accused, unless that character trait is relevant to an element of a charged offense. There is broad public perception that senior military rank, a long service record, or even proficient military performance creates immunity from criminal prosecution. The military justice system bears an institutional risk of inappropriately privileging rank and authority. It appears that Congress is addressing the tension by enacting Section 1708 and considering the VPA.

This Subcommittee recognizes that the “Good Soldier Defense” is actually an appellate court creation which has led to controversy and questions of fairness, especially in the debate over the investigation, charging, and prosecution of sexual assault cases. The Subcommittee concluded that the MREs permit admission of the character evidence of the accused when the character trait is relevant to the charged offense. In practice, counsel must establish that character evidence meets the threshold for relevance prior to a military judge ruling the character evidence admissible. Therefore, the Subcommittee members expect that relevant character evidence will still be admitted in accordance with the rules of evidence. As a result, the Subcommittee does not

900 See Services’ Responses to Request for Information 107 (Dec. 19, 2013); see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013) (on file at RSP); Minutes of RSP Comparative Systems Subcommittee Session, JBSA (Dec. 13, 2013) (same).

901 See Katz & Sloan, supra note 884, at 129; see also Majors Long & Henley, Note, Testing the Foundation of Character Testimony on Cross Examination, ARMY LAWYER 17, 25 (Oct. 1996). (“The defense may pay a high price for testimony regarding the accused’s duty performance and other evidence of good character. Such evidence may open the door to damaging cross-examination despite a careful attempt to limit the scope of the questions on direct examination.”)

902 See Katz & Sloan, supra note 884, at 129 (citing Michelson v. United States, 335 U.S. 469, 479 (1948)).


904 Victims Protection Act of 2014, S. 1917, 113th Cong., § 3(g) (2014).

905 Transcript of RSP Comparative Systems Subcommittee Meeting 326-27, 330 (Apr. 11, 2014) (comments of Dean Hillman, Subcommittee Member).
anticipate that the provision in the VPA will result in any significant changes regarding the use of character evidence in courts-martial, but it may draw attention back to the issue for attorneys and military judges to consider the admissibility of the character evidence more closely.\textsuperscript{906}

Additionally, the way in which the VPA proposal is currently written, even if the character evidence was not admissible as to one charge, like a sexual assault, it may be admissible for the other charges, such as disobeying an order or regulation, fraternization, or adultery. The VPA does not eliminate the “Good Soldier Defense” for these additional, military-specific offenses, often associated with sexual assault charges. Therefore, the character of the accused may still be relevant and admissible during a court-martial wherein a violation of Article 120 is charged.\textsuperscript{907}

As a final point, eliminating the idiom of “Good Soldier Defense” could increase victim confidence and, in turn, increase reporting. Dispelling the common myth that being a “good soldier” will exonerate criminal conduct is a positive step to increasing victim confidence. This change would align the evidentiary rules more closely with those in civilian practice, whereby character evidence alone, absent a trait called into question, would not be relevant admissible evidence.\textsuperscript{908} While the rules of evidence will likely continue to be applied according to the facts and circumstances of each case, the courts, attorneys, and leaders should refrain from calling it the “Good Soldier Defense” and call it what it is, character evidence relevant to the defense of the accused.

J. PROSECUTION AND CONVICTION RATES

...I’ve got tons of fancy spreadsheets, and I’ve compared and contrasted ... and at the end of the day, I’m always left with – and I don’t mean this negatively, but I’m left with somewhat of a so what? What does this tell me? Is this good, is this bad? Is it going in the right direction? And I think that’s one of the things we grapple with....\textsuperscript{909}

1. Data Currently Collected and Reported by the Military Serves

**Recommendation 49-A:** The Secretary of Defense direct the Service Secretaries to use a single, standardized methodology to calculate prosecution and conviction rates. The Subcommittee recommends a methodology, based on the current Army model, which will provide accurate and comparable rates by tracking the number and rates of acquittals and alternate dispositions in sexual assault cases. Figure 13 illustrates the Subcommittee’s suggested methodology.

**Recommendation 49-B:** Once the Military Services standardize definitions, procedures, and calculations for reporting prosecution and conviction rates in sexual assault cases, the Secretary of Defense direct a study of prosecutorial decision making in sexual assault cases by a highly qualified expert in the field.

\textsuperscript{906} See id. at 372–75.
\textsuperscript{907} See id.
\textsuperscript{908} Transcript of RSP Comparative Systems Subcommittee Meeting 337–38 (Apr. 11, 2014) (Subcommittee deliberations).
\textsuperscript{909} Transcript of RSP Public Meeting 211–13 (Dec. 12, 2013) (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force).
The Secretary of Defense directs the study to assess the following:

- the rate at which the Services unfound sexual assault reports using the Uniform Crime Reporting definition and the characteristics of such cases in order to determine whether any additional changes to policies or procedures are warranted;

- the rate at which referral of cases to courts-martial against the advice of the Article 32 investigating or hearing officer resulted in acquittal or conviction (unless and until our recommendation to make the Article 32 decision-maker a military judge whose probable cause decision is binding is implemented); and

- the role victim cooperation plays in determining whether to refer or not refer a case to court-martial, and whether the case results in a dismissal, acquittal or conviction.

**Finding 49-1:** There are no standardized methods that DoD and the Military Services currently use to calculate prosecution or conviction rates in sexual assault or other cases. The Military Services use different procedures and definitions, making meaningful comparisons of prosecution and conviction rates for sexual assault across the Military Services impracticable. In the absence of a standardized methodology, any attempt to compare military prosecution or conviction rates for sexual assault among the Services or between military and civilian jurisdictions is apt to be misleading.

**Discussion**

Representatives of the Service JAG Corps told the RSP they agree that the current system of calculating prosecution and conviction rates in the military “is not the model of clarity” and it is an area that “is ripe for recommendations.” The Services are required to collect and report a considerable amount of data to DoD SAPRO, Congress, the Service appellate courts, the Court of Appeals for the Armed Forces, the American Bar Association, and others, including the RSP. However, as one witness told the RSP, “[N]ot everything you can count counts.” The data the Services gather and report should be standardized, meaningful, comparable, and useful in order to draw concrete conclusions from the data annually. At this point, it is none of the above.

In particular, the Services contend that the data they must provide to DoD SAPRO is, at best, not useful and, at worst, misleading. As of December 2012, “the DoD method of tracking [prosecution and conviction rates was] flawed” for several reasons.

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910 *Id.* at 202 (testimony of Captain Robert Crow, Director, Criminal Law Division, U.S. Navy) (“[T]here is no uniform way on how we measure prosecution rate. There is no uniform way on how we measure conviction rate.”).

911 *Id.* at 211 (testimony of Captain Jason Brown, Military Justice Officer, Military Justice Branch, Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps). Lieutenant Colonel Coyne followed Captain Brown’s assessment, stating, “I agree with that.” *Id.* (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force).

912 *Id.* (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force); see also *Id.* at 212-13 (“So, as we struggle with this, I think that is – where you bin it is somewhat – somewhat clouds the real question of what are we getting after? And just because we can count it, does it really count? And how do we find the statistics that really help us understand where we’re going, and where we can make improvements?”).

913 *Id.* at 217 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).
The data required reflects a snapshot in time, but the numbers do not account for cases that are pending investigation and disposition and are improperly counted as “no action taken” for prosecution rate purposes.914

The data DoD requires and calculates does not take into consideration whether the offender is either unknown or is a civilian beyond the military’s jurisdiction.915

The DoD numbers also include restricted reports, for which investigation is prohibited and there can be no disposition.916

Additionally, the data the Services report covers a wide spectrum of eight separate offenses, from rape to unwanted touching, which distorts any accurate depiction of disposition decisions.917

The Services offered numbers and percentages for the RSP’s consideration. However, each Service uses such different variables that the information provided is not comparable. The Services offered several different reasons why their numbers do not align with either one another’s or DoD SAPRO’s reports.918

One major reason data is not comparable is the Services use different procedures and definitions to “unfound” cases, as mentioned in the earlier discussion regarding investigations.919 The Army reports a higher prosecution rate than the other Services because the convening authority is only considering cases that an attorney and MCIO investigator previously determined had probable cause, so there is a greater probability the convening authority will take some adverse action on those cases. For instance, in FY12, 118 out of 476 cases were closed by the Army CID for lack of probable cause, and the convening authority only considered 358 cases. Since an attorney already determined there was reason to believe an offense had been committed, those cases were more likely to be prosecuted, resulting in a higher prosecution rate (number of courts-martial divided by 358). If the Army’s prosecution rate was based on all 476 possible cases, the prosecution rate would likely have been lower (number of courts-martial divided by 476). The Air Force and Navy MCIOs, on the other hand, presented all to the commander, and divided the number of cases preferred by all sexual assault cases, resulting in a lower percentage.920

914 Id. at 218.
915 Id.
916 Id. at 218–19.
917 Id. at 219.
918 Id. at 207–22 (testimony of Services’ representatives).
919 Id. at 208 (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force) (“One of the other unique differences, I think most of us, the investigating – so the MCIO, Air Force OSI does not unsubstantiated any of our cases. So, before – so, our commanders get all of our cases to adjudicate, which I think it gets factored in when you look at – and I use this very subjective, but the type of case that is presented. If you have an investigative agency that said no, we unsubstantiated this [like the Army’s procedure], so you’re only being presented with substantiated cases, I think you get a different type of case.”). Cf. id. at 221–22 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army) (“Founding is a probable cause determination. The commander [in the Army] does not have a role in founding or unfounding of a case. Lawyers in coordination with investigating agencies, CID for the Army make that determination. And it is a permanent law enforcement record.” See supra Part VII, Section J(1) (discussing standardizing investigative and disposition decision process between MCIOs, JAGs, and Commanders).
920 As illustrated in Part VII, Section J(2), supra, the CSS is recommending a prosecution rate that divides the number of cases preferred by the number of known offenders within the military’s jurisdiction.
At the RSP’s request, Dr. Cassia Spohn evaluated the prosecution rates the Services reported, compared them to civilian prosecution rates and presented her assessment at a public meeting. She agreed that the Services’ different definitions of what constitutes an “unfounded” case and their calculation procedures impact the overall prosecution and conviction rates. Dr. Spohn described her understanding of each Service’s definitions and process based on the information the Services provided:

In the Army, the decision to unfound is not made by commanders, but by the prosecutor and only cases that are deemed to be founded are presented to commanders to investigate. Moreover, in the Army, founding is a probable cause determination, not a determination that the case is false or baseless.

The Air Force and the other agencies, the determinations that cases are to be unfounded are made by commanders, but the definitions of what constitutes unfounding differs somewhat. The Air Force follows the [Uniform Crime Report] guidelines in referencing cases that are false or baseless. The Coast Guard categorizes cases as unfounded if the investigation revealed that the entire allegation was fabricated which would seem to leave out those baseless complaints. And then both the Navy and the Marine Corps simply, at least in the materials I was presented, simply use the term unfounded without really defining it.

So again, this makes comparing data on unfounding across the Military Services problematic if they’re using different definitions and different procedures. But in reality, it’s not unlike the civilian system where in reality the different law enforcement agencies also may be using somewhat different interpretations of the Uniform Crime Reporting Guidelines with respect to unfounding.

The Services generate different numbers for various reports which leads to additional inconsistencies and difficulties in assessing prosecution and conviction rates in sexual assault cases. For example, if the Service divides the number of preferred sexual assault cases by the total number of unrestricted reports, a low prosecution and conviction rates results. In contrast, if the Service’s numbers reflect convictions of known subjects within the military’s criminal jurisdiction, higher prosecution and conviction rates result.

In addition, most of the Services’ conviction rate data does not specifically portray the number of convictions for sexual assault; instead, the conviction rates reflect conviction for any offense in cases that included a charged sexual assault. For example, in FY11, DoD reported an 80 percent conviction rate in sexual assault cases.

921 In response to Request for Information 39, the Navy stated that “[t]he reasons unrestricted reports do not result in a commander’s ability to take action include the offender is unknown, offender is a civilian not subject to military jurisdiction, civilian authorities prosecute the military offender, the victim declines to participate, the evidence is insufficient or the allegation is unfounded.” Navy’s Response to Request for Information 39 (Nov. 21, 2013). In response to the same question, the Marine Corps explained that NCIS does not unfound cases, and the vast majority of cases unfounded by the commander were victim recantations. Marine Corps’s Response to Request for Information 39 (Nov. 21, 2013); see also Coast Guard’s Response to Request for Information 49 (stating that “CGIS does not classify crimes as ‘unfounded’ at the current time”).

922 Transcript of RSP Public Meeting 268 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

923 Id. at 270–71.

924 FY11 SAPRO Annual Report, supra note 823.
offense, although not necessarily a sexual assault offense, which, it is not an accurate reflection of conviction rates for sexual assaults. Dr. Spohn estimated the true conviction rate averaged about 50 percent.\[825\]

2. Proposal to Standardize Data Collection Across the Services

The DoD must establish “a consistent methodology for characterizing case flow or case attrition”\[826\] and issue clear instructions to standardize the calculations for prosecution and conviction rates, as well as cases with alternate dispositions, and those where no action was taken.\[827\] “The fact that the definitions and procedures are different means that the overall data for the Department of Defense is in many ways meaningless . . . a first step is that the Military Services should use a consistent definition and consistent procedures.”\[828\]

First, the Services need to standardize the denominator for all calculations.\[829\] The prosecution rate denominator should be unrestricted reports of sexual assault with known offenders within the military’s criminal jurisdiction. The conviction rate denominator should only be cases referred to courts-martial. Then, the Services can classify accurate data into various categories including cases preferred for the prosecution rate, cases pending, dismissed, or where other adverse action occurred. For the conviction rate numerator, the number of cases with a charged sexual assault resulting in conviction, acquittal, or other resolution such as a mistrial can easily formulate conviction rates. Any information collected captures a snapshot in time; pending and unresolved cases must be accounted for.\[830\] Clear standards establishing the numerators and denominators enable useful data calculations.

The DoD should require the Services to collect the following categories of information in order to calculate comparable data:831

- All unrestricted reports of adult sexual assault;
- Reports separated by type of offense to establish the base number for: Rape, sexual assault, sexual assault involving sleeping or intoxicated victim, or victim incapable of consent, etc.;
- Reports where command action is precluded because:

\[825\] See supra Part VII, Section J(4); Transcript of RSP Public Meeting 284-85 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

\[826\] Id. at 296.

\[827\] Beginning in FY13, there were proposals to revise the calculations to result in more accurate and useful data; however, as of December 2013, the Services did not have a standardized way of presenting prosecution and conviction rates.

\[828\] Id. at 295.

\[829\] Id. at 286; see also id. at 281 (“[W]e encounter a problem with respect to the appropriate denominator for calculating these rates. This is true of both [civilian and military] systems, but I think it’s particularly true of the military where we could calculate prosecution rates based on all unrestricted reports, all reports involving cases that were presented to commanders for action, or only reports in which the evidence supported command action for sexual assault.”). Id. at 279-80 (“So again, depending upon the denominator, the conclusion that one would reach with respect to the prosecution rate would be very different.”).

\[830\] Id. at 220 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

\[831\] These data points are based on the Army’s current practice as explained by Colonel Mulligan and Janet Mansfield, see id. at 220-27 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, and Ms. Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army), and the explanation of the Air Force waterfall slides provided in response to Request for Information 39, see Air Force’s Response to Request for Information 39, at 301219 (Nov. 21, 2013).
VII. PROSECUTION AND DEFENSE

- The case is being handled by civilian or foreign prosecution authorities, and track separately as:
  - Prosecuted in civilian court as a sexual assault offense,
  - Prosecuted in civilian court as a non-sexual assault offense,
  - Dismissed by civilian authorities,
  - Pending;
- The subject is a civilian or foreign national;
- The offender is unknown;
- The subject died;
- The victim declined to cooperate in the investigation or prosecution;
- Remaining military cases separated into the following categories:
  - Unfounded Prior to Preferral – Allegations of sexual assault incidents deemed false or baseless;
  - Preferred (this is the numerator for the prosecution rate, divided by the number of cases within the
    military’s jurisdiction, as the denominator, to determine the prosecution rate);
  - Alternate Disposition (no action, NJP, adverse administrative action);
  - Victim declined to cooperate; or
- Preferred cases, classified as:
  - Alternate dispositions (resignations/ separations in lieu of courts-martial or NJP);
  - Cases not referred, and no adverse action taken;

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932 It may be possible for these cases to be handled by the Services, adding back into the number of cases under military jurisdiction.


934 The number of cases preferred divided by the number of cases within the military jurisdiction should form the prosecution rate percentage.

935 These are cases with insufficient evidence of any offense to prosecute, sometimes due to the fact that the victim declines to cooperate in investigation or prosecution, or there may not be sufficient available information to justify taking adverse action against the accused. See Transcript of RSP Public Meeting 226 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army) (explaining in detail that 30 soldiers were given no punishment because there was insufficient evidence).
• Cases referred to court-martial (this is the number that should be used to calculate conviction rates), which then should be separated into the number of:
  • Convictions,
  • Acquittals,
  • Other (mistrial, dismissed, etc.).

The **prosecution rate** is the number of cases preferred divided by the number of unrestricted reports that are within the military's criminal jurisdiction.

The **conviction rate** is the number of cases with a finding of guilty for a sexual assault offense divided by the number of cases referred to courts-martial.

**Table 16**

<table>
<thead>
<tr>
<th>Prosecution Rate by offense type</th>
<th>Conviction Rate by offense type</th>
</tr>
</thead>
<tbody>
<tr>
<td># Cases Preferred</td>
<td>Cases with Sexual Assault Conviction</td>
</tr>
<tr>
<td>Cases within Military Criminal Jurisdiction</td>
<td># Cases Referred</td>
</tr>
</tbody>
</table>
VII. PROSECUTION AND DEFENSE

Waterfall Calculations to Standardize Prosecution and Conviction Rates

Figure 13

Unrestricted Reports (By offense type)
- Command Action Precluded
- Military Jurisdiction
  - SA Offense Unfounded
  - Preferred
  - Alternate Disposition
  - Pending Decision
    - No Action / No Referral
    - Referred to Court-martial
    - Resignation or Discharge in Lieu of CM
    - Pending
      - Acquittal of sexual assault offense
      - Conviction of sexual assault offense
      - Other

Figure 14

Keeping Track of Cases in Civilian Jurisdictions involving Military Members

Civilian Jurisdiction
- Prosecuted for Sexual Assault Offense
- Prosecuted for Non-Sex Related Offense
- Dismissed
- Pending

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
3. “Substantiated” Sexual Assault Cases in Military Service Reports to Congress

**Recommendation 50:** Congress enact legislation to amend Section 1631(b)(3) of the FY11 NDAA and the related provisions in FY12 NDAA and FY13 NDAA to require the Service Secretaries provide the number of “unfounded cases,” those cases that were deemed false or baseless, as well as a synopsis of all other unrestricted reports of sexual assault with a known offender within the military’s criminal jurisdiction. Eliminating the requirement to provide information about “substantiated cases” will result in DoD and the Services providing information that more accurately reflects the disposition of all unrestricted reports of sexual assault within the military’s jurisdiction.

**Finding 50-1:** DoD and the Military Services must comply with several mandates to report sexual assault data to multiple sources, including Congress, with each report containing different requirements, calculations, and definitions.

**Finding 50-2:** Section 1631 of the FY11 NDAA mandates an annual report to Congress with a full synopsis of “substantiated cases” of sexual assaults committed against Service members. The term “substantiated” is not otherwise used by DoD or the Services through the investigative or disposition decision process in sexual assault cases, resulting in confusion and inaccuracy in the reports to Congress.

**Discussion**

Congress requires the Military Services to detail, line by line, the disposition of every “substantiated” sexual assault allegation, providing transparency for those who wish to review all data. It is critical the requested information is useful. The current requirement raises two issues.

First, the annual report to Congress uses the term “substantiated” to determine whether or not to include a case in the report. However, “substantiated” is not a term otherwise used in the military’s investigative or disposition process in sexual assault cases.

Second, the extensive annual report to Congress does not provide useful information that can be measured from year to year. The Services would provide more useful information utilizing the “waterfall analysis” detailed earlier detailing the actual number of cases that fell within the military’s jurisdiction, resulted in court-martial or alternate dispositions broken down by nonjudicial punishment, resignation or discharge in lieu of courts-martial or other adverse action, and if taken to trial, the number of convictions and acquittals. In addition to providing raw numbers, the Services could also break the information down into percentages as an easy reference to compare the results each year to identify any trends, problems, or improvements.

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936 DoDI 5505.18, dated January 25, 2013, provides the standardized definition of substantiated, however, this is only used in the report to Congress. U.S. Dep’t of Def., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (Jan. 25, 2013). DoD defines substantiated as follows:

An Unrestricted Report that was investigated by an MCIO, provided to the appropriate military command for consideration and action, and found to have sufficient evidence to support the command’s action against the subject. Actions against the subject include court-martial charge preferal, Article 15 UCMJ punishment, administrative discharge and other adverse administrative action that result from a report of sexual assault or other associated misconduct (e.g., adultery, housebreaking, etc.).

Id., Glossary at 10.

937 “Unfounded” defined according to the UCR as reports which are baseless or false. See also id. ¶ 10(a) (defining “unfounded” as crime did not occur and/or it was false allegation).
VII. PROSECUTION AND DEFENSE

Last, Congress can have confidence in numbers and percentages that follow consistent criteria and rely on actual events. Accordingly, Congress, the Services, and the public can draw conclusions from the data to inform the debate about military sexual assault.938


Recommendation 51: Congress and the Secretary of Defense should not measure success solely by comparing military and civilian prosecution and conviction rates.

Finding 51-1: Civilian and military prosecution rates are not comparable because of differences in the systems including civilian police discretion to dispose of a case and the alternate dispositions that apply only to the military. Various jurisdictions also use different definitions, procedures, and criteria throughout the process.

Finding 51-2: National data collection in the UCR traditionally focused on forcible rape of women, although beginning in January 2013, the definition of rape was expanded to include gender-neutral nonconsensual penetrative offenses. The UCR also collects data and some other sex offenses which some civilian police agencies may classify as assault. In contrast, DoD includes data on all reported penetrative and contact sexual offenses ranging from unwanted touching to rape.

Discussion

Congress directed the RSP conduct a comparison of civilian and military prosecution rates and state reasons for any differences.939 Differences in civilian and military definitions, statutes, calculations, and procedures make comparing the numbers across these two systems and their changes over time extremely difficult. The results of comparisons may be misleading.940

Some of the problems associated with comparing civilian and military statistics include:

- “[T]he Military Services use different definitions of outcomes, especially unfounding, and they calculate prosecution and conviction rates differently.”941
- Civilian police in many civilian jurisdictions have discretion to unfound a case without the prosecutor ever seeing it.942 In the military, either a trial counsel is making a probable cause determination in conjunction with the investigator in the Army, or commanders are making disposition decisions in the other Services. “So not only are the definitions of unfounding different, but the procedures that are used to unfound cases are different as well”943 which impacts the prosecution rate.

938 See supra Part III.
940 This conclusion is supported by the results of Dr. Spohn’s attempt to compare rates among DoD and studies of which she was aware in civilian jurisdictions. See Transcript of RSP Public Meeting 258 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).
941 Id. at 262; see also id. at 258 (“[T]he definitions that civilian law enforcement agencies use and those used by the Department of Defense [MCIOS] are different.”).
942 Id. at 263.
943 Transcript of RSP Public Meeting 268 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate
• DoD’s data includes both restricted and unrestricted reports “which causes challenges in terms of knowing what the denominator of these rates should be.”

• Civilian jurisdictions generally track forcible rape as sexual assault, whereas the military term pursuant to Article 120 of the UCMJ encompasses a wide range of sex-related offenses from unwanted touching to rape that are either not criminal or are characterized as non-sexual assaults in some civilian jurisdictions. “Thus, the [civilian] rates are not directly comparable since they do not include these touching or contact offenses as well as the penetration offenses.”

• Civilian authorities generally only account for cases that fall within their jurisdiction, whereas the Military Services are responsible for reports for which they may not have jurisdiction at all if the suspect is a civilian, or the local civilian authorities are prosecuting a case involving a military suspect that occurred off post.

• Military Services provide detailed data on the outcome of every report, but civilian authorities are not required to release that information. “[B]y contrast, there is no national data on outcomes of civilian cases that resulted in an arrest. The national data we do have are on offenses known to the police and on cases that were cleared by the police. And that clearance category has its own problems.”

• The military justice system offers alternate dispositions to cases that are not usually available in civilian jurisdictions, such as nonjudicial punishment, letters of reprimand, resignation or separation in lieu of courts-martial with a punitive discharge, which impact the military’s prosecution and conviction rates.

Differences between civilian and military sexual assault cases start at the beginning of a case. In the civilian sector, “one of the most important and highly [sic] criticized decisions made by law enforcement officials is the decision whether to unfound the crime or the charges.” This decision point is critical; it determines whether investigators present an allegation to a civilian prosecutor to even factor into the civilian prosecution rate. Dr. Spohn pointed out that “technically, cases can be unfounded only if the police determine following an investigation that a crime did not occur,” which meets the UCR definition of baseless. Based on her experience, however, she stated that “in reality … the unfounding decision is used in different ways and is interpreted in different ways by different law enforcement agencies. Research has documented that unfounding can be used to clear or, in words of one researcher, erase cases in which the police are convinced that a crime did occur, but also believe that the likelihood of conviction and prosecution are low.” The DoD Annual

944 Id. at 260.

945 Id. at 274; see also id. at 278 (noting that “the definition of sexual assault [in the military] is broader than the definition of forcible rape used by the FBI”).

946 Id. at 260 (noting that 16 percent of military’s unrestricted reports fell outside of military jurisdiction).

947 Id. at 261.

948 Id. at 263.

949 Id. at 264. “[T]he FBI guidelines on clearing cases for Uniform Crime Reporting purposes state that a case can be unfounded only if it is determined through an investigation to be false or baseless.” Id. at 265 (referring to FBI definition of “unfounded”); see supra note 933.

950 Transcript of RSP Public Meeting 264 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate

Programs, School of Criminology and Criminal Justice, Arizona State University); see also id. (discussing how “the definitions of unfounding and procedures by which cases are unfounded vary among the Military Services” as well).
VII. PROSECUTION AND DEFENSE

Report on Sexual Assault in the Military defines unfounding as, “When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense or the offense was improperly reported or recorded as a sexual assault, the allegations against the subject are considered unfounded.”

Dr. Spohn pointed out that “there are similar problems with calculating prosecution rates for the civilian justice system” in that the denominator may vary among jurisdictions. National prosecution rates start counting when there is sufficient evidence in the case to make an arrest for rape, whereas the military prosecution rate is currently derived from all restricted and unrestricted reports of sexual assault, including instances of unwanted touching, such as a “pat on the butt.” Due to such vast differences, a reliable comparison between civilian and military prosecution rates is not possible. As Dr. Spohn stated, “we really are comparing apples and oranges with rapes [in civilian jurisdictions] versus all sexual assaults [in the military].” Therefore, to make comparisons on current data would be misleading.

Conviction rates also pose comparison challenges because civilian prosecutors and military prosecutors and commanders use different criteria to take cases to trial. Dr. Spohn used information from her recent study in Los Angeles from 2005 to 2009 to reach her conclusion. She stated,

“If these 486 [rape] cases, just over 80 percent of the defendants were convicted. Very few, one percent were acquitted. Charges were dismissed in just about 10 percent of the cases and in another 9 percent, the cases were still pending.

If we calculate the conviction rate based on cases that had dispositions, that is, if we subtract those cases that were pending, we would come up with a conviction rate of 88.2 percent. And if we only look at cases that proceeded to trial, the conviction rate would be a whopping 98.7 percent.

These data, I don’t think are necessarily representative of outcomes in the civil justice department overall. And in part, I think that reflects the fact that the Los Angeles County District Attorney files charges only if there is evidence that meets the standard of proof beyond a reasonable doubt and if there is corroboration of the victim’s allegations. In other words, they file charges only if they believe that they can take the case to trial and win. And the conviction rate in Los Angeles confirms that that is, in fact, what is happening there.”

Programs, School of Criminology and Criminal Justice, Arizona State University); see also id. at 267 (“The problem, of course, is that these are decisions made by individual law enforcement agencies which may not interpret the FBI guidelines in the same way.”).

951 Id. at 268.

952 Id. at 287–89 (discussion between Brigadier General (Ret.) Dunn, Subcommittee Member, and Dr. Spohn in trying to compare 36.8 percent prosecution rate for all sexual related offenses in military to 50-percent prosecution rate of rape cases in civilian jurisdictions). Dr. Spohn also pointed out that the Army provided a separate prosecution for rape which was 56 percent which is comparable to the national average of 50 percent.

953 Id. at 290 (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

954 The Defense Task Force on Sexual Assault in the Military Services reached the same conclusion. See DTFSAMS, supra note 130.

955 Transcript of RSP Public Meeting 290–91 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

956 Id.
Dr. Spohn also provided State Court Processing Statistics (SCPS) data, which she believes is probable the most comprehensive source of data on conviction rates in the United States, and a six-city study that she and Julie Horney conducted in the early 1990s. She concluded that comparing military and civilian conviction rates is extremely complex and unreliable due to the differences in the systems. “With these important caveats,” Dr. Spohn considers military conviction rates to be generally aligned with at least some urban civilian jurisdictions.

The Subcommittee recommends that DOD focus on standardizing definitions and processes the Services use to gather data in order to generate useful information. An Army judge advocate told the RSP, after explaining why he believed the data DoD SAPRO currently required was not helpful, “I want to know where I am. I don’t get better if I don’t know where I am.”

Lastly, it is important to remember that as these stale numbers are generated year after year, each represents an individual. A victim-centered, offender-focused justice process must realize that there are real individuals behind every number.

957 For the latest information from 2009, see Bureau of Justice Statistics, “Data Collection: State Court Processing Statistics (SCPS),” at ("[The] SCPS provides data on the criminal justice processing of persons charged with felonies in 40 jurisdictions representative of the 75 largest counties. These counties account for nearly half of the serious crime nationwide. The program prospectively tracks felony defendants from charging by the prosecutor until disposition of their case.” The website also cautions that “BJS has issued a data advisory on the State Court Processing Statistics Data Limitations. The advisory describes limitations of the data collection that must be considered when analyzing SCPS data, drawing any conclusions based on the data, and citing BJS reports.”), available at http://www.bjs.gov/index.cfm?ty=dcdetail&iid=282.

958 Transcript of RSP Public Meeting 292 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

959 Id. at 286.

A. OVERVIEW OF CIVILIAN AND MILITARY SENTENCING

1. Purposes of Sentencing in Federal and Military Systems

Both civilian and military justice systems “pursue the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline.”

In the federal judicial system, judges consider the statutory purposes of sentencing when fashioning a sentence. Along with considering the defendant’s history, characteristics, and the nature of the offense, the judge must select a sentence that:

1. reflects the seriousness of the offense,
2. promotes respect for the law,
3. provides just punishment for the offense,
4. affords adequate deterrence to criminal conduct,
5. protects the public from further crimes of the defendant,
6. provides the defendant with needed educational or vocational training, medical care, or other correctional treatment,
7. recognizes the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and
8. recognizes the need to provide restitution to any victims of the offense.

Similar imperatives underlie sentencing processes in state criminal justice systems.


962 The term “federal judicial system” or “federal system” refers to the U.S. Federal Courts, established by Article III of the U.S. Constitution.


964 Id. at § 3553(a).
Five considerations guide sentencing in the military’s justice system: (1) rehabilitation, (2) punishment, (3) protection of society, (4) preservation of good order and discipline, and (5) deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. These reasons exist as a subset of the purposes of military law in the Manual for Courts-Martial: to promote justice, assist in maintaining good order and discipline in the Armed Forces, promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States.

In most civilian jurisdictions, the judge determines the sentence in noncapital cases. In non-capital courts-martial, the sentence is determined by the military judge or by the “members”—the military equivalent of a jury – based on the choice of the accused. The accused has four options: (1) plead not guilty, with trial and (if found guilty) sentencing by members; (2) plead not guilty, with trial and (if found guilty) sentencing by the military judge; (3) plead guilty with sentencing by members; and (4) plead guilty with sentencing by the military judge. If the accused is absent for trial, refuses to select a forum, or the accused’s request for trial by military judge alone is rejected by the military judge, the default forum is trial by officer members. In

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965 U.S. Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook, Instr. 2–5–21, at 60–61 (2014); the judge instructs the members: “You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.”

966 MCM, supra note 97, pt. I–1 ¶ 3.

967 The federal system and 44 states require sentencing by judge, rather than jurors, in noncapital cases. The exceptions are Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. See Ark. Code Ann. § 5-4-103(a) (1987) (“If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter.”); Ky. Rev. Stat. Ann. § 532.055(2) (2008) (“Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury.”); Mo. Rev. Stat. § 557.036 (2003) (“If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed ... The jury shall assess and declare the punishment as authorized by statute.”); Okla. Stat. Ann. tit. 22, § 926.1 (2003) (“In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . .”); Tex. Code Crim. Proc. Ann. § 37.07(2)(b) (2007) (“[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . .”); Va. Code Ann. § 19.2-295 (2009) (“Within the limits prescribed by law, the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury . . . .”).

968 See MCM, supra note 97, R.C.M. 903 (forum selection); R.C.M. 910 (pleas). For analysis and discussion of Rules 903 and 910, see id., App. 21. The Service member also has the right to know the military judge’s identity before making this election. 10 U.S.C. § 816 (UCMJ art. 16). The convening authority selects members “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” 10 U.S.C. § 825 (UCMJ art. 25). By default members are officers, unless the accused is enlisted and requests enlisted members; in that case, at least one-third must be enlisted, and must be from another unit. Id.

969 Id.; see also MCM, supra note 97, R.C.M. 910 (pleas). The Service member also has the right to know the military judge’s identity before making this election. See 10 U.S.C. § 816 (UCMJ art. 16).

970 See MCM, supra note 97, R.C.M. 903(b)(2), noting that the approval or disapproval of the request for military judge alone is at the discretion of the military judge. The discussion following R.C.M. 903(b)(2)(B) states, “A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as fact finder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record.” Id. at R.C.M. 903(b)(2)(B) disc.

971 Id., R.C.M. 903 (forum selection).
any case, however, the accused does not have the option to select trial by members and then, if convicted, sentencing by the military judge.\textsuperscript{972}

The table below summarizes some of the differences between the civilian and military justice systems that impact sentencing.

2. Comparison of Sentencing Procedures in Civilian Courts and Courts-Martial

Table 17

<table>
<thead>
<tr>
<th></th>
<th>Most Civilian Jurisdictions</th>
<th>Military</th>
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</thead>
<tbody>
<tr>
<td><strong>Number of members in non-capital cases</strong></td>
<td>Usually 12 jurors</td>
<td>Does not require 12 members; Ranges from 3 to 12 depending on the type of court-martial</td>
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<tr>
<td><strong>Jury Verdict Requirement for Findings</strong></td>
<td>Unanimous verdict in all cases</td>
<td>Unanimous verdict in capital cases; Usually 2/3 vote to convict by secret written ballot</td>
</tr>
<tr>
<td><strong>Time between verdict and sentencing</strong></td>
<td>Often delayed several weeks pending the completion of a presentencing report</td>
<td>Almost immediate</td>
</tr>
</tbody>
</table>
| **Who determines the sentence in non-capital cases?** | In most civilian jurisdictions, the judge determines the sentence in noncapital cases | The sentence is determined by the military judge or by the “members”(jury) based on the choice of the accused:  
  • Trial before members, sentencing by members  
  • Trial by judge alone, sentencing by judge  
  • Plead guilty, sentencing by members  
  • Plead guilty, sentencing by judge  
  The accused does not have the option to select trial by members and then, if convicted, sentencing by the military judge |
| **Types of sentences**                    | May include death, confinement, or fines, probation with completion of community service, treatment or education programs as a condition of probation | May include death, confinement, reduction in rank, reduction in pay, forfeiture of pay and allowances, separation from the military, fine, and reprimand |
| **Sentencing per count or unitary**       | Receives sentence on each count for which he/she is convicted | Unitary sentencing, meaning one overall sentence |

\textsuperscript{972} Id.
**Sentencing by members/jury**

Unanimous verdict in capital cases; Not applicable in most other cases because judge determines sentence in most jurisdictions

Unanimous verdict in capital cases; 3/4 vote for a sentence of life imprisonment or confinement for more than ten years; 2/3 vote for any other sentence

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**Sentencing Guidelines**

20 States, District of Columbia, and federal courts have sentencing guidelines to inform the sentencing process

Each offense carries a maximum penalty

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**Mandatory Minimums**

Exist in many states and federal system for a variety of offenses including some misdemeanors

- Dishonorable Discharge for penetrative sexual assault offenses
- Confinement for life for premeditated or felony murder
- Death for spying

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**Clemency**

Governor may grant pardon at the end of the process

The Convening Authority (or superior appellate authority) may set aside findings of guilt in limited circumstances,\(^{973}\) and convening authorities may not do so for "qualifying offenses," which include offenses where the maximum confinement sentence that may be adjudged does not exceed two years and the sentence adjudged does not include a punitive discharge or confinement for more than six months, and all offenses under Article 120 (a) (Rape) or 120 (b) (Sexual Assault), Article 120b (Rape and sexual assault of a child), or Article 125 (Forcible sodomy) of the UCMJ. Clemency rationale must be explained in writing. Also has rights at Service Clemency Parole Boards and a right to petition the President for Clemency.

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**Appeals Process**

Normally not granted automatic review; offender must file for review at the next higher court

All sentences with a punitive discharge or one year or greater confinement receive automatic appellate court review; all other cases automatically reviewed by a judge advocate.

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973 See FY14 NDAA, Pub. L. No. 113-66, § 1702(b) 127 Stat. 672 (2013). Under Section 1702 revisions to Article 60, convening authorities...
VIII. ADJUDICATION OF SEXUAL ASSAULT CASES

Twenty states, the District of Columbia, and the federal system have sentencing guidelines to inform the sentencing process.\textsuperscript{974} Congress established the federal sentencing guidelines and, although not binding, judges must consider them in selecting an appropriate sentence.\textsuperscript{975} The federal guidelines are derived from data analysis of sentences in thousands of cases\textsuperscript{976} and are monitored and revised by the United States Sentencing Commission, which consists of seven voting members and one nonvoting member, supported by a staff of over 100.\textsuperscript{977} The federal guidelines provide a suggested sentencing range based on the offense, including impact on the victim, as well as characteristics of the offender, including criminal history. The sentencing judge must calculate the guideline range, but may vary or depart from it with an explanation. There are no guidelines for particular offenses in courts-martial and, except for a very few specific offenses, the court-martial has unfettered discretion to adjudge any sentence from no punishment up to the prescribed maximum allowable punishment.\textsuperscript{978}

In federal civilian courts, sentencing usually occurs weeks or months after trial or acceptance of a guilty plea.\textsuperscript{979} The defendant (now called “offender” following adjudication of guilt) may or may not be detained during this time.\textsuperscript{980} During this period, a probation officer (an employee of the judicial branch of the United States Government) gathers information about the offender and prepares a Presentence Report (PSR).\textsuperscript{981} The report includes information about the circumstances of the offense(s) of conviction as well as background information about the offender, such as any prior criminal record, family, and employment history.\textsuperscript{982} The probation officer includes an initial calculation of the appropriate sentencing “range” under the U.S. Sentencing Guidelines in the PSR.\textsuperscript{983} The prosecution and defense have the opportunity to review the PSR and to contest matters in it.\textsuperscript{984} Each side may also present additional evidence at a sentencing hearing; the offender has the right of allocution at that hearing. Victims may also be heard at this proceeding.\textsuperscript{985} The procedures in most states are comparable.

\textsuperscript{974} Transcript of RSP Comparative Systems Subcommittee Meeting 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

\textsuperscript{975} Id. at 152-53 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines); see also Fed. R. Crim. P. 32.

\textsuperscript{976} See Transcript of RSP Comparative Systems Subcommittee Meeting 150-52 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

\textsuperscript{977} See 28 U.S.C. §§ 991-998.

\textsuperscript{978} See, e.g., 10 U.S.C. 906, 918 (UCMJ art. 109, 118).

\textsuperscript{979} See Fed. R. Crim. P. 32.

\textsuperscript{980} Id.

\textsuperscript{981} Id.; see also Transcript of RSP CSS Subcommittee Meeting 158, 170-73 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing role of probation officers and federal presentence report).

\textsuperscript{982} See Fed. R. Crim. P. 32.

\textsuperscript{983} Id.; see also Transcript of RSP CSS Subcommittee Meeting 158, 170-73 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing role of probation officers and federal presentence report).

\textsuperscript{984} See Fed. R. Crim. P. 32.

\textsuperscript{985} Id.
In courts-martial, the sentencing proceeding usually begins immediately after a guilty verdict is announced. This promptness allows the military to deliver swift punishment, quickly remove an offender from the unit, and return court-martial panel members to operational or training duties. The quick sentencing procedures result in other differences as well. There is no PSR in a court-martial. The trial counsel presents evidence from the accused's personnel records; this typically includes the service record of the accused and any prior convictions or disciplinary actions. Although the information in the accused's personnel record is less extensive than a PSR, it is readily available and requires no additional resources to collect. The trial counsel may also present other evidence of the circumstances of the crime, including the crime's impact on the victim. The defense may present evidence; the accused has the right of allocution.

In federal civilian criminal proceedings, and in most states, the defendant, or offender, receives a distinct sentence for each offense of which convicted. Thus, someone convicted of multiple offenses receives a sentence for each offense. The sentence for each offense is limited by a statutory maximum and, in some cases, minimum for the offense, plus any applicable guidelines. The judge has some discretion (often guided or cabined by guidelines or other rules) to direct that such separate sentences be served concurrently or consecutively, and sometimes may take other action to merge sentences for closely related offenses.

By contrast, a court-martial adjudges a single sentence regardless of the number of offenses of which the accused is found guilty. The maximum punishments for each offense of conviction are added together and presented to the court-martial for sentencing. The court-martial then has discretion to adjudge any sentence between no punishment at all and the aggregate maximum. The single sentence adjudged will not indicate what role or weight any particular offense played in determining the sentence.

986 See MCM, supra note 97, R.C.M. 1001-1007 (sentencing).
987 Id.
988 Id.
989 See United States v. Weymouth, 43 M.J. 329, 336 (C.A.A.F. 1995) (discussing unitary sentencing and distinctions between military and federal law); Jackson v. Taylor, 353 U.S. 569 (1957) (discussing unitary sentence). Because a prior conviction is almost always a bar to enlistment, and because any conviction while in military service almost always leads to punitive or administrative discharge, it is relatively rare for a court-martial defendant to have a prior conviction.
990 See MCM, supra note 97, R.C.M. 1001-1007 (sentencing).
991 Id.
992 Id.
994 See, e.g., Setser v. United States, ___ U.S. ___, ___ 132 S. Ct. 1463 (2012) (discussing concurrent and consecutive sentences in the context of federal and state convictions); see also Weymouth, 43 M.J. at 336 (discussing unitary sentencing and distinctions between military and federal law).
996 The maximum allowable punishments for each punitive article under the UCMJ are established by the President and are promulgated by Executive Order in accordance with 10 U.S.C. 836, UCMJ art. 36.
997 Unless any of the offenses of conviction carries a mandatory minimum sentence.
998 See, e.g., United States v. Savala, 70 M.J. 70 (C.A.A.F. 2011) (reversing conviction for attempted larceny, rape, unlawful entry, and adultery for which adjudged sentence was seven years of confinement, forfeiture of $898.00 pay per month for 84 months, and reduction to pay grade of E-1).
This unitary sentence system used in courts-martial has the virtue of making sentencing proceedings and deliberations less complicated, which may be especially valuable when lay court members adjudge the sentence. However, this procedure may lead to less careful consideration of each and every offense of conviction and disparity in outcomes, as well as raising other related concerns, described below.

In cases with plea agreements, the military judge or court members, depending on the accused’s election, adjudicates one sentence for all offenses of conviction according to the usual procedures.999 The judge or members do not know the agreed sentence cap between the accused and convening authority.1000 If the sentence the court-martial adjudged exceeds the maximum sentence agreed to by the convening authority, the convening authority is required to reduce the sentence from that adjudged to at most, the agreed upon sentence cap.1001 If the sentence adjudged is less than the agreed upon sentence cap, it becomes the sentence unless the convening authority grants clemency or an appellate authority takes action to reduce the sentence.1002 This difference in negotiated plea procedures, through which the convicted Service member can “beat the deal” if the judge or panel adjudges a sentence lower than the negotiated maximum sentence, is the product of the convening authority’s statutory authorities, including clemency authority.1003

In capital courts-martial, the accused may not plead guilty, an accused may not be tried or sentenced by military judge alone, and a death sentence returned by members must be unanimous.1004 This parallels the practice in federal courts1005 and in most state courts. In courts-martial and in federal and state proceedings, members, or a jury, are required to decide a series of specific questions, such as whether the prosecution has proven that one or more aggravating circumstances exist, as part of their determination whether to adjudge a sentence of death.1006

**B. SENTENCING BY JUDGE OR JURY/PANEL MEMBERS**

1. **Scope of Inquiry and Empirical Data**

The Subcommittee was asked to consider various questions relating to sentencing in courts-martial. In general, the Subcommittee determined it would be inefficient and unwise to recommend changing sentencing procedures and standards in courts-martial only for sexual assault offenses. For example, recommendations that may include eliminating sentencing by members or unitary sentencing are more feasible and employable if they are implemented across all types of offenses. The Subcommittee recognizes that such recommendations would exceed the scope of the Subcommittee charter, and therefore recommends further study of those

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999 See Weymouth, 43 M.J. at 336 (discussing unitary sentencing and distinctions between military and federal law); Jackson v. Taylor, 353 U.S. 569 (1957) (discussing unitary sentence).

1000 See MCM, supra note 97, R.C.M. 705 (plea agreement); R.C.M. 910 (plea inquiry); see also Services’ Responses to Request for Information 68 (Nov. 21, 2013); Kisor, supra note 873, at 46.

1001 See MCM, supra note 97, R.C.M. 705 (plea agreement); R.C.M. 910 (plea inquiry).

1002 Id.

1003 See generally 10 U.S.C. §§ 857, 857a, 858a, 858b, 859, 860 (UCMJ arts. 57, 57a, 58a, 58b, 59, 60).

1004 See 10 U.S.C. §§ 816, 825a (UCMJ arts. 16, 25a); MCM, supra note 97, R.C.M. 903(a)(2); R.C.M. 1004.


1006 Id.

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
issues surrounding sentencing procedures. Furthermore, the Subcommittee was unable to obtain empirical or quantifiable data regarding how courts-martial sentences may be impacted by these recommendations. The lack of data is partly due to two procedures inherent in courts-martial.

First, the unitary nature of courts-martial sentences makes it difficult to isolate sentences adjudged for particular offenses, including sexual assault offenses. When courts-martial convict Service members of more than one offense, it is unclear what portion of the aggregate punishment was based on any particular offense.

Second, courts-martial procedures provides no consolidated data source, such as a PSR, to determine the circumstances of the offense(s) of conviction and the background of the accused. The more granular information that is readily available in a PSR can be ascertained, if at all, in a court-martial only by a review of the entire record in each case. The lack of standardized, consolidated sentencing data in the courts-martial system makes comparing sentencing decisions cumbersome and challenging. Comparing courts-martial sentences based solely on convicted offenses may suggest widely disparate application of sentencing principles because matters in aggravation, extenuation, and mitigation are not maintained as part of the sentencing data as they would be in a PSR. Nevertheless, better data collection reflecting convicted offenses and corresponding sentences will significantly aid any future study into modification of court-martial sentencing procedures.

**Recommendation 52:** The Secretary of Defense direct the Service Secretaries to provide sentencing data, categorized by offense type, particularly for all rape and sexual assault offenses under Article 120 of the UCMJ, forcible sodomy under Article 125 of the UCMJ, or attempts to commit those acts under Article 80 of the UCMJ, into a searchable DoD database, in order to: (1) conduct periodic assessments, (2) identify sentencing trends or disparities, or (3) address other relevant issues. This information should also be available to the public.

**Finding 52-1:** Sentencing data in the different Services is not easily accessible to the public. The Military Services use different systems to internally report data from installations around the world. If the Services’ software programs and data fields (in DSAID, for example) are modified to include sentencing information, it would not be overly burdensome for the Services to provide this data to DoD.

**Recommendation 53:** The Secretary of Defense direct the Military Services to release sentencing outcomes on a monthly basis to increase transparency and promote confidence in the system.

**Finding 53-1:** The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all Special and General Courts-Martial to the Navy Times on a monthly basis.1007

**Discussion**

The lack of uniform, offense-specific sentencing data from military courts-martial makes meaningful comparison and analysis of sentencing outcomes in military and civilian courts difficult, if not impossible.

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Compounding this lack of uniformity is the data’s relative unavailability, which can foster misunderstanding and confusion, and limits the opportunity for an impartial examination of the system. On the other hand, making sentencing data available in an intelligible, predictable manner may serve to educate outsiders about the military justice process, strengthen confidence in the system, and dispel concerns about the outcomes in controversial cases.

The DoD’s Annual SAPRO Report to Congress includes individual Service reports to SAPRO, highlighting areas of improvement, changes in policy, and statistical trends, including case synopses of unrestricted reports. The Service spreadsheets contain a large amount of case information – including offenses alleged, location, grade of the subject and victim, military status of the victim, and some disposition information – about every unrestricted report filed in a given fiscal year. This data, while useful in identifying trends and risk patterns, does not contain the depth of sentencing information that is required to intelligibly inform sentencing reform in military courts-martial. For instance, the reports detail the “most serious offense” of which the accused was convicted, but does not indicate all convicted offenses. The reports only indicate whether the accused received certain punishments, like confinement, forfeitures, or reduction in rank, but not the length of confinement or the amount of the forfeiture. Without access to more detailed data, including all convicted offenses and the exact sentence adjudged, critically evaluating sentencing data remains incredibly challenging across the Services.

2. Judge Alone vs. Panel Members Sentencing

**Recommendation 54:** The Secretary of Defense recommend amendments to the MCM, the UCMJ, and Service regulations, respectively, to make military judges the sole sentencing authority in sexual assault and other cases in the military justice system.

**Finding 54-1:** In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. There are six states that allow jury sentencing in felony cases. The military retains an option for sentencing by panel members at the accused’s request.

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1009 FY13 SAPRO Annual Report, supra note 63, encls. 2–5.

1010 Id.

1011 See MCM, supra note 97, R.C.M. 903 (choice of forum); see also id., R.C.M. 1001–1007 (sentencing).

1012 See supra note 967.

1013 See MCM, supra note 97, R.C.M. 903; R.C.M. 910; R.C.M. 1001–1007. The court members are called the “panel,” not the “jury,” which is not used in the military.
Discussion

a. Judges’ Expertise and Experience Supports Changing the Military Justice System to Judge Alone Sentencing

During site visit discussions about adult sexual assault cases, counsel raised the issue of “wildly unpredictable” sentences by panel members. The Subcommittee could not empirically verify this, for reasons discussed above, but it has long been “conventional wisdom” that members’ sentences are more unpredictable. However, even without empirical data on sentencing differences or disparities, the greater expertise and experience of the military judge supports the conclusion that sentencing by military judges would be qualitatively superior and perceived with greater confidence in sexual assault and other cases, most, if not all, of the time.

b. Background

In federal court, as in forty-four states, judges exercise exclusive sentencing authority. In courts-martial, as noted above, members decide the sentence when the accused has so elected. A majority of the Subcommittee has recommended adoption in courts-martial of the practice in the large majority of civilian jurisdictions: sentencing by judge only, except in capital cases. A majority of the Subcommittee believes that this would foster greater expertise, consistency, and confidence in sentencing. These concerns are particularly acute in sexual assault cases.

Increased media and public attention, coupled with instantaneous worldwide coverage of adult sexual assault cases in the military, have magnified the scrutiny of sentences in the military justice system, particularly those in adult sexual assault cases. This may affect the views victims hold about the fairness of the military’s legal system. The views victims hold of likely consequences to offenders may also affect their willingness to report; in one recent survey, fifty percent indicated that they chose not to report the incident because they “did not think anything would be done.” While sentences may or may not be connected to this lack of confidence

1014 Major General (Retired) Kenneth J. Hodson, former Judge Advocate General of the Army, testified to the 1983 Commission: “I dealt with many convening authorities, and none have ever complained of the findings of a court, but many have been upset by the sentence . . . Incidentally, I have never had a convening authority complain about a sentence imposed by a judge . . . Sentences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery.” See Military Justice Act of 1983 Advisory Commission, Advisory Comm’n Report 89-90 (1984) [hereinafter Comm’n Report], available at http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf.

1015 See, e.g., Robert A. Weninger, Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas, 45 Wash. U. Urb. & Contemp. L. 3, 39 (1994) (discussing jury sentencing in statistical analysis of sentences imposed by judges and juries demonstrating that jurors sentenced more severely and concluding that jurors “may be both more harsh and more erratic than judges”).


1017 See, e.g., Matthew H. Brown, Breaking the Silence, Balt. Sun (Dec. 14, 2013) (noting barriers to reporting, which include skepticism about whether attackers will be punished); see also, e.g., Stephanie McCrummen, The Choice: Service Members Who Say They Were Sexually Assaulted Face Agonizing Decisions about Whether to Speak Up or Stay Silent, Wash. Post (Apr. 12, 2014) (discussing punishment as factor in reporting decision).

1018 See, e.g., U.S. Dep’t of D ef., 2013 Service Academy Gender Relations Focus Groups Overview Report 162 [hereinafter Focus Groups Report], available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf (discussing views of cadets indicating that some offenders believe they can get away with certain behaviors).

in the system, a majority of the Subcommittee concludes that entrusting sentencing to trained professionals improves the military justice system’s overall credibility, as discussed further below.

Until 1969, sentencing in courts-martial was by members only in all cases. Along with other expansions of the authority and responsibility of the military judge, the option of judge-alone sentencing was added by the Military Justice Act of 1968. Military justice practitioners, academics, and others have debated the military’s sentencing procedures, including sentencing by panel members.1020 Congress directed the 1983 Advisory Commission to the Military Justice Act of 1983 to study the issue, in conjunction with enacting significant reforms in 1983.1021 The divided Commission of nine men (five from the military) ultimately recommended retaining the practice, with two civilian members dissenting.1022 However, the Commission did not specifically consider adult sexual assault crimes, the perspectives of victims, or public confidence in the military justice system.1023

Sentencing is a challenging part of the criminal trial process, even for judges with professional training.1024 The increasing complexity of evidence in sexual assault cases, interplay of victims’ rights considerations, including the Crime Victims’ Rights Act1025 and Special Victim Counsel,1026 and serious collateral consequences for sex offense convictions1027 may amplify the challenge. Training for military judges concentrates on issues in adult sexual assault cases, including best practices for evidence, victims’ rights, and sentencing.1028 In contrast,

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1020 See, e.g., Captain Megan N. Schmid, Military Justice Edition: This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions, 67 A.F. L. Rev. 245, 267–68 (2011) (proposing changes to improve military sentencing); see also Kisor, supra note 873 (comparing federal system to military system and proposing abolition of members sentencing, among other reforms); Immel, supra note 961; James A. Young, III, Revising the Court Member Selection Process, 163 Mil. L. Rev. 91, 111 (2000) (discussing instructions given to court members and members’ lack of familiarity with process); James K. Lovejoy, Abolition of Court Member Sentencing in the Military, 142 Mil. L. Rev. 1, 29–30 (1994) (contending that option between sentencing by military judge or court members causes forum shopping).

1021 See Comm’n Report, supra note 1014. The Commission was “composed of nine members, five of whom were senior judge advocates with expertise in military justice from each Service, one who was a staff member of the United States Court of Military Appeals and three who were civilian attorneys recognized as experts in military justice or criminal law.” Id. at V.

1022 Id. at 6; see also id., Minority Report in Favor of Proposed Change to Judge-Alone Sentencing, at 28–46 (Commissioner Christopher J. Sterritt). Since the Commission’s report, Kentucky and Oklahoma have done away with jury sentencing. In the six remaining states that permit jury sentencing, two place limits on the jury. See Murphy v. Commonwealth, 50 S.W. 3d 173, 178 (Ky. 2001) (stating jury sentence recommendation has no mandatory effect); see also Okla. SIM. AN. tit. 22, § 927.1 (2003).


1025 18 U.S.C. § 3771, codified for the military through FY14 NDAA §1701(a), which incorporated the same crime victim’s rights from the CVRA into Article 6b of the UCMJ. Those rights are to be implemented through changes to the Manual for Courts-Martial no later than December 26, 2014.

1026 See U.S. DEP’T OF DEF., DTM 14-003, DoD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT 9 (Feb. 12, 2014); see also DoD and Services’ Responses to Request for Information 50 (Nov. 21, 2013).

1027 See, e.g., Transcript of RSP Public Meeting 356–58 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender, describing complexity of sexual assault cases and discussing varying state collateral consequences of convictions).

1028 See Services’ Responses to Request for Information 147 (Apr. 11, 2014) (listing training and selection requirements).
court-martial panel members have no training, no experience,\textsuperscript{1029} and are provided few instructions\textsuperscript{1030} for sentencing. As noted in the 1983 Commission Report’s dissent, “The right to members’ sentencing is no more than the right to gamble on a group of inexperienced or overly sympathetic laymen reaching a less severe sentence than a professional judge.”\textsuperscript{1031} However, one statistical analysis of civilian jury sentences indicates that such sentences are harsher, not more lenient, than those of judges—and that, in any event, jury sentences are not reliable.\textsuperscript{1032} Further, the American Bar Association Standard 18-1.4 holds that sentencing is a judicial function that should not be performed by juries:

> Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury’s role in a criminal trial should not extend to determination of the appropriate sentence.\textsuperscript{1033}

\section*{c. Arguments Supporting Changing to Judge Alone Sentencing}

\subsection*{(1) Military Judges’ Greater Training and Experience}

Military judges are carefully screened and selected for their judicial temperament, legal experience, and knowledge of procedure and law.\textsuperscript{1034} They are members of the bar of a Federal court or the highest court of a state, and certified as qualified for duty as a military judge by their TJAG.\textsuperscript{1035} Additionally, military judges are uniformed military officers, not civilians, selected for their abilities as both lawyers and military officers.\textsuperscript{1036}

Military judges receive specific professional training in selecting sentences that take into account all principles of sentencing.\textsuperscript{1037} Unlike military members, judges gain experience by presiding over various types of cases,
working with other judges, and participating in ongoing judicial education that incorporates best and promising practices of the judiciary.\textsuperscript{1038}

On the other hand, military panel members are not required to have any legal experience to participate in sentencing.\textsuperscript{1039} Most military panel members participating in sentencing, including in cases involving adult sexual assault, have never done so before.\textsuperscript{1040} Although military panel members receive instruction about the goals of sentencing,\textsuperscript{1041} the instruction does not equate to the training, experience, and understanding of the collateral consequences of convictions that military judges have.

Unlike the binary, structured, “not guilty/guilty” determination that members make on findings, the sentencing decision is more complex. During a trial, the question posed to panel members concerns the elements, a given standard of proof, and whether the government has carried its burden. While some charges such as conspiracy or inchoate crimes may be complex, the jury’s task remains to answer one question: Did the government meet its burden of establishing guilt beyond a reasonable doubt?\textsuperscript{1042}

Conversely, sentencing presents no such structured task. The range of potential sentencing options includes confinement, forfeitures, and fines.\textsuperscript{1043} Selecting a fair sentence involves assessing this range of punishments, including punishments not available in the civilian judicial system such as discharge from the Service and reduction in rank.\textsuperscript{1044} Likewise, military members have complained in the past that selecting a sentence is harder than voting on guilt or innocence.\textsuperscript{1045} Thus, sentencing may produce confusion that, when coupled with a lack of sentencing training and experience, may lead to unwarranted disparities.\textsuperscript{1046}

\begin{itemize}
  \item \textsuperscript{1038}Id.
  \item \textsuperscript{1039}See 10 U.S.C. § 825 (UCMJ art. 25); see generally, e.g., United States v. Gutierrez, 11 M.J. 122, 125 (C.M.A. 1981) (Everett, C.J., dissenting) (discussing maximum punishment advisement to members and stating about sentencing that “[w]hile court-martial members should not languish in ignorance, they should also be shielded from information which could well tend to confuse or mislead them”).
  \item \textsuperscript{1040}See supra notes 1021, 1037.
  \item \textsuperscript{1041}See generally U.S. Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook, Instr. 2-5-21 (2014).
  \item \textsuperscript{1042}It should be noted that in capital cases, both military and civilian, the decision whether to adjudge death is more like that on guilt or innocence than sentencing in other cases. This is because constitutional requirements in capital cases dictate a highly structured process in which the jury, or members, must decide specific questions applying an articulated standard of proof.
  \item \textsuperscript{1043}Sentencing complexity may be one reason: In the military, all known offenses committed by an accused may be tried at the same time, even if the offenses are not related to each other in any way. MCM, supra note 97, R.C.M. 307(c)(4) (“Charges and specifications alleging all known offenses by an accused may be preferred at the same time.”).
  \item \textsuperscript{1044}Punishments not available in civilian settings include: reprimand; reduction in pay grade; restriction to specified limits; hard labor without confinement; and punitive separation. See MCM, supra note 97, R.C.M. 1006; R.C.M. 1007. Punishments typically available in the civilian setting include: the death penalty; incarceration; probation (remain at liberty but subject to certain conditions and restrictions such as drug testing or drug treatment); fines; and restitution. See Bureau of Justice Statistics, “The Justice System: What Is the Sequence of Events in the Criminal Justice System: Sentencing and Sanctions” at http://www.bjs.gov/content/justsys.cfm#sentencing.
  \item \textsuperscript{1045}See Young, supra note 1020, at 111.
  \item \textsuperscript{1046}See Immel, supra note 961, at 186–87 (concluding that military sentencing data indicates high degree of disparity); see also Kisor, supra note 873, at 56 (discussing sentencing disparities in military members sentencing cases).
\end{itemize}
(2) Panel Member Sentencing May Invite Forum Shopping

Those supporting eliminating members sentencing posit that allowing the accused the choice of forum on sentence may invite consideration of which forum will provide the most lenient sentence, which the 1983 Commission Report recognized.\(^{1047}\) However, as noted, civilian jury sentencing research indicates that jury sentences may in fact not be more lenient, but may instead be more severe; in any case, the study shows them to be less predictable.\(^{1048}\)

As noted earlier, the Commission Report predated current law, which, since 1994, has allowed the government to insist on sentencing by military judge as a condition of obtaining a pretrial agreement.\(^{1049}\) However, the fact that most adult sexual assault cases go to trial diminishes the significance of this provision.\(^{1050}\)

(3) Panel Member Sentencing is Administratively Burdensome

Member sentencing requires the absence of panel members from their regular duties, disrupting ordinary military training and operations. Allowing a military judge to perform sentencing would allow panel members to return to their commands and normal duties more quickly.

(4) Members Sentencing May Undermine Victim and Public Confidence in the Military Justice System

Members are selected by the convening authority, based on that official’s assessment of their qualifications.\(^{1051}\) Even though convening authorities endeavor to select fair and unbiased members, the fact that the person who is deeply involved in the case and who elected to prosecute also chose the members can give rise to the perception of unfairness.\(^{1052}\) Of course, an accused that fears manipulation or even unintended influence by the convening authority has the option to choose trial and sentencing by the military judge. However, a victim who lacks faith in the convening authority has no such option. Nevertheless, if a panel returns a lenient sentence, public confidence in the convening authority's member selection is subject to challenge, with critics suggesting the command purposefully chose lenient members. If a panel returns an extraordinarily harsh sentence, public perception of the convening authority's member selection may also be challenged, calling into question the fairness of the military justice system.

\(^{1047}\) See Comm'n Report, supra note 1014, at 28 (“Continuing a Service member’s forum option through the sentencing phase enables an accused to ‘forum shop’ for the court-martial composition which is likely to award the most lenient sentence.”); see also Lovejoy, supra note 1020, at 29-30 (contending option between sentencing by military judge or court members causes forum shopping).

\(^{1048}\) See generally Weninger, supra note 1015.

\(^{1049}\) United States v. Burnell, 40 M.J. 175, 176 (C.M.A. 1994) held that, "The Government, when considering proposing a pretrial agreement, is not prohibited from insisting that an accused waive his right to trial by members . . . Such a provision may not only originate with the Government, it may also be required by the convening authority before he or she will even consider acceptance of any pretrial agreement."

\(^{1050}\) See Army’s Response to Request for Information 41(h) (Nov. 21, 2013). According to the Army’s response to Request for Information 41(h), the Army was the only Service that tracked the number of adult sexual assault cases that went to trial versus guilty plea before FY 2013. The FY13 contested case data shows 70% for the Army, 77% for the Navy, and 22% for the Coast Guard (with no data received from the Marine Corps).

\(^{1051}\) 10 U.S.C. § 825 (UCMJ art. 25).


The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Similarly, sentences in adult sexual assault cases may affect victim confidence in the military justice system.\textsuperscript{1053} Victim confidence in adult sexual assault case sentencing outcomes, in turn, may affect victim reporting.\textsuperscript{1054}

d. Arguments Favoring Retention of Members Sentencing\textsuperscript{1055}

\textit{(1) Members Sentences Best Represent the Military Community’s Perspective}

Proponents of panel-member sentencing state that it represents the considered judgment of the military community; panel members can best assess the impact of a military offense on the good order and discipline of the specific command in which it occurs.\textsuperscript{1056} In the past, this argument may have carried particular weight in a combat environment, where combat experience may have afforded particular insight into relevant circumstances.\textsuperscript{1057} A related benefit of members sentencing is that the process may reinforce the military community’s perceptions of fairness, because military members choose the sentence.

\textit{(2) Members Sentencing is an Important Right of the Accused}

Supporters of panel members sentencing argue that the existence of the practice of sentencing by members is an important right for those accused of committing a crime in the military. They also contend that the number of cases in which accused Service members elects sentencing by members demonstrates its desirability.\textsuperscript{1058} Sentencing includes uniquely military offenses such as failure to obey an order or regulation, contempt towards officials, unauthorized absence, and disrespect towards superiors.\textsuperscript{1059}

Members bring a ‘sense of the community’ that judges cannot entirely duplicate. Although that ‘sense’ sometimes includes considerations that some of us would think came from left field, it also includes appreciation of unique aspects of military life that can be very important, especially when dealing with certain military type offenses. This often works in the accused’s favor and could be considered an important protection.\textsuperscript{1060}


\textsuperscript{1054}For a more detailed discussion of Victim’s Rights, including a recommendation on the right of allocution, see the Report of the Victim Services Subcommittee to the Response Systems Panel, supra note 16.

\textsuperscript{1055}Subcommittee member Colonel Lawrence J. Morris’s (U.S. Army, Ret.) statement appears \textit{infra} at Part IX, and details arguments favoring retaining the current members sentencing system. Colonel (R) Morris is joined by Colonel Dawn E.B. Scholz (U.S. Air Force, Ret.) in the dissent, ultimately concluding that further study is needed. Colonel Scholz concluded, “like the change to the Art 32 hearing proposed in Recommendation 43-E, we do not have enough information as to the need for this, the larger ramifications of this change or how it might benefit DOD’s response to sexual assaults. I do not think we have enough evidence of disparity of sentences and am not sure we know how this helps sexual assault victims. It does take an option away from the accused. I believe it needs further study by the JSC or the JPP before we recommend [the Secretary of Defense] recommend amendments to the MCM, the UCMJ, and Service regulations.”


\textsuperscript{1057}However, over the past decade of deployments, military judges have deployed, and many come to the judiciary after serving in operational positions.

\textsuperscript{1058}As noted \textit{supra}, however, because the accused Service member’s choice of forum dictates the sentencing authority, others respond that this election may simply signal the desire for a trial before members, rather than any preference for sentencing.


\textsuperscript{1060}Cooke, \textit{supra} note 1052, at 20.
(3) **Experience for Future Commanders and Leaders**

Those in favor of retaining member sentencing in the military state that direct participation in the military justice system helps to involve members of the military community in the court-martial process and to prepare future commanders and leaders. This develops their judgment, as well as their knowledge of the process. In turn, this makes them better leaders, commanders, and convening authorities. Nonetheless, participation in court-martial trials satisfies these interests, and eliminating sentencing by members does not preclude or diminish such participation. Thus, leaving sentencing to judges preserves these interests while promoting best outcomes in sentencing, which serves to enhance the overall credibility of the military justice system.

**e. Positions of Military Services on Member Sentencing**

The RSP asked the Services for their positions on eliminating member sentencing. The Services’ positions generally identified the arguments already listed. The Army noted that selecting a sentencing forum has been a right of the military accused for many years, and expressed hesitation at making such a change “without careful study and consideration.” The Air Force “JAG Corps leadership recommends that the concept of judge-alone sentencing be forwarded to the Judicial Proceedings Panel (JPP) and the Military Justice Review Group (MJRG) for further study in the context of any other proposed changes to the court-martial process. At this point, the Air Force does not have an official position on eliminating sentencing by military panel members as a stand-alone proposition.” The Marine Corps supported further study of the issue by the Judicial Proceedings Panel. The Coast Guard was undecided or favorable toward judge-alone sentencing.

**f. Conclusion**

There are valid arguments for and against eliminating sentencing by court members and requiring sentencing by the military judge in all cases (except capital cases). A majority of the Subcommittee concluded as a policy decision, however, that sentencing by military judges would provide greater expertise, mitigate emotional or extraneous factors, and increase confidence in courts-martial sentences in sexual assault and other cases. It would also facilitate other possible beneficial changes in sentencing such as abolishing unitary sentencing.

**C. UNITARY SENTENCING PRACTICE**

**Recommendation 55:** The Secretary of Defense recommend amendments to the MCM and UCMJ to impose sentences which require the sentencing authority to enumerate the specific sentence awarded for each offense and to impose sentences for multiple offenses consecutively or concurrently to the President and Congress, respectively.

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1061 Sentencing by military members after a guilty plea before a military judge is possible but seldom occurs.

1062 See Army’s Response to Request for Information 148 (Apr. 11, 2014). However, there is no way to determine whether the “right” reflects the accused’s decision for trial or sentencing by members—because forum selection governs both. The proposed recommendation does not affect an accused’s choice to select a trial by members.


1065 See Coast Guard’s Response to Request for Information 148 (Apr. 11, 2014).
Finding 55-1: The military system uses a unitary or aggregate sentence provision for multiple specifications (counts) of conviction. In other words, a sentence is adjudged as a total for all offenses, rather than by specific offense. However, the FY14 NDAA changes to Article 60 restrict the convening authority’s ability to set aside or commute findings of guilt, and specifically exclude offenses under Article 120(a) or 120(b), Article 120b, or Article 125 of the UCMJ even though convictions for these offenses often occur with convictions for other non-sexual offenses. Thus, the practice of awarding a sentence as a total, rather than specified by each offense of conviction, makes the convening authority’s ability to act on these additional specifications unclear, obscures the punitive consequences of specified offenses, and makes accountability for sexual assault difficult to ascertain.

Discussion

The FY14 NDAA change to Article 60 clemency affects “unitary sentencing” because the convening authority’s ability to grant clemency for certain offenses is restricted. Consequently, the convening authority must know the precise sentence awarded for each offense of conviction to effectively exercise clemency.

As noted in Finding 55-1, sentences are currently adjudged in the aggregate. The aggregate sentence may result in the need for a sentencing rehearing when appellate courts remand cases (though most of the time the appellate court reassesses in light of error). For example, consider a Service member convicted of two specifications of sexual assault and one specification of adultery who receives 15 years of confinement. A rehearing could occur if the appellate court approves only one specification of sexual assault and the appellate court determines it cannot accurately reassess the sentence. Although they are not the norm, rehearings can place post-trial burdens on victims and prevent case closure because victims have to re-appear at sentencing. Additionally, rehearings can be time consuming, costly, and logistically challenging because witnesses move, deploy, and separate from the Service.

The Military Services’ provided their positions regarding proposing an amendment to discontinue unitary sentencing. The Army opposes a change without further careful study, noting that such a change could affect plea negotiations and potentially create appellate issues. The Air Force opposes the change. The Coast Guard did not take a position supporting or opposing the change, but listed perceived pros and cons. The Marine Corps supports further study.

D. SENTENCING GUIDELINES

Recommendation 56: The Subcommittee does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time. Rather, the Subcommittee recommends: (1) enhancing the military judge’s role in the military justice system, including in sentencing decisions, (2) data collection and analysis, and (3) sentencing for specific offenses instead of unitary sentencing.

Finding 56-1: There are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President, exercising his authority under the UCMJ, establishes a maximum punishment

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1068 See Services’ Responses to Request for Information 149 (Apr. 11, 2014).
for each offense. In contrast, the federal system, twenty states, and the District of Columbia use some form of a sentencing guideline system.

**Finding 56-2:** Sentencing guidelines are often complex and may require substantial infrastructure to support them, including sentencing commissions which study, develop, implement and amend the guidelines over time. For instance, to formulate baseline recommendations for federal sentencing guidelines, the United States Sentencing Commission collected and examined data from 100,000 cases that had been sentenced in federal courts—10,000 of which it studied in “great detail.”

**Finding 56-3:** A proper analysis of sentencing guidelines would require the appropriate time and resources to: (a) gather the data and rationale to support such a recommendation, (b) determine the form the guidelines should take, (c) assess whether the military should adopt sentencing guidelines in sexual assault or other cases.

**Finding 56-4:** A proper assessment of whether the military should adopt some form of sentencing guidelines in sexual assault or other cases requires in depth study beyond the time and resources of the Subcommittee.

**Finding 56-5:** The Subcommittee heard no empirical evidence of whether inappropriate sentencing disparities exist in sexual assault or other courts-martial. After gathering evidence and testimony from federal and state experts in sentencing guidelines, the Subcommittee recognized that a complete study would involve a comprehensive comparison to federal and state sentencing guidelines to determine whether they would be appropriate in the military justice system, and if so, what guideline model to follow.

**Finding 56-6:** There are numerous complicated policy and structural issues to factor into such a decision, including:

- The overarching goals in current state and federal sentencing guidelines vary based on the method of development, articulated purposes, structure, and application. Some common objectives include reducing sentencing disparities, achieving proportionality in sentencing, and protecting public safety.

- There are two approaches used in creating sentencing guidelines: (1) a descriptive approach, which is data-driven and used to achieve uniformity, and (2) a prescriptive approach, which is used to promote certain sentences.

- Different entities oversee sentencing guidelines in the state and federal systems, with some choosing judicial agencies and others choosing legislative agencies.

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1070 Id. at 242 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

1071 Id. at 242–44.

1072 Id. at 264 (testimony of Mr. Mark Bergstrom, Pennsylvania Commission on Sentencing).

1073 Id. at 247 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).
The flexibility of sentencing guidelines varies widely in the states, ranging from mandatory to presumptively applicable to completely discretionary.\footnote{1074} Additional details include: (1) whether a worksheet or structured form is required, (2) whether the commission regularly reports on guidelines compliance, (3) whether compelling and substantial reasons are required for departures, (4) whether written rationales are required for departures, and (5) whether there is appellate review of defendant or government based challenges related to sentencing guidelines.\footnote{1075}

The actual prison sentences defendants serve in jurisdictions with sentencing guidelines also varies depending on laws affecting parole and other “truth in sentencing” issues.\footnote{1076}

Discussion

The Subcommittee received background information and heard testimony from civilian experts in state and federal sentencing guidelines, including a representative from the United States Sentencing Commission (USSC), Virginia Criminal Sentencing Commission, and Pennsylvania Commission on Sentencing.\footnote{1077} The USSC representative has served at the USSC since its inception, and provided detailed information about the background of sentencing guidelines and the data collected in their creation.\footnote{1078}

Twenty states, the District of Columbia, and the federal system have sentencing guidelines.\footnote{1079} States differ in their approach to which group provides oversight of the sentencing guidelines, with some choosing judicial agencies and others legislative agencies.\footnote{1080} The USSC uses an extensive database of federal criminal trials and sentences.\footnote{1081} To create the Guidelines, the Commission collected and examined data from 100,000 cases sentenced in federal courts to create an initial sentencing database.\footnote{1082} Of those 100,000 cases, the Commission studied 10,000 in “great detail.”\footnote{1083} The Commission continues to use that data, along with other information, as it formulates new sentencing policy recommendations.\footnote{1084} The Commission currently has a staff of over 100 people.

This volume of data is unlikely to be available for analysis in the military community, both because there are far fewer cases, and because of the limits on empirical information described above. Nonetheless, this suggests that considerable data collection and analysis may be required to fairly assess the issue, and this would have

\footnote{1074 \textit{Id.} at 249-50.}
\footnote{1075 \textit{Id.} at 251–52.}
\footnote{1076 \textit{Id.} at 260.}
\footnote{1077 See generally \textit{Transcript of RSP Comparative Systems Subcommittee Meeting} 239-342 (Feb. 11, 2014).}
\footnote{1079 \textit{Transcript of RSP Comparative Systems Subcommittee Meeting} 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar–Owens, Virginia Criminal Sentencing Commission).}
\footnote{1080 \textit{Id.} at 247.}
\footnote{1081 \textit{Id.} at 149 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission).}
\footnote{1082 \textit{Id.}}
\footnote{1083 \textit{Id.}}
\footnote{1084 \textit{Id.} at 149–150.}
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

significant resource implications. Furthermore, a guideline system could have collateral effects on other courts-martial procedures, including how evidence is collected and presented, whether to retain unitary sentencing, and courts-martial record-keeping.

Ultimately, the jurisdictions that have employed sentencing guidelines have had clearly articulated policy reasons for implementing those guidelines, and each jurisdiction’s policy followed deliberate collection of quantifiable, empirical evidence.1085 “The most frequent [reason] that’s cited or articulated is to reduce sentencing disparity or increase consistency in sentencing outcomes.”1086 Though the most commonly cited reason for instituting sentencing guidelines, the goal of consistency in sentencing is often the most vulnerable to criticism. One public defender testified to the Subcommittee regarding federal sentencing guidelines, “The one thing I have discovered is that there is absolutely no uniformity as far as I can tell. Every district does the sentencing guidelines differently, and every district has its own policies [for applying the sentencing guidelines].”1087 Because of this potential for criticism, sentencing guidelines must be carefully studied, judiciously crafted, widely trained upon implementation, and audited for general consistency in application.

### E. MANDATORY MINIMUM SENTENCES

**Recommendation 57:** Congress not enact further mandatory minimum sentences in sexual assault cases at this time.

**Finding 57-1:** Mandatory minimum sentences remain controversial.1088 Testimony and other evidence the Subcommittee gathered from civilian prosecutors, civilian defense counsel, and two victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting.1089

**Finding 57-2:** Mandatory minimum sentences may decrease the likelihood of resolving cases through guilty pleas, especially if the mandatory minimum sentences are perceived as severe. In the FY14 NDAA, Congress tasked the JPP to examine mandatory minimums over a period of years. The JPP will be better positioned to further analyze the potential impact of mandatory minimum sentences on military sexual assault offenses.

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1085 See generally Transcript of RSP Comparative Systems Subcommittee Meeting (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, and Mr. Mark Bergstrom, Pennsylvania Commission on Sentencing, discussing history and development of sentencing commissions and guidelines).

1086 Id. at 243 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission). For further information on study and implementation of sentencing guidelines, see also PowerPoint Presentation of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, to RSP Comparative Systems Subcommittee, “Virginia Criminal Sentencing Commission, Overview of State Sentencing Guidelines and Sentencing Guidelines for Sexual Assault Offenses in VA” (Feb. 11, 2014).


1089 See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 311 (Feb. 11, 2014) (testimony of Ms. Annette Burrhus-Clay, President, National Alliance to End Sexual Violence and Executive Director, Texas Association Against Sexual Assault) (“My experience tells me that victims will be less likely to report sexual assault if we have mandatory minimums.”).
VIII. ADJUDICATION OF SEXUAL ASSAULT CASES

Finding 57-3: Very few military offenses currently require mandatory minimum sentences. A DoD-directed study of military justice in combat zones recently recommended review of “whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence.” 1090

Discussion

Mandatory minimum sentences, especially if too rigid or severe, may chill victim reporting in some cases because the victim may not want to be the cause of such consequences. 1091

The UCMJ currently requires a mandatory minimum sentence for three offenses. Spying has a mandatory minimum death sentence1092; premeditated murder1093 and felony murder1094 have a mandatory minimum of a life sentence with the possibility of parole. Additionally, Section 1705(a) of the FY14 NDAA amends Article 56 of the UCMJ to impose the mandatory minimum punishment of dismissal or dishonorable discharge for anyone convicted of rape or sexual assault (under Article 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts to commit those offenses (under Article 80). This provision becomes effective June 26, 2014 (180 days after enactment of the Act). 1095

On September 4, 2013, the Secretary of Defense directed the Acting General Counsel to request the RSP study mandatory minimum sentences for military sex-related offenses. 1096 The Acting General Counsel subsequently


1091See Transcript of RSP Comparative Systems Subcommittee Meeting 314 (Feb. 11, 2014) (testimony of Ms. Annette Burrhus-Clay, President, National Alliance to End Sexual Violence and Executive Director, Texas Association Against Sexual Assault) (“From the perspective of the sexual assault victim, the system is broken. However, adopting mandatory minimum sentencing is unlikely to mend the justice system. The net result of this type of get tough on crime, make everybody feel better reform may very well be less reporting, fewer prosecutions for sexual assault, and ultimately a step backwards in justice for survivors.”); see also, e.g., Focus Groups Report, supra note 1018, at 164 (“The punishment of turning someone in is so extreme. If you were to turn someone in for touching your butt, they could honestly be sitting in confinement for the rest of the year. That’s a huge punishment for probably not that big of a crime. But if you don’t stop it, then it escalates. So it’s a huge Catch-22, actually.”). In accordance with the Smarter Sentencing Act of 2014, the Department of Justice has asked the United States Sentencing Commission to seriously consider simplifying the Sentencing Guidelines, and to conduct a review of drug sentencing, including mandatory minimums.

1092“Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the Armed Forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.” 10 U.S.C. § 906 (UCMJ art. 106).

1093“Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill . . . .” Id. at § 918 (UCMJ art. 118).

1094“Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.” Id.


asked the RSP to include in its review an assessment on the efficacy of mandatory minimum sentences for military sexual assault cases.\footnote{1097}

The offenses that are the subject of this study are serious and, in most cases, serious punishment, including a dishonorable discharge, is appropriate. However, almost always, there are a few cases that fall outside the “norm” and for which a punishment adjudged is widely considered to be too lenient or too severe.\footnote{1098} The question raised by mandatory minimums is how much discretion to reposit in the sentencing authority to deal with unusual cases.

Given this choice, and considering the other criticisms of mandatory minimum sentences, including their potential to deter victim reporting, the Subcommittee recommends against the adoption of mandatory minimum sentences and further recommends reexamination of minimums recently adopted, as discussed below.

In response to an RSP request, the Department of Defense provided its views on establishing mandatory minimum sentences. The Department suggested that establishing mandatory minimums could increase the number of trials and decrease the number of guilty pleas for these cases.\footnote{1099} For fiscal year 2013, the U.S. Army reported 122 guilty pleas on sexual offenses, the U.S. Navy reported 17 guilty pleas on sexual offenses, and the U.S. Marine Corps reported 36 guilty pleas on sexual offenses.\footnote{1100} The DoD expressed concern about mandatory minimums increasing contested trials,\footnote{1101} and that an increase in the number of trials would “almost certainly lead to an increase in the raw number of acquittals.”\footnote{1102}

The characterization of a discharge from military service carries with it collateral consequences, potentially including loss of Veteran and retirement benefits.\footnote{1103} Of note, this mandatory discharge requirement builds upon a system that already requires processing for administrative separation for those Service members convicted of adult sexual assault offenses (if they did not receive a punitive discharge at the court-martial).\footnote{1104}

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\footnote{1097}{Letter from the Acting General Counsel of the Department of Defense to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), currently available at http://responsesystemspanel.whs.mil.}

\footnote{1098}{In a 2010 poll of federal judges by the U.S. Sentencing Commission, approximately 60 to 70 percent responded that they liked having discretion in applying sentencing guidelines. Only about 20 percent responded in favor of employing mandatory minimums within those guidelines. \textit{See Transcript of RSP Comparative Systems Subcommittee Meeting 154} (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission). Mr. Burress also testified that the U.S. Sentencing Commission data noted there were 121 cases where the sexual abuse guideline was used in federal courts in 2013. In 65 cases, judges stayed within the guidelines. In 36 cases, judges departed from the guidelines and returned a lower sentence with the prosecutor’s recommendation. In 37 additional cases, the judge gave a lower sentence with no support from the prosecutor. \textit{See id.} at 214-15.}

\footnote{1099}{DoD Response to Request for Information 110 (Nov. 21, 2013); \textit{see also, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting 497} (Feb. 11, 2014) (testimony of Colonel John Baker, U.S. Marine Corps) (“[I]n the military, one thing that I know, both statistically and more anecdotally, is since we’ve had the advent of the sexual assault registration requirement, that our assault cases have been increasingly contested. . . . [A]nd when you put more contested cases into the process, there’s going to be more acquittals.”).}

\footnote{1100}{See Service Responses to Request for Information 41h (Nov. 1, 2013). The U.S. Air Force does not track this data.}

\footnote{1101}{\textit{See also Laffer v. Cooper}, 132 S. Ct. 1376, 1388 (2012) (noting that “criminal justice today is for the most part a system of pleas, not a system of trials”).}

\footnote{1102}{DoD Response to Request for Information 110 (Nov. 21, 2013).}

\footnote{1103}{\textit{See generally, e.g., John W. Brooker, et al., Beyond "T.B.D.": Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces,} 214 Mil. L. Rv. 1 (2012).}

Even Service members acquitted of adult sexual assault crimes may be sent to administrative board proceedings for potential separation from the Service. Additionally, mandatory sex-offender registration, which is already a consequence in many jurisdictions resulting from a military conviction for adult sexual assault crimes, is tantamount to a mandatory minimum sentence.

F. CLEMENCY OPPORTUNITIES AND CHANGES TO ARTICLE 60

**Recommendation 58:** Congress should amend Section 1702(b) of the FY14 NDAA to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures.

**Finding 58-1:** In civilian jurisdictions, each state has its own rules for handling clemency matters, but many provide the Governor with the power to pardon criminals and commute sentences as the final act after the person convicted exhausts the judicial appellate process. The convening authority normally exercises clemency authority under the recently amended Article 60 of the UCMJ after the findings and sentence of a court-martial, before appellate review. The scope of appellate review varies by the length of sentence approved.

**Finding 58-2:** The impact of the changes to Article 60 of the UCMJ are not fully known at this time. However, one potential unintended consequence may be that the convening authority may no longer provide relief from forfeitures of pay to dependents of convicted Service members. Another unclear application of the amendments is the convening authority’s ability to grant clemency in cases in which there are convictions for both Article 120 and other offenses, because of the unitary nature of the sentence.

**Finding 58-3:** Post-trial relief may be effectively foreclosed for convicted Service members who do not receive punitive discharges or confinement for more than one year. Those Service members have limited access to appellate review, with the only avenue a review by the Office of The Judge Advocate General pursuant to Article 69 of the UCMJ.

1. Post-trial Responsibilities of Commanders and Convening Authorities

**Discussion**

A court-martial sentence of confinement begins immediately after the announcement of the sentence, and some sentences are completely served before the case receives appellate review. Rule for Courts-Martial 1101 requires notification to the accused’s immediate commander and the convening authority of the findings and sentence immediately following the announcement of the sentence. The accused may petition the convening authority to defer the effective date of any sentence to confinement, forfeitures, or reduction in grade which have not been ordered executed. This request may be submitted any time prior to the convening authority’s initial action on the court-martial findings and sentence. If granted, the deferment ends when the sentence is executed.

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1105 See Services’ Response to Request for Information 113 (Nov. 21, 2013).
1106 See, e.g., Transcript of RSP Public Meeting 356-58 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender); see also Brooker, supra note 1103.
1107 10 U.S.C. § 860 (UCMJ art. 60); MCM, supra note 97, R.C.M. 1101.
ordered executed by the convening authority, or may be rescinded by the convening authority at any time prior to action.\textsuperscript{1109} After the record of trial is prepared and authenticated by the military judge, the record is served on the accused with a copy of the Staff Judge Advocate’s post-trial recommendation. The accused, with the advice of counsel, has ten days (up to thirty days with an extension request), to submit additional clemency matters to the convening authority.\textsuperscript{1110} Under FY14 NDAA amendments, the victim may also submit matters for consideration by the convening authority within ten days (up to thirty days with an extension request) from receipt of the record and SJA post-trial recommendation.\textsuperscript{1111} The convening authority is not required to act on the findings.\textsuperscript{1112}

The convening authority must act on the sentence and order the execution of any approved sentence provisions.\textsuperscript{1113} Following action on the sentence, the record of trial is either reviewed by a judge advocate under Articles 66 and 69 of the UCMJ, or transmitted to the Judge Advocate General of the Service for appellate action in accordance with Articles 66 and 69 of the UCMJ, respectively.\textsuperscript{1114} After the record of trial and convening authority action has been forwarded, the convening authority may not modify the action unless directed to do so by an appellate review authority.\textsuperscript{1115} Representatives from the Services testified that, in almost all cases, administrative review boards do not provide clemency relief until after completion of the appellate process.\textsuperscript{1116}

Prior to the FY14 NDAA revisions, the convening authority had unfettered discretion in disapproving or commuting findings of guilt in a court-martial, and approving, disapproving, suspending, or commuting a court-martial sentence.\textsuperscript{1117} Following implementation of the FY14 NDAA, however, the convening authority’s ability to commute or otherwise disapprove both findings and sentences is significantly reduced.

2. Section 1702(b), Revision of Article 60, Uniform Code of Military Justice

Section 1702(b) of the FY14 NDAA amends Article 60 of the UCMJ, to curtail a convening authority’s ability to alter findings and sentences post-trial. These changes are effective June 26, 2014.\textsuperscript{1118}

Under the new law, a commander with convening authority may act (i.e., set aside a finding of guilty or change a finding of guilty to guilty of a lesser included offense) on the findings of a court-martial only for qualified offenses – that is, offenses for which the maximum sentence of confinement that may be adjudged does not exceed two years; and the sentence actually adjudged does not include dismissal, a dishonorable or bad conduct discharge, or confinement for more than six months. Rape and Sexual Assault (Articles 120(a) and 120(b) of

\begin{itemize}
\item[1109] 10 U.S.C. § 857(a)(2) (UCMJ art. 57(a)(2)); MCM, supra note 97, R.C.M. 1101(c)(7).
\item[1110] MCM, supra note 97, R.C.M. 1103; R.C.M. 1104; R.C.M. 1105; see also FY14 NDAA Pub. L. No. 113-66, § 1706, 127 Stat. 672 (2013) (prohibiting the convening authority from considering “submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.”).
\item[1113] MCM, supra note 97, R.C.M. 1107.
\item[1114] 10 U.S.C. § 865 (UCMJ art. 65).
\item[1115] See United States v. Alexander, 63 M.J. 269 (C.A.A.F. 2006).
\item[1116] Transcript Feb 11 p 98 Mr. Bruce Brown, U.S. Air Force Clemency and Parole Board.
\item[1117] 10 U.S.C. § 860 (UCMJ art. 60); MCM, supra note 97, R.C.M. 1107.
\end{itemize}
the UCMJ), Rape and sexual assault of a child (Article 120b of the UCMJ) and Forcible Sodomy (Article 125 of the UCMJ) are specifically excluded from the list of qualifying offenses. Thus, a convening authority may not change the findings in cases with these expressly excluded qualified offenses.

In cases in which a convening authority modifies the findings or sentence of a court-martial, the convening authority must prepare a written explanation which is made part of the trial record. Additionally, the convening authority may not reduce a sentence to less than a mandatory minimum, except on the recommendation of trial counsel due to the substantial assistance of the accused in the investigation or prosecution of another person who has committed an offense. The Subcommittee recommends the convening authority be permitted to delay the imposition of automatic forfeitures when necessary to protect and support dependents of the convicted Service members, who may themselves have been victims in sexual assault cases.

Conclusion

As noted previously, the Subcommittee has recommended changes to promote transparency, offender accountability, and clarity in adult sexual assault case sentences. Additionally, sentences that articulate the precise punishment awarded for each offense of conviction serve the important public interest of making sexual assault case outcome information intelligible for dissemination and comparison with data from civilian jurisdictions.

1119 Id.
I write in respectful disagreement with my colleagues, who recommend that the military adopt judge-alone sentencing in the hope that it would improve the administration of justice in cases of sexual assault. I believe that the proposed change has no relationship to the trial of sexual assault cases, is not based on any supporting data, and undermines long-validated processes unique to the military justice system that balance the rights of the accused with the needs of the military, protect against unlawful command influence, and ensure command input and community involvement in punishing criminal behavior. For similar reasons I disagree with the recommendation that only military judges serve as Article 32 investigating officers: no data support the change, and it further removes the non-lawyer perspective from the judicial process, with the related costs to system integrity and reduced rank and file confidence.

The Subcommittee should squarely and forthrightly state the basis for such a fundamental change to the military justice system: the removal of lay participation in sentencing and expanding even further the role of the military judge. To support such changes, the Subcommittee should be able to identify trends or particular circumstances that establish that military panels are unable to administer justice fairly during the sentencing phase of trial. Proponents should be able to cite information that prompts a concern about justice – e.g., sentences that are unexplainably higher or lower than the “norm,” if that norm is defined by similar cases that are presented to military judges. If there are no data, which I believe our Subcommittee concedes, then the Subcommittee should recommend the careful development of such data or, in the alternative it must be able to cite systemic factors that drive such a change, i.e. that juries are inherently incapable of administering sentences – or at least so much less capable than judges that justice compels removing such authority from...
these panels. Furthermore, for this recommendation to be within the Subcommittee’s charge, there should be some information that juries are particularly unsuited for administering sentences in cases of sexual assault – and again there is none. The Subcommittee is left with similarly unsubstantiated speculation about whether such juries would tend to give higher sentences (perhaps reflecting unlawful command influence) or lower sentences (perhaps reflecting their imperviousness to command influence, perhaps an insufficient appreciation of the seriousness of the offense). Regardless, we generally hear the conclusory statement that such juries tend to produce “outliers,” a vague term that can be applied casually to any sentence with which an observer disagrees. These “disagreements” tend to be defined by the perspective of those who know something from some source but that source did not have the information or responsibility that the jury did.

The system assumes that military panels can sort out matters of tremendous complexity and gravity under appropriate pressure – and the “system” is confident enough to permit a two-thirds vote from a jury as small as five persons to determine that a Service member is a felon; a three-fourths majority of the same panel can sentence a Service member to life in prison. We trust that panel to untangle competing versions of facts and evidence in such a way that THCA, DNA on a swab, or striations from a bullet – and we trust them to follow judges’ instructions on sophisticated matters such as conspiracy, principals, expert testimony, and mental responsibility. These juries then must use both the law and their instincts – their knowledge of the ways of the world, their evaluation of witness credibility, bias and prejudice – to reach a verdict. We trust them to follow the judge’s instructions and, having been selected according to the criteria intended to screen for wisdom, to reach just and independent conclusions on the merits. The “we” who trust military lay court members with these responsibilities includes the Supreme Court of the United States, which has twice in the last 20 years upheld 9-0 the most serious and consequential aspects of military justice—capital case procedures. But the Subcommittee concludes that these same jurors are incompetent to sentence someone whom they have convicted.

Some critics suggest that the two stages of trial are not comparable because the merits phase, though daunting in its complexity, is guided by judge-delivered instructions that keep the jury within the law; conversely, some argue the sentencing phase is less rigorous and the five generally recognized sentencing factors leave too much to juries’ discretion. This critique credits the jury’s inherent capabilities on the merits and should counsel more modest and targeted tinkering with the sentencing phase – clearer instructions and the like – rather than removal of jury authority to sentence. The critique also does not address two significant aspects of the military sentencing process: its reliance on trial advocates and its careful screening of potentially sentence-distorting information and perspectives.

1121 While a “panel” is the correct term for military juries (and “members” for those who serve on such panels), I will use the terms jury and jurors because they are more familiar to all audiences and often used informally in the military as well.

1122 For every “outlier” from a juror an observer can point to a similarly puzzling sentence from a judge, including a couple of recent sexual assault cases in which many observers, including me, considered military judges not to have appreciated the gravity of the offense.

1123 See MCM, supra note 97, R.C.M. 501 (listing composition of courts-martial), R.C.M. 921 (describing voting requirements).

1124 See 10 U.S.C. § 825 (UCMJ art. 25) (requiring a convening authority to select “best qualified” jurors, based on “age, education, training, experience, length of service, and judicial temperament”).

1125 See U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK, INSTR. 2-5-21, at 60–61 (2014); the judge instructs the members: “You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.” Id.
The sentencing phase of a court-martial, though operating under “relaxed rules,” generally has the procedural rigor and transparency of the merits phase of trial, one of many differences from most civilian jurisdictions. Normally, sentencing immediately follows the merits and all documents and testimony are presented in public and on the record. The rules place significant limits on information that the government can introduce. The defense can cross-examine government witnesses, object to proffered documents, and present its own evidence. This sentencing procedure is a significant contrast to most civilian courts where various versions of pre-sentence reports are used. Typically, civilian pre-sentence reports are unilaterally assembled by the government, often full of hearsay and evidence that would not be admissible in court, subject to minimal opportunity for the defense meaningfully to object, and often not addressed or presented in open court. In contrast, the military depends on both parties to present and argue evidence in open court and on the record. Such rigor enhances justice as well as confidence in a system that can be observed and scrutinized by any observer. The Subcommittee cites the heavy majority of states in which juries do not have sentencing authority, but those states neither permit small juries to convict nor do they have juries who are screened according to the criteria of Article 25.

Advocates of removing the right to member sentences would leave the system with the ultimate paradox, i.e., that military juries would be prevented from administering sentences – except for death penalty cases where such sentencing is mandatory.

If there is a problem, either in fact or perception, then the medicine should fix the disease but only the disease. If fact or theory were to suggest dissatisfaction with juror sentencing, then lesser alternatives should be explored before abolishing the option. The Committee has not seriously evaluated whether other options such as sentencing guidelines (perhaps establishing a sentencing range rather than merely a maximum punishment) or more detailed instructions by military judges would represent a less radical, but sufficient, solution to the problem that the Subcommittee perceives. Even permitting juries to recommend a non-binding sentence to the judge, which some states employ, would honor the community’s involvement in the sentence process while permitting a judge, perhaps supported by on-the-record special findings, to deviate from the jury’s recommendation. I do not think such a change is warranted, but it represents one of several places on the sentencing continuum that should be analyzed and discarded before reaching abolition. Such a change would respect the role of the members in sentencing while tempering their discretion.

Advocates of abolition acknowledge that the current option of jury sentencing respects the community’s stake in the sentence. That remains a singular justification for preserving this option, and candid judges will acknowledge that regularly hearing members’ sentences gives them valuable perspective and sometimes nudges their sentences in one direction or another, in light of that opportunity for reflection.

There is much richness and subtlety in the sentencing options available to the military. Wise and dispassionate representatives of that community have a comprehension of the interplay between the range of sanctions available and the sentencing characteristics explained by the judge. In that sense all sentences are “subjective,”

1126 MCM, supra note 97, at R.C.M. 1001(c).
1127 Id. at R.C.M. 1001(b).
1128 Id. at R.C.M. 1003(b)(9), R.C.M. 1004.
1129 See, e.g., Murphy v. Commonwealth, 50 S.W. 3d 173, 178 (Ky. 2001) (holding jury sentence recommendation has no mandatory effect); see also Vines v. Muncy, 553 F.2d 342 (4th Cir.), cert. denied, 434 U.S. 851 (1977) (holding that in Virginia, a jury sentencing verdict merely fixes maximum punishment judge may later award); see also OKLA. STAT. ANN. 22, § 927.1 (2003) (designating judge as sentencing authority when jury fails to agree on punishment).
in that they represent the best judgment of the community or the judge, in light of the specific offense and the specific evidence offered during the sentencing phase. Were this not a subjective process, a judge would consult a sentencing chart and “justice” would be dispensed. The conscience and sensibilities of the community are rightly a part of the sentencing process – and perhaps nowhere more so than in cases of sexual assault. In analyzing the military’s sentencing process and outcomes, critics should avoid the trap of focusing only on the term of confinement. It is the most universal element of sentencing and provides for the easiest – but sometimes superficial – comparisons. A military sentence rightly includes other major elements that we expect a panel to take into account, as each has a punitive aspect to it: reduction in rank, forfeitures of pay and allowances, and discharge.\textsuperscript{1130} While reduction in rank is generally automatic in cases of confinement, juries are expected to consider it a discrete element of punishment and to adjudge it expressly, even when it is automatic (and juries may adjudge interim reductions in certain circumstances, reinforcing the independent judgment that the system expects to go into each sentencing option).\textsuperscript{1131} Forfeitures also tend to be automatic in most cases of significant confinement, a relatively recent and healthy change that came from critical civilian analysis of the system,\textsuperscript{1132} but juries deliberate and separately adjudge them as an element of every sentence. Finally, the discharge options also are a significant and independent punitive element. Juries are instructed that such discharges must be independently deliberated and adjudged, that they should be neither automatic nor administrative in nature\textsuperscript{1133} – and analysts of the system must recognize that a sentence’s “harshness” or “legitimacy” should also be evaluated with a consciousness of the intended ignominy and disabling impact that a punitive discharge carries for the military defendant. Members of the military community, custodians of the honorable discharge and steeped in appreciation of the significance and impact of such discharges, are especially suited to evaluating this and each sentencing element and crafting a sentence appropriate for each accused Service member.

In recommending a change of this consequence the Subcommittee should pay more than passing attention to the increased expectations it places on military judges. The Subcommittee also has recommended, also by a nearly unanimous vote, that judges serve as the exclusive Article 32 investigating officers.\textsuperscript{1135} It has been less than a year since Congress fundamentally altered the Article 32 investigation by requiring that only judge advocates serve as hearing officers, while also reducing the hearing’s function as a discovery vehicle for the defense. For this Subcommittee to type over that moist ink when there has been insufficient experience even to begin to evaluate the effects of the change is precipitous. It further reflects three sentiments: (1) that lay Service members are incompetent to manage that process, (2) that the perspective and experience of a line officer as Article 32 investigating officer does not add value to the system, and (3) that, on top of its already-truncated

\textsuperscript{1130}See MCM, supra note 97, at R.C.M. 1003(b)(4), R.C.M. 1003(b)(2), R.C.M. 1003(b)(8).

\textsuperscript{1131}Id. at R.C.M. 1003(b)(4); see also 10 U.S.C. § 858 (UCMJ art. 58) (automatic forfeitures).


\textsuperscript{1133}See MCM, supra note 97, at R.C.M. 1003(b)(8) (punitive discharge); United States v. Horner, 22 M.J. 294 (C.M.A. 1986) (limiting opinion testimony regarding punitive discharge); United States v. Ohrt, 28 M.J. 301, 303 (C.M.A. 1989) (discussing at length interplay between an opinion on rehabilitative potential, a punitive discharge, and an administrative discharge).

\textsuperscript{1134}The difference between the bad-conduct discharge and dishonorable discharge, both of which can be adjudged to enlisted Service members, represents a gradation of punishment that the sentencing authority carefully considers, as each carries a different connotation regarding service and carries different post-discharge costs regarding matters such as benefits eligibility. See MCM, supra note 97, R.C.M. 1003(b)(8); see generally, e.g., John W. Brooker, et al., Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces, 214 Mil. L. Rev. 1 (2012).

\textsuperscript{1135}See Recommendation 43-E, supra.
IX. SEPARATE STATEMENT

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

IX. SEPARATE STATEMENT

The expanded role of such judges should prompt reflection on the Services’ model for the selection, training, evaluation, and independence of the judge. It is typical for judges to have been judge advocates for about 15 years, and while it is common that they will have had a couple of tours in the courtroom, it also is typical that they have practiced a wide variety of law – administrative, claims, operational, wills, and taxes – they may not have practiced criminal recently or intensively. Still, the system entrusts the judging function to them because it generally considers a range of characteristics – perhaps age, education, training, experience, length of service, and judicial temperament – that the system believes, combined with a 100-hour certification course and a sort of “soft” tenure, make them qualified to manage the courtroom. Other than the required certification course, each Service has its own non-binding criteria for judicial selection and management; therefore the tremendous expansion of judges’ consequential role in the system calls for critical evaluation. Factors to consider include who might be attracted to or recruited to the judiciary, whether a tier of “starter” judges might handle Article 32s, how to ensure judges do not self-select out of the mainstream of their JAG Corps or their military service, how to guarantee their independence, and whether the new judge-heavy system might invite a new and subtle form of command influence or presage growing leader indifference to the judicial process. The greatest irony regarding the issue of who should be an Article 32 officer is that the Article 32 hearing that drew the most opprobrium from critics and the media was conducted by a hearing officer who was not only a judge advocate (before the recent legislation mandating same) but also a military trial judge.

It can be argued that the military in recent times has become complacent about unlawful command influence, the mortal enemy of the military justice system. Command influence in the past was often manifested in dramatic ways and intuitively understood by all who experienced it. While leaders have become acculturated to the most common and enticing forms of command influence (a product of sustained lawyer-leader collaboration), policy makers must never forget the unique challenges that face a military accused: he has been accused of a crime almost always by a charge sheet sworn out by one of his leaders, each level of his command has endorsed the charges, the leader has selected the members of the jury, that jury is senior in rank and can convict most often by two-thirds vote and adjudge sentences of less than 10 years by the same ratio. For generations, and certainly since the Uniform Code of Military Justice took effect in 1951, the system has sought

1136 I am not the first to observe that the most publicized case that led to the change to judge advocates serving as Article 32 investigating officers, involving sexual assault at the United States Naval Academy – involved a judge advocate as the investigating officer. See infra note 1140.

1137 See Services’ Responses to Request for Information 147(b) (Apr. 11, 2014) (describing training of military judges as three-week course at the Judge Advocate General’s Legal Center and School); see also, e.g., Fredric I. Lederer and Barbara S. Hundley, Needed: An Independent Military Judiciary – A Proposal to Amend the Uniform Code of Military Justice, 3 WM. & MARY B. OF RTS. J. 629 (1994).

1138 See Services’ Responses to Request for Information 147(c) (Apr. 11, 2014) (listing military judge terms as three-year tour length).

1139 A sentiment COL(R) Scholz agrees with.


1141 United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986) (discussing unlawful command influence as the “mortal enemy” of military justice).
to wring command influence out of the system, but command influence, as often out of ignorance as venality, tends to arise and mutate in unforeseen ways. If members of the rank and file do not trust the system, it will not be effective.\

When an accused knows that he at least has the option of being sentenced by members of the community (and when he is enlisted he can insist that one-third of that jury be enlisted members) that provides a powerful bulwark against the potential steamroller of command and governmental authority. That jury might produce one of those “outlier” sentences, but that sentence by definition is a product of justice, because it is adjudged by members who have been selected and instructed by the processes we have mentioned – so one observer’s “outlier” is another’s affirmation that the system has lawfully spoken. To remove this option for unsubstantiated reasons is to continue the process of chipping away at measures that protect the accused and enhance confidence in the system.

While I raise some concerns about how the Subcommittee reached the conclusion that decades of practice should be altered on the notion that the change will improve military justice, it is possible that a careful examination of our systems, processes, and results will reveal the need for change. It is possible that there are enough data to suggest inequity in the sexual assault area that is significant enough to mandate changing the historic practice. It is possible that commanders, who were not consulted on this issue during the Subcommittee’s extensive and excellent hearings and deliberations, might support it – or offer a perspective worth including in the discussion. At a minimum, however, it would be appropriate for the Subcommittee to recommend careful study of the practice, controlling as much as possible for the many variables in sexual assault cases, so that at least it has information and not just a theory on which to determine what if any change is warranted.

Occasions such as this study naturally prompt all of us to examine the entire system and to recommend changes; in fact, many members have spent many years thinking about the system while working in or near it. We should be careful, however, not to become like the omnibus Congressional bill where there is the temptation to “fill the tree” with all sorts of provisions that might not be germane to the original bill, adding post offices and tax breaks to a transportation or agriculture bill. We should fix the problem before us, and to that end the Subcommittee has made many stark and appropriate recommendations – but we should focus policy makers on those justified changes and resist tinkering unrelated to our charter. Discarding jury sentencing in light of concerns expressed about leadership on this issue is akin to a ballplayer pulling a hamstring but ultimately having Tommy John elbow surgery.

The changes to the Article 32 process and removing the option of jury sentencing represent a major break from a system that has had confidence in the integral involvement of commanders, leaders, and non-lawyers in the administration of justice – not a heedless confidence, but a confidence that was appropriately bridled by Art. 25 selection criteria, the requirement for independent advice of the SJA to the convening authority, major limitations on government advocacy during the sentencing phase of trial, the secret written ballot, extreme sanctions for unlawful command influence, early and comprehensive clemency opportunities, and many other

1142 See generally Francis A. Gilligan & Fredric Lederer, 1 CourT-MarTial PRoCeduRe § 1-20.00, at 2 (1991) (“Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice based. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline within the American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice-oriented system to ensure discipline; in our case, justice is essential to discipline.”).

The recommended changes reflect not a careful calibration of the system, like those in 1968 and 1983, but a mis-aimed attempt to quash a terribly serious problem with procedural changes that do not relate to sexual assault. Nor do the proposed changes begin to address the underlying cultural problem which, if not solved, will not be fixed by a cascade of changes to the justice process.
These terms of reference establish the Secretary of Defense (SecDef) objectives for an independent subcommittee review of military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. At SecDef direction, the Comparative Systems Subcommittee (“the Subcommittee”) has been established under the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) to conduct this assessment.

Mission Statement: Assess and compare military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

Issue Statement: Section 576(d)(1) of the FY 2013 National Defense Authorization Act provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). This includes a comparison of military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. In addition, the Subcommittee should identify systems or methods for strengthening the effectiveness of military systems. Additionally, Section 1731 of the FY 2014 National Defense Authorization Act establishes additional tasks for the Response Systems Panel.

Objectives and Scope: The Subcommittee will address the following specific objectives.

• Assess the effectiveness of military systems, including the administration of the UCMJ, for the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.

• Compare military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes.

• Examine advisory sentencing guidelines used in civilian courts in adult sexual assault cases to assess whether it would be advisable to promulgate sentencing guidelines for use in courts-martial. Such assessment should include a study of the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy, and the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates).
• Compare and assess the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, to the training level of prosecution and defense counsel for similar cases in the Federal and State court systems.

• Assess and compare military court-martial conviction rates for adult sexual assault crimes with those in the Federal and State courts for similar offenses and the reasons for any differences.

• Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.

• Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

• An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel only for the purposes of identifying individuals who are subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report of sexual assault in those cases in order to facilitate increased prosecutions, particularly of serial offenders. The assessment should include an evaluation of the appropriate content to be included in the database, as well as the best means to maintain the privacy of those making a restricted report.

• An assessment of the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

The Subcommittee shall develop conclusions and recommendations on the above matters and report them to the Response Systems Panel.

Methodology:

1. The Subcommittee assessment will be conducted in compliance with the Federal Advisory Committee Act (FACA).

2. The Subcommittee is authorized to access, consistent with law, documents and records from the Department of Defense and military departments, which the Subcommittee deems necessary, and DoD personnel the Subcommittee determines necessary to complete its task. Subcommittee participants may be required to execute a non-disclosure agreement, consistent with FACA.

3. The Subcommittee may conduct interviews as appropriate.

4. As appropriate, the Subcommittee may seek input from other sources with pertinent knowledge or experience.
Deliverable:

The Subcommittee will complete its work and report to the Response Systems Panel in a public forum for full deliberation and discussion. The Response Systems Panel will then report to the Secretary of Defense.

Support:

1. The DoD Office of the General Counsel and the Washington Headquarters Services will provide any necessary administrative and logistical support for the Subcommittee.

2. The DoD, through the DoD Office of the General Counsel, the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, will support the Subcommittee’s review by providing personnel, policies, and procedures required to conduct a thorough review of civilian and military systems used to investigate, prosecute, and adjudicate adult sexual assault crimes.
Appendix B:
MEMBERS AND STAFF OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE

ELIZABETH L. HILLMAN, CHAIR, PROVOST AND ACADEMIC DEAN, UC HASTINGS COLLEGE OF THE LAW

Elizabeth Hillman is Provost & Academic Dean and Professor of Law, University of California Hastings College of the Law. Her scholarship focuses on military law and legal history, and she has taught at UC Hastings, Rutgers University School of Law-Camden, Yale University, and the U.S. Air Force Academy. She has published two books, Military Justice Cases and Materials (2d ed. 2012, LexisNexis, with Eugene R. Fidell and Dwight H. Sullivan) and Defending America: Military Culture and the Cold War Court-Martial (Princeton University Press, 2005), and many articles addressing military law and culture. She is a Director of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide, and Co-Legal Director of the Palm Center, a think tank that seeks to inform public policy on issues of gender, sexuality, and the military. Dean Hillman attended Duke University on an Air Force ROTC scholarship, earned a degree in electrical engineering, and served as a space operations officer and orbital analyst in Cheyenne Mountain Air Force Base, Colorado Springs.

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

Judge Jones is a partner at Zuckerman Spaeder, LLP (law firm). She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering and terrorism. Prior to her nomination to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County. 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 chief of the Organized Crime Unit in the Southern District of New York.
BRIGADIER GENERAL MALINDA DUNN, U.S. ARMY (RETIRED)

Brigadier General (Retired) Malinda Dunn is executive director of the American Inns of Court. Previously, BG(R) Dunn served 28 years in the U.S. Army as a judge advocate, including assignments as Assistant Judge Advocate General for Military Law and Operations, Commander of the U.S. Army Legal Services Agency, and Chief Judge of the Army Court of Criminal Appeals. While serving as Staff Judge Advocate of XVIII Airborne Corps, she served tours of duty in both Afghanistan and Iraq. During her career with the Army, BG(R) Dunn performed some ground breaking assignments. She was the first female staff judge advocate of the 82nd Airborne Division, with which she did two tours. She was also the first female chief of personnel for the Army JAG Corps, the first female staff judge advocate of the XVIII Airborne Corps, and the first woman selected as a general officer in the active duty Army Judge Advocate General's Corps.

BRIGADIER GENERAL JOHN COOKE, U.S. ARMY (RETIRED)

Brigadier General (Retired) John Cooke is the Deputy Director at the Federal Judicial Center. Brigadier General Cooke retired after twenty-six years in the U.S. Army Judge Advocate General’s Corps. His last position in the Army was as Chief Judge, U.S. Army Court of Criminal Appeals and Commander of the U.S. Army Legal Services Agency. His preceding assignments include: Judge Advocate, U.S. Army Europe; Deputy Commandant and Director, Academic Department, The Judge Advocate General’s School; Chief, Personnel, Plans and Training Office, Office of the Judge Advocate General; and Staff Judge Advocate, 25th Infantry Division.

HARVEY BRYANT, FORMER COMMONWEALTH’S ATTORNEY, CITY OF VIRGINIA BEACH

For almost 14 years Harvey Bryant led a 90 member office prosecuting approximately 16,000 criminal charges per year in Virginia’s largest city. He retired at the end of 2013. Since elected Commonwealth’s Attorney in Virginia Beach he has served as Virginia Association of Commonwealth’s Attorneys’ president, Commonwealth’s Attorneys’ Services Council chairman, and served on the board of directors of both organizations for 13 years, representing the Second Congressional District. He has served as chairman of the Criminal Law Section of the Virginia State Bar Association and represented Virginia on the National District Attorneys’ Association board of directors. He is a gubernatorial appointee to Virginia’s Criminal Sentencing Commission and serves on the board of directors for the Virginia Criminal Justice Foundation. He served as chairman of the Governor’s task force on asset forfeiture in 2012 and on Virginia’s Attorney General’s advisory committee on restoration of civil rights in 2013. He was awarded the Human Rights Award for Achievement in Government by the Virginia Beach Human Rights Commission in 2013. From 1987-2000 he was a supervisor in the Criminal Division of the U.S. Attorney’s Office, Eastern District of Virginia, Norfolk and Newport News Divisions, which duties included supervising Special Assistant United States Attorneys from every branch of the service. After graduating from the College of William and Mary, he served in the U.S. Army for three years followed by five years in the Army Reserves. He graduated from the University Of Richmond School Of Law, was in private practice for nine years and was a prosecutor for over 30 years.
APPENDIX B: MEMBERS AND STAFF OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE

COLONEL STEPHEN HENLEY, U.S. ARMY (RETIRED)

Colonel (Retired) Stephen R. Henley is currently an Administrative Law Judge (ALJ) with the Department of Labor in Washington, D.C. Before assuming his current position in May 2012, he was an ALJ with the Social Security Administration in Fayetteville, North Carolina. Prior to his appointment as an ALJ, Judge Henley served nearly 30 years in the U.S. Army. COL(R) Henley retired from the Army as Chief Trial Judge of the U.S. Army Judiciary. COL(R) Henley spent two years as a medical service corps officer prior to participating in the FLEP program and transferring to the JAG Corps. He served in a variety of assignments as a JAG officer to include: both trial and defense counsel, SAUSA for the District of Columbia, Chief of Administrative Law at West Point, and vice-chair of the Criminal Law Department at The Judge Advocate General Legal Center and School. COL(R) Henley also served as a military judge at Ft. Hood, Texas, Mannheim, Germany, and Fort Bragg, North Carolina, and the Military Commissions in Guantamano Bay, Cuba. He also formerly served as an Adjunct Professor at The George Washington University Law School.

COLONEL DAWN SCHOLZ, U.S. AIR FORCE (RETIRED)

Colonel (Retired) Dawn Scholz is an Administrative Law Judge with the Social Security Administration. Prior to this position, she was the Deputy Associate General Counsel for General Law in the Office of General Counsel, Headquarters, Department of Homeland Security where she provided legal counsel on labor and employment law matters, appropriations and fiscal law issues, general tort claims, environmental law issues and also oversaw the U.S. Coast Guard’s Board of Correction of Military Records. COL(R) Scholz served 30 years in the Air Force first as a section commander and after attending law school under the Funded Legal Education Program as a JAG officer. Her past JAG assignments include: Chief of the Air Force’s Environmental Law and Litigation Division, Senior Appellate Judge on the Air Force Court of Criminal Appeals and serving as a Judge on the U.S. Court of Military Commission Review, which hears appeals of Guantanamo detainees. She also served three tours as a Staff Judge Advocate, culminating her military career as the Staff Judge Advocate for the Pacific Air Forces at Hickam Air Force Base, Hawaii.

COLONEL LARRY MORRIS, U.S. ARMY (RETIRED)

Colonel (Retired) Lawrence J. Morris is General Counsel, The Catholic University of America. COL(R) Morris served 27 years on active duty as an Army judge advocate (JA), including assignments as: the head of the Criminal Law department of the U.S. Army Judge Advocate General’s Legal Center and School; Staff Judge Advocate to the Superintendent of the United States Military Academy at West Point; Staff Judge Advocate for the 10th Mountain Division, Fort Drum, NY; Chief of the U.S. Army Trial Defense Service, where he was responsible for the work and professional training of all uniformed Army defense attorneys; and Chief Prosecutor of the Guantanamo military commissions, tasked with the prosecution of suspected 9/11 terrorists. He spent most of the first part of his career in alternating tours as a prosecutor, defense counsel, and chief prosecutor at posts in the U.S. and Europe. He also served in Bosnia-Herzegovina and Iraq. After retiring, COL(R) Morris was the Chief of Advocacy, Headquarters, U.S. Army, responsible for training Army prosecutors and defense counsel with an emphasis on the handling of sexual offenses. He is the author of Military Justice: A Guide to the Issues, published in 2010.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
RHONNIE JAUS, FORMER DIVISION CHIEF, SEX CRIMES/CRIMES AGAINST CHILDREN DIVISION, KINGS COUNTY DISTRICT ATTORNEY’S OFFICE

Rhonnie Jaus was the Division Chief of the Sex Crimes/Crimes Against Children Division in the Kings County District Attorney’s Office in Brooklyn, New York. Her Division specializes in the investigation and prosecution of all sexual assault, child abuse, child homicide and sex trafficking offenses in the county. She has extensive experience in handling cases involving sexual abuse in religious institutions, schools and organized sports team. She also developed specialized programs for sexually exploited teens, special needs victims, cyber-predators, a child advocacy center and a John School for people arrested for prostitution related offenses. Prior to being the Division Chief, she was the Bureau Chief of the Sex Crimes/Special Victims Bureau, where she has been working since 1987. She also served as a senior trial attorney in the Major Offense Prosecution Program prior to specializing in sex crimes. She is currently an Adjunct Professor of Law at both New York Law School and St. John’s University Law School, where she teaches courses on sexual assault, child abuse and domestic violence. She is also a consultant with C&J Strategy Consulting, which specializes in sexual misconduct investigations, training and litigation support.

RUSSELL W. STRAND, CHIEF OF THE U.S. ARMY MILITARY POLICE BEHAVIORAL SCIENCES EDUCATION AND TRAINING DIVISION

Russell W. Strand is currently the Chief of the U.S. Army Military Police School Behavioral Sciences Education & Training Division. Mr. Strand is a retired U.S. Army CID Federal Special Agent with an excess of 38 year’s law enforcement, investigative, and consultation experience. Mr. Strand has specialized expertise, experience and training in the area of domestic violence intervention, critical incident peer support, and sexual assault, trafficking in persons and child abuse investigations. He has established, developed, produced, and conducted the U.S. Army Sexual Assault Investigations, Domestic Violence Intervention Training, Sexual Assault Investigations and Child Abuse Prevention and Investigation Techniques courses and supervised the development of the Critical Incident Peer Support course. Mr. Strand has also assisted in the development and implementation of Department of Defense (DOD) training standards, programs of instruction, and lesson plans for Sexual Assault Response Coordinators (SARC), victim advocates, chaplains, criminal investigators, first responders, commanders, and health professionals. He is a member of the Defense Family Advocacy Command Assistance Team and Department of the Army Fatality Review Board. He is also recognized as a national/DoD subject matter expert and consultant in the area of spouse and child abuse, critical incident peer support and sexual violence.

SUBCOMMITTEE STAFF

Lieutenant Colonel Kelly McGovern, U.S. Army, Supervising Attorney
Ms. Janice Chayt, Investigator
Mr. Dillon Fishman, Attorney
Ms. Joanne Gordon, Attorney
Ms. Shannon Green, Legislative Analyst
Ms. Amy Grace Peele, Technical Editor
Ms. Laurel Prucha Moran, Graphic Designer

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Appendix C:
GLOSSARY OF ACRONYMS AND TERMS

ACRONYMS:

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AASVTP</td>
<td>Advanced Adult Sexual Violence Training Program</td>
</tr>
<tr>
<td>ACSC</td>
<td>Advanced Crime Scene Course</td>
</tr>
<tr>
<td>ADC</td>
<td>Area Defense Counsel</td>
</tr>
<tr>
<td>AFJAG</td>
<td>Air Force Judge Advocate General</td>
</tr>
<tr>
<td>AFJAGS</td>
<td>Air Force Judge Advocate General’s School</td>
</tr>
<tr>
<td>AFI</td>
<td>Air Force Instruction</td>
</tr>
<tr>
<td>AFOSI</td>
<td>Air Force Office of Special Investigation</td>
</tr>
<tr>
<td>AGCIC</td>
<td>Advanced General Criminal Investigation Course</td>
</tr>
<tr>
<td>AMEDD</td>
<td>Army Medical Department</td>
</tr>
<tr>
<td>AOR</td>
<td>Area of Responsibility</td>
</tr>
<tr>
<td>AR</td>
<td>Army Regulation</td>
</tr>
<tr>
<td>ASALC</td>
<td>Advanced Sexual Assault Litigation Course</td>
</tr>
<tr>
<td>ASAP</td>
<td>Adult Sexual Assault Program</td>
</tr>
<tr>
<td>ASI</td>
<td>Additional Skill Identifier</td>
</tr>
<tr>
<td>ATAC</td>
<td>Advanced Trial Advocacy Course</td>
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</table>

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>BJS</td>
<td>Bureau of Justice Statistics</td>
</tr>
<tr>
<td>BLC</td>
<td>Basic Lawyer Course</td>
</tr>
<tr>
<td>BUMED</td>
<td>Bureau of Medicine</td>
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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>CA</td>
<td>Convening Authority</td>
</tr>
<tr>
<td>CAAF</td>
<td>United States Court of Appeals for the Armed Services</td>
</tr>
<tr>
<td>CAPIT</td>
<td>Child Abuse Prevention and Investigation Course</td>
</tr>
<tr>
<td>CDC</td>
<td>Center for Disease Control and Prevention</td>
</tr>
<tr>
<td>CDC</td>
<td>Chief Defense Counsel</td>
</tr>
<tr>
<td>CDLA</td>
<td>Criminal Defense lawyers Association</td>
</tr>
<tr>
<td>CENTCOM</td>
<td>Central Command</td>
</tr>
<tr>
<td>CGIS</td>
<td>Coast Guard Investigative Service</td>
</tr>
<tr>
<td>CID</td>
<td>Army Criminal Investigation Command</td>
</tr>
<tr>
<td>CIDSAC</td>
<td>Criminal Investigation Division Special Agents Course</td>
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</table>
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
### APPENDIX C: GLOSSARY OF ACRONYMS AND TERMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Definition</th>
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<tbody>
<tr>
<td>FRCP:</td>
<td>Federal Rules of Criminal Procedure</td>
</tr>
<tr>
<td>FRE:</td>
<td>Federal Rules of Evidence</td>
</tr>
<tr>
<td>FSVI:</td>
<td>Family and Sexual Violence Investigator</td>
</tr>
<tr>
<td>FY:</td>
<td>Fiscal Year</td>
</tr>
<tr>
<td>JBLM:</td>
<td>Joint Base Lewis-McChord</td>
</tr>
<tr>
<td>JMJAT:</td>
<td>Joint Military Judges’ Annual Training</td>
</tr>
<tr>
<td>JPP:</td>
<td>Judicial Proceedings Panel</td>
</tr>
<tr>
<td>JSC-SAS:</td>
<td>Joint Service Committee-Sexual Assault Subcommittee</td>
</tr>
<tr>
<td>GAO:</td>
<td>Government Accountability Office</td>
</tr>
<tr>
<td>GBI:</td>
<td>Georgia Bureau of Investigations</td>
</tr>
<tr>
<td>GCM:</td>
<td>General Courts-Martial</td>
</tr>
<tr>
<td>GCMCA:</td>
<td>General Court-Martial Convening Authority</td>
</tr>
<tr>
<td>HQE:</td>
<td>Highly Qualified Experts</td>
</tr>
<tr>
<td>LAPD:</td>
<td>Los Angeles Police Department</td>
</tr>
<tr>
<td>LCSW:</td>
<td>Licensed Clinical Social Worker</td>
</tr>
<tr>
<td>LCDR:</td>
<td>Lieutenant Commander</td>
</tr>
<tr>
<td>LLM:</td>
<td>Master of Laws</td>
</tr>
<tr>
<td>LTC:</td>
<td>Lieutenant Colonel (Army)</td>
</tr>
<tr>
<td>LtCol:</td>
<td>Lieutenant Colonel (Air Force)</td>
</tr>
<tr>
<td>MCIIO:</td>
<td>Military Criminal Investigative Organization</td>
</tr>
<tr>
<td>MCM:</td>
<td>Manual for Courts-Martial</td>
</tr>
<tr>
<td>MG:</td>
<td>Major General</td>
</tr>
<tr>
<td>MJ:</td>
<td>Military Justice</td>
</tr>
<tr>
<td>MJIA:</td>
<td>Military Justice Improvement Act</td>
</tr>
<tr>
<td>MJLCT:</td>
<td>Military Justice Litigation Career Track</td>
</tr>
<tr>
<td>MOA:</td>
<td>Memorandum of Agreement</td>
</tr>
<tr>
<td>MOU:</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>MP:</td>
<td>Military Police</td>
</tr>
<tr>
<td>MPIC:</td>
<td>Military Police Investigations Course</td>
</tr>
<tr>
<td>MRE:</td>
<td>Military Rules of Evidence</td>
</tr>
</tbody>
</table>
### Comparative Systems Subcommittee

**MTF:** Military Treatment Facility  
**MTI:** Military Training Instructor

**N**

- **NAC:** National Advocacy Center  
- **NACDL:** National Association of Criminal Defense Lawyers  
- **NCIS:** Naval Criminal Investigative Service  
- **NCMEC:** National Center for Missing and Exploited Children  
- **NCVS:** National Crime Victim Survey  
- **NDAA:** National Defense Appropriations Act  
- **NDAA:** National District Attorneys Association  
- **NIBRS:** National Incident Based Reporting System  
- **NISVS:** National Intimate Partner and Sexual Violence Survey  
- **NJC:** National Judicial College  
- **NJP:** Non-Judicial Punishment  
- **NJS:** Naval Justice School  
- **NLADA:** National Legal Aid and Defenders Association  
- **NPC:** New Prosecutor’s Course  
- **NYSDA:** New York State Defender Association

**O**

- **OCDLA:** Oregon Criminal Defense Lawyer Association  
- **OJT:** On the Job Training  
- **OMB:** Office of Management and Budget

**P**

- **PD:** Police Department  
- **PDS:** Professional Development Standards  
- **PERF:** Police Executive Research Forum  
- **PSARC:** Philadelphia Sexual Assault Response Center  
- **PSR:** Presentence Report  
- **PTA:** Pre-trial Agreement

**R**

- **RCM:** Rules for Courts-Martial  
- **RDC:** Regional Defense Counsel  
- **RDD:** Random Digital Dialing  
- **RFI:** Request for Information  
- **RILO:** Resignation in Lieu of Court-Martial  
- **RLSO:** Region Legal Service Office  
- **ROI:** Report of Investigation  
- **RSP:** Response Systems to Adult Sexual Assault Crimes Panel  
- **RTC:** Regional Trial Counsel

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### APPENDIX C: GLOSSARY OF ACRONYMS AND TERMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>SABTP:</td>
<td>Special Agent Basic Training Program</td>
</tr>
<tr>
<td>SAFE:</td>
<td>Sexual Assault Forensic Exam</td>
</tr>
<tr>
<td>SAFE:</td>
<td>Sexual Assault Forensic Examiner</td>
</tr>
<tr>
<td>SALT:</td>
<td>Special Agent Laboratory Training</td>
</tr>
<tr>
<td>SAMFE:</td>
<td>Sexual Assault Medical Forensic Examiner</td>
</tr>
<tr>
<td>SANE:</td>
<td>Sexual Assault Nurse Examiner</td>
</tr>
<tr>
<td>SAPR:</td>
<td>Sexual Assault Prevention and Response</td>
</tr>
<tr>
<td>SAPRO:</td>
<td>Sexual Assault Prevention and Response Office</td>
</tr>
<tr>
<td>SARB:</td>
<td>Sexual Assault Review Board</td>
</tr>
<tr>
<td>SARC:</td>
<td>Sexual Assault Response Coordinator</td>
</tr>
<tr>
<td>SART:</td>
<td>Sexual Assault Response Team</td>
</tr>
<tr>
<td>SARRT:</td>
<td>Sexual Assault/Abuse Response and Resource Team</td>
</tr>
<tr>
<td>SASC:</td>
<td>Senate Armed Services Committee</td>
</tr>
<tr>
<td>SATAC:</td>
<td>Sexual Assault Trial Advocacy Course</td>
</tr>
<tr>
<td>SCITP:</td>
<td>Sex Crimes Investigation Training Program</td>
</tr>
<tr>
<td>SF:</td>
<td>Security Forces</td>
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<tr>
<td>SHARP:</td>
<td>Sexual Harassment/Assault Response and Prevention</td>
</tr>
<tr>
<td>SJA:</td>
<td>Staff Judge Advocate</td>
</tr>
<tr>
<td>SME:</td>
<td>Subject Matter Expert</td>
</tr>
<tr>
<td>SORNA:</td>
<td>Sex Offender Registration and Notification Act</td>
</tr>
<tr>
<td>SPCMCA:</td>
<td>Special Court-Martial Convening Authority</td>
</tr>
<tr>
<td>STC:</td>
<td>Senior Trial Counsel</td>
</tr>
<tr>
<td>SVC:</td>
<td>Special Victim Counsel</td>
</tr>
<tr>
<td>SVC:</td>
<td>Special Victim Capability</td>
</tr>
<tr>
<td>SVP:</td>
<td>Special Victim Prosecutor</td>
</tr>
<tr>
<td>SVT:</td>
<td>Special Victim Trial Counsel</td>
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<tr>
<td>SVU:</td>
<td>Special Victims Unit</td>
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<tr>
<td>SVUI:</td>
<td>Special Victim Unit Investigator</td>
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<tr>
<td>SVUIC:</td>
<td>Special Victim Unit Investigations Course</td>
</tr>
<tr>
<td>TCAP:</td>
<td>Trial Counsel Assistance Program</td>
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<tr>
<td>TDAC:</td>
<td>Trial and Defense Advocacy Course</td>
</tr>
<tr>
<td>TDS:</td>
<td>Trial Defense Service</td>
</tr>
<tr>
<td>TFRCV:</td>
<td>Task Force Report on Care for Victims of Sexual Assault</td>
</tr>
<tr>
<td>TJAG:</td>
<td>The Judge Advocate General</td>
</tr>
<tr>
<td>TJAGLCS:</td>
<td>The Judge Advocate General's Legal Center and School's</td>
</tr>
<tr>
<td>UCMJ:</td>
<td>Uniform Code of Military Justice</td>
</tr>
<tr>
<td>UCR:</td>
<td>Uniform Crime Reports</td>
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<tr>
<td>USACIL:</td>
<td>United States Army Criminal Investigation Laboratory</td>
</tr>
<tr>
<td>USCCR:</td>
<td>United States Commission on Civil Rights</td>
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<tr>
<td>USAMPS:</td>
<td>United States Army Military Police School</td>
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<tr>
<td>USC:</td>
<td>United States Code</td>
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### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>USC</td>
<td>Unwanted sexual contact</td>
</tr>
<tr>
<td>USMC</td>
<td>United States Marine Corps</td>
</tr>
<tr>
<td>USN</td>
<td>United States Navy</td>
</tr>
<tr>
<td>USSC</td>
<td>United States Sentencing Commission</td>
</tr>
<tr>
<td>VA</td>
<td>Victim Advocate</td>
</tr>
<tr>
<td>VAW</td>
<td>Violence Against Women</td>
</tr>
<tr>
<td>VLC</td>
<td>Victim Legal Counsel</td>
</tr>
<tr>
<td>VPA</td>
<td>Victim Protection Act</td>
</tr>
<tr>
<td>WGRA</td>
<td>Workplace and Gender Relations Survey of Active Duty Members</td>
</tr>
<tr>
<td>WGRS</td>
<td>Workplace Gender Relations Survey</td>
</tr>
<tr>
<td>WOAR</td>
<td>Women Organized Against Rape</td>
</tr>
</tbody>
</table>

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
APPENDIX C: GLOSSARY OF ACRONYMS AND TERMS

TERMS

**Administrative Separation:** Early termination of military service based upon conduct on the part of the Service Member. A Service member may be administratively separated based on a pattern of misconduct, drug abuse, or convenience of the government.

**Collateral misconduct:** Victim misconduct that might be in time, place, or circumstance associated with the victim’s sexual assault incident. Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim’s fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders). See DODI 6495.02.

**Confidential Reporting:** For the purposes of the policies and procedures of the SAPR Program, confidential reporting is restricted reporting that allows a Service member to report or disclose to specified officials that he or she has been the victim of a sexual assault. This reporting option gives the member access to medical care, counseling, and victim advocacy, without requiring those specific officials to automatically report the matter to law enforcement or initiate an official investigation.

**Convening authority:** Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. See Rule for Courts-Martial 504(b) and discussion.

**Credible Information:** Information disclosed to or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate that criminal activity has occurred and would cause a reasonable investigator under similar circumstances to pursue further the facts of the case to determine whether a criminal act occurred or may have occurred. See AR 195-2, p. 41.

**Criminal intelligence:** Information compiled and analyzed in an effort to anticipate, prevent, or monitor possible or potential criminal activity or terrorist threats directed at or affecting the U.S. Army operations, material, activities personnel or installations. (AR 195-2, p. 41)

**Dark Figure:** Information of instances that were not reported through official channels, the things that were not reported to the police.

**Defense Forensic Science Center:** Department of Defense forensic science center of excellence, delivering full-spectrum, forensic services around the globe and across the entire range of military operations, providing training and conducting research to further forensic science.

**Defense Incident-Based Reporting System:** Department of Defense crime reporting system designed to collect statistical information on criminal incidents in the Department of Defense.

**Defense Sexual Assault Incident Database (DSAID):** A DoD database that captures uniform data provided by the Military Services and maintains all sexual assault data collected by the Military Services. See DODD 6496.01.
**General Court-Martial:** A court-martial consisting of a military judge and usually at least five members and having authority to impose a sentence of dishonorable discharge or death.

**Healthcare provider:** Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a military treatment facility, or who provide such care at a deployed location or otherwise in an official capacity.

**Joint Basing:** A location at which the 2005 Base Closure and Realignment Committee directed that installation management functions be consolidated between two or more Military Services operating at two or more locations within close proximity.

**Judge advocate:** An officer of the Judge Advocate General’s Corps of the Army, Air Force, Marine Corps, Navy, and the United States Coast Guard who is designated as a judge advocate.

**Judge Advocates General:** Severally, the Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

**Law enforcement:** Includes all DoD law enforcement units, security forces, and military criminal investigative organizations.

**Military Criminal Investigative Organization (MCIO):** Refers to the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (OSI).

**Military judge:** The presiding officer of a general or special court-martial detailed in accordance with Article 26 of the UCMJ to the court-martial to which charges in a case have been referred for trial.

**Military Training:** Structured training to enhance the capacity of Service Members to understand issues and concepts, as well as to perform specific tasks.

**National Incident Based Reporting System:** Incident-based reporting system in which agencies collect data on each crime occurrence. Data comes from local, state, and federal automated systems.

**Panel:** Military equivalent of a jury; short for court-martial panel or members panel.

**Permanent Change of Station (PCS):** To permanently move from an assignment at one military installation to an assignment at another installation.

**Preferral:** Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the UCMJ. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. See Rule for Courts-Martial 307.

**Referral:** The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorized to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. See Rule for Court-Martial 601(a) and discussion.
Reprisal: Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication. (DODI 6495.02)

Reserve Component: Reserve Components of the Armed Forces of the United States, which include the National Guard (Army and Air Force) and Reserve (Army, Air Force, Navy, Marine Corps, and Coast Guard).

Responders: Includes first responders, who are generally composed of personnel in the following disciplines or positions: SARC, SAPR VA, healthcare personnel, law enforcement, and MCIO. Other responders are judge advocates, chaplains, and commanders, but they are usually not first responders. See DODI 6495.02.

Restricted Reporting: A process used by a Service Member to report or disclose that he or she is the victim of a sexual assault to specified officials on a requested confidential basis. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, or a VA will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under DODD 6495.01.

Re-victimization: Process by which a victim experiences acts of violence, power, or control imposed by systems, professionals, peers, or others, causing the victim to be traumatized after the original incident.

SAFE Kit: The medical and forensic examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process and the collection, handling, analysis, testing, and safekeeping of any bodily specimens and evidence meet the requirements necessary for use as evidence in criminal proceedings. See DODD 6495.01.

Sexual Assault Forensic Examiner/Sexual Assault Medical Forensic Examiner: A healthcare provider who has completed specialized education and clinical preparation in the collection of evidence for a sexual assault forensic examination kit.

Sexual Assault Nurse Examiner: Registered nurse who has completed specialized education and clinical preparation in the medical forensic care of the patient who has experienced sexual assault or abuse.

Sexual assault prevention and response (SAPR) program: A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault.

Sexual Assault Prevention and Response Office (DoD SAPRO): Serves as the DoD’s single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.

SAPR victim advocate (VA): A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. Provides liaison assistance with other organizations on victim care matters and reports directly to the SARC when performing victim advocate duties.

Service: A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard.
Sexual assault response coordinator (SARC): The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Sexual Assault: Intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts. “Consent” means words or overt acts indicating a freely given agreement to the sexual conduct as issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct as issue shall not constitute consent.

Sexual Assault Forensic Examination (SAFE): The medical examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process, and the collection, handling, analysis, testing, and safekeeping of any bodily specimens meet the requirements necessary for use as evidence in criminal proceedings.

Sexual Assault Prevention and Response (SAPR) Program: A DOD program for the Military Departments and the DOD Components that establishes sexual assault prevention and response policies to be implemented worldwide. The program objective establishes an environment and military community free of sexual assault.

Sexual Assault Response Coordinator (SARC): Military personnel or DOD civilian employees under the senior commander’s supervision, who: Serves as the central point of contact at an installation or within a geographic area to oversee sexual assault awareness, prevention and response training. Ensures appropriate care is coordinated and provided to victims of sexual assault; and tracking the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Sexual Harassment: A form of discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that create an intimidating, hostile, or offensive environment.

Sexual Violence: A term without a specific federal legal meaning, but widely used to denote sexual acts of force against the will of victims.

Special Court–Martial: A court-martial that consists of at least three officers, a military judge, a trial counsel, and a defense counsel and that has authority to impose a limited sentence and hear only noncapital cases.

Special Victim Capability: A distinct, recognizable group of appropriately skilled professionals, including MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel, who work collaboratively to (1) investigate and prosecute allegations of child abuse (involving sexual assault and/or aggravated assault with grievous bodily harm), domestic violence (involving sexual assault and/or aggravated assault with grievous bodily harm), and adult sexual assault (not involving domestic offenses) and to (2) provide support for the victims of such offenses. See DODI 6495.02.
**Special Victim Counsel:** An attorney, provided at no charge to the victim, who will represent the victim’s interest throughout the course of the legal proceedings that might follow the report of a sexual assault.

**Staff judge advocate (SJA):** A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy, Coast Guard, or joint force command who is a judge advocate.

**Summary Court-Martial:** Lowest level court-martial in terms of punishment authority. The court-martial is composed of one commissioned officer who need not be an attorney. A Service Member can be represented by a civilian attorney but has not right to representation by a military counsel.

**Telescoping:** A temporal displacement of events, bringing events from outside of the reference period into the reference period.

**Titling:** Placing the name, and other identifying data, of an individual or entity on the subject block of an investigative report and central index, for the potential retrieval and analysis for law enforcement and security purposes.

**Trial Defense Counsel:** A judge advocate who represents a Service Member in any adverse action, such as a court-martial, administrative separation, or nonjudicial punishment proceedings.

**Unfounded:** False or baseless

**Unitary Sentencing:** In a court-martial, the sentencing authority (military judge or court-martial members) adjudges a single sentence for all the offenses of which the accused was found guilty. A court-martial may not impose separate sentences for each finding of guilt, but may impose only a single, unitary sentence covering all of the guilty findings in their entirety, no matter how many such findings there may be.

**Unrestricted Reporting:** A process a Service Member used to disclose, without requesting confidentiality or restricted reporting, that he or she is the victim of a sexual assault. Under these circumstances, the victim’s report and any details provided to healthcare personnel, the SARC, a VA, command authorities, or persons are reportable to law enforcement and may be used to initiate the official investigative process.

**US Army Criminal Investigation Laboratory (USACIL):** Located within the Defense Forensic Science Center at Fort Gillem, Georgia, provides forensic laboratory services to DOD investigative agencies and other federal law enforcement agencies.

**Victim:** A person who asserts direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault. See DODD 6405.01.

**Victim Advocate (VA):** Military personnel, DOD civilian employees, DOD contractors, or volunteers who facilitate care for victims of sexual assault under the SAPR Program, and who, on behalf of the sexual assault victim, provide liaison assistance with other organizations and agencies on victim care matters, and report directly to the SARC when performing victim advocacy duties.
Appendix D:

PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

**JUNE 27, 2013**
RSP Public Meeting
U.S. District Court, Washington, D.C.
- Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society
- Ms. Delilah Rumburg, Executive Director, Pennsylvania Coalition Against Rape
- Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)
- Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO
- Mr. Fred Borch, Army JAG Corps Regimental Historian
- Captain Robert Crow, Joint Service Committee Representative, U.S. Navy

**AUG. 1, 2013**
RSP Preparatory Session
One Liberty Center, Arlington, VA
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office
- Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program
- Major Jaclyn Grieser, Army Special Victim Prosecutor
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program
- Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch
- Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command
- Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations

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Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service
- Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director
- Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager
- Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

**AUG. 5, 2013**

**RSP Preparatory Session**

**One Liberty Center, Arlington, VA**

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (via telephone)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, British Army (via telephone)
- Major General William Mayville, Jr., U.S. Army
- Colonel Dan Brookhart, U.S. Army
- Colonel Jeannie Leavitt, U.S. Air Force
- Lieutenant Colonel Debra Luker, U.S. Air Force
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral William Baumgartner, U.S. Coast Guard
- Captain P.J. McGuire, U.S. Coast Guard
- Air Commodore Cronan, Director General, Australia Defence Force Legal Service (via telephone)

**AUG. 6, 2013**

**RSP Preparatory Session**

**One Liberty Center, Arlington, VA**

- LTC Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS), U.S. Army
- Dr. David Lisak, Professor, University of Massachusetts-Boston
- Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice
- Dr. Jim Lynch, former Director of the Bureau of Justice and current Chair, Department of Criminology and Criminal Justice at the University of Maryland
APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanelwhs.mil/

SEPT. 24, 2013  RSP Public Meeting  
U.S. District Court, Washington, D.C.  
- Professor Geoffrey Corn, South Texas College of Law  
- Professor Chris Behan, Southern Illinois University School of Law  
- Professor Michel Drapeau, University of Ottawa  
- Professor Eugene Fidell, Yale Law School (telephonic)  
- Professor Victor Hansen, New England School of Law  
- Professor Rachel VanLandingham, Stetson University College of Law  
- Lord Martin Thomas of Gresford QC, Chair of the Association of Military Advocates in the United Kingdom  
- Professor Amos Guiora, University of Utah College of Law and prior judge advocate in the Israeli Defense Forces  
- Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces  
- Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command  
- Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service  
- Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom  
- Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army  
- Senator Kirsten Gillibrand (New York)  
- Senator Claire McCaskill (Missouri)

SEPT. 25, 2013  RSP Public Meeting  
U.S. District Court, Washington D.C.  
- Lieutenant General Michael Linnington, U.S. Army  
- Colonel Corey Bradley, U.S. Army  
- Rear Admiral Dixon Smith, U.S. Navy  
- Captain David Harrison, U.S. Navy  
- Commander Frank Hutchison, U.S. Navy  
- General Edward Rice, U.S. Air Force  
- Colonel Polly S. Kenny, U.S. Air Force  
- Major General Steven Busby, U.S. Marine Corps  
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps  
- Rear Admiral Thomas Ostebo, U.S. Coast Guard  
- Commander William Dwyer, U.S. Coast Guard  
- Brigadier General Richard C. Gross, Legal Counsel, Chairman of the Joint Chiefs of Staff  
- Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army  
- Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy  
- Major General Vaughn A. Army, Staff Judge Advocate to the Commandant of the Marine Corps  
- Rear Admiral Frederick J. Kenney, Judge Advocate General and Chief Counsel, U.S. Coast Guard

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Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanelwhs.mil/

NOV. 7, 2013  
RSP Public Meeting  
U.S. District Court, Washington, D.C.  
- Major General Gary S. Patton, Director, DoD SAPRO  
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO  
- Major General Margaret Woodward, Director, Air Force SAPR Office  
- Rear Admiral Maura Dollymore, Director of Health, Safety and Work-Life, U.S. Coast Guard  
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard  
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office  
- Brigadier General Russell Sanborn, Director, Marine & Family Programs  
- Dr. Christine Altendorf, Director, U.S. Army Sexual Harassment/ Assault Response & Prevention Office  
- Master Sergeant Carol Chapman, SHARP Program Manager, 7th Infantry Division, U.S. Army  
- Ms. Christa Thompson, Victim Witness Liaison, Fort Carson, Colorado  
- Dr. Kimberly Dickman, Sexual Assault Response Coordinator, National Capitol Region, U.S. Air Force  
- Master Sergeant Stacia Rountree, Victim Advocate, National Capitol Region, U.S. Air Force  
- Ms. Liz Blanc, U.S. Navy Sexual Assault Response Coordinator, National Capitol Region  
- Ms. Torie Camp, Deputy Director, Texas Association Against Sex Assault  
- Ms. Gail Reid, Director of Victim Advocacy Services, Baltimore, Maryland  
- Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County & City of Falls Church, Virginia  
- Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia  
- Ms. Nancy Parrish, President, Protect our Defenders  
- Ms. Miranda Peterson, Program and Policy Director, Protect our Defenders  
- Mr. Greg Jacob, Policy Director, Service Women’s Action Network  
- Mr. Scott Berkowitz, President, Rape, Assault, and Incest Network  
- Dr. Will Marling, Executive Director, National Organization for Victim Assistance  
- Ms. Donna Adams (Public Comment)

NOV. 8, 2013  
RSP Public Meeting  
U.S. District Court, Washington, D.C.  
- Command Sergeant Major Julie Guerra, U.S. Army  
- Mr. Brian Lewis  
- Ms. BriGette McCoy  
- Ms. Ayana Harrell  
- Ms. Sarah Plummer  
- Ms. Marti Ribeiro  
- Colonel James McKee, Special Victims’ Advocate Program, U.S. Army  
- Colonel Carol Joyce, Officer in Charge, Victims’ Legal Counsel Organization, U.S. Marine Corps
Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanelwhs.mil/

- Captain Karen Fischer-Anderson, Chief of Staff, Victims’ Legal Counsel, U.S. Navy
- Captain Sloan Tyler, Director, Office of Special Victims’ Counsel, U.S. Coast Guard
- Colonel Dawn Hankins, Chief, Special Victims’ Counsel Division, U.S. Air Force
- Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C.
- Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia
- Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York
- Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona
- Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center
- Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service
- Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization
- Captain Charles Purnell, U.S. Navy Defense Service Office
- Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force
- Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard
- Mr. David Court of Court and Carpenter, Stuttgart, Germany
- Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas
- Ms. Bridget Wilson, Attorney, San Diego, California

**NOV. 14, 2013**

Preparatory Session
Defense Forensic Science Center (DFSC)/United States Army Criminal Investigations Laboratory (USACIL), Atlanta, GA
- Dr. Jeff Salyards, Exec. Director, DFSC
- Mr. Robert Abernathy, Chief of Staff, DFSC
- Ms. Lauren Reed, Dir. USACIL
- Mr. Mike Hill, Operations Officer, USACIL
- Mr. Scott Larson, Chief, Security, Plans and Operations
- Ms. Jennifer Coursey, Supervisory Biologist-DNA Branch
- Ms. Debra E. Glidewell, Chief, DNA-Branch
- Ms. Aniece L. Baxter-White, Attorney Advisor
- Ms. Donna Ioannidis, DNA Examiner
- Ms. Elizabeth D. Johnson, CODIS
- Dr. Kim E. Mooney, Acting Chief, Trace Evidence
- Mr. Michael A. Villarreal, Trace Evidence Examiner
- Mr. William G. Doyne, Technical leader, Latent Prints
- Ms. Monica Garcia, Latent Print Examiner
- Mr. Garold Warner, Office of the Chief Scientist
- Dr. Brigid F. O’Brien, Research Physical Scientist
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

**NOV. 14, 2013** Preparatory Session
Georgia Bureau of Investigations Lab, Atlanta, GA
- Mr. Mark R. Maycock, Assistant Deputy Director, GBI
- Ms. Kathryn P. Lee, Assistant Deputy Director, GBI
- Mr. Cleveland Miles, Forensic Biology Manager, GBI
- Ms. Tammy Jergovich, Trace Evidence Manager, GBI
- Mr. Jim Sebestyn, Forensic Biology, GBI

**NOV. 19, 2013** Comparative Systems Subcommittee Meeting
Arlington, VA
- Mr. Scott Russell, Director of the Violent Crime Division, DoD Inspector General
- Mr. Guy Surian, HQ, U.S. Army Criminal Investigation Command
- Ms. Donna Ferguson, U.S. Army Military Police School
- Mr. Kevin Poorman, Office of Special Investigations, U.S. Air Force, Quantico Headquarters
- Mr. Robert Vance, Programs and Policy, Naval Criminal Investigative Service
- Chief Warrant Officer Five Shannon Wilson, Marine Corps Investigator
- MAC Amy Pearson, Naval Investigator
- Commander Kristie Robson, Department Head of Clinical Programs and Sexual Assault Medical Program Manager, U.S. Navy Bureau of Medicine and Surgery
- Colonel Todd Poindexter, Chief of Clinical Operations, Air Force Medical Support Agency, Office of The Surgeon General
- Ms. Carol Haig, Army Sexual Assault Clinical Provider, Office of the Surgeon General
- Dr. Sue Rotolo, Ph.D., SANE, Inova Fairfax Hospital
- Major Martin Bartness, Baltimore City Police Department
- Detective Lanis Geluso, Virginia Beach Police Department
- Lieutenant Joe Carter, Falls Church City Police Department
- Detective Missy Elliott, Falls Church City Police Department
- Lieutenant Paul Thompson, Assistant Commander, Major Crimes Division, Fairfax County Police Department
- Lieutenant Mark Kidd, Sex Squad, Fairfax County Police Department
- Detective Stephen Wallace, Sex Squad, Fairfax County Police Department
- Detective Greg Sloan, Arlington Police Department

**DEC. 10, 2013** Preparatory Session
Fort Hood, TX
(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)
APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

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DEC. 11, 2013  RSP Public Meeting
Austin, TX
- Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School
- Major Ryan Oakley, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense (Personnel & Readiness), U.S. Air Force
- Dr. Cara J. Krulwich, Director, Women’s Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs)
- Captain Jason Brown, Military Justice Officer, Military Justice Branch (JAM), Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service
- Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service
- Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation
- Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command
- Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau
- Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit
- Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police
- Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations
- Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research
- Dr. Kim Lonsway, Director of Research for End Violence Against Women International

DEC. 12, 2013  RSP Public Meeting
Austin, TX
- Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney’s Office
- Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
- Captain Jason Brown, Military Justice Officer, Military Justice Branch (JAM), Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps
- Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency, U.S. Air Force
- Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy

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Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia
- Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
- Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
- Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, U.S. Army
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
- Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
- Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
- Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
- Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program, U.S. Army
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Anne Munch, Owner, Anne Munch Consulting, Inc.
- Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
- Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office
- Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
- Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
- Commander Aaron Rugh, Director, U.S. Navy Trial Counsel Assistance Program, U.S. Navy
- Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
- Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
- Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
- James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
- Lieutenant Colonel Devin Winklosky, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School, U.S. Marine Corps

**DEC. 13, 2013** Preparatory Session
Joint Base San Antonio, Lackland AFB/37th, San Antonio, TX

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APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

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JAN. 7, 2014

Comparative Systems Subcommittee Meeting
Arlington, VA

- Colonel (Retired) Francis Gilligan, Director of Training for of Military Commission Prosecutors
- Candace Mosley, Director of Programs, National District Attorneys Association
- Viktoria Kristiansson, AEquitas
- Lisa Wayne, former President, NACDL and Training Director of Colorado State Public Defender System
- Yvonne Younis, Defender Association of Philadelphia
- Lieutenant Colonel Matthew Calarco, Chair, Criminal Law Department, U.S. Army
- Colonel Vance Spath, Director, Training and Readiness, U.S. Air Force
- Lieutenant Commander Justin McEwen, Military Justice Department Head, Naval Justice School
- Lieutenant Colonel George Cadwalader, Executive Officer, Naval Justice School
- Ms. Bridget Ryan, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program
- Ms. Sandra Tullius, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program
- Mr. Ron White, Subject Matter Expert, consultant U.S. Army Trial Defense Services
- Mr. Edward O'Brien, Army DCAP,
- Colonel Ken Theurer, Commandant, Air Force Judge Advocate General's School
- Mr. David M. Houghland, Chief of Education & Training Development, Training and Readiness Directorate, HQ USAF/JAI
- Mr. Neal Puckett, Highly Qualified Expert, Naval Defense Counsel Assistance Program
- Ms. Teresa Scalzo, Deputy Director, Navy Judge Advocate General, Trial Counsel Assistance Program (TCAP)
- Ms. Kathleen Coyne, USMC, Highly Qualified Expert-Defense
- Ms. Claudia Bayliff, Attorney at Law

JAN. 30, 2014

RSP Public Meeting
George Washington University Law School, Washington, D.C.

- General (Retired) Ann Dunwoody, U.S. Army
- General (Retired) Roger Brady, U.S. Air Force
- Vice Admiral (Retired) Mike Vitale, U.S. Navy*
- Lieutenant General (Retired) James Campbell, U.S. Army
- Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force*
- Major General (Retired) Martha Rainville, U.S. Air Force*
- Brigadier General (Retired) Pat Foote, U.S. Army
- Rear Admiral (Retired) Marty Evans, U.S. Navy*
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard
- Captain (Retired) Lory Manning, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps*
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration

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- Ms. Melissa Davis, Public Comment
- Ms. Ginny Lee, Public Comment
- Ms. Sara Zak, Public Comment

**FEB. 5, 2014**

Preparatory Session
Bremerton Naval Station and Joint Base Lewis McChord, WA

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

**FEB. 6, 2014**

Preparatory Session
Dawson’s Place, Everett, WA

- Brittany Blancarte - CAP Therapist, Compass Health
- Linda Lasz - CAP Supervisor, Compass Health
- Heidi Scott - Child Interview Specialist, Dawson Place Child Advocacy Center
- Lisa Paul - Lead Deputy Prosecuting Attorney, Snohomish County Prosecutor’s Office
- Sgt. Rob Barnett - SIU Supervisor, Snohomish County Sheriff’s Office
- Lori Vanderburg - Director, Dawson Place & CAP Manager, Compass Health
- Paula Newman-Skomski - ARNP, Providence Intervention Center for Assault & Abuse
- Alicia Coragiulo - Advocate Specialist, Providence Intervention Center for Assault & Abuse
- Kristine Petereit - Fund Development Coordinator, Dawson Place Child Advocacy Center
- Mark Roe - County Prosecutor, Snohomish County Prosecutor’s Office
- Annette Tupper - Victim Advocate, Snohomish County Prosecutor’s Office
- Vicki Steffen - Office Manager II, Dawson Place Child Advocacy Center

**FEB. 11, 2014**

Comparative Systems Subcommittee Meeting
Arlington, VA

- Colonel (Ret.) Francis Gilligan, Office of Military Commission
- Colonel (Ret.) Steve Andraschko, Army Clemency & Parole Board
- Colonel John Baker, U.S. Marine Corps
- Mark Bergstrom, Pennsylvania State Sentencing Commission
- Bruce Brown, Air Force Clemency & Parole Board
- L. Russell Burress, U.S. Sentencing Commission
- Annette Burrhus-Clay, National Alliance to End Sexual Violence (NAESV)
- Lieutenant Colonel Craig Burton, U.S. Air Force
- Captain Robert Crow, U.S. Navy
- Meredith Farrar-Owens, Virginia State Sentencing Commission
- Molly Gill, Families Against Mandatory Minimums (FAMM)
- Lieutenant Commander Stuart Kirkby, U.S. Navy
- A.J. Kramer, Civilian Defense Counsel
- Michael LoGrande, Air Force Review Boards Agency
APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

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- Colonel Michael Mulligan, U.S. Army
- Michael Nachmanoff, Civilian Defense Counsel
- Jonathan Wroblewski, U.S. Department of Justice

**FEB. 20, 2014**  Preparatory Session
Norfolk, VA

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

**FEB. 20, 2014**  Preparatory Session
Philadelphia, PA

- Mr. Michael Boyle, PSARC Director
- Captain Johan Darby, Commanding Officer, SVU Philadelphia PD
- Dr. Ralph Riviello, Drexel University College of Medicine
- Pat Roussell, Sexual Assault Nurse Examiner (SANE)
- Erin O’Brien, Assistant District Attorney, Family Violence & Sexual Assault Section

**FEB. 25, 2014**  Comparative Systems Subcommittee Meeting
Arlington, VA

- Dr. Robin Wilson, Ph.D. ABPP
- David Prescott, LICSW
- LTC David Johnson, M.D. Program Director, Center for Forensic Behavioral Sciences (CFBS), U.S. Army
- Dr. Jennifer Yeaw Psy.D. CFBS (Phone)

**MAR. 5, 2014**  Preparatory Session
Quantico Marine Corps Base, Quantico, VA

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

**APR. 11, 2014**  Comparative Systems Subcommittee Meeting
Arlington, VA

- Dr. Jim Lynch, Former Director, Bureau of Justice Statistics (BJS), Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland
- Dr. Bill Sabol, Acting Director BJS
- Dr. Allen Beck, BJS Senior Statistical Advisor

**MAY 5, 2014**  RSP Public Meeting
George Washington University Law School, Washington, D.C.

- Major General Jeffrey J. Snow, Director of DoD SAPRO

(This list does not reflect presenters to other subcommittees)
Appendix E:
SOURCES CONSULTED

1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

a. Enacted Federal Statutes

b. Proposed Federal Statutes

c. Reports of Congress
Senate Report No. 113-44 (2013)

3. JUDICIAL DECISIONS

Supreme Court
Jackson v. Taylor, 353 U.S. 569 (1957)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: SOURCES CONSULTED


c. Services

Department of the Army Regulation 190-53, Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes (Nov. 3, 1986)

Department of the Army, Office of The Judge Advocate General, Publication 1-1 (Jan. 1, 2014) (updated Mar. 17, 2014)


5. MEETINGS AND HEARINGS¹

a. Public Meetings of the Response Systems Panel

Transcript of RSP Public Meeting (June 27, 2013)

Transcript of RSP Public Meeting (Sept. 24, 2013)

Transcript of RSP Public Meeting (Sept. 25, 2013)

Transcript of RSP Public Meeting (Nov. 7, 2013)

Transcript of RSP Public Meeting (Nov. 8, 2013)

Transcript of RSP Public Meeting (Dec. 11, 2013)

Transcript of RSP Public Meeting (Dec. 12, 2013)

Transcript of RSP Public Meeting (Jan. 30, 2014)

¹ Unless otherwise indicated, the materials pertaining to the meetings of the Response Systems Panel and its Subcommittees are currently available at http://responsesystemspanel.whs.mil/index.php/meetings.
b. Meetings of the RSP Subcommittees

Transcript of Role of the Commander Subcommittee Meeting (Sept. 25, 2013)
Transcript of Role of the Commander Subcommittee Meeting (Oct. 23, 2013)
Transcript of Comparative Systems Subcommittee Meeting (Nov. 19, 2013)
Transcript of Comparative Systems Subcommittee Meeting (Jan. 7, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Jan. 15, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Feb. 11, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Feb. 25, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Mar. 11, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Mar. 25, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Apr. 11, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Apr. 24, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Apr. 25, 2014)
Transcript of Comparative Systems Subcommittee Meeting (May 2, 2014)

c. Preparatory Sessions (on file at Response Systems Panel)

Minutes of RSP Preparatory Session, Arlington, VA (Aug. 1, 2013)
Minutes of RSP Preparatory Session, Arlington, VA (Aug. 6, 2013)
Minutes of Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) / U.S. Army Criminal Investigation Laboratory (USACIL) (Nov. 14, 2013)
Minutes of Comparative Systems Subcommittee Preparatory Session, Georgia Bureau of Investigation (GBI) (Nov. 14, 2013)
Minutes of Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013)
Minutes of Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (Dec. 13, 2013)
Minutes of Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (Feb. 5, 2014)
Minutes of Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014)
Minutes of Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC) (Feb. 20, 2014)
Minutes of Comparative Systems Subcommittee Preparatory Session, Norfolk, VA (Feb. 20, 2014)
Minutes of Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: SOURCES CONSULTED

d. Presentations and Materials Provided by Presenters
i. June 27, 2013 Public Meeting of the Response Systems Panel
PowerPoint Presentation of Dr. Lynn Addington, American University, “Overview of Sexual Assault Victimization Data”

PowerPoint Presentation of DoD SAPRO

ii. August 6, 2013 Preparatory Session of the Comparative Systems Subcommittee
PowerPoint Presentation of Dr. Cassia Spohn, Arizona State University, “Police and Prosecutorial Decision Making in Sexual Assault Cases: Lessons from Los Angeles”

iii. October 23, 2013 Meeting of the Role of the Commander Subcommittee
PowerPoint Presentation of DoD SAPRO (Oct. 23, 2013)

iv. November 14, 2013 Preparatory Session of the Comparative Systems Subcommittee
PowerPoint Presentation of Defense Forensic Science Center, “Overview of the DFSC/USACIL Capabilities and Sexual Assault Examination Caseload”

v. November 19, 2013 Meeting of the Comparative Systems Subcommittee
PowerPoint Presentation of Military Criminal Investigative Organizations

PowerPoint Presentation of United States Army Military Police School, “Sexual Assault Special Agent & First Responder Training”


Written Statement of Ms. Carol Haig, Office of the U.S. Army Surgeon General

PowerPoint Presentation of Dr. Suzanne Rotolo, Dr. Rotolo Consulting, “Best Practices for Sexual Assault Nurse Examiners”

vi. December 10, 2013 Meeting of the Comparative Systems Subcommittee
PowerPoint Presentation, “Fort Hood Sexual Assault Information”


Written Submission of Lieutenant Colonel Devin Winklosky, The U.S. Army Judge Advocate General’s Legal Center and School, “Article 120 and Sex Crimes Comparisons” (2013)

Ashland Police Department, “You Have Options Program’ Program: A Campaign to Increase Sexual Assault Reporting within the City of Ashland”


PowerPoint Presentation of Deputy Chief Kirk J. Albanese, Los Angeles Police Department, “Sexual Assault Crimes Executive Summary”

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: SOURCES CONSULTED

Written Submission of Mr. Francis Gilligan, Office of Military Commission, “NDAA 2014 Changes to UCMJ and Roles of SJA, Prosecutor, Convening Authority, Defense Counsel and Sexual Assault Victim’s Counsel”

National Center for the Prosecution of Violence Against Women, Information Paper

PowerPoint Presentation of Kristina M. Korobov, “Who Are They to Judge? The Jury, That’s Who: Jury Selection in Sexual Assault Cases”


National Center for Prosecution of Child Abuse, “Rape Child Statutes: As of March 2011”

Written Statement of Ms. Teresa Scalzo, U.S. Navy Trial Counsel Assistance Program

Written Statement of Mr. Neal Puckett, U.S. Navy Defense Counsel Assistance Program

Written Statement of Ms. Kathleen Coyne, U.S. Marine Corps Defense Services Organization

x. February 11, 2014 Meeting of the Comparative Systems Subcommittee


PowerPoint Presentation of Mr. Bruce T. Brown, U.S. Air Force Clemency and Parole Board

Families Against Mandatory Minimums, “Smarter Sentencing Act”

Written Statement of Mr. Steven Andraschko, U.S. Army Clemency and Parole Board


“Selected Sentencing Statistics for Fiscal Year 2012 for the Federal Sentencing Guidelines for Criminal Sexual Abuse (Rape) (§2A3.1) and Abusive Sexual Contact (§2A3.4)” (submitted by Mr. L. Russell Burress)

xi. February 25, 2014 Meeting of the Comparative Systems Subcommittee

PowerPoint Presentation of Dr. Robin J. Wilson, Wilson Psychological Services, “Sexual Abuse: Who Are the Offenders and How Do We Assess Them?”

PowerPoint Presentation of David S. Prescott, “Success: What Do We Do and How Do We Get There?”

PowerPoint Presentation of Lieutenant Colonel Dr. Jennifer Yeaw, Center for Forensic Behavioral Sciences, “DoD Expert Witness in Sexual Assault Courts-Martial”

xii. April 11, 2014 Meeting of the Comparative Systems Subcommittee

PowerPoint Presentation of Dr. James P. Lynch, University of Maryland, “Measuring Rape and Sexual Assault: In Self-Report Surveys”

PowerPoint Presentation of Dr. William J. Sabol and Allen Beck, Bureau of Justice Statistics, “Appearance before the Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel”

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
6. OFFICIAL REPORTS


Department of Defense, Report to the Committees on Armed Services of the U.S. Senate and U.S. House of Representatives, Establishment of Special Victim Capabilities with the Military Departments to Respond to Certain Special Victim Offenses, Report to the Committee on Armed Services of the U.S. Senate and the U.S.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: SOURCES CONSULTED


7. OTHER REPORTS


Cassia Spohn & Katherine Tellis, Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Los Angeles County Sheriff’s Department, and the Los Angeles County District Attorney’s Office (2012)

8. OFFICIAL POLICY STATEMENTS

a. President


b. Department of Defense


Secretary of Defense, Memorandum on Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012)


c. Services

Department of the Air Force, Memorandum from the Undersecretary of the Air Force on General Court-Martial Convening Authority (GCMCA) Review in Certain Sexual Assault Cases (June 17, 2013)


The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: SOURCES CONSULTED


9. RESPONSES TO RSP REQUESTS FOR INFORMATION2

10. BOOKS, BOOKLETS, AND FILMS


Black’s Law Dictionary (9th ed. 2009)


Wisconsin Office of Justice Assistance, Violence Against Women Program, Wisconsin’s Prosecutor’s Sexual Assault Reference Book (2009)

11. JOURNAL ARTICLES


2 Responses to RSP Requests for Information are currently available at http://responsesystemspanel.whs.mil/index.php/rfis.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.


Colonel James A. Young, III, Revising the Court Member Selection Process, 163 Military Law Review 91 (2000)

12. LETTERS AND E-MAILS

Acting General Counsel of Department of Defense, Letter to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), currently available at http://responsesystemspanel.whs.mil

Assistant Secretary of Defense for Legislative Affairs, Letter to the Honorable Carl Levin, Chair, Senate Armed Services Committee (undated) (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014), currently available at http://responsesystemspanel.whs.mil/index.php/home/materials

Secretary of Defense, Memorandum to the Acting General Counsel of Department of Defense (Sept. 4, 2013), currently available at http://responsesystemspanel.whs.mil

13. NEWS ARTICLES AND BROADCASTS


The Response Systems Panel has not yet considered or deliberated on the contents of this report.

14. ONLINE RESOURCES


Bureau of Justice Statistics, “The Justice System,” at http://www.bjs.gov/content/justsys.cfm#sentencing


California Public Defenders Association, at http://www.claraweb.us/


Department of the Army, “JAGCNet,” at https://www.jagcnet.army.mil/


APPENDIX E: SOURCES CONSULTED

National Association of Prosecutor Coordinators, at http://www.napc.us/
National Legal Aid and Defenders Association, at http://www.nlada100years.org/
Appendix F:
EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

EXCERPTS FROM THE MCM AND UCMJ

Uniform Code of Military Justice (UCMJ)
Art. 13 Punishment prohibited before trial
Art. 15 Commanding Officer’s nonjudicial punishment
Art. 16-21 Court-martial jurisdiction
Art. 22-29 Composition of court-martial
Art. 31 Compulsory self-incrimination prohibited
Art. 32 Investigation
Art. 34 Advice of staff judge advocate and reference for trial
Art. 37 Unlawfully influencing action of court
Art. 41 Challenges
Art. 46 Opportunity to obtain witnesses and other evidence
Art. 48 Contempts
Art. 49 Depositions
Art. 51 Voting and rulings
Art. 52 Number of votes required
Art. 66 Review of Court of Criminal Appeals
Art. 67 Review by Court of Appeals for the Armed Forces
Art. 69 Review in the Office of the Judge Advocate General

Punitive Articles
Article 80 Attempts
Article 92 Failure to obey order or regulation
Article 98 Noncompliance with procedural rules
Article 120 Rape and sexual assault
  • Amendment to Art. 120, dated May 15, 2013
  • Art. 120 (after June 28, 2012)
  • Art. 120 (during the period of October 1, 2007 through June 27, 2012)
  • Art. 120 (prior to October 1, 2007)
Article 125 Sodomy
Article 134 (Fraternization)

Rules for Courts-Martial (RCM)
RCM 104 Unlawful Command Influence
RCM 304 Pretrial restraint
RCM 305 Pretrial confinement
RCM 306 Initial disposition
RCM 307 Preferral of charges
RCM 404 Action by commander exercising special CM jurisdiction
RCM 405 Pretrial Investigation
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Sec 1742 Commanding officer action on reports of sexual assault involving members of the Armed Forces.

Sec 1744 Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.

Sec 1752 Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the UCMJ through courts-martial.

Sec 1753 Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.

Victims Protection Act of 2014

Sec 2 Inclusion of Senior Trial Counsel determinations of referral of cases to trial by court-martial in cases reviewed by Secretaries of Military departments.

Sec 3(b) Consultation with Victims regarding Preference in Prosecution.

Sec 3(g) Modification of MRE relating to admissibility of general Military Character.

Sec 5 Collaboration between DoD and DoJ in efforts to prevent and respond to sexual assault.

Furthering Accountability and Individual Rights within the Military Act of 2014 (Fair Military Act)

Sec 4 Modification of MRE 404 relating to Admissibility of General Military Character Toward Probability of Innocence.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

§ 809. Art. 9(a)

APPENDIX 2

certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§ 810. Art. 10. Restraint of persons charged with offenses

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require, but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

§ 811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander or a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

§ 812. Art. 12. Confinement with enemy prisoners prohibited

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

§ 813. Art. 13. Punishment prohibited before trial

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

§ 814. Art. 14. Delivery of offenders to civil authorities

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence.

SUBCHAPTER III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer’s non-judicial punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month’s pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month’s pay per month for three months;
§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—
   (A) a military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a); or
   (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and
   (C) only a military judge, if one has been detailed to the court, or reasons a military judge could not be detailed.

(2) special courts-martial, consisting of—
   (A) not less than three members; or
   (B) a military judge and not less than three members; or
   (C) only a military judge, if one has been detailed to the court, or reasons a military judge could not be detailed.

(3) summary courts-martial, consisting of one commissioned officer.

§ 817. Art. 17. Jurisdiction of courts-martial in general

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the holding of summary courts-martial.

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(c) of this title (article 16(c)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year. A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month’s pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

UNIFORM CODE OF MILITARY JUSTICE

§ 825. Art. 25. (b)(c)(1)

A2-7

300

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
§ 828. Art. 28. Detail or employment of reporters and Interpreters

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, military commission, or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

§ 829. Art. 29. Absent and additional members

(a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 8 16(1)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

§ 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

§ 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

§ 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as
§ 832. Art. 32.(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

§ 833. Art. 33. Forwarding of charges

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the Investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

(1) the specification alleges an offense under this chapter;

(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

§ 832. Art. 32.(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

Sec. 36. President may prescribe rules.

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which 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.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX 2

Excerpts from the MCM and UCMJ
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

§ 837. Art. 37. Unlawfully influencing action of court  
(a) No authority convening a general, special, or summary court-martial, or any other commanding officer, may counsel, reprehend, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel  
(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings. The accused may be represented—
   (A) by military counsel detailed under section 827 of this title (article 27), perform any duty of the trial counsel; and
   (B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—
   (A) by military counsel detailed under section 827 of this title (article 27); or
   (B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel in his sole discretion—
   (A) may detail additional military counsel as assistant defense counsel; and
   (B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define “reasonably available” for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—
   (1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);  
   (2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and
   (3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions  
(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

§ 839. Art. 39.(a) 

APPENDIX 2

this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

(b) Proceedings under subsection (a) shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29). If authorized by regulations of the Secretary concerned, and if at least one defense counsel is physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology (such as videoteleconferencing technology).

(c) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

(d) The findings, holdings, interpretations, and other precedents of military commissions under chapter 47A of this title—

(1) may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial under this chapter; and

(2) may not form the basis of any holding, decision, or other determination of a court-martial.

§ 840. Art. 40. Continuances

The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

§ 841. Art. 41. Challenges

(a)(1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevance and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b)(1) Each accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members required by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.


§ 842. Art. 42. Oaths

(a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant or associate defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined on oath.

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, rape, or rape of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2)(A) A person charged with having committed a child abuse offense against a child is liable to be tried by court-martial if the sworn charges and specifications are received during the life of the child or within five years after the date on which the offense was committed, whichever provides a longer period, by an officer exercising summary court-martial jurisdiction with respect to that person.
UNIFORM CODE OF MILITARY JUSTICE

§ 846. Art. 46.

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
§ 846. Art. 46. Any person not subject to this chapter—who—
(a) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board, or has been duly issued a subpoena duces tecum for an investigation pursuant to section 832(b) of this title (article 32(b));
(b) has performed a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage; and
(c) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.

§ 847. Art. 47. Refusal to appear or testify
(a) Any person not subject to this chapter—
(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board, or has been duly issued a subpoena duces tecum for an investigation pursuant to section 832(b) of this title (article 32(b));
(2) has been provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage; and
(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.

§ 848. Art. 48. Contempts
(a) Authority to punish contempt. A judge detailed to a court-martial, a court of inquiry, the United States Court of Appeals for the Armed Forces, a military court of Criminal Appeals, a provost court, or a military commission may punish for contempt any person who—
(1) uses any menacing word, sign, or gesture in the presence of the judge during the proceedings of the court-martial, court, or military commission;
(2) disturbs the proceedings of the court-martial, court, or military commission by any riot or disorder; or
(3) willfully disobeys the lawful writ, process, order, rule, decree, or command of the court-martial, court, or military commission.
(b) Punishment. The punishment for contempt under subsection (a) may not exceed confinement for 30 days, a fine of $1,000, or both.

§ 849. Art. 49. Depositions
(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.
(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.
(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.
(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears
(1) that the witness resides or is beyond the State, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;
(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonavailability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or
(3) that the present whereabouts of the witness is unknown.
(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.
(f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

§ 850. Art. 50. Admissibility of records of courts of inquiry
(a) In any case not capital and not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same...
issue was involved or if the accused consents to the introduction of such evidence.
(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of a commissioned officer.
(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

§ 850a. Art. 50a. Defense of lack of mental responsibility
(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.
(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.
(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—
(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of lack of mental responsibility.
(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—
(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of lack of mental responsibility.
(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—
(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or
(2) in the case of court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

§ 851. Art. 51. Voting and rulings
(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.
(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military Judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.
(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—
(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;
(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;
(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and
(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.
(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ 852. Art. 52. Number of votes required
(a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.
(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
(b)(1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.
(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.
(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.
(c) All other questions to be decided by the members of a general
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

§ 852. Art. 52.(c) or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused’s sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

§ 853. Art. 53. Court to announce action

A court-martial shall announce its findings and sentence to the parties as soon as determined.

§ 854. Art. 54. Record of trial

(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under the subsection.

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner required by such regulations as the President may prescribe.

(c)(1) A complete record of the proceedings and testimony shall be prepared—

(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and

(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.

(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.

(d) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

(e) In the case of a general or special court-martial involving a sexual assault or other offense covered by section 920 of this title (article 120), a copy of all prepared records of the proceedings of the court-martial shall be given to the victim of the offense if the victim testified during the proceedings. The records of the proceedings shall be provided without charge and as soon as the records are authenticated. The victim shall be notified of the opportunity to receive the records of the proceedings.

APPENDIX 2

SUBCHAPTER VIII. SENTENCES

Sec. 855. Art. 55. Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

§ 856. Art. 56. Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

§ 856a. Art. 56a. Sentence of confinement for life without eligibility for parole

(a) For any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement for life without eligibility for parole.

(b) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused’s life unless—

(1) the sentence is set aside or otherwise modified as a result of—

(A) action taken by the convening authority, the Secretary concerned, or another person authorized to act under section 860 of this title (article 60); or

(B) any other action taken during post-trial procedure and review under any other provision of subchapter IX;

(2) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

(3) the accused is pardoned.

§ 857. Art. 57. Effective date of sentences

(a) Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

(A) the date that is 14 days after the date on which the sentence is adjudged; or

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX 2

§ 863. Art. 63. Review by a judge advocate

upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

§ 864. Art. 64. Review by a judge advocate

(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate’s review shall be in writing and shall contain the following:

(1) Conclusions as to whether—
   (A) the court had jurisdiction over the accused and the offense;
   (B) the charge and specification stated an offense; and
   (C) the sentence was within the limits prescribed as a matter of law.
(2) A response to each allegation of error made in writing by the accused.
(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.
(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person’s successor in command) if—

(1) the judge advocate who reviewed the case recommends corrective action;
(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or
(3) such action is otherwise required by regulations of the Secretary concerned.
(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—
   (A) disapprove or approve the findings or sentence, in whole or in part;
   (B) remit, commute, or suspend the sentence in whole or in part;
   (C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or
   (D) dismiss the charges.
(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.
(3) If the opinion of the judge advocate in the judge advocate’s review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to Judge Advocate General for review under section 860(b) of this title (article 60(b)).

§ 865. Art. 65. Disposition of records

(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.
(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

§ 866. Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.
(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and
(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61),
(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.
(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.
(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the
§ 869. Art. 69. (a) The Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

§ 867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§ 868. Art. 68. Branch offices

The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Criminal Appeals with one or more panels. That Assistant Judge Advocate General and any Court of Criminal Appeals established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§ 869. Art. 69. Review in the office of the Judge Advocate General

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appro-
elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

Discussion

The words “or by fair implication” in paragraph 3b(1) and the last two sentences in paragraph 3b(1)(c) are inaccurate. See United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). Amending paragraph 3 requires an Executive Order, hence the strikethrough font used above. In Jones, the Court examined Article 79 and clarified the legal test for lesser included offenses. 68 M.J. at 466. The Court held that the elements test is the proper method of determining lesser offenses and found that a lesser offense is “necessarily included” in the offense charged only if the elements of the lesser offense are a subset of the elements of the greater offense alleged. Jones, 68 M.J. at 470. Therefore, practitioners must consider lesser offenses on a case-by-case basis. See also Article 79 analysis in Appendix 23 of this Manual.

(2) Multiple lesser included offenses. When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery, but guilty of wrongful appropriation and assault.

(3) Findings of guilty to a lesser included offense. A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word “murder,” substituting therefor the words “willfully and unlawfully kill”, of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

(4) Specific lesser included offenses. Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

Discussion

The lesser included offenses listed in Part IV of the Manual were established prior to Jones and must be analyzed on a case-by-case basis. See United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). Under Jones, some named lesser included offenses do not meet the elements test. 68 M.J. at 471-2. See discussion following paragraph 3b(1)(c) above. See also Article 79 analysis in Appendix 23 of this Manual.

4. Article 80—Attempts

a. Text of statute.

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

b. Elements.

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Excerpts from the MCM and UCMJ

commissioned, or petty officer not in the execution of office

(c) Article 80—attempts

(2) Disobeying a warrant, noncommissioned, or petty officer.

(a) Article 92—failure to obey a lawful order

(b) Article 80—attempts

(3) Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in the execution of office.

(a) Article 117—using provoking or reproachful speech

(b) Article 80—attempt

e. Maximum punishment.

(1) Striking or assaulting warrant officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Striking or assaulting superior noncommissioned or petty officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) Striking or assaulting other noncommissioned or petty officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) Willfully disobeying the lawful order of a warrant officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) Willfully disobeying the lawful order of a noncommissioned or petty officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(6) Contempt or disrespect to warrant officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(7) Contempt or disrespect to superior noncommissioned or petty officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(8) Contempt or disrespect to other noncommissioned or petty officer. Forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

f. Sample specifications.

(1) Striking or assaulting warrant, noncommissioned, or petty officer.

In that _________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _______ 20 ____, (strike) (assault) ________, a ________ officer, then known to the said ________ to be a (superior) ________ officer who was then in the execution of his/her office, by ________ him/her (in) (on) (the ________) with (a) ________ (his/her) ________ .

(2) Willful disobedience of warrant, noncommissioned, or petty officer.

In that _________ (personal jurisdiction data), having received a lawful order from ________, a ________ officer, then known by the said ________ to be a ________ officer, to ________, an order which it was his/her duty to obey, did (at/on board—location), on or about _______ 20 ____, willfully disobey the same.

(3) Contempt or disrespect toward warrant, noncommissioned, or petty officer.

In that _________ (personal jurisdiction data) (at/on board—location), on or about _______ 20 ____, [did treat with contempt] [was disrespectful in (language) (deportment) toward] ________, a ________ officer, then known by the said ________ to be a (superior) ________ officer, who was then in the execution of his/her office, by (saying to him/her, “__________,” or words to that effect) (spitting at his/her feet) ________ .

16. Article 92—Failure to obey order or regulation

a. Text of statute.

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

b. Elements.

(1) Violation of or failure to obey a lawful general order or regulation.

(a) That there was in effect a certain lawful general order or regulation;

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.
IV-24

¶16.b.(2) Article 92

(2) Failure to obey other lawful order.

(a) That a member of the armed forces issued a certain lawful order;

(b) That the accused had knowledge of the order;

(c) That the accused had a duty to obey the order; and

(d) That the accused failed to obey the order.

(3) Dereliction in the performance of duties.

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

c. Explanation.

(1) Violation of or failure to obey a lawful general order or regulation.

(a) Authority to issue general orders and regulations. General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

(i) an officer having general court-martial jurisdiction;

(ii) a general or flag officer in command; or

(iii) a commander superior to (i) or (ii).

(b) Effect of change of command on validity of order. A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) Lawfulness. A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in paragraph 14c(2)(a).

(d) Knowledge. Knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) Enforceability. Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92(1).

(2) Violation of or failure to obey other lawful order.

(a) Scope. Article 92(2) includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations. See also subparagraph (1)(c) above as applicable.

(b) Knowledge. In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) Duty to obey order.

(i) From a superior. A member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders which that member has a duty to obey under the same circumstances as a commissioned officer of one armed force is the superior commissioned officer of a member of another armed force for the purposes of Articles 89 and 90. See paragraph 13c(1).

(ii) From one not a superior. Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. See paragraph 15b(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) Dereliction in the performance of duties.

(a) Duty. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.

(b) Knowledge. Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating
manuscripts, customs of the service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

(c) Derelict. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person’s duties or when that person performs them in a culpably inefficient manner. “Willfully” means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. “Negligently” means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. “Culpable inefficiency” is inefficiency for which there is no reasonable or just excuse.

(d) Ineptitude. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

d. Lesser included offense. Article 80—attempts (violate) (fail to obey) a lawful general (order) (regulation), to wit: (paragraph ________ , (Army) (Air Force) Regulation ______ , dated ______ 20 ____) (Article ______ , U.S. Navy Regulations, dated ______ 20 ____) (General Order No. ___, U.S. Navy, dated _______ 20 ____) (_______), by (wrongfully) ________ .

(2) Violation or failure to obey other lawful written order.

In that ________ (personal jurisdiction data), having knowledge of a lawful order issued by ______ , to wit: (paragraph ______ , (_____ the Combat Group Regulation No. ______) (USS ______ , Regulation ______ ) , dated ________ ) (_______), an order which it was his/her duty to obey, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ______ 20 ___, fail to obey the same by (wrongfully) ________ .

(3) Failure to obey other lawful order.

In that ________ , (personal jurisdiction data) having knowledge of a lawful order issued by ________ , (to submit to certain medical treatment) (to ______ ) (not to ______ ) (_______), an order which it was his/her duty to obey, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ______ 20 ___, fail to obey the same (by (wrongfully) ________ .

(4) Dereliction in the performance of duties.

In that ________ , (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ______ 20 ____) (from about ______ 20 ____) (to about ______ 20 ____), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed ________ , as it was his/her duty to do.

17. Article 93—Cruelty and maltreatment

a. Text of statute.

Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

b. Elements.

(1) That a certain person was subject to the orders of the accused; and
(2) That the accused was cruel toward, or oppressed, or maltreated that person.
COMPARATIVE SYSTEMS SUBCOMMITTEE

Excerpts from the MCM and UCMJ

(1) Releasing a prisoner without proper authority.
Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) Suffering a prisoner to escape through neglect.
Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) Suffering a prisoner to escape through design.
Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specifications.
(1) Releasing a prisoner without proper authority.
In that _______ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 ___, without proper authority, release ________, a prisoner committed to his/her charge.

(2) Suffering a prisoner to escape through neglect or design.
In that _______ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 ___, through (neglect) (design), suffer ________, a prisoner committed to his/her charge, to escape.

21. Article 97—Unlawful detention
a. Text of statute.
Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

b. Elements.
(1) That the accused apprehended, arrested, or confined a certain person; and

(2) That the accused unlawfully exercised the accused’s authority to so do.

c. Explanation.
(1) Scope. This article prohibits improper acts by those empowered by the code to arrest, apprehend, or confine. See Articles 7 and 9; R.C.M. 302, 304, 305, and 1101, and paragraphs 2 and 5b, Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another’s freedom of movement by one not acting under such a delegation of authority under the code.

(2) No force required. The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

22. Article 98—Noncompliance with procedural rules
a. Text of statute.
Any person subject to this chapter who—
(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

b. Elements.
(1) Unnecessary delay in disposing of case.
(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the code;

(b) That the accused knew that the accused was charged with this duty;

(c) That delay occurred in the disposition of the case;

(d) That the accused was responsible for the delay; and

(e) That, under the circumstances, the delay was unnecessary.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.
(a) That the accused failed to enforce or comply with a certain provision of the code regulating a proceeding before, during, or after a trial;

(b) That the accused had the duty of enforcing or complying with that provision of the code;

(c) That the accused knew that the accused was charged with this duty; and
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

(d) That the accused’s failure to enforce or comply with that provision was intentional.

c. Explanation.

(1) Unnecessary delay in disposing of case. The purpose of section (1) of Article 98 is to ensure expeditious disposition of cases of persons accused of offenses under the code. A person may be responsible for delay in the disposition of a case only when that person’s duties require action with respect to the disposition of that case.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Section (2) of Article 98 does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. Unlawful command influence under Article 37 may be prosecuted under this Article. See also Article 31 and R.C.M. 104.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment.

(1) Unnecessary delay in disposing of case. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Unnecessary delay in disposing of case.

In that ________ (personal jurisdiction data), being charged with the duty of (investigating) (taking immediate steps to determine the proper disposition of) charges preferred against ________, a person accused of an offense under the Uniform Code of Military Justice (_________), was, at/on board—location), on or about ________ 20 ______: responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges _______), in that he/she (did _____) (failed to _____) (_____).

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

In that ________ (personal jurisdiction data), being charged with the duty of ________, did, (at/on board—location), on or about ________ 20 ______, knowingly and intentionally fail to (enforce) (comply with) Article ________, Uniform Code of Military Justice, in that he/she ________.

23. Article 99—Misbehavior before the enemy

a. Text of statute.

Any member of the armed forces who before or in the presence of the enemy—

(1) runs away;

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

(6) quits his place of duty to plunder or pilage;

(7) causes false alarms in any command, unit, or place under control of the armed forces;

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct.

b. Elements.

(1) Running away.

(a) That the accused was before or in the presence of the enemy;

(b) That the accused misbehaved by running away; and

(c) That the accused intended to avoid actual or impending combat with the enemy by running away.

(2) Shamefully abandoning, surrendering, or delivering up command.

(a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property;

(b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up
PART IV
PUNITIVE ARTICLES

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

Paragraph 45, Article 120, Rape and sexual assault generally, subparagraph e is amended to read as follows:

e. Maximum punishment.
   (1) Rape. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.
   (2) Sexual assault. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.
   (3) Aggravated sexual contact. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.
   (4) Abusive sexual contact. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

Paragraph 45b, Article 120b, Rape and sexual assault of a child, is amended by inserting the following new subparagraph e:

   e. Maximum punishment.
      (1) Rape of a child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.
      (2) Sexual assault of a child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.
      (3) Sexual abuse of a child.
         (a) Cases involving sexual contact.
            Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.
         (b) Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.”

Paragraph 45c, Article 120c, Other sexual misconduct, is amended by inserting the following new subparagraph e:

e. Maximum punishment.
   (1) Indecent viewing. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.
   (2) Indecent visual recording. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
   (3) Broadcasting or distribution of an indecent visual recording. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.
   (4) Forcible pandering. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.
   (5) Indecent exposure. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

¶44a.f.(1) Article 120

In that _______, (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ______ 20___, cause bodily injury to the unborn child of, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of] (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)) that woman.

(2) Killing an unborn child.

In that _______, (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ______ 20___, cause the death of the unborn child of, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of] (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)) that woman.

(3) Attempting to kill an unborn child.

In that _______, (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ______ 20___, attempt to kill the unborn child of, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of] (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)) that woman.

(4) Intentionally killing an unborn child.

In that _______, (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ______ 20___, intentionally kill the unborn child of, a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of] (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)) that woman.

45. Article 120—Rape and sexual assault generally

[Note: This statute applies to offenses committed on or after 28 June 2012. Previous versions of Article 120 are located as follows: for offenses committed on or before 30 September 2007, see Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 28.]

a. Text of statute.

(1) Rape. Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;
(2) using force causing or likely to cause death or grievous bodily harm to any person;
(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
(4) first rendering that other person unconscious; or
(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.

(2) Sexual Assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person by—

(A) threatening or placing that other person in fear;
(B) causing bodily harm to that other person;
(C) making a fraudulent representation that the sexual act serves a professional purpose; or
(D) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant,
or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) Aggravated Sexual Contact. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) Abusive Sexual Contact. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) Proof of Threat. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) Defenses. An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) Definitions. In this section:

(1) Sexual act. The term ‘sexual act’ means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. The term ‘sexual contact’ means—

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

(3) Bodily harm. The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

(4) Grievous bodily harm. The term ‘grievous bodily harm’ means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(5) Force. The term ‘force’ means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(6) Unlawful Force. The term ‘unlawful force’ means an act of force done without legal justification or excuse.

(7) Threatening or placing that other person in fear. The term ‘threatening or placing that other person in fear’ means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

(8) Consent.

(A) The term ‘consent’ means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

§45.a.(g)(8)(A) Article 120a

or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President’s authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

45a. Article 120a—Stalking

a. **Text of statute.**

   (a) **Any person subject to this section:**

   (1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family;

   (2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and

   (3) whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family; is guilty of stalking and shall be punished as a court-martial may direct.

(b) **In this section:**

   (1) The term “course of conduct” means:

   (A) a repeated maintenance of visual or physical proximity to a specific person; or

   (B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.

   (2) The term “repeated,” with respect to conduct, means two or more occasions of such conduct.

   (3) The term “immediate family,” in the case of a specific person, means a spouse, parent, child, or sibling of the person, or any other family member, relative, or intimate partner of the person who regularly resides in the household of the person or who within the six months preceding the commencement of the course of conduct regularly resided in the household of the person.

   b. **Elements.**

   (1) That the accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;

   (2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to himself or herself or a member of his or her immediate family; and

   (3) That the accused’s acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.

   c. **Explanation.** See Paragraph 54c(1)(a) for an explanation of “bodily harm”.

   d. **Lesser included offenses.** Article 80 — attempts.

   e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

   f. **Sample Specification.**

   In that _______ (personal jurisdiction data), who (knew)(should have known) that ______ would be placed in reasonable fear of (death)(bodily harm) to (himself) (herself) ( ______, a member of his or her immediate family) did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about ______ 20 ___)(from about ______ to about
(_20_, wrongly engage in a course of conduct directed at ____, to wit: ____ thereby inducing in ________, a reasonable fear of (death)/(bodily harm) to (himself)/(herself) (_____, a member of his or her immediate family).

45b. Article 120b—Rape and sexual assault of a child

[Note: This statute applies to offenses committed on or after 28 June 2012. Article 120b is a new statute designed to address only child sexual offenses. Previous versions of child sexual offenses are located as follows: for offenses committed on or before 30 September 2007, see Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 28.]

a. Text of Statute

   (a) Rape of a Child. Any person subject to this chapter who—

      (1) commits a sexual act upon a child who has not attained the age of 12 years; or
      (2) commits a sexual act upon a child who has attained the age of 12 years by—

         (A) using force against any person;
         (B) threatening or placing that child in fear;
         (C) rendering that child unconscious; or
         (D) administering to that child a drug, intoxicant, or other similar substance;

      is guilty of rape of a child and shall be punished as a court-martial may direct.

   (b) Sexual Assault of a Child. Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.

   (c) Sexual Abuse of a Child. Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

   (d) Age of Child.

      (1) Under 12 years. In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years.

      (2) Under 16 years. In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

   (c) Proof of Threat. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

   (f) Marriage. In a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), it is a defense, which the accused must prove by a preponderance of the evidence, that the persons engaging in the sexual act or lewd act were at that time married to each other, except where the accused commits a sexual act upon the person when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring or when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

   (g) Consent. Lack of consent is not an element and need not be proven in any prosecution under this section. A child not legally married to the person committing the sexual act, lewd act, or use of force cannot consent to any sexual act, lewd act, or use of force.

   (h) Definitions. In this section:

      (1) Sexual act and sexual contact. The terms ‘sexual act’ and ‘sexual contact’ have the meanings given those terms in section 920(g) of this title (article 120(g)).

      (2) Force. The term ‘force’ means—

         (A) the use of a weapon;
         (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child; or
(C) inflicting physical harm.
In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

(3) **Threatening or placing that child in fear.**
The term ‘threatening or placing that child in fear’ means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.

(4) **Child.** The term ‘child’ means any person who has not attained the age of 16 years.

(5) **Lewd act.** The term ‘lewd act’ means—
(A) any sexual contact with a child;
(B) intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;
(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or
(D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President’s authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this new statute, Article 120c. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

45c. Article 120c—Other sexual misconduct

[Note: This statute applies to offenses committed on or after 28 June 2012. Article 120c is a new statute designed to address miscellaneous sexual misconduct. Previous versions of these offenses are located as follows: for offenses committed on or before 30 September 2007, see Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 28.]

a. **Text of Statute**

(a) **Indecent Viewing, Visual Recording, or Broadcasting.** Any person subject to this chapter who, without legal justification or lawful authorization—

(1) knowingly and wrongfully views the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy;

(2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy; or

(3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.

(b) **Forcible Pandering.** Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(c) **Indecent Exposure.** Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall by punished as a court-martial may direct.

(c) **Definitions.** In this section:

(1) **Act of prostitution.** The term ‘act of prostitution’ means a sexual act or sexual contact (as defined in section 920(g) of this title (article 120(g))) on account of which anything of value is given to, or received by, any person.

(2) **Private area.** The term ‘private area’
means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

(3) Reasonable expectation of privacy. The term ‘under circumstances in which that other person has a reasonable expectation of privacy’ means—

(A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or

(B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(4) Broadcast. The term ‘broadcast’ means to electronically transmit a visual image with the intent that it be viewed by a person or persons.

(5) Distribute. The term ‘distribute’ means delivering to the actual or constructive possession of another, including transmission by electronic means.

(6) Indecent manner. The term ‘indecent manner’ means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President’s authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this new statute, Article 120c. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

46. Article 121—Larceny and wrongful appropriation

a. Text of statute.

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

b. Elements.

(1) Larceny.

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in paragraph 46c(1)(h), add the following element]

(e) That the property was military property.

(2) Wrongful appropriation.

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in paragraph 46c(1)(h), add the following element]
APPENDIX 28
PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED
DURING THE PERIOD 1 OCTOBER 2007
THROUGH 27 JUNE 2012

The punitive articles contained in this appendix were replaced or superseded by Articles 120, 120b, and 120c, Uniform Code of Military Justice, as amended or established by the National Defense Authorization Act for Fiscal Year 2012. Article 120 was previously amended by the National Defense Authorization Act for Fiscal Year 2006. Each version of Article 120 is located in a different part of this Manual. For offenses committed prior to 1 October 2007, the relevant sexual offense provisions are contained in Appendix 27. For offenses committed during the period 1 October 2007 through 27 June 2012, the relevant sexual offense provisions are contained in this appendix and listed below. For offenses committed on or after 28 June 2012, the relevant sexual offense provisions are contained in Part IV of this Manual (Articles 120, 120b, and 120c).

45. Article 120—Rape, sexual assault, and other sexual misconduct

a. Text of statute.
   (a) Rape. Any person subject to this chapter who causes another person of any age to engage in a sexual act by—
      (1) using force against that other person;
      (2) causing grievous bodily harm to any person;
      (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
      (4) rendering another person unconscious; or
      (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.
   (b) Rape of a child. Any person subject to this chapter who—
      (1) engages in a sexual act with a child who has not attained the age of 12 years; or
      (2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years; is guilty of rape of a child and shall be punished as a court-martial may direct.
   (c) Aggravated sexual assault. Any person subject to this chapter who—
      (1) causes another person of any age to engage in a sexual act by—
         (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
         (B) causing bodily harm; or
      (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—
         (A) appraising the nature of the sexual act;
         (B) declining participation in the sexual act; or
         (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.
   (d) Aggravated sexual assault of a child. Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.
   (e) Aggravated sexual contact. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.
   (f) Aggravated sexual abuse of a child. Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.
APPENDIX 28

(g) Aggravated sexual contact with a child. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

(h) Abusive sexual contact. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(i) Abusive sexual contact with a child. Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

(j) Indecent liberty with a child. Any person subject to this chapter who engages in indecent liberty in the physical presence of a child—

(1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or

(2) with the intent to abuse, humiliate, or degrade any person; is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.

(k) Indecent act. Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

(l) Forcible pandering. Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(m) Wrongful sexual contact. Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person’s permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(n) Indecent exposure. Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(o) Age of child.

(1) Twelve years. In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) Sixteen years. In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

(p) Proof of threat. In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

(q) Marriage.

(1) In general. In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct were married to each other.
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

(2) Definition. For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

(3) Exception. Paragraph (1) shall not apply if the accused’s intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.

(r) Consent and mistake of fact as to consent. Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

(s) Other affirmative defenses not precluded. The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.

(t) Definitions. In this section:

(1) Sexual act. The term “sexual act” means—

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening of another by a hand or finger 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.

(2) Sexual contact. The term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) Grievous bodily harm. The term “grievous bodily harm” means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246(4) of title 18.

(4) Dangerous weapon or object. The term “dangerous weapon or object” means—

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

(5) Force. The term “force” means action to compel submission of another or to overcome or prevent another’s resistance by—

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) Threatening or placing that other person in fear. The term “threatening or placing that other person in fear” under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

(7) Threatening or placing that other person in fear.

(A) In general. The term “threatening or placing that other person in fear” under paragraph (1)(A) of subsection (e) (aggravated sexual
assault), or under subsection (h) (abusive sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) Inclusions. Such lesser degree of harm includes—

(i) physical injury to another person or to another person’s property; or

(ii) a threat—

(1) to accuse any person of a crime;

(II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or

(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(8) Bodily harm. The term “bodily harm” means any offensive touching of another, however slight.

(9) Child. The term “child” means any person who has not attained the age of 16 years.

(10) Lewd act. The term “lewd act” means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) Indecent liberty. The term “indecent liberty” means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one’s genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child’s consent is not relevant.

(12) Indecent conduct. The term “indecent conduct” means that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person’s reasonable expectation of privacy, of—

(A) that other person’s genitalia, anus, or buttocks, or (if that other person is female) that person’s areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) of this chapter), or sexual contact.

(13) Act of prostitution. The term “act of prostitution” means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

(14) Consent. The term “consent” means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if—

(A) under 16 years of age; or

(B) substantially incapable of—

(i) appraising the nature of the sexual conduct at issue due to—

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(II) mental disease or defect that renders the person unable to understand the nature of the sexual conduct at issue;

(ii) physically declining participation in the sexual conduct at issue; or
MISTAKE OF FACT AS TO CONSENT

The term "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

AFFIRMATIVE DEFENSE

The term "affirmative defense" means any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.

b. Elements.

(1) Rape.

(a) Rape by using force.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person.

(b) Rape by causing grievous bodily harm.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by causing grievous bodily harm to any person.

(c) Rape by using threats or placing in fear.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) Rape by rendering another unconscious.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by rendering that other person unconscious.

(e) Rape by administration of drug, intoxicant, or other similar substance.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by administering to that other person a drug, intoxicant, or other similar substance;

(ii) That the accused administered the drug, intoxicant or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(iii) That, as a result, that other person’s ability to appraise or control conduct was substantially impaired.

(2) Rape of a child.

(a) Rape of a child who has not attained the age of 12 years.

(i) That the accused engaged in a sexual act with a child; and

(ii) That at the time of the sexual act the child had not attained the age of twelve years.

(b) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by using force against that child.

(c) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by causing grievous bodily harm to any person.
APPENDIX 28

(d) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by threatening or placing that child in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(e) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child unconscious.

(f) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by administering to that child a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child; and

(c) That, as a result, that child’s ability to appraise or control conduct was substantially impaired.

(3) Aggravated sexual assault.

(a) Aggravated sexual assault by using threats or placing in fear.

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).

(b) Aggravated sexual assault by causing bodily harm.

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

(ii) That the accused did so by causing bodily harm to another person.

(c) Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.

(i) That the accused engaged in a sexual act with another person, who is of any age; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual act;

(iv) That the other person was substantially incapable of declining participation in the sexual act; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual act.

(4) Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years.

(a) That the accused engaged in a sexual act with a child; and

(b) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.

(5) Aggravated sexual contact.

(a) Aggravated sexual contact by using force.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by using force against that other person.

(b) Aggravated sexual contact by causing grievous bodily harm.
Excerpts from the MCM and UCMJ

(i) (a) That the accused engaged in sexual contact with another person; or
(b) That the accused caused sexual contact with or by another person; and
(ii) That the accused did so by causing grievous bodily harm to any person.

(c) Aggravated sexual contact by using threats or placing in fear.
   (i) (a) That the accused engaged in sexual contact with another person; or
   (b) That the accused caused sexual contact with or by another person; and
   (ii) That the accused did so by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) Aggravated sexual contact by rendering another unconscious.
   (i) (a) That the accused engaged in sexual contact with another person; or
   (b) That the accused caused sexual contact with or by another person; and
   (ii) That the accused did so by rendering that other person unconscious.

(e) Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.
   (i) (a) That the accused engaged in sexual contact with another person; or
   (b) That the accused caused sexual contact with or by another person; and
   (ii) (a) That the accused did so by administering to that other person a drug, intoxicant, or other similar substance;
   (b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that other person; and
   (c) That, as a result, that other person’s ability to appraise or control conduct was substantially impaired.

(6) Aggravated sexual abuse of a child.
   (a) That the accused engaged in a lewd act; and
   (b) That the act was committed with a child who has not attained the age of 16 years.

(7) Aggravated Sexual Contact with a Child.
   (a) Aggravated sexual contact with a child who has not attained the age of 12 years.
      (i) (a) That the accused engaged in sexual contact with a child; or
      (b) That the accused caused sexual contact with or by a child or by another person with a child; and
      (ii) That at the time of the sexual contact the child had not attained the age of twelve years.
   (b) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.
      (i) (a) That the accused engaged in sexual contact with a child; or
      (b) That the accused caused sexual contact with or by a child or by another person with a child; and
      (ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and
      (iii) That the accused did so by using force against that child.
   (c) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.
      (i) (a) That the accused engaged in sexual contact with a child; or
      (b) That the accused caused sexual contact with or by a child or by another person with a child; and
      (ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and
      (iii) That the accused did so by causing grievous bodily harm to any person.
   (d) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.
      (i) (a) That the accused engaged in sexual contact with a child; or
      (b) That the accused caused sexual contact with or by a child or by another person with a child; and
      (ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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APPENDIX 28

(a) Article 120—Indecent act
(b) Article 128—Aggravated sexual assault by using threats or placing in fear. Article 120—Aggravated sexual assault upon a person principally incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(1)(c) Rape by using threats or placing in fear. Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(1)(d) Rape by rendering another unconscious. Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(2)(a) - (f) Rape of a child who has not attained 12 years; Rape of a child who has attained the age of 12 years but has not attained the age of 16 years. Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(3) Aggravated sexual assault. Article 120—Wrongful sexual contact; Indecent act

(4) Aggravated sexual assault of a child. Article 120—Aggravated sexual abuse of a child; Indecent act; Wrongful sexual contact

(5)(a) Aggravated sexual contact by force. Article 120—Indecent act; Wrongful sexual contact

(5)(b) Abusive sexual contact by causing or placing in fear. Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(5)(c) Aggravated sexual contact by using threats or placing in fear. Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(5)(d) Aggravated sexual contact by rendering another unconscious. Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(5)(e) Aggravated sexual contact by administration of drug, intoxicant, or other similar substance. Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact
PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

(6) Aggravated sexual abuse of a child. Article 120—Aggravated sexual contact with a child; aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact.

(7) Aggravated sexual contact with a child. Article 120—Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact.

(8) Abusive sexual contact. Article 120—Wrongful sexual contact; Indecent act.

(9) Abusive sexual contact with a child. Article 120—Indecent liberty with a child; Wrongful sexual contact.

(10) Indecent liberty with a child. Article 120—Wrongful sexual contact.

f. Maximum punishment.

(1) Rape and rape of a child. Death or such other punishment as a court martial may direct.

(2) Aggravated sexual assault. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years, aggravated sexual abuse of a child, aggravated sexual contact with a child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) Abusive sexual contact with a child and indecent liberty with a child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(5) Abusive sexual contact. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(6) Indecent act or forcible pandering. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) Wrongful sexual contact or indecent exposure. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

g. Sample specifications.

(1) Rape.

(a) Rape by using force.

(i) Rape by use or display of dangerous weapon or object. In that personal jurisdiction data, did (at/on board-location) (subject-matter jurisdiction data, if required), on or about 20 cause to engage in a sexual act, to wit:________________, by (using a dangerous weapon or object, to wit:________________ against (him)(her)) (displaying a dangerous weapon or object, to wit:________________ to (him)(her)).

(ii) Rape by suggestion of possession of dangerous weapon or object. In that __________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about 20 cause to engage in a sexual act, to wit:__________, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him) (her) to believe it was a dangerous weapon or object.

(iii) Rape by using physical violence, strength, power, or restraint to any person. In that __________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about 20 cause to engage in a sexual act, to wit:__________, by using (physical violence) (strength) (power) (restraint applied to __________), sufficient that (he) (she) could not avoid or escape the sexual conduct.

(b) Rape by causing grievous bodily harm. In that __________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about 20 cause to engage in a sexual act, to wit:__________, by causing grievous bodily harm upon (him)(her) (__________), to wit: a (broken leg)(deep cut)(fractured skull)(__________).

(c) Rape by using threats or placing in fear. In that __________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about 20 cause to engage in a sexual act, to wit: __________ by [threatening] [placing (him)(her) in fear] that (he)(she) (__________) will be subjected to (death)(grievous bodily harm) (kidnapping) by __________.

(d) Rape by rendering another unconscious. In that __________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about 20 cause to engage in a sexual act, to wit: __________ by rendering (him)(her) unconscious.

(e) Rape by administration of drug, intoxicant, or other similar substance. In that __________ (personal jurisdiction data), did (at/on board-location) (subject-
APPENDIX 28

matter jurisdiction data, if required), on or about ________ 20 ______ cause ________ to engage in a sexual act, to wit: ________ by administering to (him)(her) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise) (control)](his) (her) conduct.

(2) Rape of a child.

(a) Rape of a child who has not attained the age of 12 years. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years.

(b) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.

(i) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by (using a dangerous weapon or object) (displaying a dangerous weapon or object), to wit: ________ to (him)(her).

(ii) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her) to believe it was a dangerous weapon or object.

(iii) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by administering to (him)(her) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise) (control)](his) (her) conduct.

(c) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by causing grievous bodily harm upon (him)(her)(________), to wit: a (broken leg)(deep cut)(fractured skull)(______).

(d) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by [threatening] [placing (him)(her) in fear] that (he)(she) ( ________ would be subjected to (death)(grievous bodily harm) (kidnapping) by ________

(e) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by rendering (him)(her) unconscious.

(f) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance. In that ________ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ________ 20 ______ engage in a sexual act, to wit: ________ with ________, a child who had attained the age of 12 years, but had not attained the age of 16 years, by administering to (him)(her) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise) (control)](his) (her) conduct.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

thereby substantially impaired (his/her) ability to [(appraise)(control)][(his)(her)] conduct.

(3) Aggravated sexual assault.

(a) Aggravated sexual assault by using threats or placing in fear. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 ______ cause _____ to engage in a sexual act, to wit: _____ by [threatening] [placing(him)(her) in fear of] [(physical injury to _____) (injury to _____’s property)(accusation of crime)(exposition of secret)(abuse of military position)(_____)].

(b) Aggravated sexual assault by causing bodily harm. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____ cause _____ to engage in a sexual act, to wit: _____ by causing bodily harm upon (him)(her)(_____), to wit: _____.

(c) Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 ____ engage in a sexual act, to wit: _____ with ____ who was (substantially incapacitated) (substantially incapable of (appraising the nature of the sexual act)(declining participation in the sexual act) (communicating unwillingness to engage in the sexual act)].

(4) Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____ [(engage in sexual contact, to wit: _____with ____)(cause _____ to engage in sexual contact, to wit: _____ with ____)] by using (physical violence) (strength) (power) (restraint applied to ____), sufficient that (he)(she)(_____) could not avoid or escape the sexual conduct.

(b) Aggravated sexual assault by causing grievous bodily harm. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____ [(engage in sexual contact, to wit: _____with ____)(cause _____ to engage in sexual contact, to wit: _____ with ____)] by causing grievous bodily harm upon (him)(her)(_____), to wit: a (broken leg)(deep cut)(fractured skull)(______).

(c) Aggravated sexual assault by causing bodily harm. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____ [(engage in sexual contact, to wit: _____with ____)(cause _____ to engage in sexual contact, to wit: _____ with ____)] by using (physical violence) (strength) (power) (restraint applied to ____), sufficient that (he)(she)(_____) could not avoid or escape the sexual conduct.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
(d) Aggravated sexual contact by rendering another unconscious. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ______ 20 ______ [(engage in sexual contact, to wit: ______ with _____) (cause _____ to engage in sexual contact, to wit: ______ with _____) (cause sexual contact with or by _____ to wit: _____)] by rendering (him)(her)(____) unconscious.

(e) Aggravated sexual contact by administration of drug, intoxicant, or other similar substance. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ______ 20 ______ [(engage in sexual contact, to wit: ______ with _____) (cause _____ to engage in sexual contact, to wit: ______ with _____) (cause sexual contact with or by _____ to wit: _____)] by administering to (him)(her)(____) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without his/her(____) knowledge or permission), and thereby substantially impaired (his/her(____) ability to [(appraise) (control)] [(his) (her)] conduct.

(6) Aggravated sexual abuse of a child. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ______ 20 ______, engage in a lewd act, to wit: ______ with _____, a child who had not attained the age of 16 years.

(7) Aggravated sexual contact with a child. (a) Aggravated sexual contact with a child who has not attained the age of 12 years. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ______ 20 ______ [(engage in sexual contact, to wit: ______ with _____, a child who had not attained the age of 12 years) (cause _____ to engage in sexual contact, to wit: ______ with _____, a child who had not attained the age of 12 years)] (cause sexual contact with or by _____ a child who had not attained the age of 12 years, to wit: _____).

(b) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.

(i) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object. In that ______ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ______ 20 ______ [(engage in sexual contact, to wit: ______ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause _____ to engage in sexual contact, to wit: ______ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____) (by using a dangerous weapon or object, to wit: _____ against (him)(her)(____)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)(____)).

Excerpts from the MCM and UCMJ

APPENDIX 28

Excerpts from the MCM and UCMJ

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

Excerpts from the MCM and UCMJ

attained the age of 12 years, but had not attained the age of 16 years, to wit: ____] by using (physical violence) (strength) (power) (restraint applied to ____) sufficient that (he)(she)(____) could not avoid or escape the sexual conduct.

(c) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm. In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20 ____ [(engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause sexual contact with or by ____ a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____] by rendering (him)(her)(____) unconscious.

(f) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance. In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20 ____ [(engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause sexual contact with or by ____ a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by using (physical injury to ____ (subject-matter jurisdiction data, if required), on or about ____ 20 ____ [(engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by administering to (him)(her)(____) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without ____ knowledge or permission), and thereby substantially impaired (his)(her)(____) ability to [(appraise) (control)][(his) (her) conduct.

(8) Abusive sexual contact.

(a) Abusive sexual contact by using threats or placing in fear. In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20 ____ [(engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)[(engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years), to wit: a (broken leg)(deep cut)(fractured skull)(____).]

(b) Abusive sexual contact by causing bodily harm. In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20 ____ [(engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____ with ____ a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause sexual contact with or by ____ a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by [(threatening) (placing (him)(her)(____) in fear of)] [(physical injury to ____ [(his) (her) conduct.

A28-15

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX 28

Excerpts from the MCM and UCMJ

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

45. Article 120—Rape, sexual assault, and other sexual misconduct

2007 Amendment: Changes to this paragraph are contained in Div. A. Title V. Subtitle E, Section 552(a)(1) of the National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, 119 Stat. 3257 (6 January 2006), which supersedes the previous paragraph 45, Rape and Carnal Knowledge, in its entirety and replaces paragraph 45 with Rape, sexual assault and other sexual misconduct. In accordance with Section 552(c) of that Act, the amendment to
the Article applies only with respect to offenses committed on or after 1 October 2007.

Nothing in these amendments invalidates any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 October 2007. Any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

This new Article 120 consolidates several sexual misconduct offenses and is generally based on the Sexual Abuse Act of 1986, 18 U.S.C. Sections 2241-2245. The following is a list of offenses that have been replaced by this new paragraph 45:

(1) Paragraph 63, Article 134 Assault - Indecent, has been replaced in its entirety by three new offenses under paragraph 45. See subsections (e) Aggravated Sexual Contact, (h) Abusive Sexual Contact, and (m) Wrongful Sexual Contact.

(2) Paragraph 87, Article 134 Indecent Acts or Liberties with a Child, has been replaced in its entirety by three new offenses under paragraph 45. See subsections (g) Aggravated Sexual Contact with a Child, (i) Abusive Sexual Contact with a Child, and (j) Indecent Liberty with a Child.

(3) Paragraph 88, Article 134 Indecent Exposure, has been replaced in its entirety by a new offense under paragraph 45. See subsection (n) Indecent Exposure.

(4) Paragraph 90, Article 134 Indecent Acts with Another, has been replaced in its entirety by a new offense under paragraph 45. See subsection (k) Indecent Act.

(5) Paragraph 97, Article 134 Pandering and Prostitution, has been amended. The act of compelling another person to engage in an act of prostitution with another person will no longer be an offense under paragraph 97 and has been replaced by a new offense under paragraph 45. See subsection (l) Forcible Pandering.

c. Explanation. Subparagraph (3), definition of “indecent,” is taken from paragraphs 89.c and 90.c of the Manual (2005 ed.) and is intended to consolidate the definitions of “indecent,” as used in the former offenses under Article 134 of “Indecent acts or liberties with a child,” “Indecent exposure,” and “Indecent acts with another,” formerly at paragraphs 87, 88, and 90 of the 2005 Manual, and “Indecent language,” at paragraph 89. The application of this single definition of “indecent” to the offenses of “Indecent liberty with a child,” “Indecent act,” and “Indecent exposure” under Article 120 is consistent with the construction given to the former Article 134 offenses in the 2005 Manual that were consolidated into Article 120. See e.g. United States v. Negron, 60 M.J. 136 (C.A.A.F. 2004).

d. Additional Lesser Included Offenses. The test to determine whether an offense is factually the same as another offense, and therefore lesser-included to that offense, is the “elements” test. United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994). Under this test, the court considers “whether each provision requires proof of a fact which the other does not.” Blockburger, 284 U.S. 299 at 304 (1932). Rather than adopting a literal application of the elements test, the Court stated that resolution of lesser-included claims “can only be resolved by lining up elements realistically and determining whether each element of the supposed ‘lesser’ offense is rationally derivative of one or more elements of the other offense - and vice versa.” Foster, 40 M.J. at 146.

Whether an offense is a lesser-included offense is a matter of law that the Court will consider de novo. United States v. Palagar, 56 M.J. 294, 296 (C.A.A.F. 2002).

e. Maximum punishment. See 1995 Amendment regarding maximum punishment of death.
APPENDIX 27
PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED PRIOR TO 1 OCTOBER 2007

The punitive articles contained in this appendix were replaced or superseded by changes to Article 120, Uniform Code of Military Justice, contained in the National Defense Authorization Act for Fiscal Year 2006. Article 120 was amended again by the National Defense Authorization Act for Fiscal Year 2012. Each version of Article 120 is located in a different part of this Manual. For offenses committed prior to 1 October 2007, the relevant sexual offense provisions and analysis are contained in this appendix and listed below. For offenses committed during the period 1 October 2007 through 27 June 2012, the relevant sexual offense provisions and analysis are contained in Appendix 28. For offenses committed on or after 28 June 2012, the relevant sexual offense provisions are contained in Part IV of this Manual (Articles 120, 120b, and 120c).

45. Article 120—Rape and carnal knowledge
a. Text.
   (a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.
   (b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—
      (1) who is not his or her spouse; and
      (2) who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.
   (c) Penetration, however slight, is sufficient to complete either of these offenses.
   (d)(1) In a prosecution under subsection (b), it is an affirmative defense that—
      (A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and
      (B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.
      (2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence.
   b. Elements.
      (1) Rape.
         (a) That the accused committed an act of sexual intercourse; and
         (b) That the act of sexual intercourse was done by force and without consent.
      (2) Carnal knowledge.
         (a) That the accused committed an act of sexual intercourse with a certain person;
         (b) That the person was not the accused’s spouse; and
         (c)(1) That at the time of the sexual intercourse the person was under the age of 12; or
         (2) That at the time of the sexual intercourse the person had attained the age of 12 but was under the age of 16.
   c. Explanation.
      (1) Rape.
         (a) Nature of offense. Rape is sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense.
         (b) Force and lack of consent. Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or grievous bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual
consent, although obtained by fraud, the act is not rape, but if to the accused’s knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent.

(c) Character of victim. See Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim’s character.

(2) Carnal knowledge. “Carnal knowledge” is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused’s spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

d. Lesser included offenses.

(1) Rape.
(a) Article 128—assault; assault consummated by a battery
(b) Article 134—assault with intent to commit rape
(c) Article 134—indecent assault
(d) Article 80—attempts
(e) Article 120(b)—carnal knowledge

(2) Carnal knowledge.
(a) Article 134—indecent acts or liberties with a person under 16
(b) Article 80—attempts

e. Maximum punishment.

(1) Rape. Death or such other punishment as a court-martial may direct.

(2) Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) Carnal knowledge with a child under the age of 12 years at the time of the offense. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

f. Sample specifications.

(1) Rape. In that (personal jurisdiction data), did, (at/on board — location) (subject - matter jurisdiction data, if required), on or about _______ rape, _______ (a person under the age of 12) (a person who had attained the age of 12 but was under the age of 16).

(2) Carnal knowledge. In that (personal jurisdiction data), did, (at/on board — location) (subject - matter jurisdiction data, if required), on or about _______, commit the offense of carnal knowledge with _______ (a person under the age of 12) (a person who attained the age of 12 but was under the age of 16).

63. Article 134—(Assault—indecent)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of ‘indecent’, see paragraph 90c.

d. Lesser included offenses.

(1) Article 128—assault consummated by a battery; assault
(2) Article 134—indecent acts
(3) Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification. In that (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about _______, commit an indecent assault upon a person not his/her wife/husband by _______ with intent to gratify his/her lust (sexual desires).

87. Article 134—(Indecent acts or liberties with a child)

a. Text. See paragraph 60.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
b. Elements.
   (1) Physical contact.
      (a) That the accused committed a certain act upon or with the body of a certain person;
      (b) That the person was under 16 years of age and not the spouse of the accused;
      (c) That the act of the accused was indecent;
      (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
      (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
   (2) No physical contact.
      (a) That the accused committed a certain act;
      (b) That the act amounted to the taking of indecent liberties with a certain person;
      (c) That the accused committed the act in the presence of this person;
      (d) That this person was under 16 years of age and not the spouse of the accused;
      (e) That the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
      (f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.
   (1) Consent. Lack of consent by the child to the act or conduct is not essential to this offense; consent is not a defense.
   (2) Indecent liberties. When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one’s private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.
   (3) Indecent. See paragraph 89c and 90c.

d. Lesser included offense.

(1) Article 134—indecent acts with another
(2) Article 128—assault; assault consummated by a battery
(3) Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. Sample specification. In that (personal jurisdiction data), did, (at/on board — location) (subject-matter jurisdiction data, if required), on or about ________ (take (indecent) liberties with) (commit an indecent act (upon) (with) the body of) ________, a (female) (male) under 16 years of age, not the (wife) (husband) of the said ________, by (fondling (her) (him) and placing his/her hands upon (her) (his) leg and private parts) ( ), with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the said ( ).

88. Article 134—(Indecent exposure)

a. Text. See paragraph 60.

b. Elements.
   (1) That the accused exposed a certain part of the accused’s body to public view in an indecent manner;
   (2) That the exposure was willful and wrongful; and
   (3) That, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. “Willful” means an intentional exposure to public view. Negligent indecent exposure is not punishable as a violation of the code. See paragraph 90c concerning “indecent.”

d. Lesser included offense. Article 80—attempts
e. Maximum punishment. Bad - conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specification. In that (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________ willfully and wrongfully expose in an indecent manner to public view his or her ________.

90. Article 134—(Indecent acts with another)

a. Text. See paragraph 60.
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

APPENDIX 27

Excerpts from the MCM and UCMJ

b. Elements.
   (1) That the accused committed a certain wrong-ful act with a certain person;
   (2) That the act was indecent; and
   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. “Indecent” signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

d. Lesser included offense. Article 80—attempts

APPENDIX 23 Analysis Follows:

[Note: The analysis below was removed from Appendix 23 and pertains to Article 120 and other punitive articles applicable to sexual offenses as they existed prior to the 2007 Amendment. The analysis was inserted into this appendix to accompany the version of Article 120, and other punitive sexual offense articles, applicable to offenses committed before 1 October 2007. For offenses committed during the period 1 October 2007 through 27 June 2012, analysis related to Article 120 is contained in Appendix 27. For offenses committed on or after 28 June 2012, analysis related to Article 120, 120b, and 120c is contained in Appendix 23.]

45. Article 120—Rape and carnal knowledge

b. Elements. 2004 Amendment: Paragraph 45(b)(2) was amended to add two distinct elements of age based upon the 1994 amendment to paragraph 45(e). See also concurrent change to R.C.M. 307(c)(3) and accompanying analysis.

c. Explanation. This paragraph is based on paragraph 199 of MCM, 1969 (Rev.). The third paragraph of paragraph 199(a) was deleted as unnecessary. The third paragraph of paragraph 199(b) was deleted based on the preemption doctrine. See United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Norris, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). Cf. Williams v. United States, 327 U.S. 711 (1946) (scope of preemption doctrine). The Military Rules of Evidence deleted the requirement for corroboration of the victim’s testimony in rape and similar cases under former paragraph 153 a of MCM, 1969. See Analysis, Mil. R. Evid. 412.

d. Lesser included offense. Carnal knowledge was deleted as a lesser included offense of rape in view of the separate elements in each offense. Both should be separately pleaded in a proper case. See generally United States v. Smith, 7 M.J. 842 (A.C.M.R. 1979).

1993 Amendment. The amendment to para 45d(1) represents an administrative change to conform the Manual with case authority. Carnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not attained the age of 16 years. See United States v. Baker, 28 M.J. 900 (A.C.M.R. 1989); United States v. Stratton, 12 M.J. 998 (A.F.C.M.R. 1982), pet. denied, 15 M.J. 107 (C.M.A. 1983); United States v. Smith, 7 M.J. 842 (A.C.M.R. 1979).

e. Maximum punishment.

1994 Amendment. Subparagraph e was amended by creating two distinct categories of carnal knowledge for sentencing purposes -- one involving children who had attained the age of 12 years at the time of the offense, now designated as subparagraph e(2), and the other for those who were younger than 12 years. The latter is now designated as subparagraph e(3). The punishment for the older children was increased from 15 to 20 years confinement. The maximum confinement for carnal knowledge of a child under 12 years was increased to life. The purpose for these changes is to bring the punishments more in line with those for sodomy of a child under paragraph 51e of this part and with the Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241–2245. The alignment of the maximum punishments for carnal knowledge with those of sodomy is aimed at paralleling the concept of gender–neutrality incorporated into the Sexual Abuse Act.

1995 Amendment. The offense of rape was made gender neutral and the spousal exception was removed under Article 120(a). National Defense Au-
Rape may “be punished by death” only if constitutionally permissible. In Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the death penalty is “grossly disproportionate and excessive punishment for the rape of an adult woman,” and is “therefore forbidden by the Eighth Amendment as cruel and unusual punishment.” Id. at 592 (plurality opinion). Coker, however, leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult. See Coker, 433 U.S. at 595. See Leatherwood v. State, 548 So.2d 389 (Miss. 1989) (death sentence for rape of minor by an adult is not cruel and unusual punishment prohibited by the Eighth Amendment). But see Buford v. State, 403 So.2d 943 (Fla. 1981) (sentence of death is grossly disproportionate for sexual assault of a minor by an adult and consequently is forbidden by Eighth Amendment as cruel and unusual punishment).

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120, UCMJ, to make the offense gender neutral and create a mistake of fact as to age defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age.

f. Sample Specification. 2004 Amendment: Paragraph 45(f)(2) was amended to aid practitioners in charging the two distinct categories of carnal knowledge created in 1994. For the same reason paragraph 45(f)(1) was amended to allow for contingencies of proof because carnal knowledge is a lesser-included offense of rape if properly pleaded. See also concurrent change to R.C.M.307(c)(3) and accompanying analysis.

63. Article 134—(Assault—indecent)


Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent assault such as may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. See, e.g., United States v. Respess, 7 M.J. 566 (A.C.M.R. 1979). See generally 1 U.S.C. § 1 (“unless the context indicates otherwise … words importing the masculine gender include the feminine as well ….”).
Excerpts from the MCM and UCMJ

APPENDIX 27

charge. Indecent exposure in some circumstances (e.g., in front of children, but without the intent to incite lust or gratify sexual desires necessary for indecent acts or liberties) is sufficiently serious to authorize a punitive discharge.

2007 Amendment: This paragraph has been replaced in its entirety by paragraph 45. See Article 120(n) Indecent Exposure.

90. Article 134—(Indecent acts with another)

A27-6
Excerpts from the MCM and UCMJ

§50.b.1

Article 125

(1) That the accused inflicted a certain injury upon a certain person;

(2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(3) That the accused inflicted this injury with an intent to cause some injury to a person.

c. Explanation.

(1) Nature of offense. It is maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

(2) Means of inflicting injury. To prove the offense it is not necessary to prove the specific means by which the injury was inflicted. However, such evidence may be considered on the question of intent.

(3) Intent. Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable.

(4) Defenses. If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. See R.C.M. 916.

d. Lesser included offenses.

(1) Article 128—assault; assault consummated by a battery

(2) Article 128—assault with a dangerous weapon

(3) Article 128—assault intentionally inflicting grievous bodily harm

(4) Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. Sample specification.

In that, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about , maim by (crushing his/her foot with a sledge hammer) .

51. Article 125—Sodomy

a. Text of statute.

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

b. Elements.

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

[Note: Add any of the following as applicable]

(2) That the act was done with a child under the age of 12.

(3) That the act was done with a child who had attained the age of 12 but was under the age of 16.

(4) That the act was done by force and without the consent of the other person.

c. Explanation. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

d. Lesser included offenses.

(1) With a child under the age of 16.

(a) Article 125—forcible sodomy (and offenses included therein; see subparagraph (2) below)

(b) Article 80—attempts
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

Article 126

§52.c.(2)(b)

(2) Forcible sodomy.
(a) Article 125—sodomy (and offenses included therein; see subparagraph (3) below)
(b) Article 134—assault with intent to commit sodomy
(c) Article 80—attempts.
(3) Sodomy. Article 80—attempts
[Note: Consider lesser included offenses under Art. 120, depending on the factual circumstances in each case.]

e. Maximum punishment.
(1) By force and without consent. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.
(2) With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.
(3) With a child under the age of 12 years at the time of the offense. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.
(4) Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.
In that _______ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 ___ , commit sodomy with ________, (a child under the age of 12) (a child who had attained the age of 12 but was under the age of 16) (by force and without the consent of the said ________).

52. Article 126—Arson
a. Text of statute.
(a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.
(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.

b. Elements.
(1) Aggravated arson.
(a) Inhabited dwelling.
(i) That the accused burned or set on fire an inhabited dwelling;
(ii) That this dwelling belonged to a certain person and was of a certain value; and
(iii) That the act was willful and malicious.
(b) Structure.
(i) That the accused burned or set on fire a certain structure;
(ii) That the act was willful and malicious;
(iii) That there was a human being in the structure at the time;
(iv) That the accused knew that there was a human being in the structure at the time; and
(v) That this structure belonged to a certain person and was of a certain value.
(2) Simple arson.
(a) That the accused burned or set fire to certain property of another;
(b) That the property was of a certain value; and
(c) That the act was willful and malicious.

c. Explanation.
(1) In general. In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.
(2) Aggravated arson.
(a) Inhabited dwelling. An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. A person may be guilty of aggravated arson of the person's dwelling, whether as owner or tenant.
(b) Structure. Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, when the offender knows that there is a human being inside at the time. It may be that the offender...
someone other than the driver or a passenger in the driver’s vehicle. It also covers accidents caused by the accused, even if the accused’s vehicle does not contact other people, vehicles, or property.

(2) Knowledge. Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

(3) Passenger. A passenger other than a senior passenger may also be liable under this paragraph. See paragraph 1 of this Part.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specification.

In that, (personal jurisdiction data), (the driver of) (*a passenger in) (the senior officer/noncommissioned officer in) (____) in a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at (subject-matter jurisdiction data, if required), on or about (wrongfully leave) (by , assist the driver of the said vehicle in wrongfully leaving) (wrongfully order, cause, or permit the driver to leave) the scene of the accident without (providing assistance to , who had been struck (and injured) by the said vehicle) (making his/her (the driver’s) identity known).

[*Note: This language should be used when the accused was a passenger and is charged as a principal. See paragraph 1 of this part.]

83. Article 134—(Fraternization)

a. Text of statute. See paragraph 60.

b. Elements.

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused’s service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) Regulations. Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. See paragraph 16.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specification.

In that, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about (wrongfully leave) (by , assist the driver of the said vehicle in wrongfully leaving) (wrongfully order, cause, or permit the driver to leave) the scene of the accident without (providing assistance to , who had been struck (and injured) by the said vehicle) (making his/her (the driver’s) identity known).

[*Note: This language should be used when the accused was a passenger and is charged as a principal. See paragraph 1 of this part.]

84. Article 134—(Gambling with subordinate)

a. Text of statute. See paragraph 60.

b. Elements.

(1) That the accused gambled with a certain servicemember;
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

(B) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B);

(C) In the case of a private dwelling which is military property or under military control, or non-military property in a foreign country

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry;

(D) In the case of a private dwelling not included in subsection (e)(2)(C) of this rule.

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority; or

Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

Discussion

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.

The Military Rules of Evidence should be consulted when conducting interrogations (see Mil. R. Evid. 301-306), searches (see Mil. R. Evid. 311-317), and eyewitness identifications (see Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, see Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. See also R.C.M. 702 (depositions). A person who is an accuser (see Article 1(9)) is disqualified from convening a general or special court-martial in that case. R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that preferral is warranted.

Rule 304. Pretrial restraint

(a) Types of pretrial restraint. Pretrial restraint is moral or physical restraint on a person’s liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) Conditions on liberty. Conditions on liberty are imposed by orders directing a person to do or
525 The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

R.C.M. 304(a)(1)

refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) Restriction in lieu of arrest. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) Arrest. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. See R.C.M. 305.

Discussion

Conditions on liberty include orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must not hinder pretrial preparation, however. Thus, when such conditions are imposed, they must be sufficiently flexible to permit pretrial preparation.

Restriction in lieu of arrest is a less severe restraint on liberty than is arrest. Arrest includes suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction in lieu of arrest. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest.

Breaches of restraint or restriction in lieu of arrest or violation of conditions on liberty are offenses under the code. See paragraphs 16, 19, and 102, Part IV. When such an offense occurs, it may warrant appropriate action such as nonjudicial punishment or court-martial. See R.C.M. 306. In addition, such a breach or violation may provide a basis for the imposition of a more severe form of restraint.

R.C.M. 707(a) requires that the accused be brought to trial within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4).

(b) Who may order pretrial restraint.

(1) Of civilians and officers. Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

Discussion

Civilians may be restrained under these rules only when they are subject to trial by court-martial. See R.C.M. 202.

(2) Of enlisted persons. Any commissioned officer may order pretrial restraint of any enlisted person.

(3) Delegation of authority. The authority to order pretrial restraint of civilians and commissioned warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer’s command or subject to the authority of that commanding officer.

(4) Authority to withhold. A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) When a person may be restrained. No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

Discussion

The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of R.C.M. 305(b)(2)(B) should be considered. The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

Restraint is not required in every case. The absence of pretrial restraint does not affect the jurisdiction of a court-martial. However, see R.C.M. 202(c) concerning attachment of jurisdiction. See R.C.M. 305 concerning the standards and procedures governing pretrial confinement.

(d) Procedures for ordering pretrial restraint. Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the re-
COMPARATIVE SYSTEMS SUBCOMMITTEE

Excerpts from the MCM and UCMJ

Rule 305. Pretrial confinement

(a) In general. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Discussion

See R.C.M. 201 and 202 and the discussions therein concerning persons who are subject to trial by courts-martial.

(b) Who may be confined. Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

Discussion

See also R.C.M. 306.

(c) Who may order confinement. See R.C.M. 304(b).

Discussion

“No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.” Article 11(a).

(d) When a person may be confined. No person may be ordered into pretrial confinement except for prob-
Commentary on R.C.M. 305(d)

Probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;
(2) The person confined committed it; and
(3) Confinement is required by the circumstances.

Discussion

The person who directs confinement should consider the matters discussed under subsection (h)(2)(B) of this rule before ordering confinement. However, the person who initially orders confinement is not required to make a detailed analysis of the necessity for confinement. It is often not possible to review a person’s background and character or even the details of an offense before physically detaining the person. For example, unless additional information can be secured, it may be necessary to confine a person apprehended in the course of a violent crime.

“[W]hen charged only with an offense normally tried by summary court-martial, [an accused] shall not ordinarily be paced in confinement.” Article 10.

Confinement should be distinguished from custody. Custody is restraint which is imposed by apprehension and which may be, but is not necessarily, physical. Custody may be imposed by anyone authorized to apprehend (see R.C.M. 302(b)), and may continue until a proper authority under R.C.M. 304(b) is notified and takes action. Thus, a person who has been apprehended could be physically restrained, but this would not be pretrial confinement in the sense of this rule until a person authorized to do so under R.C.M. 304(b) directed confinement.

(e) Advice to the accused upon confinement. Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;
(2) The right to remain silent and that any statement made by the person may be used against the person;
(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and
(4) The procedures by which pretrial confinement will be reviewed.

(f) Military counsel. If requested by the prisoner and such request is made known to military authorities, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner’s own selection.

(g) Who may direct release from confinement. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) and/or (j) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For purposes of this subsection, “any commander” includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) Notification and action by commander.

(1) Report. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the prisoner should be notified. In unusual cases any commander to whose authority the prisoner is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with subsection (h)(2) of this rule.

(2) Action by commander.

(A) Decision. Not later than 72 hours after the commander’s ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander’s unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander’s compliance with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsections R.C.M. 305(d), R.C.M.
Excerpts from the MCM and UCMJ

305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander’s decision immediately after an accused is ordered into pretrial confinement.

(B) Requirements for confinement. The commander shall direct the prisoner’s release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, “national security” means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

Discussion

A person should not be confined as a mere matter of convenience or expediency. Some of the factors which should be considered under this subsection are:

(1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;

(2) The weight of the evidence against the accused;

(3) The accused’s ties to the locale, including family, off-duty employment, financial resources, and length of residence;

(4) The accused’s character and mental condition;

(5) The accused’s service record, including any record of previous misconduct;

(b) The accused’s record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and

(7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

Although the Military Rules of Evidence are not applicable, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner’s personnel records, police records, and may consider the recommendations of others.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the prisoner could be safely returned to the prisoner’s unit, at liberty or under restriction, arrest, or conditions on liberty. See R.C.M. 304.

(C) 72-hour memorandum. If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) Procedures for review of pretrial confinement.

(1) 48-hour probable cause determination. Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) 7-day review of pretrial confinement. Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement
under military control shall count as one day and the date of the review shall also count as one day.

(A) Nature of the 7-day review.

(i) Matters considered. The review under this subsection shall include a review of the memorandum submitted by the prisoner’s commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner’s counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

(ii) Rules of evidence. Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) Standard of proof. The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(B) Extension of time limit. The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) Action by 7-day reviewing officer. Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(D) Memorandum. The 7-day reviewing officer’s conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) Reconsideration of approval of continued confinement. The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the prisoner based upon any significant information not previously considered.

(j) Review by military judge. Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) Release. The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer’s decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) Credit. The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of this rule.

(k) Remedy. The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7). For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(l) Confinement after release. No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release,
of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion
See R.C.M. 304(b) concerning who may order confinement.

(m) Exceptions.
(1) Operational necessity. The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) At sea. Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion
Under this subsection the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of these standards). Also, pretrial confinement remains subject to judicial review. The prisoner’s commander still must determine whether confinement will continue under subsection (h)(2)(B) of this rule. The suspension of subsection (h)(2)(A) of this rule removes the 72-hour requirement since in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under subsection (2) since the commander of a vessel is always available.)

Rule 306. Initial disposition
(a) Who may dispose of offenses. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

Discussion
Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer’s authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. See R.C.M. 401(c); 601(f). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604.

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

(b) Policy. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

Discussion
The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline;
(B) when applicable, the views of the victim as to disposition;
(C) existence of jurisdiction over the accused and the offense;
(D) availability and admissibility of evidence;
(E) the willingness of the victim or others to testify;
(F) cooperation of the accused in the apprehension or conviction of others;
(G) possible improper motives or biases of the person(s) making the allegation(s);
(H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
(I) appropriateness of the authorized punishment to the particular accused or offense;
R.C.M. 306(b)

(J) the character and military service of the accused; and
(K) other likely issues.

(c) How offenses may be disposed of. Within the limits of the commander’s authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

Discussion

Prompt disposition of charges is essential. See R.C.M. 707 (speedy trial requirements).

Before determining an appropriate disposition, a commander should ensure that a preliminary inquiry under R.C.M. 303 has been conducted. If charges have not already been preferred, the commander may, if appropriate, prefer them and dispose of them under this rule. But see R.C.M. 601(c) regarding disqualification of an accuser.

If charges have been preferred, the commander should ensure that the accused has been notified in accordance with R.C.M. 307, and that charges are in proper form. See R.C.M. 307. Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d).

When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5); 601(c)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706; 909; 916(k).

(1) No action. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

Discussion

A decision to take no action or dismissal of charges at this stage does not bar later disposition of the offenses under subsection (c)(2) through (5) of this rule.

See R.C.M. 401(a) concerning who may dismiss charges, and R.C.M. 401(c)(1) concerning dismissal of charges.

When a decision is made to take no action, the accused should be informed.

(2) Administrative action. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. 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, or any combination of the above.

Discussion

Other administrative measures, which are subject to regulations of the Secretary concerned, include matters related to efficiency reports, academic reports, and other ratings; rehabilitation and reassignment; career field reclassification; administrative investigation for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation.

(3) Nonjudicial punishment. A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.

(4) Disposition of charges. Charges may be disposed of in accordance with R.C.M. 401.

Discussion

If charges have not been preferred, they may be preferred. See R.C.M. 307 concerning preferal of charges. However, see R.C.M. 601(c) concerning disqualification of an accuser.

Charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial. Before charges may be referred to a general court-martial, compliance with R.C.M. 405 and 406 is necessary. Therefore, if appropriate, an investigation under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

(5) Forwarding for disposition. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

Discussion

The immediate commander may lack authority to take action which that commander believes is an appropriate disposition. In such cases, the matter should be forwarded to a superior officer with a recommendation as to disposition. See also R.C.M. 401(c)(2) concerning forwarding charges. If allegations are forwarded to a higher authority for disposition, because of lack of authority or otherwise, the disposition decision becomes a matter within the discretion of the higher authority.

A matter may be forwarded for other reasons, such as for investigation of allegations and preferal of charges, if warranted (see R.C.M. 303, 307), or so that a subordinate can dispose of the matter.

(d) National security matters. If a commander not authorized to convene general courts-martial finds

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that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

Rule 307. Preferential charges
(a) Who may prefer charges. Any person subject to the code may prefer charges.

Discussion
No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath. See Article 30(a) and subsection (b) of this rule. A person who has been the accuser or nominal accuser (see Article 1(9)) may not also serve as the convening authority of a general or special court-martial to which the charges are later referred. See Articles 22(b) and 23(b); R.C.M. 601; however, see R.C.M. 1302(b) (summary court-martial convening authority is not disqualified by being the accuser). A person authorized to dispose of offenses (see R.C.M. 306(a); 401–404 and 407) should not be ordered to prefer charges when this would disqualify that person from exercising that person’s authority or would improperly restrict that person’s discretion to act on the case. See R.C.M. 104 and 504(c).

Charges may be preferred against a person subject to trial by court-martial at any time but should be preferred without unnecessary delay. See the statute of limitations prescribed by Article 43. Preferment of charges should not be unnecessarily delayed. When a good reason exists—as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until guilty knowledge becomes apparent—a reasonable delay is permissible. However, see R.C.M. 707 concerning speedy trial requirements.

(b) How charges are preferred; oath. A person who prefers charges must:

1. Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

2. State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person’s knowledge and belief.

Discussion
See Article 136 for authority to administer oaths. The following form may be used to administer the oath:

“You swear (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true in fact to the best of your knowledge and belief. (So help you God.)”

The accuser’s belief may be based upon reports of others in whole or in part.

(c) How to allege offenses.

1. In general. The format of charge and specification is used to allege violations of the code.

Discussion
See Appendix 4 for a sample of a Charge Sheet (DD Form 458).

2. Charge. A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

Discussion
The particular subdivision of an article of the code (for example, Article 118(1)) should not be included in the charge. When there are numerous infractions of the same article, there will be only one charge, but several specifications thereunder. There may also be several charges, but each must allege a violation of a different article of the code. For violations of the law of war, see (D) below.

(A) Numbering charges. If there is only one charge, it is not numbered. When there is more than one charge, each charge is numbered by a Roman numeral.

(B) Additional charges. Charges preferred after others have been preferred are labeled “additional charges” and are also numbered with Roman numerals, beginning with “I” if there is more than one additional charge. These ordinarily relate to offenses not known at the time or committed after the original charges were preferred. Additional charges do not require a separate trial if incorporated in the trial of the original charges before arraignment. See R.C.M. 601(c)(2).

(C) Preemption. An offense specifically defined by Articles 81 through 132 may not be alleged as a violation of Article 134. See paragraph 60c(5)(a) of Part IV. But see subsection (d) of this rule.

(D) Charges under the law of war. In the case of a person subject to trial by general court-martial for violations of the law of war (see Article 18), the charge should be: “Violation of the Law of War”; or “Violation of ______” referring to the local penal law of the occupied territory. See R.C.M. 301(f)(1)(B). But see subsection (d) of this rule. Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.

(3) Specification. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

R.C.M. 307(c)(3)

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APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

The Social Security number or service number of an accused should not be stated in the specification.

(iv) Basis of personal jurisdiction.

(a) Military members on active duty. Ordinarily, no allegation of the accused’s armed force or unit or organization is necessary for military members on active duty.

(b) Persons subject to the code under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4. The specification should describe the accused’s armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(i) In general. The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) Use of “on or about.” In alleging the date of the offense it is proper to allege it as “on or about” a specified day.

(iii) Hour. The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of “at” or “about” is proper.

(iv) Extended periods. When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, “from about 15 June 1983 to about 4 November 1983” or “did on divers occasions between 15 June 1983 and 4 November 1983.”

(E) Place of offense. The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as “at or near” a certain place if the exact place is uncertain.

(F) Subject-matter jurisdiction allegations. Pleading the accused’s rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction.

(G) Description of offense.

[Note: To state an offense under Article 134, practitioners should expressly allege every element of the charged offense. See United States v. Foster, 70 M.J. 225 (C.A.A.F. 2011); United States v. Ballan, 71 M.J. 28 (C.A.A.F. 2012). To state an offense under Article 134, practitioners should expressly allege at least one of the three terminal elements, i.e., that the alleged conduct was: prejudicial to good order and discipline; service discrediting; or a crime or offense not capital. See Foster, 70 M.J. at 226. An accused must be given notice as to which clause or clauses he must defend against, and including the word and figures “Article 134” in a charge does not by itself allege the terminal element expressly or by necessary implication. See Foster, 70 M.J. at 229. See also discussion following paragraph 60(c)(6)(a) in Part IV of this Manual and the related analysis in Appendix 23.]

How to draft specifications.

(A) Sample specifications. Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.

[Note: Be advised that the sample specifications in this Manual have not been amended to comport with R.C.M 1003(d) except for aggravating factors under R.C.M 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

(i) Name. The specification should state the accused’s full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.

(ii) Military association. The specification should state the accused’s rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman ______ then Seaman Apprentice ______, etc.

(iii) Social security number or service number. The social security number or service number of an accused should not be stated in the specification.

(iv) Basis of personal jurisdiction.

(a) Military members on active duty. Ordinarily, no allegation of the accused’s armed force or unit or organization is necessary for military members on active duty.

(b) Persons subject to the code under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4. The specification should describe the accused’s armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(D) Date and time of offense

(i) In general. The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) Use of “on or about.” In alleging the date of the offense it is proper to allege it as “on or about” a specified day.

(iii) Hour. The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of “at” or “about” is proper.

(iv) Extended periods. When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, “from about 15 June 1983 to about 4 November 1983” or “did on divers occasions between 15 June 1983 and 4 November 1983.”

(E) Place of offense. The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as “at or near” a certain place if the exact place is uncertain.

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(i) Name. The specification should state the accused’s full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.

(ii) Military association. The specification should state the accused’s rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman ______ then Seaman Apprentice ______, etc.
having the effect of law, then words indicating criminality such as “wrongfully,” “unlawfully,” or “without authority” (depending upon the nature of the offense) should be used to describe the accused’s acts.

(iii) **Specificity.** The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused’s conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

(iv) **Duplicity.** One specification should not allege more than one offense, either conjunctively (the accused “lost and destroyed”) or alternatively (the accused “lost or destroyed”). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively. See R.C.M. 906(b)(5).

(H) **Other considerations in drafting specifications.**

(i) **Principals.** All principals are charged as if each was the perpetrator. See paragraph 1 of Part IV for a discussion of principals.

(ii) **Victim.** In the case of an offense against the person or property of a person, the first name, middle initial and last name of such person should be alleged, if known. If the name of the victim is unknown, a general physical description may be used. If this cannot be done, the victim may be described as “a person whose name is unknown.” Military rank or grade should be alleged, and must be alleged if an element of the offense, as in an allegation of disobedience of the command of a superior officer. If the person has no military position, it may otherwise be necessary to allege the status as in an allegation of using provoking words toward a person subject to the code. See paragraph 42 of Part IV.

(iii) **Property.** In describing property generic terms should be used, such as “a watch” or “a knife,” and descriptive details such as make, model, color, and serial number should ordinarily be omitted. In some instances, however, details may be essential to the offense, so they must be alleged. For example: the length of a knife blade may be important when alleging a violation of general regulation prohibiting carrying a knife with a blade that exceeds a certain length.

(iv) **Value.** When the value of property or other amount determines the maximum punishment which may be adjudged for an offense, the value or amount should be alleged, for in such a case increased punishments that are contingent upon value may not be adjudged unless there is an allegation, as well as proof, of a value which will support the punishment. If several articles of different kinds are the subject of the offense, the value of each article should be stated followed by a statement of the aggregate value. Exact value should be stated, if known. For ease of proof an allegation may be “of a value not less than __________.” If only an approximate value is known, it may be alleged as “of a value of about ________.” If the value of an item is unknown but obviously minimal, the term “of some value” may be used. These principles apply to allegations of amounts.

(v) **Documents.** When documents other than regulations or orders must be alleged (for example, bad checks in violation of Article 123a), the document may be set forth verbatim (including photocopies and similar reproductions) or may be described, in which case the description must be sufficient to inform the accused of the offense charged.

(vi) **Orders.**

(a) **General orders.** A specification alleging a violation of a general order or regulation (Article 92(1)) must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and date. It is not necessary to recite the text of the general order or regulation verbatim.

(b) **Other orders.** If the order allegedly violated is an “other lawful order” (Article 92(2)), it should be set forth verbatim or described in the specification. When the order is oral, see (vii) below.

(c) **Negating exceptions.** If the order contains exceptions, it is not necessary that the specification contain a specific allegation negating the exceptions. However, words of criminality may be required if the alleged act is not necessarily criminal. See subsection (G)(ii) of this discussion.

(vii) **Oral statements.** When alleging oral statements the phrase “or words to that effect” should be added.

(viii) **Joint offense.** In the case of a joint offense each accused may be charged separately as if each accused acted alone or all may be charged together in a single specification. For example:

(a) If Doe and Roe are joint perpetrators of an offense and it is intended to charge and try both at the same trial, they should be charged in a single specification as follows: “In that Doe and Roe, acting jointly and pursuant to a common intent, did . . . .”

(b) If it is intended that Roe will be tried alone or that Roe will be tried with Doe at a common trial, Roe may be charged in the same manner as if Roe alone had committed the offense. However, to show in the specification that Doe was a joint actor with Roe, even though Doe is not to be tried with Roe, Roe may be charged as follows: “In that Roe did, in conjunction with Doe, . . . .”

(ix) **Matters in aggravation.** Matters in aggravation that do not increase the maximum authorized punishment ordinarily should not be alleged in the specification. Prior convictions need not be alleged in the specification to permit increased punishment. Aggravating factors in capital cases should not be alleged in the specification. Notice of such factors is normally provided in accordance with R.C.M. 1004(b)(1).

(x) **Abbreviations.** Commonly used and understood abbreviations may be used, particularly abbreviations for ranks, grades, units and organizations, components, and geographic or political entities, such as the names of states or countries.

(4) **Multiple offenses.** Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.

**Discussion**

[Note: Practitioners are advised that the use of the phrase “multiplicity in sentencing” has been deemed confusing. United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012). Unreasonable multipli-
Excerpts from the MCM and UCMJ

R.C.M. 307(c)(4)

citation of charges should not be confused with multiplicity. See R.C.M. 1003(c)(1)(C).

See R.C.M. 906(b)(12) and 1003(c)(1)(C). For example, a person should not be charged with both failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave. There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

See also R.C.M. 601(c)(2) concerning referral of several offenses.

(5) Multiple offenders. A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

Discussion

See also R.C.M. 601(c)(3) concerning joinder of accused.

A joint offense is one committed by two or more persons acting together with a common intent. Principals may be charged jointly with the commission of the same offense, but an accessory after the fact cannot be charged jointly with the principal whom the accused is alleged to have received, comforted, or assisted. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same kinds of offenses at the time, although material as tending to show concert of purpose, does not necessarily establish this. The fact that several persons happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a joint design, purpose, or plan to justify joining them in one specification, for they may merely have been availing themselves of the same opportunity. In joint offenses the participants may be separately or jointly charged. However, if the participants are members of different armed forces, they must be charged separately because their trials must be separately reviewed. The preparation of joint charges is discussed in subsection (c)(3) Discussion (H) (viii) (a) of this rule. The advantage of a joint charge is that all accused will be tried at one trial, thereby saving time, labor, and expense. This must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic. An accused cannot be called as a witness except upon that accused’s own request. If the testimony of an accomplice is necessary, the accomplice should not be tried jointly with those against whom the accomplice is expected to testify. See also Mil. R. Evid. 306. See R.C.M. 603 concerning amending specifications. See R.C.M. 906(b)(5) and (6) concerning motions to amend specifications and bills of particulars.

(d) Harmless error in citation. Error in or omission of the designation of the article of the code or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Rule 308. Notification to accused of charges

(a) Immediate commander. The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

Discussion

When notice is given, a certificate to that effect on the Charge Sheet should be completed. See Appendix 4.

(b) Commanders at higher echelons. When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection (a) of this rule as soon as practicable.

(c) Remedy. The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.
the hour and date of receipt to be entered on the charge sheet.

Discussion

See Article 24 and R.C.M. 1302(a) concerning who may exercise summary court-martial jurisdiction.

The entry indicating receipt is important because it stops the running of the statute of limitations. See Article 43; R.C.M. 907(b)(2)(B). Charges may be preferred and forwarded to an officer exercising summary court-martial jurisdiction over the command to stop the running of the statute of limitations even though the accused is absent without authority.

(b) Disposition. When in receipt of charges a commander exercising summary court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the effect of dismissing charges, and options for further action.

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate. When appropriate, charges may be forwarded to a subordinate even if the subordinate previously considered them.

(3) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

(4) Subject to R.C.M. 601(d), refer charges to a summary court-martial for trial; or

Discussion

See R.C.M. 1302(c) concerning referral of charges to a summary court-martial.

(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation with the charges to a superior commander for disposition.

Discussion

An investigation should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. See R.C.M. 405. If an investigation of the subject matter already has been conducted, see R.C.M. 405(b).

Rule 404. Action by commander exercising special court-martial jurisdiction

When in receipt of charges, a commander exercising special court-martial jurisdiction may:

(a) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the effect of dismissing charges, and options for further action.

(b) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate. When appropriate, charges may be forwarded to a subordinate even if that subordinate previously considered them.

(c) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

(d) Subject to R.C.M. 601(d), refer charges to a summary court-martial or to a special court-martial for trial; or

Discussion

See Article 23 and R.C.M. 504(b)(2) concerning who may convene special courts-martial. See R.C.M. 601 concerning referral of charges to a special court-martial. See R.C.M. 1302(c) concerning referral of charges to a summary court-martial.
Rule 405. Pretrial investigation

(a) In general. Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

Discussion

The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers. See subsection (e) of this rule. Recommendations of the investigating officer are advisory.

(b) Earlier investigation. If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion

An investigation of the subject matter of an offense has been conducted, see R.C.M. 405(b).

(c) Who may direct investigation. Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) Personnel.

(1) Investigating officer. The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion

Before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion

An investigation of the subject matter of an offense has been conducted, see R.C.M. 405(b).

(c) Who may direct investigation. Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) Personnel.

(1) Investigating officer. The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion

Before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
obtaining the witness’ appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6), is not “reasonably available.”

Discussion

A witness located beyond the 100-mile limit is not per se unavailable. To determine if a witness beyond 100 miles is reasonably available, the significance of the witness’ live testimony must be balanced against the relative difficulty and expense of obtaining the witness’ presence at the hearing.

(B) Evidence. Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Discussion

In preparing for the investigation, the investigating officer should consider what evidence will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, if potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness’ testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness’ personal appearance if the sole reason for the witness’ testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subparagraph (g)(6), may be required to protect whatever information the government may decide to release to the accused.

(2) Determination of reasonable availability.

(A) Military witnesses. The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the immediate commander of the requested witness and with others. If the immediate commander determined that the witness is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(B) Civilian witnesses. The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

Discussion

The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this rule, civilian witnesses may be paid for travel and associated
Excerpts from the MCM and UCMJ

expenses to testify at a pretrial investigation. Except for use in support of the deposition of a witness under Article 49, UCMJ, and ordered pursuant to R.C.M. 702(b), the investigating officer and any government representative to an Article 32, UCMJ, proceeding does not possess authority to issue a subpoena to compel against his or her will a civilian witness to appear and provide testimony or documents.

(C) Evidence. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion
The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(D) Action when witness or evidence is not reasonably available. If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) Witness expenses. Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

Discussion
See Department of Defense Joint Travel Regulations, Vol 2, paragraphs C3054, C6000.

(4) Alternatives to testimony.
(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:
(i) Sworn statements;
(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness’ identity is as claimed;
(iii) Prior testimony under oath;
(iv) Depositions;
(v) Stipulations of fact or expected testimony;
(vi) Unsworn statements; and
(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:
(i) Sworn statements;
(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness’ identity is as claimed;
(iii) Prior testimony under oath; and
(iv) Deposition of that witness; and
(v) In time of war, sworn statements.

(5) Alternatives to evidence.
(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:
(i) Testimony describing the evidence;
(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;
(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;
(iv) A stipulation of fact, document’s contents, or expected testimony;
(v) An unsworn statement describing the evidence; or
(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:
(i) Testimony describing the evidence;
(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or
(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(6) Protective order for release of privileged information. If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(1)(B) through (F) or 506(g)(2) through (5).

(h) Procedure.

(1) Presentation of evidence.

(A) Testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

Discussion

The following oath may be given to witnesses:

“Do you swear (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

The investigating officer is required to include in the report of the investigation a summary of the substance of all testimony. See subsection (j)(2)(B) of this rule. After the hearing, the investigating officer should, whenever possible, reduce the substance of the testimony of each witness to writing.

If the accused testifies, the investigating officer may invite but not require the accused to swear to the truth of a summary of that testimony. If substantially verbatim notes of a testimony or recordings of testimony were taken during the investigation, they should be preserved until the end of trial.

If it appears that material witnesses for either side will not be available at the time anticipated for trial, the investigating officer should notify the commander who directed the investigation so that depositions may be taken if necessary.

If during the investigation any witness subject to the code is suspected of an offense under the code, the investigating officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary, (e).

(B) Other evidence. The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) Defense evidence. The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) Objections. Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

Discussion

See also subsection (k) of this rule.

Although the investigating officer is not required to rule on objections, the investigating officer may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the investigating officer believes such action is appropriate.

If an objection raises a substantial question about a matter within the authority of the commander who directed the investigation (for example, whether the investigating officer was properly appointed) the investigating officer should promptly inform the commander who directed the investigation.

(3) Access by spectators. Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer. Article 32 investigations are public hearings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Commanders or investigating officers must conclude that no lesser methods short of closing the Article 32 investigation can be used to protect the overriding interest in the case. Commanders or investigating officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a commander or investigating officer believes closing the Article 32 investigation is necessary, the commander or investigating officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the Article 32 investigating officer's report.
cer’s report. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

(4) Presence of accused. The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) Military Rules of Evidence. The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412 and Section V—shall not apply in pretrial investigations under this rule.

**Discussion**

The investigating officer should exercise reasonable control over the scope of the inquiry. See subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, see subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented.

Certain rules relating to the form of testimony which may be considered by the investigating officer appear in subsection (g) of this rule.

(j) Report of investigation.

(1) In general. The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

**Discussion**

If practicable, the charges and the report of investigation should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. Article 33.

(2) Contents. The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

**Discussion**

See R.C.M. 909 (mental capacity); 916(k) (mental responsibility).

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer’s conclusion whether the charges and specifications are in proper form;

(H) The investigating officer’s conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

**Discussion**

For example, the investigating officer may recommend that the charges and specifications be amended or that additional charges be preferred. See R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer’s Report (DD Form 457).

(3) Distribution of the report. The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) Objections. Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening au-
Excerpts from the MCM and UCMJ

R.C.M. 405(j)(4)

Authority from referring the charges or taking other action within the 5-day period.

(k) Waiver. The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Discussion

See also R.C.M. 905(b)(1); 906(b)(3).

If the report fails to include reference to objections which were made under subsection (b)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.

Rule 406. Pretrial advice

(a) In general. Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

Discussion

A pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority may, however, seek the advice of a lawyer before referring charges to such a court-martial. When charges have been withdrawn from a general court-martial (see R.C.M. 604) or when a mistrial has been declared in a general court-martial (see R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

(b) Contents. The advice of the staff judge advocate shall include a written and signed statement which sets forth that person’s:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) Recommendation of the action to be taken by the convening authority.

Discussion

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally.

Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 investigating officer. However, there is no legal requirement to include such information, and failure to do so is not error.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief.

See R.C.M. 905(b)(1); 906(b)(3).

The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause. See R.C.M. 601(d)(1). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. See R.C.M. 905(b)(1) and its Discussion.

(c) Distribution. A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

Rule 407. Action by commander exercising general court-martial jurisdiction

(a) Disposition. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges and the effect of dismissing charges.

(2) Forward charges (or, after dismissing charges,
CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL;
CONVENING COURTS-MARTIAL

Rule 501. Composition and personnel of courts-martial

(a) Composition of courts-martial.

(1) General courts-martial.

(A) Except in capital cases, general courts-martial shall consist of a military judge and not less than five members, or of the military judge alone if requested and approved under R.C.M. 903.

(B) In all capital cases, general courts-martial shall consist of a military judge and no fewer than 12 members, unless 12 members are not reasonably available because of physical conditions or military exigencies. If 12 members are not reasonably available, the convening authority shall detail the next lesser number of reasonably available members under 12, but in no event fewer than five. In such a case, the convening authority shall state in the convening order the reasons why 12 members are not reasonably available.

(2) Special courts-martial. Special courts-martial shall consist of:

(A) Not less than three members;

(B) A military judge and not less than three members; or

(C) A military judge alone if a military judge is detailed and if requested and approved under R.C.M. 903.

Discussion

See R.C.M. 1301(a) concerning composition of summary courts-martial.

(b) Counsel in general and special courts-martial. Military trial and defense counsel shall be detailed to general and special courts-martial. Assistant trial and associate or assistant defense counsel may be detailed.

(c) Other personnel. Other personnel, such as reporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally.

Discussion

The convening authority may direct that a reporter not be used in special courts-martial. Regulations of the Secretary concerned may also require or restrict the use of reporters in special courts-martial.

Rule 502. Qualifications and duties of personnel of courts-martial

(a) Members.

(1) Qualifications. The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) A commissioned officer;

(B) A warrant officer, except when the accused is a commissioned officer; or

(C) An enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

Discussion

Retired members of any Regular component and members of Reserve components of the armed forces are eligible to serve as members if they are on active duty.

Members of the National Oceanic and Atmospheric Administration and of the Public Health Service are eligible to serve as members when assigned to and serving with an armed force. The Public Health Service includes both commissioned and warrant officers. The National Oceanic and Atmospheric Administration includes only commissioned officers.

(2) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except the president of a special
Excerpts from the MCM and UCMJ

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

court-martial without a military judge may use such materials in open session.

Discussion

Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for determination. Members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members should not form an opinion on any matter in connection with a case until that matter has been submitted to them for determination.

(b) President.

(1) Qualifications. The president of a court-martial shall be the detailed member senior in rank then serving.

(2) Duties. The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations;

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and

(C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

(c) Qualifications of military judge. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General’s designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General’s designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection “military judge” does not include the president of a special court-martial without a military judge.

Discussion

See R.C.M. 502(d)(3)(B) for description of some of the general duties of the military judge.

Military judges assigned as general court-martial judges may perform duties in addition to the primary duty of judge of a general court-martial only when such duties are assigned or approved by the Judge Advocate General, or a designee, of the service of which the military judge is a member. Similar restrictions on other duties which a military judge in special courts-martial may perform may be prescribed in regulations of the Secretary concerned.

(d) Counsel.

(1) Certified counsel required. Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general courts-martial.

Discussion

To be certified by the Judge Advocate General concerned under Article 27(b), a person must be a member of the bar of a Federal court or the highest court of a State. The Judge Advocate General concerned may establish additional requirements for certification.

When the accused has individual military or civilian defense counsel, the detailed counsel is “associate counsel” unless excused from the case. See R.C.M. 506(b)(3).

(2) Other military counsel. Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel or assistant defense counsel in general or special courts-martial. The Secretary concerned may establish additional qualifications for such counsel.

(3) Qualifications of individual military and civilian defense counsel. Individual military or civilian defense counsel who represents an accused in a court-martial shall be:

(A) A member of the bar of a Federal court or of the bar of the highest court of a State; or

(B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity
with the general principles of criminal law which apply in a court-martial.

Discussion

In making such a determination—particularly in the case of civilian defense counsel who are members only of a foreign bar—the military judge also should inquire into:

(i) the availability of the counsel at times at which sessions of the court-martial have been scheduled;
(ii) whether the accused wants the counsel to appear with military defense counsel;
(iii) the familiarity of the counsel with spoken English;
(iv) practical alternatives for discipline of the counsel in the event of misconduct;
(v) whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than might military counsel; and
(vi) whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.

(4) Disqualifications. No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) The accuser;
(B) An investigating officer;
(C) A military judge; or
(D) A member.

No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

Discussion

In the absence of evidence to the contrary, it is presumed that a person who, between referral and trial of a case, has been detailed as counsel for any party to the court-martial to which the case has been referred, has acted in that capacity.

(5) Duties of trial and assistant trial counsel. The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service.

Discussion

(A) General duties before trial. Immediately upon receipt of referred charges, trial counsel should cause a copy of the charges to be served upon accused. See R.C.M. 602.

Trial counsel should: examine the charge sheet and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (see R.C.M. 603); and assure that the information about the accused on the charge sheet and any evidence of previous convictions are accurate.

(B) Relationship with convening authority. Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers; report an actual or anticipated reduction of the number of members below quorum to the convening authority; bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons.

(C) Relations with the accused and defense counsel. Trial counsel must communicate with a represented accused only through the accused’s defense counsel. However, see R.C.M. 602. Trial counsel may not attempt to induce an accused to plead guilty or surrender other important rights.

(D) Preparation for trial. Trial counsel should: ensure that a suitable room, a reporter (if authorized), and necessary equipment and supplies are provided for the court-martial; obtain copies of the charges and specifications and convening orders for each member and all personnel of the court-martial; give timely notice to the members, other parties, other personnel of the court-martial, and witnesses for the prosecution and (if known) defense of the date, time, place, and uniform of the meetings of the court-martial; ensure that any person having custody of the accused is available and necessary to sustain the prosecution’s contentions; arrange for the presence of witnesses and evidence in accordance with R.C.M. 703; prepare to make an opening statement of the prosecution’s case (see R.C.M. 913); prepare to conduct the examination and cross-examination of witnesses; and prepare to make final argument on the findings and, if necessary, on sentencing (see R.C.M. 919; 1001(g)).

(E) Trial. Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings. Trial counsel should not allude to or disclose to the members any evidence not yet admitted or reasonably expected to be admitted in evidence or intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused, an appropriate sentence, or any other matter within the discretion of the court-martial.

(F) Post-trial duties. Trial counsel must promptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused’s immediate commander, and (if applicable) the officer in charge of the confinement facility (see R.C.M. 1101(a)), and supervise the preparation, authentication, and distribution of copies of the record as required by these rules and regulations of the Secretary concerned (see R.C.M. 1103; 1104).

(G) Assistant trial counsel. An assistant trial counsel may act in that capacity only under the supervision of the detailed trial counsel.
Excerpts from the MCM and UCMJ

6) Duties of defense and associate or assistant defense counsel. Defense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

Discussion

(A) Initial advice by military defense counsel. Defense counsel should promptly explain to the accused the general duties of the defense counsel and inform the accused of the rights to request individual military counsel of the accused’s own selection, and the effect of such a request on retaining counsel. If the accused wants to request individual military counsel, the defense counsel should immediately inform the convening authority through trial counsel and, if the request is approved, serve as associate counsel if the accused requests and the convening authority permits. Unless the accused directs otherwise, military counsel will begin preparation of the defense immediately after being detailed without waiting for approval of a request for individual military counsel or retention of civilian counsel. See R.C.M. 506.

(B) General duties of defense counsel. Defense counsel must guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused’s secrets or confidences except as the accused may authorize (see also Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused’s understanding and choice may be made a matter of record. See R.C.M. 901(d)(4)(D). Defense counsel must explain to the accused: the elections available as to composition of the court-martial and assist the accused to make any request necessary to effect the election (see R.C.M. 903); the right to plead guilty or not guilty and the meaning and effect of a plea of guilty; the rights to introduce evidence, to testify or remain silent, and to assert any available defense; and the rights to present evidence during sentencing and the rights of the accused to testify under oath, make an unsworn statement, and have counsel make a statement on behalf of the accused. These explanations must be made regardless of the intentions of the accused as to testifying and pleading.

Defense counsel should try to obtain complete knowledge of the facts of the case before advising the accused, and should give the accused a candid opinion of the merits of the case.

(C) Preparation for trial. Defense counsel may have the assistance of trial counsel in obtaining the presence of witnesses and evidence for the defense. See R.C.M. 703. Defense counsel should consider the elements of proof of the offenses alleged and the pertinent rules of evidence to ensure that evidence that the defense plans to introduce is admissible and to be prepared to object to inadmissible evidence offered by the prosecution.

Defense counsel should: prepare to make an opening statement of the defense case (see R.C.M. 913(b)); and prepare to examine and cross-examine witnesses, and to make final argument on the findings and, if necessary, on sentencing (see R.C.M. 919; 1001(g)).

(D) Trial. Defense counsel should represent and protect the interests of the accused at trial. When a trial proceeds in the absence of the accused, defense counsel must continue to represent the accused.

(E) Post-trial duties.

(i) Deferment of confinement. If the accused is sentenced to confinement, the defense counsel must explain to the accused the right to request the convening authority to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one. See R.C.M. 1101(c).

(ii) Examination of the record; appellate brief. The defense counsel should in any case examine the record for accuracy and note any errors in it. This notice may be forwarded for attachment to the record. See R.C.M. 1103(b)(3)(C). See also R.C.M. 1103(a)(1)(B).

(iii) Submission of matters. If the accused is convicted, defense counsel may submit to the convening authority matters for the latter’s consideration in deciding whether to approve the sentence or to disapprove any findings. See R.C.M. 1105. Defense counsel should discuss with the accused the right to submit matters to the convening authority and the powers of the convening authority in taking action on the case. Defense counsel may also submit a brief of any matters counsel believes should be considered on further review.

(iv) Appellate rights. Defense counsel must explain to the accused the rights to appellate review that apply in the case, and advise the accused concerning the exercise of those rights. If the case is subject to review by the Court of Criminal Appeals, defense counsel should explain the powers of that court and advise the accused of the right to be represented by counsel before it. See R.C.M. 1202 and 1203. Defense counsel should also explain the possibility of further review by the Court of Appeals for the Armed Forces and the Supreme Court. See R.C.M. 1204 and 1205. If the case may be examined in the office of the Judge Advocate General under Article 69(a), defense counsel should explain the nature of such review to the accused. See R.C.M. 1201(b)(1). Defense counsel must explain the consequences of waiver of appellate review, when applicable, and, if the accused elects to waive appellate review, defense counsel will assist in preparing the waiver. See R.C.M. 1110. If the accused waives appellate review, or if it is not available, defense counsel should explain that the case will be reviewed by a judge advocate.
R.C.M. 502(d)(6) and should submit any appropriate matters for consideration by the judge advocate. See R.C.M. 1112. The accused should be advised of the right to apply to the Judge Advocate General for relief under Article 69(b) when such review is available. See R.C.M. 1201(b)(3).

(v) Examination of post-trial recommendation. When the post-trial recommendation is served on defense counsel, defense counsel should examine it and reply promptly in writing, noting any errors or omissions. Failure to note defects in the recommendation waives them. See R.C.M. 1106(f).

(F) Associate or assistant defense counsel. Associate or assistant counsel may act in that capacity only under the supervision and by the general direction of the defense counsel. A detailed defense counsel becomes associate defense counsel when the accused has individual military or civilian counsel and detailed counsel is not excused. Although associate counsel acts under the general supervision of the defense counsel, associate defense counsel may act without such supervision when circumstances require. See, for example, R.C.M. 805(c). An assistant defense counsel may do this only if such counsel has the qualifications to act as defense counsel. Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel. An assistant defense counsel may not act in the absence of the defense counsel at trial unless the assistant has the qualifications required of a defense counsel. See also R.C.M. 805. Unless the contrary applies, all acts of an assistant or associate defense counsel are presumed to have been done under the supervision of the defense counsel.

(e) Interpreters, reporters, escorts, bailiffs, clerks, and guards.

(1) Qualifications. The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under subsection (e)(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge.

(2) Disqualifications. In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, or orderly in any case in which that person is or has been in the same case:

(A) The accuser;
(B) A witness;
(C) An investigating officer;
(D) Counsel for any party; or
(E) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) Duties. In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties:

(A) Interpreters. Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

Discussion
The accused also may retain an unofficial interpreter without expense to the United States.

(B) Reporters. Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) Others. Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) Payment of reporters, interpreters. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

Discussion
See R.C.M. 807 regarding oaths for reporters, interpreters, and escorts.

(f) Action upon discovery of disqualification or lack of qualifications. Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

Rule 503. Detailing members, military judge, and counsel

(a) Members.

(1) In general. The convening authority shall detail qualified persons as members for courts-martial.

Discussion
The following persons are subject to challenge under R.C.M. 912(f) and should not be detailed as members: any person who is, in the same case, an accuser, witness, investigating officer, or counsel for any party; any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused, unless this is unavoidable; an enlisted member from the same unit as the accused; or any person who is in arrest or confinement.

(2) Enlisted members. An enlisted accused may,
before assembly, request orally on the record or in writing that enlisted persons serve as members of the general or special court-martial to which that accused’s case has been or will be referred. If such a request is made, an enlisted accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of enlisted members cannot be obtained, the court-martial may be assembled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial.

Discussion

When such a request is made, the convening authority should:

1. Detail an appropriate number of enlisted members to the court-martial and, if appropriate, relieve an appropriate number of commissioned or warrant officers previously detailed:

2. Withdraw the charges from the court-martial to which they were originally referred and refer them to a court-martial which includes the proper proportion of enlisted members; or

3. Advise the court-martial before which the charges are then pending to proceed in the absence of enlisted members if eligible enlisted members cannot be detailed because of physical conditions or military exigencies.

See also R.C.M. 1103(b)(2)(D)(iii).

(3) Members from another command or armed force. A convening authority may detail as members of general and special courts-martial persons under that convening authority’s command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

Discussion

Concurrence of the proper commander may be oral and need not be shown by the record of trial.

Members should ordinarily be of the same armed force as the accused. When a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the service.

(1) By whom detailed. The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General’s designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) Record of detail. The order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) Military judge from a different armed force. A military judge from one armed force may be detailed to a court-martial convened in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the military judge is a member. The Judge Advocate General may delegate authority to make military judges available for this purpose.

(c) Counsel.

(1) By whom detailed. Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person, that person may detail himself or herself as counsel for a court-martial.

(2) Record of detail. The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the counsel was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) Counsel from a different armed force. A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the counsel is a member.
The Judge Advocate General may delegate authority to make persons available for this purpose.

**Rule 504. Convening courts-martial**

(a) **In general.** A court-martial is created by a convening order of the convening authority.

(b) **Who may convene courts-martial.**

(1) **General courts-martial.** Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

**Discussion**

The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. The rule by which command devolves are found in regulations of the Secretary concerned.

(2) **Special courts-martial.** Unless otherwise limited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

**Discussion**

See the discussion under subsection (b)(1) of this rule.

(3) **Summary courts-martial.** See R.C.M. 1302(a).

**Discussion**

See the discussion under subsection (b)(1) of this rule.

(4) **Delegation prohibited.** The power to convene courts-martial may not be delegated.

(c) **Disqualification.**

(1) **Accuser.** An accuser may not convene a general or special court-martial for the trial of the person accused.

**Discussion**

See also Article 1(9); 307(a); 601(c). However, see R.C.M. 1302(b) (accuser may convene a summary court-martial).

(2) **Other.** A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) **Action when disqualified.** When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral

(a) In general. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

Discussion
Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and (c)); preferred charges which have been received by the convening authority for disposition (see R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (see R.C.M. 504).

If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, see R.C.M. 401(d) and 407(b).

(b) Who may refer. Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

Discussion
See R.C.M. 306(a), 403, 404, 407, and 504.

The convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority’s control to assure the appearance of the accused at trial. The convening authority’s power over the accused may be based upon agreements between the commanders concerned.

(c) Disqualification. An accuser may not refer charges to a general or special court-martial.

Discussion
Convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser. For a definition of “accuser,” see Article 1(9). A convening authority who is disqualified may forward the charges and allied papers for disposition by competent authority superior in rank or command. See R.C.M. 403 concerning actions which the superior may take.

See R.C.M. 1301(c) concerning limitations on the referral of certain cases to summary courts-martial.

(d) When charges may be referred.

(1) Basis for referral. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (d)(2) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

Discussion
For a discussion of selection among alternative dispositions, see R.C.M. 306. The convening authority is not obliged to refer all charges which the evidence might support. The convening authority should consider the options and considerations under R.C.M. 306 in exercising the discretion to refer.

(2) General courts-martial. The convening authority may not refer a specification under a charge to a general court-martial unless—

(A) There has been substantial compliance with the pretrial investigation requirements of R.C.M. 405; and

(B) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406. These requirements may be waived by the accused.

Discussion
See R.C.M. 201(f)(2)(C) concerning limitations on referral of capital offenses to special courts-martial. See R.C.M. 103(3) for the definition of a capital offense.

See R.C.M. 1301(c) concerning limitations on the referral of certain cases to summary courts-martial.

(c) How charges shall be referred.

(1) Order, instructions. Referral shall be by the personal order of the convening authority. The con-
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

vening authority may include proper instructions in the order.

**Discussion**

Referral is ordinarily evidenced by an indorsement on the charge sheet. Although the indorsement should be completed on all copies of the charge sheet, only the original must be signed. The signature may be that of a person acting by the order or direction of the convening authority. In such a case the signature element must reflect the signee’s authority.

If, for any reason, charges are referred to a court-martial different from that to which they were originally referred, the new referral is ordinarily made by a new indorsement attached to the original charge sheet. The previous indorsement should be lined out and initialed by the person signing the new referral. The original indorsement should not be obliterated. See also R.C.M. 604.

If the only officer present in a command refers the charges to a summary court-martial and serves as the summary court-martial under R.C.M. 1302, the indorsement should be completed with the additional comments, “only officer present in the command.”

The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. See subsection (2) below.

The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. See subsection (3) below.

The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided that the convening authority has otherwise complied with the applicable notice requirements. If the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

The convening authority should acknowledge by an instruction that a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged without consent of the accused. See subsection (4) below.

Ordinarily all known charges should be referred to a single court-martial.

(3) **Joinder of accused.** Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

**Discussion**

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. See R.C.M. 307(c)(5) Discussion. Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

(f) **Superior convening authorities.** Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.

**Rule 602. Service of charges**

The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet. In time of peace, no person may, over objection, be brought to trial—including an Article 39(a) session—before a general court-martial within a period of five days after service of charges, or before a special court-martial within a period of three days after service of charges. In computing these periods, the date of service of charges and the...
CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) Disclosure by the trial counsel. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) Papers accompanying charges; convening orders; statements. As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:
   (A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;
   (B) The convening order and any amending orders; and
   (C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) Documents, tangible objects, reports. After service of charges, upon request of the defense, the Government shall permit the defense to inspect:
   (A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and
   (B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

For specific rules concerning certain mental examinations of the accused or third party patients, see R.C.M. 701(f), R.C.M. 706, Mil. R. Evid. 302 and Mil. R. Evid. 513.

(3) Witnesses. Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:
   (A) In the prosecution case-in-chief; and
   (B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

Discussion

Such notice should be in writing except when impracticable.

(4) Prior convictions of accused offered on the merits. Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel’s possession.

(5) Information to be offered at sentencing. Upon request of the defense the trial counsel shall:
   (A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and
   (B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) Evidence favorable to the defense. The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:
   (A) Negate the guilt of the accused of an offense charged;
   (B) Reduce the degree of guilt of the accused of an offense charged; or
   (C) Reduce the punishment.

Discussion

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil. R. Evid. 506 covers the disclosure of unclassified...
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information which is under the control of the Government. Mil. R. Evid. 505 covers disclosure of classified information.

Other R.C.M. and Mil. R. Evid. concern disclosure of other specific matters. See R.C.M. 308 (identification of accuser), 405 (report of Article 32 investigation), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating circumstances in capital cases); Mil. R. Evid. 301(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (testimony of accused for limited purpose on line-ups), 412(c)(1) and (2) (intent of defense to use evidence of sexual misconduct by a victim); 505(h) (intent to disclose classified information), 506(h) (intent to disclose government information), and 609(b) (intent to impeach with conviction over 10 years old).

(b) Disclosure by the defense. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) Names of witnesses and statements.

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

Discussion

Such notice shall be in writing except when impracticable. See R.C.M. 701(f) for statements that would not be subject to disclosure.

(2) Notice of certain defenses. The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

Discussion

Such notice should be in writing except when impracticable. See R.C.M. 916(k) concerning the defense of lack of mental responsibility. See R.C.M. 706 concerning inquiries into the mental responsibility of the accused. See Mil. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. See R.C.M. 906(b)(6).

(3) Documents and tangible objects. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) Reports of examination and tests. If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.
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R.C.M. 702(c)(3)(A)

the witness’ testimony, or that the witness’ testimony would be unnecessary. The fact that the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness.

(B) Written deposition. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

Discussion
A request for an oral deposition may be approved without the consent of the opposing party.

(C) Notification of decision. The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) Waiver. Failure to review before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) Action when request is approved.

(1) Detail of deposition officer. When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

Discussion
See Article 49(c).

When a deposition will be at a point distant from the command, an appropriate authority may be requested to make available an officer to serve as deposition officer.

(2) Assignment of counsel. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

Discussion
The counsel who represents the accused at a deposition ordinarily will form an attorney-client relationship with the accused which will continue through a later court-martial. See R.C.M. 506.

If the accused has formed an attorney-client relationship with military counsel concerning the charges in question, ordinarily that counsel should be appointed to represent the accused.

(3) Instructions. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

Discussion
Such instruction may include the time and place for taking the deposition.

(e) Notice. The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) Duties of the deposition officer. In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703(c);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and
Excerpts from the MCM and UCMJ

forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies to the parties.

(g) Procedure.

(1) Oral depositions.

(A) Rights of accused. At an oral deposition, the accused shall have the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition; (b) the accused is disruptive within the meaning of R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) Examination of witnesses. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

Discussion

As to objections, see subsections (f)(7) and (h) of this rule. As to production of prior statements of witnesses, see R.C.M. 914; Mil. R. Evid. 612, 613.

A sample oath for a deposition follows.

“You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

(2) Written depositions.

(A) Rights of accused. The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(B) Presence of parties. No party has a right to be present at a written deposition.

(C) Submission of interrogatories to opponent. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

Discussion

The interrogatories and cross-interrogatories should be sent to the deposition officer by the party who requested the deposition. See subsection (h)(3) of this rule concerning objections.

(D) Examination of witnesses. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) How recorded. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

Discussion

A deposition read in evidence or one that is played during a court-martial, is recorded and transcribed by the reporter in the
(1) In general. A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) Oral depositions. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

Discussion

A party may show that an objection was made during the deposition but not recorded, but, in the absence of such evidence, the transcript of the deposition governs.

(3) Written depositions. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) Deposition by agreement not precluded.

(1) Taking deposition. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) Use of deposition. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence

(a) In general. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. With the consent of both the accused and Government, the military judge may authorize any witness to testify by remote means.

Over a party’s objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness’ personal appearance (although such testimony will not be admissible over the accused’s objection as evidence on the ultimate issue of guilt). Factors to be considered include, but are not limited to: the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony.

Discussion

See also R.C.M. 801(c) concerning the opportunity of the court-martial to obtain witnesses and evidence.

(2) On sentencing. Each party is entitled to the
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COMPARATIVE SYSTEMS SUBCOMMITTEE

Excerpts from the MCM and UCMJ

production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) **Unavailable witness.** Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness’ presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

(c) **Determining which witness will be produced.**

(1) **Witnesses for the prosecution.** The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) **Witnesses for the defense.**

(A) **Request.** The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) **Contents of request.**

(i) **Witnesses on merits or interlocutory questions.** A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) **Witnesses on sentencing.** A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness’ personal appearance will be necessary under the standards set forth in R.C.M. 1001(e).

(C) **Time of request.** A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness’ presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) **Determination.** The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness’ production is not required under this rule. If the trial counsel contends that the witness’ production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

**Discussion**

When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than a court-martial. See R.C.M. 906(b)(7). See also R.C.M. 905(j).

(d) **Employment of expert witnesses.** When the employment of expert witnesses is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

**Discussion**

See Mil. R. Evid. 702, 706.

(e) **Procedures for production of witnesses.**
(1) Military witnesses. The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness’ presence is required and requesting the commander to issue any necessary orders to the witness.

Discussion

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at government expense, or if informal coordination is inadequate, the appropriate superior should be requested to issue the necessary order.

If practicable, a request for the attendance of a military witness should be made so that the witness will have at least 48 hours notice before starting to travel to attend the court-martial.

The attendance of persons not on active duty should be obtained in the manner prescribed in subsection (e)(2) of this rule.

(2) Civilian witnesses—subpoena.

(A) In general. The presence of witnesses not on active duty may be obtained by subpoena.

Discussion

A subpoena is not necessary if the witness appears voluntarily at no expense to the United States.

Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose.

A subpoena may not be used to compel a civilian to travel outside the United States and its territories.

A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.

(B) Contents. A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

Discussion

A subpoena may not be used to compel a witness to appear at an examination or interview before trial, but a subpoena may be used to obtain witnesses for a deposition or a court of inquiry.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. See Appendix 7 for an example of a Subpoena with certificate of service (DD Form 453) and a Travel Order (DD Form 453-1).

(C) Who may issue. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.

(D) Service. A subpoena may be served by the person authorized by this rule to issue it, a United States marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned.

Discussion


If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. See Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the code. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot
be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

(E) Place of service.

(i) In general. A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) Foreign territory. In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) Occupied territory. In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(F) Relief. If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(G) Neglect or refusal to appear.

(i) Issuance of warrant of attachment. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

Discussion

A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are Federal process and shall be attached to the warrant, together with the charge sheet and convening orders.

(ii) Requirements. A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness’ failure to appear.

(iii) Form. A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) Execution. A warrant of attachment may be executed by a United States marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such nondeadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify as soon as practicable and be released.

Discussion

In executing a warrant of attachment, no more force than necessary to bring the witness to the court-martial, deposition, or court of inquiry may be used.

(v) Definition. For purposes of subsection (e)(2)(G) of this rule “military judge” does not include a summary court-martial or the president of a special court-martial without a military judge.

(f) Right to evidence.

(1) In general. Each party is entitled to the production of evidence which is relevant and necessary.

Discussion

See Mil. R. Evid. 401 concerning relevance.

Relevant evidence is necessary when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

As to the discovery and introduction of classified or other
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Excerpts from the MCM and UCMJ

may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

(1) Persons subject to the code. A general court-martial convening authority may grant immunity to any person subject to the code. However, a general court-martial convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

When testimony or a statement for which a person subject to the code may be granted immunity may relate to an offense for which that person could be prosecuted in a United States District Court, immunity should not be granted without prior coordination with the Department of Justice. Ordinarily coordination with the local United States Attorney is appropriate. Unless the Department of Justice indicates it has no interest in the case, authorization for the grant of immunity should be sought from the Attorney General. A request for such authorization should be forwarded through the office of the Judge Advocate General concerned. Service regulations may provide additional guidance. Even if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grant of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a Federal civilian offense.

(2) Persons not subject to the code. A general court-martial convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

See the discussion under subsection (c)(1) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

(3) Other limitations. The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

Discussion

Department of Defense Directive 1355.1 (21 July 1981) provides: “A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States, shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the Department of Justice. The General Counsel shall obtain the view of other appropriate elements of the Department of defense in furtherance of such consultation.”

(d) Procedure. A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a service member who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. See Mil. R. Evid. 301(c). A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the code may be charged under Article 134. See paragraph 108, Part IV. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. See Mil. R. Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil. R. Evid. 301(c)(2).

(c) Decision to grant immunity. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right

R.C.M. 704(e)(1)

II-67
against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness’ testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

**Rule 705. Pretrial agreements**

(a) In general. Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

**Discussion**

The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by courts-martial. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States District Courts, convening authorities shall ensure that appropriate consultation under the “Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction” has taken place prior to trial by court-martial or approval of a pretrial agreement in cases where such consultation is required. See Appendix 3.

(b) Nature of agreement. A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

   (A) Refer the charges to a certain type of court-martial;

   (B) Refer a capital offense as noncapital;

   (C) Withdraw one or more charges or specifications from the court-martial;

   **Discussion**

   A convening authority may withdraw certain specifications and/or charges from a court-martial and dismiss them if the accused fulfills the accused’s promises in the agreement. Except when jeopardy has attached (see R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority. A judicial determination that the accused breached the pretrial agreement is not required prior to reinstatement of withdrawn or dismissed specifications and/or charges. If the defense moves to dismiss the reinstated specifications and/or charges on the grounds that the government remains bound by the terms of the pretrial agreement, the government will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the pretrial agreement. If the agreement is intended to grant immunity to an accused, see R.C.M. 704.

   (D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

   (E) Take specified action on the sentence adjudged by the court-martial.

**Discussion**

For example, the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.

(c) Terms and conditions.

(1) Prohibited terms or conditions.

   (A) Not voluntary. A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

   (B) Deprivation of certain rights. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

   **Discussion**

   A pretrial agreement provision which prohibits the accused from making certain pretrial motions (see R.C.M. 905–907) may be improper.

(2) Permissible terms or conditions. Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

   (A) A promise to enter into a stipulation of fact
concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

Discussion

See R.C.M. 704(a)(2) concerning testimonial immunity. Only a general court-martial convening authority may grant immunity.

(C) A promise to provide restitution;

(D) A promise to conform the accused’s conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) Procedure.

(1) Negotiation. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) Formal submission. After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

Discussion

The first part of the agreement ordinarily contains an offer to plead guilty and a description of the offenses to which the offer extends. It must also contain a complete and accurate statement of any other agreed terms or conditions. For example, if the convening authority agrees to withdraw certain specifications, or if the accused agrees to waive the right to an Article 32 investigation, this should be stated. The written agreement should contain a statement by the accused that the accused enters it freely and voluntarily and may contain a statement that the accused has been advised of certain rights in connection with the agreement.

(3) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

Discussion

The convening authority should consult with the staff judge advocate or trial counsel before acting on an offer to enter into a pretrial agreement.

(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.

(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.

(e) Nondisclosure of existence of agreement. Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connec-
Discussion

See also R.C.M. 910(f) (plea agreement inquiry).

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(a) Initial action. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Discussion

See R.C.M. 909 concerning the capacity of the accused to stand trial and R.C.M. 916(k) concerning mental responsibility of the accused.

(b) Ordering an inquiry.

(1) Before referral. Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) After referral. After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) Inquiry.

(1) By whom conducted. When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) Matters in inquiry. When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) Directions to board. In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board’s investigation, a statement consisting only of the board’s ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused’s commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical pur-
poses, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

Discussion

Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, administrative action may be taken to discharge the accused from the service or, subject to Mil. R. Evid. 302, the charges may be tried by court-martial.

(4) Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) Disclosure to trial counsel. No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

Discussion

See Mil. R. Evid. 302.

Rule 707. Speedy trial

(a) In general. The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. See also Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline. Priority shall be given to persons in arrest or confinement.

(2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or

(3) Entry on active duty under R.C.M. 204.

(b) Accountability.

(1) In general. The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)–(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) Multiple Charges. When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) Events which affect time periods.

(A) Dismissal or mistrial. If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of

(i) the date of repreferral; or

(ii) the date of imposition of restraint under R.C.M. 304(a)(2)–(4).

(B) Release from restraint. If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)–(4) is reimposed; or

(iii) the date of entry on active duty under R.C.M. 204.

(C) Government appeals. If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if
there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) Rehearings. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) Commitment of the incompetent accused. If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) Excludable delay. All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) Procedure. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

Discussion

The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.

(2) Motions. Upon accused’s timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) Remedy. A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) Dismissal. Dismissal will be with or without prejudice to the government’s right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) Sentence relief. In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused’s demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.
Discussion

See subsection (c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

(e) Waiver. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

Discussion

Speedy trial issues may also be waived by a failure to raise the issue at trial. See R.C.M. 905(e) and 907(b)(2).
CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge’s responsibilities; other matters

(a) Responsibilities of military judge. The military judge is the presiding officer in a court-martial.

Discussion

The military judge is responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources. Unless otherwise specified, the president of a special court-martial without a military judge has the same authority and responsibility as a military judge. See R.C.M. 502(b)(2).

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

Discussion

The military judge should consult with counsel concerning the scheduling of sessions and the uniform to be worn. The military judge recesses or adjourns the court-martial as appropriate. Subject to R.C.M. 504(d)(1), the military judge may also determine the place of trial. See also R.C.M. 906(b)(11).

(2) Ensure that the dignity and decorum of the proceedings are maintained;

Discussion

See also R.C.M. 804 and 806. Courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings.

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

Discussion

See R.C.M. 102. The military judge may, within the framework established by the code and this Manual, prescribe the manner and order in which the proceedings may take place. Thus, the military judge may determine: when, and in what order, motions will be litigated (see R.C.M. 905); the manner in which voir dire will be conducted and challenges made (see R.C.M. 902(d) and 912); the order in which witnesses may testify (see R.C.M. 913; Mil. R. Evid. 611); the order in which the parties may argue on a motion or objection; and the time limits for argument (see R.C.M. 905; 919; 1001(g)).

The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties’ presentations or the appearance of partiality. The parties are entitled to a reasonable opportunity to properly present and support their contentions on any relevant matter.

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

Discussion

The military judge instructs the members concerning findings (see R.C.M. 920) and sentence (see R.C.M. 1005), and when otherwise appropriate. For example, preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate. See R.C.M. 913. Other instructions (for example, instructions on the limited purpose for which evidence has been introduced, see Mil. R. Evid. 105) may be given whenever the need arises.

(b) Rules of court; contempt. The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) Obtaining evidence. The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

Discussion

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence. See also Mil. R. Evid. 614. In taking such action, the court-martial must not depart from an impartial role.

(d) Uncharged offenses. If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.
Section 23.1: Military Judges

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

Discussion

A report of the matter may be made to the convening authority after trial. If charges are preferred for an offense indicated by the evidence referred to in this subsection, no member of the court-martial who participated in the first trial should sit in any later trial. Such a member would ordinarily be subject to a challenge for cause. See R.C.M. 912. See also Mil. R. Evid. 105 concerning instructing the members on evidence of uncharged misconduct.

(e) Interlocutory questions and questions of law. For purposes of this subsection “military judge” does not include the president of a special court-martial without a military judge.

(1) Rulings by the military judge.

(A) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) Changing a ruling. The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) Article 39(a) sessions. When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

Discussion

Sessions without members are appropriate for interlocutory questions, questions of law, and instructions. See also Mil. R. Evid. 103; 304; 311; 321. Such sessions should be used to the extent possible consistent with the orderly, expeditious progress of the proceedings.

(2) Ruling by the president of a special court-martial without a military judge.

(A) Questions of law. Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) Questions of fact. Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) Changing a ruling. The president of a special court-martial without a military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) Presence of members. Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.

(A) Determination. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) Instructions. When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) Voting. When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) Consultation. The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) Standard of proof. Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party
making the motion or raising the objection shall bear the burden of persuasion.

**Discussion**

A ruling on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof. See, for example, Mil. R. Evid. 314(e)(5), which requires consent for a search to be proved by clear and convincing evidence.

Most of the common motions are discussed in specific rules in this Manual, and the burden of persuasion is assigned therein. The prosecution usually bears the burden of persuasion (see Mil. R. Evid. 304(c); 311(e); see also R.C.M. 903 through 907) once an issue has been raised. What “raises” an issue may vary with the issue. Some issues may be raised by a timely motion or objection, See, for example, Mil. R. Evid. 304(e). Others may not be raised until the defense has made an offer of proof or presented evidence in support of its position. See, for example, Mil. R. Evid. 311(g)(2). The rules in this Manual and relevant decisions should be consulted when a question arises as to whether an issue is raised, as well as which side has the burden of persuasion. The military judge or president of a special court-martial may require a party to clarify a motion or objection or to make an offer of proof, regardless of the burden of persuasion, when it appears that the motion or objection is vague, inappropriate, irrelevant, or spurious.

(5) **Scope.** Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

**Discussion**

Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. Challenges are specifically covered in R.C.M. 902 and 912.

Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any, were given by an interrogator to a suspect would be a factual question.

A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory. An issue may arise as both an interlocutory question and a question which may determine the ultimate issue of guilt. An issued is not purely interlocutory if an accused raises a defense or objection and the disputed facts involved determine the ultimate question of guilt. For example, if during a trial for desertion the accused moves to dismiss for lack of jurisdiction and presents some evidence that the accused is not a member of an armed force, the accused’s status as a military person may determine the ultimate question of guilt because status is an element of the offense. If the motion is denied, the disputed facts must be resolved by each member in deliberation upon the findings. (The accused’s status as a servicemember would have to be proved by a preponderance of the evidence to uphold jurisdiction, see R.C.M. 907, but beyond a reasonable doubt to permit a finding of guilty.) If, on the other hand, the accused was charged with larceny and presented the same evidence as to military status, the evidence would bear only upon amenability to trial and the issue would be disposed of solely as an interlocutory question.

Interlocutory questions may be questions of fact or questions of law. This distinction is important because the president of a special court-martial without a military judge rules finally on interlocutory questions of law, but not on interlocutory questions of fact. On interlocutory questions of fact the president of a special court-martial without a military judge rules subject to the objection of any other member. On mixed questions of fact and law, rulings by the president are subject to objection by any member to the extent that the issue of fact can be isolated and considered separately.

(f) **Rulings on record.** All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] “military judge” does not include the president of a special court-martial without a military judge.

**Discussion**

See R.C.M. 808 and 1103 concerning preparation of the record of trial.

(g) **Effect of failure to raise defenses or objections.** Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

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*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
Excerpts from the MCM and UCMJ

R.C.M. 902(c)(1)

(1) “Proceeding” includes pretrial, trial, post-trial, appellate review, or other stages of litigation.
(2) The “degree of relationship” is calculated according to the civil law system.

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

(3) “Military judge” does not include the president of a special court-martial without a military judge.
(d) Procedure.
(1) The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified.

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

Discussion

Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of the military judge’s possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.
(e) Waiver. No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 903. Accused's elections on composition of court-martial

(a) Time of elections.
(1) Request for enlisted members. Before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.
(2) Request for trial by military judge alone. Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

Discussion

Only an enlisted accused may request that enlisted members be detailed to a court-martial. Trial by military judge alone is not permitted in capital cases (see R.C.M. 201(f)(1)(C)) or in special courts-martial in which no military judge has been detailed.

(b) Form of election.
(1) Request for enlisted members. A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused or shall be made orally on the record.
(2) Request for trial by military judge alone. A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.
(c) Action on election.
(1) Request for enlisted members. Upon notice of a timely request for enlisted members by an enlisted accused, the convening authority shall detail enlisted members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exi-
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.

Rule 910. Pleas

(a) Alternatives.

(1) In general. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

Discussion

See paragraph 2, Part IV, concerning lesser included offenses. When the plea is to a lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. In 2010, the court held in United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010), that the elements test is the proper method of determining lesser included offenses. As a result, “named” lesser included offenses listed in the Manual are not binding and must be analyzed on a case-by-case basis in conformity with Jones. See discussion following paragraph 3b(1)(c) in Part IV of this Manual and the related analysis in Appendix 23.

A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. See also subsection (g) of this rule.

(b) Conditional pleas. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) Refusal to plead; irregular plea. If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

Discussion

An irregular plea includes pleas such as guilty without criminality or guilty to a charge but not guilty to all specifications thereunder. When a plea is ambiguous, the military judge should have it clarified before proceeding further.

(c) Advice to accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. See also subsection (e) of this rule.

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

Discussion

In a general or special court-martial, if the accused is not represented by counsel, a plea of guilty should not be accepted.

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused’s
R.C.M. 910(c)(5)

answers may later be used against the accused in a prosecution for perjury or false statement.

Discussion
The advice in subsection (5) is inapplicable in a court-martial in which the accused is not represented by counsel.

(d) Ensuring that the plea is voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused’s willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

Discussion
A plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offenses(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused. If any potential defense is raised by the accused’s account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. If the statute of limitations would otherwise bar trial for the offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused. See R.C.M. 907(b)(2)(B).

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true.

The accused should remain at the counsel table during questioning by the military judge.

(f) Plea agreement inquiry.

(1) In general. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) Notice. The parties shall inform the military judge if a plea agreement exists.

Discussion
The military judge should ask whether a plea agreement exists. See subsection (d) of this rule. Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge.

(3) Disclosure. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

Discussion
If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused’s understanding of any terms in the agreement, the military judge should explain those terms to the accused.

(g) Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

Discussion
If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

See R.C.M. 913(a), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(h) Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea.

If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

Discussion

When the accused withdraws a previously accepted plea for guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. In a trial by military judge alone, recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings; in trial with members, a mistrial will ordinarily be necessary.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

Discussion

See subsection (f)(3) of this rule.

(i) Record of proceedings. A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M. 1305.

(j) Waiver. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the court-martial

The military judge shall announce the assembly of the court-martial.

Discussion

When trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn. The members are ordinarily sworn at the first session at which they appear, as soon as all parties and personnel have been announced. The members are seated with the president, who is the senior member, in the center, and the other members alternately to the president’s right and left according to rank. If the rank of a member is changed, or if the membership of the court-martial changes, the members should be reseated accordingly.

When trial is by military judge alone, the court-martial is ordinarily assembled immediately following approval of the request for trial by military judge alone.

Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (see Article 29; R.C.M. 505; 902; 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved (see Article 16; R.C.M. 903(a)(2)(d)); and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for, enlisted members (see Article 25(c)(1); R.C.M. 903(a)(1)(d)).

Rule 912. Challenge of selection of members; examination of members

(a) Pretrial matters.

(1) Questionnaires. Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;
(B) Sex;
(C) Race;

R.C.M. 912(a)(1)(C)
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

R.C.M. 912(a)(1)(D)

(D) Marital status and sex, age, and number of dependents;
(E) Home of record;
(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;
(G) Current unit to which assigned;
(H) Past duty assignments;
(I) Awards and decorations received;
(J) Date of rank; and
(K) Whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member’s responses to the questions shall be written and signed by the member.

Discussion

Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges.

If the questionnaire is marked or admitted as an exhibit at the court-martial it must be attached to or included in the record of trial. See R.C.M. 1103(b)(2)(D)(iv) and (b)(3)(B).

(2) Other materials. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) Challenge of selection of members.

(1) Motion. Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

Discussion

See R.C.M. 502(a) and 503(a) concerning selection of members. Members are also improperly selected when, for example, a certain group or class is arbitrarily excluded from consideration as members.

(2) Procedure. Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) Waiver. Failure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) Stating grounds for challenge. The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) Examination of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

Discussion

Examination of the members is called “voir dire.” If the members have not already been placed under oath for the purpose of voir dire (see R.C.M. 807(b)(2) Discussion (B)), they should be sworn before they are questioned.

The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case.

The nature and scope of the examination of members is within the discretion of the military judge. Members may be questioned individually or collectively. Ordinarily, the military judge should permit counsel to personally question the members. Trial counsel ordinarily conducts an inquiry before the defense. Whether trial counsel will question all the members before the defense begins or whether some other procedure will be followed depends on the circumstances. For example, when members are...
questioned individually outside the presence of other members, each party would ordinarily complete questioning that member before another member is questioned. The military judge and each party may conduct additional questioning, after initial questioning by a party, as necessary.

Ordinarily the members should be asked whether they are aware of any ground for challenge against them. This may expedite further questioning. The members should be cautioned, however, not to disclose information in the presence of other members which might disqualify them.

(e) Evidence. Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) Challenges and removal for cause.

(1) Grounds. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an investigating officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

Discussion

Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

(2) When made.

(A) Upon completion of examination. Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) Other times. A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) Procedure. Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. When a challenge for cause is granted, the member concerned shall be excused. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) Waiver. The grounds for challenge in subsection (f)(1)(A) of this rule may not be waived except that membership of enlisted members in the same unit as the accused may be waived. Membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

R.C.M. 912(f)(4)
of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.

Discussion

See also Mil. R. Evid. 606(b) when a member may be a witness.

(g) Peremptory challenges.

(1) Procedure. Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

Discussion


(2) Waiver. Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

Discussion

When the membership of the court-martial has been reduced below a quorum (see R.C.M. 501) or, when enlisted members have been requested, the fraction of enlisted members has been reduced below one-third, the proceedings should be adjourned and the convening authority notified so that new members may be detailed. See R.C.M. 505. See also R.C.M. 805(d) concerning other procedures when new members are detailed.

(h) Special courts-martial without a military judge.

In a special court-martial without a military judge, the procedures in this rule shall apply, except that challenges shall be made in the presence of the members and a ruling on any challenge for cause shall be decided by a majority vote of the members upon secret written ballot in closed session. The challenged member shall not be present at the closed session at which the challenge is decided. A tie vote on a challenge disqualifies the member challenged. Before closing, the president shall give such instructions as may be necessary to resolve the challenge. Each challenge shall be decided separately, and all unexcused members except the challenged member shall participate. When only three members are present and one is challenged, the remaining two may decide the challenge. When the president is challenged, the next senior member shall act as president for purposes of deciding the challenge.

(i) Definitions.

(1) Military judge. For purpose of this rule, “military judge” does not include the president of a special court-martial without a military judge.

(2) Witness. For purposes of this rule, “witness” includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

Discussion

For example, a person who by certificate has attested or otherwise authenticated an official record or other writing introduced in evidence is a witness.

(3) Investigating officer. For purposes of this rule, “investigating officer” includes any person who has investigated charges under R.C.M. 405 and any person who as counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 913. Presentation of the case on the merits

(a) Preliminary instructions. The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty.
Discussion
A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) Required instructions. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that—
   (A) The accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond reasonable doubt;
   (B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;
   (C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and
   (D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) or (j)(3) is raised, add: The accused has the burden of proving the defense of mistake of fact as to consent or age by a preponderance of the evidence.]

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings
(a) In general. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present (all members for offenses where the death penalty is mandatory) vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

(5) Included offenses. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has not been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) Procedure for voting.

(A) Order. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) Counting votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

(d) Action after findings are reached. After the
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
section (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(e) Production of witnesses.

(1) In general. During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2) of this rule.

Discussion

See R.C.M. 703 concerning the procedures for production of witnesses.

(2) Limitations. A witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if—

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) Other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

Discussion

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B.

(f) Additional matters to be considered. In addition to matters introduced under this rule, the court-martial may consider—

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

Discussion

The fact that the accused is of low intelligence or that, because of a mental or neurological condition the accused’s ability to adhere to the right is diminished, may be extenuating. On the other hand, in determining the severity of a sentence, the court-martial may consider evidence tending to show that an accused has little regard for the rights of others.

(g) Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence
The Response Systems Panel has not yet considered or deliberated on the contents of this report. 

Excerpts from the MCM and UCMJ

R.C.M. 1002

To be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

Discussion

See R.C.M. 1003 concerning authorized punishments and limitations on punishments. See also R.C.M. 1004 in capital cases.

Rule 1003. Punishments

(a) In general. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

Discussion

"Any person" includes officers, enlisted persons, person in custody of the armed forces serving a sentence imposed by a court-martial, and, insofar as the punishments are applicable, any other person subject to the code. See R.C.M. 202.

(b) Authorized punishments. Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

1. Reprimand. A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority;

Discussion

A reprimand adjudged by a court-martial is a punitive censure.

2. Forfeiture of pay and allowances. Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced.

Discussion

A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues. Forfeitures accrue to the United States.

Forfeitures of pay and allowances adjudged as part of a court-martial sentence, or occurring by operation of Article 58b are effective 14 days after the sentence is adjudged or when the sentence is approved by the convening authority, whichever is earlier.

"Basic pay" does not include pay for special qualifications, such as diving pay, or incentive pay such as flying, parachuting, or duty on board a submarine.

Forfeiture of pay and allowances under Article 58b is not a part of the sentence, but is an administrative result thereof.

At general courts-martial, if both a punitive discharge and confinement are adjudged, the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only confinement is adjudged, then if that confinement exceeds six months, the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only a punitive discharge is adjudged, Article 58b has no effect on pay and allowances. A death sentence results in total forfeiture of pay and allowances.

At a special court-martial, if a bad-conduct discharge and confinement are adjudged, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during that period of confinement. If only confinement is adjudged, and that confinement exceeds six months, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during the period of confinement. If only a bad conduct discharge is adjudged, Article 58b has no effect on pay.

If the sentence, as approved by the convening authority or other competent authority, does not result in forfeitures by the operation of Article 58b, then only adjudged forfeitures are effective.

Article 58b has no effect on summary courts-martial.

3. Fine. Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not ad-
judge a fine in excess of two-thirds of one year of the highest rate of officer pay. To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial;

**Discussion**

A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. In the case of a civilian subject to military law, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged, regardless of whether unjust enrichment is present.

See R.C.M. 1113(c)(3) concerning imposition of confinement when the accused fails to pay a fine.

Where the sentence adjudged at a special court-martial includes a fine, see R.C.M. 1107(b)(5) for limitations on convening authority action on the sentence.

(4) **Reduction in pay grade.** Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

**Discussion**

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

(5) **Restriction to specified limits.** Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

**Discussion**

Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. See subsection (c)(1)(A)(ii) of this rule. The sentence adjudged should specify the limits of the restriction.

(6) **Hard labor without confinement.** Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

**Discussion**

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

(7) **Confinement.** The place of confinement shall not be designated by the court-martial. When confinement for life is authorized, it may be with or without eligibility for parole. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

**Discussion**

The authority executing a sentence to confinement may require hard labor whether or not the words “at hard labor” are included in the sentence. See Article 58(b). To promote uniformity, the words “at hard labor” should be omitted in a sentence to confinement.

(8) **Punitive separation.** A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) **Dismissal.** Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
authorized punishment for the offense carrying the greatest maximum punishment.

Discussion

[Note: The use of the phrase “multiplicity in sentencing” has been deemed confusing. United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012). The word “multiplicity” refers to the protection against Double Jeopardy, as determined using the Blockburger/Teters analysis. After Campbell, “unreasonable multiplication of charges as applied to sentence” encompasses what had previously been described as “multiplicity in sentencing.” See Campbell, 71 M.J. at 26. Subparagraph (c)(1)(C) confusingly merges multiplicity and unreasonable multiplication of charges; therefore, practitioners are encouraged to read and comply with Campbell.]

See also R.C.M. 906b(12); 907b(3)(B).

Even if charges are not multiplicous, a military judge may rule on a motion that the prosecutor abused his discretion under R.C.M. 307(c)(d) or a motion that an unreasonable multiplication of charges requires relief under R.C.M. 1003(b)(1). Rather than the “single impulse” test previously noted in this Discussion, “[t]he better approach is to allow the military judge, in his or her discretion, to merge the offenses for sentencing purposes…” by determining whether the Quiroz test is fulfilled. United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012). (citing United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).]

(2) Based on rank of accused.

(A) Commissioned or warrant officers, cadets, and midshipmen.

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the Code, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall by dishonorable discharge.

(B) Enlisted persons. See subsection (b)(9) of this rule and R.C.M. 1301(d).

(3) Based on reserve status in certain circumstances.

(A) Restriction on liberty. A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) by sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) Forfeiture. A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

Discussion

For application of this subsection, see R.C.M. 204. At the conclusion of nonjudicial punishment proceedings or final adjournment of the court-martial, the reserve component member who was ordered to active duty for the purpose of conducting disciplinary proceedings should be released from active duty within one working day unless the order to active duty was approved by the Secretary concerned and confinement or other restriction on liberty was adjudged. Unursed punishments may be carried over to subsequent periods of inactive-duty training or active duty.

(4) Based on status as a person serving with or accompanying an armed force in the field. In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation.

(5) Based on other rules. The maximum limits on punishments in this rule may be further limited by other Rules of Courts-martial.

Discussion

The maximum punishment may be limited by: the jurisdictional limits of the court-martial (see R.C.M. 201(i) and 1301(d); the
R.C.M. 1003(c)(5)

nature of the proceedings (see R.C.M. 810(d) (sentence limitations in rehearsals, new trials, and other trials)); and by instructions by a convening authority (see R.C.M. 601(e)(1)). See also R.C.M. 1107(d)(4) concerning limits on the maximum punishment which may be approved depending on the nature of the record.

(d) Circumstances permitting increased punishments.

(1) Three or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) Two or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) Two or more offenses. If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Discussion

All of these increased punishments are subject to all other limitations on punishments set forth elsewhere in this rule. Convictions by summary court-martial may not be used to increase the maximum punishment under this rule. However they may be admitted and considered under R.C.M. 1001.

Rule 1004. Capital cases

(a) In general. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) Procedure. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) Notice.

(A) Referral. The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided:

(i) that the convening authority has otherwise complied with the notice requirement of subsection (B); and

(ii) that if the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

(B) Arraignment. Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) Evidence of aggravating factors. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.
Excerpts from the MCM and UCMJ

**Discussion**

*See also subsection (b)(5) of this rule.*

(3) **Evidence in extenuation and mitigation.** The accused shall be given broad latitude to present evidence in extenuation and mitigation.

**Discussion**

*See R.C.M. 1001(c).*

(4) **Necessary findings.** Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) **Basis for findings.** The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) **Instructions.** In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) **Voting.** In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) **Announcement.** If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) **Aggravating factors.** Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

**Discussion**

*See paragraph 23, Part IV, for a definition of “before or in the presence of the enemy.”*

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):
(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid.315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, “substantial physical harm” means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain or suffering” is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age.

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

Discussion

Conduct amounts to “reckless indifference” when it evinces a wanton disregard of consequences under circumstances involving grave danger to the life of another, although no harm is necessarily intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause a reasonable person to realize the highly dangerous character of such conduct. In determining whether participation in the offense was major, the accused’s presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participants should be considered. See United States v. Berg, 31 M.J. 35 (C.M.A. 1990); United States v. McMonagle 38 M.J. 53 (C.M.A. 1993).

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the
Excerpts from the MCM and UCMJ

law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, “national security” means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

Discussion

Examples of substantial damage of the national security of the United States include: impeding the performance of a combat mission or operation; impeding the performance of an important mission in a hostile fire or imminent danger pay area (see 37 U.S.C. § 310(a)); and disclosing military plans, capabilities, or intelligence such as to jeopardize any combat mission or operation of the armed services of the United States or its allies or to materially aid an enemy of the United States.

(d) Spy ing. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.

Discussion

A sentence of death may not be ordered executed until approved by the President. See R.C.M. 1207. A sentence to death which has been finally ordered executed will be carried out in the manner prescribed by the Secretary concerned. See R.C.M. 1113(e)(1).

Rule 1005. Instructions on sentence

(a) In general. The military judge shall give the members appropriate instructions on sentence.

Discussion

Instructions should be tailored to the facts and circumstances of the individual case.

(b) When given. Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instructions. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. But see R.C.M. 801(e)(1)(C); 803. The military judge is not required to give the specific instruction requested by counsel if the matter is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

(d) How given. Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS
them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(c) Required instructions. Instructions on sentence shall include:

(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;

Discussion

The maximum punishment that may be adjudged is the lowest of the total permitted by the applicable paragraph(s) in Part IV for each separate offense of which the accused was convicted (see also R.C.M. 1003 concerning additional limits on punishments and additional punishments which may be adjudged) or the jurisdictional limit of the court-martial (see R.C.M. 201(f) and R.C.M. 1301(d)). See also Discussion to R.C.M. 810(d). The military judge may upon request or when otherwise appropriate instruct on lesser punishments. See R.C.M. 1003. If an additional punishment is authorized under R.C.M. 1003(d), the members must be informed of the basis for the increased punishment.

A carefully drafted sentence worksheet ordinarily should be used and should include reference to all authorized punishments in the case.

(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused’s entitlement to pay and allowances;

(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

Discussion

See also R.C.M. 1004 concerning additional instructions required in capital cases.

(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

Discussion

See also R.C.M. 1002.

(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).

Discussion

For example, tailored instructions on sentencing should bring attention to the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character, and any pretrial restraint imposed on the accused.

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) In general. The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) Deliberations. Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) Proposal of sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed.
The junior member shall collect the proposed sentences and submit them to the president.

**Discussion**

A proposal should state completely each kind and, where appropriate, amount of authorized punishment proposed by that member. For example, a proposal of confinement for life would state whether it is with or without eligibility for parole. **See R.C.M. 1003(b).**

**Discussion**

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**Discussion**

A proposal should state completely each kind and, where appropriate, amount of authorized punishment proposed by that member. For example, a proposal of confinement for life would state whether it is with or without eligibility for parole. **See R.C.M. 1003(b).**

(d) **Voting.**

(1) **Duty of members.** Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member’s vote or opinion as to the guilt of the accused.

(2) **Secret ballot.** Proposed sentences shall be voted on by secret written ballot.

(3) **Procedure.**

(A) **Order.** All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) **Counting votes.** The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

**Discussion**

A sentence adopted by the required number of members may be reconsidered only in accordance with **R.C.M. 1009.**

**Discussion**

A sentence adopted by the required number of members may be reconsidered only in accordance with **R.C.M. 1009.**

**Discussion**

A sentence adopted by the required number of members may be reconsidered only in accordance with **R.C.M. 1009.**

（4）**Number of votes required.**

(A) **Death.** A sentence which includes death may be adjudged only if all members present vote for that sentence.

**Discussion**

A sentence which includes death may be adjudged only if all members present vote for that sentence. **See R.C.M. 1004.**

**Discussion**

A sentence which includes death may be adjudged only if all members present vote for that sentence. **See R.C.M. 1004.**

(B) **Confinement for life, with or without eligibility for parole, or more than 10 years.** A sentence that includes confinement for life, with or without eligibility for parole, or more than 10 years may be adjudged only if at least three-fourths of the members present vote for that sentence.

(C) **Other.** A sentence other than those described in subsection (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

**Discussion**

In computing the number of votes required to adopt a sentence, any fraction of a vote is rounded up to the next whole number. For example, if there are seven members, at least six would have to concur to impose a sentence requiring a three-fourths vote, while at least five would have to concur to impose a sentence requiring a two-thirds vote.

**Discussion**

In computing the number of votes required to adopt a sentence, any fraction of a vote is rounded up to the next whole number. For example, if there are seven members, at least six would have to concur to impose a sentence requiring a three-fourths vote, while at least five would have to concur to impose a sentence requiring a two-thirds vote.

**Discussion**

In computing the number of votes required to adopt a sentence, any fraction of a vote is rounded up to the next whole number. For example, if there are seven members, at least six would have to concur to impose a sentence requiring a three-fourths vote, while at least five would have to concur to impose a sentence requiring a two-thirds vote.

(5) **Mandatory sentence.** When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule.

(6) **Effect of failure to agree.** If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) **Action after a sentence is reached.** After the members have agreed upon a sentence, the court-martial shall be opened and the president shall inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

**Discussion**

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. See Appendix 11 for a format for forms of sentences. If a sentence worksheet has been provided, the military judge should examine it before the president announces the sentence. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give.

The president should not disclose any specific number of votes for or against any sentence.

If the sentence is ambiguous or apparently illegal, see **R.C.M. 1009.**

**Discussion**

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. See Appendix 11 for a format for forms of sentences. If a sentence worksheet has been provided, the military judge should examine it before the president announces the sentence. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give.

The president should not disclose any specific number of votes for or against any sentence.

If the sentence is ambiguous or apparently illegal, see **R.C.M. 1009.**
R.C.M. 1007

Rule 1007. Announcement of sentence
(a) In general. The sentence shall be announced by the president or, in a court-martial composed of a military judge alone, by the military judge, in the presence of all parties promptly after it has been determined.

Discussion
See Appendix 11.
An element of a sentence adjudged by members about which no instructions were given and which is not listed on a sentence worksheet is not proper.

(b) Erroneous announcement. If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

Discussion
For procedures governing reconsideration of the sentence, see R.C.M. 1009. See also R.C.M. 1102 concerning the action to be taken if the error in the announcement is discovered after the record is authenticated and forwarded to the convening authority.

(c) Polling prohibited. Except as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1008. Impeachment of sentence
A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion
See R.C.M. 923 Discussion concerning impeachment of findings.

Rule 1009. Reconsideration of sentence
(a) Reconsideration. Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) Exceptions.
(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence upon reconsideration in accordance with subsection (e) of this rule.
(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.
(c) Clarification of sentence. A sentence may be clarified at any time prior to action of the convening authority on the case.
(1) Sentence adjudged by the military judge. When a sentence adjudged by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practical after the ambiguity is discovered.
(2) Sentence adjudged by members. When a sentence adjudged by members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members who adjudged the sentence as soon as practical after the ambiguity is discovered.
(d) Action by the convening authority. When a sentence adjudged by the court-martial is ambiguous, the convening authority may return the matter to the court-martial for clarification. When a sentence adjudged by the court-martial is apparently illegal, the convening authority may return the matter to the court-martial for reconsideration or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.
(e) Reconsideration procedure. Any member of the court-martial may propose that a sentence reached by the members be reconsidered.
(1) Instructions. When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.
(2) Voting. The members shall vote by secret
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

M.R.E. 305

Rule 305. Warnings about Rights
(a) General Rule. A statement obtained in violation of this rule is involuntary and will be treated under Mil. R. Evid. 304.

(b) Definitions. As used in this rule:

1. “Person subject to the code” means a person subject to the Uniform Code of Military Justice as contained in Chapter 47 of Title 10, United States Code. This term includes, for purposes of subdivision (c) of this rule, a knowing agent of any such person or of a military unit.

2. “Interrogation” means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

3. “Custodial interrogation” means questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.

(c) Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements.

1. Article 31 Rights Warnings. A statement obtained from the accused in violation of the accused’s rights under Article 31 is involuntary and therefore inadmissible against the accused except as provided in subdivision (d). Pursuant to Article 31, a person subject to the code may not interrogate or request any statement from an accused or a person suspected of an offense without first:

   A. informing the accused or suspect of the nature of the accusation;

   B. advising the accused or suspect that the accused or suspect has the right to remain silent; and

   C. advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

2. Fifth Amendment Right to Counsel. If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible against the accused unless counsel was present for the interrogation.

(3) Sixth Amendment Right to Counsel. If an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges by anyone acting in a law enforcement capacity, or the agent of such a person, and the accused requests counsel, or if the accused has appointed or retained counsel, any statement made in the interrogation, or evidence derived from the interrogation, is inadmissible unless counsel was present for the interrogation.

4. Exercise of Rights. If a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately. If a person who is subjected to interrogation under the circumstances described in subdivisions (c)(2) or (c)(3) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present.

(d) Presence of Counsel. When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) will be provided by the United States at no expense to the person and without regard to the person’s indigency and must be present before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) Waiver.

1. Waiver of the Privilege Against Self-Incrimination. After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement.

2. Waiver of the Right to Counsel. If the right to counsel is applicable under this rule and the accused or suspect does not affirmatively decline the right to counsel, the prosecution must

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Waiver After Initially Invoking the Right to Counsel

(Fifth Amendment Right to Counsel). If an accused or suspect subjected to custodial interrogation requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

(B) Sixth Amendment Right to Counsel. If an accused or suspect interrogated after preferential of charges as described in subdivision (c)(1) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver.

(b) Standards for Nonmilitary Interrogations.

(1) United States Civilian Interrogations. When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, the person’s entitlement to rights warnings and the validity of any waiver of applicable rights will be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) Foreign Interrogations. Warnings under Article 31 and the Fifth and Sixth Amendments to the United States Constitution are not required during an interrogation conducted outside of a State, district, Commonwealth, territory, or possession of the United States by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (f)(1). A statement obtained from a foreign interrogation is admissible unless the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not “participated in” by military personnel or their agents or by the officials or agents listed in subdivision (f)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Rule 306. Statements by One of Several Accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

Rule 311. Evidence Obtained from Unlawful Searches and Seizures

(a) General Rule. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) the accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure, or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(b) Definition. As used in this rule, a search or seizure is “unlawful” if it was conducted, instigated, or participated in by:

(1) military personnel or their agents and was in violation of the Constitution of the United States.
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

M.R.E. 406

(A) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and

(B) do so before trial – or during trial if the military judge, for good cause, excuses lack of pretrial notice.

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

(c) By Affidavit. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) Definitions. “Reputation” means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. “Community” in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The military judge may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
M.R.E. 407

Rule 407. Subsequent Remedial Measures
(a) When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
   (1) negligence;
   (2) culpable conduct;
   (3) a defect in a product or its design; or
   (4) a need for a warning or instruction.
(b) The military judge may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise Offers and Negotiations
(a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
   (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in order to compromise the claim; and
   (2) conduct or a statement made during compromise negotiations about the claim – except when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
(b) Exceptions. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Offers to Pay Medical and Similar Expenses
Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, Plea Discussions, and Related Statements
(a) Prohibited Uses. Evidence of the following is not admissible against the accused who made the plea or participated in the plea discussions:
   (1) a guilty plea that was later withdrawn;
   (2) a nolo contendere plea;
   (3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or
   (4) any statement made during plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.
(b) Exceptions. The military judge may admit a statement described in subdivision (a)(3) or (a)(4):
   (1) when another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
   (2) in a proceeding for perjury or false statement, if the accused made the statement under oath, on the record, and with counsel present.
(c) Request for Administrative Disposition. A “statement made during plea discussions” includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; “on the record” includes the written statement submitted by the accused in furtherance of such request.

Rule 411. Liability Insurance
Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice or proving agency, ownership, or control.

Rule 412. Sex Offense Cases: The Victim’s Sexual Behavior or Predisposition
(a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving
an alleged sexual offense except as provided in subdivisions (b) and (c):

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior.

2. Evidence offered to prove any alleged victim’s sexual predisposition.

(b) Exceptions.

1. In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) Procedure to determine admissibility.

1. A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.

2. Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim’s privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

(d) For purposes of this rule, the term “sexual offense” includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. “Sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Similar Crimes in Sexual Offense Cases

(a) Permitted Uses. In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Accused. If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including any witnesses’ statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.
M.R.E. 413(d)

(d) Definition. As used in this rule, “sexual offense” means an offense punishable under the Uniform Code of Military Justice, or a crime under federal or state law (as “state” is defined in 18 U.S.C. § 513), involving:

1. any conduct prohibited by Article 120;
2. any conduct prohibited by 18 U.S.C. chapter 109A;
3. contact, without consent, between any part of the accused's body, or an object held or controlled by the accused, and another person's genitals or anus;
4. contact, without consent, between the accused's genitals or anus and any part of another person's body;
5. contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
6. an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Accused. If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definitions. As used in this rule:

1. “Child” means a person below the age of 16; and
2. “Child molestation” means an offense punishable under the Uniform Code of Military Justice, a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513), that involves:

(A) any conduct prohibited by Article 120 and committed with a child;
(B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
(C) any conduct prohibited by 18 U.S.C. chapter 110;
(D) contact between any part of the accused's body, or an object held or controlled by the accused, and a child's genitals or anus;
(E) contact between the accused's genitals or anus and any part of a child's body;
(F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
(G) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

Rule 501. Privilege in General

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

1. the United States Constitution as applied to members of the armed forces;
2. a federal statute applicable to trials by court-martial;
3. these rules;
4. this Manual; or
5. the principles of common law generally recognized in the trial of criminal cases in the United States district courts under rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

1. refuse to be a witness;
2. refuse to disclose any matter;
3. refuse to produce any object or writing; or
4. prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term “person” includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.
(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rule 502. Lawyer-Client Privilege

(a) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or the client’s representative and the lawyer or the lawyer’s representative;

(2) between the lawyer and the lawyer’s representative;

(3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest;

(4) between representatives of the client or between the client and a representative of the client; or

(5) between lawyers representing the client.

(b) Definitions. As used in this rule:

(1) “Client” means a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) “Lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term “lawyer” does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member:

(A) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

(B) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

(C) is authorized to practice law and renders professional legal services during off-duty employment.

(3) “Lawyer’s representative” means a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer’s representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under any of the following circumstances:

(1) Crime or Fraud. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Document Attested by the Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

M.R.E. 502(d)(4)
M.R.E. 502(d)(5)

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to Clergy
(a) General Rule. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman’s assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) Definitions. As used in this rule:
(1) “Clergyman” means a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) “Clergyman’s assistant” means a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.

(3) A communication is “confidential” if made to a clergyman in the clergyman’s capacity as a spiritual adviser or to a clergyman’s assistant in the assistant’s official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman’s assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman’s assistant to do so is presumed in the absence of evidence to the contrary.

Rule 504. Husband-Wife Privilege
(a) Spousal Incapacity. A person has a privilege to refuse to testify against his or her spouse.

(b) Confidential Communication Made During the Marriage.

(1) General Rule. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) Definition. As used in this rule, a communication is “confidential” if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) Who May Claim the Privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) Exceptions.
(1) To Spousal Incapacity Only. There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) To Spousal Incapacity and Confidential Communications. There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or
(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 18 U.S.C. §1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

(D) Where both parties have been substantial participants in illegal activity, those communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated are not marital communications for purposes of the privilege in subdivision (b) and are not entitled to protection under the privilege in subdivision (b).

(d) Definitions. As used in this rule:

1. “A child of either” means a biological child, adopted child, or ward of one of the spouses and includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is:

   A) an individual under the age of 18; or
   B) an individual with a mental handicap who functions under the age of 18.

2. “Temporary physical custody” means a parent has entrusted his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody, nor is a written agreement required. Rather, the focus is on the parent’s agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of their child for recurring care or during absences due to temporary duty or deployments.

Rule 505. Classified Information

(a) General Rule. Classified information must be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

(b) Definitions. As used in this rule:

1. “Classified information” means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

2. “National security” means the national defense and foreign relations of the United States.

3. “In camera hearing” means a session under Article 39(a) from which the public is excluded.

4. “In camera review” means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

5. “Ex parte” means a discussion between the military judge and either the defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect classified information or other good cause. Prior to granting a request from one party for an ex parte discussion or hearing, the military judge must provide notice to the opposing party on the record. If the ex parte discussion is conducted off the record, the military judge should later state on the record that such ex parte discussion took place and generally summarize the subject matter of the discussion, as appropriate.

(c) Access to Evidence. Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge must be provided to the accused.

(d) Declassification. Trial counsel should, when practicable, seek declassification of evidence that may be used at trial, consistent with the requirements of national security. A decision not to declassify evidence under this section is not subject to review by a military judge or upon appeal.
M.R.E. 513

Rule 513. Psychotherapist—Patient Privilege

(a) General Rule. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.

(b) Definitions. As used in this rule:

(1) “Patient” means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) “Psychotherapist” means a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) “Assistant to a psychotherapist” means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) “Evidence of a patient’s records or communications” means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient’s mental or emotional condition.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient’s mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to Determine Admissibility of Patient Records or Communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:
(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient’s guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient’s records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard at the patient’s own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient’s records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Rule 514. Victim Advocate—Victim Privilege

(a) General Rule. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim.

(b) Definitions. As used in this rule:

(1) “Victim” means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) “Victim advocate” means a person who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(3) A communication is “confidential” if made in the course of the victim advocate - victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(4) “Evidence of a victim’s records or communications” means testimony of a victim advocate, or records that pertain to communications by a victim to a victim advocate, for the purposes of advising or providing supportive assistance to the victim.

(c) Who May Claim the Privilege. The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a defense counsel representing the victim to claim the privilege on his or her behalf. The victim advocate who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, guardian, conservator, or a defense counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the victim is dead;

(2) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
M.R.E. 514(d)(3)

(3) when a victim advocate believes that a victim’s mental or emotional condition makes the victim a danger to any person, including the victim;  

(4) if the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;  

(5) when necessary to ensure the safety and security of military personnel, military property, classified information, or the accomplishment of a military mission; or  

(6) when admission or disclosure of a communication is constitutionally required.  

(c) Procedure to Determine Admissibility of Victim Records or Communications.  

(1) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:  

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and  

(B) serve the motion on the opposing party, the military judge and, if practicable, notify the victim or the victim’s guardian, conservator, or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subdivision (c)(2).  

(2) Before ordering the production or admission of evidence of a victim’s records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard at the victim’s own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.  

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.  

(4) To prevent unnecessary disclosure of evidence of a victim’s records or communications, the military judge may issue protective orders or may admit only portions of the evidence.  

(5) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Rule 601. Competency to Testify in General  
Every person is competent to be a witness unless these rules provide otherwise.

Rule 602. Need for Personal Knowledge  
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Mil. R. Evid. 703.

Rule 603. Oath or Affirmation to Testify Truthfully  
Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.

Rule 604. Interpreter  
An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Military Judge’s Competency as a Witness  
(a) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Excerpts from the MCM and UCMJ

M.R.E. 614(a)

cross-examine the witness. When the members wish to call or recall a witness, the military judge must determine whether the testimony would be relevant and not barred by any rule or provision of this Manual.

(b) Examining. The military judge or members may examine a witness regardless of who calls the witness. Members must submit their questions to the military judge in writing. Following the opportunity for review by both parties, the military judge must rule on the propriety of the questions, and ask the questions in an acceptable form on behalf of the members. When the military judge or the members call a witness who has not previously testified, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) Objections. A party may object to the court-martial's calling or examining a witness either at that time or at the next opportunity when the members are not present.

Rule 615. Excluding Witnesses

At a party's request, the military judge must order witnesses excluded so that they cannot hear other witnesses' testimony, or the military judge may do so sua sponte. This rule does not authorize excluding:

(a) the accused;

(b) a member of an armed service or an employee of the United States after being designated as a representative of the United States by the trial counsel;

(c) a person whose presence a party shows to be essential to presenting the party's case;

(d) a person authorized by statute to be present; or

(e) a victim of an offense from the trial of an accused for that offense, when the sole basis for exclusion would be that the victim may testify or present information during the presentencing phase of the trial.

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the military judge orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
SEC. 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(1) RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

(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 H. R. 4310—128 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.—

(A) RESPONSE SYSTEMS PANEL.—The panel required by subsection (a)(1) shall be composed of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the chairman and ranking member of the Committees on Armed Services of the Senate and the House of Representatives.

(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.—

(A) RESPONSE SYSTEMS PANEL.—All original appointments to the panel required by subsection (a)(1) shall be made not later than 120 days after the date of the enactment of this Act.

(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.—

(1) RESPONSE SYSTEMS PANEL.—The panel established under subsection (a)(1) shall terminate upon the earlier of the following:

(A) Thirty days after the panel has submitted a report of its findings and recommendations, through the Secretary of Defense, to the Committees on Armed Services of the Senate and the House of Representatives.

(B) Eighteen months after the first meeting of the panel, by which date the panel is expected to have made its report.

(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.—

(1) RESPONSE SYSTEMS PANEL.—In conducting a systemic review and assessment, the panel required by subsection (a)(1) shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice). The review shall include the following:

(A) Using criteria the panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the Uniform Code of the Military Justice, and the investigation, prosecution, and adjudication, of adult sexual assault crimes during the period 2007 through 2011.

(B) A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims and the identification of civilian best practices that may be incorporated into any phase of the military system.

(C) An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial.

(D) An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems.

(E) An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences.

(F) An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault.

(G) An assessment of the strengths and weakness of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.
(H) An assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by section 3771 of title 18, United States Code, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2.

(I) Such other matters and materials the panel considers appropriate.

(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.
Legislation

(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.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

vocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

“(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

“(c) Report of Results.—After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f).

“(d) Rights of Accused and Victim.—(1) The accused shall be advised of the charges against the accused and of the accused’s right to be represented by counsel at the preliminary hearing under subsection (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

“(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).
“(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

“(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

“(e) Recording of Preliminary Hearing.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.

“(f) Effect of Evidence of Uncharged Offense.—If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused—

“(1) is present at the preliminary hearing;

“(2) is informed of the nature of each uncharged offense considered; and
Legislation

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715

“(3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).

“(g) Effect of Violation.—The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.

“(h) Victim Defined.—In this section, the term ‘victim’ means a person who—

“(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

“(2) is named in one of the specifications.”.

(2) Clerical Amendment.—The table of sections at the beginning of subchapter VI of chapter 47 of such title is amended by striking the item relating to section 832 and inserting the following new item:

“832. Art 32. Preliminary hearing.”.

(b) Elimination of Unlimited Command Prerogative and Discretion; Imposition of Additional Limitations.—Subsection (c) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

717

“(3)(A) Action on the findings of a court-martial by the convening authority or by another person authorized to act under this section is not required.

“(B) If the convening authority or another person authorized to act under this section acts on the findings of a court-martial, the convening authority or other person—

“(i) may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto; or

“(ii) may not change a finding of guilty to a charge or specification, other than a charge or specification for a qualifying offense, to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

“(C) If the convening authority or another person authorized to act under this section acts on the findings to dismiss or change any charge or specification for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

“(D)(i) In this subsection, the term ‘qualifying offense’ means, except in the case of an offense excluded
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
719

other person authorized to act under this section shall have the authority to disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists.

“(C) If a pre-trial agreement has been entered into by the convening authority and the accused, as authorized by Rule for Courts–Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pre-trial agreement, subject to the following limitations for convictions of offenses that involve a mandatory minimum sentence:

“(i) If a mandatory minimum sentence of a dishonorable discharge applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may commute the dishonorable discharge to a bad conduct discharge pursuant to the terms of the pre-trial agreement.

“(ii) Except as provided in clause (i), if a mandatory minimum sentence applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under
720

this section may not disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part, unless authorized to do so under subparagraph (B).”.

c (e) Conforming Amendments.—

(1) References to sole discretion and other persons authorized to act under article 60.—Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is further amended—

(A) in subsection (b)(2), by striking “or other person taking action under this section” and inserting “or another person authorized to act under this section”;

(B) in subsection (d), by striking “or other person taking action under this section” the first place it appears and inserting “or another person authorized to act under this section”;

(C) in subsection (e)(1), by striking “or other person taking action under this section, in his sole discretion,” and inserting “or another person authorized to act under this section”; and

(D) in subsection (e)(3), by striking “or other person taking action under this section”
Legislation

721

and inserting “or another person authorized to act under this section”.

(2) OTHER AUTHORITY FOR CONVENING AUTHORITY TO SUSPEND SENTENCE.—Section 871(d) of such title (article 71(d) of the Uniform Code of Military Justice) is amended by adding at the end the following new sentence: “Paragraphs (2) and (4) of subsection (c) of section 860 of this title (article 60) shall apply to any decision by the convening authority or another person authorized to act under this section to suspend the execution of any sentence or part thereof under this subsection.”.

(3) REFERENCES TO ARTICLE 32 INVESTIGATION.—(A) Section 802(d)(1)(A) of such title (article 2(d)(1)(A) of the Uniform Code of Military Justice) is amended by striking “investigation under section 832” and inserting “a preliminary hearing under section 832”.

(B) Section 834(a)(2) of such title (article 34(a)(2) of the Uniform Code of Military Justice) is amended by striking “investigation under section 832 of this title (article 32) (if there is such a report)” and inserting “a preliminary hearing under section 832 of this title (article 32)”.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

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723
1 after the date of the enactment of this Act and shall
2 apply with respect to offenses committed under
3 chapter 47 of title 10, United States Code (the Uni-
4 form Code of Military Justice), on or after that ef-
5 fective date.
SEC. 1704. DEFENSE COUNSEL INTERVIEW OF VICTIM OF AN ALLEGED SEX-RELATED OFFENSE IN PRESENCE OF TRIAL COUNSEL, COUNSEL FOR THE VICTIM, OR A SEXUAL ASSAULT VICTIM ADVOCATE.

Section 846 of title 10, United States Code (article 846 of the Uniform Code of Military Justice), is amended—

(1) by inserting ``(a) OPPORTUNITY TO OBTAIN WITNESSES AND OTHER EVIDENCE.—'' before ``The trial counsel'';

(2) by striking ``Process issued'' and inserting the following:

``(c) PROCESS.—Process issued''; and

(3) by inserting after subsection (a), as designated by paragraph (1), the following new subsection (b):

``(b) DEFENSE COUNSEL INTERVIEW OF VICTIM OF ALLEGED SEX-RELATED OFFENSE.—(1) Upon notice by trial counsel to defense counsel of the name of an alleged victim of an alleged sex-related offense who trial counsel intends to call to testify at a preliminary hearing under section 832 of this title (article 32) or a court-martial
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

725
1 under this chapter, defense counsel shall make any request to interview the victim through trial counsel.
2 “(2) If requested by an alleged victim of an alleged sex-related offense who is subject to a request for inter-
3 view under paragraph (1), any interview of the victim by defense counsel shall take place only in the presence of
4 trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate.
5 “(3) In this subsection, the term ‘alleged sex-related offense’ means any allegation of—
6 “(A) a violation of section 920, 920a, 920b, 920c, or 925 of this title (article 120, 120a, 120b, 120c, or 125); or
7 “(B) an attempt to commit an offense specified in a paragraph (1) as punishable under section 880 of this title (article 80).”.

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-
1 RELATED OFFENSES AND TRIAL OF SUCH OFF-
2 FENSES BY GENERAL COURTS-MARTIAL.
3 (a) MANDATORY DISCHARGE OR DISMISSAL RE-
4奎RED.—
5 (1) IMPOSITION.—Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended—
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

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727

1 “§ 856. Art. 56. Maximum and minimum limits”.

2 (B) TABLE OF SECTIONS.—The table of
3 sections at the beginning of subchapter VIII of
4 chapter 47 of such title is amended by striking
5 the item relating to section 856 and inserting
6 the following new item:

“856. Art 56. Maximum and minimum limits.”.

7 (b) JURISDICTION LIMITED TO GENERAL COURTS-
8 MARTIAL.—Section 818 of title 10, United States Code
9 (article 18 of the Uniform Code of Military Justice), is
10 amended—
11 (1) by inserting “(a)” before the first sentence;
12 (2) in the third sentence, by striking “However,
13 a general court-martial” and inserting the following:
14 “(b) A general court-martial”; and
15 (3) by adding at the end the following new sub-
16 section:
17 “(c) Consistent with sections 819, 820, and 856(b)
18 of this title (articles 19, 20, and 56(b)), only general
19 courts-martial have jurisdiction over an offense specified
20 in section 856(b)(2) of this title (article 56(b)(2)).”.

21 (c) EFFECTIVE DATE.—The amendments made by
22 this section shall take effect 180 days after the date of
23 the enactment of this Act, and apply to offenses specified
24 in section 856(b)(2) of title 10, United States Code (arti-
25 cle 56(b)(2) of the Uniform Code of Military Justice), as
addicted by subsection (a)(1), committed on or after that date.

SEC. 1706. PARTICIPATION BY VICTIM IN CLEMENCY PHASE OF COURTS-MARTIAL PROCESS.

(a) VICTIM SUBMISSION OF MATTERS FOR CONSIDERATION BY CONVENING AUTHORITY.—Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), as amended by section 1702, is further amended—

(1) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(2) by inserting after subsection (c) the following new subsection:

“(d)(1) In any case in which findings and sentence have been adjudged for an offense that involved a victim, the victim shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action under this section.

“(2)(A) Except as provided in subparagraph (B), the submission of matters under paragraph (1) shall be made within 10 days after the later of—
Legislation

“(i) the date on which the victim has been given an authenticated record of trial in accordance with section 854(e) of this title (article 54(e)); and

“(ii) if applicable, the date on which the victim has been given the recommendation of the staff judge advocate or legal officer under subsection (e).

“(B) In the case of a summary court-martial, the submission of matters under paragraph (1) shall be made within seven days after the date on which the sentence is announced.

“(3) If a victim shows that additional time is required for submission of matters under paragraph (1), the convening authority or other person taking action under this section, for good cause, may extend the submission period under paragraph (2) for not more than an additional 20 days.

“(4) A victim may waive the right under this subsection to make a submission to the convening authority or other person taking action under this section. Such a waiver shall be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which a victim may make a submission under this subsection shall be deemed to have expired upon the submission of such waiver to the convening authority or such other person.
Legislation

730

“(5) In this section, the term ‘victim’ means a person who has suffered a direct physical, emotional, or pecuniary loss as a result of a commission of an offense under this chapter (the Uniform Code of Military Justice) and on which the convening authority or other person authorized to take action under this section is taking action under this section.”.

(b) LIMITATIONS ON CONSIDERATION OF VICTIM’S CHARACTER.—Subsection (b) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph:

“(5) The convening authority or other person taking action under this section shall not consider under this section any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.”.

(c) CONFORMING AMENDMENT.—Subsection (b)(1) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended by striking “subsection (d)” and inserting “subsection (e)”. 

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
SEC. 1708. MODIFICATION OF MANUAL FOR COURTS-MARTIAL TO ELIMINATE FACTOR RELATING TO CHARACTER AND MILITARY SERVICE OF THE ACCUSED IN RULE ON INITIAL DISPOSITION OF OFFENSES.

Not later than 180 days after the date of enactment of this Act, the discussion pertaining to Rule 306 of the Manual for Courts-Martial (relating to policy on initial disposition of offenses) shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Subtitle C—Amendments to Other Laws

SEC. 1721. TRACKING OF COMPLIANCE OF COMMANDING OFFICERS IN CONDUCTING ORGANIZATIONAL CLIMATE ASSESSMENTS FOR PURPOSES OF PREVENTING AND RESPONDING TO SEXUAL ASSAULTS.

Section 572 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1753; 10 U.S.C. 1561 note) is amended by adding at the end the following new subsection:

“(d) TRACKING OF ORGANIZATIONAL CLIMATE ASSESSMENT COMPLIANCE.—The Secretary of Defense shall direct the Secretaries of the military departments to verify
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

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754

1 and track the compliance of commanding officers in conducting organizational climate assessments, as required by subsection (a)(3).”
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

SEC. 1725. QUALIFICATIONS AND SELECTION OF DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE PERSONNEL AND REQUIRED AVAILABILITY OF SEXUAL ASSAULT NURSE EXAMINERS.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

(b) Availability of Sexual Assault Nurse Examiners at Military Medical Treatment Facilities.—

(1) Facilities with full-time emergency department.—The Secretary of a military department shall require the assignment of at least one full-time sexual assault nurse examiner to each military medical treatment facility under the jurisdiction of that Secretary in which an emergency department
operates 24 hours per day. The Secretary may assign additional sexual assault nurse examiners based on the demographics of the patients who utilize the military medical treatment facility.

(2) OTHER FACILITIES.—In the case of a military medical treatment facility not covered by paragraph (1), the Secretary of the military department concerned shall require that a sexual assault nurse examiner be made available to a patient of the facility, consistent with the Department of Justice National Protocol for Sexual Assault Medical Forensic Examinations, Adult/Adolescent, when a determination is made regarding the patient’s need for the services of a sexual assault nurse examiner.

(3) QUALIFICATIONS.—A sexual assault nurse examiner assigned under paragraph (1) or made available under paragraph (2) shall meet such training and certification requirements as are prescribed by the Secretary of Defense.

(c) REPORT ON TRAINING, QUALIFICATIONS, AND EXPERIENCE OF SEXUAL ASSAULT PREVENTION AND RESPONSE PERSONNEL.—

(1) REPORT REQUIRED.—The Secretary shall prepare a report on the review, conducted pursuant to the Secretary of Defense Memorandum of May
17, 2013, of the adequacy of the training, qualifications, and experience of each member of the Armed Forces and civilian employee of the Department of Defense who is assigned to a position that includes responsibility for sexual assault prevention and response within the Armed Forces for the successful discharge of such responsibility.

(2) REPORT ELEMENTS.—The report shall include the following:

(A) An assessment of the adequacy of the training and certifications required for members and employees described in paragraph (1).

(B) The number of such members and employees who did not have the training, qualifications, or experience required to successfully discharge their responsibility for sexual assault prevention and response within the Armed Forces.

(C) The actions taken by the Secretary of Defense with respect to such members and employees who were found to lack the training, qualifications, or experience to successfully discharge such responsibility.

(D) Such improvements as the Secretary considers appropriate in the process used to se-
lect and assign members and employees to positions that include responsibility for sexual assault prevention and response within the Armed Forces in order to ensure the highest caliber candidates are selected and assigned to such positions.

(3) SUBMISSION.—Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall submit the report to the Committees on Armed Services of the Senate and the House of Representatives.
Subtitle D—Studies, Reviews, Policies, and Reports

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

(a) ADDITIONAL DUTIES FOR RESPONSE SYSTEMS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—

The independent panel established by the Secretary of Defense under subsection (a)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “response systems panel”, shall conduct the following:

(A) An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), would have on overall reporting and prosecution of sexual assault cases.
Legislation

(B) An assessment regarding whether the roles, responsibilities, and authorities of Special Victims’ Counsel to provide legal assistance under section 1044e of title 10, United States Code, as added by section 1716, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

(C) An assessment of the feasibility and appropriateness of extending to victims of crimes covered by chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the right afforded a crime victim in civilian criminal legal proceedings under subsection (a)(4) of section 3771 of title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section.

(D) An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected,
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

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764

1 searchable database accessible only to military
2 criminal investigators, Sexual Assault Response
3 Coordinators, or other appropriate personnel
4 only for the purposes of identifying individuals
5 who are subjects of multiple accusations of sexual
6 assault and encouraging victims to make an
7 unrestricted report of sexual assault in those
8 cases in order to facilitate increased prosecutions, particularly of serial offenders. The assessment should include an evaluation of the
9 appropriate content to be included in the database, as well as the best means to maintain the
10 privacy of those making a restricted report.
11
12 (E) As part of the comparison of military
13 and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes, as required by subsection
15 provided in the military and civilian systems, the appropriateness of clemency proceedings in
16 the military system, the manner in which clemency is used in the military system, and whether
clemency in the military justice system could
COMPARATIVE SYSTEMS SUBCOMMITTEE

Legislation

765
1 be reserved until the end of the military appeals
2 process.
3 (F) An assessment of whether the Depart-
4 ment of Defense should promulgate, and ensure
5 the understanding of and compliance with, a
6 formal statement of what accountability, rights,
7 and responsibilities a member of the Armed
8 Forces has with regard to matters of sexual as-
9 sault prevention and response, as a means of
10 addressing those issues within the Armed
11 Forces. If the response systems panel re-
12 commends such a formal statement, the response
13 systems panel shall provide key elements or
14 principles that should be included in the formal
15 statement.
16 (2) SUBMISSION OF RESULTS.—The response
17 systems panel shall include the results of the assess-
18 ments required by paragraph (1) in the report re-
19 quired by subsection (c)(1) of section 576 of the Na-
20 tional Defense Authorization Act for Fiscal Year
21 2013, as amended by section 1722.
22 (b) ADDITIONAL DUTIES FOR JUDICIAL PRO-
23 CEDINGS PANEL.—
24 (1) ADDITIONAL ASSESSMENTS SPECIFIED.—
25 The independent panel established by the Secretary
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

766

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.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

767
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 of-
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

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768
fenses 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.

SEC. 1732. REVIEW AND POLICY REGARDING DEPARTMENT OF DEFENSE INVESTIGATIVE PRACTICES IN RESPONSE TO ALLEGATIONS OF UNIFORM CODE OF MILITARY JUSTICE VIOLATIONS.

(a) Review.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall conduct a review of the practices of the military criminal investigative organizations (Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigation) in response to an allegation that a member of the Armed Forces has committed an offense under the Uniform Code of Military Justice, including the extent to which the military criminal investigative organizations make a recommendation regarding whether an allegation appears founded or unfounded.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
(b) POLICY.—After conducting the review required by subsection (a), the Secretary of Defense shall develop a uniform policy for the Armed Forces, to the extent practicable, regarding the use of case determinations to record the results of the investigation of an alleged violation of the Uniform Code of Military Justice. In developing the policy, the Secretary shall consider the feasibility of adopting case determination methods, such as the uniform crime report, used by nonmilitary law enforcement agencies.
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

SEC. 1742. COMMANDING OFFICER ACTION ON REPORTS ON SEXUAL OFFENSES INVOLVING MEMBERS OF THE ARMED FORCES.

(a) IMMEDIATE ACTION REQUIRED.—A commanding officer who receives a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer shall act upon the report in accordance with subsection (b) immediately after receipt of the report by the commanding officer.

(b) ACTION REQUIRED.—The action required by this subsection with respect to a report described in subsection (a) is the referral of the report to the military criminal investigation organization with responsibility for inves-
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

SEC. 1744. REVIEW OF DECISIONS NOT TO REFER CHARGES OF CERTAIN SEX-RELATED OFFENSES FOR TRIAL BY COURT-MARTIAL.

(a) Review Required.—
Legislation

(1) IN GENERAL.—The Secretary of Defense shall require the Secretaries of the military departments to provide for review of decisions not to refer charges for trial by court-martial in cases where a sex-related offense has been alleged by a victim of the alleged offense.

(2) SPECIFIC REVIEW REQUIREMENTS.—As part of a review conducted pursuant to paragraph (1), the Secretary of a military department shall require that—

(A) consideration be given to the victim’s statement provided during the course of the criminal investigation regarding the alleged sex-related offense perpetrated against the victim; and

(B) a determination be made whether the victim’s statement and views concerning disposition of the alleged sex-related offense were considered by the convening authority in making the referral decision.

(b) SEX-RELATED OFFENSE DEFINED.—In this section, the term “sex-related offense” means any of the following:

(1) Rape or sexual assault under subsection (a) or (b) of section 920 of title 10, United States Code...
The Response Systems Panel has not yet considered or deliberated on the contents of this report.


Legislation

784
(article 120 of the Uniform Code of Military Justice).

(2) Forcible sodomy under section 925 of such title (article 125 of the Uniform Code of Military Justice).

(3) An attempt to commit an offense specified in paragraph (1) or (2) as punishable under section 880 of such title (article 80 of the Uniform Code of Military Justice).

(c) Review of Cases Not Referred to Court-Martial Following Staff Judge Advocate Recommendation of Referral for Trial.—In any case where a staff judge advocate, pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority.

(d) Review of Cases Not Referred to Court-Martial Following Staff Judge Advocate Recommendation Not to Refer for Trial.—In any case where a staff judge advocate, pursuant to section 834 of...
title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense should not be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority.

(e) Elements of Case File.—A case file forwarded to higher authority for review pursuant to subsection (c) or (d) shall include the following:

(1) All charges and specifications preferred under section 830 of title 10, United States Code (article 30 of the Uniform Code of Military Justice).

(2) All reports of investigations of such charges, including the military criminal investigative organization investigation report and the report prepared under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), as amended by section 1702.

(3) A certification that the victim of the alleged sex-related offense was notified of the opportunity to express views on the victim’s preferred disposition of the alleged offense for consideration by the convening authority.
(4) All statements of the victim provided to the military criminal investigative organization and to the victim’s chain of command relating to the alleged sex-related offense and any statement provided by the victim to the convening authority expressing the victim’s view on the victim’s preferred disposition of the alleged offense.

(5) The written advice of the staff judge advocate to the convening authority pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice).

(6) A written statement explaining the reasons for the convening authority’s decision not to refer any charges for trial by court-martial.

(7) A certification that the victim of the alleged sex-related offense was informed of the convening authority’s decision to forward the case as provided in subsection (c) or (d).

(f) Notice on Results or Review.—The victim of the alleged sex-related offense shall be notified of the results of the review conducted under subsection (c) or (d) in the manner prescribed by the victims and witness assistance program of the Armed Force concerned.

(g) Victim Allegation of Sex-Related Offense.—The Secretary of Defense shall require the Sec-
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

SEC. 1752. SENSE OF CONGRESS ON DISPOSITION OF CHARGES INVOLVING CERTAIN SEXUAL MISCONDUCT OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE THROUGH COURTS-MARTIAL.

(a) Sense of Congress.—It is the sense of Congress that—

(1) any charge regarding an offense specified in subsection (b) should be disposed of by court-martial, rather than by non-judicial punishment or administrative action; and

(2) in the case of any charge regarding an offense specified in subsection (b) that is disposed of by non-judicial punishment or administrative action, rather than by court-martial, the disposition authority should include in the case file a justification for the disposition of the charge by non-judicial punishment or administrative action, rather than by court-martial.

(b) Covered Offenses.—An offense specified in this subsection is any of the following offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice):

(1) Rape or sexual assault under subsection (a) or (b) of section 920 of such title (article 120 of the Uniform Code of Military Justice).
LEGISLATION

It is the sense of Congress that—

1. the Armed Forces should be exceedingly sparing in discharging in lieu of court-martial members of the Armed Forces who have committed rape, sexual assault, forcible sodomy, or attempts to commit such offenses, and should do so only when the facts of the case clearly warrant such discharge;

2. whenever possible, the victims of offenses referred to in paragraph (1) shall be consulted prior to the determination regarding whether to discharge the members who committed such offenses;

3. convening authorities should consider the views of victims of offenses referred to in paragraph (1) when determining whether to discharge the
APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Calendar No. 293

113TH CONGRESS
2D SESSION

S. 1917

To provide for additional enhancements of the sexual assault prevention and response activities of the Armed Forces.

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 2014

Mrs. McCaskill (for herself, Ms. Ayotte, and Mrs. Fischer) introduced the following bill; which was read the first time

JANUARY 15, 2014
Read the second time and placed on the calendar

A BILL

To provide for additional enhancements of the sexual assault prevention and response activities of the Armed Forces.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Victims Protection Act of 2014”.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

Legislation

2

SEC. 2. INCLUSION OF SENIOR TRIAL COUNSEL DETERMINATIONS ON REFERRAL OF CASES TO TRIAL BY COURT-MARTIAL IN CASES REVIEWED BY SECRETARIES OF MILITARY DEPARTMENTS.

Section 1744 of the National Defense Authorization Act for Fiscal Year 2014 is amended—

(1) in subsection (e)—

(A) in the subsection heading, by inserting “OR SENIOR TRIAL COUNSEL” after “STAFF JUDGE ADVOCATE”; and

(B) by inserting “or the senior trial counsel detailed to the case” after “Military Justice),”; and

(2) in subsection (d)—

(A) in the subsection heading, by inserting “OR SENIOR TRIAL COUNSEL” after “STAFF JUDGE ADVOCATE”; and

(B) by inserting “or the senior trial counsel detailed to the case” after “Military Justice),”.

SEC. 3. ADDITIONAL ENHANCEMENTS OF MILITARY DEPARTMENT ACTIONS ON SEXUAL ASSAULT PREVENTION AND RESPONSE.
(b) Consultation With Victims Regarding Preference in Prosecution of Certain Sexual Offenses.—

(1) In general.—The Secretaries of the military departments shall each establish a process to ensure consultation with the victim of a covered sexual offense that occurs in the United States with respect to the victim’s preference as to whether the offense should be prosecuted by court-martial or by a civilian court with jurisdiction over the offense.

(2) Weight afforded preference.—The preference expressed by a victim under paragraph (1) with respect to the prosecution of an offense, while not binding, should be afforded great weight in the determination whether to prosecute the offense by court-martial or by a civilian court.
(3) Notice to victim of lack of civilian criminal prosecution after preference for such prosecution.—In the event a victim expresses a preference under paragraph (1) in favor of prosecution of an offence by civilian court and the civilian authorities determine to decline prosecution, or defer to prosecution by court-martial, the victim shall be promptly notified of that determination.
(g) Modification of Military Rules of Evidence Relating to Admissibility of General Military Character Toward Probability of Innocence.—Not later than 180 days after the date of the enactment of this Act, Rule 404(a) of the Military Rules of Evidence shall be modified to clarify that the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused, except that evidence of a trait of the military character of an accused may be offered in evidence by the accused when that trait is relevant to an element of an offense for which the accused has been charged.
SEC. 5. COLLABORATION BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF JUSTICE IN EFFORTS TO PREVENT AND RESPOND TO SEXUAL ASSAULT.

(a) Strategic Framework on Collaboration Required.—Not later than 270 days after the date of the enactment of this Act, the Secretary of Defense and the Attorney General shall jointly develop a strategic framework for ongoing collaboration between the Department of Defense and the Department of Justice in their efforts to prevent and respond to sexual assault. The framework shall be based on and include the following:

(1) An assessment of the role of the Department of Justice in investigations and prosecutions of sexual assault cases in which the Department of Defense and the Department of Justice have concurrent jurisdiction, with the assessment to include a review of and list of recommended revisions to relevant Memoranda of Understanding and related doc-
Legislation

10

...ments between the Department of Justice and the Department of Defense.

(2) An assessment of the feasibility of establishing the position of advisor on military sexual assaults within the Department of Justice (using existing Department resources and personnel) to assist in the activities required under paragraph (1) and provide to the Department of Defense investigative and other assistance in sexual assault cases occurring on domestic and overseas military installations over which the Department of Defense has primary jurisdiction, with the assessment to address the feasibility of maintaining representatives or designees of the advisor at military installations for the purpose of reviewing cases of sexual assault and providing assistance with the investigation and prosecution of sexual assaults.

(3) An assessment of the number of unsolved sexual assault cases that have occurred on military installations, and a plan, with appropriate benchmarks, to review those cases using currently available civilian and military law enforcement resources, such as new technology and forensics information.

S 1917 PCS
Legislation

11

(4) A strategy to leverage efforts by the Department of Defense and the Department of Justice—

(A) to improve the quality of investigations, prosecutions, specialized training, services to victims, awareness, and prevention regarding sexual assault; and

(B) to address social conditions that relate to sexual assault.

(5) Mechanisms to promote information sharing and best practices between the Department of Defense and the Department of Justice on prevention and response to sexual assault, including victim assistance through the Violence against Women Act and Office for Victims of Crime programs of the Department of Justice.

(b) REPORT.—The Secretary of Defense and the Attorney General shall jointly submit to the appropriate committees of Congress a report on the framework required by subsection (a). The report shall—

(1) describe the manner in which the Department of Defense and Department of Justice will collaborate on an ongoing basis under the framework;

(2) explain obstacles to implementing the framework; and
(3) identify changes in laws necessary to achieve the purpose of this section.

(c) APPROPRIATE COMMITTEES OF CONGRESS DEFINED.—In this section, the term “appropriate committees of Congress” means—

(1) the Committee on Armed Services and the Committee on the Judiciary of the Senate; and

(2) the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives.
H. R. 4485

To provide for additional enhancements to the sexual assault prevention and response activities of the Armed Forces.

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 2014

Mr. TURNER (for himself and Ms. TSONGAS) introduced the following bill; which was referred to the Committee on Armed Services, and in addition to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide for additional enhancements to the sexual assault prevention and response activities of the Armed Forces.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Furthering Account-
ability and Individual Rights within the Military Act of
2014” or the “Fair Military Act”.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
SEC. 4. MODIFICATION OF MILITARY RULES OF EVIDENCE RELATING TO ADMISSIBILITY OF GENERAL MILITARY CHARACTER TOWARD PROBABILITY OF INNOCENCE.

(a) Modification Required.—Not later than 180 days after the date of the enactment of this Act, Rule 404(a) of the Military Rules of Evidence shall be modified to clarify that, except as provided by subsection (b), the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused.

(b) Exception.—Evidence of a trait of the military character of an accused may be offered in evidence by the accused when that trait is relevant to an element of an offense for which the accused has been charged.
Appendix G:
ATTORNEY TRAINING

PROSECUTION TRAINING

Additional Training Courses Offered by Army TCAP in 2013

Intermediate Trial Advocacy Course

Judge Advocates with approximately 1-3 years of experience out of the Judge Advocate Officer Basic Course (JAOBC) are usually assigned to serve as trial counsel or defense counsel. Within the first three months in that assignment, the attorney will attend this course, which builds on the military justice block from JAOBC. This course is offered twice a year and presents intensive intermediate trial skills instruction and practical exercises and workshops covering issues regarding courts-martial from case analysis through presentencing argument. The following areas are addressed: trial procedure; trial advocacy techniques; professional responsibility; and topical aspects of current military law, with particular emphasis on the military rules of evidence. The factual scenario that forms the basis of all instruction is a sexual assault scenario.

Regional Conferences

TCAP conducted seven three-day Regional Conferences. All of TCAP’s regional conferences are focused on sexual assault and special victim. The instructors include uniformed/TCAP personnel, TCAP HQEs, and prominent civilian experts in the area of sexual assault and special victim prosecutions. These three-day training events include instruction concerning the prosecution of special victim cases (i.e., sexual assault cases, domestic violence, child pornography, and the sexual and physical abuse of children). They also include instruction concerning new developments in criminal law, advocacy classes, developing strong sentencing cases, impact of diminished responsibility, and roundtable discussions among participants. TCAP solicits subject areas and areas of focused instruction from the various Chiefs of Military Justice for the installations covered by the Regional Conferences.

Outreach Program Training

TCAP conducted approximately 21 of these 2.5-day training events. The instructors include both uniformed TCAP personnel and TCAP HQEs. This program concentrates on basic military justice practice and procedures with a focus on sexual assault prosecutions and walking new/relatively new counsel through the courts-martial process from initial allegation through sentencing. The outreach program includes up to eight hours of sexual assault specific training, advocacy training and specific/focused training as requested by the Chiefs of Military Justice focusing on issues encountered at participating installations. Additionally, TCAP personnel conduct

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1 Information from Services’ Responses to RSP Request for Information 1d (Nov. 1, 2013).
roundtable case discussions with trial counsel and Chiefs of Military Justice, and daily individual case reviews when not engaged in formal instruction.

**Essential Strategies for Sexual Assault Prosecution (ESSAP) Course**

TCAP conducted four of these three-day training events. Taught in conjunction with the New Prosecutor’s Course (NPC), the subject matter is sexual assault crimes and crimes against special victims. The training is modeled after sexual assault institutes throughout the country, which train prosecutors to successfully prosecute sex and other special victim crimes. The ESSAP is an Army led training event, designed to provide trial counsel of all experience levels with an offender focused approach to prosecuting sexual assault cases. The course covers: developing offender-focused themes/theories by understanding the offender’s pathology; non-intuitive responses by rape victims; using experts to explain victim behavior; health, medical, and forensic issues observed in sexual assault cases including how to understand and effectively present medical evidence; and presenting a sentencing case.

**Complex Litigation Course**

TCAP conducted one three-day course on complex litigation. The Complex Litigation course focuses on the very difficult aspects and challenges of litigating high profile cases, such as voir dire, discovery, use of expert testimony, and sentencing. Taught by TCAP personnel, HQEs, and experts from the field, the course provides relevant and timely training for advanced litigation.

**National Center for Missing and Exploited Children (NCMEC) Course**

TCAP sponsored two of these training events. The NCMEC Course is a four-and-one-half-day seminar to familiarize prosecutors with computer-facilitated crimes committed against children and the ever-evolving legal and technical issues surrounding those investigations. The course walks prosecutors through an online child exploitation case by first familiarizing prosecutors with how perpetrators use the computer and internet to locate children to exploit and disseminate child pornography. Day two focuses on the computer technologies used by the sexual predator to commit crimes against children, the use of experts to explain the technology involved, and search and seizure issues when dealing with digital media. Day three focuses on the trial strategies of an online child exploitation case, from charging to plea negotiations to sentencing. Day four includes instruction modules on the use of medical evidence in child exploitation cases, to include discussions of child psychosexual and physical development, and concerns regarding long term complications of sexual exploitation. The final half day of instruction is geared to issues specifically raised in military prosecutions of child exploitation cases, including charging decisions and sentencing considerations.

**Sexual Assault Trial Advocacy Course (SATA C)**

TCAP conducted one SATAC, which included both trial counsel and defense counsel. The SATAC is a two-week trial advocacy course focusing on the fundamentals of trial advocacy in the context of litigating special victim cases. The course includes lectures, break-outs, and numerous advocacy exercises, culminating in a full-day trial for each participant. The course is a follow on to The Judge Advocate General’s Legal Center and School’s (TJAGLCS) one-week long Intermediate Trial Advocacy Course.

**Introduction to Forensic Evidence Course**

TCAP offered this five-day training event twice. This course is held at the Defense Forensic Science Center (formerly United States Army Criminal Investigation Laboratory (USACIL)), Fort Gillem, Georgia using USACIL instructors. During the investigation of many sexual assault cases, local investigators from the
Army’s Criminal Investigation Division (CID) send various pieces of evidence to the lab for examination. This collected and examined evidence can be used to identify (or exclude) perpetrators and to corroborate the victim’s account of events. This course introduces the students to the laboratory analysis involved in sexual assault cases, to include: the examination of DNA evidence; the examination of trace evidence such as fibers; serology; the examination of digital evidence; testing for drugs such as date rape drugs; and a review and use of the criminal records database. The various laboratory experts conduct classes on their areas of expertise and demonstrate how examinations are conducted. It also includes instruction on firearms and ballistics evidence, and an expanded block on discovery issues and obligations.

**Sexual Assault Expert Symposium**

TCAP offered this three-day training event once. The expert symposium introduces participants to the scientific disciplines they will encounter while litigating special victim cases. Classes are taught by some of the leading experts in their fields. The experts include: a Forensic Pathologist; a Forensic Psychologist; a Forensic Psychiatrist; a Sexual Assault Forensic Examiner/Sexual Assault Nurse Examiner; a Forensic Toxicologist; a Forensic Child Interviewer; a Forensic Computer Examiner; a Fingerprint Examiner; a Trace Evidence Examiner; and a DNA and Serology Examiner.

**Special Victim Prosecutor (SVP) Conference**

TCAP conducted an SVP conference, which brought all SVPs assigned throughout the world to one location to discuss trends and issues in the investigation and disposition of special victim cases. The conference is a three-day event where TCAP personnel, as well as military and civilian HQEs, provide relevant and timely military justice training, both substantive and advocacy, to the attendees. Additionally, substantive legal issues regarding defense experts, administrative issues, the need for automation and the need for personnel support, are discussed and courses of action developed to attempt to enhance the prosecution of cases and minimize the distractions caused by the administrative demands placed on each SVP.

**DEFENSE COUNSEL TRAINING**

*Army*

In Fiscal Year 2013, the Defense Counsel Assistance Program (DCAP) conducted or sponsored the following courses:

**DC 101**

DCAP conducted this training at Fort Leavenworth in October 2012, Wiesbaden, Germany in August 2013, Fort Bragg in August 2013, Fort Lewis in September 2013, and Fort Hood in September 2013. DCAP also conducted DC 101 in February 2013 at Fort Belvoir. This three-day course combines law and trial advocacy focused on preparing newly assigned defense counsel to represent their clients at courts-martial. Two DCAP personnel (often including Trial Defense Service (TDS) HQEs) serve as instructors of this course. Areas of instruction include: initial client interview; major client decisions; discovery; Article 32 investigations; all stages of the court-martial process; roundtable discussion of active cases, and professional responsibility.

**Annual Training**

DCAP, on behalf of Trial Defense Service (TDS), conducted annual training for all counsel assigned to TDS. DCAP conducted training in Germany in November 2012 for counsel stationed in Europe and the Central...
Command Area of Responsibility. DCAP conducted training in December 2012 for all TDS counsel east of the Mississippi River and Pacific Rim. DCAP conduct training in January 2013 for all counsel west of the Mississippi River. Instructors include members of DCAP (including both HQEs) and TDS counsel. These conferences typically include a heavy focus on sexual assault or special victims crimes. Topics covered at these three day events include themes and strategies in sexual assault cases, MRE 412, case updates, and professional responsibility.

**Regional Training**

The Army’s Regional Defense Counsel (RDC) host annual regional training events. In 2012, DCAP coordinated with RDCs to train all TDS counsel east of the Mississippi River in March and all defense counsel west of the Mississippi River in April. These events provide three days of instruction to all defense counsel in their particular region(s). DCAP (to include both HQEs) provides most of the instruction at these events based on the RDC’s training plan. Traditional topics include professional responsibility, new developments, evidentiary issues, trial advocacy, and post-trial matters. Sexual assault and special victim issues are always included, and previous regional conferences focused almost exclusively on sexual assault cases.

**DC 201**

DCAP conducted this training for the East Coast in February 2013 and the West Coast in April 2013. This three-day course combined law and trial advocacy focused on preparing more experienced defense counsel on more complicated areas of the law. Two DCAP personnel (often including TDS HQEs) served as instructors for this course. Areas of instruction covered advanced topics of criminal law, including: character evidence, MRE 404(b), 412, 413, 414, remote testimony, confrontation, privileges and immunities. Training on sexual assault issues and special victim issues was included.

**Intermediate Trial Advocacy Course (ITAC)**

The Judge Advocate General’s Legal Center and School (TJAGLCS) hosted three of these events in September, November, and February. TDS typically sends eight officers to each event.

**Advanced Communications and Advocacy**

DCAP participated in these joint training events hosted by TCAP/DCAP. Instruction was provided by civilian experts, along with TCAP and DCAP personnel. The focus is exclusively on courtroom advocacy and consists of lecture, group discussion, and practical exercise. There are typically four of these events scheduled annually.

**Sexual Assault Training Advocacy Course (SATAC)**

DCAP and TCAP jointly hosted this course. This course utilizes a sexual assault fact pattern to train more advanced counsel on effective advocacy in all phases of the trial process. Instructors include DCAP and TCAP personnel, as well as outside instructors, selected for their expertise in advocacy and sexual assault cases. Instruction format included lecture, small group discussion, one on one mentoring, and practical exercises.

**Sexual Assault Expert Symposium**

DCAP and TCAP jointly hosted this course in the late spring. This week-long training consisted of lectures given by experts commonly encountered by advocates in a typical sexual assault case. There were also breakout sessions for prosecutors and defense counsel to address their specific areas of concern with the experts.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
U.S. Army Trial Defense Service (TDS) Leadership Training

TDS held this three-day training event in August 2013 for RDCs and Senior Defense Counsel from both active and reserve components. The instruction typically covers various leadership duties and substantive law updates that can be shared with their counsel. DCAP (including both HQEs) presented a series of classes on legal issues that included some sexual assault and special victim emphasis (e.g., MRE 412).

APPENDIX: NAVY MILITARY JUSTICE LITIGATION CAREER TRACK (MJLCT) DETAILS

In 2007, to improve the overall quality of Navy court-martial litigation, the Navy JAG Corps established the MJLCT. The MJLCT is a career track for judge advocates with demonstrated military justice knowledge and advocacy skills. The track combines courtroom experience, training, and education with mentoring from senior litigators who help judge advocates develop the skills needed to become preeminent trial lawyers. Military Justice Litigation Qualified (MJLQ) officers are detailed to lead trial and defense departments at each of nine Regional Legal Service Offices (RLSOs) and four Defense Services Organizations (DSOs), which provide Navy prosecutors and defense counsel, respectively.

At the close of FY13, there were 65 Navy MJLCT officers, with 45 filling the 53 MJLCT-designated billets. Additional MJLCT officers are at the Office of Military Commissions, on aircraft carriers, at the Naval Justice School, in VLC positions, and at postgraduate school to obtain Masters of Laws (LL.M.) degrees in trial advocacy. The promotion rate for MJLCT officers is monitored, and the in-zone MJLCT officers were selected for promotion by the FY14 promotion selection boards at a rate comparable to, or better than, the overall in-zone selection rate.

SPECIALIST I MJLQ is the entry point for the MJLCT. A judge advocate may be qualified as SPECIALIST I after demonstrating military justice litigation proficiency and MJLCT potential. Candidates are normally eligible for SPECIALIST I after their fourth year of active duty. After SPECIALIST I qualification, a judge advocate may qualify as SPECIALIST II by obtaining sufficient military justice litigation experience and professional development as a naval officer. Candidates will normally be eligible for SPECIALIST II after their tenth year of active duty. Following SPECIALIST II, a judge advocate may qualify as EXPERT after obtaining significant military justice litigation experience and demonstrating leadership of junior judge advocates. EXPERT is ordinarily reserved for judge advocates who have reached the senior-most MJLCT positions. Candidates will normally be eligible for EXPERT after their sixteenth year of active duty.

SPECIALIST II and EXPERT MJLQ are community-management tools to guide the assignment, training, and professional development needs of MJLQ judge advocates. Navy JAG senior leaders seek to provide all MJLQ judge advocates with training and duty assignment opportunities that facilitate their professional development. Military justice litigation proficiency includes quantitative and qualitative criminal courtroom litigation experience and demonstrated proficiency in military justice procedure. As judge advocates seek MJLCT advancement, they are required to demonstrate increased courtroom experience, continued growth in litigation leadership, and familiarity with the Navy’s broader mission. MJLQ judge advocates are encouraged to explore the wide variety of naval experiences that contribute to the development of a broad understanding of the duties of judge advocates, and to seek out detailing to non-litigation billets even after MJLQ. Accordingly,

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applicants for EXPERT MJLQ should generally have served at least two years in a non-litigation billet prior to their application for qualification.

**Table of Information Gathered from Civilian Prosecution Offices**

<table>
<thead>
<tr>
<th>Office</th>
<th>Organization/Size</th>
<th>Experience Required to Prosecute Sex Crimes</th>
<th>Prosecutor Training Program</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska Attorney General's Office⁴</td>
<td>Several districts; Anchorage has Special Assault Unit (SAU) with five prosecutors</td>
<td>No minimum.</td>
<td>Start misdemeanors, go to general felonies, then SAU. No set criteria to enter SAU.</td>
<td></td>
</tr>
<tr>
<td>Maricopa County (AZ) Attorney's Office⁵</td>
<td>Divisions, then Bureaus. Sex Crimes Bureau has 19 attorneys.</td>
<td>Varies. Range from 3-17 years. No minimum. Budget cuts/ lower salaries have increased turnover and decreased experience.</td>
<td>4 week training for new prosecutors. In-house and statewide training before assigned to specialty bureaus. Spend 9-12 months on misdemeanors, then trial bureau, then specialty such as sex crimes.</td>
<td>“Prosecutors need to learn up front that there [are] as many different responses to the trauma of a sexual assault as there are victims. The one person who presents with a stereotypical stress-related trauma may not be the same as the next person, who is rather stoic.”⁶</td>
</tr>
</tbody>
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³ Unless otherwise indicated, the source for this information is Joint Service Committee Sexual Assault Subcommittee (JSC-SAS) Report (Sept. 2013) appendices.


⁵ JSC-SAS Report, Appendix D.

⁶ See Transcript of RSP Public Meeting 481 (December 12, 2013) (testimony of Bill Montgomery, Maricopa County Attorney).
### APPENDIX G: ATTORNEY TRAINING

<table>
<thead>
<tr>
<th>San Diego County District Attorney’s Office⁷</th>
<th>Sex Crimes and Human Trafficking Division⁸ consists of 11 attorneys.</th>
<th>Start in a misdemeanor unit; minimum 4 years experience before assigned sex crimes cases.</th>
<th>Every other year, 3-day formal in-house training. Also train other members of SART and attend trainings as time/budget permit.</th>
<th>Office part of Sexual Assault Response Team (SART), which includes military investigators, prosecutors, medical personnel, and victim support personnel</th>
</tr>
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<tbody>
<tr>
<td>Kent County, Delaware Prosecutor’s Office³</td>
<td>16 prosecutors total. 2 attorneys in Sex Crimes Unit. Rotate every 3-4 years.</td>
<td>Juvenile bench trials for 2 years, then misdemeanor jury trials, then general felony unit before Sex Crimes Unit.</td>
<td>Lead prosecutor attends trainings if time allows; preferred training for young prosecutors is to be in court.</td>
<td></td>
</tr>
<tr>
<td>United States Attorney’s Office, District of Columbia (Superior Court Division)¹⁰</td>
<td>Sex Offense and Domestic Violence Section prosecutes all misdemeanors and felonies involving sexual abuse.</td>
<td>No minimum, but several years of experience required to interview for sex crimes positions.</td>
<td>Ongoing in-house training and outside conferences. DOJ National Advocacy Center offers variety of courses. Supervisors conduct pre-trial conference before felony trials, observe them, and give feedback/training after.¹¹</td>
<td>Recent/recommended training topics: FETI interviewing; sexual assault nurse training; DNA and digital evidence; secondary trauma; sex offender registration; crime victims’ rights laws.¹²</td>
</tr>
<tr>
<td>Athens-Clarke County (GA) District Attorney’s Office³</td>
<td>3 special victims prosecutors are lead counsel on all crimes against female, elderly, child victims, and all serious violent felonies</td>
<td>Assigned to courts with experienced supervisory attorney and two line prosecutors. Supervisor is also special victims prosecutor.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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7 JSC-SAS Report, Appendix E.
9 JSC-SAS Report, Appendix F.
10 JSC-SAS Report, Appendix G.
11 See Transcript of RSP Public Meeting 469 (December 12, 2013) (testimony of Kelly Higashi, AUSA, District of Columbia).
12 Id. at 465-68.
13 JSC-SAS Report, Appendix H.
<table>
<thead>
<tr>
<th>Institution</th>
<th>Specializations</th>
<th>Experience</th>
<th>Training</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baltimore State Attorney’s Office</td>
<td>Special Victims Unit devoted to prosecution of cases involving sex crimes domestic violence and child abuse. Also prosecutes sex-related misd.</td>
<td>3-5 years of experience prosecuting misdemeanors and general felonies (such as drug, property, and gun crimes) before specialty units, including SVU</td>
<td></td>
</tr>
<tr>
<td>Kent County Prosecutor’s Office (Grand Rapids, MI)</td>
<td>17 felony prosecutors, 4-5 misdemeanor prosecutors.</td>
<td>Experience level about 9-10 years.</td>
<td>Typically attend prosecutor trainings in San Diego, CA or Huntsville, AL</td>
</tr>
<tr>
<td>Bronx District Attorney’s Office</td>
<td>Child Abuse/Sex Crimes Bureau (CAS) prosecutes all sexual assault cases involving both child and adult victims. 24 attorneys assigned.</td>
<td>Normally hired as Misdemeanor ADAs; 5-6 years of experience to do sex crimes.</td>
<td>Attend a series of varied training sessions; New York Prosecutors Training Institute (NYPTI) conducts specialized training. NYPD also has trainings that ADAs sometimes attend.</td>
</tr>
<tr>
<td>Brooklyn County District Attorney’s Office</td>
<td>Separate unit for sex crimes prosecution (includes crimes against children). 30 attorneys assigned.</td>
<td>1-1.5 years’ experience doing sex-related misdemeanors (such as prostitution or “touching” cases) followed by one year at the Grand Jury.</td>
<td></td>
</tr>
</tbody>
</table>

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14 JSC-SAS Report, Appendix I.
15 JSC-SAS Report, Appendix J.

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
## APPENDIX G: ATTORNEY TRAINING

<table>
<thead>
<tr>
<th>New York County District Attorney’s Office[^18]</th>
<th>No unit; chief and two deputies supervise pool of experienced attorneys who report to them for these cases</th>
<th>Four years of experience, and interest in sexual assault cases, plus interview screening.</th>
<th>Ongoing substantive training: laws, rules. Continue to train most senior people. Bring in outside speakers.[^19]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Multnomah County District Attorney’s Office (OR)[^20]</td>
<td>3 large divisions, each divided into smaller specialty units. Specialty unit prosecutes adult sex crimes and other felony assaults</td>
<td>New prosecutors in misdemeanor units for 3-4 years, then Felony Trial Division 2-6 years (property or drug crimes). Then eligible for person crime units.</td>
<td></td>
</tr>
<tr>
<td>Yamhill County District Attorney’s Office (OR)[^21]</td>
<td>No special unit for adult sex crimes. 10 prosecutors in office, including the DA. Two attorneys handle all adult felony cases.</td>
<td>New attorneys do misdemeanors before felonies. No minimum time requirement for assignment to sex crimes cases; based on supervisor discretion.</td>
<td>New prosecutors attend a basic prosecution course, and then attend training sponsored by DOJ. Also attend annual OR District Attorney’s Conference, and other specialized training as time and funding permit.</td>
</tr>
</tbody>
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[^19]: See Transcript of RSP Public Meeting 432 (December 12, 2013) (testimony of Martha Bashford, New York County District Attorney’s Office).
[^20]: JSC-SAS Report, Appendix L.
[^21]: JSC-SAS Report, Appendix L.

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
<th>Experience</th>
<th>Training and Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philadelphia District Attorney’s Office</td>
<td>Family Violence and Sexual Assault Section includes 18 prosecutors; 4 are new-hires handling misdemeanor DV and preliminary hearings. Other 14 handle more serious adult/child cases.</td>
<td>9-12 months on misdemeanors, followed by stint in Juvenile Court Unit (may include sex cases for bench trials). 8-9 years before becoming a supervisor</td>
<td>Most hired directly out of law school. 2 wk. orientation plus observation of trials and hearings before handling cases. Prosecutors Assoc. training on criminal code; mentoring and guidance from supervisors and more experienced prosecutors. Many in-house trainings.</td>
</tr>
<tr>
<td>Austin (TX) District Attorney’s Office</td>
<td>No separate unit or division for sex offenses. Prosecutors in Trial Division assigned by court and supervised by a Trial Court Chief</td>
<td>Prosecutors assigned to sex offense cases must at least have experience prosecuting misdemeanor cases.</td>
<td>The Trial Court Chief supervises, mentors, and trains prosecutors working in the division.</td>
</tr>
<tr>
<td>Arlington County (VA) Commonwealth Attorney’s Office</td>
<td>15 prosecutors in office. All assigned all types criminal cases, but primarily three prosecute sexual assault cases.</td>
<td>One very experienced, second is fairly experienced, third relatively new attorney.</td>
<td>-</td>
</tr>
</tbody>
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22 JSC-SAS Report, Appendix M.  
23 JSC-SAS Report, Appendix N.  
24 JSC-SAS Report, Appendix O.
| Snohomish County Prosecutor's Office (WA)⁵⁵ | Criminal Division divided into specialized units. Special Assault Unit (SAU) is composed of 7 deputy prosecutors (including the lead prosecutor). | Typically 4-6 years of experience before considered for SAU. Misdemeanors for 2-3 years, then felonies such as drugs, then SAU or other specialty unit. | No formal training program; new prosecutors observe trials, attend state trainings and law enforcement trainings on sexual assault. Some at little or no cost. May also attend other national training seminars if funding is available. | Expected to rotate assignments throughout their career. May spend 2-3 years in SAU before rotating to another unit, but will likely return to the SAU later. |

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²⁵ JSC-SAS Report, Appendix P.
Table of Information Gathered from Civilian Defender Offices

<table>
<thead>
<tr>
<th>Name</th>
<th>Type of Organization</th>
<th>Structure</th>
<th>Experience</th>
<th>Training</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska Public Defender Agency&lt;sup&gt;26&lt;/sup&gt;</td>
<td>Quasi-independent agency within the Department of Administration; 13 Public Defender offices in the state.</td>
<td>Anchorage Office has 23 attorneys; 5 handle misd. and 18 handle felonies. 6 are qualified and trained to handle sex cases.</td>
<td>Senior attorneys handle most serious sex offense cases. Large and dispersed area, system of travel and coordination is required to gain experience</td>
<td>New lawyers second-chair felony cases. Supervisors evaluate them. Two-week intensive training on trial practice for new attorneys. Also a defense conference that provides on-going training.</td>
<td>Due to budget issues, both training events were cancelled in 2013.</td>
</tr>
<tr>
<td>Bronx Defenders&lt;sup&gt;27&lt;/sup&gt;</td>
<td>Public defense and advocacy firm: criminal defense attorneys, advocates, civil attorneys, immigration attorneys, social workers, investigators</td>
<td>120 attorneys, divided up and assigned to different mixed trial teams</td>
<td>Defense counsel from the Bronx Defenders never sit at trial alone, and despite the attorney's experience level, will always have a co-counsel.</td>
<td>One trial team is used for the first year public defenders for training</td>
<td></td>
</tr>
</tbody>
</table>

<sup>26</sup> JSC-SAS Report, Appendix C.  
<sup>27</sup> JSC-SAS Report, Appendix K-1.
| Multnomah County Metropolitan Public Defender Services | Private, nonprofit corporation originally established by the Multnomah County Bar Association. 63 attorneys; largest public defender organization in Oregon. | Services are provided via a contract with Multnomah County (Metropolitan also has a contract with neighboring Washington County). | Typically little prior experience, handle misdemeanor cases, progress to felony drug or property crime cases for about a year. New attorneys second-chair major cases. Assigned to cases based on their experience levels. | Oregon Criminal Defense Lawyers Association provides CLE training for defense attorneys, which attorneys from the Metropolitan Public Defense Association attend. They also will attend a defense college in Macon, GA. | Problem retaining experienced attorneys, because the salaries are less than equivalent prosecutors earn. |

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28 JSC-SAS Report, Appendix L.

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel

May 2014

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Report of the Role of the Commander Subcommittee

On September 23, 2013, the Secretary of Defense established this Subcommittee to support the Response Systems Panel in its duties under Section 576(d)(1) of the National Defense Authorization Act for Fiscal Year 2013. The Secretary established five objectives for the Subcommittee to address the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice). This Subcommittee has completed its review and submits to the Response Systems Panel its report with our assessment, recommendations, and findings.

Barbara Jones
Subcommittee Chair
**TABLE OF CONTENTS**

**EXECUTIVE SUMMARY** ......................................................... 1

**ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS** ........................................... 7

**I. OVERVIEW OF SUBCOMMITTEE ASSESSMENT.** ................................................................. 17
   A. Responsibility of the Subcommittee .......................................................... 18
   B. Methodology of Subcommittee Review .................................................. 19

**II. COMMANDER AND CONVENING AUTHORITY CONCEPTS** .................................................. 21
   A. Commander Authority and Responsibility .......................................... 21
   B. Distinction between Commanders and Convening Authorities ............... 22
   C. Legislative Origin of Commander Authority under the UCMJ .................. 23
   D. Supreme Court Review of Commander Authority Under the UCMJ ........ 27

**III. LEGISLATION AND POLICY AFFECTING COMMANDER ROLES AND RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION AND RESPONSE.** ........................................ 31
   A. Recent Legislation .................................................................................. 31
   B. Department of Defense Policy ............................................................... 34
   C. Proposed Legislation ............................................................................ 37
   D. Part III Subcommittee Recommendations and Findings ....................... 42

**The Response Systems Panel has not yet considered or deliberated on the contents of this report.**
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Secretary of Defense established the Role of the Commander Subcommittee (Subcommittee) to report to the Response Systems to Adult Sexual Assault Crimes Panel (RSP) on the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. § 920 (Article 120 of the Uniform Code of Military Justice (UCMJ)). The Subcommittee was tasked with five objectives for analysis:

- Examine the roles and effectiveness of commanders at all levels in the administration of the UCMJ and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.

- Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes, including the role of a commander under Article 60 of the UCMJ.

- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.

- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the Response Systems Panel recommends such a formal statement, the Response Systems Panel shall provide key elements or principles that should be included in the formal statement.

ASSESSMENT METHODOLOGY

To consider the many perspectives on the commander’s role in sexual assault prevention and response (SAPR), members of the Subcommittee participated in nineteen days of hearings involving more than 240 witnesses. The members reviewed articles and information from RSP and Subcommittee hearing participants, as well as comments and information from the public. The RSP sent requests for information and solicited inputs from

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
the Department of Defense (DoD), the Military Services, and victim advocacy organizations, and the members received more than 15,000 pages of information in response to these requests. Information received and considered by the Subcommittee is available on the RSP website (http://responsestystemspanel.whs.mil/).

CONCLUSION OF THE SUBCOMMITTEE

Based on its extensive review, the Subcommittee believes military commanders must lead the way in DoD’s efforts to prevent sexual assault, establishing organizational climates that are wholly intolerant of the behaviors and beliefs that contribute to sexual assault crimes. When sexual assault does occur, military commanders must lead decisive response efforts, assuring appropriate care for victims. They must also ensure protection of the due process rights of those who are accused of sexual assault crimes, and they must take appropriate administrative and criminal action against offenders. How commanders fulfill these responsibilities reflects their leadership and effectiveness, and DoD, the Services, and senior leaders must ensure all commanders and leaders are held accountable and fairly evaluated on their execution of these critical tasks.

RECOMMENDATIONS AND FINDINGS

The Subcommittee divided its assessment into eight topics concerning the commander’s role in sexual assault prevention and response: commander and convening authority concepts, legislation and policy, sexual assault prevention, sexual assault response, military justice responsibilities, perspectives on military justice authorities, command climate for sexual assault prevention and response, and accountability for sexual assault response. Based on its review of these critical topics, the Subcommittee identified 31 recommendations with findings related to the role of the commander in sexual assault prevention and response. These topics will be addressed in order:

Commander and Convening Authority Concepts:

Commanders lead military organizations and are primarily responsible for ensuring mission readiness, to include maintaining good order and discipline within military units. Historically, commanders have proved essential in leading organizational responses during periods of military cultural transition, as the Services have relied on them to set and enforce standards and effect change among subordinates under their command. All commanders have disciplinary responsibility for subordinates. However, the power to convene courts-martial for criminal offenses is established by the UCMJ, which vests convening authority in only a very limited group of senior commanders. Of the U.S. military’s 15,000 commanders who lead an active duty force of more than 1.4 million, just 148 senior commanders (less than 1% of the total number of commanders) convened general courts-martial for Service members under their command in Fiscal Year 2013.

Legislation and Policy:

Congress adopted the UCMJ following World War II partially in response to concerns about the broad military justice authority held historically by U.S. military commanders. While commander control remained a central element of the UCMJ adopted by Congress, the Code also included important restrictions designed to safeguard the rights of military members and ensure fairness and justice. Congress has amended the UCMJ continuously since its adoption, adding features and requirements to the military justice system that have refined the process by which convening authorities make disposition decisions in cases. However, the authority vested in senior commanders to convene courts-martial has remained a central feature of the UCMJ. The Supreme Court has reviewed and endorsed this vesting of disposition authority in designated military commanders, noting that the disciplinary response to crimes committed by individuals subject to the
EXECUTIVE SUMMARY

UCMJ—most notably members of the Armed Forces—directly impacts morale, discipline, and the military’s readiness to execute assigned missions.

Congress recently adopted significant amendments that target the processing of courts-martial for sexual assault crimes, including limiting courts-martial jurisdiction for the most serious allegations to only general courts-martial and requiring Service Secretary review of cases where a convening authority disagrees with his or her staff judge advocate’s recommendation to refer a charge to trial. In addition, the Secretary of Defense implemented numerous policy changes to SAPR guidelines and programs. Some changes have only recently been implemented and other amendments to the UCMJ are pending implementation. As a result, DoD has not yet fully evaluated what impact these reforms will have on the incidence, reporting, or prosecution of sexual assault in the military.

Congress also recently considered other legislative proposals that address the prosecution of sex assault crimes in the military. Two proposals, the Sexual Assault Training Oversight and Prevention Act (the STOP ACT) and the Military Justice Improvement Act (MJIA), would further amend the UCMJ and transfer the convening authority vested in senior military commanders to legal officials outside the chain of command. A third proposal, the Victims Protection Act of 2014 (VPA), would impose alternative mandates in addition to those previously adopted by Congress. The Subcommittee does not recommend amending the UCMJ to divest military commanders of their authority to convene courts-martial to try allegations of sexual assault, and therefore does not recommend Congress adopt the reforms in either the STOP Act or MJIA. The Subcommittee also recommends Congress not adopt Section 2 or Section 3(d) of the VPA, because the members do not believe either section will be productive in improving sexual assault response or reducing the incidence of sexual assault in the military.

The Subcommittee believes the Secretary of Defense should establish an advisory panel to offer to the Secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD SAPR programs and policies. This advisory group, which should be comprised of persons external to the Department of Defense, would aid the Department in evaluating and monitoring SAPR progress and would provide useful information to the public on DoD SAPR programs and initiatives.

Sexual Assault Prevention:

Sexual assault crimes pose a significant risk to the military’s readiness and effectiveness. Preventing sexual assault crimes and stopping the attitudes and behaviors that contribute to such crimes is a primary responsibility for all leaders in DoD. DoD’s work with leading national experts and resources for sexual assault prevention strategies is encouraging, but more must be done.

DoD must employ effective and comprehensive prevention policies, informed by the best available science and targeted toward strategies that have the greatest potential to impact behavior and reduce risk factors for sexual assault. Alcohol abuse is a major contributing factor in a significant number of sexual assaults. DoD must do more to identify promising alcohol mitigation strategies and must provide greater strategic direction to commanders to reduce alcohol-related sexual assault across the Services. DoD must also continue to develop effective bystander intervention training for personnel that increases Service member vigilance toward the attitudes and behaviors that increase the potential for sexual assault. Leaders must ensure those who report sexual assault or intervene on behalf of others are supported and not subject to retaliation for their willingness to step forward. DoD must do more to address male-on-male sexual assault. Commanders must directly acknowledge the potential for male-on-male sexual assault in their commands and strive to mitigate the stigma associated with it.
In executing robust prevention programs, commanders must ensure they also fulfill their obligation to anyone within their command who may be accused of a sexual assault crime, ensuring training and initiatives emphasize the due process rights—most significantly respect for the presumption of innocence—of a Service member who is accused of a crime and the necessity for fair resolution of individual cases.

**Sexual Assault Response:**

In spite of prevention efforts, crimes of sexual violence in DoD remain an important concern, just as they are throughout society. Most sexual assault crimes are not reported to authorities or law enforcement, and DoD has directed substantial effort toward increasing sexual assault reporting. DoD adopted an option for restricted reporting in 2005, which allowed victims of sexual assault crimes to elect to confidentially report and receive support without triggering an investigation. DoD also established reporting channels outside of law enforcement or the chain of command where Service members can report when they are victims of sexual assault, and military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies. Reporting channels are broadly publicized throughout the military, but it is not clear from Service member feedback and junior enlisted personnel, in particular, that a sufficient percentage of military personnel adequately understand their options for reporting sexual assault. Most concerning is that nearly one half of junior enlisted personnel surveyed this year mistakenly believe they can make a restricted report to someone in their chain of command.

When a Service member makes an unrestricted report of sexual assault, the allegation must be investigated by an independent military criminal investigation organization (MCIO). By law, commanders must immediately forward all allegations to investigators, and they have no authority or control over the conduct of investigations. Once an MCIO completes its investigation, the case is returned to the appropriate commander for action. DoD policy establishes the minimum level of commander who may make decisions about the disposition of an allegation of sexual assault. The first special court-martial convening authority in the grade of O-6 or above in the chain of command of the accused serves as the “initial disposition authority” for any sexual assault allegation. DoD policy further requires the initial disposition authority to consult with a judge advocate before determining appropriate disposition.

**Military Justice Responsibilities:**

Once an allegation of sexual assault has been investigated, the initial disposition authority may determine a court-martial is warranted. Recent amendments to the UCMJ, which take effect this year, restrict jurisdiction for all serious sexual assault offenses to general courts-martial, which limits convening authority for these offenses to only the small number of senior commanding officers (almost all general or flag officers) who serve as general courts-martial convening authorities (GCMCAs). To initiate a court-martial, charges must be preferred and then reviewed by an investigating officer as part of a pretrial investigation under Article 32 of the UCMJ. Once the pretrial investigation is complete, the investigation report and recommendation of the investigating officer are provided to the initial disposition authority (or whichever convening authority directed the Article 32 investigation). When warranted, the case is then forwarded to the GCMCA for consideration, who must receive written advice from his or her staff judge advocate (SJA) before referring a charge to trial by general court-martial. The GCMCA, upon receiving advice from his or her SJA, makes an independent decision whether to refer the case to court-martial.

A recent congressional amendment requires higher-level review any time a sex-related charge is not referred for trial. If an SJA and a convening authority agree that a charge should not be referred for trial, the case must be reviewed by the next superior commander who is a GCMCA. If an SJA recommends referral to trial and the GCMCA decides not to refer the charge, the case must be forwarded to the Service Secretary for review.
EXECUTIVE SUMMARY

In addition to referral authority, the UCMJ also vests other pretrial and trial responsibilities in convening authorities. The convening authority selects and details—in accordance with statutory qualification criteria—personnel who serve as panel members, or jurors, on a case. The convening authority also has authority to enter into a pretrial agreement, or plea bargain, with an accused. Other authorities vested by the UCMJ in convening authorities include discovery oversight, search authorization and other magistrate duties, appointment and funding of expert witnesses and expert consultants, and procurement of witnesses. Once a trial is complete, the convening authority must act on the findings and sentence adjudged by the court-martial. Recent statutory changes to Article 60 of the UCMJ significantly restrict the discretion of convening authorities to disapprove a guilty finding or reduce the sentence for a sexual assault charge.

Perspectives on Military Justice Responsibilities:
The Subcommittee heard substantial testimony and received extensive information about commander responsibilities in the criminal disposition of sexual assault allegations. The Subcommittee considered numerous proposals and supporting materials advocating for removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Proponents for change articulated a number of reasons why the UCMJ’s current disposition authority framework discourages sexual assault victims and reporting of sexual assault crimes. The Subcommittee also heard from many who believe convening authority is a vital tool for commanders and that changing the UCMJ’s convening authority framework would be counter-productive to military effectiveness and sexual assault response.

Based on its review, the Subcommittee believes Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses. Evidence considered by the Subcommittee does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase conviction rates in these cases. Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization. Further, civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.

The Subcommittee also believes Congress should not further modify the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and changes to DoD policy. According to these recent changes, the authority to make disposition decisions regarding sexual assault allegations is sufficiently limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution. Additionally, Congress should not further amend Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities. However, the Subcommittee believes additional consideration and study is warranted to evaluate the feasibility and consequences of modifying other pretrial and trial responsibilities currently assigned under the UCMJ to convening authorities. The Subcommittee heard recommendations for and against changes to these authorities, and we believe further study is appropriate to fully assess what positive and negative impacts would result.

Command Climate for Sexual Assault Prevention and Response:
The Subcommittee heard contrasting perspectives about what role commanders should have in military justice processing for sexual assault crimes, but there is near universal agreement that military commanders and their

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
subordinate leaders are essential to establishing and maintaining an organizational climate that mitigates the risk of sexual assault crimes and responds appropriately to incidents when they occur. DoD, the Services, and individual commanders must proactively monitor organizational climate for sexual assault prevention and response and respond swiftly to correct indications of unacceptable behaviors or attitudes. DoD has developed climate survey tools that may provide helpful insight into positive and negative climate factors within an organization, and the Services have established aggressive mandates that require commanders and their supervising commanders to utilize surveys and review survey results. While these surveys appear helpful, DoD and the Services should ensure commanders are trained broadly in unit SAPR climate monitoring methods, and commanders must use other means of assessment to validate or expand upon climate survey results.

Institutionally, DoD should also expand its assessment of SAPR programs and management through direct periodic and regular evaluations of DoD SAPR programs and performance, to be conducted by independent organizations. The DoD Sexual Assault Prevention and Response Office serves as the Department’s single point of accountability and oversight for developing and implementing SAPR programs and initiatives, and it is also responsible for assessing and monitoring the effectiveness of these efforts. External, independent evaluations would serve to validate or disprove DoD’s own internal assessments and would provide credible, unbiased measurement of SAPR initiatives, programs, and effectiveness, which would enhance public confidence in SAPR programs and initiatives.

Accountability for Sexual Assault Response:

To ensure SAPR program effectiveness, commanders and leaders must be held accountable and fairly evaluated on how they execute these critical duties. All officers preparing to assume command should be sufficiently trained and prepared to execute their SAPR responsibilities and the quasi-judicial authorities assigned to them under the UCMJ. Once trained, the Secretaries of the Military Departments should ensure commanders are evaluated according to clearly defined and established standards for SAPR leadership and performance, and assessment of commander performance must incorporate more than results from command climate surveys. Chaplains, social services providers, military judges, inspectors general, and officers and enlisted personnel participating in professional military education courses may be underutilized resources for obtaining accurate, specific, and unvarnished information about institutional and local climate. Victim satisfaction interviews may provide direct insight into climate factors and feedback on installation services and organizational support.

In addition to commanders, other subordinate leaders, including officers, enlisted leaders, and civilian supervisors, play a significant role in the success or failure of SAPR efforts. SAPR programs cannot be effective without the full investment of these subordinate leaders, but Service policies on SAPR expectations and assessment vary. If performance evaluation assessment increases attention to and support of SAPR programs, these differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel. The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers and noncommissioned officers.

CONCLUSION

The Subcommittee believes its recommendations and findings will strengthen DoD, Service, installation, and individual unit sexual assault prevention and response efforts. Further, the Subcommittee believes it is important to recognize that senior commander convening authority roles under the UCMJ are well founded and appropriate, and recent legislative and policy changes have clarified and improved the reporting, investigation, and military justice response to sexual assault allegations. Finally, DoD must ensure robust, continuous, and comprehensive climate assessment in military organizations and ensure consistent accountability expectations for sexual assault prevention and response among commanders and leaders.
Recommendation 1: The Subcommittee recommends against any further modification to the authority vested in commanders also designated as court-martial convening authorities. Accordingly, the Subcommittee does not recommend Congress adopt the reforms in either the Sexual Assault Training Oversight and Prevention Act (STOP Act) or the Military Justice Improvement Act (MJIA).

Finding 1-1: Congress has enacted significant amendments to the Uniform Code of Military Justice (UCMJ) to enhance the response to sexual assault in the military, and the Department of Defense (DoD) implemented numerous changes to policies and programs for the same purpose. Some changes have only just been implemented and other amendments to the UCMJ have not yet been implemented, and DoD has not yet fully evaluated what impact these reforms will have on the incidence, reporting or prosecution of sexual assault in the military.

Finding 1-2: The MJIA includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel and yet implementing the convening authority mandate included in the MJIA will involve significant personnel and administrative costs.

Finding 1-3: Implementing the MJIA will require reassignment of O-6 judge advocates who meet the statutory prosecutor qualifications. The existing pool of O-6 judge advocates who meet these requirements is finite; and many of these officers routinely serve in assignments related to other important aspects of military legal practice. Therefore, implementing MJIA’s mandate, absent an increase in personnel resources, may result in under-staffing of other important senior legal advisor positions.

Recommendation 2: Congress should not adopt Section 2 of the Victims Protection Act of 2014 (VPA). The decision whether to refer a case to courts-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate.

Finding 2-1: Section 2 of the VPA would mandate Secretarial review of cases involving sex-related offenses when the senior trial counsel detailed to a case recommends that charges be referred to trial and the convening authority, upon the advice of his or her staff judge advocate, decides not to refer charges. Most “senior trial counsel” assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. This provision inappropriately elevates the assessments of generally more junior judge advocates and would likely prove to be unproductive, disruptive, and unnecessary to ensuring the fair disposition of cases.
Recommendation 3: Congress should not adopt Section 3(d) of the Victims Protection Act of 2014. Alternatively, the Secretary of Defense should direct the formulation of a review process to be applied following each reported instance of sexual assault to determine the non-criminal factors surrounding the event. Such reviews should address what measures ought to be taken to lessen the likelihood of recurrence (e.g.; physical security, lighting, access to alcohol, off-limits establishments, etc.).

Finding 3-1: Evaluating a unit’s culture or climate may be helpful or may provide relevant information in some criminal investigations, but it is not clear how organizational climate assessments would be effective following each report of a sexual offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements for personnel and the possibility of survey fatigue may also reduce the accuracy of feedback and the effectiveness of assessments.

Finding 3-2: DoD has not formalized a standard process to review reported incidents of sexual assault to determine what additional actions might be taken in the future to prevent the occurrence of such an incident. Some organizations and commands within DoD have developed review processes that warrant evaluation by DoD.

Recommendation 4: The Secretary of Defense should establish an advisory panel, comprised of persons external to the Department of Defense, to offer to the Secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD’s sexual assault prevention and response programs and policies.

Commander Responsibilities in Sexual Assault Prevention

Recommendation 5: The Secretary of Defense should direct appropriate DoD authorities to partner with researchers to determine how best to implement promising, evidence-based alcohol mitigation strategies (e.g., those that affect pricing, outlet density, and the availability of alcohol). The Secretary of Defense should ensure DoD’s strategic policies emphasize these strategies and direct the DoD Sexual Assault Prevention and Response Office (SAPRO) to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.

Finding 5-1: Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender. According to researchers, alcohol mitigation strategies that affect pricing, outlet density, and the availability of alcohol have promising potential to reduce the incidence of sexual violence.

Finding 5-2: The Department of Defense has not sufficiently identified specific promising alcohol mitigation strategies in its strategic documents for sexual assault prevention, thereby failing to provide local commanders with the strategic direction necessary to expect a consistent reduction in the rate of alcohol-related sexual assault across the Services. Nevertheless, some local commanders have developed innovative alcohol-mitigation programs on their own that warrant wider evaluation.

Finding 5-3: DoD’s prevention strategies and approach require continued partnership with sexual assault prevention experts in other government agencies, non-profit organizations, and academia. Consultation with these experts is particularly necessary to enhance understanding of: male-on-male sexual violence; the impact of victimization prior to Service members’ entry onto active duty; and effective community-level prevention strategies, including mitigation of alcohol consumption and youth violence.
ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Finding 5-4: The Centers for Disease Control and Prevention (CDC) and leading private prevention organizations agree there is no silver-bullet answer to the occurrence of sexual assault. An approach to preventing sexual violence has greater potential to impact behavior to the extent it applies multiple and varied strategies at the different levels of a given environment.

Finding 5-5: Scientists’ understanding of the various risk and protective factors for sexual violence continues to evolve, and much remains to be learned. DoD’s prevention policies and requirements adopted since 2012 reflect its efforts to be informed by the best available science. While DoD’s prevention approach currently reflects its consultation with the CDC and leading private organizations like the National Sexual Violence Resource Center, it is too soon to assess the effectiveness of specific prevention programs initiated in the Services.

Finding 5-6: According to the CDC, the only two sexual violence programs that have demonstrated evidence of effectiveness in reducing sexually violent behavior were developed and evaluated for middle and high school-aged youth. As for prevention programs that can be adapted to the military, the CDC and leading private prevention organizations identify bystander intervention and alcohol mitigation as two promising sexual violence prevention strategies that studies have demonstrated reduce risk factors and warrant further research into their impact on behavior change.

Finding 5-7: By spearheading additional research and implementing prevention strategies that are based on the best available science, DoD can share knowledge it gains with civilian organizations and thereby become a national leader in preventing sexual violence.

Recommendation 6: The Secretary of Defense and Service Secretaries should direct DoD SAPRO and the Services, respectively, to review bystander intervention programs to ensure they do not rely upon common misconceptions or overgeneralized perceptions. In particular, programs should not overemphasize serial rapists and other sexual “predators” and should instead emphasize preventive engagement, encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault.

Finding 6-1: According to the CDC and leading sexual assault prevention research experts and organizations, the bystander intervention programs that hold the most promise are those that encourage peer groups to guard against a spectrum of attitudes, beliefs, and behaviors that contribute to a climate in which sexual violence is more likely to occur. This spectrum starts with language and behaviors by males even in the absence of women, such as sexist comments, sexually objectifying jokes, and vulgar gestures.

Recommendation 7: The Secretary of Defense should direct DoD SAPRO to establish specific training and policies addressing retaliation toward peers who intervene and/or report.

- Bystander intervention programs for service members should include training that emphasizes the importance of guarding against such retaliation.
- DoD and Service policies and requirements should ensure protection from retaliation against not just victims, but also the peers who speak out and step up on their behalf.
- Commanders must encourage members to actively challenge attitudes and beliefs that lead to offenses and interrupt and/or report them when they occur.
Recommendation 8: The Secretary of Defense should direct DoD SAPRO to evaluate development of risk-management programs directed toward populations with particular risk and protective factors that are associated with prior victimization. In particular, DoD SAPRO should partner with researchers to determine to what extent prior sexual victimization increases Service members’ risk for sexual assault in the military in order to develop effective programs to protect against re-victimization.

Finding 8-1: Research underscores the importance in developing programs to identify Service members who are victimized prior to entering the military and strengthen their ability to deal with the consequences of prior victimization, including increased risk for future victimization.

Recommendation 9: The Secretary of Defense and Service Secretaries should ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure SAPR training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member’s presumption of innocence, right to fair investigation and resolution, and access to witnesses or evidence.

Finding 9-1: In addition to supporting victims of sexual assault, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.

Recommendation 10: The Secretary of Defense should direct DoD SAPRO and the Services to enhance their efforts to prevent and respond to male-on-male sexual assault.

- Prevention efforts should ensure commanders directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it.
- Prevention efforts should also ensure Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing or labeled as “horseplay” in the past constitute punishable offenses that should not be tolerated.
- DoD SAPRO should seek expert assistance to understand the risk and protective factors that are unique to male-on-male sexual assault in the military and should develop targeted prevention programs for male-on-male sexual assault offenses.

Recommendation 11: The Service Secretaries should direct further development of local coordination requirements both on and off the installation, and expand requirements for installation commanders to liaison with victim support agencies.

Recommendation 12: The Service Secretaries should ensure commanders focus on effective prevention strategies. Commanders must demonstrate leadership of DoD’s prevention approach and its principles, and they must ensure members of their command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.
**ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS**

**Recommendation 13:** Given existing training and curriculum mandates, the Department of Defense should not promulgate an additional formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response.

**Finding 13-1:** As described in Enclosure 10 of DoD Instruction 6495.02, DoD has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on SAPR principles, reporting options and resources for help, SAPR program and command personnel roles and responsibilities, prevention strategies and behaviors, and sexual assault report document retention requirements.

**Finding 13-2:** DoD SAPRO established core SAPR training competencies with tailored instruction requirements for the following situations: accessions training, annual refresher training, pre- and post-deployment training, professional military education, pre-command and senior enlisted leader training, sexual assault response coordinator (SARC) and victim advocate (VA) training, and chaplain training.

**COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE**

**Recommendation 14:** The Secretary of Defense should direct DoD SAPRO to ensure sexual assault reporting options are clarified to ensure all members of the military, including the most junior personnel, understand their options for making a restricted or unrestricted report and the channels through which they can make a report.

**Finding 14-1:** Sexual assault victims currently have numerous channels outside the chain of command to report incidents of sexual assault, and they are not required to report to anyone in their military unit or any member of their chain of command. These alternative reporting channels are well and broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.

**Finding 14-2:** It is not clear that a sufficient percentage of military personnel understand sexual assault reporting options. Based on recent survey results, junior enlisted personnel scored lowest in understanding the options for filing a restricted report. Nearly one-half of junior enlisted personnel surveyed believed they could make a restricted report to someone in their chain of command.

**Finding 14-3:** Under current law and practice, unrestricted reports of sexual assault must be referred to, and investigated by, military criminal investigative organizations that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
ROLE OF THE COMMANDER SUBCOMMITTEE

COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

Recommendation 15: Congress should not further modify the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and Department of Defense policy.

Finding 15-1: Criticism of the military justice system often confuses the term “commander” with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing.

Finding 15-2: Pursuant to the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) amendments to the UCMJ and current practice, only a GCMCA is authorized to order trial by court-martial for any offense of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit these offenses. Subordinate officers, even when in positions of command, may not do so.

Finding 15-3: Commanders with authority to refer a sexual assault allegation for trial by court-martial will normally be removed from any personal knowledge of the accused or victim.

Finding 15-4: If a convening authority has other than an official interest in a particular case, the convening authority is required to recuse himself or herself.

Finding 15-5: Under current law and practice, the authority to make disposition decisions regarding sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.

Recommendation 16: The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate the feasibility and consequences of modifying authority for specific quasi-judicial responsibilities currently assigned to convening authorities, including discovery oversight, court-martial panel member selection, search authorization and other magistrate duties, appointment and funding of expert witnesses and expert consultants, and procurement of witnesses.

Finding 16-1: Further study is appropriate to fully assess what positive and negative impacts would result from changing some pretrial or trial responsibilities of convening authorities.

Recommendation 17: The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a GCMCA should not have authority to override an Article 32 investigating officer’s recommendation against referral of an investigated charge for trial by court-martial.

Finding 17-1: Convening authorities should generally retain referral discretion and should not be bound in all circumstances by the recommendations of an Article 32 investigating officer.
Recommendation 18: Congress should not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

Finding 18-1: Section 1702 of the FY14 NDAA, which modifies Article 60 of the UMCJ, significantly limits the post-trial authority and discretion of convening authorities for serious sexual offenses by precluding them from disapproving findings and reducing their discretion to reduce the court-martial sentence for such offenses.

Recommendation 19: Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses.

Finding 19-1: The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces.

Finding 19-2: The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases.

Finding 19-3: Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.

Finding 19-4: Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.

Finding 19-5: None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.

Finding 19-6: It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.
## ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

**Recommendation 20:** DoD and the Services must identify and utilize means in addition to surveys to assess and measure institutional and organizational climate for sexual assault prevention and response.

**Finding 20-1:** Although surveys may provide helpful insight into positive and negative climate factors within an organization, surveys alone do not provide a comprehensive assessment of the climate in an organization.

**Recommendation 21:** In addition to personnel surveys, DoD, the Services, and commanders should identify and utilize other resources to obtain information and feedback on the effectiveness of SAPR programs and local command climate.

**Finding 21-1:** Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations.

**Recommendation 22:** The Secretary of Defense and Service Secretaries should ensure commanders are trained in methods for monitoring a unit’s SAPR climate, and they should ensure commanders are accountable for monitoring their command’s SAPR climate outside of the conduct of periodic surveys.

**Recommendation 23:** The Secretary of Defense and Service Secretaries should ensure commanders are required to develop action plans following completion of command climate surveys that outline steps the command will take to validate or expand upon survey information and steps the command will take to respond to issues identified through the climate assessment process.

**Recommendation 24:** The Secretary of Defense should direct periodic and regular evaluations of DoD SAPR programs and performance, to be conducted by independent organizations, which would serve to validate or disprove DoD’s own internal assessments and would provide useful feedback to the Department and enhance public confidence in SAPR programs and initiatives.

**Finding 24-1:** Evaluations conducted by independent organizations of institutional and installation command climate are essential to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness.

**Recommendation 25:** DoD SAPRO and the Defense Equal Opportunity Management Institute (DEOMI) should ensure survey assessments and other methods for assessing command climate accurately assess and evaluate the effectiveness of subordinate organizational leaders and supervisors in addition to commanders.

**Finding 25-1:** Commanders are ultimately accountable for their unit’s performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including all subordinate personnel exercising leadership or supervisory authority.
ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Finding 25-2: Because officers and noncommissioned officers who are subordinate to the commander will inevitably have the most contact with sexual assault victims in their units, unit climate assessments and response measures must be sufficiently comprehensive to include leaders and supervisors at every level.

Finding 25-3: Commanders at all levels must be attuned to the critical role played by subordinate officers, noncommissioned officers and civilian supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

Recommendation 26: DoD and the Services must be alert to the risk of survey fatigue, and DoD SAPRO and DEOMI should monitor and assess what impact increased survey requirements have on survey response rates and survey results.

Finding 26-1: The dramatic increase and large volume of surveys administered by DEOMI last year creates risk of survey fatigue. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide thoughtful input.

COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Recommendation 27: DoD and the Services should consider opportunities and methods for effectively factoring accountability metrics into commander performance assessments, including climate survey results, indiscipline trends, sexual assault statistics, and equal opportunity data.

Finding 27-1: Results-based assessment provides both positive and negative reinforcement and highlights the importance of a healthy command climate.

Finding 27-2: Although statutory provisions require assessment of a commander’s success or failure in responding to incidents of sexual assault, there are no provisions that mandate assessment or evaluation of a commander’s success or failure in sexual assault prevention.

Finding 27-3: All Services have policies and methods for evaluating commanders on their ability to foster a positive command climate, but definitions and evaluation mechanisms vary across the Services.

Recommendation 28: The Service Secretaries should ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys.

Finding 28-1: Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance.

Finding 28-2: Mandated reporting of command climate surveys to the next higher level of command has the potential to improve command visibility of climate issues of subordinate commanders. Meaningful review by senior commanders increases opportunities for early intervention and can improve command response to survey feedback. However, commanders and leaders must recognize that surveys may or may not reflect long-term trends, and they provide only one measure of a unit’s actual command climate and the commander’s contribution to that climate.
Recommendation 29: To hold commanders accountable, DoD SAPRO and the Service Secretaries must ensure SAPR programs and initiatives are clearly defined and establish objective standards when possible.

Finding 29-1: The Navy’s accountability effort, which provides specific direction and command-tailored direction on SAPR and other command climate initiatives, offers an encouraging model for ensuring compliance and fostering program success.

Finding 29-2: Detailed standards and expectations provide commanders clear guidance on supporting SAPR programs.

Recommendation 30: The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers, noncommissioned officers, and civilian supervisors.

Finding 30-1: Service policies on SAPR expectations for subordinate accountability vary.

Finding 30-2: If performance evaluation assessment increases attention to and support of SAPR programs, differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel.

Finding 30-3: Subordinate leaders in a unit play a significant role in the success or failure of SAPR efforts, and accountability should extend beyond commanders to junior officers, noncommissioned officers, and civilian supervisors.

Finding 30-4: SAPR program effectiveness will be limited without the full investment of subordinate leaders.

Finding 30-5: Section 3(c) of the Victims Protection Act of 2014 would extend evaluation requirements to all Service members.

Recommendation 31: The Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to perform the quasi-judicial authority and functions assigned to them under the UCMJ.

Finding 31-1: Legal training provided to senior commanders through resident and on-site Service JAG School hosted courses varies significantly among the Services. For example, the Army and Navy JAG Schools provide senior commanders with mandatory resident or on-site courses on legal issues. Formal Air Force legal training is less robust and is incorporated into group and wing commander courses hosted by Air University.
I. OVERVIEW OF SUBCOMMITTEE ASSESSMENT

The Role of the Commander Subcommittee (Subcommittee) of the Response Systems to Adult Sexual Assault Crimes Panel (RSP) conducted an extensive review of the role of the commander in the prevention and response to sexual assault crimes. The issue of sexual assault in the U.S. military has been the subject of significant public, legislative, and administrative scrutiny. A focus point in current discussion on this subject is the role of commanders under the Uniform Code of Military Justice (UCMJ), and more specifically on the authority assigned to designated senior commanders to convene courts-martial and refer criminal offenses for trial. This Subcommittee has completed its review of the role of commanders in sexual assault prevention and response. The following report provides our assessment and our recommendations and findings based on this review.

Federal law requires commanding officers to demonstrate exemplary conduct, including vigilant inspection of the conduct of those placed under their command and promotion and safeguarding of the welfare of the officers and enlisted persons under their command.1 At the heart of every military commander’s duty is the responsibility to ensure mission readiness, which includes maintaining good order and discipline within the command. For centuries, U.S. military commanders have held the authority to impose discipline as well as direct trials for criminal allegations. The UCMJ, the U.S. military’s criminal code, vests the authority to establish and convene courts-martial in select, senior commanding officers.

Some individuals and groups, however, contend that commanders should not have authority over military justice matters and should be relieved of their authority to convene courts-martial for sexual assault offenses. Accordingly, they propose amending the UCMJ to shift convening authority for courts-martial from commanders to military prosecutors who are independent of the military command in which the alleged misconduct occurs. Others contend senior military commanders are essential to resolving the pernicious issues of sexual assault in military organizations. They assert that divesting senior commanders of convening authority will dilute their capacity to lead and impair their ability to maintain good order and discipline, thereby damaging the efficiency and effectiveness of the Armed Forces.

In the past three years, Congress has significantly amended the UCMJ and enacted substantial mandates on the Department of Defense (DoD) to address the issue of sexual assault in the military. Additionally, DoD has implemented many changes to its processes and systems for preventing, assessing, and responding to sexual assault. Sexual assault reports, including reports of assaults that occurred before the person entered the military, significantly increased during Fiscal Year 2013, possibly suggesting that some sexual assault victims may have increased confidence that the military will respond sympathetically and effectively to them.

1 See 10 U.S.C. § 3583 (requiring exemplary conduct for Army commanding officers); 10 U.S.C. § 5947 (requiring exemplary conduct for commanding officers in the Navy and Marine Corps); 10 U.S.C. § 8583 (requiring exemplary conduct for Air Force officers).
Based on its extensive review, the Subcommittee believes military commanders must lead the way in DoD’s efforts to prevent sexual assault, establishing organizational climates that are wholly intolerant of the behaviors and beliefs that contribute to sexual assault crimes. When sexual assault does occur, military commanders must lead decisive response efforts, assuring appropriate care for victims. They must also ensure protection of the due process rights of those who are accused of sexual assault crimes, and they must take appropriate administrative and criminal action against offenders. How commanders fulfill these responsibilities reflects their leadership and effectiveness, and DoD, the Services, and senior leaders must ensure all commanders and leaders are held accountable and fairly evaluated on their execution of these critical tasks.

A. RESPONSIBILITY OF THE SUBCOMMITTEE

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 directed the Secretary of Defense to establish the RSP “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.” In order to assist the RSP in accomplishing, in twelve months, the many areas Congress directed it to assess, the RSP Chair requested that the Secretary of Defense establish three subcommittees—Role of the Commander, Comparative Systems, and Victim Services.

On September 23, 2013, the Secretary of Defense established the RSP subcommittees and appointed nine members to the Role of the Commander Subcommittee, including four members of the RSP. The Secretary of Defense established three objectives for the Role of the Commander Subcommittee focused on assessment of “the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.” The National Defense Authorization Act for Fiscal Year 2014 added two requirements for RSP study that were assigned to the Role of the Commander Subcommittee. In total, the Subcommittee was tasked with five objectives for analysis:

- Examine the roles and effectiveness of commanders at all levels in the administration of the UCMJ and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.

- Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes, including the role of a commander under Article 60, UCMJ.

- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.

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I. OVERVIEW OF SUBCOMMITTEE ASSESSMENT

- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the Response Systems Panel recommends such a formal statement, the Response Systems Panel shall provide key elements or principles that should be included in the formal statement.

B. METHODOLOGY OF SUBCOMMITTEE REVIEW

Since June 2013, RSP and Subcommittee members have held and attended nineteen days of hearings—including public meetings, subcommittee meetings, preparatory sessions, and site visits—with more than 240 different presenters. Presenters included surviving sexual assault victims; current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims’ counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocates General from each of the Services; current and former military justice officials and experts from Allied nations; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners and emergency physicians; first responders; chaplains; and currently serving United States Senators.

In addition, the Subcommittee considered information submitted by the public and publicly available information and documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. The RSP sent specific requests for information (RFIs) to DoD and each of the Services. The RFIs focused on the role of the commander, comparing military and civilian investigative and prosecution systems, and victim services. To date, DoD and the Services have submitted more than 620 pages of narrative responses and more than 15,000 pages of information in response to these requests.

The RSP also sent letters to eighteen victim advocacy organizations around the country soliciting input from those organizations to assist the Panel in its review. Advocacy organizations providing information to the RSP have included those working specifically in military sexual assault, including: Protect Our Defenders; Service Women’s Action Network; Rape, Abuse, and Incest National Network; the National Organization for Victim Assistance; and the National Alliance to End Sexual Violence.

Information received and considered by the Subcommittee is available on the RSP website (http://responcessystemspanel.whs.mil/). The Subcommittee wishes to express its gratitude to all the presenters and to those who provided information and other assistance to it.
II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

A. COMMANDER AUTHORITY AND RESPONSIBILITY

The term “commander” has a unique and specific meaning within the military. It indicates a position of seniority, authority, and responsibility. The Rules for Courts-Martial distinguish “commander” from “convening authority,” and the two roles, while overlapping, are not interchangeable. Military officers at all ranks and experience levels may serve in command positions. Commanders serve as part of the “chain of command,” which is the succession of commanders from superior to subordinate through which command authority is exercised.

The commander is the head of a military organization and is primarily responsible for ensuring mission readiness, to include maintaining good order and discipline within the unit. The importance of the commander’s disciplinary responsibility is reflected in the preamble to the Manual for Courts-Martial: “The purpose of military law is 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.”

The commander also plays a key role in times of cultural change in the Armed Forces. Historically, commanders have proved essential in leading the organizational response during periods of military cultural transition, especially since enactment of the UCMJ. Beginning with racial integration and continuing toward greater inclusion of women and, most recently, the repeal of “Don’t Ask, Don’t Tell,” the Services have relied on commanders to set and enforce standards and effect change among subordinates under their command.

A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command in achieving change in the attitudes and behaviors of


5 While often used as an all-encompassing term for military superiors, the term “chain of command” refers only to the distinct organizational chain of commanders. Supervisory or “technical chains” are not part of a Service member’s chain of command, and they lack the responsibility and authority unique to military commanders and chains of command.

6 Id. at pt. I, ¶ 3.


8 Transcript of Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee [hereinafter Transcript of SASC Hearing] 12 (June 4, 2013) (testimony of General Raymond T. Odierno, Chief of Staff, U.S. Army); Transcript of Response Systems Panel [hereinafter RSP] Public Meeting 214 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army) (“Past progress and institutional change, whether racial or gender integration, or, more recently, Don’t Ask, Don’t Tell, have been successful because of the focus and authority of commanders, not because of lawyers. And so it should be in addressing sexual assault.”).
Service members. Senator Carl Levin, Chair of the Senate Armed Services Committee, observed that the chain of command has been “[t]he key to cultural change in the military.” Stated directly, commanders—the leaders of military organizations—set and enforce standards and have the requisite station to drive cultural change in the military.

B. DISTINCTION BETWEEN COMMANDERS AND CONVENING AUTHORITIES

While all commanders have disciplinary responsibility for subordinates, the authority vested by the UCMJ to convene courts-martial is legally distinct from command authority. The authority to convene general, special, and summary courts-martial is purely statutory in nature, and is established by Articles 22, 23, and 24 of the UCMJ, respectively. Under these articles, convening authority is a specific statutory authority that attaches to individual officers serving in certain positions and designations.

With limited and rarely invoked statutory exceptions, convening authorities must be commanders. However, not all commanders are convening authorities. An officer in command does not become a convening authority until he or she is selected for a specific command or level of command meeting the statutory requirement. Stated simply, nearly all convening authorities are commanders, but few commanders have authority to convene special courts-martial, and fewer still possess the authority to convene general courts-martial.

Officers serving in positions with special courts-martial convening authority (SPCMCA) or general courts-martial convening authority (GCMCA) are senior officers with many years of service and experience. A senior officer assuming a command position with convening authority also receives military justice training in pre-command courses, as well as specific legal training conducted by judge advocate instructors. In addition to

9 Transcript of RSP Role of the Commander [hereinafter RoC] Subcommittee Meeting 40 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy) (noting that he had “witnessed the chain of command’s ability to effect change in the military culture on racial discrimination”); accord id. at 299–301 (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps); see also Transcript of RSP RoC Subcommittee Meeting 115–17 (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director for Military Equal Opportunity, Department of Defense [hereinafter DoD] Office of Diversity Management and Equal Opportunity) (describing significance of military leaders in achieving cultural and climate change in race relations).

10 Transcript of SASC Hearing 4 (June 4, 2013).

11 See, e.g., Transcript of RSP Public Meeting 213 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, U.S. Army) (“It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders, not lawyers.”).

12 Article 16 of the UCMJ classifies three kinds of courts-martial. General courts-martial are the highest level of military courts-martial. They consist of a military judge and at least five panel members, and they may adjudge any punishment authorized by law, up to and including death, life imprisonment, and a dishonorable discharge or dismissal. Special courts-martial are used to resolve offenses that are not so severe as to warrant a general court-martial, and they consist of a military judge and at least three panel members. Special courts-martial may adjudge punishment up to a bad conduct discharge and confinement for up to one year, among other punishment limits. Summary courts-martial are the lowest level of courts-martial, and they are ordinarily used to dispose of relatively minor offenses. Service members may decline to be tried by summary courts-martial, which consist only of one officer who may adjudge limited punishments.


14 The only convening authorities who are not military commanders are the President, the Secretary of Defense, and Service Secretaries. See 10 U.S.C. § 822(a)(1, 2, 4) (UCMJ art. 22(a)(1, 2, 4)).

15 Army commanders selected for SPCMCA positions attend Senior Officer Legal Orientation; selected Air Force commanders receive legal training at the Wing Commanders Course; selected Navy executive officers, commanders, and officers in charge, as well as Marine Corps commanders, attend the Senior Officer Course. See DoD and Services’ Responses to Request for Information 1c (Nov. 21, 2013).
II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

military justice training, each Service allocates judge advocate support to senior commanders with convening authority.

An officer will not typically serve in a command position with SPCMCA until he or she is promoted to the grade of O-6 (i.e., colonel or Navy/Coast Guard captain). Officers serving as SPCMCAs generally have at least 20 years of service and have been selected for this level of command through a rigorous and highly competitive process. An officer’s leadership ability, career service record, and previous performance in lower levels of command are important factors in selection for senior command positions.

Officers serving as GCMCAs have even longer records of service, with distinguished performance and substantial command experience. In general, an officer serving as a GCMCA has “had 25 years of experience in a quasi-judicial role, either reviewing misconduct and referring it to the commander who has the authority or [taking] corrective actions on his own with the powers that he or she has.” GCMCAs are normally two-star general or flag officers and higher.

The following chart illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCAs and even smaller number of GCMCAs:

<table>
<thead>
<tr>
<th>Service</th>
<th>Active Duty Personnel</th>
<th>Commanders</th>
<th>SPCMCAs</th>
<th>GCMCA who convened 1 or more court-martial in FY13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army</td>
<td>521,685</td>
<td>7,000</td>
<td>424</td>
<td>85</td>
</tr>
<tr>
<td>Navy</td>
<td>323,930</td>
<td>1,422</td>
<td>1,080</td>
<td>94</td>
</tr>
<tr>
<td>Marine Corps</td>
<td>192,350</td>
<td>2,182</td>
<td>451</td>
<td>106</td>
</tr>
<tr>
<td>Air Force</td>
<td>330,172</td>
<td>3,943</td>
<td>97</td>
<td>70</td>
</tr>
<tr>
<td>Coast Guard</td>
<td>40,665</td>
<td>677</td>
<td>350</td>
<td>12</td>
</tr>
</tbody>
</table>

C. LEGISLATIVE ORIGIN OF COMMANDER AUTHORITY UNDER THE UCMJ

The authority to convene and manage courts-martial has been vested in U.S. military commanders since the colonial period. Indeed, until after World War II, commanders enjoyed “virtually unfettered” discretion in determining whether to try soldiers and sailors by court-martial. In the words of Brigadier General S. T. Ansell, acting Judge Advocate General of the Army in 1919, the commander “govern[ed] the trial from the moment of

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18 Transcript of RSP Public Meeting 190–91 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General’s Corps).
accusation to the execution of the sentence, and such law adviser as he may have on his staff is without authority or right to interpose.”22 Nevertheless, a committee appointed to investigate military justice during World War I endorsed the status quo, and the system continued without significant change through World War II.21

Reviews in the years following World War II challenged the commander’s unfettered discretion in convening courts-martial. In 1946, the Vanderbilt Commission, a committee of leading jurists and law professors, found “frequent breakdowns” in the administration of wartime military justice resulting largely from failure and excesses of command.22 This finding was based in part on evidence that trial by court-martial was “frequently used as a substitute for leadership,” and that its “frequency of use chang[ed] not only with each change in command, but also per the whim of a given commander.”23 At the same time, the Commission found evidence of a consistent tendency of commanders to deliberately attempt to influence the outcomes of courts-martial, a practice that was sometimes “freely admitted.”24

By the time it held hearings on drafts of the UCMJ in 1949, Congress heard from those opposing proposals to reduce commander authority over courts-martial,25 and also from those “urg[ing] [it] to remove the authority to convene courts martial from ‘command’ and place that authority in judge advocates or legal officers, or at least in a superior command.”26 While commanders retained convening authority under the UCMJ, the Code that was adopted was a compromise between those opposing any erosion of absolute commander control and those advocating change.27 More specifically, in its 1949 report on the UCMJ, the House Armed Services

21 Hansen, supra note 19, at 427. One exception was the requirement established by the Articles of War of 1920 that the convening authority refer charges to his staff judge advocate for pretrial advice. The Judge Advocate General’s School, The Background of the Uniform Code of Military Justice 5 (1959).
22 REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 3 (1946).
24 REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 6-7 (1946).
25 In 1946, while serving as the Army Chief of Staff, General Dwight D. Eisenhower wrote to the Acting Chairman of the House Armed Services Committee that the grave responsibility of commanders “can be fully discharged only by the exercise of commensurate authority without which the effectiveness of the commander will be seriously impaired.” General Eisenhower asserted his confidence that other experienced combat commanders would agree that “any other system would produce ruinous results.” Letter from General Dwight D. Eisenhower, U.S. Army, to Acting Chairman Dewey Short (June 30, 1947), reprinted in Hearings Before Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments 1947, 80th Cong., 1st Sess. 4157-58 (1947).
26 H.R. REP. NO. 81-491, at 7-8 (1949). The Committee addressed such testimony in its report as follows: We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations. Our conclusions in this respect are contrary to the recommendations of numerous capable and respected witnesses who testified before our committee, but the responsibility for the choice was a matter which had to be resolved according to the dictates of our own conscience and judgment. Id.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

Committee detailed eight “restrictions on command” included in the Code that would be effective checks on the commanders with convening authority. For example, the Committee noted, the UCMJ would prohibit the commander from preferring charges until they were first examined for legal sufficiency by the staff judge advocate or legal officer and would authorize the staff judge advocate or legal officer to communicate directly with the Judge Advocate General.28

The concerns that weighed most heavily in the minds of those who drafted the UCMJ were the issue of command control and the need to curb unlawful command influence.29 In its current form, Article 37 of the UCMJ provides that no convening authority or commanding officer may “censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings.”30 Article 37 further provides that no person subject to the UCMJ “may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”31

By adopting Article 37, Congress prohibited convening authorities and all commanding officers from unlawfully influencing the law officer, counsel, and members of courts-martial.32 Article 37 reflects Congress’s recognition that while a commanding officer is responsible for discipline, “in the long run, discipline will be better and morale will be higher if service personnel receive fair treatment.”33 In particular, Article 37 represents

28 H.R. Rep. No. 81–491, at 7–8, 40–41 (1949). The other six “restrictions on command” identified by the Committee focus on the due process rights of the accused during and after trial. See id. (noting that UCMJ: requires that all counsel at general court-martial be lawyers and be certified as qualified by Judge Advocate General; requires that law officer (now known as military judge) be a lawyer, that his rulings on interlocutory questions of law be final, and that he instruct court-martial members on presumption of innocence, burden of proof, and elements of charged offense[s]; requires staff judge advocate to examine record of trial for sufficiency before convening authority may act on findings or sentence; guarantees accused legally qualified appellate counsel; establishes civilian Court of Military Appeals (now known as Court of Appeals for the Armed Forces) that is “completely removed from all military influence or persuasion”; and makes it offense for any person subject to Code to unlawfully influence action of court-martial). See id.

29 Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate 15 (1963) (hereinafter Report of Hearings); H.R. Rep. No. 98–549, at 13 (1983). In United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), the Court of Military Appeals called command influence “the mortal enemy of military justice” and “a corruption of the truth-seeking function of the trial process.” Id. at 393–94 (internal quotation marks omitted). The Court noted the exercise of unlawful command influence, depending upon whom it is directed, could deny an accused access to favorable evidence, the right to effective assistance of counsel, or the right to an impartial court-martial forum. Id. at 393.

30 10 U.S.C. § 837(a). The prohibition on unlawful command influence also applies to others who act with the “mantle of official command authority.” United States v. Stombaugh, 40 M.J. 208, 211 (C.A.A.F. 1994). Actual unlawful command influence or an appearance of unlawful command influence may result from the actions of staff judge advocates, trial counsel, and other representatives of the government. See United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006) (finding actual unlawful command influence by staff judge advocate and trial counsel in actions to unseat military trial judge and apparent unlawful command influence because they succeeded in removing judge without facing detriment or sanctions for their actions); United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013) (finding apparent unlawful command influence when government representatives used information from military judge’s personnel file to seek his disqualification from a case).


32 While it incorporated the provisions of Article of War 88, Article 37 expanded upon Article 88 by including within the prohibition the influencing of law officers and counsel.

an effort by Congress to achieve for the accused the right to an impartial trial that is guaranteed in the Sixth Amendment.\textsuperscript{34}

Congress’s concern about unlawful command influence, however, permeates the Code far beyond Article 37. In fact, twelve other UCMJ provisions were designed to eliminate it; in addition to the eight “restrictions on command” enumerated by the House Armed Services Committee (see above); these include the accused’s right to counsel, to present evidence, and to cross-examination at the pretrial investigation hearing; the prohibition against compelling self-incrimination; and the guarantee of equal access to witnesses.\textsuperscript{35} Early decisions of the Court of Military Appeals that enhanced the law officer to a position similar to “the trial judge in a civilian court” aided in curbing unlawful command influence, as did as the Army’s creation of a field judiciary.\textsuperscript{36}

Despite Congress’s initial attempt to prevent unlawful command influence, some commanders viewed the original Article 37 as an obstacle to execution of their disciplinary responsibilities, just as others overcame it by exerting improper influence in more subtle ways.\textsuperscript{37} In 1960, the Powell Committee\textsuperscript{38} recommended that the Chief of Staff of the Army “publish a directive to clarify for all commanders the distinction between proper exercise of command responsibility and improper command influence.”\textsuperscript{39} Ultimately, Congress added a provision to Article 37 in its 1968 amendments to the UCMJ that prohibited adverse personnel actions based on members’ participation in courts-martial.\textsuperscript{40}

The authority vested in senior commanders to convene courts-martial remains a central tenet of the UCMJ, but Congress has refined procedural requirements for their disposition decisions. For example, the UCMJ initially provided in Article 34(a) that the convening authority may not refer a charge for trial by general court-martial “unless he has found” that the charge alleges an offense under the UCMJ and is warranted by the evidence.\textsuperscript{41} In 1983, Congress changed Article 34(a) to state that the convening authority may not refer such a charge “unless

\begin{itemize}
  \item \textsuperscript{34} Joint Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, United States Senate, Appendix A, at 512.
  \item \textsuperscript{35} TJAG’S SCHOOL, supra note 21, at 12-13. Additional UCMJ provisions were designed to eliminate unlawful command influence during and after trial. \textit{Id.} (noting enlisted accused’s right to demand that panel include enlisted members; requirement that all voting on challenges, findings, and sentences be by secret ballot; automatic review of trial record for errors of law and of fact by Courts of Criminal Appeals (initially called Boards of Review); and right of accused to seek review in Court of Appeals for the Armed Forces).
  \item \textsuperscript{36} Report of Hearings, supra note 29, at 18 & n.109 (collecting cases).
  \item \textsuperscript{37} Joint Hearings, supra note 34, at 452, 458.
  \item \textsuperscript{38} This ad hoc committee was appointed by Secretary of the Army Wilber M. Brucker and chaired by Lieutenant General Herbert B. Powell, U.S. Army, REPO RT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY, BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD OR DRD AND DISCIPLINE IN THE ARMY I, III (1960).
  \item \textsuperscript{39} \textit{Id.} at 3, 16.
  \item \textsuperscript{40} See 10 U.S.C. § 837(b) (UCMJ art. 37(b)) (“In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.”).
  \item \textsuperscript{41} MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 35b (1969); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 35b (1951). This “clarified th[e] ambiguity” that existed in this regard in the Articles of War. TJAG’S SCHOOL, supra note 21, Annex A, at 13.
\end{itemize}
II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

he has been advised in writing by the staff judge advocate that” the charge alleges an offense, that the charges are supported by the evidence, and that there is jurisdiction over the accused and the offense.42

There have been other significant changes and revisions to the UCMJ since its enactment. Most recently, the National Defense Authorization Act for Fiscal Year 2014 modified several provisions of the UCMJ related to commander authority and responsibility and the prosecution of sexual assault crimes.43 As a military historian told the RSP, “the system has changed over time; first courts-martial [were] made more like courts, and then because of this desire to have our system mirror what’s going on in civilian courts, more and more courts-martial look like any trial in Federal District Court.”44

D. SUPREME COURT REVIEW OF COMMANDER AUTHORITY UNDER THE UCMJ

Since the UCMJ was adopted, the Supreme Court has reviewed, but not substantially modified, the authority vested in military commanders to convene courts-martial for criminal offenses committed by military personnel. One notable exception was O’Callahan v. Parker,45 a challenge to court-martial jurisdiction over an accused convicted of the rape of a civilian and related offenses that were committed off the installation. In a split decision, the majority of Justices held that any grant of jurisdiction to courts-martial must be limited to offenses that are “service connected” in order to bring the constitutional grant of power to Congress over the military46 into harmony with the guarantees of the Bill of Rights.47

Two years later, in Relford v. Commandant,48 the Supreme Court described another application of the service-connection test. The Relford Court “stress[ed] . . . [t]he responsibility of the military commander for maintenance of order in his command” as well as “[t]he impact and adverse effect that a crime committed


43 For a summary of the FY14 NDAA provisions that impact roles and responsibilities of commanders in sexual assault prevention and response, see Part III, infra.

44 Transcript of RSP Public Meeting 197 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian).


46 See U.S. Const. art. I, § 8, cl. 14 (allocating to Congress power to “make Rules for the Government and Regulation of the land and naval Forces”).

47 O’Callahan, 395 U.S. at 272-73. The dissenting Justices foreshadowed the Court’s eventual return to its traditional adherence to military deference:

The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. Furthermore, because its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty. Thus, as General George Washington recognized: “All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.

Id. at 281-82 (Harlan, J., joined by Stewart & White, JJ., dissenting) (quoting 14 Writings of George Washington 140-41 (bicent. ed.)) (footnote omitted).

against a person or property on a military base . . . has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.”

Moreover, the Relford Court affirmed a soldier’s convictions for the on-base rapes of a military dependent and of the relative of another fellow Service member, expressly holding that “when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial.” Thus, under Relford, sexual assaults committed by one Service member on another or on a dependent continued to be triable by courts-martial, even after the O’Callahan decision. In upholding jurisdiction in such cases, the military appellate courts recognized that such sexual-assault offenses “pose a serious threat to good order and discipline within the unit” regardless of where they occur and that “[m]ilitary jurisdiction provides a deterrent to such offenses and to the temptation . . . to wreak vengeance upon the wrongdoer.”

In Parker v. Levy, the Supreme Court noted that the military’s purpose distinguishes it and its laws from civilian society, and the Court recalled the “particular position of responsibility and command” held by military officers. Parker concerned a constitutional challenge to convictions under Articles 133 (“conduct unbecoming an officer and a gentleman”) and 134 (conduct prejudicial to “good order and discipline”) of the UCMJ that arose out of an Army officer’s on-base public statements critical of the Vietnam War to enlisted Service members. In affirming the convictions, the Court noted it had “long recognized that the military is, by necessity, a specialized society separate from civilian society,” and that “[t]he differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise.’” The Parker Court liberally quoted from earlier judicial deference decisions. In particular, the Court took care to highlight

[the] different relationship of the Government to members of the military. It is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often

49 Id. at 367.
50 Id. at 369 (“Expressing it another way: a serviceman’s crime against the person of an individual upon the base or against property on the base is ‘service connected,’ within the meaning of that requirement as specified in O’Callahan, 395 U.S., at 272[.]”)
51 United States v. Ruggiero, 1 M.J. 1089, 1098 (N.C.M.R. 1977) (rejecting challenge to court-martial jurisdiction over off-base rape and related offenses by marine of fellow marine); see also United States v. White, 1 M.J. 1048, 1051-52 (N.C.M.R. 1976) (rejecting challenge to court-martial jurisdiction over off-base indecent assault by sailor upon fellow sailor’s wife).
53 Id. at 743.
54 10 U.S.C. §§ 933, 934. Parker challenged both Articles under the First Amendment as unconstitutionally vague and overbroad.
55 Parker, 417 U.S. at 743 (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).
56 In In re Grimley, 137 U.S. 147, 153 (1890), the Court observed: “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” More recently we noted that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” Orlaff v. Wiloughby, 345 U.S. 83, 94 (1953), and that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . .” Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion). We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces: “The President’s commission . . . recites that ‘reposing special trust and confidence in the patriotism, valor, fidelity and abilities of the appointee he is named to the specified rank during the pleasure of the President.’ Orlaff, 345 U.S. at 91.

Parker, 417 U.S. at 743-44 (omissions and alterations in original) (citation forms modified).
employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities. As we observed in In re Grimley, 137 U.S. 147, 153 (1890), the military “is the executive arm” whose “law is that of obedience.” While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.57

The Supreme Court generally followed the precedent established in Parker in UCMJ cases it decided thereafter. In Middendorf v. Henry,58 the Court declined to recognize a constitutional right,59 to defense counsel at summary courts-martial, repeating its observation in Parker that individual rights in the Armed Forces “must perforce be conditioned to meet certain overriding demands of discipline and duty.”60

In Solorio v. United States,61 the Court followed the standard it expressed in Parker, expressly overruling its decision in O’Callahan. Solorio again presented the question whether “non-military” offenses, this time child sexual abuse, committed off-post could be tried by court-martial. In holding that the military status of the accused was sufficient to support court-martial jurisdiction, as it had been prior to O’Callahan, the Court noted that “[i]mplicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress.”62

More recently, in Weiss v. United States,63 the Court rejected a structural challenge to the UCMJ based on its failure to provide for the presidential appointment of military judges or that they be appointed for a fixed term. As Professor Victor Hansen has noted:

the Weiss Court condoned a justice system where the military commander played such a critical and involved role. Rather than use this case as an opportunity to reexamine or question the role of the military commander, the Court pointed to this aspect of the military justice system to explain why no additional appointment is needed for an officer to serve as a military judge.64

It was coincidence that Solorio, like O’Callahan, was convicted of sexual assault offenses; neither decision turned on the sexual nature of the offenses. Thus, even prior to the Solorio decision, a member of the military could be tried by court-martial for raping a fellow Service member on base. Indeed, the Court of Military Appeals found just months after O’Callahan that “where an offense cognizable under the Code is perpetrated

57 Parker, 417 U.S. at 751 (citation form modified).
59 The Court refused to recognize such a right either as a matter of Fifth Amendment due process, see Middendorf, 425 U.S. at 42-48, or under the Sixth Amendment right to counsel, see id. at 33–42. In considering the Sixth Amendment issue, the Court exhibited its level of deference by asking “whether the factors militating in favor of counsel at summary courts-martial [were] so extraordinarily weighty as to overcome the balance struck by Congress.” Id. at 44.
60 Id. at 43 (adding that it was up to Congress, not the Court, to “determine the precise balance to be struck in this adjustment”) (quoting Burns, 346 U.S. at 140).
62 Solorio, 483 U.S. at 440.
64 Hansen, supra note 19, at 447 (footnote omitted).
against the person or property of another serviceman, regardless of the circumstances, the offense is cognizable by court-martial.\textsuperscript{65}

\textsuperscript{65} United States v. Everson, 41 C.M.R. 70, 71 (C.M.A. 1969).
### A. RECENT LEGISLATION


The National Defense Authorization Act for Fiscal Year 2012 (FY12 NDAA)
\[66\] included eight provisions intended to improve sexual assault prevention and response in the Armed Forces. In the course of its study, the Subcommittee considered two statutory requirements that affect military commanders or convening authorities. Unless otherwise noted, the provisions were effective immediately:

<table>
<thead>
<tr>
<th>Section</th>
<th>Report Discussion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 582.</strong> Consideration of application for permanent change of station or unit transfer based on humanitarian conditions for victim of sexual assault or related offense.</td>
<td>Part V, Section D (see note 275)</td>
</tr>
<tr>
<td><strong>Section 585.</strong> Training and education programs for sexual assault prevention and response program.</td>
<td>Part IV; Part VIII, Section B</td>
</tr>
<tr>
<td>• <em>Curriculum was to be developed by December 31, 2012 (one year after enactment of the Act).</em></td>
<td></td>
</tr>
<tr>
<td>• <em>Section 574 of the FY13 NDAA amends this section by requiring sexual assault prevention and response training for new or prospective commanders at all levels of command.</em></td>
<td></td>
</tr>
</tbody>
</table>

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The National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA)\(^{68}\) included twelve provisions intended to improve sexual assault prevention and response in the Armed Forces. The subcommittee considered three statutory requirements that impact military commanders or convening authorities. Unless otherwise noted, the provisions were effective immediately:

<table>
<thead>
<tr>
<th>Section</th>
<th>Report Discussion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 572 (a)(2). Requires administrative discharge processing if convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged.</td>
<td>Part VI, Section D (see note 350)</td>
</tr>
<tr>
<td>Effective June 2, 2013 (180 days after enactment of the Act).</td>
<td></td>
</tr>
</tbody>
</table>

| Section 572 (a)(3). Commander to conduct climate assessments within 120 days after commander assumes command and annually thereafter so long as in command. | Part VII, Section C |
| Effective June 2, 2013 (180 days after enactment of the Act). |
| Section 1721 of the FY14 NDAA amends this section by requiring the Secretary of Defense to direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments. |

| Section 574. Enhancement to training and education for sexual assault prevention and response. | Part IV; Part VIII, Section B |
| Amends Section 585 of the FY12 NDAA to require sexual assault prevention and response training in the training for new or prospective commanders at all levels of command. |


The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA)\(^{69}\) included 36 provisions intended to improve sexual assault prevention and response in the Armed Forces, including comprehensive changes to the roles of commanders and convening authorities in military justice cases. The Subcommittee considered sixteen statutory requirements that impact military commanders or convening authorities. Unless otherwise noted, the provisions were effective immediately:

<table>
<thead>
<tr>
<th>Section</th>
<th>Report Discussion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1702 (a). Revision of Article 32, Uniform Code of Military Justice.</td>
<td>Part VI, Section B</td>
</tr>
<tr>
<td>Effective December 26, 2014 (one year after enactment of the Act).</td>
<td></td>
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</tbody>
</table>

| Section 1702 (b). Revision of Article 60, Uniform Code of Military Justice. | Part IV, Section D |
| Effective June 24, 2014 (180 days after enactment of the Act). |

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III. LEGISLATION AND POLICY

Section 1705. Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial.

- Effective June 24, 2014 (180 days after enactment of the Act).
- For offenses committed on or after effective date, limits jurisdiction for offenses of rape or sexual assault (under Art. 120), rape or sexual assault of a child (under Art. 120b), forcible sodomy (under Art. 125), or attempts thereof (under Art. 80) to general courts-martial.

Part V, Section C

Section 1706. Participation by victim in clemency phase of courts-martial process.

- Effective June 24, 2014 (180 days after enactment of the Act).
- Further amends Section 1702 of the FY14 NDAA (which amends Article 60 of the Uniform Code of Military Justice (UCMJ)).

Part IV, Section D

Section 1708. Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses.

- Effective June 24, 2014 (180 days after enactment of the Act).

Part V, Section C; Part VI, Section A

Section 1709. Prohibition of retaliation against members of the Armed Forces for reporting a criminal offense.

- Effective April 25, 2014 (120 days after enactment of the Act).

Part V, Section D (see note 276)

Section 1712. Issuance of regulations applicable to the Coast Guard regarding consideration of request for permanent change of station or unit transfer by victim of sexual assault.

Part V, Section D (see note 275)

Section 1713. Temporary administrative reassignment or removal of a member of the Armed Forces on active duty who is accused of committing a sexual assault or related offense.

Part III, Section B

Section 1721. Amends Section 572 of the FY13 NDAA by requiring the Secretary of Defense to direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments.

Part VIII, Section C (see note 508)

Section 1742. Commanding officer action on reports on sexual offenses involving members of the Armed Forces.

- Upon receipt of a report of a “sex-related offense” against a commander’s Service member, the commander must immediately forward the report to the military criminal investigative organization (MCIO).

Part V, Section B

Section 1743. Eight-day incident reporting requirement in response to unrestricted report of sexual assault in which the victim is a member of the Armed Forces.

- Requires the Secretary of Defense to prescribe regulations to carry out this section by June 24, 2014.

Part V, Section B

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
ROLE OF THE COMMANDER SUBCOMMITTEE

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<thead>
<tr>
<th>Section 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.</th>
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<td>• Requires the Secretaries of the Military Departments to review all cases under Articles 120(a), 120(b), 125, and attempts thereof, where the staff judge advocate (SJA) recommends referral and the convening authority declines to refer charges to court-martial. Requires review by the next superior commander authorized to exercise general court-martial convening authority when both the SJA recommends not referring charges and the convening authority does not refer charges.</td>
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<td>Part VI, Section B</td>
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<tr>
<th>Section 1744(e)(6). Requirement for written statement explaining the reasons for convening authority’s decision not to refer any charges for trial by court-martial.</th>
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<tbody>
<tr>
<td>Part VI, Section B (note 313)</td>
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</tbody>
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<tr>
<th>Section 1751. Sense of Congress on commanding officer responsibility for command climate free of retaliation.</th>
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<td>Part VIII, Section C</td>
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<tr>
<th>Section 1752. Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the UCMJ through courts-martial.</th>
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<td>Part V, Section C (note 262)</td>
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<tr>
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<td>Part V, Section C (note 262)</td>
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B. DEPARTMENT OF DEFENSE POLICY

In addition to congressional mandates, the Secretary of Defense has issued numerous policy changes that impact commander and convening authority roles and responsibilities in sexual assault cases. Most notably, on April 20, 2012, the Secretary of Defense elevated the initial disposition authority for sexual assault offenses to commanders in the grade of O-6 or above who also serve as special or general court-martial convening authorities. This change vested initial disposition authority at a level of command that is normally distanced from the accused and/or accuser. Since convening authorities at this level are generally removed by multiple levels of command from the unit to which an accused or accuser is assigned, the policy substantially mitigated the likelihood that a commander exercising disposition authority for these offenses will have a close personal connection to the victim or accused Service member. The Secretary of Defense’s withholding policy became effective on June 28, 2012. Prior to the policy’s implementation, Rule for Courts-Martial (R.C.M.) 401 authorized any commander who received preferred charges to dismiss or otherwise dispose of charges, unless that authority had otherwise been withheld or limited by a superior competent authority.

70 See U.S. Dep’t of Def., 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) [hereinafter Apr. 2012 SecDef Withhold Memo]]. See Part VI Section A of this report for additional discussion.

71 Any superior competent convening authority may withhold categories of misconduct from action by subordinate commanders. In accordance with R.C.M. 401(a), convening authorities across the services regularly exercise this authority with respect to certain serious offenses or offenses committed by officers and senior non-commissioned officers. See Transcript of RSP Public Meeting 231-36 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

72 Disposition of charges may include dismissal of charges with no additional action, returning charges to a subordinate commander for action, dismissal of charges with alternate administrative action, referral to a court-martial within that commander’s convening authority, or forwarding to the next superior commander with recommendations as to disposition.

73 Individual Services had policies withholding authority to take action for sexual assault offenses prior to implementation of the DoD policy. See Transcript of RSP Public Meeting 231-32 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy).
less senior commanders with limited experience sometimes made disposition decisions for allegations of sexual assault. This is no longer possible.

Contemporaneous with the elevation of the initial disposition authority for certain sexual assault cases, the Secretary of Defense announced four other initiatives on April 17, 2012, that impacted commander roles and responsibilities in sexual assault prevention and response:74

- Require explanation of sexual assault policies to all Service members within 14 days of their entrance on active duty.
- Mandate wide publication of information on sexual assault resources.
- Require commanders to conduct annual organization climate assessments.75 Section 572(a)(3) of the FY13 NDAA codified this policy. Section 1721 of the FY14 NDAA subsequently amended Section 572 of the FY13 NDAA to add a requirement that the Secretary of Defense direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments.
- Enhance training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters. Section 574 of the FY13 NDAA codified commander sexual assault prevention and response (SAPR) training requirements.

The Secretary of Defense announced additional expanded sexual assault prevention efforts on September 25, 2012. Specifically, the Secretary ordered the Services to develop training programs for core competencies and methods of assessment, requiring each Service to: (1) provide a dedicated, two-hour block of SAPR training in all pre-command and senior enlisted leader training courses, (2) provide commanders a SAPR “quick reference” program and information guide, (3) assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts, and (4) develop and implement refresher training for sustainment of SAPR skills and knowledge.76

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCMJ.77 Following this review, the Secretary directed the Office of General Counsel to draft proposed legislation that amends Article 60. The proposal eliminated convening authority discretion to change courts-martial findings except for certain offenses and required convening authorities to explain in writing any changes made to courts-martial sentences.78 Section 1702 of the FY14 NDAA codified this proposal.

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75 Service policies previously mandated organizational climate assessments, but the policy standardized the requirement across all Services. See infra Part VIII, Section C.

76 U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Evaluation of Pre-Command Sexual Assault Prevention and Response Training (Sept. 25, 2012).

77 U.S. Dep’t of Def., News Release, Statement from Secretary Hagel on Sexual Assault Prevention and Response (Apr. 8, 2013).

78 Id.
On May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan and announced six additional measures that impacted commander roles and responsibilities in sexual assault prevention and response:79

- Align military Services’ programs with a revised SAPR strategic plan.

- Develop methods to hold military commanders accountable for establishing command climate. *Section 1751 of the FY14 NDAA provided a sense of Congress that commanders are responsible for creating a command climate free of retaliation.*

- Implement methods to improve victim treatment by their peers, coworkers, and chains of command.

- Require that commanders receive copies of their subordinate commanders’ annual command climate surveys.

- Improve effectiveness of SAPR programs in recruiting organizations.

- Mandate comprehensive and regular visual inspections of all DoD workplaces, including military academies.

In response to the initiative requiring Service Secretaries to develop methods to assess performance of military commanders in establishing an appropriate command climate, each of the Services announced plans to modify annual performance evaluation programs so evaluations explicitly address the commander’s execution of this responsibility.80 At the November 20, 2013 Subcommittee meeting, each Service detailed plans to incorporate assessments into personnel systems, including plans for revising Service regulations and individual personnel evaluations.81

On August 14, 2013, the Secretary of Defense directed five additional SAPR measures that impact commander and convening authority roles and responsibilities in sexual assault prevention and response:82

- Require the DoD General Counsel to draft language for an executive order that would amend the Manual for Courts Martial to provide victims of crime the opportunity to provide input in the post-trial action phase of courts-martial. *Section 1706 of the FY14 NDAA codified this requirement.*

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80 See U.S. Dep’t of the Air Force, Memorandum from the Acting Secretary of the Air Force to the Secretary of Defense on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013); U.S. Dep’t of the Army, Memorandum from the Secretary of the Army to the Secretary of Defense on Sexual Assault Prevention and Response (SAPR) – Enhanced Commander Accountability (Nov. 1, 2013); U.S. Dep’t of the Navy, Memorandum from the Secretary of the Navy to the Secretary of Defense on Report on Enhancing Commander Accountability (Oct. 28, 2013); U.S. Marine Corps, Memorandum from the Deputy Commandant for Manpower and Reserve Affairs to the Secretary of the Navy on Enhancing Commander Accountability (Sept. 19, 2013). Service requirements for how to assess and document commander oversight of unit climate in performance evaluations differ. See infra Part VIII, Section C.

81 Transcript of RSP RoC Subcommittee Meeting 189-282 (Nov. 20, 2013) (testimony of senior Service personnel representatives).

• Require the Services to develop an enhanced protection policy that would allow the administrative reassignment or transfer of a member accused of committing a sexual assault or related offense. *Section 1713 of the FY14 NDAA codified this requirement.*

• Require consistent policies prohibiting inappropriate relations between trainers and trainees and recruiters and recruits across the Services. *Section 1741 of the FY14 NDAA codified this requirement.*

• Require the DoD Inspector General to evaluate the adequacy of closed sexual assault investigations on a recurring basis.

• Develop standard policy across the Services requiring status reports of unrestricted sexual assault allegations and actions taken to the first general/flag officer within the chain of command.

### C. PROPOSED LEGISLATION

Following the broad reforms in the FY14 NDAA, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress made with respect to sexual assault prevention and response. This report is due to the President by December 1, 2014.83 The President indicated he will consider additional reforms to the military justice system if significant improvements are not realized by that time.84 Meanwhile, increased scrutiny of the military’s handling of sexual assault cases has prompted several attempts to enact statutory change to the convening authority vested in certain senior military commanders. Some proposed legislation would divest commanders of convening authority for sex-related offenses, while other proposals seek to divest commanders of convening authority for most major crimes. Some members of Congress believe the convening authority vested in military commanders is central to the administration of military justice and must be retained.85 These legislators propose additional enhancements to the sexual assault prevention and response activities of the U.S. military and other modifications to the UCMJ that do not alter convening authority responsibilities.

#### 1. Sexual Assault Training Oversight and Prevention Act

On November 16, 2011, Representative Jackie Speier (D-CA) introduced H.R. 3435, the Sexual Assault Training Oversight and Prevention Act (STOP Act).86 The bill was not passed during the 112th Congress. On April 17, 2013, Representative Speier reintroduced the STOP Act as H.R. 1593.87 The STOP Act proposes to remove reporting, oversight, investigation and victim care of sexual assaults from the military chain of command and place jurisdiction in the newly created, autonomous Sexual Assault Oversight and Response Office.88

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83 The White House, Statement by the President on Eliminating Sexual Assault in the Armed Forces (Dec. 20, 2013).

84 Id.

85 See generally Part VII, Section C, for discussion of arguments advocating against change in commander roles in military justice actions.


88 Id.
ROLE OF THE COMMANDER SUBCOMMITTEE

In addition, the STOP Act would create a Sexual Assault Oversight and Response Council, composed primarily of civilians “independent from the chain of command within the Department of Defense,” which would oversee the Sexual Assault Oversight and Response Office and appoint a Director of Military Prosecutions. The Director of Military Prosecutions would have independent and final authority to oversee the prosecution of all sex-related offenses committed by a member of the Armed Forces, and to refer such cases to trial by courts-martial. All other offenses under the UCMJ would remain under the current system. For discussion of arguments for and against changes to commander’s disposition authority in military justice actions, see Part VII, Sections B and C, respectively.

The STOP Act has not been enacted by Congress. The bill has 148 co-sponsors and remains pending in the House Armed Services Committee, Military Personnel Subcommittee.

2. Military Justice Improvement Act of 2013

On May 16, 2013, Senator Kirsten Gillibrand (D-NY) introduced S. 967, the Military Justice Improvement Act of 2013 (MJIA). In contrast to the STOP Act, the MJIA proposed divesting convening authority from commanders for most serious crimes, not just sex-related offenses, and placing that authority in military legal officers in the grade of O-6 or above who meet certain specified criteria.

Under the MJIA, disposition authority for “covered offenses” that are not “excluded offenses” would no longer be vested in senior commanders in the chain of command who have authority to convene courts-martial. Instead, decisions whether to refer charges to trial by court-martial would be made by a new cadre of judge advocates, assigned by the Chiefs of the Services, who are independent of the chains of command of victims and those accused. Senator Gillibrand’s rationale for this proposal was to shift prosecution decision-making authority for “serious crimes akin to a felony” to non-biased, “professionally trained” military prosecutors, while leaving disposition authority for “37 serious crimes that are unique to the military . . . , such as insubordination or going absent without leave” and less serious crimes punishable by less than one year of confinement, to the chain of command.

89 Id. at § 189(c).
90 Under the STOP Act, sexual-related offenses include rape, sexual assault, aggravated sexual contact, abusive sexual contact, indecent assault, nonconsensual sodomy, “any other sexual-related offense the Secretary of Defense determines should be covered,” and attempts to commit these offenses. See id. at § 940A(c).
93 “Covered offenses” under the MJIA include offenses under the Uniform Code of Military Justice that are triable by court-martial and for which the maximum punishment authorized includes confinement for more than one year, unless otherwise excluded. Covered offenses under the current version of the MJIA (S. 1752) include conspiracy to commit such an offense under Article 81; solicitation for such an offense under Article 82; or attempt to commit such an offense under Article 80. S. 1752, 113th Cong., Military Justice Improvement Act of 2013, § 2(a)(2) (2013) [hereinafter S. 1752].
94 “Excluded offenses” under S. 967 included offenses under Articles 83 through 91, Articles 93 through 117, and Article 133. S. 967, § 2(a)(2). “Excluded offenses” under the current version of the MJIA (S. 1752) include offenses under Articles 83 through 117 and Articles 133 and 134 of the UCMJ, conspiracy to commit such an offense under Article 81, solicitation for such an offense under Article 82; or attempt to commit such an offense under Article 80. S. 1752, § 2(a)(3).
96 Transcript of RSP Public Meeting 308-09 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).
The Subcommittee heard testimony about technical challenges with S. 967. Among the criticisms presented to the Subcommittee, the proposal appeared to create a bifurcated system where some crimes (covered offenses) were removed to a separate system for prosecution and others remained under the current system, at times with illogical outcomes. For example, an attempt to commit rape under Article 80 would be tried under the current system and a rape under Article 120 (which is a covered offense) would be tried in this new system. The proposal also included no mechanism for combining covered and not-covered offenses that arose out of the same alleged criminal acts into one prosecution system. Consequently, it was unclear how multiple offenses arising out of the same alleged criminal conduct would be addressed. This uncertainty raised due process concerns, with the potential for delayed trials and double jeopardy issues.

The Senate Armed Services Committee did not include the MJIA in its mark of the FY14 NDAA. On November 18, 2013, Senator Gillibrand filed an amended version of the MJIA. The amendment addressed technical criticisms levied against S. 967 but retained the bill’s primary feature of transferring convening authority for most serious crimes to independent, senior judge advocates. The amendment was not enacted as part of the FY14 NDAA. On November 20, 2013, Senator Gillibrand filed the MJIA as a stand-alone bill, S. 1752. On Thursday, March 6, 2014, the Senate, on a 55 to 45 vote, rejected a motion for cloture on the MJIA, which precluded the Senate from voting on the underlying bill. The MJIA remains pending in the Senate and Senator Gillibrand could try to incorporate it, or another version of it, into the next defense authorization bill.

Under the revised version of the MJIA, the decision by the new disposition authority to try covered offenses by courts-martial must include determinations with regard to “all known offenses.” This provision purports to ensure joinder for trial of all offenses arising out of the same criminal transaction, including lesser-included offenses and offenses that would otherwise be subject to a commander’s convening and disposition authority (i.e., excluded offenses). As Senator Gillibrand explained: “We were also asked about crimes that happen simultaneously—for example, what if during a sexual assault, crimes are also committed that fall under the old system? In order to clarify any confusion about this question, the amendment says that all known crimes will be charged under the new system.” The MJIA provides that the determination by the proposed judge advocate disposition authority “to try” covered offenses by court-martial is binding on “any applicable convening authority for a trial by court-martial” as to those charges.

The MJIA requires each Service Chief or Commandant (for the Marine Corps and Coast Guard) to establish an office (Section 3(c) Office) to convene general and special courts-martial for covered offenses, and to

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97 See generally Transcript of RSP RoC Subcommittee Meeting (Nov. 13, 2013).
101 See Senate Rule XXII, available at http://www.rules.senate.gov/public/index.cfm?p=RuleXXII. Cloture is the procedure by which the Senate can vote to end debate on a bill without rejecting the bill; if cloture is invoked, a bill may proceed to a vote. The majority required to invoke cloture on this motion was 60 Senators.
103 See Floor Speech, supra note 101.
detail members to those courts-martial (responsibilities assigned currently to the convening authority). The authority to convene general courts-martial under Article 22 of the UCMJ would be amended to add two additional convening authorities: (1) officers in the Section 3(c) Office and (2) officers in the grade of O-6 or higher who are assigned such responsibility by the Service Chief or Commandant. This new convening authority would have authority only with respect to covered offenses.

The MJIA mandates that staff for the Section 3(c) Office must be detailed or assigned to the office from billets already in existence on the date of enactment of the Act, and no additional resources are authorized for implementation of the Act. For implementation of any legislation that creates additional structure, resources are an issue of primacy. For example, Section 1716 of the FY14 NDAA codified the Special Victim Counsel (SVC) program. Unlike the current version of the MJIA, however, Section 1716 did not contain a prohibition of additional resources for implementation. In fact, to assist with the cost of staffing and operation, Congress specifically appropriated funds to the DoD to implement the SVC program.

DoD leadership expressed to the RSP that implementing a new convening authority for covered offenses as proposed by the MJIA would involve “significant personnel and administrative costs” and would remove senior O-6 judge advocates from other critical responsibilities. DoD expressed concern that developing “a sufficient number of O-6 judge advocates with significant trial experience while maintaining other critical competencies would take years.” Additionally, the DoD Office of Cost Assessment and Program Evaluation (CAPE) estimated the additional personnel required for the MJIA would cost $113 million dollars per year. Without endorsing the CAPE assessment, the Subcommittee recognizes the substantial likelihood that additional resources will be required to effectively implement the requirements of the MJIA.

3. Victims Protection Act of 2014

On January 14, 2014, Senator Claire McCaskill filed the Victims Protection Act of 2014 (VPA), which seeks to provide additional enhancements to the sexual assault prevention and response activities of the Armed Forces. On March 10, 2014, the Senate unanimously passed the VPA. The VPA contains three provisions that impact military commanders or convening authorities:

Section 2 of the VPA modifies Section 1744 of the FY14 NDAA to mandate Secretarial review of referral decisions where the senior trial counsel believes a case should be referred to court-martial and the convening authority decides to not refer the case, in addition to Section 1744’s mandate when the SJA differs similarly

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106 Id. at § 3(c).
107 Id. at § 3(a)
108 Id. at § 2(a)(4)(c).
110 Id.
113 Letter from the Judge Advocates General to Senator Carl Levin, Chair, Senate Armed Services Committee (SASC) (Oct. 28, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131113_ROC/07_JointTJAG_Ltr_SenLevin.PDF.
from the convening authority. The DoD expressed concerns with this provision, explaining that it believes such review is not warranted where the SJA has thoroughly reviewed a case, consulted with the assigned trial counsel and recommended non-referral.115

While a contrary opinion from a staff judge advocate regarding a GCMCA’s decision not to refer a sexual-related offense to court-martial may warrant Secretarial review, it is not clear that the same deference should be afforded in response to a senior trial counsel’s disagreement over disposition. In nearly all circumstances, the “senior trial counsel” assigned to a case is a judge advocate with significantly less experience than the staff judge advocate advising the convening authority. The policy implications of allowing the opinion of a senior trial counsel, when he or she believes a case should be referred to courts-martial and the SJA and convening authority disagree, to trigger Secretarial level review seems patently unwise. Further, it is unlikely that the Service Secretary, who is more removed from the circumstances of the case, will be better positioned to determine an appropriate outcome than the original convening authority.

Section 3(c) of the VPA requires an assessment of SAPR program support in all performance appraisals, and the performance appraisals of commanding officers must specifically indicate the extent to which the commanding officer has or has not established a command climate in which allegations of sexual assault are properly managed and fairly evaluated and a victim can report criminal activity, including sexual assault, without fear of retaliation.116

Section 3(d) of the VPA requires the chain of command of both the victim and the accuse to conduct a command climate assessment following any incident involving a covered sexual offense. The assessment must be provided to the MCIO conducting the investigation of the offense concerned and the next higher-level commander.117

The DoD expressed concerns with Section 3(d). While DoD believes command climate assessments are an important tool, the Department is concerned that requiring a command climate survey after every report of an alleged sexual assault could lead to survey fatigue and resentment against victims for reporting offenses.118

Evaluating a unit’s culture or climate may be helpful or may provide relevant information in some criminal investigations, but it is not clear to the Subcommittee how organizational climate assessments would be effective following each report of a sexual offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements for personnel and the possibility of survey fatigue may also reduce the accuracy of feedback and the effectiveness of assessments.

115 Letter from the Assistant Secretary of Defense for Legislative Affairs to Senator Carl Levin, Chair, SASC (undated), currently available at http://responsesystemspanel.whs.mil/index.php/pubcomment-gen.

116 S. 1917, § 3(c).

117 Id. at § 3(d). For additional discussion on requirements for command climate assessments, see Part VIII, infra, of this report.

118 Letter from the Assistant Secretary of Defense for Legislative Affairs to Senator Carl Levin, Chair, SASC (undated), currently available at http://responsesystemspanel.whs.mil/index.php/pubcomment-gen.
ROLE OF THE COMMANDER SUBCOMMITTEE

D. PART III SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 1:** The Subcommittee recommends against any further modification to the authority vested in commanders also designated as court-martial convening authorities. Accordingly, the Subcommittee does not recommend Congress adopt the reforms in either the Sexual Assault Training Oversight and Prevention Act (STOP Act) or the Military Justice Improvement Act (MJIA).

**Finding 1-1:** Congress has enacted significant amendments to the Uniform Code of Military Justice (UCMJ) to enhance the response to sexual assault in the military, and the Department of Defense (DoD) implemented numerous changes to policies and programs for the same purpose. Some changes have only just been implemented and other amendments to the UCMJ have not yet been implemented, and DoD has not yet fully evaluated what impact these reforms will have on the incidence, reporting or prosecution of sexual assault in the military.

**Finding 1-2:** The MJIA includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel and yet implementing the convening authority mandate included in the MJIA will involve significant personnel and administrative costs.

**Finding 1-3:** Implementing the MJIA will require reassignment of O-6 judge advocates who meet the statutory prosecutor qualifications. The existing pool of O-6 judge advocates who meet these requirements is finite; and many of these officers routinely serve in assignments related to other important aspects of military legal practice. Therefore, implementing MJIA’s mandate, absent an increase in personnel resources, may result in under-staffing of other important senior legal advisor positions.

**Recommendation 2:** Congress should not adopt Section 2 of the Victims Protection Act of 2014 (VPA). The decision whether to refer a case to courts-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate.

**Finding 2-1:** Section 2 of the VPA would mandate Secretarial review of cases involving sexual-related offenses when the senior trial counsel detailed to a case recommends that charges be referred to trial and the convening authority, upon the advice of his or her staff judge advocate, decides not to refer charges. Most “senior trial counsel” assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. This provision inappropriately elevates the assessments of generally more junior judge advocates and would likely prove to be unproductive, disruptive, and unnecessary to ensuring the fair disposition of cases.

**Recommendation 3:** Congress should not adopt Section 3(d) of the VPA. Alternatively, the Secretary of Defense should direct the formulation of a review process to be applied following each reported instance of sexual assault to determine the non-criminal factors surrounding the event. Such reviews should address what measures ought to be taken to lessen the likelihood of recurrence (e.g.; physical security, lighting, access to alcohol, off-limits establishments, etc.).

**Finding 3-1:** Evaluating a unit’s culture or climate may be helpful or may provide relevant information in some criminal investigations, but it is not clear how organizational climate assessments would be effective following each report of a sexual offense. Organizational climate may not be a contributing factor in every alleged crime.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
III. LEGISLATION AND POLICY

of sexual assault. Additional survey requirements for personnel and the possibility of survey fatigue may also reduce the accuracy of feedback and the effectiveness of assessments.

**Finding 3-2:** DoD has not formalized a standard process to review reported incidents of sexual assault to determine what additional actions might be taken in the future to prevent the occurrence of such an incident. Some organizations and commands within DoD have developed review processes that warrant evaluation by DoD.

**Recommendation 4:** The Secretary of Defense should establish an advisory panel, comprised of persons external to the Department of Defense, to offer to the Secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD’s sexual assault prevention and response programs and policies.
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

Experts agree that sexual violence is learned and is fed by cultural norms such as dominance over others and the objectification of women. Sexual violence in the military is no different: solving the military’s sexual assault problem “will require an integrated effort that includes a cultural transformation within the armed forces, education and training to recognize and prevent sexual assaults, [and] structural and organizational changes to reduce the opportunities for” their occurrence. Accordingly, Section 585 of the FY12 NDAA required the Service Secretaries to develop a curriculum “to provide sexual assault prevention . . . training and education for members of the Armed Forces . . . to strengthen individual knowledge, skills, and capacity to prevent” sexual assault. Section 585 further directed that curriculum development include consultation with outside experts on sexual assault prevention training.

While they may disagree as to the exact extent of commanders’ responsibility within the military justice system, policymakers within and outside of DoD agree commanders play a central role in DoD’s prevention efforts. To

119 See, e.g., Transcript of RSP Public Meeting 49–50 (June 27, 2013) (testimony of Ms. Delilah Rumberg, Executive Director, Pennsylvania Coalition Against Rape); accord Transcript of RSP Public Meeting 87–89 (Dec. 12, 2013) (testimony of Ms. Anne Munch, Owner, Anne Munch Consulting, Inc.).

120 Transcript of RSP Public Meeting 18–19 (Sept. 24, 2013) (testimony of Professor Christopher W. Behan, Southern Illinois University School of Law); accord Transcript of SASC Hearing 19 (June 4, 2013) (testimony of Admiral Robert J. Papp, Jr., Commandant, U.S. Coast Guard) (noting that prevention “is the first and best option”); Transcript of Briefing on Sexual Assault in the Military, U.S. Comm’n on Civil Rights 162 (Jan. 11, 2013) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office [hereinafter SAPRO]) (“Any effective strategy to combat sexual assault must include prevention.”).


122 As the Deputy Director of DoD SAPRO testified before the Subcommittee, “Commanders and leaders are the center of gravity and the most important actors in [the prevention] line of effort.” Transcript of RoC Subcommittee Meeting 92 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO); id. at 23 (noting that “it’s critical for commanders and leaders to be part of the solution because climate is a big part of it”). See also Transcript of RSP Public Meeting 19–20 (Sept. 24, 2013) (testimony of Professor Christopher W. Behan, Southern Illinois University School of Law) (“[N]o plan to resolve the crisis will succeed without the active involvement of military commanders in all phases of the problem from prevention to punishment.”); Transcript of RSP Public Meeting 213 (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino, The Judge Advocate General, U.S. Army) (“It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders . . . . It is commanders’ focus, involvement, and emphasis that will bring the change in the culture we seek.”); Written Statement of Protect Our Defenders to RSP 3 (Sept. 17, 2013) [arguing that removing convening authority from commanders would “free[] [them] to focus on preventing sexual assault”]; Transcript of SASC Hearing 75 (June 4, 2013) (testimony of Colonel Tracy W. King, U.S. Marine Corps) (“Preventing sexual assault in my regiment is my personal responsibility.”); Transcript of Briefing on Sexual Assault in the Military, U.S. Comm’n on Civil Rights 100–01 (Jan. 11, 2013) (testimony of Professor Victor Hansen, New England School of Law) (“[C]ommanders [must] do all that is reasonable and within their power and authority to investigate, prevent and suppress these sexual assault crimes within their ranks.”); Letter from Representatives of Government Accountability Office to The Honorable Louise M. Slaughter, Ranking Member, Committee on Rules, House of Representatives (Mar. 30, 2012) (“DOD
ensure commanders are adequately trained to address these responsibilities, Section 585 directed the Secretary of Defense to “provide for the inclusion of a sexual assault prevention and response training module at each level of professional military education” and that the training “shall be tailored to the new responsibilities and leadership requirements of members of the Armed Forces as they are promoted.”

A. CONSENSUS AND DEBATES IN CURRENT PREVENTION RESEARCH

Generally speaking, the field of sexual violence prevention remains under-resourced, with budgets that “are not terribly deep.” In the words of one behavioral science expert who testified before the Response Systems Panel, “there’s more that we don’t know than we know” about preventing sexual violence; “[w]e’re experts in a few things [] and ignorant about most.” At its February 12, 2014 meeting, the Subcommittee heard testimony and received information outlining the best available science on preventing sexual violence from representatives from the Division of Violence Prevention of the Centers for Disease Control and Prevention (CDC), “the lead federal organization for violence prevention.” Practitioners and academic researchers provided additional testimony and information at the meeting, including several presenters who had worked with the Services and/or studied the adaptation of prevention programs to military settings. From these sources, the Subcommittee gained valuable insight into the risk and protective factors for sexual violence, as well as effective prevention strategies and how best to implement them.

1. Public Health Approach to Sexual Assault Prevention

The CDC defines sexual violence as a public health problem. Accordingly, prevention strategies involve three essential elements, consistent with approaching any threat to the public health such as those posed by life-threatening communicable diseases like HIV and tuberculosis. First, prevention efforts are directed at

and the military services rely largely on Commanders and Sexual Assault Response Coordinators to implement SAPR programs at military installations, including the coordinating and reporting of sexual assault incidents.”), available at http://www.gao.gov/assets/590/589780.pdf.


124 Transcript of RoC Subcommittee Meeting 56 (Feb. 12, 2014) (testimony of Ms. Elizabeth Reimels, Public Health Analyst, CDC Division of Violence Prevention).


127 While the CDC refers to “sexual violence” instead of “sexual assault,” the term used by DoD SAPRO, both terms are defined broadly so as to include sexual acts committed or attempted without the victim’s freely given consent. Compare Transcript of RoC Subcommittee Meeting 14-15 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC), with Transcript of RSP Public Meeting 96 (June 27, 2013) (testimony of Major General Gary Patton, Director, DoD SAPRO) (noting that “sexual assault” encompasses the statutory offenses of rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, and attempts to commit these offenses). Although the CDC includes within its definition of “sexual violence” certain non-contact offenses such as coerced viewing of pornography, the CDC has begun to use the term “contact sexual violence” in the context of military sexual assault to more closely align with the DoD definition. National Center for Injury Prevention and Control, Prevalence of Intimate Partner Violence, Stalking, and Sexual Violence Among Active Duty Women and Wives of Active Duty Men – Comparisons with Women in the U.S. General Population, 2010: Technical Report 10 (Mar. 2010) [hereinafter NCIPC Technical Report]; Transcript of RoC Subcommittee Meeting 173-75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

the entire population. Second, partnerships are emphasized, as multiple levels of society are simultaneously targeted. Third, decisions and policies are driven by scientific data.\(^{128}\)

The public health approach translates these strategic elements into a workable model for sexual violence prevention. First, the nature, magnitude, and burden of sexual violence are defined. Second, risk factors (those factors that increase the risk of sexual violence) and protective factors (factors that either decrease the risk of sexual violence or buffer the effect of a risk factor) for sexual violence are identified. Third, prevention strategies that address the risk and protective factors are tested and developed, and successful strategies are identified and widely adopted.\(^{129}\)

As part of its approach, the CDC employs a sexual violence prevention framework called the social-ecological model. The social-ecological model recognizes four distinct levels or settings at which risk factors can occur: (1) the individual; (2) family/peer; (3) community; and (4) societal. Because risk factors can occur in each of these contexts, the social-ecological model envisions multiple strategies across multiple levels. This comprehensive approach creates a “surround sound” effect, such that people hear the same message in multiple ways from multiple influencers.\(^{130}\)

While it focuses on “primary prevention” strategies that target potential perpetrators, the CDC recognizes that strategies geared toward different or wider audiences may be effective, depending on particular risk and protective factors involved.\(^{131}\) For example, victim-focused strategies can “show some positive effects”; these programs stress risk reduction by teaching potential victims how to protect themselves from perpetrators.\(^{132}\) As described below, the CDC also recognizes “promising” approaches that target potential bystanders, appealing to the wider audience of the peer groups that are at risk for sexual violence.\(^{133}\)

2. Myths and popular misconceptions about sexual violence

The CDC noted that some sexual violence prevention strategies reflect popular beliefs and common understandings that may not provide an accurate, scientifically based assessment of sexual violence issues. For example, the CDC underscores the following common misconceptions about sexual violence:

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128 Transcript of RoC Subcommittee Meeting 7-8 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D).
129 Id. at 8-9, 17.
130 Id. at 9-14, 36. In addition to comprehensiveness, as the “best practices” of prevention, the CDC recommends that prevention programs: be based on theory and research; promote positive relationships; be appropriately timed in participants’ development; use varied teaching methods; reflect the culture of participants; use evaluation to assess impact and effects; employ well-trained staff; and be of sufficient dosage. Id.; accord National Sexual Violence Resource Center, “Resources for Sexual Violence Preventionists: Resource Packet: Intro” (2012); see also Andra Teten Tharp, Preventing Sexual Violence Perpetration 10-11 (Feb. 12, 2014) (PowerPoint presentation to RoC Subcommittee) [hereinafter CDC PowerPoint Presentation].
132 Transcript of RoC Subcommittee Meeting 73 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).
133 Id. at 72-76. When reviewing evaluations of a given program to determine whether it is effective, the CDC considers such factors as whether positive changes can be attributed to the program, whether changes in behavior resulted rather than merely changes in attitude, and whether such behavioral effects are sustained over time. When existing evaluations do not quite prove that a program meets such requirements but that it warrants continued research, the CDC deems such a program “promising.” Id. at 24-25.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

• ‘Sexual violence is perpetrated by relatively few men.’\textsuperscript{134} While 6 to 10 percent of men in some sexual violence surveys respond that they perpetrated rape, the self-report rate climbs to 25 to 50 percent of male respondents when sexual violence is defined more inclusively.\textsuperscript{135} This dramatic difference in potential perpetrator risk justifies a public health approach where prevention efforts are universally directed toward the entire population. Moreover, because re-perpetration may be less common than conventional wisdom suggests, “there are so many more opportunities for prevention” beyond “a criminal justice kind of response.”\textsuperscript{136}

• ‘Perpetrators of sexual violence tend to fit a certain profile.’\textsuperscript{137} According to Dr. David Lisak, an expert on sexual violence whose research focuses on rape, “decades of social science research and media coverage [...] have focused on the tiny handful of rapists whose crimes are reported by victims and who are then subsequently successfully prosecuted.”\textsuperscript{138} As Dr. Lisak explains, many of these incarcerated rapists “committed acts of grievous violence, inflicting gratuitous injuries on victims,” many of whom were “total strangers.” Resulting media attention spurs “classic” myths about rapists: “they wear ski masks, hide in ambush, attack strangers, and inflict brutal injuries on their victims.”\textsuperscript{139} In fact, according to the CDC, 35 different risk factors are associated with sexual violence, meaning perpetrators are actually a dissimilar population whose behavior is not easily explainable or predictable.\textsuperscript{140}

• ‘All perpetrators re-perpetrate.’\textsuperscript{141} A March 2014 study found that approximately 70 percent of the known “sex offending population” pose a low to low/moderate risk of reoffending.\textsuperscript{142} In contrast, Dr. Lisak contends that perpetrators of rape “tend to be serial offenders” and “are accurately and appropriately labeled as predator,” noting that in a 2009 Naval Health Research Center survey where 13 percent of Navy recruits acknowledged having committed rapes, 71 percent of these who

\begin{itemize}
  \item \textsuperscript{134} Transcript of RoC Subcommittee Meeting 22 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); see also Anna Mulrine, US military’s new tactic to curtail sexual assaults: nab serial predators, The CHRISTIAN SCIENCE MONITOR (Feb. 24, 2014) (noting that DoD “is putting new emphasis on ferreting out serial predators within the ranks, as military officials become increasingly convinced that relatively few people are responsible for the bulk of sex crimes”).
  \item \textsuperscript{135} Transcript of RoC Subcommittee Meeting 20-21, 41-47 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); id. at 49 (testimony of Sarah DeGue, Ph.D., Behavioral Scientist, Division of Violence Prevention, CDC). But see Transcript of RSP Public Meeting 20, 68 (Dec. 11, 2013) (testimony of Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School) (representing that “five percent of men in any given population will commit a sexual assault either one time or many times” and that “there’s a small group of people, primarily men, who are creating a vast victim pool in our society, both in the military and outside the military”).
  \item \textsuperscript{136} Transcript of RoC Subcommittee Meeting 20-21, 42-47 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); accord id. at 49 (testimony of Sarah DeGue, Ph.D.).
  \item \textsuperscript{137} Id. at 22 (testimony of Andra Teten Tharp, Ph.D.).
  \item \textsuperscript{139} David Lisak, \emph{Understanding the Predatory Nature of Sexual Violence}, 14 \textit{Sexual Assault Report} 49, 50 (2011).
  \item \textsuperscript{140} Transcript of RoC Subcommittee Meeting 21 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); see also Transcript of RSP Public Meeting 37-38 (Dec. 11, 2013) (testimony of Mr. Russ Strand, U.S. Army Military Police School) (“[T]he biggest mistake we’ve made is that we viewed sex offenders as a group, a homogenous group of people. But they’re not. They’re as individual as everybody else and they offend for a variety of reasons.”).
  \item \textsuperscript{141} Transcript of RoC Subcommittee Meeting 22 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).
  \item \textsuperscript{142} Transcript of Comparative Systems Subcommittee Meeting 40 (Feb. 25, 2014) (testimony of Robin J. Wilson, Ph.D.) (citing R. Karl Hanson, et al., \emph{High Risk Sex Offenders May Not Be High Risk Forever}, \textit{Journal of Interpersonal Violence} (2014)).
\end{itemize}
acknowledged committing rape “were serial offenders who committed an average of six sexual assaults.” Estimating re-perpetration risk may depend in part on the definition of sexual violence that is used, and because studies indicate differing conclusions about re-perpetration, it is important to ensure diverse perspectives help inform prevention strategies.

3. Current gaps in research

As noted, research into sexual violence prevention generally remains under-resourced, precluding research that experts believe is necessary to develop effective programs. A recent CDC review of 191 research studies found that certain areas are particularly under-researched. For example, the community and societal levels of the social-ecological model received relatively little attention. The CDC also found prevention research concentrated on sexual violence perpetrated by male college students against their female peers. There is “very little work” that examines the risk and protective factors that are unique to male-on-male sexual violence.

The CDC also noted a need for further research into risk and protective factors that are “military-specific” when compared to the general population. For example, the CDC suggests further study of deployment (in particular, multiple deployments and combat deployments) as a potential military-specific risk factor. Military-specific protective factors warranting additional evaluation include having at least one fully employed family member and access to health care, stable housing, and family support services.

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143 Lisak, *supra* note 139, at 56 (citing Stephanie K. McWhorter, et al., *Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel*, 24 VIOLENCE AND VICTIMS 209 (2009)); accord *Transcript of RSP Public Meeting* 39-40 (Dec. 12, 2013) (testimony of Ms. Anne Munch, Owner, Anne Munch Consulting, Inc.) (citing study by Dr. Lisak finding that 63 percent of the six percent of men who admitted in survey that they had committed rape self-reported as serial rapists, and finding that 71 percent of male respondents in military survey self-reported as serial rapists, averaging seven rapes each); *Transcript of RSP Public Meeting* 67 (Dec. 11, 2013) (testimony of Mr. Russ Strand, U.S. Army Military Police School) (representing that “a good part of sex offenders are serial”).

144 *Transcript of RoC Subcommittee Meeting* 17-19 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC; Caroline Lippy and Sarah DeGue, “Summary of Preliminary Findings for Members of the Response Systems to Adult Sexual Assault Crimes Panel in the Office of the General Counsel, Department of Defense,” at 1 [unnumbered] (Feb. 13, 2014) [summarizing preliminary findings of review expected to be made publicly available by late 2014 entitled Using Alcohol Policy to Prevent Sexual Violence Perpetration: A Review of Current Evidence] [hereinafter Lippy & DeGue Summary].

145 *Transcript of RoC Subcommittee Meeting* 17-20 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

4. Effective Prevention Strategies and Programs

Consistent with best practice, an effective public health approach to sexual violence prevention has greater potential to impact behavior to the extent that it applies multiple and varied strategies at the different levels of a given environment. The following diagram provides an example of such a comprehensive approach:  

<table>
<thead>
<tr>
<th>Individual:</th>
<th>Relationships:</th>
<th>Leadership:</th>
<th>Community:</th>
<th>Society:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social-Emotional Skills</td>
<td>Promising Bystander Intervention</td>
<td>Engagement and support</td>
<td>Social Norms Campaign and Monitoring High Risk Areas</td>
<td>Alcohol Policy Strengthen and Support Enforcement, Response, and Reporting Policies</td>
</tr>
</tbody>
</table>

Thus, according to the CDC, applying multiple strategies simultaneously in each context has greater potential to impact behavior: conflict resolution and emotion regulation at the individual level; bystander intervention within peer groups; engaged and supportive leadership; instilling cultural change and monitoring of areas reported to feel unsafe at the local level; and introduction of alcohol policies and enforcement of victim protection measures at the societal level. A comprehensive approach employs cohesive and complementary skills and messages such that the strategies build upon one another, creating a “surround sound” effect that permeates the environment.  

147 CDC PowerPoint Presentation, supra note 130, at 43 (bolded headings added for sake of clarity).

148 Transcript of RoC Subcommittee Meeting 36-38 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); accord National Sexual Violence Resource Center, Engaging Bystanders to Prevent Sexual Violence: A Guide for Preventionists 2 (2013) [hereinafter NSVRC, Engaging Bystanders]; see also Transcript of RoC Subcommittee Meeting 107-10 (Feb. 12, 2014) (testimony of Ms. Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault) (emphasizing diversity of motivations for individuals’ changes in behavior) (“[I]f we really want to be serious about preventing sexual violence, we have to look at it on all these different levels, because some things are going to resonate with some folks, and other things aren’t[,]”); id. at 121 (testimony of Victoria L. Banyard, Ph.D., Co-Director, Prevention Innovations, University of New Hampshire) (“[O]ne of the things that we have learned in our research on college campuses is that the same prevention program . . . will have different impacts for different people, based on their level of awareness, their level of motivation for engaging in it.”).
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

a. Bystander intervention

College campuses increasingly use bystander intervention education, and scientific studies show the military can effectively adapt it.\(^{149}\) Compared to college campuses, peer groups on installations involve similar high concentrations of young adults aged 18-24 living in relatively small residential spaces, who can encounter similar potential sexual violence risks.\(^{150}\)

Bystander intervention programs teach peer group members how to be “engaged bystanders,” defined by the National Sexual Violence Resource Center (NSVRC) as “someone who intervenes in a positive way before, during, or after a situation or event in which they see or hear behaviors that promote sexual violence.”\(^{151}\) As defined, “bystander intervention” is somewhat of a misnomer, since the approach encourages preventive engagement in addition to interrupting incidents already occurring. The approach shifts prevention responsibility from the potential perpetrator or potential victim to everyone in the community.\(^{152}\)

Dr. Jackson Katz, co-founder of the successful Mentors in Violence Prevention (MVP),\(^{153}\) told the Subcommittee that some prevention programs employ “a very narrow understanding” of bystander intervention, limited to interrupting an incident as it is occurring. In contrast, effective bystander intervention programs encourage peer groups to guard against attitudes, beliefs, and behaviors that contribute to a climate where sexual violence may occur. This spectrum includes language and behaviors including sexist comments, sexually objectifying jokes, and vulgar gestures.\(^{154}\) Studies show bystander intervention programs can be effective among both male and female participants.\(^{155}\)

b. Alcohol policy

Studies indicate a strong and consistent relationship between alcohol consumption and sexual violence perpetration.\(^{156}\) Alcohol policy strategies encompass laws and regulations at the local, state, and national level.

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149 See, e.g., Sharyn J. Potter and Mary M. Moynihan, Bringing in the Bystander In-Person Prevention Program to a U.S. Military Installation: Results from a Pilot Study, 176 MILITARY MEDICINE 870, 874 (2011) (finding that soldiers who participated in a bystander intervention program on their installation were “significantly more likely to report that they had engaged in” bystander-intervention behaviors); Sharyn J. Potter and Jane G. Stapleton, Translating Sexual Assault Prevention from a College Campus to a United States Military Installation: Piloting the Know-Your-Power Bystander Social Marketing Campaign, 27(8) JOURNAL OF INTERPERSONAL VIOLENCE 1593, 1613 (2012) (finding that soldiers’ exposure to a bystander-intervention social-marketing campaign increased their sense of responsibility for prevention of sexual assaults on their installation).

150 Transcript of RoC Subcommittee Meeting 74–75 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); see also Transcript of RSP Public Meeting 86-89 (Dec. 12, 2013) (testimony of Ms. Anne Munch, Owner, Anne Munch Consulting, Inc.) (endorsing bystander training as “a piece of the prevention model that we don’t focus enough on”).

151 NSVRC, Engaging Bystanders, supra note 148, at 2.

152 Id. at 3; see, e.g., Potter and Moynihan, supra note 149, at 870; Victoria L. Banyard, et al., Sexual Violence Prevention through Bystander Education: An Experimental Evaluation, 35: 4 J. of CMY. PSYCHOLOGY 463, 464 (2007).

153 Evaluations find the MVP program effective in both college and high school environments, and promising as adapted in the Navy and Marine Corps, especially among E-1 to E-3 participants. NSVRC, Engaging Bystanders, supra note 148, at 13. For more information about the history and development of the MVP program, see Jackson Katz, “Penn State: The mother of all teachable moments for the bystander approach” (Dec. 1, 2011), at http://nsvrc.org/news/Jackson-Katz-Series_Penn-State-Teachable-moment, and NSVRC, Engaging Bystanders, supra note 148, at 12-13.

154 Transcript of RoC Subcommittee Meeting 86-89 (Feb. 12, 2014) (testimony of Jackson Katz, Ph.D.); Katz, supra note 153.


156 Transcript of RoC Subcommittee Meeting 34 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); Lippy & DeGue Summary, supra
intended to regulate or modify the production, sale, and consumption of alcohol.\textsuperscript{157} Extrapolating from a recent study of programs for middle and high school students, the CDC identified alcohol policy as another domain where promising programs may be applicable to military settings.\textsuperscript{158}

The CDC identified three alcohol policy strategies that appear to reduce consumption and, in turn, reduce incidence of sexual violence:

- **pricing strategies:** Increasing the price of alcohol is associated with reduced rates of rape and sexual assault, as well as risk factors such as risky sexual behaviors.

- **outlet density:** Decreasing the number of locations where alcohol is served or sold in a given area is associated with lower rates of self- and police-reported sexual violence, as well as risk factors such as hostility and aggression.

- **college campus restrictions:** Campus-wide bans of alcohol are associated with lower rates of on-campus sexual violence. In addition, substance-free dorms have been linked to a lower incidence of rape and sexual assault in the dating context.\textsuperscript{159}

The CDC considers these alcohol policy strategies promising based on study evidence. Studies focused on civilian universities, but the CDC believes they may be similarly promising in military settings, given demographic and risk factor similarities.\textsuperscript{160}

Identifying populations with heightened vulnerability

In addition to alcohol consumption, studies increasingly identify prior victimization as a sexual violence risk factor. Studies show that individuals, especially women, who are sexual assault victims are significantly more likely to suffer sexual victimization again later in life. One study found that more than one third of women raped as minors were also raped as adults. The 2012 Workplace and Gender Relations Survey conducted by the Defense Manpower Data Center found that 45 percent of women and 19 percent of men who experienced unwanted sexual contact in the past 12 months also experienced unwanted sexual contact before entering the military.\textsuperscript{161}

\begin{thebibliography}{9}
\bibitem{note144} at 1.
\bibitem{157} Lippy & DeGue Summary, \textit{supra} note 144, at 1.
\bibitem{158} \textit{Transcript of RoC Subcommittee Meeting} 31–34 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., observing that “approximately half of sexual assaults involve consumption of alcohol, 34 to 74 percent of sexual violence perpetrators used alcohol at the time of assault, and men who drink heavily are more likely to report committing sexual assault”); see also Lippy & DeGue Summary, \textit{supra} note 144, at 1.
\bibitem{159} \textit{Transcript of RoC Subcommittee Meeting} 34–35, 41 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); \textit{id.} at 65–66 (testimony of Sarah DeGue, Ph.D., Behavioral Scientist, Division of Violence Prevention, CDC); Lippy & DeGue Summary, \textit{supra} note 144, at Table 1; see also CDC PowerPoint Presentation, \textit{supra} note 130, at 39–41.
\bibitem{160} \textit{Transcript of RoC Subcommittee Meeting} 74–75 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.). But see \textit{id.} at 342 (testimony of Command Sergeant Major Pamela Williams, U.S. Army) (“I would say even if we . . . raised the price, you know, made it limited hours, I mean, soldiers would still, you know, they’re able to drive off-post, they would be able to acquire it in some manner.”); \textit{id.} at 343 (testimony of Senior Master Sergeant Patricia Granan, U.S. Air Force) (noting that after alcohol was banned in barracks at one installation, sexual assaults ceased on base but increased off base); \textit{id.} at 344–45 (testimony of Sergeant Major Mark Allen Byrd, Sr., U.S. Marine Corps) (observing that enlisted Marines often find ways to get around alcohol restrictions).
\bibitem{161} \textit{White House Report}, \textit{supra} note 126, at 9 & n.8 (citing \textit{National Center for Injury Prevention and Control, National Intimate Partner and Sexual Violence...}
Different theories seek to explain re-victimization levels. For example, once sexually assaulted, some survivors may initiate risky behavior such as heavy drinking to cope with resulting mental health issues, thereby putting themselves at increased risk for subsequent sexual assault.\textsuperscript{162} Other survivors may experience cognitive changes in how they perceive risk.\textsuperscript{163} Programs that focus on survivors of sexual assault are a “secondary prevention” strategy.\textsuperscript{164} For participants to be receptive to such programs, instruction must teach risk-reduction techniques in a way that avoids unintentional victim-blaming messages.\textsuperscript{165}

The Subcommittee also heard evidence that men who experienced physical abuse as children are more likely to perpetrate rape against women than those who were not abused.\textsuperscript{166} This suggests opportunities to develop programs that help survivors of prior sexual assault and individuals at heightened risk for perpetration understand the consequences of prior victimization.

B. DOD SEXUAL ASSAULT PREVENTION EFFORTS

1. Evolution of DoD’s Approach to Prevention

DoD established the Sexual Assault Prevention and Response (SAPR) program in 2005 “to promote prevention, encourage increased reporting of the crime, and improve response capabilities for victims.”\textsuperscript{167} In July 2007, DoD SAPRO held its first Prevention Summit, a three-day meeting of DoD leadership, military SAPR program managers, and experts recommended by the NSVRC, including representatives from the CDC and the California Coalition Against Sexual Assault.\textsuperscript{168} The Summit focused on a unified DoD approach to preventing sexual assault. The Pennsylvania Coalition Against Rape, with which SAPRO entered into a contract in 2006, issued a white paper that reported information from the Summit. The white paper informed DoD’s 2008 Prevention Strategy, which was authored under contract by two non-DoD experts. The 2008 Prevention Strategy outlined a comprehensive blueprint for DoD’s prevention efforts.\textsuperscript{169}
ROLE OF THE COMMANDER SUBCOMMITTEE

The 2008 Prevention Strategy introduced several key prevention strategy components, beginning with adoption of a “spectrum of prevention,” which is based on the CDC’s social-ecological model. The 2008 Strategy states that “[r]educing or eliminating sexual assault will require a comprehensive and coordinated set of interventions” at cultural, organizational, community, peer, family, and individual levels. The 2008 Strategy uses interconnected intervention categories to frame its recommendations: individual skill development, community education, service provider training, coalition building, organizational practice, and policy development.170

DoD SAPRO’s 2008 Prevention Strategy emphasized bystander intervention education as a core prevention strategy. By shifting its focus to bystander intervention, DoD SAPRO began to educate and train commanders and leaders on “creatin[g] a non-permissive environment” where they and their subordinates do not tolerate, condone, or ignore “the types of . . . inappropriate jokes, crude and offensive language, sexist behaviors – things that are the precursors . . . that an offender might use to . . . test their victim.”171

The 2008 Prevention Strategy also recommended increased focus in SAPR training on the link between alcohol consumption and sexual assault. In particular, the 2008 Strategy recommended that Service members be trained on the “role of beliefs about alcohol, social norms that link masculinity and alcohol, negative stereotypes about drinking and women, and the pharmacological effects of alcohol on decision-making and violent behavior.”172 It did not, however, recommend any of the three alcohol mitigation strategies that were emphasized to the Subcommittee by the CDC as empirically promising.173

In May 2013, the Secretary of Defense directed implementation of a new SAPR strategic plan. The 2013 SAPR Strategic Plan addressed prevention and the four other distinct SAPR “lines of effort”: investigation, accountability, advocacy/victim assistance, and assessment. Reflecting the May 2012 Strategic Direction to the Joint Force,174 the 2013 SAPR Strategic Plan identified commanders and first line supervisors as the center of gravity of DoD SAPRO’s prevention efforts.175 Accordingly, in addition to directing a collaborative review of and update to the 2008 strategy, the 2013 SAPR Strategic Plan identified other high-priority prevention tasks:

- enhancement and integration of SAPR professional military education, in accordance with NDAA FY12 requirements;
- development of core competencies and learning objectives for all SAPR training to ensure consistency and standardization throughout the military;

170 2008 PREVENTION STRATEGY, supra note 169, at 18-20; see also Transcript of RoC Subcommittee Meeting 175-77, 186 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO) (testifying that pursuant to 2008 Strategy, spectrum of prevention became “a lens through which” SAPRO focuses its prevention work to ensure that it is addressing prevention “at every level” of military society and emphasizing that “[t]here is no single bullet answer”); DoD SAPRO, Prevention Strategy Update 3 (Feb. 12, 2014) (PowerPoint presentation to RoC Subcommittee) [hereinafter Feb. 2014 SAPRO PowerPoint Presentation].

171 2008 PREVENTION STRATEGY, supra note 169, at 18-20, 41; Transcript of RoC Subcommittee Meeting 178-79, 187-88, 193-97 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.); id. at 193-97 (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO).

172 2008 PREVENTION STRATEGY, supra note 169, at 34-35.

173 See id.

174 Joint Chiefs of Staff, “Strategic Direction to the Joint Force on Sexual Assault Prevention and Response” (May 7, 2012).

IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

- enhancement of SAPR training for pre-command and senior enlisted personnel; and
- establishment and implementation of “policies that mitigate high-risk behaviors and personal vulnerabilities (e.g., alcohol consumption, barracks visitation).”

In May 2013, DoD SAPRO began extensive and focused research of prevention strategies and programs. DoD SAPRO’s research included on-site visits and web- and teleconferences with more than 20 organizations, including the CDC and different universities referred by members of Congress, advocacy groups, the Services, and Allied militaries. DoD SAPRO has developed a database of more than 200 best practices, techniques, and programs to serve as a resource for commanders and organizations at all levels throughout the Services. DoD SAPRO representatives visited the CDC in July and September 2013 to coordinate with the CDC’s sexual violence research experts and outside alcohol policy experts.

DoD SAPRO’s new prevention strategy further refines its adaptation of the CDC’s social-ecological model and shifts prevention focus to commanders and first line supervisors. The strategy introduces “leaders at all levels” as a distinct level/setting of the model, emphasizing the need to leverage leaders as “the cornerstone” of prevention efforts.

2. DoD Prevention Policies and Requirements

DoD revised its strategic SAPR policy in January 2012 to reflect that sexual assault prevention programs “shall be established and supported by all commanders” and that “[s]tandardized SAPR requirements, terminology,

176 2013 SAPR STRATEGIC PLAN, supra note 175, at 4, 7, 10–11, 18 (Apr. 30, 2013); Transcript of RoC Subcommittee Meeting 198–202 (Feb. 12, 2014) (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO); DoD Feb. 2014 PowerPoint Presentation, supra note 170, at 6–7; see also id. at 17 (enumerating and describing five core competencies and various learning objectives resulting from each).

177 Transcript of RoC Subcommittee Meeting 204–08 (Feb. 12, 2014) (Colonel Litonya Wilson, Chief of Prevention and Victim Assistance, DoD SAPRO); DoD Feb. 2014 PowerPoint Presentation, supra note 170, at 8–9.

178 Transcript of RoC Subcommittee Meeting 76–77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

179 Id. at 208–12 (testimony of Nathan Galbreath and Colonel Alan R. Metzler); DoD Feb. 2014 PowerPoint Presentation, supra note 170, at 12.
guidelines, protocols, and guidelines for instructional materials shall focus on prevention. DoD has since adopted initiatives to strengthen SAPR training for all Service members, as well as specific SAPR training for commanders and other leaders. On April 17, 2012, the Secretary of Defense directed enhanced training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters. The initiative required enhanced SAPR training for commanders and senior enlisted leaders.

The Secretary of Defense announced additional sexual assault prevention efforts on September 25, 2012. Specifically, the Secretary directed the Services to develop training core competencies and methods of assessment, requiring each Service to: (1) provide a dedicated, two-hour block of SAPR training in all pre-command and senior enlisted leader training courses; (2) provide commanders a SAPR “quick reference” program and information guide; (3) assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts; and (4) develop and implement refresher training for sustainment of SAPR skills and knowledge.

Since March 28, 2013, DoD policy has required that “[m]ilitary and DoD civilian officials at each management level shall “advocate a robust SAPR program and provide education and training that shall enable them to prevent and appropriately respond to incidents of sexual assault.” Commanders are required to ensure that SAPR training for all Service members “who supervise Service members”:

- incorporates adult learning theory, including interaction and group participation;
- is appropriate to Service members’ grade and commensurate with their level of responsibility;
- identifies “prevention strategies and behaviors that may reduce sexual assault, including bystander intervention, risk reduction, and obtaining affirmative consent”; and
- provides “scenario-based, real-life situations to demonstrate the entire cycle of prevention, reporting, response, and accountability procedures.”

In addition, SAPR training has been added to professional military education (PME) curricula “from junior-level noncommissioned officer schools through the senior-level War Colleges.” In particular, PME and leadership development training for senior NCOs and officers, as well as pre-command training, must explain:

rape myths, facts, and trends;

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183 U.S. Dep’t of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures [hereinafter DoDI 6495.02] encl. 10, ¶¶ 1-3 (Mar. 28, 2013); see also FY13 NDAA, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013) (requiring sexual assault prevention and response training for new or prospective commanders at all levels of command).
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

- procedures to protect victims of sexual assault from coercion, retaliation, and reprisal; and

- actions that constitute reprisal.185

These training requirements reinforce DoD’s policy that “[v]ictims of sexual assault shall be protected from coercion, retaliation, and reprisal” in accordance with DoD Directive 7050.06 (Military Whistleblower Protection Act).186

DoD-required SAPR training also addresses re-victimization. The 2012 DoD SAPRO report noted the “long-standing civilian research” finding that “sexual victimization is a likely risk factor for subsequent victimization,”187 and DoD incorporated re-victimization in its SAPR program procedures regulation in March 2013. DoD defines re-victimization as a “pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse as a child” and that “[t]his latter pattern is particularly notable in cases of sexual abuse.”188 DoD noted in May 2013 that initiatives were “underway to address special populations within the Department that may require more targeted interventions.”189 For example, all DoD responder training, which is provided to all SARC’s, SAPR Victim Advocates (VAs), healthcare personnel, DoD law enforcement, military criminal investigative organizations (MCIOs), judge advocates, chaplains, firefighters, and emergency medical technicians, now must explain the pattern of re-victimization.190 In addition, DoD SAPRO began emphasizing outside agencies as alternative resources where male Service members may be less reluctant to self-identify as victims of sexual assault.191 Further, DoD SAPRO expects the 2014 Workplace and Gender Relations survey to yield a sufficient male response to significantly improve DoD’s understanding of the unique aspects of the experiences of male victims of sexual assault.192

On May 17, 2013, the Secretary of Defense directed a dedicated SAPR focus and training day for all organizations before July 1, 2013. In particular, he directed:

- review of credentials and qualifications of current-serving military recruiters, SARC’s and SAPR VAs;

- refresher training on ethics and standards for recruiters, SARC’s, and SAPR VAs; and

purposeful and direct commander and leader engagement with Service members and civilian employees on SAPR principles and command climate.

185 DoDI 6495.02 encl. 10, ¶¶ 1-3; see also FY13 NDAA, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013) (requiring sexual assault prevention and response training for new or prospective commanders at all levels of command).


188 DoDI 6495.02 Glossary.

189 FY12 SAPRO Annual Report, supra note 167, at 15.

190 Sec DoDI 6495.02 encl. 10, ¶ 7.a(2)(d)(1).


192 Transcript of RoC Subcommittee Meeting 236-37 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).
The Secretary described his expectation for the stand-down, envisioning it would result in installations where:

leaders, recruiters, SARCs, and every member of the Armed Forces clearly understand that they are accountable for fostering a climate where sexist behaviors, sexual harassment, and sexual assault are not tolerated, condoned, or ignored; where dignity, trust, and respect are core values we live by and define how we treat one another; where victims’ reports are treated with the utmost seriousness, their privacy is protected, and they are treated with sensitivity; where bystanders are motivated to intervene because offensive or criminal conduct is neither tolerated or condoned; and where offenders know they will be held appropriately accountable.193

Finally, effective February 12, 2014, SAPR training was required for new or prospective commanders at all levels. Tailored to specific commander responsibilities and leadership requirements, the pre-command training must “foster[] a command climate in which persons assigned to the command are encouraged to intervene to prevent potential incidents of sexual assault.”194

3. DoD Assessment of Effectiveness of Prevention Efforts

In 2012, DoD revised its strategic SAPR policy to mandate that the Under Secretary of Defense for Personnel and Readiness “[d]evelop metrics to measure compliance and effectiveness of SAPR training, awareness, prevention, and response policies and programs” and to “[a]nalyze data and make recommendations regarding the SAPR policies and programs to the Secretaries of the Military Departments.”195 The Director of SAPRO was similarly directed on March 28, 2013.196 In addition, DoD’s policy mandated that its annual reports on sexual assault in the military must include an assessment of the implementation of SAPR policies and procedures, including those concerning prevention to determine their effectiveness.197

Following the broad reforms in the FY14 NDAA, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress with respect to sexual assault prevention and response.198 Pursuant to the President’s directive, DoD SAPRO recently developed twelve new assessment metrics that are in addition to the six metrics currently used.199 Five of these new metrics will focus on prevention efforts.200 In the shorter term, DoD SAPRO told the Subcommittee it will focus on other assessment measures such as surveys, research studies, and on-site visits.201 The Defense Equal Opportunity

193 U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response Stand-down (May 17, 2013).
194 DoDI 6495.02 encl. 10, ¶ 3.f(6) (Change 1) (Feb. 12, 2014).
195 DoDD 6495.01 encl. 2, ¶ 1.c.
196 See DoDI 6495.02 encl. 3, ¶ 1.g.
197 Id. at encl. 12, ¶ 1.b.
198 The White House, “Statement by the President on Eliminating Sexual Assault in the Armed Forces” (Dec. 20, 2013). The President directed the Secretary and Chairman to report to him by December 1, 2014.
199 Transcript of RoC Subcommittee Meeting 214-15 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).
200 Id. at 215.
201 Id. at 216-19.
Climate Survey (DEOCS) in particular includes questions focused on prevention and leadership support of SAPR programs, including bystander intervention.\textsuperscript{202}

In consultation with the CDC, DoD SAPRO is initiating a focused review of installation-level prevention efforts. By March 2015, DoD SAPRO plans to visit four or five installations and invite outside experts to educate leaders and “begin to shape policy that fits the environment in which that installation resides.” DoD SAPRO intends to engage the surrounding community, partnering with local law enforcement, prosecutors, providers of alcohol, and hotel managers, “to help check behaviors before they get out of hand.”\textsuperscript{203}

\section*{C. SERVICE IMPLEMENTATION OF DOD’S POLICIES AND REQUIREMENTS FOR PREVENTION}

\subsection*{1. Service SAPR Training}

Pursuant to Section 574 of the FY13 NDAA,\textsuperscript{204} all of the Services now provide SAPR training to Service members within the first two weeks of initial entrance on active duty, to include bystander intervention training.\textsuperscript{205} SAPR training is also integrated into each of the Services’ pre-command and senior enlisted advisor courses.\textsuperscript{206}

Prevention components in current Service-specific SAPR training also reflect DoD prevention policies and requirements:

\begin{itemize}
  \item The Air Force provides airmen with prevention resources via newcomers’ orientation, posters, brochures, business cards, promotional items, etc. Enlisted airmen on the delayed entry program receive a SAPR class before basic training.
  \item In the Navy and the Marine Corps, SAPR training is facilitated and scenario-based and introduces members to risk reduction and bystander intervention as well as the role of alcohol in impairment of judgment specific to sexual assault. Sexual Assault Awareness Month and SAPR stand-down activities at the command level supplement this training throughout the year.
  \item All Coast Guard accession points include course information on sexual assault prevention and response. The Coast Guard Academy SARC typically meets with new cadets again within their first six weeks to also address bystander intervention. In addition, the Coast Guard is currently implementing a four-hour Sexual Assault Prevention Workshop Coast Guard-wide to increase awareness among Coast Guard personnel.\textsuperscript{207}
\end{itemize}

\textsuperscript{202} Id.

\textsuperscript{203} Transcript of RoC Subcommittee Meeting 219-22 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.).


\textsuperscript{205} U.S. Dep’t of Def., SAPRO, Memorandum from Major General Gary S. Patton, Director, on Assessment of Services’ Reviews of Prevention and Reporting of Sexual Assault and Other Misconduct in Initial Military Training at 3 (unnumbered) (Apr. 3, 2013).

\textsuperscript{206} Id. In a DEOCS survey conducted in January and February 2014, 94 percent of DoD respondents “indicated that they would take an intervening action if they witnessed a situation that might lead to sexual assault (selecting either seeking assistance, telling the person, or confronting the Service member).” DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SEXUAL ASSAULT PREVENTION AND RESPONSE CLIMATE REPORT: DEPARTMENT OF DEFENSE AND RESERVE COMPONENT RESULTS 37 (Mar. 2014).

\textsuperscript{207} Services’ Responses to RSP Request for Information 1b (Nov. 1, 2013); Services’ Responses to Requests for Information 79a, 80c (Dec.
The Services reported the following sexual assault prevention training efforts for commanders and leaders:

- As Army commanders and leaders progress through their careers and levels of responsibility, they are provided SAPR training, including on bystander intervention, tailored to specific leadership positions and/or increased rank, in addition to mandatory annual training. Each year, the Army conducts a Sexual Harassment/Assault Response and Prevention Summit where commanders hear from national leaders, DoD and Army leadership, and subject matter experts, as well as exchange ideas with one another and provide feedback to Army leadership on challenges in executing SAPR responsibilities. In addition, SARCs and Victim Advocates receive training on how to support commander efforts to prevent sexual harassment and sexual assault.

- SAPR training in the Navy and Marine Corps is integrated into critical leadership training, including the Senior Enlisted Academy and Command Leadership School. SAPR training for leaders emphasizes their role in educating subordinates about sexual assault, including “the influence and power of alcohol” and “the importance of Bystander Intervention.”

- All Coast Guard leadership courses include a SAPR module, and annual Coast Guard-specific training is offered to VAs and SARC that includes prevention segments, including bystander intervention education.208

2. Recent Prevention Initiatives in the Services

Since implementing DoD SAPRO’s 2008 Prevention Strategy, the Services implemented bystander intervention and alcohol policy in various ways:

In the Army, initial military training at Basic Combat Training of newly enlisted soldiers includes “Sex Signals,” a 90-minute interactive series of improvisational skits that explore subjects like dating, rape, consent, body language, alcohol, and bystander intervention. At the Basic Officer Leadership Course, training of newly commissioned officers also includes the “Sex Signals” presentation, and officers apply leader decision-making in response to the vignettes.209

Air Force bystander intervention training introduced an interactive program where participants practice techniques by role-playing in realistic scenarios involving airmen in vulnerable situations.210

The Navy and Marine Corps indicated that recent prevention initiatives include increased use of roving barracks patrols designed to increase the visible presence of leadership so as to deter behavior that may lead to sexual assault.211 The Navy also reported:

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208 Services’ Responses to RSP Request for Information 1b (Nov. 1, 2013); Services’ Responses to Requests for Information 79a, 80c, 80d (Dec. 19, 2013); U.S. NAVY, TAKE THE HELM: SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING FOR LEADERS (SAPR-L) FACILITATION GUIDE FY 12/13, at 70.

209 Army’s Responses to RSP Requests for Information 79c, 80c (Dec. 19, 2013); accord Transcript of RoC Subcommittee Meeting 348 (Feb. 12, 2014) (testimony of Command Sergeant Major Pamela Williams, U.S. Army) (describing interactive “got-your-back-type training” in which trainers use terminology more familiar to young enlisted soldiers and “the entire audience gets involved”).


211 NAVADMIN 181/13 re Implementation of Navy Sexual Assault Prevention and Response Program Initiatives ¶ 3.a (July 13, 2013); see
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

- use of physical surveys of facility lighting and visibility to identify needed safety improvements to reduce members’ vulnerability in transit on bases and a comprehensive alcohol de-glamorization campaign, including implementing Alcohol Detection Devices and changes to the sale of distilled spirits in on-base stores co-located with barracks and ships.

- during Fiscal Year 2013, presentation of “No Zebras, No Excuses,” a 90-minute theater-based training show with twelve vignettes to over 41,000 junior Sailors and Marines. Discussions followed the presentations, with facilitators addressing issues relating to laws, behaviors, and the inactive bystander mentality;

- during Fiscal Year 2012, presentation of “All Hands” SAPR training to all Marines; the training included messages from the Commandant and video-based “ethical decision games” that present opportunity for bystanders to intervene passes; and

- presentation to all Marine NCOs during Fiscal Year 2012 of “Take A Stand,” a three-hour bystander intervention course comprised of mini-lectures, guided group discussions, activities, and video recordings.

D. SUBCOMMITTEE ASSESSMENT OF DOD’S SEXUAL ASSAULT PREVENTION EFFORTS

DoD’s prevention policies and requirements adopted since 2012 reflect Department efforts to coordinate with the CDC and leading private organizations like the NSVRC. Moreover, installation-level initiatives described to the Subcommittee largely reflect prevention best practices. In particular, the Navy’s use of complementary prevention initiatives mirrors the comprehensive approach recommended the CDC. Nevertheless, areas of disconnect remain between DoD’s current efforts and what the Subcommittee heard from sexual assault prevention experts.

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212 NAVADMIN 181/13 re Implementation of Navy Sexual Assault Prevention and Response Program Initiatives ¶ 3.d (July 13, 2013); see also Transcript of RoC Subcommittee Meeting 289 (Feb. 12, 2014) (testimony of Captain Peter R. Nette, U.S. Navy) (describing facility surveys conducted on bases in Naval Support Activities South Potomac); DoD 6495.02 encl. 5, ¶ 8.e (requiring commanders to “implement a SAPR prevention program that [i]dentifies and remedies environmental factors specific to the location that may facilitate the commission of sexual assaults (e.g., insufficient lighting)).

213 Navy Responses to Requests for Information 79c, 80a (Dec. 19, 2013); see also Transcript of RoC Subcommittee Meeting 259–60, 341–42 (Feb. 12, 2014) (testimony of Colonel David W. Maxwell and Sergeant Major Mark Allen Byrd, Sr., U.S. Marine Corps) (describing removal of all liquor from Exchange stores on Marine Corps Base Quantico and limitation of sale of alcohol from 8:00 a.m. to 10:00 p.m.).

214 Navy Responses to Requests for Information 79c, 80a (Dec. 19, 2013).


216 Id.

217 See also Transcript of RoC Subcommittee Meeting 77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC) (noting that CDC prevention experts have “been very encouraged and pleased by the way that [DoD SAPRO] ha[s] taken so much information and, in the midst of all these gaps [in research], . . . distilled it to what could be a very profitable direction to move in to really create some change”).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
For example, the Services have increased focus on bystander intervention and alcohol policy, but programs and prevention education that rely upon common misconceptions or overgeneralized perceptions will not be effective. In particular, overemphasizing the threat posed by the relatively few serial rapists and other types of sexual “predators” may reduce Service member attention and vigilance toward more common and seemingly harmless attitudes and behaviors that can increase the potential for sexual assault.

If primary prevention strategies like bystander intervention education are to succeed, commanders must encourage members to actively challenge attitudes and beliefs that lead to offenses and interrupt and/or report them when they occur, and then protect those who do so. As Dr. Katz explained, “men who speak out and confront or interrupt each other’s abusive behavior run the risk of fostering resentment from other men, increasing tensions in their daily interpersonal relationships, or in some cases, even suffering violent reprisals.”218 DoD bystander intervention programs should educate Service members to guard against retaliation toward peers who intervene and/or report. Policies and requirements must ensure protection from retaliation against not just victims, but also the peers who speak out and step up on their behalf.

Bystander intervention and alcohol policy programs are essential, but DoD must also pursue other strategies. DoD must maintain a comprehensive approach to prevention by applying a range of strategies that target members and groups in different ways. For example, DoD should consider additional general deterrence strategies, such as publicizing findings and sentences adjudged at courts-martial for sexual assault offenses.

Likewise, DoD should not restrict prevention strategies to those emphasizing primary prevention. Victim-focused programs should educate Service members on important risk factors that are unique to the military, such as disparity in rank. Such programs can be designed and executed in a way that avoids unintentional messages of victim-blaming.

DoD has only begun to address strategies that target populations at heightened vulnerability, and increased consideration and emphasis are warranted. Research underscores the importance of developing programs to identify Service members who are victimized prior to entering the military and strengthen these members’ ability to deal with the consequences of prior victimization and avoid re-victimization. Through training, DoD has increased focus on special populations that may require targeted interventions, but it can and should do more by further developing targeted risk-management programs.

DoD must enhance its understanding of and response to male-on-male sexual assault. Cultural stigmas from barriers that existed in the past, such as “Don’t Ask, Don’t Tell,”219 still serve to limit openness about the problem, which harms prevention and response efforts. Commanders must intentionally and directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it. Service members must understand that demeaning or humiliating behaviors potentially minimized previously as hazing or labeled as “horseplay” constitute punishable offenses that are not tolerated. DoD should seek expert assistance to understand the risk and protective factors unique to male-on-male sexual assault in the military. Using information gained from research, DoD should develop targeted prevention programs that address male-on-male sexual assault.


220 Cf. 2008 PREVENTION STRATEGY, supra note 169, at 25 (calling generally for funding for sexual assault prevention that ultimately is “authorized, appropriated, and planned as part of established programming within the Department of Defense” and noting that primary prevention programs and staff specifically trained to conduct them require “stable and protected funding” from Congress);
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

Commanders must recognize that robust prevention programs may raise concern about unlawful command influence. In particular, commanders must avoid creating perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials, or that compromise an accused Service member’s presumption of innocence or access to witnesses or evidence.221

In addition to supporting sexual assault victims, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes. Commanders must execute balanced prevention programs, to include emphasizing the presumption of innocence for anyone accused of misconduct, the right to fair investigation and resolution, and the right to seek and present witnesses and evidence. Without such balance, prevention initiatives may foster improper bias against any person accused of wrongdoing, including bias among those called to serve as court-martial panel members or witnesses whose testimony is sought on behalf of the accused. Additionally, if any accusation of sexual assault immediately creates irreparable consequences against an accused, inappropriately severe or ill-informed responses may actually create perceptions of unfairness that discourage reporting, as victims and/or witnesses may feel responsible for unduly harsh or unfair treatment of an accused.

DoD must further develop local coordination requirements on and off the installation. To leverage partnerships, DoD SAPRO’s 2008 Prevention Strategy recognized that “sexual assault prevention cannot solely be the responsibility of SARCs and Victim Advocates on a military base or in a combat theater.” Accordingly, the 2008 Strategy recommended inclusion of outside agencies and organizations such as rape crisis centers and domestic violence service providers in local prevention networks for military organizations.222 One new requirement, made effective March 2013, is that SARCs must “[m]aintain liaison with commanders, DoD law enforcement, and MCIOs, and civilian authorities, as appropriate, for the purpose of facilitating . . . collaboration[on] on public safety, awareness, and prevention measures.”223 DoD should expand requirements for installation commanders to liaison with victim support agencies in adjacent communities.224

Commanders must focus on meaningful prevention strategies and must demonstrate leadership of DoD’s prevention approach and its principles. They must ensure members of their command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.

221 See Services’ Responses to BSP Request for Information 84 (Dec. 19, 2013) (identifying UCI motions and complaints arising in sexual assault cases in 2012 and 2013, some of which cite SAPR training).


223 DOD 6495.02 encl. 6, ¶ 1.h[17](b).

224 The following Navy requirement as of July 2013 serves as a good model for the other Services:

Designate a Flag Officer, reporting to you, as the SAPR program leader for each Navy installation/Fleet Concentration Area and associated local commands. This designated Flag Officer will establish routine coordination meetings with appropriate installation/local command representatives, and local community and civic leaders to review SAPR program efforts. This designated Flag Officer will also ensure that community outreach and engagement – including base and region commander cooperation, coordination and consultation with local law enforcement, hospitals and hotels – is part of each area’s prevention and response measures. Operational Flag Officers assigned to command positions, but not designated as lead for an oversight group, will participate to the maximum extent practicable. Local Naval Criminal Investigative Service (NCIS) representatives, Region Legal Service Offices, and installation SARCs will be included in these coordination meetings whenever possible.

Given existing training and curriculum mandates, the Subcommittee does not believe DoD should promulgate an additional formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response. As described in Enclosure 10 of DoD Instruction 6495.02, DoD has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on SAPR principles, reporting options and resources for help, SAPR program and command personnel roles and responsibilities, prevention strategies and behaviors, and sexual assault report document retention requirements. DoD SAPRO recently established core SAPR training competencies with tailored instruction requirements for the following situations: accessions training, annual refresher training, pre- and post-deployment training, professional military education, pre-command and senior enlisted leader training, sexual assault response coordinator (SARC) and victim advocate (VA) training, and chaplain training.

E. PART IV SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

RecommenDation 5: The Secretary of Defense should direct appropriate DoD authorities to partner with researchers to determine how best to implement promising, evidence-based alcohol mitigation strategies (e.g., those that affect pricing, outlet density, and the availability of alcohol). The Secretary of Defense should ensure DoD’s strategic policies emphasize these strategies and direct DoD Sexual Assault Prevention and Response Office (SAPRO) to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.

Finding 5-1: Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender. According to researchers, alcohol mitigation strategies that affect pricing, outlet density, and the availability of alcohol have promising potential to reduce the incidence of sexual violence.

Finding 5-2: The Department of Defense has not sufficiently identified specific promising alcohol mitigation strategies in its strategic documents for sexual assault prevention, thereby failing to provide local commanders with the strategic direction necessary to expect a consistent reduction in the rate of alcohol-related sexual assault across the Services. Nevertheless, some local commanders have developed innovative alcohol-mitigation programs on their own that warrant wider evaluation.

Finding 5-3: DoD’s prevention strategies and approach require continued partnership with sexual assault prevention experts in other government agencies, non-profit organizations, and academia. Consultation with these experts is particularly necessary to enhance understanding of: male-on-male sexual violence; the impact of victimization prior to Service members’ entry onto active duty; and effective community-level prevention strategies, including mitigation of alcohol consumption and youth violence.

Finding 5-4: The Centers for Disease Control and Prevention (CDC) and leading private prevention organizations agree there is no silver-bullet answer to the occurrence of sexual assault. An approach to preventing sexual violence has greater potential to impact behavior to the extent it applies multiple and varied strategies at the different levels of a given environment.

Finding 5-5: Scientists’ understanding of the various risk and protective factors for sexual violence continues to evolve, and much remains to be learned. DoD’s prevention policies and requirements adopted since 2012 reflect its efforts to be informed by the best available science. While DoD’s prevention approach currently reflects
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

its consultation with the CDC and leading private organizations like the National Sexual Violence Resource Center, it is too soon to assess the effectiveness of specific prevention programs initiated in the Services.

Finding 5-6: According to the CDC, the only two sexual violence programs that have demonstrated evidence of effectiveness in reducing sexually violent behavior were developed and evaluated for middle and high school-aged youth. As for prevention programs that can be adapted to the military, the CDC and leading private prevention organizations identify bystander intervention and alcohol mitigation as two promising sexual violence prevention strategies that studies have demonstrated reduce risk factors and warrant further research into their impact on behavior change.

Finding 5-7: By spearheading additional research and implementing prevention strategies that are based on the best available science, DoD can share knowledge it gains with civilian organizations and thereby become a national leader in preventing sexual violence.

Recommendation 6: The Secretary of Defense and Service Secretaries should direct DoD SAPRO and the Services, respectively, to review bystander intervention programs to ensure they do not rely upon common misconceptions or overgeneralized perceptions. In particular, programs should not overemphasize serial rapists and other sexual “predators” and should instead emphasize preventive engagement, encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault.

Finding 6-1: According to the CDC and leading sexual assault prevention research experts and organizations, the bystander intervention programs that hold the most promise are those that encourage peer groups to guard against a spectrum of attitudes, beliefs, and behaviors that contribute to a climate in which sexual violence is more likely to occur. This spectrum starts with language and behaviors by males even in the absence of women, such as sexist comments, sexually objectifying jokes, and vulgar gestures.

Recommendation 7: The Secretary of Defense should direct DoD SAPRO to establish specific training and policies addressing retaliation toward peers who intervene and/or report.

- Bystander intervention programs for Service members should include training that emphasizes the importance of guarding against such retaliation.
- DoD and Service policies and requirements should ensure protection from retaliation against not just victims, but also the peers who speak out and step up on their behalf.
- Commanders must encourage members to actively challenge attitudes and beliefs that lead to offenses and interrupt and/or report them when they occur.

Recommendation 8: The Secretary of Defense should direct DoD SAPRO to evaluate development of risk-management programs directed toward populations with particular risk and protective factors that are associated with prior victimization. In particular, DoD SAPRO should partner with researchers to determine to what extent prior sexual victimization increases Service members’ risk for sexual assault in the military in order to develop effective programs to protect against re-victimization.
**Finding 8-1:** Research underscores the importance in developing programs to identify Service members who are victimized prior to entering the military and strengthen their ability to deal with the consequences of prior victimization, including increased risk for future victimization.

**Recommendation 9:** The Secretary of Defense and Service Secretaries should ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure SAPR training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member’s presumption of innocence, right to fair investigation and resolution, and access to witnesses or evidence.

**Finding 9-1:** In addition to supporting victims of sexual assault, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.

**Recommendation 10:** The Secretary of Defense should direct DoD SAPRO and the Services to enhance their efforts to prevent and respond to male-on-male sexual assault.

- Prevention efforts should ensure commanders directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it.
- Prevention efforts should also ensure Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing or labeled as “horseplay” in the past constitute punishable offenses that should not be tolerated.
- DoD SAPRO should seek expert assistance to understand the risk and protective factors that are unique to male-on-male sexual assault in the military and should develop targeted prevention programs for male-on-male sexual assault offenses.

**Recommendation 11:** The Service Secretaries should direct further development of local coordination requirements both on and off the installation, and expand requirements for installation commanders to liaison with victim support agencies.

**Recommendation 12:** The Service Secretaries should ensure commanders focus on effective prevention strategies. Commanders must demonstrate leadership of DoD’s prevention approach and its principles, and they must ensure members of their command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.

**Recommendation 13:** Given existing training and curriculum mandates, the Department of Defense should not promulgate an additional formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response.

**Finding 13-1:** As described in Enclosure 10 of DoD Instruction 6495.02, DoD has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on...
IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

SAPR principles, reporting options and resources for help, SAPR program and command personnel roles and responsibilities, prevention strategies and behaviors, and sexual assault report document retention requirements.

Finding 13-2: DoD SAPRO established core SAPR training competencies with tailored instruction requirements for the following situations: accessions training, annual refresher training, pre- and post-deployment training, professional military education, pre-command and senior enlisted leader training, sexual assault response coordinator (SARC) and victim advocate (VA) training, and chaplain training.
V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

Crimes of sexual violence are a national concern, and efforts to improve sexual assault prevention and response in the military are influenced by many of the same factors and barriers that exist throughout American society. Studies indicate that the risk for “contact sexual violence” for women in the military is comparable to the risk for women in the civilian sector. A 2010 study conducted by the Centers for Disease Control and Prevention estimated that 40.3 percent of women in the general population experienced contact sexual violence during their lifetimes, compared to 36.3 percent of active duty females. When assessing more recent risk, the survey found the prevalence of contact sexual violence was also similar in the three years and in the twelve months prior to the survey for the two groups.

Sexual assault, however, is chronically underreported in both the military and the civilian sector when compared to reporting rates for other forms of violent crime. Studies indicate 65 percent of sexual violence victimizations are not reported to law enforcement or other authorities, with similar reporting rates in the civilian sector and the military among females. As a result, significant effort within DoD and the Services has been focused on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and . . . is a bridge to accountability where offenders can be held appropriately accountable.”

225 Transcript of RSP Public Meeting 124–26 (June 27, 2013) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO) (citing NCIPC, TECHNICAL REPORT, supra note 127); see also SAPRO June 2013 PowerPoint Presentation, supra note 161, at 60. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent. Id.

226 NCIPC TECHNICAL REPORT, supra note 127, at 27. The study did not compare prevalence rates for men. However, the study’s survey of U.S. men determined one in 71 men in the general population experienced rape in their lifetimes (compared to one in five women), while 22.2 percent of men experienced sexual violence victimization other than rape at some point in their lives. NCIPC, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18–19 (Nov. 2011).

227 Transcript of RSP Public Meeting 26 (June 27, 2013) (testimony of Professor Lynn Addington, American University) (citing statistics from National Crime Victimization Survey and 2012 Workplace and Gender Relations Survey of Active Duty Personnel). Studies of military victims who reported their victimization indicate they did so because it was the right thing to do, to seek closure, or to protect others. In contrast, the most common reason cited by those who did not report was that they did not want anyone to know, felt uncomfortable making a report, or thought the report would not be kept confidential. Transcript of RSP RoC Subcommittee Meeting 58–60 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); see also DoD SAPRO PowerPoint Presentation to RoC Subcommittee at 8–9 (Oct. 23, 2013) [hereinafter Oct. 2013 SAPRO PowerPoint Presentation].

228 Transcript of RSP Public Meeting 108–09 (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).
A. REPORTING CHANNELS FOR VICTIMS OF SEXUAL ASSAULT

When a Service member believes he or she has been sexually assaulted, there are numerous options available for reporting the assault. A victim is never required to report the offense to his or her commander or any other military commander.

This protection of a victim’s interests is reflected in Department of Defense (DoD) policy providing that sexual assault victims may choose to make a restricted or unrestricted report of the incident. In fact, DoD implemented restricted reporting in 2005 “before [the option] was even an item of discussion” in civilian jurisdictions. A restricted report remains confidential and will not result in notification of law enforcement or the victim’s chain of command. Restricted reports allow victims to report an assault confidentially in order to obtain the support of healthcare treatment and services of a Sexual Assault Response Coordinator (SARC) or Sexual Assault Prevention and Response Victim Advocate (SAPR VA) without being forced to initiate a criminal investigation. This option is intended to maximize the provision of support for such victims without requiring them to choose between obtaining support or retaining their privacy.

Only SARCs, SAPR VAs, and healthcare personnel are authorized to accept restricted reports. A SARC or SAPR VA is required to report the fact of the assault to the installation commander, but the report will not contain personally identifiable information and may not be used for investigative purposes. Accordingly, the victim’s identity remains confidential in a restricted report. If a victim confides in another person about a sexual assault, the victim retains the restricted reporting option, unless the confidant is a member of law enforcement or is in the victim’s supervisory hierarchy or chain of command.

Victims can make unrestricted reports of sexual assault to SARCs, SAPR VAs, and healthcare personnel, as well as chaplains, judge advocates, and military or civilian law enforcement personnel. Victims may also report an assault to a supervisor or their chain of command, but they are not required to do so. Unrestricted reports of sexual assault will result in investigation of the allegation, although military criminal investigative organizations (MCIOs) should honor a victim’s choice to decline to participate in the investigation. Military personnel in the United States may always call civilian law enforcement or other civilian agencies to report a sexual assault if they are not comfortable notifying military authorities.

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229 Transcript of RSP Public Meeting 421-22 (Dec. 11, 2013) (testimony of Ms. Joanne Archambault, Executive Director, End Violence Against Women International and President and Training Director, Sexual Assault Training and Investigations).

230 U.S. Dep’t of Def. Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 4, ¶ 1.b (Mar. 28, 2013) [hereinafter DoDI 6495.02].

231 Id. at encl. 4, ¶ 1.e.

232 In most cases, the installation commander is not the victim’s immediate commander. The installation commander may or may not be the victim’s chain of command, depending on the organization to which the victim is assigned.

233 DoDI 6495.02 encl. 4, ¶ 1.b.

234 Id.

235 Id. at encl. 4, ¶ 1.e.

236 If a report is made in the course of otherwise privileged communications, chaplains are not required to disclose they have received a report of a sexual assault. Id. at encl. 4, ¶ 1.b(3).

237 Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. See id.

238 Id. at encl. 4, ¶ 1.c(1).
Though several categories of military personnel are trained as initial responders to sexual assault reports, only SARCs and SAPR VAs are responsible for documenting reports on a Defense Department Form 2910. The following chart depicts the different reporting resources available within DoD to victims of sexual assault:

<table>
<thead>
<tr>
<th>Unrestricted Reporting Resources</th>
<th>Restricted Reporting Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Sexual Assault Response Coordinators (SARCs)</td>
<td>• Sexual Assault Response Coordinators (SARCs)</td>
</tr>
<tr>
<td>• Victim Advocates (VAs)</td>
<td>• Victim Advocates (VAs)</td>
</tr>
<tr>
<td>• Health Care Professionals or Personnel</td>
<td>• Health Care Professionals or Personnel</td>
</tr>
<tr>
<td>• Chaplains(^{241})</td>
<td>• Chaplains(^{242})</td>
</tr>
<tr>
<td>• Legal Personnel</td>
<td>• Legal Assistance Attorneys(^{243}) and Special Victims Counsel</td>
</tr>
<tr>
<td>• Chain of Command</td>
<td></td>
</tr>
<tr>
<td>• Law Enforcement – Military Police or Military Criminal Investigative Organizations</td>
<td></td>
</tr>
</tbody>
</table>

Reporting options are well and broadly publicized throughout the military. DoD policy requires that all military personnel must receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and leadership development training, before and after deployments, and prior to filling a command position. Training must explain available restricted and unrestricted reporting options and the advantages and limitations of each option, and it must highlight that victims may seek help or report offenses outside their chain of command.

Although reporting options are well publicized, it is less clear that all members of the military fully understand them. Recent results from organizational climate surveys conducted by the Defense Equal Opportunity Management Institute (DEOMI) indicated that 71 percent of DoD personnel surveyed correctly understood restricted reporting options. At the unit level, only 32 percent of units scored a mean of 75 percent or higher.

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239 See id. at encls. 4, 10.
240 See also id. at encl. 4, ¶ 1.c(1) (“A victim’s communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information (e.g., roommate, friend, family member) is in the victim’s officer and non-commissioned officer chain of command or DoD law enforcement, there can be no Restricted Report.”).
241 Chaplains, Legal Personnel, members of the chain of command or supervisory chain, and law enforcement do not intake reports for purposes of SAPR reporting. Supervisors and leaders are trained to immediately contact their servicing SARC or VA, who will advise the victim of available services and options and document victim preferences on the DD Form 2910.
242 Outcry in the course of otherwise privileged communications does not eliminate the restricted reporting option. “In the course of otherwise privileged communications with a chaplain or legal assistance attorney, a victim may indicate that he or she wishes to file a Restricted Report. If this occurs, a chaplain and legal assistance attorney shall facilitate contact with a SARC or SAPR VA to ensure that a victim is offered SAPR services and so that a DD Form 2910 can be completed. A chaplain or legal assistance attorney cannot accept a Restricted Report.” Id. at encl. 4, ¶ 1.b(3).
243 Legal Assistance attorneys, like chaplains, have privileged communications with clients. They are expected to facilitate contact with a SARC or VA if a victim expresses interest in filing a restricted report, but do not intake reports themselves.
244 Id. at encl. 10, ¶ 3. Training must be specific to a Service member’s grade and commensurate with his or her level of responsibility. Id. at encl. 10, ¶ 2.d.
245 Id. at encl. 10, ¶ 2.d(6, 11).
246 DEOMI Directorate of Research Development and Strategic Initiatives, SAPR Climate Report: Department of Defense and Reserve Component Results iii–iv, 45–46 (Mar. 2014). The information reflects data from 2,582 climate surveys conducted in January and February 2014, which
on restricted reporting options. Individually, junior enlisted personnel scored lowest on restricted reporting knowledge, with 65 percent of those surveyed correctly identifying which individuals can and cannot take a restricted report. Importantly, 50 percent of junior enlisted males and 41 percent of junior enlisted females incorrectly responded that “anyone in my chain of command” could take a restricted report of sexual assault.

**B. INVESTIGATION OF SEXUAL ASSAULT ALLEGATIONS**

DoD policy mandates that investigations of unrestricted reports of sexual assault will be conducted by specially trained investigators from the MCIOs, not the victim’s immediate commander or chain of command. All unrestricted reports of sexual assault must be immediately reported to an MCIO, regardless of the severity of the crime alleged.\(^{247}\) A commander of a victim or alleged offender may not ignore a complaint or judge its veracity, and Section 1743 of the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) requires written notification to the installation commander and first O-6 and general or flag officers in the chains of command of the victim and alleged offender within eight days of the filing of an unrestricted report of sexual assault.\(^{248}\) MCIOs are assigned to an independent chain of command from the accused and his or her Special Court-Martial Convening Authority (SPCMCA) and must independently report all sexual assault accusations to the Service Secretaries and Chiefs of Staff.\(^{249}\)

MCIOs must initiate investigations for all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports.\(^{250}\) Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and access to services for the victim.\(^{251}\)

Allegations of sexual assault by a Service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction and may accept investigative responsibility if the MCIO declines, or the investigation may be worked jointly by the MCIO and the civilian agency.\(^{252}\) If a reported crime occurs off a military installation in a location under civilian jurisdiction, civilian law enforcement has primary jurisdiction over the investigation, and the MCIO will provide assistance as requested or deemed appropriate.\(^{253}\)

resulted in 122,003 responses from DoD and Coast Guard personnel.


248 See FY14 NDAA, Pub. L. No. 113-66, § 1743, 127 Stat. 672 (2013). DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. See DoDI 6495.02 encl. 4, ¶ 4.

249 Transcript of RSP Public Meeting 222-23 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

250 DoDI 5505.18 encl. 2, ¶ 6.

251 Id. at encl. 2, ¶ 1.

252 Id. at ¶ 3.c(3).

253 Id. Additionally, UCMJ jurisdiction over an accused Service member does not deprive state courts of concurrent jurisdiction over that Service member, and states may elect to charge and try military personnel for crimes that occurred in a civilian jurisdiction, regardless of whether the military prosecutes the accused. See United States v. Delarosa, 67 M.J. 318, 321 (C.A.A.F. 2009); see also
In sexual assault investigations where the MCIO is the lead investigating agency, DoD policy requires implementation of Special Victim Capabilities. Special Victim Capabilities are a distinct, recognizable group of appropriately skilled professionals, consisting of specially trained and selected MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel who work collaboratively to investigate allegations of adult sexual assault, domestic violence involving sexual assault, and/or aggravated assault with grievous bodily harm, and child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm; and provide support for victims of these offenses.

MCIOs investigating sexual assault allegations must collaborate regularly with respective Special Victim Capability partners for periodic investigative case reviews and to ensure all aspects of the victim’s needs are being met. Commanders are provided updates on significant developments in criminal investigations, but they may not impede an investigation or the use of investigative techniques. Once an investigation is complete, the case is provided to the appropriate military commander (the commander who is the initial disposition authority, as described below, for the accused) for consideration of “some form of punitive, corrective, or discharge action against an offender.”

C. DISPOSITION AUTHORITY FOR REPORTS OF SEXUAL ASSAULT

DoD policy also establishes the minimum level of command that may resolve an allegation of sexual assault. The first SPCMCA in the grade of O-6 or above in the chain of command of the accused serves as the “initial disposition authority” for all sexual assault allegations. Senior commanders with initial disposition authority often have no personal knowledge of either the accused or the victim. When an investigation is complete, the initial disposition authority reviews the results of the investigation in consultation with a judge advocate and determines the appropriate disposition of the case.

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Heath v. Alabama, 474 U.S. 82, 89 (1985) (holding that federal and state governments are treated as separate sovereigns, in which criminal proceedings by one sovereign do not preclude proceedings by the other). For offenses that occur on post, the local United States Attorney may also exercise jurisdiction as the Federal sovereign in place of the military. Crimes that occur overseas fall within the jurisdiction of the host country unless exempted by law or agreement with the United States, often through status of forces agreements that provide specific guidance for jurisdiction over Service members.


255 DTM-14-002 at Glossary.

256 For further discussion on structure and implementation of Special Victim Capabilities, see the Comparative Systems Subcommittee Report to the RSP.


258 DoDI 6495.02 encl. 12 (app.), ¶ a (referring to standard reporting of substantiated reports).

259 Id. at encl. 5, ¶ 7.b (referring to Apr. 2012 SecDef Withhold Memo, supra note 70).

260 Apr. 2012 SecDef Withhold Memo, supra note 70; see also Transcript of RSP Public Meeting 210-11 (June 27, 2013) [testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General’s Corps] (“[C]ommanders do not make decisions in a vacuum . . . and their [judge advocate]s are involved at every step of the way . . . .”). Disposition may include no action, nonjudicial punishment, administrative action such as administrative separation from the service, referral to a summary or special court-martial,
If the initial disposition authority determines that a court-martial is warranted, charges alleging the offense(s) are preferred against the accused. The commander also may choose to dispose of offenses by nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), initiate an administrative discharge to involuntarily separate an offender, take other adverse administrative action, or a combination of actions. The commander may decline to take action or may be precluded from action based on evidentiary insufficiency, the running of the statute of limitations, or the unavailability of witnesses or evidence. The commander may also decline action and “unfound” an allegation when the commander determines the report was either false or baseless.

In the Army, “[t]he decision as to whether an offense is founded or not, and whether the accused should be indexed as having committed a founded offense belongs to the supported prosecutor.” The Army defines a “founded” offense as a probable cause determination that an offense was committed. U.S. Army Criminal Investigation Command (CID) solicits an opinion from a supporting judge advocate, and is the only MCIO to provide the command with an investigation after making a qualitative evidentiary determination. Unlike the Army, the Air Force Office of Special Investigations (AFOSI), Naval Criminal Investigative Service (NCIS), and Coast Guard Investigative Service (CGIS) all provide investigations to relevant commanders without any legal conclusions or qualitative opinions on the evidence. Irrespective of any previous determinations made by judge advocates or MCIOs, commanders are required to review all open investigative reports and provide MCIOs a written response indicating what action was taken in a case prior to closure of a criminal investigation for any sexual assault allegation.

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261 Any person subject to the UCMJ, including a Service member who has been the victim of a sexual assault, may prefer charges. MCM, supra note 4, R.C.M. 307(a). Often, however, charges are preferred by unit-level commanders.

262 DoDI 6495.02 encl. 12, ¶ b(1). In Section 1752 of the FY14 NDAA, Congress expressed its sense that charges of rape or sexual assault under Article 120, forcible sodomy under Article 125, and attempts to commit these offenses under Article 80 of the UCMJ should be disposed of by court-martial rather than nonjudicial punishment or administrative discharge. FY14 NDAA, Pub. L. No. 113-66, § 1708, 127 Stat. 672 (2013). In Section 1753, Congress expressed its sense that “the Armed Forces should be exceedingly sparing in discharging in lieu of court-martial” those who have committed these offenses. Id. at § 1753. Congress further provided its sense that victims should be consulted prior to deciding whether to discharge an alleged offender in lieu of court-martial, and convening authorities should consider the views of victims in their determination. Id.

263 DoDI 6495.02 encl. 12, ¶ c. Determining a report to be “unfounded” because it is false or baseless is the same standard used by the Department of Justice and Federal Bureau of Investigation. See U.S. Dep’t of Justice, Uniform Crime Reporting Handbook 41 (2004), available at http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

264 Id. at encl. 12, ¶ d.

265 Army Response to RSP Request For Information 66 (Nov. 21, 2013).


267 DoD Instruction 6495.02 also authorizes MCIOs to unfound reports. DoDI 6495.02 encl. 12 (app.), ¶ f. There is inconsistency in terminology and application regarding qualitative evidentiary review and the naming conventions assigned thereto. Though all services are required by DoD Instruction and the NDAA FY11 to use the same definitions for “substantiated reports,” those definitions are inconsistent within DoD Instruction 6495.02, Enclosure 12 (Appendix). For a more in-depth analysis of investigative processes and conflicting terminology, see the Comparative Systems Subcommittee Report to the RSP.

268 Services’ Responses to RSP Request For Information 66 (Nov. 21, 2013).

269 DoDI 5505.18 encl. 2, ¶¶ 4, 5.
V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

For any offense committed after June 24, 2014, Section 1705 of the FY14 NDAA amends Article 18 of the UCMJ, to restrict jurisdiction for certain sexual assault offenses to general courts-martial.270 As such, the SPCMCA who is the initial disposition authority will not have the power to refer charges of rape or sexual assault under Article 120(a) or (b), rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts to commit these offenses under Article 80 of the UCMJ to a special court-martial. Any allegation warranting trial must be forwarded to the general court-martial convening authority (GCMCA) for referral, following completion of a pretrial investigation in accordance with Article 32 of the UCMJ. In other words, if the initial disposition authority believes there is sufficient evidence of one of these offenses to warrant trial by court-martial, the case cannot be referred to a special court-martial. Instead, the offense may be referred only to a general court-martial. If a judge advocate disagrees with the SPCMCA’s disposition decision, that judge advocate may bring the issue to the attention of a higher authority.271

D. OTHER COMMANDER RESPONSIBILITIES

In addition to their case disposition responsibilities, military commanders are also responsible for the care and protection of both the victim and the accused. Military commanders must ensure victims and those accused are treated fairly and their rights are respected. As one retired general officer explained to the Subcommittee, “[i]t’s not a matter of who holds convening authority to make members feel valued and understand they’ll be treated fairly. It’s about a commander’s role across the board to make sure people — our members are valued.”272

After a victim files an unrestricted report, which triggers an investigation and informs the chain of command of an allegation, the commander has means to safeguard the victim. A commander may impose a military protective order or other lawful order (e.g., a no-contact order) to insulate an alleged victim from the subject of the allegation.273 The commander may restrict or confine a subject, if warranted.274 The commander may also move the victim or subject to a different workplace or unit or pursue a location transfer for either individual. If a victim requests to change his or her unit, assignment, or location, DoD and Service policies require the commander to act on the request within 72 hours, and any request that is denied must be reviewed by the first general officer in the chain of command.275 In addition, a commander must ensure a victim has sufficient time to attend medical, legal, or other appointments and ensure he or she does not experience retaliation through personnel actions or from others in the organization when he or she reports or is a victim of a crime.

273 See Dep’t of Def. Form 2873, Military Protective Order (July 2004).
274 For additional discussion on restriction and pretrial confinement, see Part VI, infra.
276 Section 1709 of FY14 NDAA requires the Secretary of Defense to prescribe regulations or require the Service Secretaries to prescribe
A commander must also ensure protection of the rights of an accused assigned to the organization throughout an investigation or any adjudication that results. A commander may not investigate and should not discuss allegations with a subject, but Article 31 of the UCMJ obligates a commander who interrogates or requests a statement from an accused to properly advise the accused of his or her right to remain silent and to seek counsel.\textsuperscript{277} A commander must ensure the accused is fairly treated and not improperly punished prior to trial.\textsuperscript{278} A commander must also ensure that a Service member who is accused has adequate time and opportunity to prepare for his or her defense, including adequate duty time to meet with his or her military defense counsel.

Whether intentional or not, commanders must remain ever cognizant that their words and actions may inappropriately influence resolution of cases. Article 37 of the UCMJ prohibits commanders from unlawfully influencing witnesses, court members, judge advocates, military judges, or investigators. In addition to their influence on others, commanders may also be subject themselves to undue or unlawful command influence.\textsuperscript{279} Cases of sexual assault pose a particular concern for undue or unlawful command influence, and commanders must be scrupulous in exercising their own independent discretion in actions they take before, during, and after a case.\textsuperscript{280}

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\textsuperscript{277} 10 U.S.C. § 831(b) (UCMJ art. 31(b)).

\textsuperscript{278} Article 13 of the UCMJ prohibits "punishment or penalty other than arrest or confinement upon the charges pending," and if arrest or confinement is imposed, it may not be "any more rigorous than the circumstances required to insure his presence." Infractions of discipline during this period, however, may subject an accused to "minor punishment." 10 U.S.C. § 813 (UCMJ art. 13).

\textsuperscript{279} 10 U.S.C. § 837(a) (UCMJ art. 37(a)); MCM, supra note 4, R.C.M. 104(a)(1).

\textsuperscript{280} The U.S. Army observed that "[a]fter comments [regarding sexual assault in the military] earlier [in 2013] by several high-profile officials including the President, two Secretaries of Defense, the Chief of Staff of the Army, the Sergeant Major of the Army, and several elected officials, the litigation has increased with the defense filing UCI motions in approximately one-fourth of contested sexual assault cases since those comments." Army Response to RSP Request for Information 84 (Dec. 19, 2013). The U.S. Marine Corps estimated that UCI motions were filed in approximately 100 UCI cases following comments made by the Commandant of the Marine Corps during his worldwide 2012 Heritage Brief speaking tour, the Navy approximated 80 or more UCI motions were likely filed in 2012 and 2013, and the Air Force noted "numerous" UCI motions were pending litigation in sexual assault cases. The Coast Guard reported six UCI motions in 2012 and 2013 based on senior official commentary. See Services’ Responses to RSP Request for Information 84 (Dec. 19, 2013).
E. PART V SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 14:** The Secretary of Defense should direct DoD SAPRO to ensure sexual assault reporting options are clarified to ensure all members of the military, including the most junior personnel, understand their options for making a restricted or unrestricted report and the channels through which they can make a report.

**Finding 14-1:** Sexual assault victims currently have numerous channels outside the chain of command to report incidents of sexual assault, and they are not required to report to anyone in their military unit or any member of their chain of command. These alternative reporting channels are well and broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.

**Finding 14-2:** It is not clear that a sufficient percentage of military personnel understand sexual assault reporting options. Based on recent survey results, junior enlisted personnel scored lowest in understanding the options for filing a restricted report. Nearly one-half of junior enlisted personnel surveyed believed they could make a restricted report to someone in their chain of command.

**Finding 14-3:** Under current law and practice, unrestricted reports of sexual assault must be referred to, and investigated by, military criminal investigative organizations that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.
VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

The evolution of military justice and the role of the commander in it reflect a systematic effort to ensure the good order, discipline, and readiness of U.S. forces by providing for the fair administration of justice. This essential relationship between justice and mission readiness is embodied in the preamble to the Manual for Courts-Martial: “The purpose of military law is 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.”

A. PRETRIAL RESPONSIBILITIES OF COMMANDERS

The UCMJ vests commanders with military justice responsibilities that precede their responsibilities in courts-martial. Commanders are responsible for ensuring allegations of misconduct are properly investigated. When any serious allegation is made, commanders may take steps to ensure the accused’s presence at trial and the prevention of serious misconduct (including threats against or intimidation of witnesses). If circumstances are appropriate, a commander may order a form of pretrial restraint, such as imposition of conditions on liberty, restriction to certain physical limitations, arrest, or confinement (with no option for bail). A commander may order an accused into pretrial confinement when there is probable cause to believe that an offense triable by court-martial has been committed, the accused committed the offense, and confinement is required by the circumstances. A commander need not have convening authority to order pretrial confinement, and it may be imposed any time before or after preferral (initiation) of charges.

When a commander receives the results of a preliminary inquiry into an offense, such as a report of investigation from a military criminal investigative organization (MCIO), the commander must exercise independent discretion in considering appropriate disposition. Commanders may consider the “nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command.”

281 MCM, supra note 4, at pt. I, ¶ 3.
282 See id. at R.C.M. 303.
283 See id. at R.C.M. 305.
284 Id. at R.C.M. 304.
285 Id. at R.C.M. 305(h)(2)(B).
286 Apr. 2012 SecDef Withhold Memo, supra note 70. For additional discussion, see Part III, Section B, supra.
287 See MCM, supra note 4, at R.C.M. 306(b) disc. Section 1708 of the FY14 NDAA eliminated character and military service of the
may weigh those factors, as well as several other recommended jurisdictional and evidentiary issues, prior to making an initial determination on disposition. This decision is usually made after consultation with and recommendation from a judge advocate officer. As explained in Part V, Section C of this report, DoD policy reserves the authority to decide initial disposition for sexual assault allegations to O-6 commanders serving as SPCMCAs, who must consult with a judge advocate before determining disposition.

If the allegation and information warrants court-martial, charges are preferred against the accused. Once charges are properly preferred, the immediate commander or higher echelon commander “cause[s] the accused to be informed” of the charges. Charges are then forwarded through the chain of command for prompt disposition determination. A commander does not necessarily need convening authority to dispose of charges. Unless a higher-level commander has withheld disposition authority, as the Secretary of Defense did for certain sexual offenses, commanders with authority to impose nonjudicial punishment under Article 15 of the UCMJ may dispose of charges. Charges may be disposed by dismissing some or all of the charges, forwarding any or all of them to the next higher commander, or referring any or all of them to a court-martial that commander is authorized to convene. Like the preferral decision, these decisions are normally made after consultation with, and recommendation from, a judge advocate officer.

B. PRETRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES

The convening authority, in conjunction with the military judge, is responsible for ensuring a military member is brought to trial, in general, within 120 days after preferral of charges or the imposition of pretrial restraint, the speedy trial standard established by the UCMJ. Prior to referral, the convening authority is responsible for granting pretrial delays and approving exclusion of any delays from the statutory speedy trial right of the accused.

Referral is the act of ordering a charge tried by court-martial, and only a general court-martial convening authority (GCMCA) may refer a charge to trial by general court-martial. However, pursuant to Article 32 of the UCMJ, no charge may be referred to a general court-martial until the completion of a pretrial investigation, unless waived by the accused. Unless limited by Service regulation, the Article 32 investigation may be ordered by any convening authority. The convening authority who orders the Article 32 also details the investigating

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288 Unit-level commanders typically prefer charges, but any person subject to the UCMJ may do so. The individual preferring charges must sign the charges under oath and must swear to having personal knowledge of the charges, and that the signer believes they are true. See MCM, supra note 4, at R.C.M. 307.

289 Id. at R.C.M. 306(a).

290 Id. at R.C.M. 306, R.C.M. 401(b).

291 Withheld offenses include rape and sexual assault under 10 U.S.C. § 920 (UCMJ art. 120); forcible sodomy under 10 U.S.C. § 925 (UCMJ art. 125); and any attempts thereof under 10 U.S.C. § 880 (UCMJ art. 80); see also Apr. 2012 SecDef Withhold Memo, supra note 70.

292 MCM, supra note 4, at R.C.M. 401(c).

293 Id. at R.C.M. 707.

294 Section 1701 of the FY14 NDAA incorporates eight rights for victims of offenses under the UCMJ into Article 6b of the UCMJ. One right is the “right to proceedings free from unreasonable delay.” FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013). It is not clear at this time how this right will affect existing speedy trial considerations and procedures.

295 MCM, supra note 4, at R.C.M. 405(c). Article 32 investigations are normally ordered by the SPCMCA.
VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Under current law, an Article 32 investigation “shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to disposition which should be made of the case in the interest of justice and discipline.” In addition to other amendments, Section 1702(a) of the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) changes the review standard under Article 32 from a “thorough and impartial investigation” of charges to a preliminary hearing for the narrow purposes of: (1) determining whether probable cause exists to believe an offense has been committed and that the accused committed the offense; (2) determining whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) consideration of the form of charges; and (4) recommending disposition. These changes are effective December 27, 2014, one year after enactment of the FY14 NDAA.

Once the investigation is complete, the Article 32 investigating officer provides findings and recommendations to the convening authority who directed the Article 32. That convening authority then makes an informed decision on the disposition of charges. Where the evidence supports the charged offenses, the charges and the Article 32 investigating officer’s report, recommendations of subordinate commanders, and any documents accompanying the charges will normally be forwarded to the GCMCA. A convening authority disposing of charges may also return the charges to a subordinate commander for action, but may not direct or influence that action.

For any offense committed after June 24, 2014, Section 1705 of the FY14 NDAA amends Article 18 of the UCMJ to restrict jurisdiction for charges of rape or sexual assault under Article 120(a) or (b), rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts to commit these offenses under Article 80 of the UCMJ to general courts-martial. As such, an initial disposition authority or GCMCA will not have authority to return charges for these offenses to a subordinate commander for possible referral to a special court-martial.

Upon receipt of preferred charges with a recommendation that the case be tried by general court-martial, the GCMCA must comply with certain statutory requirements prior to referring the case to trial. The GCMCA must ensure that a thorough and impartial investigation was conducted in accordance with Article 32 of the UCMJ, and he or she must refer the charges to his or her staff judge advocate for advice and consideration.

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296 Id. at R.C.M. 405(d)(1). Section 1702 mandates that a judge advocate of equal or senior rank to the military counsel is required to serve as the hearing officer “whenever practicable” in all cases. FY14 NDAA, Pub. L. No. 113-66, § 1702(b)(2), 127 Stat. 672 (2013). In an August 2013 memorandum, the Secretary of Defense mandated that all Services would provide judge advocates as investigating officers in Article 32 investigations where sexual assault is alleged by December 1, 2013. U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013).
297 10 U.S.C. § 832 (UCMJ art. 32).
299 Id. at § 1702(d)(1).
300 See MCM, supra note 4, at R.C.M. 405(j). The report should include the name of the defense counsel, the substance of the testimony taken, other matters considered, a statement of any reasonable grounds to question the accused’s mental responsibility for the offense or ability to participate, a statement regarding the availability of witnesses and evidence, an explanation of delays, a conclusion as to whether the charges are in their proper form, a conclusion as to whether reasonable grounds exist to believe the accused committed the charged offenses, and a recommendation that includes disposition.
301 See id. at R.C.M. 401(c)(2)(B) and disc. (referencing R.C.M. 104); see also 10 U.S.C. § 837 (UCMJ art. 37).
303 10 U.S.C. § 832 (UCMJ art. 32); MCM, supra note 4, R.C.M. 405. As noted above, the FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 26, 2014. See supra note 299 and accompanying text.
304 10 U.S.C. § 834 (UCMJ art. 34); MCM, supra note 4, at R.C.M. 406.
A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command. Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6. Before the convening authority may refer charges to a general court-martial, the staff judge advocate must provide, in writing, his or her own personal legal opinion expressing whether the charges state an offense, whether the charges are warranted by the Article 32 investigation report, and whether a court-martial would have jurisdiction over the individual and the offense. In advising convening authorities, all military attorneys acting on behalf of the Government are bound by their Service’s rules of professional conduct, which require them to advise the convening authority when a charge is not warranted by the evidence or supported by probable cause. The staff judge advocate must also provide a recommendation as to the disposition of the offenses, but this recommendation is not binding on the convening authority. Once the staff judge advocate has provided written advice and a disposition recommendation, the GCMCA may decide whether to refer the case to court-martial or send it to a lesser forum for adjudication.

Information presented to the Subcommittee indicates that convening authorities and staff judge advocates agree on disposition of allegations in the overwhelming majority of cases. However, as a matter of law the GCMCA is not bound by the staff judge advocate’s recommendation. So long as the staff judge advocate advises that the charge states an offense, that the charge is warranted by the evidence, and that there is jurisdiction over the person and offense, the convening authority may refer the charge to court-martial, even if the staff judge advocate recommends a different disposition. The convening authority may also elect, contrary to the staff judge advocate’s recommendation, not to refer the charge for trial. The staff judge advocate may communicate directly with the staff judge advocate of the superior commander (the next higher commander in the chain of command) or with the Judge Advocate General of his or her Service if he or she disagrees with the convening authority’s decision. While a superior commander is prohibited from attempting to influence the subordinate convening authority in response to being notified of such a disagreement, the superior convening

305 MCM, supra note 4, at R.C.M. 103(17), R.C.M. 105(a).

306 See Transcript of RSP Public Meeting 244 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

307 The discussion to R.C.M. 406 provides that a staff judge advocate will use a probable cause standard of proof in assessing whether the allegation of each offense is warranted by the evidence in the report of investigation. MCM, supra note 4, at R.C.M. 406(b)(2) disc.

308 See U.S. Dep’t of Army, Army Reg. 27-26, Rules of Professional Conduct for Lawyers 23 (Rule 3.8) (May 1, 1992); U.S. Dep’t of Air Force, Air Force Inst. 51-201, Administration of Military Justice 299 (Standard 3-3.9) (June 6, 2013); U.S. Dep’t of Navy, Judge Advocate General Instr. 5803.1D, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of The Judge Advocate General 95 (Rule 3.8) (May 1, 2012).

309 10 U.S.C. § 834 (UCMJ art. 34); MCM, supra note 4, at R.C.M. 406. Article 34 of the UCMJ requires only written SJA advice for referral to general courts-martial, but written advice may be provided to the convening authority in referrals to lesser courts-martial as well.

310 As noted above, for offenses committed after June 27, 2014, adjudication of sexual assault offenses at a lesser forum than general court-martial will no longer be an option, as only general courts-martial will have subject-matter jurisdiction over sexual assault offenses. See supra note 299 and accompanying text.

311 A review of criminal cases between January 1, 2010 and April 23, 2013 showed that Air Force commanders and their staff judge advocates agreed on appropriate disposition in more than 98 percent of cases where the staff judge advocate recommended trial by court-martial. Written Statement of Lieutenant General Richard C. Harding, U.S. Air Force, to the RSP (Sept. 25, 2013). Retired officers who held GCMCA testified they had never personally disagreed or heard of a case where a GCMCA disagreed with a staff judge advocate’s recommendation to refer charges to court-martial. Transcript of RSP RoC Subcommittee Meeting 278-79 (Jan. 8, 2014) (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy; General (Retired) Roger A. Brady, U.S. Air Force; and Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps).

312 See 10 U.S.C. § 806(b) (UCMJ art. 6(b)).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

authorities may withdraw a decision from a subordinate commander and dispose of the charges pursuant to his or her own independent judgment.

To ensure more rigorous scrutiny of a convening authority’s referral discretion, Section 1744 of the FY14 NDAA imposed a new review requirement for any decision not to refer charges of sex-related offenses to trial by court-martial. If the staff judge advocate recommends charges be referred to trial by court-martial and the convening authority rejects that advice, the convening authority must forward the case file to the Service Secretary for review. If the staff judge advocate recommends that charges not be referred to trial by court-martial and the convening authority concurs, the convening authority must forward the case file to a superior commander authorized to exercise general court-martial convening authority for review.313

Before referring charges to court-martial, the convening authority must select and detail personnel who will serve as voting members of the court-martial, normally referred to as panel members (jurors) in accordance with Article 25 of the UCMJ. The convening authority must consider all personnel assigned to his or her command, regardless of rank or occupational specialty.314 The convening authority personally details members of the command as voting members of the court-martial convened by referral of the charges to trial. His discretion is not, however, absolute. Instead, Article 25 of the UCMJ requires detail of panel members who are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”315 Members must be senior to the accused,316 and may be officer or enlisted personnel. If an enlisted accused requests enlisted members, at least one-third of the panel will be comprised of enlisted members.317 The convening authority’s decision is recorded on a court-martial convening order, which is a written order designating the type of court-martial, court-martial panel members, the authority under which the court is convened (statutory or Secretarial), and location of the court-martial.318 The convening authority may then refer charges to a court-martial constituted under the court-martial convening order.319

The convening authority may excuse and detail new members for any reason before the court is assembled (the court is assembled after the detailed members have undergone voir dire, all challenges have been exercised, and the remaining panel members are sworn for their duty as voting members of the court), and for good cause following assembly of the court.320 As a senior commander, the convening authority assesses different and

313 FY14 NDAA, Pub. L. No. 113-66, § 1744(c),(d), 127 Stat. 672 (2013). Section 1744(c)(6) requires “a written statement explaining the reasons for the convening authority’s decision not to refer any charges for trial by court-martial” to be included in the case file forwarded for review.
315 10 U.S.C. 825(d)(2) (UCMJ art. 25(d)(2)).
316 Court members may be in the same grade as the accused, but they must have seniority based on the date they were promoted to that grade. In other words, for an accused who is an Army captain, other captains may serve as court members so long as their date of promotion to captain is earlier than the accused’s date. 10 U.S.C. § 825(d)(1) (UCMJ art. 25(d)(1)).
317 MCM, supra note 4, at R.C.M. 503(a)(2).
318 Id. at R.C.M. 504(d).
319 Id. at R.C.M. 601.
320 Id. at R.C.M. 505.
sometimes competing priorities, including operational requirements, readiness considerations, and individual hardships in determining whether a member is available for service on a court-martial panel.321

Unlike the members of a court-martial, the military judge for a court-martial is detailed in accordance with Service regulations by a senior military judge directly responsible to the Judge Advocate General or the Judge Advocate General’s designee.322 Nevertheless, a court-martial convening order is required to properly constitute the court, even when an accused requests trial by military judge alone instead of trial before members.

The convening authority who referred the charges may enter into a pretrial agreement with the accused. Pretrial agreements are used primarily as the military method of plea bargaining, with the accused agreeing to plead guilty to one or more charges, enter into a stipulation of fact, or agree to other conditions not prohibited by law, including the waiver of certain non-jurisdictional procedural or legal errors.323 In exchange for the accused’s offer, the convening authority may agree to refer the charges to a certain type of court-martial, withdraw one or more charges or specifications from court-martial, and/or direct the trial counsel to present no evidence on one or more specifications (resulting in acquittal on those offenses). Because a sentence adjudged by court-martial must be approved by the convening authority, and because the convening authority is vested with authority to reduce the punishment adjudged by the court, perhaps the most common commitment made by convening authorities is to take a specified action on the adjudged sentence, for example a commitment to disapprove confinement in excess of a certain amount, or to disapprove a certain level of punitive discharge. However, based on changes under Section 1702 of the FY14 NDAA to the convening authority’s Article 60 clemency authority,324 which take effect on June 24, 2014, the convening authority will no longer have authority to enter into a pretrial agreement for certain sex offenses in which he or she agrees to disapprove a punitive discharge entirely, but may still agree to commute a mandatory minimum dishonorable discharge to a bad-conduct discharge.325

C. TRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES AND THE MILITARY JUDGE

Once a case is referred for trial by court-martial, Rule for Courts-Martial (R.C.M.) 701 establishes compulsory discovery provisions for the government. Article 46 of the UCMJ and R.C.M. 703 require that the trial counsel, defense counsel, and court-martial have equal opportunity to obtain witnesses and evidence.326

321 A retired Air Force judge advocate and former senior representative from the Department of Defense Office of the General Counsel described the challenge in assessing member availability based on competing military interests, particularly in times or locations of active military operations. Since once assembled, the duty as a member of the court takes priority over all other duties, he observed that panel service “[impacts] the fighting force available at the tip of the [spear]. Now who makes that decision as to who is expendable at the tip of the [spear]? Should it be the judge advocate? Should it be pulling the name out of the hat? Or should it be the Commander whose responsibility it is to execute the war?” Transcript of RSP RoC Subcommittee Meeting 36 [Mar. 12, 2014] (testimony of Mr. Robert Reed, former DoD Associate Deputy General Counsel for Military Justice and Personnel Policy).

322 MCM, supra note 4, at R.C.M. 503(b)(1).

323 Id. at R.C.M. 705.

324 The convening authority’s ability to enter into certain terms of a pre-trial agreement will be limited based on statutory changes to Articles 18 and 60 of the UCMJ. See FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

325 Id. at §§ 1702(b), 1705.

326 10 U.S.C. § 846; MCM, supra note 4, at R.C.M. 701. Section 1704 of the FY14 NDAA amends Article 46 of the UCMJ to include a provision limiting defense counsel access to interview victims of sex-related offenses. If a trial counsel notifies a defense counsel of the name of an alleged victim of an alleged sexual offense whom the trial counsel intends to call at an Article 32 hearing or court-martial, the defense counsel must submit any request to interview the alleged victim through the trial counsel. If requested by the
VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

The trial counsel, acting under the supervision of the staff judge advocate and on behalf of the convening authority, approves or disapproves specific requests for witnesses and evidence. The convening authority funds government and defense witness and travel costs, and defense requests for production of witnesses are approved or disapproved by the trial counsel. If disapproved, the defense may file a motion requesting the military judge to compel production of the witness. If the military judge grants a motion to compel a defense witness, the trial counsel must produce the witness. If the convening authority persists in the refusal to produce the witness, the military judge may abate the proceedings or take other appropriate action.

Except where the Services have established central funding resources, the convening authority is also responsible for funding expert assistance or expert witnesses for the prosecution and defense, including the expert assistance of defense investigators. Both trial and defense counsel are required to submit a request to the convening authority to obtain expert assistance and funding. A request can be renewed to the military judge if denied, but only after the case is referred for trial. Prior to referral, there is no process for challenging a convening authority’s denial of expert assistance in preparation for trial. Instead, the defense must await referral to trial by court-martial in order to invoke the procedures permitting a military judge to review the denial.

Following referral of charges, several of the pretrial responsibilities vested in the convening authority shift to the military judge, who schedules and presides over any initial sessions and trial. Prior to that first session, the convening authority may order an inquiry into the mental capacity and mental responsibility of the accused. After the first session, the authority to order an inquiry into mental capacity and responsibility belongs to the military judge. Prior to referral, the convening authority may make minor changes to charges and specifications; following arraignment, the military judge may permit changes upon motion of the parties. At any time after referral, the military judge may grant a motion to dismiss specifications or charges based on factual or legal insufficiency, or other irreparable procedural error. The military judge also has authority to grant appropriate relief, including sentence credit, suppression of evidence, and rule on many other legal issues.

327 MCM, supra note 4, at R.C.M. 703(c)(2)(D).
328 Id.
330 A defense counsel from the Navy told the RSP that this can impact trial preparation for the defense and the speedy trial rights of an accused: “The Government is able to use consultant and expert witness, essentially from preferral. But if the defense asks for an expert consultant . . . we have to wait until it’s referred to trial . . . . We can’t use a consultant prior to that unless we can convince the convening authority to give us one.” Id. at 402 (testimony of Commander Don King, U.S. Navy).
331 MCM, supra note 4, at R.C.M. 801. Under Article 35 of the UCMJ, the initial session cannot be held earlier than five days following referral to general court-martial, and three days in the case of a special court-martial. 10 U.S.C. § 835.
332 MCM, supra note 4, at R.C.M. 706(b)(2).
333 Id. at R.C.M. 603.
334 Id. at R.C.M. 907.
as the facts and law determine. Notably, the military judge may also grant appropriate relief in the form of dismissal, with our without prejudice, as the result of unlawful command influence.

Nevertheless, the convening authority retains several responsibilities throughout the trial. The convening authority is responsible for funding and producing witnesses or expert assistance the military judge orders, or face abatement of the proceedings or other appropriate relief as the judge determines. The convening authority may order depositions upon request of a party before or after referral, while the military judge only has that authority after referral. Although a military judge may compel a convening authority to do so, only a GCMCA may grant testimonial or transactional immunity for members subject to the UCMJ. The authority to grant immunity may not be delegated.

D. POST-TRIAL RESPONSIBILITIES OF COMMANDERS AND CONVENING AUTHORITIES

A convening authority may not disapprove a finding of not guilty or any ruling amounting to a finding of not guilty. If an accused is convicted of a charge and sentenced to confinement, he or she begins serving confinement immediately following the announcement of the sentence by the court-martial, and the immediate commander and convening authority are notified of the findings and sentence. The accused may petition the convening authority to defer the effective date of any sentence to confinement, forfeitures of pay, or reduction in grade/rank which have not been ordered executed. If granted, the deferment ends when the sentence is ordered executed by the convening authority, or it may be rescinded by the convening authority at any time prior to action.

After trial, a court reporter assigned to the staff judge advocate prepares the record of trial, which is then reviewed by all counsel and authenticated by the military judge. The record is served on the accused with a copy of the staff judge advocate’s recommendation to the convening authority, which summarizes the trial result, advises whether any corrective action should be taken on allegation of legal error, and provides a recommendation on clemency. The accused, with the advice of counsel, has ten days (up to 30 days with an extension request), to submit additional clemency matters to the convening authority.

335 Id. at R.C.M. 906.
336 Id. at R.C.M. 702(b).
337 MCM, supra note 4, at R.C.M. 704. Only a GCMCA may grant immunity against prosecution or other adverse action for those subject to the Code, even alleged victims of sexual assault who may be concerned about their own collateral misconduct. For further discussion on collateral misconduct, see the Comparative Systems Subcommittee Report to the RSP.
338 MCM, supra note 4, at R.C.M. 704(c)(3).
339 MCM, supra note 4, at R.C.M. 1107(b)(4).
340 10 U.S.C. §§ 857, 857a (UCMJ arts. 57, 57a); MCM, supra note 4, at R.C.M. 1101.
341 10 U.S.C. § 857(a)(2) (UCMJ art. 57(a)(2)); MCM, supra note 4, at R.C.M. 1101(c)(7).
342 MCM, supra note 4, at R.C.M. 1103, 1104, 1105; see also FY14 NDAA, Pub. L. No. 113-66, § 1706(b), 127 Stat. 672 (2013) (prohibiting the convening authority from considering “submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial”).
VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

The convening authority" within ten days (up to 30 days with an extension request) from receipt of the record and the SJA’s post-trial recommendation.343

Action on the findings of a court-martial by the convening authority is not required, but Article 60 of the UCMJ provides significant discretion to a convening authority, deemed “a matter of command prerogative involving the sole discretion of the convening authority,” to disapprove or commute findings of guilt.344 Section 1702(b) of the FY14 NDAA, which takes effect on June 24, 2014, significantly reduces the convening authority’s authority to commute or otherwise disapprove findings. Findings of guilt may only be set aside or commuted for “qualifying offense[s]” — i.e., when the maximum sentence of confinement that may be adjudged does not exceed two years; the sentence adjudged does not include a punitive discharge or confinement for more than six months; and none of the offenses is a violation of Article 120(a) (rape) or 120(b) (sexual assault), Article 120b (rape and sexual assault of a child), or Article 125 (forcible sodomy) of the UCMJ.345

In contrast to the presumptive regularity of court-martial findings, the convening authority must take action on the adjudged sentence.346 A convening authority may not increase the severity of the sentence. While Article 60 provides broad discretion to convening authorities as a matter of “command prerogative” to disapprove, commute, or suspend punishments, Section 1702 of the FY14 NDAA reduces this discretion.347 Under Section 1702’s revisions to Article 60, convening authorities may not disapprove, commute, or suspend adjudged sentences of confinement of more than six months or sentences that include a punitive discharge except for limited circumstances upon recommendation of the trial counsel in recognition of “substantial assistance by the accused in the investigation or prosecution of another person” or in accordance with a pretrial agreement, subject to certain limitations where the offense requires a mandatory minimum sentence.348 If the convening authority disapproves, commutes, or reduces any portion of a court-martial sentence, the convening authority must explain the reason in writing, and the written explanation becomes part of the record of trial and convening authority action.349

Following convening authority action on the sentence,350 the record of trial is either reviewed by a judge advocate under Article 64 of the UCMJ, or transmitted to the Judge Advocate General of the Service for

344 10 U.S.C. § 860 (UCMJ art. 60(a)(4)).
346 MCM, supra note 4, at R.C.M. 1107(d).
348 Unlike civilian jurisdictions, the accused in a court-martial benefits from the lower of the adjudged punishment or the agreed-upon punishment in a pretrial agreement. The authority vested in convening authorities under Article 60 of the UCMJ permits them to reduce sentencing terms in an adjudged sentence to comply with provisions of pretrial agreements limiting sentencing terms. Under Section 1702(b), a convening authority may not commute a mandatory minimum sentence except to reduce a mandatory dishonorable discharge to a bad-conduct discharge. FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).
349 Id.
350 Section 572(a)(2) of the FY13 NDAA also requires initiation of administrative discharge proceedings against any Service member who is convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged. FY13 NDAA, Pub. L. No. 112-239, § 572(a)(2), 126 Stat. 1632 (2013).
E. PART VI SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 15:** Congress should not further modify the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and Department of Defense policy.

**Finding 15-1:** Criticism of the military justice system often confuses the term “commander” with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing.

**Finding 15-2:** Pursuant to National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) amendments to the UCMJ and current practice, only a GCMCA is authorized to order trial by court-martial for any offense of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit these offenses. Subordinate officers, even when in positions of command, may not do so.

**Finding 15-3:** Commanders with authority to refer a sexual assault allegation for trial by court-martial will normally be removed from any personal knowledge of the accused or victim.

**Finding 15-4:** If a convening authority has other than an official interest in a particular case, the convening authority is required to recuse himself or herself.

**Finding 15-5:** Under current law and practice, the authority to make disposition decisions regarding sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.

**Recommendation 16:** The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate the feasibility and consequences of modifying authority for specific quasi-judicial responsibilities currently assigned to convening authorities, including discovery oversight, court-martial panel member selection, search authorization and other magistrate duties, appointment and funding of expert witnesses and expert consultants, and procurement of witnesses.

**Finding 16-1:** Further study is appropriate to fully assess what positive and negative impacts would result from changing some pretrial or trial responsibilities of convening authorities.

**Recommendation 17:** The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a GCMCA should not have authority to override a recommendation from an investigating officer against referral of an investigated charge for trial by court-martial.

351 10 U.S.C. §§ 864, 865 (UCMJ arts. 64, 65).

VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

Finding 17-1: Convening authorities should generally retain referral discretion and should not be bound in all circumstances by the recommendations of an Article 32 investigating officer.

Recommendation 18: Congress should not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.

Finding 18-1: Section 1702 of the FY 14 NDAA, which modifies Article 60 of the UMCJ, significantly limits the post-trial authority and discretion of convening authorities for serious sexual offenses by precluding them from disapproving findings and reducing their discretion to reduce the court-martial sentence for such offenses.
The Subcommittee heard and received substantial information about the roles assigned to military commanders under the UCMJ. The Subcommittee considered numerous proposals and supporting materials advocating for removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Proponents for change articulated a number of reasons why the UCMJ’s current disposition authority framework discourages sexual assault victims and reporting of sexual assault crimes. The Subcommittee also heard from many who believe convening authority is a vital tool for commanders and that changing the UCMJ’s convening authority framework would be counter-productive to military effectiveness and sexual assault response.

A. RECENT STUDIES OF COMMANDER AUTHORITY UNDER THE UCMJ

Recent reviews conducted by organizations outside of DoD have considered the disciplinary powers of commanders under the UCMJ. In 2001, the Cox Commission353 undertook a review of the system in light of the many changes the U.S. military experienced after a half-century under the UCMJ as well as significant military-justice reforms adopted in several Allied countries. As the Commission noted in its report, many witnesses testified that “the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces.”354

Citing such testimony, the Commission concluded that “[t]he combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.”355 Nevertheless, the Cox Commission did not recommend changing the authority held by commanders to convene courts-martial, but recommended other changes to pretrial responsibilities, such as removing commanders from panel selection, approval of witness travel for pretrial hearings, funding for expert witnesses and assistance, and funding for pretrial investigative assistance.356 As for the wisdom of possible additional changes to commanders’ role in matters of military justice, the Commission recommended further study.357

353 The Commission was sponsored by the National Institute of Military Justice and chaired by the Honorable Walter T. Cox, III, former Chief Judge of the Court of Appeals for the Armed Forces.


355 Id. at 8.

356 Id. at 7-8.

357 Id. at 7.
The U.S. Commission on Civil Rights (USCCR) considered the topic of sexual assault in the military for its 2013 annual report. The USCCR held three sessions during a one-day hearing on January 11, 2013, focused on victim and accused perspectives, academic scholar perspectives, and perspectives of military officials. The USCCR issued its report in September 2013.

The USCCR concluded that greater accountability was needed for “leadership failures to implement” the policies implemented by the Department of Defense (DoD) to combat sexual harassment and sexual assault, as well as increased data collection to measure the effects of changes implemented by the military.358 The eight commissioners did not reach a majority conclusion regarding the military justice authority of commanders, but individual commissioners proposed recommendations regarding the role of the commander as convening authority. Four commissioners joined in a statement recommending that “Congress should pass, and the President should sign, legislation creating an authority outside of the military in which is vested the power to investigate, prosecute, try, and impose sentence upon conviction in all sexual assault cases which arise within the military’s ranks.”359 If the military retained jurisdiction, the opinion recommended

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legislation establishing within each branch of the military a centralized legal body ... [with] authority to investigate all reported sexual assault offenses within its Branch, to file charges, and to pursue prosecutions of those allegations in cases where the potential punishment of a perpetrator is not less than imprisonment of six months. In cases where the maximum punishment for [sic] upon conviction is imprisonment of less than six months, these bodies shall return the case to command for Article 15 proceedings.
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The commissioners called on DoD and the Armed Forces to “strip commanders of discretion in the investigation and disposition decisions of sexual assault cases in the military” as an improvement to the current military justice system.361

In a separate statement, one USCCR commissioner opined that the most controversial issue was “whether command should retain the authority to refer soldiers, sailors, marines and airmen to courts martial or merely administer Article 15 discipline.”362 He proposed that “a separate prosecutor’s office should be created in DoD, made up of civilian and military lawyers and investigators. This office should decide, after its investigative staff has examined an incident, whether to bring charges and, if charges are brought, whether they will be at a court martial or an Article 15.”363 The commissioner reasoned that because commanders do not have special legal training to make prosecutorial decisions, it “puts the determining officer at a disadvantage. As hard as they might try not to, the officer will almost inevitably consider conflicts that arise above and/or below their rank in the chain of command.”364

In a separate opinion, the USCCR Vice Chair observed that the military’s prosecution rate for sexual offenses is comparable to that in the civilian sector, and she stated that “[p]olitical pressure from Congress and advocacy

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358 U.S. Comm’n on Civil Rights, Sexual Assault in the Military v (2013).
359 Id. at 135.
360 Id. at 135–36.
361 Id. at 137.
362 Id. at 200 (Statement of Commissioner Dave Kladney).
363 Id. at 200-01.
364 Id. at 201.
groups has resulted in an increase of charges and prosecutions while doing little to reduce the problem.\textsuperscript{365} She further stated that “[r]emoving the commander’s discretion over sexual assault cases would represent a loss, however small, of the commander’s authority and her ability to command her personnel.”\textsuperscript{366} A separate opinion of three USCCR commissioners said “the radical change . . . pending in Congress won’t fix anything. The damage that could be done to command authority far outweighs any benefit that might accrue, and there is no evidence such proposals would benefit sexual assault victims anyway.”\textsuperscript{367}

At its quarterly meeting held on September 26-27, 2013, the Defense Advisory Committee on Women in the Services (DACOWITS) considered the proposal to remove commanders’ convening authority. DACOWITS is a Federal Advisory Committee established by the Secretary of Defense to “examine and advise [the Secretary] on matters relating to women in the Armed Forces.”\textsuperscript{368} On September 26, the Committee heard from Senator Kirsten Gillibrand and Senator Claire McCaskill about their perspectives on sexual assault in military justice and proposed changes to command authority in the UCMJ.\textsuperscript{369} The Committee also received public comment on September 27 from representatives of two advocacy organizations that support removal of commanders’ convening authority: the Women in the Military Project, Women’s Research and Education Institute, and the Service Women’s Action Network (SWAN) but did not hear any other testimony on the matter.\textsuperscript{370} During deliberations, DACOWITS adopted the following recommendation:

DoD should support legislation to remove from the chain of command the prosecution of military cases involving serious crimes, including sexual assault, except crimes that are uniquely military in nature. Instead, the decisions to prosecute, to determine the kind of court martial to convene, to detail the judges and members of the court martial, and to decide the extent of the punishment, should be placed in the hands of the military personnel with legal expertise and experience and who are outside the chain of command of the victim and the accused.\textsuperscript{371}

B. ARGUMENTS FOR CHANGES TO COMMANDER ROLES FOR SEXUAL ASSAULT CRIMES

The Subcommittee considered numerous proposals and supporting materials advocating the removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Many proponents for change asserted that the current role played by commanders as convening authorities discourages Service members from reporting sexual assaults and fosters apprehension among victims about

\begin{footnotesize}
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\item \textsuperscript{365} Id. at 144 (Statement of Vice Chair Abigail Ternstrom).
\item \textsuperscript{366} Id. at 146-47.
\item \textsuperscript{367} Id. at 149 (Statement of Commissioner Todd Gaziano, joined by Vice Chair Ternstrom and Commissioner Kirsanow).
\item \textsuperscript{370} Id. at 10.
\item \textsuperscript{371} Id. at 12-13. Committee discussion on the proposal “generally centered around whether to proceed with the recommendation based on information from the existing briefings and materials or to postpone making a recommendation to further study the issue.” Id. at 13. The DACOWITS committee voted to adopt the recommendation as proposed, with ten votes in favor and six abstentions. Id.
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retaliation and retribution. The Subcommittee reviewed the following arguments in favor of eliminating the military justice authority vested in commanders:

1. Victim Reporting

Proponents for change assert that the current system with commanders serving as convening authority discourages Service members from reporting sexual assaults. According to the military sexual assault advocacy organization Protect Our Defenders (POD), “[v]ictims are often discouraged or sometimes outright told not to report a sexual assault. Of the 26,000 incidents of sexual assaults and other sexual crimes that occurred in 2012, only 3,374 were officially reported. Many times, victims are advised by people in their chain of command that if they report, the victim could face criminal charges or non-judicial punishment for collateral misconduct. This is often enough to silence a victim who is already intimidated or distrustful of the system.”

In June 2013, the President of POD told the Senate Armed Services Committee (SASC) that [Victims] don’t report because they are disbelieved. They don’t report because the often higher-ranking perpetrator is buddies with those that they must report to. They don’t report because they are told when they are given their options to report that, oh, by the way, you were drinking. You are under age. You will be charged with collateral misconduct.

You don’t report because the thought that you have heard from your friend who tried to report that – and you see what happens to them, and they are being drummed out and diagnosed with a personality disorder. These things are not going to change at any tweaks to the system, even common sense tweaks that are good. It is still not going to fundamentally address this issue.

At the same hearing, a representative from SWAN told the SASC, “[s]ervicemembers tell us that they do not report for two reasons primarily. They fear retaliation, and they are convinced that nothing will happen to their perpetrator.”

A former congressman and Army judge advocate told the Subcommittee, “[s]oldiers don’t understand what’s going on. And when they’re victims they fear the worst. And that’s why if you have an independent military justice system at the felony level I do believe more women will come forward.” A former senior Navy chaplain said placing prosecutorial authority in the hands of independent Judge Advocate General (JAG) officers will lead to increased prosecutions and influence victims to report once they see a greater number of perpetrators being “tried and convicted and put out of the service and jailed and all the other appropriate punishments which they’re not seeing. That’s what will send the strong message.”

2. Reprisal and Retribution against Alleged Victims

Several proponents recommending change described frequent allegations of retaliation and retribution against victims. Elaborating on SWAN’s testimony about victim fear of retaliation serving as a deterrent to reporting,

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373 Transcript of SASC Hearing 130 (June 4, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).
374 Id. at 110 (testimony of Ms. Anu Bhagwati, Executive Director, Service Women’s Action Network).
375 Transcript of RSP RoC Subcommittee Meeting 67 (Jan. 8, 2014) (testimony of former U.S. Representative Patrick J. Murphy).
376 Id. at 149 (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy).
VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

Senator Kirsten Gillibrand said victims “have told us that the reason they do not report these crimes is because they fear retaliation. More than half say they think nothing is going to be done, and close to half say they fear they will have negative consequences. They will be retaliated against.”

The Subcommittee received different perspectives on retaliation concerns and why removing prosecutorial authority from commanders would impact the problem. A representative from SWAN described different types of retaliation and retribution against victims:

Retaliation happens in many respects. We see on a day-to-day basis that our callers, both servicemembers and veterans who have recently been discharged, have been punished with anything from personal retaliation from roommates and family members to professional retaliation by their chain of command from the lowest levels to the highest levels, platoon sergeants all the way up the chain.

They are also retaliated in more kind of insidious ways. They are given false diagnoses, mental health diagnoses, like personality disorders, which bar them from service, which force them to be discharged, which ban them from getting VA services, VA benefits. So it is comprehensive retaliation.

Sexual assault survivors also described retaliation they experienced. “The colonel at one point said, you know, . . . boys, girls and alcohol just don’t mix. We’ll never really know what happened inside that office-only you and the major know and he’s not talking. So, at this point, the investigation is closed for a lack of evidence and we’ve reopened a new investigation against you for conduct unbecoming of an officer and public intoxication.”

Another survivor recalled “[t]his officer bragged to his fellow officer friends that he had ‘bagged’ me. I got called up to a major’s office and he charged me with fraternization and adultery. He was married, I wasn’t, and I was charged with adultery.”

POD said victims also face the threat of discipline for collateral misconduct. POD’s president told the RSP in November that “victims who want to come forward are often directed not to report. They are often inappropriately threatened with collateral misconduct, and if they do go forward, targeted with a barrage of minor [disciplinary] infractions as a pretext to force them out of the service.” POD notes that “[t]his is often enough to silence a victim who is already intimidated or distrustful of the system.”

377 Transcript of SASC Hearing 48 (June 4, 2013) (statement of Senator Kirsten E. Gillibrand). In September, Senator Gillibrand told the RSP it wasn’t certain whether removing commanders from the courts-martial referral process would increase sexual assault reporting. She observed that victims indicated it would increase reporting, but “[m]aybe it won’t.” Regardless, Senator Gillibrand said her proposed reform would be a “very good first step.” Transcript of RSP Public Meeting 331 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

378 Transcript of SASC Hearing 116 (June 4, 2013) (testimony of Ms. Anu Bhagwati, Executive Director, Service Women’s Action Network).

379 THE INVISIBLE WAR (Chain Camera Pictures 2012) (statement of Ms. Elle Helmer).

380 Id. (statement of unidentified soldier).

381 Transcript of RSP Public Meeting 325-26 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Out Defenders).

382 “Nine Roadblocks,” supra note 372.
The role of the Commander Subcommittee

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

 ROLE OF THE COMMANDER SUBCOMMITTEE

this problem. The retaliation is not about peer pressure. The retaliation is about the lower-ranking victim being disbelieved by the higher-ranking perpetrators and their friends.\(^{383}\)

3. Expectations of Victims and Survivors

Many proponents for changing the role of the commander described the expectations of victims and survivors. Senator Gillibrand told the RSP she suggested her solution because it is what “victims have said over and over again” and that victims indicated “the problem is that our only decision maker is in the chain of command.”\(^{384}\)

A retired Navy admiral told the Subcommittee “[w]hat has come through loud and clear in my encounters, particularly recently, is optimism from women who are serving. Optimism that this is a time of change.”\(^{385}\)

Another presenter said the proposed change will build trust in victims to report because it “will send the signal that the commander doesn’t have the authority to make the decision anymore.”\(^{386}\)

At its September and November RSP public meetings, the Panel received accounts, in person and through written public comment, from survivors who support removing decision authority for sexual assault cases from the chain of command.\(^{387}\)

Similarly, a retired senior Navy commander and women’s advocate commented on the significant expectations of some victims and survivors. She said “there is so much psychological focus on [the Military Justice Improvement Act] that if it fails there will be repercussions within what they call themselves[,] the victim community.”\(^{388}\)

Another presenter to the Subcommittee stated that “from the eyes of the victims, the survivors, this Gillibrand amendment is huge. It is to them a proxy for what might have made it different in their situation.”\(^{389}\)

4. Fundamental Fairness and Objectivity

In explaining POD’s support of proposals to remove convening authority from commanders, a representative from POD told the RSP this issue “is fundamentally about American values of fairness and justice. We must ensure that the men and women who have signed up to serve this country and risk their lives for our rights are given the same access to impartial justice that every other citizen of this country is entitled to. In order to make that a reality, the military justice system must be reformed to ensure that there is fairness, objectivity, and impartiality. This cannot be achieved without removing the prosecution and adjudication from commanders.”\(^{390}\)

Senator Gillibrand emphasized the need to ensure the victim and accused are treated fairly, which she asserts will happen if prosecutorial discretion is removed from commanders. “[A]t the end of the day, you want to have as close to an unbiased system as possible. I don’t want to weigh the scales of justice in favor of the victim.

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383 Transcript of SASC Hearing 122 (June 4, 2013) (testimony of Ms. Nancy Parrish).
385 Transcript of RSP RoC Subcommittee Meeting 105-06 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Marty Evans, U.S. Navy).
386 Id. at 100 (testimony of Ms. K. Denise Rucker Krepp, former Chief Counsel, U.S. Maritime Administration).
387 Transcript of RSP Public Meeting 17-75 (Nov. 8, 2013); Written Statement of Protect Our Defenders to RSP, Attachment 1 (Sept. 17, 2013).
389 Id. at 147 (testimony of Brigadier General (Retired) Loree Sutton, U.S. Army).
I don’t want to weigh the scales of justice in favor of the defendant. I want it to be even... I want justice to be blind. That’s the whole point. And in today’s system, it is not blind.”391 A retired Army general officer who supports Senator Gillibrand said “objectivity at a level not seen before will be introduced in the process by taking out of the chain of command the responsibility for adjudication.”392

Some former senior military officers also emphasized fairness and objectivity as reasons for change. According to a retired Army general officer, removing convening authority from commanders “will remove the inherent conflict of interest that clouds the perception and, all too often, the decision-making process under the current system. Implementing these reforms will actually support leaders to build and sustain unit cultures marked by respect, good order and discipline.”393 Another retired Army general officer stated that “[t]o hold leadership accountable means there must be independence and transparency in the system. Permitting professionally trained prosecutors rather than commanding officers to decide whether to take sexual assault cases to trial is a measured first step toward such accountability.”394 A retired Air Force general officer said removing military justice authority from commanders will allow them to focus on improving the command climate “[b]ecause [commanders] don’t have to be the judge and jury. They can be the commander and they can analyze their units and the command climate. They can work to change it... We leave it in the hands of professionals and the commanders then can really command and they can lead. And our men and women can have faith in the system.”395

5. Independence and Training of Judge Advocates

Closely related to the perspective that removing prosecutorial discretion from commanders will promote judicial fairness is the sense that independent JAG officers are better trained to make these decisions. “I think what we need so urgently is transparency, and accountability, and an objective review of facts by someone who knows what they’re doing, who is trained to be a prosecutor, who understand [sic] prosecutorial discretion. And these cases on a good day for any prosecutor in America to get right is [sic] difficult. So why would we be giving it to someone who doesn’t have a law degree[?]”396

Some victim advocates and former military officers agreed with this perspective. A civilian lawyer and victim advocate wrote in a letter to POD that “[m]ilitary commanders are the appropriate arbiters where most matters of discipline and good order are concerned, and will always have a crucial role in prevention as well as response. But because of the often misunderstood dynamics that arise in major felonies—particularly but not exclusively sexual violence—their prosecution under the UCMJ is better handled by prosecutors still in uniform but possessed of specialized knowledge. This knowledge involves legal details, cultural aspects, and offense

391 Transcript of RSP Public Meeting 325-26 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).
396 Transcript of RSP Public Meeting 312-13 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

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dynamics. Military lawyers specially trained and unburdened by command concerns are in a better position to
pursue justice and make our military healthier and more efficient.”

A retired general officer and former commander acknowledged that her decision to support removing
prosecutorial decision from commanders was difficult, but she explained her support is “driven by my
conviction that our men and women in uniform deserve to know without doubt that they are valued and will
be treated fairly with all due process should they report an offense and seek help or face being accused of an
offense. When allegations of serious criminal misconduct have been made, the decision of whether to prosecute
should be made by a trained legal professional. Fairness and justice requires [sic] sound judgment based
on evidence and facts independent of preexisting command relationships.”

One former congressman and Marine officer reiterated this point by noting “commanders are rarely trained or prepared to exercise informed judgment regarding the weight of evidence in pending criminal matters.”

Another retired Army general officer told the RSP that “[a]s a commander of soldiers throughout my career, I
would have welcomed the wise counsel and action of independent legal experts in determining the resolution
of sexual assault cases.” She said:

[W]e need to think out of the box. We need new direction. We need creative thinking. We
need not to be so married to the chain of command, which I believe in, I truly believe in, as the
mechanism to command, manage, and administer to the Army in war and peace. But when you
have got a weak link in that chain, then it behooves us to take that weak link out and come up
with a different mechanism for handling the very complex cases of sexual assault with which
we deal.

6. Problems Arising from Conflicts of Interest

According to some, the perceived or actual conflict of interest commanders face as convening authorities is
an inherent problem in the current military justice system. A retired Navy senior commander who served as a
general court-martial convening authority (GCMCA) described her concern to the RSP:

With commanders retaining the decision on which cases go to trial, I believe overcoming
the fact or appearance of conflict of interest is too huge a mountain to climb. From my own
experience, it was gut-wrenching to receive a sailor’s allegation of sexual assault by another
member of the command, particularly one who was senior and perhaps had an excellent
performance record. But it is even more gut-wrenching to reflect on what crimes may not have

397 Letter from Mr. Roger A. Canaff to Ms. Taryn Meeks, Executive Director of Protect Our Defenders (Sept. 16, 2013), reprinted in Written Statement of Protect Our Defenders to the RSP, Attachment 1 (Sept. 17, 2013).
400 Written Statement of Brigadier General (Retired) Evelyn P. Foote to the RSP (Jan 30, 2014).
402 Of the retired and former senior commanders who presented to the RSP or Subcommittee and advocated for change, only Rear Admiral Evans had previously served as a GCMCA.
VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

been reported because the man or woman in my command did not believe I would believe their side of the story or they thought there would be retaliation.\textsuperscript{403}

Advocacy groups cited to comments made by senior officers that led to recent claims of undue command influence in the military justice system:

The classic kind of example of why the current problem is so serious is the Commandant of the Marine Corps doing the right thing as the head of the Marine Corps by speaking out strongly against sexual assault in the Marines. We were very excited to hear that kind of language, but because he is in everyone’s chain of command, it is seen as problematic. But if he were removed from that process like all other unit commanders, he could speak strongly about this issue, as he should, as everyone within the Armed Forces should. But we have this perception that there is undue influence by the Commandant or other military commanders because commanders have this discretion over these cases.\textsuperscript{404}

A former Army criminal investigator expressed her concern with command discretion in \textit{The Invisible War} documentary. “As a CID agent, I found it tremendously frustrating when I would demonstrate that an offender had committed an offense, and taking it to a commander and having a commander being the deciding authority. You know, I don’t think commanders are capable of making an objective decision. I do not think it should be in their hands.”\textsuperscript{405} A retired general officer voiced her agreement on this aspect. “There has to be independent oversight over what’s happening in these cases. Simply put, we must remove the conflicts of interest in the current system, the system in which a commander can sweep his own crime or the crime of a decorated soldier or friend under the rug, protects the guilty and protects serial predators.”\textsuperscript{406}

Recognizing the difficulty commanders face in being truly impartial and objective, a former Marine officer and congressman said the necessity for commanders to develop relationships in their command will always lead to “lingering doubts as to the commander’s impartiality regarding previously well-known subordinates.”\textsuperscript{407} At a January RSP public meeting, he further observed that

\[\text{commanders are rightly held accountable for their command climate. . . . In that context, each court martial referral may be seen by some as proof of poor command climate, potentially affecting a commander’s own career and thereby deterring justified criminal referrals. By contrast, some commanders may be tempted to pursue unwarranted prosecutions, try the accused, to quickly distance themselves and the command from notorious criminal allegations.}\textsuperscript{408}

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\item \textsuperscript{403} \textit{Id.} at 26 (testimony of Rear Admiral (Retired) Marty Evans, U.S. Navy).
\item \textsuperscript{404} \textit{Transcript of Hearing to Receive Testimony on Sexual Assaults in the Military, SASC Personnel Subcommittee} 28 (Mar. 13, 2013) (testimony of Ms. Anu Bhagwati, Executive Director, Service Women’s Action Network).
\item \textsuperscript{405} \textit{the invisiBle War (Chain Camera piCtures 2012) (statement of Ms. Myla Haider)}.
\item \textsuperscript{406} \textit{Transcript of RSP Public Meeting} 302 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand (quoting Lieutenant General (Retired) Claudia J. Kennedy, U.S. Army)).
\item \textsuperscript{407} \textit{Transcript of RSP RoC Subcommittee Meeting} 52 (Jan. 8, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense for Homeland Defense and U.S. Representative).
\item \textsuperscript{408} \textit{Transcript of RSP Public Meeting} 52-53 (Jan 30, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps).
\end{itemize}
7. Military Justice Systems of Allied Nations

Proponents highlighted examples from military justice systems employed by our Allies as support for the contention that commanders should not have convening authority in the U.S. military justice system.409 A frequent assertion has been that removing the commander as convening authority will increase the confidence of sexual assault victims in the military justice system and thereby increase reporting of sexual assault offenses.410

Others asserted that Allied military justice systems validate that good order and discipline does not suffer if commanders are not responsible for prosecutorial decisions for serious crimes. In a June 2013 media interview, Senator Kirsten Gillibrand said “[t]he allies that we fight side by side with have already made this change. Israel, the UK, Canada, Australia, Germany. They’ve all said in order to have justice within the military system, you need decision making about whether to go to trial done by trained prosecutors. All felonies and above, serious crimes, have been taken out of their chains of command into trained military prosecutor systems.”411

Addressing the Panel in September 2013, Senator Gillibrand said that the UK, Israel, and Australia “do not see a lack of good order and discipline because this one legal decision isn’t being made in their chain of command... They will not tell you that their militaries have fallen apart. They will not tell you that their commanders have no ability to set the command climate without this one ability to make a legal decision.”412 She further stated, “[n]ow, you may be told... these other jurisdictions, they don’t have less sexual assault than ours... That’s not why we’re citing them. We’re citing them because their militaries didn’t fall apart... Yes, they’re different militaries than us. You can have a panoply of differences. But they still have good order and discipline and have been able to maintain a command climate without this one legal decision.”413

409 On November 6, 2013, the Subcommittee submitted an initial assessment to the RSP on whether reducing the commander’s role in the military justice systems in Israel, Canada, Australia, and the United Kingdom increased reporting for sexual assault crimes under those systems. See RSP RoC Subcommittee, Memorandum to RSP on Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes (Nov. 6, 2013) at Appendix F.

410 Professor Amos Guiora, a former judge advocate in the Israel Defense Forces, commented on an increase in sexual assault reporting in Israel between 2007 and 2011 in a June letter to the SASC. This letter stated in part: “There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers’ confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forcefully prosecution policy implemented by JAG officers who are not in the ‘chain of command.” Letter from Professor Amos N. Guiora, S.J. Quinney College of Law, University of Utah, to SASC (undated), currently available at http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/Guiora/Prof_Guiora_Statement_to_Senate_Armed%20Services_Committee.pdf. The Deputy Military Advocate General for the IDF, Colonel Eli Bar-On, noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increased reporting. While IDF reports increased, sexual offense indictments declined each year between 2007 and 2011, and Colonel Bar-On observed that many reported incidents do not warrant a criminal indictment and are referred to disciplinary adjudication. Email from Colonel Eli Bar-On to Colonel Patricia Ham, Staff Director, RSP “Statistical Tables Relating to Sexual Assault Within the IDF: 2007 – 2012” (Aug. 11, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/israel-mj-sys/01_Email_To_RSP_from_COL_Eli_Bar_On_Israeli_Defence_Forces.pdf.


413 Id. at 329.
An academic expert on Israel’s military justice system highlighted the importance of preventing undue command influence as reason to remove prosecutorial discretion from the chain of command. “The decision in Israel to create a system whereby indictment decisions are an exclusive bailiwick of the JAG reflects a profound belief in the system and also, I think, in the country that the separation between judge advocates and commanders is necessary in order to prevent undue command influence.” He also noted “that in the Israeli system in the context of ensuring or seeking to ensure objectivity in court martial decisions, and ensuring that they are based on legal analysis rather than unit or command interest, it is in many ways for that reason that the JAG is the decision maker rather than the commander.”

An academic expert on Canada’s military justice system told the RSP, “I have commanded myself in the past. I cannot see what the interest of a commander would be. Even in combat, if one of his soldiers is accused of sexual assault, murder, torture, a major crime, why would he want to continue to be involved in any aspect of prosecution [ ] as opposed to putting it into the hands of the proper authorities that would prosecute this and see this [ ] come to trial? If for no other reason, he also owes a duty to both his unit and other people under his command, particularly if the victim is residing from within. So why would he want to take a role and lose any objectivity that he may have, impartiality, and [h]is focus on delivering the mission?”

An expert on the United Kingdom’s military justice system said, “I’m hearing [the suggestion] that the purpose of maintaining the [commanding officer (CO)’s] position is to enhance his status as a wise leader, and to improve his status to be seen to be a fair decision maker. But, of course, it may diminish his status if he’s seen to be an unfair decision maker when it comes to prosecution. And you can have a situation where in one regiment, the CO is thought to be very strict, and in the other regiment he’s seen to be very weak. How does that help? Why don’t we have an independent [authority] . . . who achieves parity across the whole system?”

C. ARGUMENTS AGAINST CHANGES TO COMMANDER ROLES FOR SEXUAL ASSAULT CRIMES

In contrast, the Subcommittee also heard from those who believe divesting military commanders of their existing convening authority role is both unjustified and counter-productive. A consistent theme among these proponents was that UCMJ authority is essential and integral to the leadership authority, responsibility, and function of those in command. This authority is, according to these proponents, integral to the command function of setting and enforcing standards by holding accountable those who fail to meet standards, which in turn contributes to good order and discipline in their organizations necessary for the Armed Forces to accomplish its mission. Removing convening authority from senior commanders, supporters assert, would not only limit the ability of commanders to address sexual assault issues in their organizations effectively, it would fundamentally impair operational readiness and effectiveness in military organizations. The Subcommittee reviewed the following arguments in favor of retaining the military justice authority vested in commanders.

1. Good Order and Discipline

Many presenters and written submissions to the RSP argued that removing the authority of senior commanders to convene courts-martial for crimes under the UCMJ would impact mission accomplishment and have a detrimental effect on the commander’s ability to ensure good order and discipline within their organizations.

414 Id. at 53 (testimony of Professor Amos N. Guiora).
415 Id. at 54-55.
416 Id. at 80-81 (testimony of Professor Michel Drapeau, University of Ottawa).
417 Id. at 91 (testimony of Lord Martin Thomas of Gresford, QC).
One presenter noted “the commander is accountable for taking all reasonable and necessary means to ensure good order and discipline, and certain obligations are non-delegable. These include disciplining subordinates and understanding both the context of the misconduct and the impact on order and discipline within the unit. These, I believe, represent the core functions of command, and I believe it would be both unwise and inefficient — ineffective, rather, to remove that responsibility from the commander.”

Operational commanders with GCMCA argued the authority to convene courts-martial is essential to their ability to lead the development, readiness, and performance of their organizations. A senior Navy commander with GCM convening authority noted the ability of commanders “to hold offenders accountable for their behavior and their crimes is key to maintaining good order and discipline and also the interests of justice.” He stated “removing a commander from that role with respect to sexual assault or any other criminal offenses would have a detrimental impact on the role of the commander to fulfill the mission.” A senior Air Force GCMCA said giving a commander responsibility without authority is a “recipe for failure,” reasoning that commanders must be trusted to “be fair, impartial, and timely in the execution of [their] responsibilities and authorities,” and confidence in the system weakens without this trust, which “weakens the environment of good order and discipline” and ultimately military effectiveness. Retired senior commanders who held and exercised GCMCA authority also indicated convening authority was a necessary element of their authority for ensuring good order and discipline within the organization.

Senior legal representatives of the Services and staff judge advocates to GCMCAs appearing before the RSP also said a senior commander’s convening authority is essential to his or her ability to effectively lead the organization. One observed that “[r]emoval of the commander from this central role will, in my opinion, have a negative impact both on the commander’s authority to maintain a disciplined force and the commander’s ability to engage in military operations which could require kinetic force.” Another reasoned that “[i]nherent in the concept of military discipline is an accepted senior-subordinate relationship. If that is diminished because the commander cannot hold accountable those in his unit who commit the most serious offenses, the discipline of the military structure will erode.”

2. Command Authority

Analogous to the contention that removing a commander’s convening authority would undermine his or her ability to ensure good order and discipline is the perspective that reducing the disciplinary capability of commanders would damage the ability to lead and enforce standards within their organizations. A former senior Army commander described the “totality of command,” and he reasoned that commanders “must pay attention to everything that goes on in their command” to ensure the right thing is done for the organization’s...

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418 Transcript of RSP Public Meeting 32 (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).
419 Transcript of RSP Public Meeting 22 (Sept. 25, 2013) (testimony of Rear Admiral Dixon Smith, U.S. Navy).
420 Id. at 28–29 (testimony of General Edward A. Rice, Jr., U.S. Air Force). General Rice has since retired.
422 Written Statement of Lieutenant General Flora D. Darpino, U.S. Army, to RSP ¶ 19 (undated).
423 Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard, to RSP (Sept. 25, 2013).
VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

mission, people, and families. Another retired senior commander said that removing a commander’s military justice authority and placing him or her on the sideline would mean “the [S]ervices lose an asset and the commander loses credibility and[,] in turn[,] effectiveness.”

In a June 2013 statement to the Senate Armed Services Committee, General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, stated that “[t]he commander’s ability to preserve good order and discipline remains essential to accomplishing any change within our profession. Reducing command responsibility could adversely affect the ability of the commander to enforce professional standards and ultimately, to accomplish the mission.” The Judge Advocate General of the Air Force said that “out-sourcing enforcement of standards to faraway lawyers diminishes the authority of commanders and cannot, despite its best effort, achieve optimal military discipline.” According to the Staff Judge Advocate to the Commandant of the Marine Corps, “[w]hen their commanders have court martial convening authority, marines know that they can and will be held accountable for failing to act like a responsible and honorable marine. Removing such authority undermines the ability of commanders to enforce the standards they set.”

More specifically, a panel of retired senior commanders who all held GCMCA spoke with the Subcommittee and expressed concern that removing convening authority from the chain of command would reduce a commander’s capability to address sexual assault issues in the organization. One told the Subcommittee, “our commanders need every tool in the UCMJ including non-judicial punishment to enforce [a] climate of trust and respect.” Another said that “any removal or lessening of the authority of the commander will have attendant impact on the commander’s ability to lead, . . . to shape, to mold the command climate, to hold people accountable and to aggressively . . . attack all of the leadership challenges including sexual assault.”

3. Commander Objectivity and Perceived Conflicts of Interest

Retired senior commanders expressed their views that commanders regularly make objective decisions on disciplinary issues and are not influenced by personal relationships with, or knowledge of, those involved. A retired Air Force general officer told the RSP that the conflict of interest issue

is a valid question because occasionally, I think rarely, frankly, . . . commanders flunk that test. Command 101 is do the right thing. We are taught [that] from the beginning. . . . [C]ommanders are the guardians of that value. [I]t means that nobody is bigger than the team. Nobody is bigger than the mission, including the commander. . . . We need to distinguish between the uncomfortable and the difficult. What was right was easy. That is not a difficult decision. It is uncomfortable. . . . And I think most commanders understand that.”

425 Id. at 214 (testimony of Major General (Retired) K.C. McClain, U.S. Air Force).
426 Written Statement of General Martin E. Dempsey, U.S. Army, to SASC 3 (June 4, 2013); see also Transcript of RSP Role of the Commander Subcommittee Meeting 214 (Jan. 8, 2014) (testimony of General (Retired) Roger A. Brady, U.S. Air Force).
430 Id. at 192-93 (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy).
Another retired Air Force general officer described his decision to investigate and then remove a senior subordinate commander after he received a complaint against the commander. The general acknowledged that the decision was “one of the hardest . . . I have ever had to make in my Air Force career,” he took action because he had “lost faith, trust and confidence” in the commander and “there was no question that that was the right decision.”\[^{432}\] He observed that “commanders can be objective. . . . They wrestle with [these issues] day in and day out and it comes down to . . . what do we need for good order and discipline in the overall unit.”\[^{433}\]

Retired senior commanders also rebutted arguments that commanders felt pressure to minimize cases to preclude negative perceptions about their unit. They told the RSP they never looked unfavorably on subordinate commanders who referred a case to trial or perceived such action was indicative of a bad climate in that unit. A retired Army general officer said:

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\text{[A]ll inquiries need to be looked at. And the stats are not important. What's important is your role as a commander, which is about leadership and command is a privilege. And with the command authority comes responsibilities and accountability, and that is what soldiers, men and women, and their families look to the commander for. . . . I can assure you . . . the cost of not doing the right thing is much more damaging than doing the right thing. Soldiers are looking to you to see what action you take both in rewarding good soldiers or disciplining poor performance and not disciplining poor performance, it is not invisible on them.}\[^{434}\]

A retired senior Navy commander added to the Subcommittee that the role of staff judge advocates on military justice matters and recent changes providing for review of case disposition decisions by more senior commanders also alleviate real or perceived concerns about conflicts of interest. He called the commander’s authority and oversight afforded on such decisions “a very positive element for the victim and for justice.”\[^{435}\]

4. Operational Effectiveness

Proponents for retaining commanders in convening authority roles also addressed the potential impact that change could have on military operations. The Legal Counsel to the Chairman of the Joint Chiefs of Staff told the RSP that “the question of military discipline is fundamentally intertwined with the greater question of the commander’s responsibility for operational readiness,”\[^{436}\] and some presenters described potential negative consequences to military operations if commanders lacked military justice convening authority.

Military officials expressed concern that removing or limiting a commander’s military justice authority may impair the essential decisiveness of effective military operations. Speaking about his recent experiences in Afghanistan, a senior Army commander observed that Allied commanders lacked the comprehensive military justice authority he held, which he believed “made for tentative actions on the battlefield or on decision making in general.”\[^{437}\] Similarly, The Judge Advocate General of the U.S. Army said that “commanders and other forces sometimes hesitate to engage the opposing force in combat operations based on their concerns that their

\[^{432}\] Id. at 133 (testimony of Lieutenant General (Retired) Ralph Jodice, II, U.S. Air Force).
\[^{433}\] Id. at 134.
\[^{434}\] Id. at 137-38 (testimony of General (Retired) Ann Dunwoody, U.S. Army).
\[^{437}\] Id. at 11 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).
actions will be viewed in hindsight by individuals who do not understand combat. There is actually a term of art used to describe this hesitation. It is called ‘judicial insecurity.’”}

Additionally, some argue that removing convening authority from a commander with operational responsibility may create issues for subordinates. A retired senior Army commander observed that removing court-martial authority from a commander “would seriously undermine the ability of that commander to ensure justice in his or her entire organization and thereby gain the trust that is absolutely essential to success in any kind of military operation.” The Judge Advocate General of the Air Force said that removing a commander’s military justice authority would send a message that “you can trust your commander to send you into battle where his or her decisions may cause you to pay the ultimate price . . . but you cannot trust your commander to hold your fellow airman accountable for his crime against you. This message is more than just confusing and counterintuitive. It degrades airmen’s trust and confidence in their commanders and, in turn, degrades military discipline.”

5. Commander Accountability for Sexual Assault Prevention and Response

Many presenters emphasized the importance of commanders in addressing the issue of sexual assault in the military. A senior Army commander said that “[i]ncreasing commander involvement and accountability is key to solving this problem.” According to a professor who presented to the RSP, removing commanders from responsibility “could create a perverse incentive for military justice matters in which commanders feel a diminished sense of responsibility because a distant set of judge advocates somewhere else is in charge of these things. This could erode the relationship between the military justice system and the command it is designed to serve.”

Some presenters articulated issues of particular importance to victims of sexual assault that could be affected by removing convening authority from commanders. “In every Service, we have heard that victims are concerned about the length of the process, their inclusion and ability to voice preferences within the process, and the opacity of the system. Taking military justice decision-making authority away from commanders will exacerbate all of these problems.” A senior Air Force commander noted that

in my experience, . . . one of the top reasons people don’t report is because they perceive that the environment into which they are going to report is either, at worst, hostile or, at best, not welcoming. And my experience is in many cases that’s true, but it’s not at the level of the commander, it’s the level below the commander and the individual offices and the unit. I believe the way forward is not to take the commander further out of that responsibility to make

438 Id. at 222–23 (testimony of Lieutenant General Flora D. Darpino, U.S. Army) (noting that judge advocates from other countries indicated commanders were reluctant to engage in aggressive operations when they perceived their actions would be reviewed, investigated, or prosecuted according to common law principles rather than through the lens of armed conflict).


441 Id. at 13 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

442 Written Statement of Professor Christopher Behan, Southern Illinois University School of Law, to RSP (undated).

sure that that environment is the one that we want to . . . increase reporting, but to hold them further accountable for it.\textsuperscript{444}

Presenters also stressed that addressing sexual assault in military organizations requires more than changes to legal authority or procedures. “The eradication of sexual assault within the Coast Guard requires more than extra lawyers or added legal procedures. It requires a cultural change. Cultural change requires leadership; and leadership in the military is provided by the commander. . . . It is imperative that the commander have a role in the disciplinary process so that they remain engaged in the fight to eliminate sexual assault and that their subordinates see that commitment. . . . Currently, our commanders are openly and frankly discussing the issues of sexual assault with their subordinates while at the same time backing up that talk by holding those accountable who fail to follow the law. If the ability to hold members accountable is removed, the importance of the prevention message will also be diminished, no matter how much the commanders stress it.\textsuperscript{445}"

The Subcommittee considered views of survivors of sexual assault who did not advocate removing the commander from the process and from those who expressed satisfaction at the manner in which their cases were handled in the military justice system.\textsuperscript{446} One survivor told the RSP in November that “[t]he chain of command must be held responsible and accountable for serious errors in judgment. Complainants and victims must be protected from retaliation and reprisal. A process must be in place now to ensure this does not happen. This is the only area that should be taken out of the Department of Defense.”\textsuperscript{447}

6. Convening Authority and Staff Judge Advocate Relationship and Interaction

Proponents stressed the importance and nature of the relationship between a convening authority and his or her staff judge advocate. Current GCMCAs said they value and rely on advice and recommendations of their staff judge advocates and legal staffs in making military justice decisions. Commanders said they communicate frequently with their legal advisors, and they highlighted the importance of the advice provided to them in evaluating cases. A current Army GCMCA noted he didn’t always view cases with the same perspective as his staff judge advocate, but he knew he could count on receiving “the very best legal advice, unvarnished and free from influence, except by the laws of our military.”\textsuperscript{448}

Legal advisors indicated they felt comfortable and well trained to independently advise senior commanders and disagree with their decisions, when appropriate. A staff judge advocate to a Navy GCMCA said Navy judge advocates receive ethics training from the Naval Justice School prior to serving as advisors to Navy flag officers, which helps them understand how to respond to disagreements with their commanders.\textsuperscript{449} A current GCMCA from the Marine Corps said he expects his staff judge advocate “to be a second and third order

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\textsuperscript{445} Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard, to RSP (Sept. 25, 2013).
\textsuperscript{447} Transcript of RSP Public Meeting 418–19 (Nov. 7, 2013) (public comment of DA).
\textsuperscript{448} Transcript of RSP Public Meeting 13–14 (Sept. 25, 2013) (testimony of Lieutenant General Michael S. Linnington, U.S. Army).
\textsuperscript{449} Id. at 124–25 (testimony of Captain David M. Harrison, U.S. Navy).
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
A senior commander with GCMCA authority said he perceived benefits in the current system when operating in a deployed location. “Operationally, I have witnessed firsthand . . . the advantages U.S. commanders had in making use of the military justice system that affords investigation, prosecution, and adjudication cases from a deployed footprint, while affording the military justice system access to witnesses, trial attorneys representing both sides, and an impartial judge, and, if necessary, a military jury.”\footnote{\textit{Id.} at 10-11 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).} In contrast, he observed that the military justice systems of Allied nations were “inefficient, costly, and less effective system[s] for dealing with these unique cases.”\footnote{\textit{Id.} at 11.} For example, statistics provided by the former Army Prosecuting Authority for the British Army showed the United Kingdom had not tried any cases in theater in either of the conflicts in Iraq or Afghanistan, despite its commitment of forces to those operations.\footnote{\textit{Id.} at 209 (testimony of Brigadier General Richard C. Gross, U.S. Army).}

Numerous presenters discussed resource impacts if convening authority were vested in someone other than the organizational commander. Some said the U.S. military is sufficiently resourced and adaptable to accommodate increased logistical requirements that might result, if such requirements are prioritized.\footnote{\textit{Id.} at 11.} However, a senior Service legal official said “[c]reating two parallel systems of military justice, each run by a completely different authority will create an inefficient system that will stress existing resources.”\footnote{\textit{Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP 12} (Sept. 25, 2013).} A staff judge advocate stated that “when you have the decision making process bifurcated, you create the inherent possibility of a conflict in prioritization . . . there may be times where a referral decision authority may view the importance of when and where that court-martial stands differently than a commander. And by bifurcating that, you create the possibility of conflict in that decision making process.”\footnote{\textit{Id.} at 209 (testimony of Brigadier General Richard C. Gross, U.S. Army).}

8. Military Justice Systems of Allied Nations

Many presenters highlighted differences between the U.S. and Allied military justice systems, and many noted that our Allies have not produced better results under different legal frameworks in combating sexual assault crimes. The Legal Counsel to the Chairman of the Joint Chiefs of Staff said that “the move by our [A]llies to more civiliz[ed] systems mirrors a general global trend towards demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and it will continue to be different. While many countries can afford for the center of the[ir] military justice systems to be located . . . far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.”\footnote{\textit{Id.} at 209 (testimony of Brigadier General Richard C. Gross, U.S. Army).} General Gross further noted that “[i]t is also important to keep in mind that the scope and scale of our [A]llies’ caseloads are vastly different than ours. None of our [A]llies handle the volume of cases that the U.S. military does. This is likely due to the greater size of our military forces in comparison.”\footnote{\textit{Id.}}
Changes made by our Allies to their military justice systems have occurred at different times, and Allied representatives told the RSP that changes were not made in order to improve sexual assault reporting or prosecution.468 A professor stated that our Allies removed prosecutorial discretion and the ability to convene and administer courts-martial from commanders “in the wake of court decisions interpreting treaty obligations and changes in national charters of rights and freedoms.” He noted that “similar changes are not constitutionally required in our system. With respect to military justice, the foundational constitutional principles [in the United States] have never been amended or changed.”469 A recent article observed that, contrary to the view that the United States is “lagging behind” its Allies in modifying its military justice system, the United States was actually “the forerunner in considering the role of the commander in its military justice system.”470 The article notes that the Elston Act of 1948, the adoption of the UCMJ, the Military Justice Act of 1968, the enactment of the Military Rules of Evidence in 1980, and the Military Justice Act of 1983 all reflect the civilianization of the U.S. military justice system, but they “did not fundamentally alter the command-centric focus of the chain of command in relation to court martial procedures.”471

Current and former military officials from our Allied partners addressed structural changes that removed the commander from the prosecution of cases and what effect, if any, the changes had on reporting trends for sexual assault offenses. None found the changes increased sexual assault reporting. The Deputy Military Advocate General for the Israeli Defense Forces (IDF) noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increase.472 Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue.473 The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010.474 The Canadians were unable to present statistics addressing whether the change in commanders’ role in the military justice system affected sex crime reporting.475 The Commodore of Naval Legal Services for Britain’s Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had “no discernible” effect on the reporting of sexual assault offenses.476 The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and

468 Transcript of RSP Public Meeting 181 (Sept. 24, 2013) (testimony of Major General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces); id. at 244-45 (testimony of Commodore Andrei Spence, Naval Legal Services, British Royal Navy); id. at 238-39 (testimony of Air Commodore Paul A. Cronan, Director General, Australian Defence Force Legal Service).

469 Written Statement of Professor Christopher Behan, Southern Illinois University School of Law, to RSP (Sept. 21, 2013).


471 Id.

472 For discussion regarding Israel’s reporting increase and Colonel Bar-On’s assessment that this increase cannot be attributed to changes in prosecutorial authority for sexual offenses see note 410, supra.

473 Id.

474 Transcript of RSP Public Meeting 163-64 (Sept. 24, 2013) (testimony of Major General Blaise Cathcart, Canadian Armed Forces).

475 Id. at 181-82.

476 Id. at 282-83 (testimony of Commodore Andrei Spence, British Royal Navy). Recent discussion also indicates that prosecution authority changes in the United Kingdom have not quelled concern about sexual assault reporting and prosecution or the protection of Service members. Member of Parliament Madeleine Moon, commenting on recent data from the Ministry of Defence on sexual assault reporting and prosecution, said that the figures could simply be the “tip of the iceberg” and that many more sex attacks in the armed forces could be going unreported. She said “[n]ot enough is being done to make sure that people who join the armed forces are safe from attack and abuse by colleagues.” Sexual assault allegations in military number 200 in three years, THE GUARDIAN (Mar. 2, 2014).
2006 reforms. The Australian Defence Force, however, estimates that between 2008 and 2011, 80% of sexual assaults in their armed forces were unreported even though, by that time, sex offenses had been removed from the criminal jurisdiction of their defense forces.

Moreover, the Legal Counsel to the Chairman of the Joint Chiefs of Staff said he surveyed legal advisors from Allied nations and learned that none could correlate system changes to increased or decreased sexual assault reporting. He indicated there was no statistical or anecdotal evidence among U.S. Allies that removing commanders from the charging decision had any effect on victims’ willingness to report crimes.

9. Progress Indicated through Recent Efforts under Current System

Senior command and legal officials from the Services stated that any proposals for change to the U.S. military justice system must be considered carefully in the context of changes already made and functionality of the overall system. The Staff Judge Advocate to the Commandant of the Marine Corps observed that the Services are “in the middle of executing a remarkable amount of change. Included in this change was a complete revision of the substantive law defining sexual assault.” The Judge Advocate General of the Navy said “when you [consider] . . . the importance of discipline in our business, changing the system, frankly, standing it on its head to get at the possibility is something that we should think very, very carefully about before we go forth and do it, particularly when we’ve improved a lot of the victim support processes, reporting processes.” The Chief of Staff of the Army stated that changes to the UCMJ, even where everyone agrees change is required, should “not be made in a piecemeal fashion. . . By taking a deliberate and thoughtful approach, we can ensure that the UCMJ remains a first class piece of legislation, but also ensure that unforeseen or unanticipated consequences do not adversely affect our military legal system. Any changes to our system must be done with a full appreciation for the second and third order effects on our pre-trial, post-trial and appellate process.”

Service officials also warned against implementing systemic change before there is adequate time to assess the effects of current initiatives, and in the absence of any evidence that change would achieve the objectives those advocating removal of convening authority seek. The Staff Judge Advocate to the Commandant of the Marine Corps commented that there has been a “staggering amount of evolutionary change for one particular class of offenses. We should embrace these changes if they improve our ability to prosecute and defend cases, and protect victims. We must also fully assess the effects of these changes before implementing more revolutionary and fundamental changes to the military justice system. Replacing a commander-driven system of justice with a lawyer-driven model is revolutionary, not evolutionary, and will do more harm than good.”


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role of the commander subcommittee

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The framework offered differing opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what consequences, positive or negative, would result from substantially changing the UCMJ’s convening authority framework. Accordingly, the Subcommittee believes caution is warranted, and systemic change is not advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening authority for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September RSP public meeting observed that it “assumes too much, that somehow a prosecutor is always going to be better at this than commanders.” Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective. A recent White House report, describing the civilian sector, notes that “[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them.”

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors. Often, prosecutors based charging decisions on whether “physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor’s character or behavior.” Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Many proponents of removing convening authority from commanders highlight the predicted impact on reporting rates and victims’ confidence as key reasons for making the change. Nevertheless, the evidence does not support the conclusion that removal of convening authority from commanders would increase reporting rates. Further, the totality of the information received by the Subcommittee does not support a conclusion that removing convening authority from commanders will reduce concerns that victims express about possible retaliation for making reports of sexual assault. Retaliation concerns raised by victims generally relate to peers or direct supervisors and rarely involve convening authorities. Under Section 1709 of the FY14 NDAA, such retaliation will now constitute a criminal offense. Commanders must remain involved, exercising oversight of the treatment of victims after they report and taking action when victims suffer retaliation. Commanders must be held accountable when they fail to do so.

Although the Subcommittee recommends against modification of convening authority responsibilities for sexual assault offenses, it may be appropriate to consider other changes to authorities currently assigned to commanders and convening authorities under the UCMJ. In particular, the Subcommittee believes that expanding the role of military judges, who are independent from the chain of command, may improve case

493 Transcript of RSP Public Meeting 91 (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).
494 White House Report, supra note 126, at 5.
495 Id. at 17 (“One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted [their] desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.”) (footnote omitted).
496 Id.
VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

The Subcommittee believes further study is necessary to fully assess what positive and negative impacts would result from changing pretrial or trial responsibilities of commanders. In particular, the Subcommittee believes discovery oversight, court-martial panel member selection, search authorization and other magistrate duties, appointment and funding of expert witnesses, and procurement of witnesses are responsibilities that are currently assigned in whole or in part to commanders that should be considered and fully assessed.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of potential changes to senior commander authority in the military justice system, commanders and leaders at all levels must enhance their efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility.

F. PART VII SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Recommendation 19: Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses.

Finding 19-1: The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces.

Finding 19-2: The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases.

Finding 19-3: Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.

Finding 19-4: Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.

Finding 19-5: None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the
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convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.

**Finding 19-6:** It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.
Perspectives differ about the role commanders should have in military justice processing for sexual assault crimes, but there is near universal agreement that military commanders and their subordinate leaders are essential to establishing and maintaining an organizational climate that reduces and eliminates sexual assault crimes and responds appropriately to incidents when they occur. Senator Carl Levin (D-MI) observed that “[o]nly the chain of command has the authority needed to [address] any problems with command climate that foster or tolerate sexual assaults. Only the chain of command can protect victims of sexual assaults by ensuring that they are appropriately separated from the alleged perpetrators during the investigation and prosecution of a case. And only the chain of command can be held accountable if it fails to change an unacceptable military culture.”

Senator Kirsten Gillibrand (D-NY) agreed, noting that “[o]nly commanders are responsible for setting command climate. Only commanders are responsible for good order and discipline.” General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, stated that “[c]ommanders are accountable for all that goes on in a unit, and ultimately, they are responsible for the success of the missions assigned to them. Of course, commanders and leaders of every rank must earn that trust and, therefore, to engender trust in their units.”

A. ASSESSMENT METHODS

The Department of Defense and the Services use a variety of tools and methods to assess institutional and command effectiveness in preventing sexual assault and responding appropriately to sexual assault reports. Institutional assessment measures include metrics based on sexual assault case report information in the Defense Sexual Assault Incident Database (DSAID). DoD SAPRO currently monitors DoD and Service performance on six metrics, including trends in overall reports of sexual assault and number and certification of full-time sexual assault prevention and response personnel, and fifteen additional metrics are in development. DoD SAPRO and the Services also use information from the Workplace and Gender Relations Surveys, which are conducted biannually by the Defense Manpower Data Center (DMDC), and the Defense Equal Opportunity Management Institute (DEOMI) Equal Opportunity Climate Surveys (DEOCS) to assess DoD and Service effectiveness in sexual assault prevention and response.
The Services assess the effectiveness of individual commands in sexual assault prevention and response in a variety of ways. All of the Services use command climate surveys as a primary information source to assess the SAPR climate within commands, requiring units to conduct surveys when a new commander assumes responsibility for the organization and annually thereafter. Additionally, a variety of other assessment methods, including individual incident reports, SAPR office feedback from training course evaluations and Case Management Group and Sexual Assault Response Team meetings, DoD and Service inspectors general inspections, SAPR program compliance inspections, 360-degree and other leadership assessments, and local personnel surveys, are used to obtain information about the climate in a command.

B. COMMAND CLIMATE SURVEYS

DEOMI conducts command climate surveys for DoD organizations. DEOMI was established in 1971 as the Defense Race Relations Institute (DRRI), responsible for race relations education for all members of the Armed Forces. DRRI became DEOMI in 1979, and its training mission expanded to include military and civilian equal opportunity and organizational management practices. In the 1990s, DEOMI developed an organizational assessment questionnaire designed to provide organization leaders information about the equal opportunity climate perceptions of assigned personnel. This survey, now called the DEOCS, has since been expanded to address a wide variety of human relations issues, including sexual assault, sexual harassment, hazing, and bullying.

Initially, DEOCS was a voluntary tool available to commanders to assess perceptions within their organizations. The Services also had internal climate survey instruments, and commanders used surveys in conjunction with focus groups, interviews, and other local information gathering methods to assess their command’s organizational climate. As the DEOCS evolved, it became the primary assessment survey for all military commanders at all levels of command. DEOCS became DoD’s exclusive command climate survey instrument to assess perceptions within an organization on January 1, 2014. DEOMI administered more than 1.8 million DEOCS surveys to DoD personnel in 2013, up from 154,381 surveys in 2005.

The DEOCS survey asks respondents questions related to specific factors that impact command and organizational climate. DEOCS Version 3.3.5, which DEOMI implemented in March 2012, assessed fourteen workplace climate factors, including sexual harassment and discrimination; differential command behavior; positive equal opportunity behavior; racist behaviors; age, religious, and disability discrimination; organizational commitment and trust; work group effectiveness and cohesion; leadership cohesion; job satisfaction; and leadership support for sexual assault prevention and response. Version 3.3.5 was the first version of the DEOCS to include SAPR climate questions as a core component of the survey.

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503 Id. at 83-85 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI). Dr. McDonald said DEOCS assessments have increased from ten to 15 assessments per week in 2005 to 250 per week currently, reaching approximately 50,000 personnel with a 53-percent return rate on surveys. Id. at 84-85.


505 Prior to transitioning to the DEOCS on January 1, 2014, the Air Force used the Air Force Unit Climate Assessment for its climate assessment surveys. The six SAPR questions incorporated into DEOCS Version 3.3.5 were also included in the Air Force’s Unit Climate Assessment starting May 31, 2012. See DEOMI Directorate of Research Development and Strategic Initiatives, Sexual Assault Prevention and Response (SAPR) Climate Report: DoD-Wide Analyses and Results I, 1 (Oct. 2013).
respondents answered six questions and sub-parts that assessed four dimensions of the SAPR climate within the command:

- Perceptions of leadership support for SAPR
- Perceptions of barriers to reporting sexual assault
- Bystander intervention climate
- Knowledge of sexual assault reporting options

To provide leaders with a more comprehensive snapshot of the climate within their commands, DEOMI developed and released DEOCS Version 4.0 in January 2014. Version 4.0 includes 95 questions with sub-parts that assess 23 workplace climate factors. SAPR questions in DEOCS Version 4.0 were significantly revised and expanded, in part to meet the requirement in Section 572(a)(3) of the FY13 NDAA to assess the command “for purposes of preventing and responding to sexual assaults.” SAPR climate factors assessed through nine questions with sub-parts on DEOCS Version 4.0 include:

- Perceptions of safety
- Chain of command support
- Publicity of SAPR information
- Unit reporting climate
- Perceived barriers to reporting
- Unit prevention climate/bystander intervention
- Restricted reporting knowledge

In addition, commanders may incorporate up to ten locally developed questions and five short-answer questions into the DEOCS to provide more information on specific topics of interest or focus to the commander. DEOMI provides commanders with examples of locally developed questions and works with commanders to ensure additional questions are valid for survey purposes.

C. FREQUENCY, USE, AND REPORTING OF COMMAND CLIMATE SURVEYS

Prior to 2013, the Services had individual policies for frequency and use of command climate surveys. Section 572(a)(3) of the FY13 NDAA established a common command climate assessment standard, mandating that all military commanders must conduct a climate assessment of the command within 120 days after assuming command and at least annually thereafter. In July 2013, the Under Secretary of Defense for Personnel and Readiness required the Secretaries of the Military Departments to establish procedures to ensure commanders of all units of 50 or more persons conduct climate assessments in accordance with the FY13 NDAA requirement. Section 587(b) of the FY14 NDAA required performance evaluations for all commanders to include a statement whether required climate assessments were conducted, and Section 587(c) directed that failure to conduct required assessments must be noted in a commander’s performance evaluation.

506 See id. at i.
507 DEOMI SAPR Climate Report, supra note 504, at i-iii. In January and February 2014, DEOMI administered 2,582 climate surveys for DoD and Coast Guard units, which resulted in 122,003 responses from personnel. Id. at 16.
In addition, DoD’s July 2013 policy mandated that the commander at the next level in the chain of command also receive survey results and analysis within 30 days after the requesting commander received the survey results.510 This policy took effect prior to passage of Section 587(a) of the FY14 NDAA, which mandated that results of command climate assessments must go to the individual commander and the next higher level of command. The Services have since established policies in accordance with DoD’s guidance for survey frequency and result reporting requirements.511

According to DEOMI, administering a survey does not complete assessment of a command’s climate, because the results obtained from a DEOCS are only the “starting point” that may “highlight issues.”512 The results of climate surveys are compared against the normal distribution of the respective Service, and commands receive grades of “below average,” “average,” or “above average” on each survey factor.513 If results for a particular survey factor indicate below-average assessment, such as leadership cohesion, the survey alone will not distinguish if the problem lies with the commander or subordinate leaders in the organization. Based on survey results, DEOMI provides additional recommendations for assessment tools, such as focus groups, interviews, or records reviews, that a commander may use to better diagnose areas of concern. Additionally, DEOMI provides training tools and other resources for commanders to improve command performance in specific focus areas that are assessed through the DEOCS.514

With the additional mandate requiring superior commanders to receive command climate survey results for their subordinate units, DEOMI expects “the accountability level is going to go up” on command climate survey results.515 Since July 2013, commanders requesting a DEOCS must provide the email address of their superior commander, and that commander is able to access survey results at the same time as the requesting commander.516 In addition to receiving access to results through DEOMI, each of the Services has established policies requiring commanders to brief survey results to their superior commanding officer within 30 days. In September 2013, the Marine Corps implemented a policy requiring commanders to develop an action plan that addresses concerns identified in a DEOCS report and identifies periodic evaluations for assessing the plan’s effectiveness. Marine Corps commanders must brief the survey results, analysis, and action plan to the

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510 U.S. Dep’t of Def., Memorandum from the Under Secretary of Defense for Personnel and Readiness on Command Climate Assessments (July 25, 2013).


513 Id. at 106 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI).

514 Id. at 104-05.

515 Id. at 101. Additionally, DoD Directive 1350.2 requires the Service Secretaries to ensure commanders are held accountable for the equal opportunity climates within their commands. U.S. Dep’t of Def., Dir. 1350.2, Department of Defense Military Equal Opportunity (MEO) Program ¶ 6.2.2 (Nov. 21, 2003).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

VIII. ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

next higher-level commander, who must approve the plan prior to implementation. Other Services recently implemented similar policies for climate assessment action plans and reporting.

In addition to unit-level report results, DEOMI aggregates SAPR climate data from DEOCS and provides summary reports to DoD SAPRO and the Services. Monthly reports provided to DoD SAPRO include unit-level and demographic subgroup summaries of the previous four months of data collected across the DoD, and quarterly reports provide trend analyses of survey results. DEOMI prepares similar quarterly summaries for the Army, Navy, Air Force, Marine Corps, National Guard, Reserve Component, and Joint Commands.

D. SUBCOMMITTEE ASSESSMENT OF COMMAND CLIMATE ASSESSMENT INITIATIVES

DoD and the Services have developed tools for individual commanders and senior leaders to assess the climate within commands for sexual assault and response. Mandates from Congress, DoD, and the Services establish baseline requirements for conducting and reporting climate assessments that seek to ensure commanders are attuned to and accountable for the SAPR climate within their unit. However, surveys alone do not provide a comprehensive assessment of the climate in an organization, and DoD and the Services must develop and implement other means to assess and measure organizational culture and culture change for sexual assault prevention and response. A command climate survey may not identify issues in an organization that warrant attention from leadership, and commanders must seek information from a variety of sources to fully assess the climate within their unit.

In addition to personnel surveys, DoD, the Services, and commanders should identify other resources for feedback on SAPR programs and local command climate. Chaplains, social services providers, military judges, inspectors general, and officers and enlisted personnel participating in professional military education courses may be underutilized resources for obtaining accurate, specific, and unvarnished information about institutional and local climate. Victim satisfaction interviews may provide direct insight into climate factors and feedback on installation services and organizational support.

Additionally, external evaluation of institutional and installation command climate is important to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness. DoD SAPRO serves as the Department’s single point of accountability and oversight for developing and implementing SAPR programs and initiatives, and it is also responsible for assessing and monitoring the effectiveness of these efforts. External, independent reviews of SAPR efforts in DoD, no matter if they validate or disprove DoD’s own internal assessments, would provide useful feedback to the Department and the public on SAPR programs and initiatives.

Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations. DEOMI stresses that command climate surveys are only a first step in organizational assessment. Additional interviews, targeted surveys, focus groups, audits, and records reviews are important follow-up tools to fully assess and understand indicators from survey results. Action plans developed by commanders following a climate survey, which are mandated by some Services but not by all, should first outline the steps the command will take to validate or expand upon survey information. Commanders should

517 See MARADMIN 464/13.
519 See DEOMI Responses to Requests for Information 33c, 33e (Nov. 21, 2013).
also be accountable for developing a plan for assessing and monitoring the organization’s SAPR climate through means other than periodic surveys.

Commanders are ultimately accountable for their unit’s performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including other officers, enlisted leaders, supervisors, and noncommissioned officers. Most issues and concerns expressed by victims are with lower-level leaders, not senior commanders or convening authorities. Assessment of command climate must accurately assess and evaluate the effectiveness of subordinate organizational leaders in addition to commanders. Commanders must pay particular attention to the critical role played by noncommissioned officers and subordinate leaders and supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

The dramatic increase and large volume of surveys administered by DEOMI last year raises concern about survey fatigue. Surveys administered by DEOMI have increased substantially, and it appears this trend will continue based on new statutory and policy climate survey requirements. Although a climate survey can be a valuable tool for assessment, accurate and thoughtful feedback from unit members is essential to ensuring meaningful survey information. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide meaningful input. DoD and the Services must be mindful of survey fatigue, and they should monitor and assess what impact increased survey requirements have on survey response rates and survey results.

Section 3(d) of the Victims Protection Act of 2014 proposes to further expand climate assessment mandates by requiring climate assessments for the commands of the accused and the victim following an incident involving a covered sexual offense. The results of these climate assessments must be provided to the MCIO investigating the offense concerned and next higher level commander of the command. While information about a unit’s culture or climate may prove helpful or relevant in some criminal investigations, it is not clear how organizational climate surveys would be effective following each report of a sexual assault offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements increase concerns about survey fatigue and the accuracy of the information collected.

**E. PART VIII SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS**

**Recommendation 20:** DoD and the Services must identify and utilize means in addition to surveys to assess and measure institutional and organizational climate for sexual assault prevention and response.

**Finding 20-1:** Although surveys may provide helpful insight into positive and negative climate factors within an organization, surveys alone do not provide a comprehensive assessment of the climate in an organization.

**Recommendation 21:** In addition to personnel surveys, DoD, the Services, and commanders should identify and utilize other resources to obtain information and feedback on the effectiveness of SAPR programs and local command climate.

**Finding 21-1:** Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations.

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VIII. ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

**Recommendation 22:** The Secretary of Defense and Service Secretaries should ensure commanders are trained in methods for monitoring a unit’s SAPR climate, and they should ensure commanders are accountable for monitoring their command’s SAPR climate outside of the conduct of periodic surveys.

**Recommendation 23:** The Secretary of Defense and Service Secretaries should ensure commanders are required to develop action plans following completion of command climate surveys that outline steps the command will take to validate or expand upon survey information and steps the command will take to respond to issues identified through the climate assessment process.

**Recommendation 24:** The Secretary of Defense should direct periodic and regular evaluations of DoD SAPR programs and performance, to be conducted by independent organizations, which would serve to validate or disprove DoD’s own internal assessments and would provide useful feedback to the Department and enhance public confidence in SAPR programs and initiatives.

**Recommendation 25:** DoD SAPRO and the Defense Equal Opportunity Management Institute (DEOMI) should ensure survey assessments and other methods for assessing command climate accurately assess and evaluate the effectiveness of subordinate organizational leaders and supervisors in addition to commanders.

**Finding 24-1:** Evaluations conducted by independent organizations of institutional and installation command climate are essential to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness.

**Finding 25-1:** Commanders are ultimately accountable for their unit’s performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including all subordinate personnel exercising leadership or supervisory authority.

**Finding 25-2:** Because officers and noncommissioned officers who are subordinate to the commander will inevitably have the most contact with sexual assault victims in their units, unit climate assessments and response measures must be sufficiently comprehensive to include leaders and supervisors at every level.

**Finding 25-3:** Commanders at all levels must be attuned to the critical role played by subordinate officers, noncommissioned officers, and civilian supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

**Recommendation 26:** DoD and the Services must be alert to the risk of survey fatigue, and DoD SAPRO and DEOMI should monitor and assess what impact increased survey requirements have on survey response rates and survey results.

**Finding 26-1:** The dramatic increase and large volume of surveys administered by DEOMI last year creates risk of survey fatigue. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide thoughtful input.
IX. COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

As part of their statutory responsibility of exemplary conduct,520 commanders at all levels are responsible for maintaining good order and discipline within their unit and caring for those in their charge. A retired general officer testified before the panel and spoke of the responsibility: “[W]e are charged with maintaining good order and discipline, and that means we’re responsible for setting the climate, a climate of mutual respect and trust, and everybody must know what our commander’s intent is.”521 As commanders are responsible for unit climate and direct day-to-day unit operations, they are responsible and directly accountable for the implementation and support of SAPR initiatives.

Enhancing commander accountability therefore extends beyond evaluating the quasi-judicial authority and function of the convening authority or how a commander responds to an allegation of sexual assault. Both proponents and opponents of allowing commanders to exercise convening authority agree that all military commanders — whether they exercise court-martial convening authority or not — are responsible for the climate of their commands, and should be held accountable when that climate is assessed as contributing to incidents of sexual violence committed by or against subordinates. As emphasized by a retired U.S. Marine who also served in Congress and as a senior Department of Defense official, “[c]ompany commanders never had convening authority but they were still held accountable and responsible for all aspects, everything that went on in their company.”522

Defining, assessing, and improving command accountability for incidents of sexual violence is central to reducing sexual assault and sex-related offenses. The Subcommittee received overwhelming evidence that indicates the climate established by commanders has a direct causal relationship to increasing reporting of sexual assaults when they occur and to the legally appropriate, timely, and compassionate response to reported sexual assaults. The Services seek to select commanders who possess the highest standards of professional competence and character to discharge their responsibilities effectively. The effort to ensure only the very best are selected for command increases proportionally according to the level of command, with the process becoming more centralized and deliberate for levels of command that are also vested with special and general court-martial convening authority.

To enhance confidence that commanders will establish command climates that contribute to the reduction of sexual violence, the DoD and Congress have sought to ensure those selected for command are appropriately


trained in their role in preventing and responding to sex-related offenses and, as climate assessment tools continue to develop, are held accountable when the climate within their commands undermines this effort. Determining and standardizing methods and mechanisms by which commanders are held accountable, however, is not a simple task. Command climate survey data provides limited information for fully understanding and assessing climate, and surveys cannot be the sole basis on which command climate, and in turn commanders, are evaluated.

A. TRAINING AND SELECTION OF COMMANDERS

Military commanders are a select group, comprising approximately 1.0 percent of the active military service. Professional development to prepare officers for this responsibility often begins before commissioning and continues through the junior officer grades as military officers are groomed for command positions. From the earliest opportunity to command, normally at the company or platoon level, commanders receive training and guidance on command and leadership expectations and the weight of the responsibility they hold in their positions. As officers become more senior in grade, command selection becomes more competitive and more rigorous. The Deputy Chief of DoD SAPRO outlined the deliberate nature of the command selection screening process to the Subcommittee:

[T]hrough your development as a junior officer, you are singled out as somebody that could compete for command. And if you don’t have a record that supports even competing for command and getting on a command list, you’re not going to be there. Then you have to be competitively selected to be on the command list, and then you have to be hired because usually there’s two to three times as many people qualified for command as those that get hired.

To be considered for more senior command billets, an officer’s record must reflect certain developmental training, key positions, high marks in performance evaluations, and demonstrated increases in leadership responsibility. Command selection boards are vetted by senior leaders who understand and can identify the quality of a military officer and whether he or she is an appropriate selection for command.

Throughout their career professional development, military officers receive continual training and education. Each Service has a command and staff college where a command-tracked officer spends “an entire year learning about and studying command.” As officers develop and are groomed for command, they attend additional training courses and leadership schools, with each Service offering instruction in legal roles and responsibilities. Once selected for command, officers receive tailored pre-command training and other Service-specific courses based on the level of command and nature of the unit. Commanders, who are paired with an assigned senior enlisted leader, often attend pre-command training course as a team.

523 See supra Part II, Section B.
524 See Army Response to RSP Request for Information 1c (Nov. 1, 2013).
526 See id. at 152.
527 Id. The courses of study for the command and staff colleges each last about ten months.
528 See Services’ Responses to RSP Request for Information 1c (Nov. 1, 2013).
529 See id.
For senior commanders, the Naval Justice School (NJS) and the Army Judge Advocate General’s Legal Center and School (TJAGLCS) provide commander-focused courses in military law, including the commander’s role in the military justice process. TJAGLCS courses are offered as resident courses in Charlottesville, Virginia, while the NJS courses are offered through on-site training at various Navy installations. Formal Air Force legal training for senior commanders is less robust and is incorporated into group and wing commander courses hosted by Air University at Maxwell Air Force Base, Alabama.

In January 2012, the Secretary of Defense directed a DoD-wide evaluation of pre-command SAPR training. DoD SAPRO led the evaluation, after “multiple internal and external reviews of SAPR training in the Military Services have identified such training lacks standardized content, is delivered inconsistently, and is missing an evaluation of effectiveness.” In May 2012, DoD SAPRO completed its final evaluation, with 13 recommendations to sustain and improve pre-command SAPR training. Notable among DoD SAPRO’s improvement recommendations was the proposal to create a standardized SAPR curriculum across the Services, expand training time for quality instruction time, and assess training participants to ensure mastery of key SAPR concepts. In a January 2013 report to the Secretary of Defense, the Under Secretary of Defense for Personnel and Readiness noted that pre-command SAPR training enhancements across the Services included standardized core competencies, learning objectives, and methods for assessing training effectiveness to be implemented across the Services for both pre-command and senior enlisted leader training.

B. DOD INITIATIVES TO ENHANCE ACCOUNTABILITY AND ASSESS COMMANDER PERFORMANCE IN SEXUAL ASSAULT PREVENTION AND RESPONSE

With standardized training objectives and core competencies in sexual assault prevention and response, the DoD has attempted to develop methods to evaluate commanders and ensure accountability. One retired general officer told the Subcommittee that “[c]ommand without accountability is a failed model. It absolutely will not work.” Requirements in the FY13 NDAA, several of which were incorporated by the Undersecretary of Defense for Personnel and Readiness into mandates for pre-command SAPR training, provided additional measures to improve commander accountability by requiring a SAPR module in training for new or prospective commanders and requiring commanders to conduct regular climate assessments.

On May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan. He also announced several additional measures to address sexual

530 See id.
531 See id.
532 Because the evaluation was directed by the Secretary of Defense, Coast Guard sexual assault prevention and response training was not evaluated.
533 Dep’t of Def., SAPRO, Evaluation of Pre-Command Sexual Assault Prevention and Response Training 5 (May 2012).
534 Id. at 3-4.
535 Id.
536 Dep’t of Def., SAPRO, Enhancements to Pre-Command and Senior Enlisted Leader Sexual Assault Prevention and Response Training (Jan. 2013).
assault in the military, two of which focused on commander accountability. He directed the Services to develop methods to hold military commanders accountable for command climate, and he required the next-superior commander to receive copies of annual command climate surveys from subordinate commanders. Command climate surveys are a principal method used by the Department of Defense to evaluate climate factors and assess a commander’s performance in sustaining an appropriate unit climate. However, at the unit level, these surveys are only one source of information within the totality of information that senior commanders utilize to oversee and mentor subordinate commanders. Thus, insight from surveys provides senior commanders an opportunity to detect and intervene when command climate issues exist in a subordinate unit, and the information also provides a method for superior commanders to assess how effectively subordinate commanders execute their important responsibility to contribute to the reduction of sexual violence in the Armed Forces. However, commanders at all levels must be continuously engaged with subordinate commanders and their units to assess subordinate command climate.

The Secretary of Defense also directed the Services to report on implementation of DoD’s 2013 SAPR Strategic Plan. Consistent with the plan, he required each Service to develop methods and metrics for enhancing commander accountability, tailored to Service needs and structure. Each of the Services reported back on their initiatives. The Secretary of Defense meets weekly with senior Service leadership to review SAPR efforts and progress to ensure full implementation of all initiatives.

Each of the Services reported modification of performance evaluations as a primary initiative. Performance appraisals in each Service directly impact promotion potential and future assignments, including command selection. The Navy, Army, and Air Force issued Service-wide, direct guidance on performance evaluations that now requires specific consideration of command climate and SAPR issues in officer and noncommissioned officer performance appraisals. However, the evaluation scope and level of detail required vary among the Services:

- Army evaluation reporting now requires raters to assess how the rated officer or noncommissioned officer supported Army Sexual Harassment and Assault Response and Prevention (SHARP) programs. It also requires commentary if the rated soldier was the subject of a substantiated sexual harassment or sexual assault allegation, failed to report an incident of sexual harassment or assault, or failed to respond to a reported incident or retaliated against the reporting individual.

- Air Force officers and noncommissioned officers are evaluated on what they did to ensure a “healthy unit climate.” In particular, Air Force commanders are evaluated on their ability to

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539 Dep’t of Def., News Transcript, Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy from the Pentagon (May 7, 2013); see also U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013). For additional discussion on the DoD SAPRO Strategic Plan and the commander’s role in prevention, see Part IV, supra.

540 Id. Section 587 of the FY14 NDAA codified this requirement and provided that failure to conduct required climate assessments must be noted in a commander’s performance evaluation. FY14 NDAA, Pub. L. No. 113-66, § 587, 127 Stat. 672 (2013).

541 See U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013).


543 U.S. Dep’t of the Army, Memorandum from the Secretary of the Army on Sexual Assault Prevention and Response (SAPR) – Enhancing Commander Accountability (Nov. 1, 2013).

544 U.S. Dep’t of the Air Force, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and
IX. COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

ensure a “healthy climate in their command,” specifically in light of their “special responsibility and authority” to ensure good order and discipline.545 An Air Force representative told the Subcommittee it is updating its evaluation forms to specifically address organizational climate and support of SAPR initiatives.546

- Marine Corps officer fitness reports, which have not been revised, include a leadership assessment section, which includes five sub-category evaluations in how well the officer leads subordinates, develops subordinates, sets the example, ensures well-being of subordinates, and communication skills.547 One presenter said he felt new command climate mandates gave “teeth” to the fitness report’s evaluation for developing subordinates.548 The Marine Corps indicated they are “reviewing [their] performance evaluation system to ensure it promotes command climate accountability.”549

- Navy evaluation and fitness reports now require all sailors to demonstrate how they have “cultivated or maintained a positive command climate” where “improper discrimination of any kind, sexual harassment, sexual assault, hazing, and other inappropriate conduct [are] not tolerated.”550

Commander effectiveness in sexual assault prevention and response to allegations is now a part of evaluation reporting systems.551 The Deputy Chief of DoD SAPRO expressed optimism about recent Service changes adding SAPR support to performance appraisals: “My personal feeling is when you start measuring on somebody’s evaluation report, it starts to change leaders’ attitudes and behaviors, and they pay attention to it. So I think it will have a profound effect.”552

Section 3(c) of the Victims Protection Act of 2014 (VPA)553 would further expand assessment of SAPR support on all performance appraisals, and it would statutorily require assessment of a commander’s sexual assault response efforts. Section 3(c) provides:

> The Secretaries of the military departments shall ensure that the performance appraisals of commanding officers . . . indicate the extent to which each such commanding officer has or has not established a command climate in which (A) allegations of sexual assault are properly managed and fairly evaluated; and (B) a victim can report criminal activity, including

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545 Id.


547 Id. at 234–35 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters & Service Battalion Quantico, U.S. Marine Corps).


549 U.S. Marine Corps, Memorandum from the Deputy Commandant for Manpower and Reserve Affairs on Enhancing Commander Accountability (Sept. 19, 2013).

550 U.S. Dep’t of the Navy, Memorandum from the Secretary of the Navy on Report on Enhancing Commander Accountability (Oct. 28, 2013); Navy Administrative Message, 216/13, Navy Performance Evaluation Changes (Aug. 2013) [hereinafter NAVADMIN 216/13].


552 Id. at 95.

553 For further discussion on the Victims Protection Act of 2014, see Part III, supra.
sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command.\textsuperscript{554}

This provision would require assessment of the ability of commanders to foster a safe climate for crime reporting and adequately respond to allegations of sexual assault, but it would not require performance appraisals to specifically address how a commander performs his or her sexual assault prevention responsibilities.\textsuperscript{555}

Section 3(c) of the VPA mirrors Section 1751 of the FY14 NDAA, which expresses the sense of Congress on a commanding officer’s responsibility for a command climate free of retaliation and the responsibility for senior officers to evaluate subordinate commanding officers on their performance in these areas.\textsuperscript{556} Section 1751 further specifies the sense of the Congress that commander evaluations should be maintained for use in personnel assignment decisions as well as promotion and command selection boards.\textsuperscript{557}

A commander may shape the climate in a command, but subordinate leaders and supervisors engaged in day-to-day interactions with unit personnel are also principal contributors to command climate. A former director of DoD SAPRO observed that accountability is essential at all levels, including “commanders, junior officers, and NCOs, because I have heard many times from victims that it’s not the commander who’s the problem but the supervisors in between the victim and the commander.”\textsuperscript{558}

As described, Service requirements vary for documenting subordinate leader and Service member support of SAPR programs in performance evaluation reports. If performance evaluation assessment increases attention to and support of SAPR programs, these differences may result in uneven support and attention among subordinate leaders and personnel. Section 3(c) of the VPA would extend evaluation requirements to all Service members by mandating that the Service Secretaries “ensure that the written performance appraisals of members of the Armed Forces . . . include an assessment of the extent to which each such member supports the sexual assault prevention and response program of the Armed Force concerned.”\textsuperscript{559}

In addition to performance evaluation mandates, the Air Force and Navy reported additional enhancements to commander accountability, including training mandates for improving the treatment of victims by their peers, co-workers, and chains of command. The Air Force transitioned from an Air Force-specific Unit Climate Survey to the DEOCS administered by DEOMI and indicated increased frequency and use of climate assessments. The Air Force also indicated improved SAPR training that includes enhanced sensitivity training for all Air Force members, to “improve victim care and trust in the chain of command,” and to “improve understanding of victim trauma and care.”\textsuperscript{560}

\textsuperscript{554} Victims Protection Act of 2014, S. 1917, § 3(c)(2), 113th Cong. (2014).

\textsuperscript{555} See id. at § 3(c).


\textsuperscript{557} See id.

\textsuperscript{558} Transcript of RSP RoC Subcommittee Meeting 223 (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

\textsuperscript{559} Victims Protection Act of 2014, S. 1917, § 3(c)(1), 113th Cong. (2014).

\textsuperscript{560} U.S. Dep’t of the Navy, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).
The Navy reported it adopted a definition for “positive command climate” that extends beyond sexual assault prevention to also include professionalism, dignity and respect, and efforts to oppose improper discrimination, sexual harassment, hazing, and other inappropriate conduct. The Navy provided tailored and specific guidance on implementation of Navy SAPR program initiatives to the entire fleet, including programs, directives, and expectations focused on “improving the safety of our Sailors and reducing incidents of sexual assault” for immediate implementation by Navy commanders.

C. METHODS OF ACCOUNTABILITY

The most fundamental way a commander may be held accountable for any failure in his or her responsibilities is relief from command. Commanders serve at the discretion of their superior commanders and leaders, and a retired senior Air Force commander explained to the RSP that “[t]here is no process in our society that is easier to execute than removing a commander. That person’s superior only has to say: ‘I have lost confidence in your ability to command this organization.’ That’s it.” A Marine commander explained to the Subcommittee that commander reliability and accountability go hand-in-hand: “We can be relied on by our seniors . . . so we can be relieved by our seniors, and we can relieve our subordinates, too.” In addition to requiring senior officers to evaluate subordinate commanders on their performance in establishing a healthy command climate, Section 1751 of the FY14 NDAA provides the sense of Congress that “the failure of commanding officers to maintain such a command climate is an appropriate basis for relief from their command positions.”

In addition to relief from command, other provisions of law and policy provide accountability mechanisms for commanders who fail to meet their SAPR obligations. Section 1701(b)(2)(E) of the FY14 NDAA authorizes disciplinary sanctions against members who willfully or wantonly fail to comply with victim rights requirements under the revised Article 6b of the UCMJ. Punitive sanctions may also be imposed for illegal conduct during an investigation or trial, particularly if a substantial right of the accused or the victim was impacted. Article 92 of the UCMJ criminalizes failure to obey a lawful order, as well as willful or negligent dereliction of duty, which includes failure to obey the statutory obligations related to the reporting and resolution of sexual assault reports. Article 98 of the UCMJ criminalizes noncompliance with procedural rules in the UCMJ. Article 133 and 134 are more general in nature, and they may apply to other illegal conduct which is unbecoming of an officer or which may be prejudicial to good order and discipline or of a nature to bring discredit upon the Armed Forces, including obstruction of justice or interference with administrative proceedings.

561 NAVADMIN 216/13.
562 Navy Administrative Message, 181/13, Implementation of Navy Sexual Assault Prevention and Response Program Initiatives (July 2013) [hereinafter NAVADMIN 181/13].
563 Transcript of RSP Public Meeting 105 (Jan. 30, 2013) (testimony of General (Retired) Roger A. Brady, U.S. Air Force); see also Transcript of RSP RoC Subcommittee Meeting 211 (Nov. 20, 2013) (testimony of Lieutenant General Howard B. Bromberg, Deputy Chief of Staff for Personnel, U.S. Army, noting Army's standard for relief for cause of commander is loss of trust and confidence in subordinate’s ability to perform his or her job).
564 Id. at 235 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters & Service Battalion Quantico, U.S. Marine Corps).
566 Id. at § 1701(b)(2)(E).
Relief from command and punitive or criminal sanctions are severe options when a commander fails in his or her fundamental responsibilities, but lesser means are also available to hold commanders accountable for SAPR performance. Commanders may receive administrative correction from their superiors, such as a letter of reprimand or admonishment. As described above, poor performance may be documented on the commander’s evaluation and fitness report. An officer who has been selected for promotion to the next higher grade may be recommended for a promotion delay or removal from the promotion list, which elevates review of the officer’s capacity to serve in the higher grade to the Service Secretary. Officer promotions and selection for higher command are extremely competitive, and any indicators in an officer’s record that reflect negatively on his or her performance in command will undoubtedly impact the officer’s prospect for future promotion or command selection.

D. SUBCOMMITTEE ASSESSMENT OF COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

It is important to continue to leverage accountability mechanisms that focus on encouraging commanders to set a positive command climate that contributes to sexual assault prevention and appropriate response to sexual assault allegations. Commanders should be consistently held accountable in three primary instances: (1) when they are personally involved in misconduct, (2) when they fail to act in a legally or ethically proper manner in response to an incident, or (3) when a superior commander determines that there are poor climate indicators demonstrating inadequate prevention or response efforts within the organization. While ineffective or inadequate commanders should be relieved, accountability must also include positive reinforcement that will strengthen good commanders. DoD and the Services must pay particular attention to developing leaders who are well suited for command at every level, selecting the best among this pool for positions of command, and training them in effective leadership and oversight of SAPR issues.

The consequences of rank in the military are profound, and there is a persistent perception of immunity and/or protection for high-ranking officers—both for wrongful or criminal behavior and for oversight and response. Regardless of whether these perceptions are accurate or inaccurate, failure to take appropriate action on misconduct or improper action by senior leaders leads to a perception that high-ranking members are impervious to disciplinary action for wrongdoing, which results in an erosion of trust among the force. The opposite is also possible: taking inappropriate action in an attempt to demonstrate “zero tolerance” or to “do something” in response to problematic allegations can backfire and lead to further erosion of trust. As with all other adverse actions, any response to allegations against any Service member, regardless of rank, must be individually tailored based on the facts and law, with both due process of law and the presumption of innocence intact.

Transparency is important in commander accountability, and lack of transparency may contribute to a perception of favorable treatment based on rank. The Subcommittee noted that the Services have different perspectives on Privacy Act implications of administrative actions that hold commanders accountable, because Service policies for releasing or publicizing instances where commanders are relieved differ substantially. For example, the Navy publicizes when and why a commander is relieved for cause, while the Air Force and Army generally release information only if the commander is a general officer or the incident receives substantial public interest.

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IX. COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Assessment of a commander’s performance does not necessarily culminate when the commander relinquishes the position and departs the unit. Most command assignments are relatively short, with officers serving in a command position for only two years, and problems related to a commander’s tenure may not be known until after a commander departs. Command climate surveys conducted by new commanders shortly after assuming command will likely provide insight into the effectiveness of previous unit leadership. This insight should be appropriately assessed and fully validated, but the Services must ensure post-command feedback on a commander’s service is considered and appropriately documented, even if the commander has moved on to other duties.

E. PART IX SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 27:** DoD and the Services should consider opportunities and methods for effectively factoring accountability metrics into commander performance assessments, including climate survey results, indiscipline trends, sexual assault statistics, and equal opportunity data.

**Finding 27-1:** Results-based assessment provides both positive and negative reinforcement and highlights the importance of a healthy command climate.

**Finding 27-2:** Although statutory provisions require assessment of a commander’s success or failure in responding to incidents of sexual assault, there are no provisions that mandate assessment or evaluation of a commander’s success or failure in sexual assault prevention.

**Finding 27-3:** All Services have policies and methods for evaluating commanders on their ability to foster a positive command climate, but definitions and evaluation mechanisms vary across the Services.

**Recommendation 28:** The Service Secretaries should ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys.

**Finding 28-1:** Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance.

**Finding 28-2:** Mandated reporting of command climate surveys to the next higher level of command has the potential to improve command visibility of climate issues of subordinate commanders. Meaningful review by senior commanders increases opportunities for early intervention and can improve command response to survey feedback. However, commanders and leaders must recognize that surveys may or may not reflect long-term trends, and they provide only one measure of a unit’s actual command climate and the commander’s contribution to that climate.

**Recommendation 29:** To hold commanders accountable, DoD SAPRO and the Service Secretaries must ensure SAPR programs and initiatives are clearly defined and establish objective standards when possible.
Finding 29-1: The Navy’s accountability effort, which provides specific direction and command-tailored direction on SAPR and other command climate initiatives, offers an encouraging model for ensuring compliance and fostering program success.

Finding 29-2: Detailed standards and expectations provide commanders clear guidance on supporting SAPR programs.569

Recommendation 30: The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers, noncommissioned officers, and civilian supervisors.

Finding 30-1: Service policies on SAPR expectations for subordinate accountability vary.

Finding 30-2: If performance evaluation assessment increases attention to and support of SAPR programs, differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel.

Finding 30-3: Subordinate leaders in a unit play a significant role in the success or failure of SAPR efforts, and accountability should extend beyond commanders to junior officers, noncommissioned officers, and civilian supervisors.

Finding 30-4: SAPR program effectiveness will be limited without the full investment of subordinate leaders.

Finding 30-5: Section 3(c) of the Victims Protection Act of 2014 would extend evaluation requirements to all Service members.

Recommendation 31: The Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to perform the quasi-judicial authority and functions assigned to them under the UCMJ.

Finding 31-1: Legal training provided to senior commanders through resident and on-site Service JAG School hosted courses varies significantly among the Services. For example, the Army and Navy JAG Schools provide senior commanders with mandatory resident or on-site courses on legal issues. Formal Air Force legal training is less robust and is incorporated into group and wing commander courses hosted by Air University.

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569 See, e.g., NAVADMIN 181/13.
I join the parts of the Role of the Commander Subcommittee Report that address the importance of broad-gauge efforts to reduce the incidence of rape and sexual assault. Such efforts include researching and implementing proven strategies to prevent assaults and enhance public confidence in the military justice system. I also concur with the Report’s recommendation that widespread confusion about “restricted” reporting, an option available to victims of sexual assault who are active-duty service members, should be corrected with clarification and education. The recommendations that accompany those sections of the Report are likely to complement existing efforts and improve the military’s response to sexual assault.¹

I have already written, in a separate statement appended below, about why I believe requiring convening authorities to exercise prosecutorial discretion violates basic procedural fairness and undermines the legitimacy of military justice. By recommending that the authority to prosecute remain within the command structure, the Subcommittee rejects the premise that independent and impartial prosecutors should decide on the charges filed at courts-martial, as they do in U.S. state and federal criminal courts, in our allies’ national military justice systems, and in international criminal courts.

I write now to explain why I decline to join most of the Subcommittee's final report. Commanders play a powerful and distinctive role in the armed forces, a role not fully acknowledged in the Subcommittee Report. The command structure of the armed forces enforces obedience, rewards sacrifice, and prioritizes the mission, each of which can discourage reporting of sexual assaults. Likewise, the distinctive demographics of the armed forces, which tilt toward youth, are 85% male, and until very recently included only those lesbian and gay service members who were willing to serve in fear of criminal prosecution and social ostracism, make military sexual assault different from sexual assault in civilian workplaces and institutions.² When the dust settles after this most recent round of criticism and reform, commanders will—again—be left to solve a set of problems that they cannot manage alone, however deep their commitment and integrity.

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¹ In particular, I concur in Recommendations 4 through 12, 14, 21, 24, 27, and 30. See Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel, Abstract of Subcommittee Recommendations and Findings (May 2014) [hereinafter Subcommittee Report].

History tells us that commanders do not always “drive cultural change in the military.” Racial minorities, women, and lesbians and gay men entered the ranks of the military only after overcoming extreme resistance from military leaders and winning protracted civil rights battles. Attorneys like the late Robert L. Carter, a veteran, civil rights leader, and U.S. District Court judge, would be surprised at the assertion that racial integration was led, not resisted, by commanding officers. While working for the NAACP Legal Defense and Education Fund, Judge Carter argued Burns v. Wilson, a 1953 Supreme Court case rejecting the habeas corpus petitions of African American soldiers sentenced to death at court-martial for rape and murder. Military justice was marked by racial disparities long after President Truman’s 1948 order mandating equality of treatment for all races.

When I was a first lieutenant in the Air Force in the spring of 1993, I listened to General Merrill A. McPeak, then the Air Force Chief of Staff, respond to a question about female pilots flying combat missions by stating that he was personally opposed to service women flying bombers or fighters but would reluctantly follow the law if it changed. His comment implied that informal resistance to formal equality was acceptable, even expected, among Air Force leaders. Likewise, the actions of many commanding officers before, during, and after “don’t ask/don’t tell,” the legal regime that banned service by gays and lesbians who failed to hide their sexual orientation from 1993 until 2011, do not reveal a corps of senior leaders eager to embrace equal opportunity. Social and cultural change within the U.S. armed forces is a complex historical phenomenon that has not been driven primarily by command.

The Subcommittee Report’s description of the measures that each branch of service takes to ensure commanders are qualified (referred to as “grooming”), and can be removed if necessary, does not resolve the problem created by placing excessive legal authority in the chain of command. No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders. Giving commanders authority over criminal prosecution and an extensive “quasi-judicial” role, in addition to their many other mission-related responsibilities, exacerbates the impact of inevitable failures of command.

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3 Subcommittee Report, Part II, Section A.
4 Burns v. Wilson, 346 U.S. 137 (1953); see also James E. Westheider, Fighting on Two Fronts: African Americans and the Vietnam War (1997); Bernard C. Nalty, Strength for the Fight: A History of Black Americans in the Military (1989); Morris J. MacGregor, Integration of the Armed Forces 1940–1965 (1981). Racism in military justice was a primary challenge of civil rights leaders throughout the 1950s, ’60s, and ’70s.
7 Subcommittee Report, Part VIII, Section A; see also id. at n.1 (collecting statutes requiring “exemplary conduct” of commanding officers).
8 Two examples in just the last few weeks reveal that screening and training is not enough to forestall conduct that makes high-level commanders seem entirely unprepared to adjudicate sexual assault cases fairly. See Craig Whitlock, Disgraced Army General, Jeffrey A. Sinclair, Gets $20,000 Fine, No Jail Time, Wash. Post (Mar. 20, 2014) (reporting on sentence following conviction at court-martial for sex offenses of brigadier general who had been deemed an up-and-coming star), available at http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c5556b50-b039-11e3-95e8-39efc8e9a48b_story.html; Craig Whitlock, Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment, Wash. Post (Apr. 23, 2014) (reporting on complaint that former commander of elite naval aviation squadron and president of Tailhook Association created permissive environment in which pornography, lewd behavior, and hazing were common), available at http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be4221be-cb0f-11e3-95f7-7e2c0e72d2ea_story.html.
9 Subcommittee Report, Part II, Section B.
The Subcommittee Report narrates a history of modern military justice that elides the contested nature of that history and overstates the degree of consensus about the origins and progress of reform in military justice, and in military institutions overall. The Subcommittee was not asked to write a history of military justice and heard almost no testimony about it. Legal reform within the military justice system has frequently provoked resistance and backlash, as has social change. The report’s review of Supreme Court cases under the UCMJ omits key precedents and dismisses as mere coincidence the fact that nearly every case it cites involves military sexual assault or domestic violence. A selective history of military justice does not help to illuminate the impact of the military’s command structure on rape and sexual assault in the contemporary armed forces.

Sexual assault is a different problem in the military than in civilian life in part because the coercive nature of command makes sexual exploitation both easier to commit and easier to hide. Service members are introduced to a culture of obedience and hierarchy from the start of their military service, a culture enforced by law and custom that defines their speech, their dress, their pay—even who can serve as a member of court-martial panel. This deference to authority undermines the autonomy of service members, who often live and work in close proximity, creating more opportunity for sexual harassment and assault. Service members who wish to be “good soldiers” and support their commands may find it more difficult to resist pressure for unwanted sexual acts from peers, be less willing to come forward if their harassers or rapists are superior officers, and be disinclined to report if disclosure might embarrass or impair the effectiveness of their units. The far-reaching legal authority of commanding officers, presented as a solution to military sexual assault in the Subcommittee Report, is also a problem, for commanders and victims alike. Fear of exercising unlawful command influence may deter commanders from making forceful statements about the wrongfulness of sexual harassment and assault. Deference to authority may make victims less likely to report superiors for misconduct and more likely to sacrifice their own well-being in favor of protecting the reputations of their peers and branches of service.

Yet the Subcommittee Report states that “sexual violence in the military is no different” than among civilians. This simply cannot be true. Only service members can be tried for crimes if they fail to obey the order of

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11 Before the Subcommittee was formed, the RSP heard from Colonel (Retired) Fred Borch. See generally Transcript of RSP Public Meeting 187-221 (June 27, 2013).


13 See, e.g., Reid v. Covert, 345 U.S. 1 (1957), a hard-fought case in which the Air Force lost its effort to exert military jurisdiction over the dependent wife of a service member for a domestic murder committed overseas. For an alternate reading of service connection cases and Supreme Court review of military cases, see Diane H. Mazur, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER (2010).


15 10 U.S.C. § 825 (UCMJ art. 25).


17 Id. at second sentence of Part IV.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
I write separately to explain why I stand apart from my colleagues on the issue of whether convening authorities should retain prosecutorial discretion. I believe we should vest discretionary authority to prosecute rape and sexual assault in the same people on whom federal, state, and many respected military criminal justice systems rely: trained, experienced prosecutors.

For decades, military sexual assault scandals have been a regular source of national embarrassment. Senior military officers testified repeatedly, and convincingly, before our Panel and Subcommittees about the imperative to “get to the left of the problem,” not to wait until the next incident to respond but instead make immediate changes to break the cycle of scandal, apology, response, and recurrence. They, and many other witnesses, asserted that the only way to prevent military sexual assault is to attend to the “big picture” factors—cultural, social, demographic, environmental—that enable it to occur. We heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault. We did, however, see proof that rape and sexual assault continue to occur at too high a frequency in the armed forces, despite distinctive elements of military service that should curb their prevalence. These elements include the elevation of honor and sacrifice above personal gain, the greater degree of surveillance in military life, the higher ethical standards that service members must embrace, and the military’s ability to select its members from among those who are eligible to serve.

Rape and sexual assault pose distinctive challenges in the U.S. military, which remains predominantly male and marked by imbalances of power among the individuals who serve. We entrust our military with the legitimate use of force to support and defend our country and Constitution against all enemies, a duty it bears in part by drawing on a history of war and military successes in which sexual violence has unfortunately been commonplace. Commanders must overcome this by leading a cultural shift toward greater respect for gender

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3 See, e.g., Transcript of RSP Public Meeting 30-31 (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, Department of Defense Sexual Assault Prevention and Response Office, noting recent initiatives “aimed at advancing culture change, which we see as a necessary condition to reducing sexual assault in the military”); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 3 (Jan. 23, 2013), available at http://docs.house.gov/meetings/AS/AS00/201303123/100231/HHRG-113-AS00-Wstate-WelshG-201303123.pdf (describing recent training and personnel initiatives motivated by need for cultural change); Transcript of RSP Public Meeting 183-84 (Sept. 24, 2013) (testimony of Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command, describing policies implemented to effect behavioral change).
4 The report of the Comparative Systems Subcommittee will elaborate on these issues.
equality and legitimate avenues for sexual expression, away from a norm that celebrates only aggressive male sexuality. This shift is no slight change in course. It is a sea change, albeit one that is underway.\textsuperscript{7}

If commanders remain focused on implementing this change, they will continue to improve the confidence of survivors of rape and sexual assault in the military’s ability to respond. Survivors, and their families and communities, will be able to trust that assailants with stellar military records or mission-essential skills will not be protected from legitimate prosecution.\textsuperscript{8} They will realize that reprisals from fellow service members are not an inevitable consequence of reporting a sexual assault. And all service members will know that attitudes that denigrate women and gay men will not be tolerated—both because they violate regulations and because they create conditions in which sexual assault is more likely.

Although commanders must lead the way in changing military culture, they are neither essential nor well-suited for their current role in the legal process of criminal prosecution. Command authority in military justice has already been reduced significantly over time.\textsuperscript{9} It will be further limited through recently enacted changes.\textsuperscript{10} Yet the Uniform Code of Military Justice continues to require that convening authorities exercise prosecutorial discretion. This mixture of roles, in which a convening authority must both protect the overall well-being of a unit and ensure that unit’s mission is accomplished as well as decide whether a specific factual context warrants prosecution, creates a conflict that cuts in different directions, all unhealthy. For example, commanders who speak out assertively on the importance of prosecuting sexual assaults risk undermining the legitimacy of any later court-martial convictions by exerting unlawful command influence, “the mortal enemy of military justice.”\textsuperscript{11} Or consider, in light of the heightened attention now directed toward military sexual assault, defense counsel’s well-founded concern that convening authorities under pressure to demonstrate high rates of prosecution


\textsuperscript{8} The report of the Victim Services Subcommittee will help us assess the best ways to address these issues.


\textsuperscript{10} \textit{See}, e.g., H.R. 3304, § 1702, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (precluding convening authorities from dismissing or modifying convictions for sexual assault offenses and requiring them to explain in writing any sentence modification); id. at § 1705 (requiring discharge or dismissal for certain sex offenses and trial for such offenses by general court-martial), id. at § 1708 (eliminating character and military service of accused as factor relevant to initial disposition of offenses), id. at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial contrary to recommendation of staff judge advocate).

\textsuperscript{11} \textit{United States v. Thomas}, 22 M.J. 388, 391 (C.M.A. 1986); see also \textit{Transcript of RSP Public Meeting} 294 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service) (“Increasingly, defense counsel must also confront and overcome instances of unlawful command influence in sexual assault cases. There is tremendous pressure on senior leaders to articulate zero tolerance policies and pass judgment on those merely accused of sexual assault. Even if command actions do not rise to the level of unlawful command influence, it contributes to an environment that unfairly prejudices an accused’s right to a fair trial.”); id. at 336–38 (testimony of Mr. Jack Zimmermann of Lavine, Zimmermann & Sampson, P.C., explaining how claims of unlawful command influence have arisen from recent training on sexual assault prevention and response).
will order courts-martial to go forward regardless of the strength of the evidence.\textsuperscript{15} Removing the convening authority from the charging process would address these concerns while freeing commanders to zero in on the changes in culture that are our best hope for sustainable improvement in sexual assault prevention and response.

The decision to prosecute is among the heaviest burdens we place on attorneys in public service; the ethics of the prosecutor are among the most powerful and most studied in the legal profession.\textsuperscript{13} Whether there is sufficient evidence to support a criminal prosecution is a question of law and discretion. Senior judge advocates, licensed by the same authorities that license civilian attorneys and subject to the professional ethics codes of both civilian and military authorities, are every bit as capable of exercising that discretion as their civilian counterparts.

When some of our allies adopted legal reforms to replace convening authorities with experienced and trained prosecutors, opponents voiced concerns about the deterioration of command and disengagement from the problem of sexual assault that were very similar to those now raised by many U.S. military leaders.\textsuperscript{14} Yet no country with independent prosecutors has reported any such dire consequences.\textsuperscript{15} I see no reason to defer to predictions about the impact of this change over the pleas of survivors of sexual assault, many of whom consider an independent prosecutorial authority the cornerstone of any effective response to military sexual assault.\textsuperscript{16} Likewise, U.S. service members who face courts-martial deserve no fewer safeguards of an impartial and independent tribunal than service members of other countries with whom they often serve.\textsuperscript{17} The United Kingdom, Canada, Australia, and most other countries with well-regarded military justice systems have already ended command control of courts-martial to protect the rights of service members.\textsuperscript{18} That goal is consistent...
with the procedural fairness that both victims and alleged perpetrators of rape and sexual assault deserve from U.S. military justice.

Our Panel and Subcommittees heard, again and again, that the sexual assault problem in the military has given service members reason to pause when young people turn to them for advice about whether they should join the U.S. armed forces. That reluctance to allow our daughters and sons to embrace a life of service to our country is the real threat to U.S. military effectiveness at stake in this debate. An impartial and independent military justice system that operates beyond the grasp of command control would help restore faith that military service remains an honorable, viable choice for all.

eliminated convening authorities or radically reduced military jurisdiction, much like countries subject to the Inter-American Commission on Human Rights (IACHR), which has limited military jurisdiction to address human rights abuses. For but two very recent examples of this accelerating trend, see the IACHR response to Colombia’s attempt to expand military jurisdiction and Taiwan’s abolition of military justice entirely, both in January 2014. See Inter-American Commission on Human Rights Press Release, “IACHR Expresses Concern over Constitutional Reform in Colombia” (Jan. 4, 2013), available at https://www.oas.org/en/iachr/media_center/PRReleases/2013/004.asp; Amnesty International Public Statement, “Taiwan government must ensure the reform of military criminal procedure legislation lives up to its promise of greater accountability” (Jan. 13, 2014), available at http://www.amnesty.org/en/library/asset/ASA38/001/2014/en/5c6a95be-d90c-4378-8a6c-d941c2a83cb4/asa380012014en.pdf.

See, e.g., Transcript of Role of the Commander Subcommittee Meeting 41 (Jan. 8, 2014) (testimony of Rear Admiral [ret.] Marty Evans, U.S. Navy); id. at 71-76 (testimony of Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG and former Chief Counsel, U.S. Maritime Administration); Transcript of RSP Public Meeting 72-75 (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, former U.S. Air Force staff sergeant); id. at 348 (testimony of Mr. Zimmermann); compare with, Transcript of RSP Public Meeting 56 (Sept. 24, 2013) (“The fact that our system is predicated on the JAG making the decision in the context of minimizing command influence, I think, enables us as parents, at least in Israel, to sleep more soundly at night.”); id. at 96-97 (testimony of Professor Drapeau, noting “increased sense of confidence that those who become victims of crimes, many of them our sons and daughters serving in uniform” have in Canadian military justice system after removal of convening authority from commanders); id. at 46 (testimony of Lord Thomas) (“[T]he public has the right to expect for their sons and daughters who enlist the same standards of fairness in the military system of justice as would be their entitlement in civilian life.”).
Appendix A:

TERMS OF REFERENCE

These terms of reference establish the Secretary of Defense (SecDef) objectives for an independent subcommittee review of the role of the commander in the investigation, prosecution, and adjudication of adult sexual assault crimes. At SecDef direction, the Role of the Commander Subcommittee ("the Subcommittee") has been established under the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) to conduct this assessment.

Mission Statement: Assess the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

Issue Statement: Section 576(d)(1) of the FY 2013 National Defense Authorization Act provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). This includes an assessment of the role of the commander in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses. In addition, the Subcommittee should identify systems or methods for strengthening the effectiveness of military systems. Additionally, Section 1731 of the FY 2014 National Defense Authorization Act establishes additional tasks for the Response Systems Panel.

Objectives and Scope: The Subcommittee will address the following specific objectives.

- Examine the roles and effectiveness of commanders at all levels in the administration of the UCMJ and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.

- Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes, including the role of a commander under Article 60, UCMJ.

- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.

- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member
of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the response systems panel recommends such a formal statement, the response systems panel shall provide key elements or principles that should be included in the formal statement.

The Subcommittee shall develop conclusions and recommendations on the above matters and report them to the Response Systems Panel.

Methodology:
1. The Subcommittee assessment will be conducted in compliance with the Federal Advisory Committee Act (FACA).

2. The Subcommittee is authorized to access, consistent with law, documents and records from the Department of Defense and military departments, which the Subcommittee deems necessary, and DoD personnel the Subcommittee determines necessary to complete its task. Subcommittee participants may be required to execute a non-disclosure agreement, consistent with FACA.

3. The Subcommittee may conduct interviews as appropriate.

4. As appropriate, the Subcommittee may seek input from other sources with pertinent knowledge or experience.

Deliverable:
The Subcommittee will complete its work and report to the Response Systems Panel in a public forum for full deliberation and discussion. The Response Systems Panel will then report to the Secretary of Defense.

Support:
1. The DoD Office of the General Counsel and the Washington Headquarters Services will provide any necessary administrative and logistical support for the Subcommittee.

2. The DoD, through the DoD Office of the General Counsel, the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, will support the Subcommittee’s review by providing personnel, policies, and procedures required to conduct a thorough review of civilian and military systems used to investigate, prosecute, and adjudicate adult sexual assault crimes.
Appendix B:

SUBCOMMITTEE MEMBERS AND STAFF

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

Judge Jones is a partner at Zuckerman Spaeder, LLP (law firm). She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering and terrorism. 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 chief of the Organized Crime Unit in the Southern District of New York.

FORMER REP. ELIZABETH HOLTZMAN

Rep. Holtzman is counsel with Herrick Feinstein, LLP, (law firm). Rep. Holtzman served for eight years as a U.S. Congresswoman (D-NY, 1973-81) and while in office she authored the Rape Privacy Act. She subsequently served for eight years as the Kings County, New York (Brooklyn) District Attorney (the 4th largest DA’s office in the country) from 1981-89, where she helped change rape laws, improved standards and methods for prosecution, and developed programs to train police and medical personnel. Rep. Holtzman was also elected Comptroller of New York City, the only woman to be elected to this position. Rep. Holtzman graduated from Radcliffe College, magna cum laude, and received her law degree from Harvard Law School.

VICE ADMIRAL JAMES HOUCK, U.S. NAVY (RETIRED)

Vice Admiral (Retired) Houck joined the Penn State University Dickinson School of Law faculty as Distinguished Scholar in Residence after retiring as the 41st Judge Advocate General (JAG) of the U.S. Navy. As the Judge Advocate General, Admiral Houck served as the principal military legal counsel to the Secretary of the Navy and Chief of Naval Operations and led more than 2,000 attorneys, enlisted legal staff, and civilian employees of the worldwide Navy JAG Corps. He also oversaw the Department of the Navy’s military justice system.
ROLE OF THE COMMANDER SUBCOMMITTEE

PROFESSOR ELIZABETH L. HILLMAN, HASTINGS LAW SCHOOL

Elizabeth Hillman is Professor of Law, University of California Hastings College of the Law. Her current research concerns the law and politics of aerial bombing and military sexual violence. Professor Hillman has published two books, Military Justice Cases and Materials (2d ed. 2012, LexisNexis, with Eugene R. Fidell and Dwight H. Sullivan) and Defending America: Military Culture and the Cold War Court-Martial (Princeton University Press, 2005), and many articles, including “Sexual Violence in State Militaries” in Prosecuting International Sex Crimes (Forum for International Criminal and Humanitarian Law, 2012). She has testified before Congress, served as an expert at trial, and commented frequently in the media about military law, history, and culture. Professor Hillman is president of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide. Professor Hillman attended Duke University on an Air Force ROTC scholarship, earned a degree in electrical engineering, and served as a space operations officer and orbital analyst in Cheyenne Mountain Air Force Base, Colorado Springs.

MAJOR GENERAL JOHN D. ALTENBURG, JR., U.S. ARMY (RETIRED)

Major General (Retired) Altenburg is counsel for Greenberg Traurig, LLP (law firm). Previously, General Altenburg served 28 years as a lawyer in the Army, where he represented the Army before state and local governments, in court in the United States and Germany and before Congressional committees on Military Justice. He served as the Deputy Judge Advocate General for the Department of the Army from 1997 to 2001, and was the principal legal advisor to senior national security leaders on Military Justice, including high profile sex assault cases. In December 2003, General Altenburg was named as the appointing authority for military commissions covering detainees at Guantanamo, an appointment he held until November 2006.

GENERAL CARTER F. HAM, U.S. ARMY (RETIRED)

General (Retired) Ham served 37 years in the U.S. Army before he retired in June 2013. General Ham served in a variety of command positions throughout his distinguished military career, to include Commander, United States Africa Command; Commanding General, United States Army Europe and Seventh Army; Commanding General, 1st Infantry Division and Fort Riley; Commander, Multi-National Brigade Northwest, OPERATION IRAQI FREEDOM; Commander, Infantry Training Support Brigade (29th Infantry Regiment), United States Army Infantry School; and Commander, 1st Battalion, 6th Infantry, 3d Infantry Division, United States Army Europe and Seventh Army, and OPERATION ABLE SENTRY, Macedonia.

COLONEL LISA L. TURNER, U.S. AIR FORCE

Colonel Turner is currently assigned as Staff Judge Advocate, Headquarters Air Mobility Command (AMC), Scott AFB, IL. Colonel Turner has been a judge advocate in the U.S. Air Force for 23 years. Her previous assignments include Staff Judge Advocate for Headquarters Air Education and Training Command, Staff Judge Advocate for North American Aerospace Defense Command and United States Northern Command, Chief of The Judge Advocate General’s Action Group, Chief of the General Law Branch, Administrative Law Division and assignments as a circuit trial counsel, area defense counsel and as an instructor in the Military Justice Division of the Air Force JAG School.
APPENDIX B: SUBCOMMITTEE MEMBERS AND STAFF

PROFESSOR GEOFFREY CORN, SOUTH TEXAS COLLEGE OF LAW (LIEUTENANT COLONEL, U.S. ARMY (RETIRED))

Geoffrey Corn is Presidential Research Professor of Law at the South Texas College of Law. He has been a professor with the South Texas College of Law since 2005. Previously, Professor Corn served 20 years in the U.S. Army, including 12 years as a judge advocate. As a judge advocate, Lieutenant Colonel (Retired) Corn held assignments as a Legal Assistance Attorney, the Chief of Criminal Law and Senior Criminal Trial Attorney, Regional Defense Counsel, Professor of Law at the Army JAG School, and Chief of the International Law and Operations Divisions. After retiring from the Army, he served as Special Assistant to the Judge Advocate General for Law of War Matters and Chief of the Law of War Branch. Professor Corn has authored a number of books and articles in the areas of armed conflict, military law, and the law of war. He’s also served as an expert consultant and witness in military cases and testified before the Senate Armed Service Committee and Senate Judiciary Committee.

JOYE E. FROST, DIRECTOR OF THE OFFICE FOR VICTIMS OF CRIME, DEPARTMENT OF JUSTICE

Ms. Joye E. Frost was appointed as the Director of the Office for Victims of Crime (OVC) on June 14, 2013. During her previous tenure as OVC’s Acting Director and Principal Deputy Director, she launched the Vision 21: Transforming Victim Services initiative to expand the reach and impact of the victim assistance field. She was instrumental in the development of OVC’s Sexual Assault Nurse Examiner and Sexual Assault Response Team Training and Technical Assistance initiatives and spearheaded a number of OVC projects to identify and serve victims of crime with disabilities. She also implemented and oversees a discretionary grant program to fund comprehensive services to victims of human trafficking. Ms. Frost began her career as a Child Protective Services caseworker in South Texas and worked in the victim assistance, healthcare, and disability advocacy fields for more than 35 years in the United States and Europe. During this time she spent several years working at both the community and headquarters level for the Department of Army.

SUBCOMMITTEE STAFF

Lieutenant Colonel Kyle Green, U.S. Air Force – Supervising Attorney

Mr. Doug Nelson – Attorney

Major Ranae Doser-Pascual, U.S. Air Force – Attorney

Ms. Joanne Gordon – Attorney

Ms. Laurel Prucha Moran – Graphic Designer

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Appendix C: GLOSSARY OF ACRONYMS AND TERMS

**ACRONYMS:**

<table>
<thead>
<tr>
<th>ACRONYM</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAAF</td>
<td>Court of Appeals for the Armed Forces</td>
</tr>
<tr>
<td>CAPE</td>
<td>Cost Assessment and Program Evaluation</td>
</tr>
<tr>
<td>CDC</td>
<td>Centers for Disease Control and Prevention</td>
</tr>
<tr>
<td>CMA</td>
<td>Court of Military Appeals</td>
</tr>
<tr>
<td>DACOWITS</td>
<td>Defense Advisory Committee on Women in the Services</td>
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<tr>
<td>DEOCS</td>
<td>Defense Equal Opportunity Climate Survey</td>
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<tr>
<td>DEOMI</td>
<td>Defense Equal Opportunity Management Institute</td>
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<tr>
<td>DRRI</td>
<td>Defense Race Relations Institute</td>
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<tr>
<td>DSAID</td>
<td>Defense Sexual Assault Incident Database</td>
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<tr>
<td>DMDC</td>
<td>Defense Manpower Data Center</td>
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<tr>
<td>DoD</td>
<td>Department of Defense</td>
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<tr>
<td>DoDD</td>
<td>Department of Defense Directive</td>
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<tr>
<td>DoDI</td>
<td>Department of Defense Instruction</td>
</tr>
<tr>
<td>DTM</td>
<td>Directive-Type Memorandum</td>
</tr>
<tr>
<td>DTF-SAMS</td>
<td>Defense Task Force on Sexual Assault in the Military Services</td>
</tr>
<tr>
<td>FY</td>
<td>Fiscal year</td>
</tr>
<tr>
<td>GCMCA</td>
<td>General court-martial convening authority</td>
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<tr>
<td>IDF</td>
<td>Israeli Defense Forces</td>
</tr>
<tr>
<td>JAG</td>
<td>Judge advocate general</td>
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<tr>
<td>JSC</td>
<td>Joint Service Committee on Military Justice</td>
</tr>
<tr>
<td>MARADMIN</td>
<td>Marine Corps Administrative Message</td>
</tr>
<tr>
<td>MCIQ</td>
<td>Military Criminal Investigative Organization</td>
</tr>
<tr>
<td>MCM</td>
<td>Manual for Courts-Martial</td>
</tr>
<tr>
<td>MJIA</td>
<td>Military Justice Improvement Act of 2013</td>
</tr>
<tr>
<td>MVP</td>
<td>Mentors in Violence Prevention</td>
</tr>
</tbody>
</table>
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
**TERMS:**

**Accessions training:** Training that a Service member receives upon initial entry into military service through basic military training.

**Armed Forces of the United States:** A term used to denote collectively all components of the Army, Marine Corps, Navy, Air Force, and Coast Guard (when mobilized under Title 10, United States Code, to augment the Navy).

**Base:** An area or locality containing installations which provide logistic or other support.

**Chain of command:** The succession of commanding officers from a superior to a subordinate through which command is exercised.

**Command:** (1) The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment; (2) an order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action; or (3) a unit (or units), an organization, or an area under the command of one individual.

**Commander:** A commissioned officer or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a DoD organization or prescribed territorial area.

**Convening authority:** Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. See Rule for Courts-Martial 504(b) and discussion.

**Flag officer:** An officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.

**General officer:** An officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

**Grade:** A step or degree, in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

**Healthcare provider:** Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a military treatment facility, or who provide such care at a deployed location or otherwise in an official capacity.

**Installation:** A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard.
including any leased facility. It does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard.

**Judge advocate:** An officer of the Judge Advocate General’s Corps of the Army, Air Force, Marine Corps, Navy, and the United States Coast Guard who is designated as a judge advocate.

**Judge Advocates General:** Severally, the Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

**Law enforcement:** Includes all DoD law enforcement units, security forces, and military criminal investigative organizations.


**Military Department:** One of the departments within the Department of Defense created by the National Security Act of 1947, which are the Department of the Army, the Department of the Navy, and the Department of the Air Force.

**Military judge:** The presiding officer of a general or special court-martial detailed in accordance with Article 26 of the UCMJ to the court-martial to which charges in a case have been referred for trial.

**Preferral:** Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the UCMJ. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. See Rule for Courts-Martial 307.

**Rank:** The order of precedence among members of the Armed Forces.

**Referral:** The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorized to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. See Rule for Court-Martial 601(a) and discussion.

**Reprisal:** Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication.

**Restricted reporting:** Reporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an official investigation. The victim’s report to specified individuals will not be reported to law enforcement or to the command to initiate the official investigative process unless the victim consents or an established exception applied. Restricted reporting applies to Service members and their military dependents 18 years of age or older.
APPENDIX C: GLOSSARY OF ACRONYMS AND TERMS

Re-victimization: A pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse of a child. The latter pattern is particularly notable in cases of sexual abuse.

Service Secretaries: The Secretary of the Army, with respect to matters concerning the Army; the Secretary of the Navy, with respect to matters concerning the Navy, Marine Corps, and the Coast Guard when it is operating as a service in the Navy; the Secretary of the Air Force, with respect to matters concerning the Air Force; The Secretary of the Army, with respect to matters concerning the Army; The Secretary of Homeland Security, with respect to matters concerning the Coast Guard, when it is not operating as a service in the Navy.

Sexual assault prevention and response (SAPR) program: A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault.

Sexual Assault Prevention and Response Office (DoD SAPRO): Serves as the DoD's single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.

SAPR victim advocate (VA): A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. Provides liaison assistance with other organizations on victim care matters and reports directly to the SARC when performing victim advocate duties.

Sexual assault response coordinator (SARC): The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Service: A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard.

Special victim capabilities: A distinct, recognizable group of appropriately skilled professionals, consisting of specially trained and selected MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel who work collaboratively to investigate allegations of adult sexual assault, domestic violence involving sexual assault, and/or aggravated assault with grievous bodily harm, and child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm; and provide support for victims of these offenses.

Staff judge advocate (SJA): A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy, Coast Guard, or joint force command who is a judge advocate.

Status-of-forces agreement: A bilateral or multilateral agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state.

Subordinate command: A command consisting of the commander and all those individuals, units, detachments, organizations, or installations that have been placed under the command by the authority establishing the subordinate command.
**Unit:** Any military element whose structure is prescribed by competent authority or an organization title of a subdivision of a group in a task force.

**Unrestricted reporting:** A process that a Service member uses to disclose, without requesting confidentiality or restricted reporting, that he or she is the victim of a sexual assault. Under these circumstances, the victim's report may be used to initiate the official investigative process.
Appendix D:

PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

**JUNE 27, 2013**

Public Meeting of the RSP
U.S. District Court for the District of Columbia, Washington, D.C.

- Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society
- Ms. Delilah Rumburg, Pennsylvania Coalition Against Rape
- Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)
- Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO
- Mr. Fred Borch, Army JAG Corps Regimental Historian
- Captain Robert Crow, Joint Service Committee Representative

**AUG. 1, 2013**

Preparatory Session of the RSP
One Liberty Center, Arlington, VA

- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office
- Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program
- Major Jaclyn Grieser, Army Special Victim Prosecutor
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program
- Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch
- Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command
- Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service
- Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director
- Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager
- Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

AUG 5, 2013

Preparatory Session of the RSP
One Liberty Center, Arlington, VA

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army (telephonic)
- Major General William Mayville, Jr., U.S. Army
- Colonel Dan Brookhart, U.S. Army
- Colonel Jeannie Leavitt, U.S. Air Force
- Lieutenant Colonel Debra Luker, U.S. Air Force
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral William Baumgartner, U.S. Coast Guard
- Captain P.J. McGuire, U.S. Coast Guard
- Air Commodore Cronan, Director General, Australia Defence Force Legal Service (telephonic)

AUG 6, 2013

Preparatory Session of the RSP
One Liberty Center, Arlington, VA

- Lieutenant Colonel Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
- Dr. David Lisak, Professor, University of Massachusetts-Boston (telephonic)
- Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice
- Dr. Jim Lynch, former Director of the Bureau of Justice Statistics and current Chair, Department of Criminology and Criminal Justice, University of Maryland
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SEPT. 24, 2013  Public Meeting of the RSP
U.S. District Court for the District of Columbia, Washington, D.C.

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Lord Martin Thomas of Gresford QC, Chair, Association of Military Advocates (UK)
- Professor Amos Guiora, University of Utah College of Law
- Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces
- Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command
- Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service
- Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom
- Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army
- Senator Kirsten Gillibrand (New York)
- Senator Claire McCaskill (Missouri)

SEPT. 25, 2013  Public Meeting of the RSP
U.S. District Court for the District of Columbia, Washington, D.C.

- Lieutenant General Michael Linnington, U.S. Army
- Colonel Corey Bradley, U.S. Army
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- General Edward Rice, U.S. Air Force
- Colonel Polly S. Kenny, U.S. Air Force
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral Thomas Ostebo, U.S. Coast Guard
- Commander William Dwyer, U.S. Coast Guard
- Brigadier General Richard C. Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff
- Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army
- Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy
- Major General Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps
- Rear Admiral Frederick J. Kenney, Judge Advocate General and Chief Counsel, U.S. Coast Guard
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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**OCT. 23, 2013**

**Role of the Commander Subcommittee Meeting**
One Liberty Center, Arlington, VA
- Colonel Alan Metzler, Deputy Chief, DoD SAPRO
- Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO
- Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center

**NOV. 7, 2013**

**Public Meeting of the RSP**
U.S. District Court for the District of Columbia, Washington, D.C.
- Major General Gary S. Patton, Director, DoD SAPRO
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force SAPR Office
- Rear Admiral Maura Dollymore, Director of Health, Safety and Work-Life, U.S. Coast Guard
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Dr. Christine Altendorf, Director, U.S. Army Sexual Harassment/Assault Response & Prevention Office
- Master Sergeant Carol Chapman, SHARP Program Manager, 7th Infantry Division, U.S. Army
- Ms. Christa Thompson, Victim Witness Liaison, Fort Carson, Colorado
- Dr. Kimberly Dickman, Sexual Assault Response Coordinator, National Capitol Region, U.S. Air Force
- Master Sergeant Stacia Rountree, Victim Advocate, National Capitol Region, U.S. Air Force
- Ms. Liz Blanc, U.S. Navy Sexual Assault Response Coordinator, National Capitol Region
- Ms. Torie Camp, Deputy Director, Texas Association Against Sex Assault
- Ms. Gail Reid, Director of Victim Advocacy Services, Baltimore, Maryland
- Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County & City of Falls Church, Virginia
- Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia
- Ms. Nancy Parrish, President, Protect our Defenders
- Ms. Miranda Peterson, Program and Policy Director, Protect our Defenders
- Mr. Greg Jacob, Policy Director, Service Women’s Action Network
- Mr. Scott Berkowitz, President, Rape, Assault, and Incest Network
- Dr. Will Marling, Executive Director, National Organization for Victim Assistance
- Ms. Donna Adams (Public Comment)
APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

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**NOV. 8, 2013**

**Public Meeting of the RSP**

U.S. District Court for the District of Columbia, Washington, D.C.

- Mr. Brian Lewis
- Ms. BriGette McCoy
- Ms. Ayana Harrell
- Ms. Sarah Plummer
- Ms. Marti Ribeiro
- Command Sergeant Major Julie Guerra, U.S. Army
- Colonel James McKee, Special Victims’ Advocate Program, U.S. Army
- Colonel Carol Joyce, Officer in Charge, Victims’ Legal Counsel Organization, U.S. Marine Corps
- Captain Karen Fischer-Anderson, Chief of Staff, Victims’ Legal Counsel, U.S. Navy
- Captain Sloan Tyler, Director, Office of Special Victims’ Counsel, U.S. Coast Guard
- Colonel Dawn Hankins, Chief, Special Victims’ Counsel Division, U.S. Air Force
- Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C.
- Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia
- Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York
- Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona
- Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center
- Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service
- Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization
- Captain Charles Purnell, US. Navy Defense Service Office
- Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force
- Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard
- Mr. David Court of Court and Carpenter, Stuttgart, Germany
- Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas
- Ms. Bridget Wilson, Attorney, San Diego, California

**NOV. 13, 2013**

**Role of the Commander Subcommittee Meeting**

One Liberty Center, Arlington, VA

- Brigadier General Charles Pede, U.S. Army
- Senator Claire McCaskill (Missouri)
Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

**NOV. 20, 2013**  
Role of the Commander Subcommittee Meeting  
One Liberty Center, Arlington, VA  
- Professor Eugene Fidell, Yale Law School (telephonic)  
- Mr. James Love, Acting Director, Military Equal Opportunity & DEOMI Liaison, DoD Office of Diversity Management & Equal Opportunity  
- Dr. Dan McDonald, Defense Equal Opportunity Management Institute  
- Lieutenant Colonel Kay Emerson, U.S. Army, Office of Diversity & Leadership (MEO)  
- Mr. George Bradshaw, U.S. Navy, 21st Century Sailor Office (MEO)  
- Colonel T.V. Johnson, U.S. Marine Corps, Diversity & Equal Opportunity Office  
- Master Gunner Sergeant Lester Poole, U.S. Marine Corps, Diversity & Equal Opportunity Office  
- Mr. Cyrus Salazar, U.S. Air Force Equal Opportunity Program  
- Mr. James Ellison, U.S. Coast Guard, Civil Rights Directorate  
- Lieutenant General Howard Bromberg, U.S. Army, Deputy Chief of Staff, G1  
- Captain Steve Deal, Deputy Director, U.S. Navy 21st Century Sailor Division  
- Colonel Robin Gallant, Commanding Officer, U.S. Marine Corps, Headquarters & Services Battalion  
- Brigadier General Gina Grosso, U.S. Air Force, Director of Force Management Policy, AF/A1  
- Rear Admiral Daniel Neptun, U.S. Coast Guard, Assistant Commandant for Human Resources

**DEC. 10, 2013**  
Site Visit  
Role of the Commander Subcommittee  
Fort Hood, TX  
- General Courts-Martial Convening Authorities  
- Special Courts-Martial Convening Authorities and Subordinate Commanders  
- Senior Enlisted Leaders  
- Defense Counsel

**DEC. 11, 2013**  
Public Meeting of the RSP  
University of Texas – Austin, Austin, TX  
- Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School  
- Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness)  
- Dr. Cara J. Krulewitch, Director, Women’s Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs)  
- Captain Jason Brown, Military Justice Branch, Judge Advocate Division, U.S. Marine Corps  
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy  
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General
- Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service
- Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service
- Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation
- Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command
- Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau
- Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit
- Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police
- Sergeant Jason Staniszewski, Austin Police Department, Sex Crimes Unit
- Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations
- Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research
- Dr. Kim Lonsway, Director of Research for End Violence Against Women International
- Major Melissa Brown, Texas National Guard (Public Comment)
- Mr. Daniel Ross, Attorney, Chairman of the Advisory Committee, Institute on Domestic Violence and Sexual Assault (Public Comment)

**DEC. 12, 2013**

**Public Meeting of the RSP**

**University of Texas – Austin, Austin, TX**

- Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney’s Office
- Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
- Captain Jason Brown, Military Justice Branch (JAM), Judge Advocate Division, Headquarters U.S. Marine Corps
- Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney’s Office, District of Columbia
- Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
- Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
- Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, Army Trial Defense Service, U.S. Army
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

• Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
• Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
• Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
• Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program
• Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
• Anne Munch, Owner, Anne Munch Consulting, Inc.
• Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
• Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney’s Office
• Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
• Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
• Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program, U.S. Navy
• Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
• Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
• Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
• James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
• Lieutenant Colonel Devin Winklosky, U.S. Marine Corps, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General’s Legal Center and School

DEC. 13, 2013

Site Visit
Role of the Commander Subcommittee
Joint Base San Antonio – Lackland, TX
• Basic Military Training Commanders and Training Instructors
• Basic Military Training Trainees
• Special Courts-Martial Convening Authorities and Subordinate Commanders
• Senior Enlisted Leaders
• Defense Counsel

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

JAN. 8, 2014  Role of the Commander Subcommittee Meeting  
One Liberty Center, Arlington, VA  
- Lieutenant General (Retired) Claudia Kennedy, U.S. Army (telephonic)  
- Major General (Retired) Martha Rainville, U.S. Air Force  
- Brigadier General (Retired) Loree Sutton, U.S. Army  
- Rear Admiral (Retired) Harold Robinson, U.S. Navy  
- Rear Admiral (Retired) Marty Evans, U.S. Navy  
- Colonel (Retired) Paul McHale, U.S. Marine Corps  
- Captain (Retired) Lory Manning, U.S. Navy  
- Honorable Patrick Murphy, former congressman and U.S. Army JAG  
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration  
- General (Retired) Fred Franks, U.S. Army (telephonic)  
- General (Retired) Roger Brady, U.S. Air Force (telephonic)  
- Lieutenant General (Retired) Tom Metz, U.S. Army  
- Lieutenant General (Retired) John Sattler, U.S. Marine Corps  
- Vice Admiral (Retired) Scott Van Buskirk, U.S. Navy  
- Major General (Retired) K.C. McClain, U.S. Air Force (telephonic)  
- Major General (Retired) Mary Kay Hertog, U.S. Air Force (telephonic)

JAN 30, 2014  Public Meeting of the RSP  
The George Washington University Law School, Washington, D.C.  
- Major General (Retired) Martha Rainville, U.S. Air Force (telephonic)  
- Brigadier General (Retired) Pat Foote, U.S. Army  
- Rear Admiral (Retired) Marty Evans, U.S. Navy (telephonic)  
- Rear Admiral (Retired) Harold Robinson, U.S. Navy  
- Captain (Retired) Lory Manning, U.S. Navy  
- Colonel (Retired) Paul McHale, U.S. Marine Corps (telephonic)  
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration  
- General (Retired) Ann Dunwoody, U.S. Army  
- General (Retired) Roger Brady, U.S. Air Force  
- Vice Admiral (Retired) Mike Vitale, U.S. Navy (telephonic)  
- Lieutenant General (Retired) James Campbell, U.S. Army  
- Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force (telephonic)  
- Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
ROLE OF THE COMMANDER SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

**FEB. 12, 2014** Role of the Commander Subcommittee Meeting  
One Liberty Center, Arlington, VA  
- Dr. Andra Tharp, Center for Disease Control and Prevention *(telephonic)*  
- Dr. Kathleen Basile, Center for Disease Control and Prevention *(telephonic)*  
- Dr. Sarah DeGue, Center for Disease Control and Prevention *(telephonic)*  
- Ms. Beth Reimels, Center for Disease Control and Prevention *(telephonic)*  
- Ms. Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault  
- Mr. Benje Douglas, Project Manager, National Sexual Violence Resource Center  
- Dr. Victoria Banyard, Co-director, Prevention Innovations and Professor of Psychology, University of New Hampshire  
- Dr. Sharyn Potter, Co-director, Prevention Innovations and Associate Professor of Sociology, University of New Hampshire  
- Dr. Jackson Katz, Co-founder, Mentors in Violence Prevention Program *(telephonic)*  
- Colonel Alan Metzler, Deputy Director, DoD SAPRO  
- Colonel Litonya Wilson, Chief of Prevention, DoD SAPRO  
- Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO  
- Colonel Karen Gibson, U.S. Army  
- Colonel David Maxwell, U.S. Marine Corps  
- Colonel Trent Edwards, U.S. Air Force  
- Captain Steven Andersen, U.S. Coast Guard  
- Captain Peter Nette, U.S. Navy  
- Command Sergeant Major Pamela Williams, U.S. Army  
- Sergeant Major Mark Byrd, U.S. Marine Corps  
- Command Master Chief Marilyn Kennard, U.S. Navy  
- Senior Master Sergeant Patricia Granan, U.S. Air Force

**MAR. 12, 2014** Role of the Commander Subcommittee Meeting  
One Liberty Center, Arlington, VA  
- Colonel (Retired) Denise K. Vowell, Former Chief Trial Judge of the Army  
- Mr. Robert Reed, former DoD Assoc. Dep. General Counsel (Military Justice and Personnel Policy)
Appendix E:
SOURCES CONSULTED

1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

a. Enacted Statutes


b. Proposed Statutes

Military Justice Improvement Act of 2013, S. 967, 113th Congress (2013); S. 1197, § 552, amend. no. 2099 (2013); S. 1752, 113th Cong. (2013)

c. Reports of Congress

3. JUDICIAL DECISIONS

a. Supreme Court


b. Court of Appeals for the Armed Forces

United States v. Alexander, 63 M.J. 269 (CAAF 2006)
United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006)
United States v. Thomas, 22 M.J. 388 (C.M.A. 1986)
Service Courts of Criminal Appeals
United States v. Ruggiero, 1 M.J. 1089 (N.C.M.R. 1977)
United States v. White, 1 M.J. 1048, 1051-52 (N.C.M.R. 1976)

4. RULES AND REGULATIONS

a. Congress


b. Executive Order

c. Department of Defense


d. Services


5. MEETINGS AND HEARINGS

a. Public Meetings of the Response Systems Panel

Transcript of RSP Public Meeting (June 27, 2013)
Transcript of RSP Public Meeting (Sept. 24, 2013)
Transcript of RSP Public Meeting (Sept. 25, 2013)
Transcript of RSP Public Meeting (Nov. 7, 2013)
Transcript of RSP Public Meeting (Nov. 8, 2013)
Transcript of RSP Public Meeting (Dec. 11, 2013)
Transcript of RSP Public Meeting (Dec. 12, 2013)

1 Except where indicated, the materials pertaining to the meetings of the Response Systems Panel and its Subcommittees are currently available at http://responsesystemspanel.whs.mil/index.php/meetings.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
ROLE OF THE COMMANDER SUBCOMMITTEE

Transcript of RSP Public Meeting (Jan. 30, 2014)
PowerPoint Presentation of DoD SAPRO, “Sexual Assault Prevention and Response Program” (June 27, 2013)
Written Statement of Protect Our Defenders to RSP (Sept. 17, 2013)
Lisa M. Schenck, “Fact Sheet on Australian Military Justice” (Sept. 18, 2013)
Written Statement of Professor Christopher Behan, Southern Illinois University School of Law (Sept. 21, 2013)
Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps (Sept. 25, 2013)
Written Statement of Brigadier General Flora D. Darpino, U.S. Army (undated)
Written Statement of Brigadier General Richard Gross, U.S. Army (Sept. 25, 2013)
Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard (Sept 25, 2013)
Letter with Enclosures from Lieutenant General Flora D. Darpino, U.S. Army, to RSP (Nov. 6, 2013)
PowerPoint Presentation of DoD SAPRO, “DoD Sexual Assault Prevention and Response Metrics” (Nov. 7, 2013)
Written Statements Submitted by Protect Our Defenders (undated)
Written Statement of Brigadier General (ret.) Evelyn P. Foote, U.S. Army (Jan 30, 2014)

b. Meetings of the RSP Subcommittees

Transcript of Role of the Commander Subcommittee Meeting (Oct. 23, 2013)
Transcript of Role of the Commander Subcommittee Meeting (Nov. 13, 2013)
Transcript of Role of the Commander Subcommittee Meeting (Nov. 20, 2013)
Transcript of Role of the Commander Subcommittee Meeting (Jan. 8, 2014)
Transcript of Role of the Commander Subcommittee Meeting (Feb. 12, 2014)
Transcript of Comparative Systems Subcommittee Meeting (Feb. 25, 2014)
Transcript of Role of the Commander Subcommittee Meeting (Mar. 12, 2014)
PowerPoint Presentation of DoD SAPRO (Oct. 23, 2013)
PowerPoint Presentation of Andra Teten Tharp, “Preventing Sexual Violence Perpetration” (Feb. 12, 2014)
PowerPoint Presentation of DoD SAPRO, “Prevention Strategy Update” (Feb. 12, 2014)
APPENDIX E: SOURCES CONSULTED

c. Other Hearings


Transcript of Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee (June 4, 2013), available at http://www.armed-services senate.gov/download/2013/06/04/hearing-060413

Written Statement of General Martin E. Dempsey, Chairman, Joint Chiefs of Staff, to Armed Services Committee, U.S. Senate (June 4, 2013), available at http://www.armed-services senate.gov/download/2013/06/04/martin-dempsey-testimony-060413


6. OFFICIAL POLICY STATEMENTS

a. President


b. Department of Defense


ROLE OF THE COMMANDER SUBCOMMITTEE


c. Services

Acting Secretary of the Air Force, Memorandum to the Secretary of Defense re Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08a_AF_EnhancingCdrAccountability.pdf

Secretary of the Army, Memorandum to the Secretary of Defense re Sexual Assault Prevention and Response (SAPR) – Enhanced Commander Accountability (Nov. 1, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08b_Army_EnhancingCdrAccountability.pdf


Deputy Commandant for Manpower and Reserve Affairs, U.S. Marine Corps, Memorandum to the Secretary of the Navy on Enhancing Commander Accountability (Sept. 19, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08d_USMC_EnhancingCdrAccountability.pdf


The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: SOURCES CONSULTED


7. OFFICIAL REPORTS


Department of Defense, SAPRO, Memorandum from Major General Gary S. Patton, Director, DoD SAPRO, re “Assessment of Services' Reviews of Prevention and Reporting of Sexual Assault and Other Misconduct in Initial Military Training” (Apr. 3, 2013), reprinted in DoD Response to Request for Information 31 at 000760, currently available at http://responsesystemspanel.whs.mil/index.php/rfis


The Response Systems Panel has not yet considered or deliberated on the contents of this report.


8. RESPONSES TO RSP REQUESTS FOR INFORMATION

Services’ Responses to Request for Information 1b, 1c (Nov. 1, 2013)
DoD Response to Request for Information 1c (Nov. 1, 2013)
DEOMI Response to Request for Information 33c, 33e (Nov. 21, 2013)
Services’ Responses to Request for Information 66 (Nov. 21, 2013)
DoD Response to Request for Information 79a (Dec. 19, 2013)
Services’ Responses to Requests for Information 79a, 79c (Dec. 19, 2013)
Services’ Responses to Requests for Information 80a, 80c, 80d (Dec. 19, 2013)
Marine Corps’s Response to Request for Information 81a (Dec. 19, 2013)
Services’ Responses to Request for Information 84 (Dec. 19, 2013)
Services’ Responses to Request for Information 154 (Jan. 14, 2014)

9. BOOKS, BOOKLETS, AND FILMS

The Invisible War (Chain Camera Pictures 2012)


2 These materials are currently available at http://responsesystemspanel.whs.mil/index.php/rfis.
APPENDIX E: SOURCES CONSULTED

10. JOURNAL ARTICLES


Christopher W. Behan, Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members, 176 Military Law Review 190 (June 2003)

Victor Hansen, Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?, 16 Tulane Journal of International & Comparative Law 419 (Spring 2008)


Sharyn J. Potter and Mary M. Moynihan, Bringing in the Bystander In-Person Prevention Program to a U.S. Military Installation: Results from a Pilot Study, 176 Military Medicine 870 (2011)


11. LETTERS AND E-MAILS


Assistant Secretary of Defense for Legislative Affairs to Senator Carl Levin, Chair, Armed Services Committee, U.S. Senate (undated), currently available at http://responsesystemspanel.whs.mil/index.php/pubcomment-gen


Roger A. Canaff, Letter to Ms. Taryn Meeks, Executive Director of Protect Our Defenders (Sept. 16, 2013), reprinted in Written Statement of Protect Our Defenders to RSP, App. 1 (Sept. 17, 2013), supra


The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Amos N. Guiora, Letter to Armed Services Committee, U.S. Senate (undated), currently available at http://responesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/Guiora/Prof_Guiora_Statement_to_Senate_Armed%20_Services_Committee.pdf

The Judge Advocates General, Letter to Senator Carl Levin, Chair, Armed Services Committee, U.S. Senate (Oct. 28, 2013), currently available at http://responesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131113_ROC/07_JointTJAG_Ltr_SenLevin.PDF


12. NEWS ARTICLES AND BROADCASTS


12. ONLINE RESOURCES


Military Rape Crisis Center, “Reporting Option” at http://militaryrapecrisiscenter.org/for-active-duty/reporting-option/


Maxwell A. Sturtz, “The Administration of Military Justice: A Summary of Constructive Criticisms Received by the War Department’s Advisory Committee on Military Justice” (1946), at http://www.loc.gov/rr/frd/Military_Law/Vanderbilt-report.html

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
November 6, 2013

MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes

A Term of Reference established for this Subcommittee by the Secretary of Defense is to “assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.” One focus of the Subcommittee’s work has been the authority assigned to designated senior commanders to refer criminal offenses for trial by courts-martial. A specific focus of our inquiry is assessing whether removing the commander as convening authority will increase the confidence of sexual assault victims in the military justice system and thereby increase reporting of sexual assault offenses, which are underreported when compared to reporting statistics for other serious crimes.

To examine the impact on reporting of sexual assault crimes in the militaries of our Allies, the Subcommittee reviewed extensive materials regarding the justice systems for military personnel and sexual assault reporting in other nations. The Subcommittee reviewed presentations to the Response Systems-Panel by experts on Allied military justice systems and senior military representatives from Australia, Canada, Israel, and the United Kingdom. These representatives and experts provided overviews of their current military justice systems, described the evolution of their systems and the reasons that the systems were changed, provided statistics and information about sexual assault reporting and sexual assault response, and provided their opinions as to what if any effect the structure of their military justice systems had on sexual assault reporting. The Subcommittee also reviewed background materials provided by presenters and outside reports and hearing presentations referencing foreign military justice systems.

This information was provided to the Role of the Commander Subcommittee for consideration. On October 23, 2013, members of the Subcommittee met to review and discuss the materials and testimony on Allied systems. The following represents the findings and assessments of the Subcommittee regarding the information and materials reviewed:

Overview:

The changes our Allies have made to their military justice systems have occurred at different times and none of them was made in order to improve sexual assault reporting or prosecution.1 Israel adopted the Military Justice Law in 1955, which vested prosecutorial discretion in an Independent Military Advocate General, and the adjudication system for

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1 Public Session, Response Systems to Adult Sexual Assault Crimes Panel 152 (Sept. 24, 2013); Id. at 181 (testimony of Major General Blaise Canhaert, Judge Advocate General, Canadian Armed Forces); Id. at 244-45 (testimony of Commodore Andrei Spence, Commodore, Naval Legal Services and Senior Legal Officer, British Royal Navy); Id. at 238 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service).
members of the Israel Defense Forces (IDF) has remained largely the same since that date. Canada removed the chain of command from the prosecutorial decision for serious criminal offenses and created a director of military prosecutions through the 1999 amendments to the National Defence Act. Changes to the Canadian military justice system were made subsequent to fundamental changes in the Canadian Charter of Rights and Freedoms which necessitated these changes and reflected general societal concern for the rights of the accused. In 2006, the Australian Parliament enacted legislation to establish the Director of Military Prosecutions as the convening authority to convene courts-martial under the Defence Force Discipline Act (DFDA). This legislation was also enacted out of concern that the public perceived the system as unfair to defendants. In the United Kingdom, the Armed Forces Act of 2006 became effective on November 1, 2009, thereby removing authority for prosecution of serious offenses from the chain of command and placing such authority in a new, independent Director of Service Prosecutions. These changes were also made out of concern for the rights of defendants raised both within the United Kingdom and before the European Court of Human Rights – the rulings of which the United Kingdom is bound by treaty to follow.

Sexual Assault Reporting, Investigation, and Prosecution Statistics:

Allied military partners provided statistics for the reporting, investigation, and prosecution of sexual assault crimes within their military services. The nature of the offenses described within the reported statistics varies by country based on the systems available for tracking sexual assault data and the specific statutory offenses encompassed within each country’s definition of sexual assault. For example, sexual assault under the DFDA in Australia refers only to rape and attempted rape, while sexual offense reporting data provided by the IDF includes the offenses of rape and attempted rape, indecent assault, physical and/or verbal sexual harassment, and peeping. Likewise, the timeframes for reported information also varied. Data from Canada was provided for 2007 to 2010, while the United Kingdom provided data from 2005 to 2012. The variations in tracking methods, offenses reflected, and reporting periods make comparisons of the data of different countries difficult.

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3 Public Session, supra note 1, at 158 (statement of Major General Cathcart).
4 Id. at 156-57.
5 L. LIBR. OF CONG., supra note 2, at 4-5.
6 Public Session, supra note 1, at 223 (testimony of Air Commodore Cronan).
7 L. LIBR. OF CONG., supra note 2, at 55, 58 (citing Armed Forces Act 2006, c. 52, § 364).
8 Public Session, supra note 1, at 38-42 (statement of Lord Martin Thomas of Gresford QC; see also Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997)).
9 Public Session, supra note 1, at 216 (statement of Air Commodore Cronan).
10 Email from Col. Eli Bar-On to COL Patricia Ham, Staff Director, Response Systems Panel, Statistical Tables relating to Sexual Assault within the IDF: 2007 – 2012 (Aug. 11, 2013) (on file with the Response Systems Panel).
However, it is possible to consider general tracking and reporting trends within each country and to assess the framework established by each nation’s military organization for sexual assault reporting and response.

**Effect of System Changes on Sexual Assault Reporting:**

Current and former military officials from our Allied partners were asked to assess whether the structural changes that removed the commander from the prosecution of cases, implemented in their military justice systems, had a connection to reporting trends for sexual assault offenses. None of the representatives made this connection. 15

The Deputy Military Advocate General for the IDF noted an increase in sexual assault complaints in the IDF between 2007 and 2011 16 but attributed no specific reason for the increase. 17 Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue. 18 The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010. 19 The Canadians were unable to present statistics addressing whether the change in the military justice system affected sex crime reporting. 20 The Commodore of Naval Legal Services for Britain’s Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had “no discernible” effect on the reporting of sexual assault offenses. 21 The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and 2006 reforms. 22 He acknowledged, however, that the Australian Defence Force estimates that between 2008 and 2011, 80% of

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13 Additional assessment by the Legal Counsel to the Chairman of the Joint Chiefs of Staff further reinforces the perspectives of the Allied military officials who provided information to the Response Systems Panel. In his discussions with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany, he learned that none of the nations changed their military justice systems in response to sexual assault prosecution or reporting. Further, none could correlate system changes to increased or decreased sexual assault reporting, and there was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims’ willingness to report crimes. *Public Session, supra* note 1, at 207-09 (statement of Brigadier General Richard Gross, Legal Advisor to the Chairman of the Joint Chiefs of Staff).

14 Professor Amos Guiora, a former judge advocate in the IDF, also commented on this increase in sexual assault reporting in a letter to the SASC in advance of its June hearing. This letter stated in part: “There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israeli Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers’ confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the ‘chain of command.’” Letter from Prof. Amos Guiora, Professor, Univ. of Utah, to Senate Armed Services Committee (undated) (on file with the Response Systems Panel).

15 E-mail from Col. Eli Bar-On, *supra* note 10.

16 *Id.*

17 *Public Session, supra* note 1, at 163-64 (testimony of Major General Cathcart).

18 *Id.* at 181-82 (testimony of Major General Cathcart).

19 *Id.* at 282-83 (testimony of Commodore Andrei Spence).

20 *Id.* at 238-39 (statement of Air Commodore Cronan).
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial

The Role of the Commander Subcommittee is conducting a comprehensive review of the role of the commander in the military justice system. The Subcommittee has focused particular attention thus far on the question of whether senior commanders serving as convening authorities should retain the authority to refer sexual assault offenses to court-martial.

Based on all information considered to this point, a strong majority of Subcommittee members agrees the evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces. Nor does the evidence indicate it will improve the quality of investigations and prosecutions or increase the conviction rate in these cases. Further, the evidence does not support a conclusion that removing such authority will increase confidence among victims of sexual assault about the fairness of the military justice system or reduce their concerns about possible reprisal for making reports of sexual assault. As a result, the Subcommittee’s assessment at this time is that the authority vested in senior commanders to convene courts-martial under the Uniform Code of Military Justice (UCMJ) for sexual assault offenses should not be changed. In reaching this conclusion, the Subcommittee makes the following findings:

1. Criticism of the military justice system often confuses the term “commander” with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing.

2. Under current law and practice, the authority to refer a sexual assault allegation for trial by court-martial is reserved to a level of commander who will normally be removed from any personal knowledge of the accused or victim. If a convening authority has an interest in a particular case other than an official interest, the convening authority is required to recuse himself or herself.

3. Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.

4. There is no evidentiary basis at this time supporting a conclusion that removing senior commanders as convening authority will reduce the incidence of sexual assault or increase sexual assault reporting.

5. Sexual assault victims currently have numerous channels outside the chain of command to report incidents of sexual assault, and they are not required to report to anyone in their
organization or any member of their chain of command. These alternative reporting channels are well and broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.

6. Under current law and practice, sexual assault allegations must be referred to, and investigated by, military criminal investigative organizations that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.

7. Under current law and practice, the authority to resolve sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.

8. None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.

9. It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.

10. Congress has recently enacted significant reforms addressing sexual assault in the military, and the Department of Defense has implemented numerous changes to policies and programs to improve oversight and response. These reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

11. Prosecution of sexual misconduct contributes to the overall effort to address this problem. Commanders must play a central role in preventing sexual assault by establishing command climates that ensure subordinates are trained in and embrace their moral and legal obligations, and by emphasizing the role of accountability at all levels of the organization.

The full report of the Subcommittee will provide additional information and analysis on this issue, but the following represents our initial assessment.

Barbara S. Jones
Chair
Role of the Commander Subcommittee

1. Subcommittee Assessment
2. Separate Statement of Subcommittee Member Elizabeth L. Hillman
ROLE OF THE COMMANDER SUBCOMMITTEE

Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial

I. ASSESSMENT SUMMARY

The issue of sexual assault crimes in the U.S. military has been the subject of significant public, legislative, and administrative scrutiny. Some individuals and groups assert commanders should lose the authority to convene courts-martial for sexual assault offenses. Accordingly, they propose amending the Uniform Code of Military Justice (UCMJ) to strip convening authority from commanders and vest authority in legal officers whose function will be independent of the military command in which the alleged misconduct occurs. Others contend senior military commanders are essential to resolving the pernicious issues of sexual assault in military organizations and divesting senior commanders of their role as courts-martial convening authorities will dilute their capacity to lead and impair their ability to maintain good order and discipline, resulting in damage to the efficiency and effectiveness of the Armed Forces.

Over the past three years, Congress made significant changes to the UCMJ and enacted substantial mandates on the Department of Defense (DoD) to address the issue of sexual assault in the military. Additionally, DoD implemented considerable changes to its processes and systems for preventing, assessing, and responding to sexual assault crimes. Reporting of alleged sexual assaults, including assaults that occurred before the person entered the military, significantly increased during Fiscal Year 2013, suggesting increased confidence of sexual assault victims in the sympathetic and effective response they could receive from the military.

a. Responsibility of the Subcommittee

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.” In order to assist the RSP in accomplishing, in twelve months, the many areas Congress directed it to assess, the RSP Chair directed the establishment of three subcommittees—Role of the Commander, Comparative Systems, and Victim Services.

On September 23, 2013, the Secretary of Defense established the RSP subcommittees and appointed nine members to the Role of the Commander Subcommittee, including four members of the RSP. The Secretary of Defense established three objectives for the Role of the Commander Subcommittee (Subcommittee), including a requirement to “assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.” The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) adds the requirement to assess “the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under ... the Uniform Code of Military Justice would have on overall reporting and prosecution of sexual assault cases.”

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b. Methodology of Subcommittee Review

Since June 2013, RSP and Subcommittee members have held and attended 16 days of hearings—including public meetings, subcommittee meetings, preparatory sessions, and site visits—with more than 170 different presenters. Presenters included surviving sexual assault victims; current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims’ counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocates General from each of the Services; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners and emergency physicians; first responders; chaplains; and currently serving United States Senators.

In addition, the Subcommittee considered publicly available information and documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. The RSP sent specific requests for information (RFIs) to DoD and each of the Services. The RFIs focused on the role of the commander, comparing military and civilian investigative and prosecution systems, and victim services. To date, DoD and the Services have submitted more than 400 pages of narrative responses and more than 750 attached documents. The RSP also sent letters to eighteen victim advocacy organizations around the country soliciting input from those organizations to assist the Panel in its review. Advocacy organizations providing information to the RSP have included those working specifically in military sexual assault, including: Protect Our Defenders; Service Women’s Action Network; Rapes, Abuse, and Incest National Network; the National Organization for Victim Assistance; and the National Alliance to End Sexual Violence.

II. THE ROLES OF COMMANDERS AND CONVENING AUTHORITIES

a. Commander Authority and Responsibility

The term “commander” has a unique and specific meaning within military organizations. It indicates a position of seniority, authority, and responsibility within a particular military organization. By definition, the Rules for Courts-Martial distinguish “commander” from “convening authority,” and the two roles, while overlapping, are not interchangeable.3 Military officers at all ranks and experience levels may serve in command positions.

The commander serves as the head of a military organization and is primarily responsible for ensuring mission readiness, to include the maintenance of good order and discipline within a unit. The importance of the commander’s disciplinary responsibility is reflected in the preamble to the Manual for Courts-Martial: “The purpose of military law is 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.”

The importance of the commander’s role in maintaining good order and discipline in military organizations has also been reflected in times of cultural change in the Armed Forces. Historically, commanders have proved essential in leading the organizational response during periods of military cultural transition, especially since enactment of the UCMJ. Beginning with racial integration and continuing toward greater inclusion of women and, most recently, the repeal of


Initial Assessment - Role of the Commander Subcommittee

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
“Don’t Ask, Don’t Tell,” the Services relied on commanders to set the appropriate tone and effect change among subordinates under their command. A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command in achieving change in the attitudes and behaviors of service members. As Senator Carl Levin, Chair of the Senate Armed Services Committee, observed, the chain of command has been “the key to cultural change in the military.” Stated directly, commanders—the leaders of military organizations—set and enforce standards and drive cultural change in the military.

b. Distinction between Commanders and Convening Authorities

While all commanders have disciplinary responsibility for subordinates, the authority under the UCMJ to convene courts-martial is legally distinct from command authority. Convening authority for general, special, and summary courts-martial is established by Articles 22, 23, and 24 of the UCMJ, respectively.

Since 1775, the power to convene courts-martial has been vested in U.S. commanders as a necessary tool for maintaining discipline in commands. In fact, until the UCMJ was adopted in 1950, commanders enjoyed virtually unfettered discretion in determining whether to try soldiers and sailors by court-martial. The UCMJ vested commanders with the authority to convene courts-martial, but a number of important restrictions in the new code served as checks on this authority. Enactment of the UCMJ, as well as its significant amendments in 1968 and 1983.

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6 Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee 12 (June 4, 2013) (testimony of General Raymond T. Odierno, Chief of Staff, U.S. Army); Transcript of RSP Public Meeting 214 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army) (“Past progress and institutional change, whether racial or gender integration, or, more recently, Don’t Ask, Don’t Tell, have been successful because of the focus and authority of commanders, not because of lawyers. And so it should be in addressing sexual assaults.”).
7 While often used as an all-encompassing term for military superiors, the term “chain of command” refers only to a distinct organizational chain of commanders, from superior to subordinate, who hold the authority to execute the responsibilities of command over an individual. Supervisory or “technical chains” are not part of a service member’s chain of command, and they lack the responsibility and authority unique to military commanders and chains of command.
8 Transcript of RSP Role of the Commander Subcommittee Meeting 40 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy) (noting that he had “witnessed the chain of command’s ability to effect change in the military culture on racial discrimination”); see id. at 299-301 (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps); see also Transcript of RSP Role of the Commander Subcommittee Meeting 115-17 (Nov. 20, 2013) (testimony of Mr. James Love, Acting Director for Military Equal Opportunity, Department of Defense Office of Diversity Management and Equal Opportunity) (describing significance of military leaders in achieving cultural climate change in race relations).
9 Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee 4 (June 4, 2013).
10 See, e.g., Transcript of RSP Public Meeting 213 (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino) (“It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders, not lawyers.”).
12 Transcript of RSP Public Meeting 190-91 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General’s Corps).
13 For example, the UCMJ prohibited convening authorities from preferring charges until they are first examined for legal sufficiency by the staff judge advocate, see 10 U.S.C. § 834 (UCMJ art. 34(a)); the staff judge advocate was authorized to directly communicate with the staff judge advocate of a superior or subordinate commander, or with The Judge Advocate General, see 10 U.S.C. § 886(b) (UCMJ art. 66(b)); and convening authorities, as well as all commanding officers, were prohibited from unlawfully influencing the law officer, counsel, and panel members of courts-martial, see 10 U.S.C. § 837 (UCMJ art. 37).
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The following chart illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCAs and even smaller number of GCMCAs:

<table>
<thead>
<tr>
<th></th>
<th>Active Duty Personnel</th>
<th>Commanders</th>
<th>SPCMCAs</th>
<th>GCMCAs who convened 1 or more court-martial in FY13</th>
<th>GCMCAs who convened for more court-martial in FY13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army</td>
<td>528,527</td>
<td>7,090 (approx.)</td>
<td>424</td>
<td>Not tracked</td>
<td>85</td>
</tr>
<tr>
<td>Navy</td>
<td>332,251</td>
<td>1,422</td>
<td>1,080</td>
<td>94</td>
<td>200</td>
</tr>
<tr>
<td>Marine Corps</td>
<td>194,561</td>
<td>2,182</td>
<td>451</td>
<td>106</td>
<td>50</td>
</tr>
<tr>
<td>Air Force</td>
<td>329,452</td>
<td>3,043</td>
<td>97</td>
<td>70</td>
<td>58</td>
</tr>
<tr>
<td>Coast Guard</td>
<td>40,962</td>
<td>677</td>
<td>350</td>
<td>12</td>
<td>18</td>
</tr>
</tbody>
</table>

III. ARGUMENTS FOR REMOVAL OF CONVENING AUTHORITY FROM COMMANDERS

The Subcommittee considered proposals and supporting materials advocating the removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Many proponents for change asserted that the current role played by commanders as convening authorities discourages service members from reporting sexual assaults and fosters apprehension among victims about retaliation and retribution. In addition to personal retaliation from friends and family, advocates for removing convening authority from commanders asserted victims have experienced, and in the future will experience, professional retaliation from their chain of command, including administrative consequences and discipline for collateral misconduct.

Proponents for change also asserted the U.S. military justice system lacks fairness and objectivity. They argued the existing system endangers inherent conflicts of interest that may cloud the judgment of commanders and impair the objectivity and credibility of their prosecutorial decision-making. Most notably, they highlighted what they believe is a risk that commanders will be improperly influenced in discipline decisions, either by the desire to protect well-known or valuable subordinates or to avoid addressing criminal allegations that could “reflect poorly on the command climate” or “affect the commander’s career.” Further, they expressed concern that commanders may be unduly influenced to pursue unwarranted prosecutions because of perceived pressure from higher levels of command. A convening system of judge advocates independent of the chain of command, they believe, would eliminate these inherent conflicts of interest, remove any perceptions of undue command influence, and mitigate concerns about prosecutorial objectivity and impartiality.

Advocates also stressed the need for more system transparency, where allegations cannot be disregarded without thorough, independent, and full consideration. Some asserted that unlike an independent legal official, commanders are not properly trained or prepared to make informed

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20 See MCM, supra note 3, R.C.M. 194(a)(2) (“No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority’s judicial act.”) (emphasis added).
ROLE OF THE COMMANDER SUBCOMMITTEE

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

judgments in criminal matters, particularly those involving complex felony-level offenses. Proponents of change also said removing commanders from military justice roles would remove an unwanted or unnecessary burden, allowing them to focus on the warfighting function of accomplishing their primary missions with little or no dilution of their authority to foster a healthy command climate.

Some proponents of change referenced military justice systems of Allied nations, where convening authority formerly analogous to that vested in U.S. commanders has been shifted from commanders to legal officers. These examples were cited to indicate that similar change in the U.S. system will not harm good order and discipline and will improve system confidence among sexual assault victims and increase reporting of sexual assault offenses.22 At a November RSP public meeting, the Panel received accounts, in person and through written public comment, from survivors who support removing disposition authority for sexual assault cases from the chain of command.23

IV. ARGUMENTS FOR COMMANDERS TO RETAIN CONVENING AUTHORITY

In contrast, the Subcommittee also considered proposals and supporting materials from those who believe divesting military commanders of their existing convening authority role is both unjustified and counter-productive. A consistent theme among these proponents is that UCMJ authority is essential and integral to the leadership authority, responsibility, and function of those in command. This authority is, according to these proponents, integral to the command function of setting and enforcing standards by holding accountable those who fail to meet standards, which in turn contributes to good order and discipline in their organizations necessary for the Armed Forces to accomplish its mission. Removing convening authority from senior commanders, supporters of retaining that authority assert, would not only limit the ability of commanders to address sexual

22 Professor Azmos Guiora, a former judge advocate in the Israeli Defense Forces, commented on an increase in sexual assault reporting in Israel between 2007 and 2011 in a June letter to the Senate Armed Services Committee. This letter stated in part: “There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israeli Defense Forces (IDF) soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers’ confidence that their complaints will be forcefully dealt with. The cause for this, is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the ‘chain of command.’” Letter from Professor Azmos Guiora, S.J. Quinney College of Law, Univ. of Utah, to S. Armed Services Comm. (updated), currently available at http://rеспонсивнаясистеманазал.водны.cл/PublicDoc/meetings/20130924/materials/academic-panel/GuioraProf_Guiora_ Statement_to_Senate_Armed%20_Services_Committee.pdf. The Deputy Military Advocate General for the IDF, Colonel Eli Bar-On, noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increased reporting. While IDF reports increased, sexual offense incidents declined each year between 2007 and 2011, and Colonel Bar-On observed that many reported incidents do not warrant a criminal indictment and are referred to disciplinary adjudication. Email from Colonel Eli Bar-On to Colonel Patricia Hum, Staff Director, RSP, Statistical Tables Relating to Sexual Assault Within the IDF: 2007 – 2012 (Aug. 11, 2013), currently available at http://rеспонсивнаясистеманазал.водны.cл/PublicDoc/meetings/20130924/materials/allied-forces-mil-justice/israel-mj-sys01_Email_To_RSP_from.COL_Eli_Bar_On.Israel_Defence_Forces.pdf.

23 Transcript of RSP Role of the Commander Subcommittee Meeting 147 (Jan. 8, 2014) (testimony of Brigadier General (Retired) Lorrie Sutton, U.S. Army).

24 Transcript of RSP Public Meeting 7-75 (Nov. 8, 2013), id. at 19-20 (testimony of BLN); id. at 44 (testimony of AH); id. at 54 (testimony of SP); see also Public Comment from HP and TY provided by Protect Our Defenders, currently available at http://rеспонсивнаясистеманазал.водны.cл/Index.php/meetings/meetings-panel-sessions/20131107-08/fm-nov-16.
assault issues in their organizations effectively, it would fundamentally impair operational readiness and effectiveness in military organizations.

Numerous presenters emphasized the overall size, larger caseload, and transportability of the U.S. military justice system, which is controlled by commanders and deployable to any location where U.S. Forces operate. Commanders expressed their belief that the U.S. system is more effective than the systems of those Allied nations that have removed convening authority from commanders. U.S. commanders stated that those Allied systems were “inefficient, costly, and less effective” for “dealing with these unique cases.” Moreover, the Legal Counsel to the Chairman of the Joint Chiefs of Staff said legal advisors from Allied nations where the commander was removed from military justice decisions could not correlate system changes to increased or decreased sexual assault reporting. He indicated, as this Subcommittee and the RSP have already concluded, there was no statistical or anecdotal evidence among U.S. Allies that removing commanders from the charging decision had any effect on victims’ willingness to report crimes.

Those recommending commanders retain convening authority also highlighted the importance and nature of the relationship between a convening authority and his or her staff judge advocate, the senior legal counsel to command. Presenters described a high level of confidence and communication between commanders and their legal advisors. Senior commanders described seeking and receiving unvarnished legal advice when making military justice decisions. Legal advisors indicated they felt comfortable and well trained to provide independent advice, and noted their authority under Article 6 of the UCMJ, to take an issue up the chain of command where necessary to ensure the right decision for the organization, an authority they said they had exercised in certain cases. These witnesses also expressed a belief that the close and common interaction with the legal advisor in relation to military justice issues enhanced the commander/legal advisor relationship, thereby strengthening the staff judge advocate’s advice across a broad spectrum of topics other than military justice, including operational, contract and fiscal, environmental, and international law.

Senior command and legal officials from the Services said any proposals for change to the U.S. military justice system must be considered carefully in the context of changes already made and functionality of the overall system. Presenters described recent reporting and prosecution increases that have resulted from substantial legal and policy changes and DoD initiatives. They warned against implementing systemic change before there is adequate time to assess the effects of current initiatives, and in the absence of any evidence that change would achieve the objectives those advocating removal of convening authority seek.

Finally, the Subcommittee considered views of some survivors of sexual assault who did not advocate removing the commander from the process and from those who expressed satisfaction at the manner in which their cases were handled in the military justice system.

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25 Id. at 207-09 (testimony of Brigadier General Richard Gross, U.S. Army).
26 Transcript of RSP Public Meeting 411-23 (Nov. 7, 2013) (public comment of DA); Transcript of RSP Public Meeting 6-17 (Nov. 8, 2013) (testimony of Command Sergeant Major KS, U.S. Army); Transcript of RSP Public Meeting, 496-505 (Dec. 11, 2013) (testimony of Major MB, Texas National Guard); Letter to Enclavations from Lieutenant General Flora Darpino to Judge Jones and RSP (Nov. 6, 2013), currently available at http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08/trm-nov-16.
ROLE OF THE COMMANDER SUBCOMMITTEE

V. REPORTING AND RESPONSE TO SEXUAL ASSAULT ALLEGATIONS

Crimes of sexual violence are a national concern, and efforts to improve sexual assault prevention and response in the military are influenced by many of the same factors and barriers that exist throughout American society. Studies indicate that the risk for “contact sexual violence” for women in the military is comparable to the risk for women in the civilian sector. Sexual assault, however, is chronically underreported in both the military and the civilian sector when compared to reporting rates for other forms of violent crime. As a result, significant effort within DoD and the Services has been focused on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and ... a bridge to accountability where offenders can be held appropriately accountable.”

a. Reporting Channels for Victims of Sexual Assault

When a service member believes he or she has been sexually assaulted, there are numerous options available for reporting the assault. A victim is never required to report the offense to his or her commander or any other military commander, and the commander does not investigate the report or decide whether it merits investigation.

This protection of a victim’s interests is reflected in DoD policy providing that sexual assault victims may choose to make a restricted or unrestricted report of the incident. In fact, DoD implemented restricted reporting “before [the option] was even an item of discussion” in civilian jurisdictions. A restricted report remains confidential and will not result in notification of law enforcement or the victim’s chain of command. Restricted reports allow victims to report an assault confidentially in order to obtain the support of healthcare treatment and services of a Sexual Assault Response Coordinator (SARC) or Sexual Assault Prevention and Response Victim Advocate (SAPR VA) without being forced to initiate a criminal investigation. This option is intended to maximize the provision of support for such victims without requiring them to choose between obtaining support or retaining their privacy.

Only SARC, SAPR VA, and healthcare personnel are authorized to accept restricted reports. A SARC or SAPR VA is required to report the fact of the assault to the installation.

27 Transcript of RSP Public Meeting 124-26 (June 27, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office (SAPRO)) (citing 2010 National Intimate Partner and Sexual Violence Survey conducted by Center for Disease Control and Prevention in 2013); see also slide 69 of accompanying presentation. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent.

28 Studies indicate 65 percent of sexual assault crimes are not reported to law enforcement or other authorities, with similar reporting rates in the civilian sector and the military among females. Transcript of RSP Public Meeting 26 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University) (citing statistics from National Crime Victimization Survey and 2012 Workplace and Gender Relations Survey of Active Duty Personnel). Studies of military victims who reported their victimization indicate they did so because it was the right thing to do, to seek closure, or to protect themselves or others. In contrast, the most common reason cited by those who did not report was that they did not want anyone to know, felt uncomfortable making a report, or thought the report would not be kept confidential. Transcript of RSP Role of the Commander Subcommittee Meeting 59-60 (Oct. 23, 2013) (testimony of Dr. Galbreath); see also slides 8 and 9 of accompanying presentation.

29 Transcript of RSP Public Meeting 108-09 (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).


32 Id.; see also Military Rape Crisis Center, http://militaryrapecrisiscenter.org/for-active-duty/reporting-options/.

Initial Assessment - Role of the Commander Subcommittee
commander, but the report will not contain personally identifiable information and may not be used for investigative purposes. Accordingly, the victim’s identity remains confidential in a restricted report. If a victim makes a report to someone not authorized to accept restricted reports—for example, someone in the chain of command or a law enforcement officer—an investigation may ensue, as all officials are required to report the alleged sex crime to the command and an investigative agency.

Victims can make unrestricted reports of sexual assault to SARC's, SAPR VA's, and healthcare personnel, as well as chaplains, judge advocates, and military or civilian law enforcement personnel. Victims may also report an assault to a supervisor or their chain of command, but they are not required to do so. Unrestricted reports of sexual assault will result in investigation of the allegation. Military personnel in the United States may always call civilian law enforcement or other civilian agencies to report a sexual assault if they are not comfortable notifying military authorities.

The following chart depicts the different reporting options available within DoD to victims of sexual assault:

<table>
<thead>
<tr>
<th>Unrestricted Reporting Options</th>
<th>Restricted Reporting Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Assault Response Coordinators (SARCS)</td>
<td>Sexual Assault Response Coordinators (SARCS)</td>
</tr>
<tr>
<td>Victim Advocates (VAs)</td>
<td>Victim Advocates (VAs)</td>
</tr>
<tr>
<td>Health Care Professionals or Personnel</td>
<td>Health Care Professionals or Personnel</td>
</tr>
<tr>
<td>Chaplains</td>
<td>Chaplains</td>
</tr>
<tr>
<td>Legal Personnel</td>
<td>Legal Assistance Attorneys</td>
</tr>
<tr>
<td>Chain of Command</td>
<td>Chain of Command</td>
</tr>
<tr>
<td>Law Enforcement – Military Police or Military Criminal Investigative Organizations</td>
<td></td>
</tr>
</tbody>
</table>

Reporting options are well and broadly publicized throughout the military. DoD policy requires that all military personnel receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and...

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31 In most cases, the installation commander is not the victim's immediate commander. The installation commander may or may not be in the victim's chain of command, depending on the organization to which the victim is assigned.

32 DoDI 6495.02 encl. 4, ¶ 1.b.

33 Id.

34 DoDI 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (May 1, 2013). See infra note 39.

35 If a report is made in the course of otherwise privileged communications, chaplains are not required to disclose they have received a report of a sexual assault. DoDI 6495.02 encl. 4, ¶ 1.b(i).

36 Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. See id.

37 See also DoDI 6495.02 encl. 4, ¶ 1.c(1) (“A victim’s communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information (e.g., roommate, friend, family member) is in the victim’s chain of command or DoD law enforcement, there can be no Restricted Report.”).

38 Only the SARC, SAPR VA and healthcare personnel are designated as authorized to accept a restricted report. Victim outcry to chaplains and legal assistance attorneys is considered confidential, and does not result in an unrestricted report. DoDI 6495.02 encl. 4, ¶ 1.b(i).

39 Members of the chain of command and supervisory chain do not take reports. Supervisors and leaders are trained to immediately contact their servicing SARC or VA, who will advise the victim of available services and options.

Initial Assessment - Role of the Commander Subcommittee

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
ROLE OF THE COMMANDER SUBCOMMITTEE

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

leadership development training, before and after deployments, and prior to filling a command position. Training must explain available restricted and unrestricted reporting options and the advantages and limitations of each option, and it must highlight that victims may seek help or report offenses outside their chain of command.

b. Investigation and Disposition of Sexual Assault Allegations

DoD policy mandates that investigations of unrestricted reports of sexual assault will be conducted by specially trained investigators from the military criminal investigative organizations (MCIOs), not the victim’s immediate commander or chain of command. All unrestricted reports of sexual assault must be immediately reported to an MCIO, regardless of the severity of the crime alleged. A commander of a victim or alleged offender may not ignore a complaint or judge its veracity. MCIOs are assigned to an independent chain of command from the accused and his or her SPCMCA and must independently report all sexual assault accusations to the Service Secretaries and Chiefs of Staff.

MCIOs must initiate investigations for all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports. Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and access to services for the victim.

Allegations of sexual assault by a service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction and may accept investigative responsibility if the MCIO declines, or the investigation may be worked jointly by the MCIO and the civilian agency. If a reported crime occurs off a military installation in a location under civilian jurisdiction, civilian law enforcement has primary jurisdiction over the investigation, and the MCIO will provide assistance as requested or deemed appropriate.

DoD policy also establishes the minimum level of command that may resolve an allegation of sexual assault. The first SPCMCA in the grade of O-6 or above in the chain of command of the

42 DoDI 6495.02 encl. 10, ¶ 3. Training must be specific to a service member’s grade and commensurate with his or her level of responsibility. Id. at ¶ 2.d.
43 Id. at ¶ 2.d.(4, 11).
44 DoDI 5505.18. Section 1742 of the FY14 NDAA codifies this requirement.
45 DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. See DoDI 6495.02 encl. 4, ¶ 4.
46 Transcript of RSP Public Meeting 222-23 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).
47 DoDI 5505.18 encl. 2, ¶ 6.
48 Id. at encl. 2, ¶ 1.
49 Id. at ¶ 3(c).
50 Id. Additionally, UCMJ jurisdiction over an accused service member does not deprive state courts of concurrent jurisdiction over that service member, and states may elect to charge and try military personnel for crimes that occurred in a civilian jurisdiction, regardless of whether the military prosecutes the accused. See United States v. Delarosa, 67 M.J. 318, 321 (C.A.A.F. 2009); see also Heath v. Alabama, 474 U.S. 82, 89 (1985) (holding that federal and state governments are treated as separate sovereigns, in which criminal proceedings by one sovereign do not preclude proceedings by the other). For offenses that occur on post, the local United States Attorney may also exercise jurisdiction as the Federal sovereign in place of the military.

Initial Assessment - Role of the Commander Subcommittee
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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Section 574 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) addressed the role of commanders by requiring sexual assault prevention and response training for new or prospective commanders at all levels of command. 69 Section 578 of the FY13 NDAA directed the Secretary of Defense to develop a policy to require general or flag officer review of circumstances and grounds for the proposed involuntary separation of any member of the Armed Forces who: made an unrestricted report of sexual assault; within one year after making the unrestricted report, is recommended for involuntary separation from the Armed Forces; and requests the review on the grounds that the member believes the recommendation for involuntary separation was initiated in retaliation for making the report. 70

Most recently, the FY14 NDAA modified Article 60 of the UCMJ, to preclude convening authorities from dismissing or modifying findings of a court-martial for sexual assault and rape offenses under Article 120, forcible sodomy offenses under Article 125, and attempts to commit such offenses under Article 80 of the UCMJ. 71 If a convening authority modifies the sentence of a court-martial, he or she must prepare a written explanation, which is made part of the trial record. Additionally, the convening authority may not reduce a sentence to less than a mandatory minimum, except on the recommendation of trial counsel due to the substantial assistance of the accused in the investigation or prosecution of another person who has committed an offense. 72 A number of other provisions in the FY14 NDAA also impact the role of the commander and courts-martial for sexual assault offenses. 73

b. DoD Policies and Initiatives

In addition to statutory mandates, the Secretary of Defense has issued a number of policy changes affecting commanders’ roles and responsibilities in sexual assault cases. Most notably, on April 20, 2012, the Secretary of Defense elevated the initial disposition authority for sexual assault offenses to a command level that is distanced from the accused and/or accuser and away from the local unit level. 74 The policy withholds initial disposition authority for sexual assault and rape offenses under Article 120, forcible sodomy offenses under Article 125, and attempts to commit such offenses under Article 80 of the UCMJ, from all commanders who do not possess at least special court-martial convening authority and who are not in the grade of O-6 or higher. 75 The policy places responsibility on the initial disposition authority to determine whether court-martial, nonjudicial punishment, or adverse administrative action is appropriate, and it mandates consultation with a judge advocate prior to initial disposition decisions. 76

In addition to elevating initial disposition authority, the Secretary of Defense announced new initiatives on April 17, 2012, to include: the establishment of a special victim’s unit within each Service; a requirement that commanders conduct annual organization climate assessments; and

68 Id. at § 578.
69 FY14 NDAA, supra note 61, at § 1702(b).
71 Id.
72 Id. at §§ 1702, 1705, 1708, 1713, 1721, 1742, 1744, 1751.
74 See SecDef Withhold Memo, supra note 51
76 Id.
enhanced training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters.\textsuperscript{73}

On September 25, 2012, DoD announced expanded sexual assault prevention efforts. The Secretary of Defense directed the Services to develop training core competencies and methods of assessment, requiring each service to: provide a two-hour block of instruction dedicated to Sexual Assault Prevention and Response (SAPR) training in all pre-command and senior enlisted leader training courses; provide commanders a SAPR “quick reference” program and information guide; assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts; and develop and implement refresher training for sustainment of SAPR skills and knowledge.\textsuperscript{74} The Initiative requires enhanced SAPR training for commanders and senior enlisted leaders.\textsuperscript{75}

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCJM.\textsuperscript{76} Following the review, Secretary Hagel directed the Office of General Counsel “to prepare legislation for Congress to amend Article 60 . . . [to] eliminate[e] the discretion for a convening authority to change the findings of a court-martial, except for certain minor offenses” and to “require[e] the convening authority to explain in writing any changes made to court-martial sentences, as well as any changes to findings involving minor offenses.”\textsuperscript{77}

Two months later, on May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan; and announced eight additional measures to address sexual assault in the military. Two of the measures that directly impact commanders include developing methods to hold military commanders accountable for command climate and requiring commanders to receive copies of their subordinate commanders’ annual command climate surveys.\textsuperscript{78}

Three months later, on August 14, 2013, the Secretary of Defense ordered seven additional measures addressing sexual assault in the military. The two most sweeping initiatives required each service to create special counsel programs for sexual assault victims, and required JAG officers to preside at all Article 32 investigations for sexual assault-related charges.\textsuperscript{79}

On December 20, 2013, the Secretary of Defense issued a statement underscoring the Department’s commitment to eliminating sexual assault in the military. He commended the

\textsuperscript{73} Press Release, supra note 72; see also U.S. Dep’t of Def., Initiatives to Combat Sexual Assault in the Military (undated), available at http://www.defense.gov/news/DoDSexualAssault.pdf.


\textsuperscript{75} Id.


\textsuperscript{77} Id. The FY14 NDAA codifies this requirement. See FY14 NDAA § 1707(b).


Initial Assessment - Role of the Commander Subcommittee

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
President and leaders in Congress for the initiatives included in the FY14 NDAA, and affirmed DoD’s commitment to effectively implement those initiatives.\textsuperscript{82}

APPENDIX G: INITIAL CONVENING AUTHORITY ASSESSMENT

\textbf{c. Proposed Additional Legislative Changes to Convening Authority}

In addition to provisions enacted through the National Defense Authorization Acts addressing the issue of sexual assault in the military, some lawmakers believe that the military justice system requires more fundamental change, such as modifying or restricting the convening authority vested in certain senior military commanders.\textsuperscript{83}

Representative Jackie Speier (D-CA) introduced the Sexual Assault Training Oversight and Prevention Act (the STOP Act) on November 16, 2011, and again on April 17, 2012.\textsuperscript{84} This proposal sought to remove disposition authority for only sex-related offenses from existing convening authorities and place disposition authority for such offenses under the jurisdiction of an autonomous Sexual Assault Oversight and Response Office comprised of civilian and military personnel.\textsuperscript{85} While the STOP Act was not incorporated into law, the bill was supported by 148 co-sponsors during the 113th Congress.\textsuperscript{86}

Expanding the STOP Act, the Military Justice Improvement Act of 2013 (MJIA), first introduced by Senator Kirsten Gillibrand (D-NY) on May 15, 2013, would divest convening authority from commanders for most serious crimes, not just sexual assault crimes.\textsuperscript{87} On November 18, 2013, Senator Gillibrand filed an amendment to the pending defense authorization bill. The amendment modified some aspects of her earlier bill but retained the bill’s features modifying convening authority for most serious crimes.\textsuperscript{88} On November 20, 2013, Senator Gillibrand filed a stand-alone version of this amendment, which is currently pending in the Senate.\textsuperscript{89} Her amendment was not adopted as part of the FY14 NDAA.

Senator Claire McCaskill (D-MO), in contrast to Representative Speier and Senator Gillibrand, views the commander as central to the military justice process. On January 14, 2014, Senator McCaskill filed the Victims Protection Act of 2014, which seeks to address the challenge of sexual assault through additional enhancements to the sexual assault prevention and response activities of the Armed Forces.\textsuperscript{90} The bill does not alter the role of the commander in referring sexual assault cases for prosecution.


\textsuperscript{84} H.R. 3435, 112th Cong. (2011); H.R. 1593, 113th Cong. (2013).

\textsuperscript{85} Id.

\textsuperscript{86} H.R. 1593, 113th Cong. (2013).

\textsuperscript{87} S. 967, 112th Cong. (2013).

\textsuperscript{88} S. 1197, § 552, amend. no. 2999 (2013).

\textsuperscript{89} S. 1752, 113th Cong. (2013).

\textsuperscript{90} S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
consequences, positive or negative, would result from substantially changing the UCMJ's convening authority framework. Accordingly, the Subcommittee believes caution is warranted, and systemic change may not be advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening decisions for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September RSP public meeting observed that it “assumes too much, that somehow a prosecutor is always going to be better at this than commanders.”100 Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective. A recent White House report, describing the civilian sector, notes that “[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them.”101

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors.102 Often, prosecutors based charging decisions on whether “physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor’s character or behavior.”103 Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of changes to senior commander authority in the military justice system, commanders and leaders at all levels must continue their focused efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility. The full report of the Subcommittee will provide additional information and analysis on this issue.

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100 Transcript of RSP Public Meeting 90 (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).
101 The White House Council on Women and Girls, Rape and Sexual Assault: A Renewed Call to Action 5 (Jan. 2014).
102 Id. at 17 (“One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted her desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.”).
103 Id.
Report of the Victim Services Subcommittee
to the Response Systems to Adult Sexual Assault Crimes Panel

May 2014

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Report of the Victim Services Subcommittee

On September 23, 2013, the Secretary of Defense established this Subcommittee to support the Response Systems Panel in its duties under Section 576(d)(1) of the National Defense Authorization Act for Fiscal Year 2013. The Secretary established seven objectives for the Subcommittee to assess the adequacy of military systems and proceedings for providing support and protection to victims in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice). This Subcommittee has completed its review and submits to the Response Systems Panel its report with our assessment, recommendations, and findings.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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APPENDICES

A. Subcommittee Terms of Reference 133
B. History of SAPR Program and Legislative Initiatives 135
C. Members and Staff of the Subcommittee 147
D. Glossary of Terms and Acronyms 151
E. Presentations to the Subcommittee and Response Systems Panel 155
F. Sources Consulted 171
G. Victim Witness Liaison Comparison 175
H. SARC and SAPR Victim Advocate Comparison 193
I. Special Victim Counsel Comparison 225
J. CVRA/NDAA/DoD Policy Comparison 273
K. GAO Report List 279
L. Inspector General Report List 283

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
REPORT OF THE VICTIM SERVICES SUBCOMMITTEE
EXECUTIVE SUMMARY

This executive summary highlights key findings and recommendations of the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel. For a full exposition of recommendations and findings, see specific sections addressing Victim Services, Special Victim Counsel, and Victim Rights.

RESPONSIBILITY OF THE VICTIM SERVICES SUBCOMMITTEE

On September 23, 2013, the Secretary of Defense established three RSP subcommittees and appointed nine members to the Victim Services Subcommittee, including four members of the RSP. The overall mission of the Subcommittee is to assess the adequacy of military systems and proceedings for providing support and protection to victims in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under Article 120 of the Uniform Code of Military Justice (UCMJ). To assist the Subcommittee with its mission, the Secretary of Defense established objectives for the Victim Services Subcommittee, including the requirements to assess the adequacy of victim services in the military; the differences between military and civilian victim support systems and any best practices for victim support and protection from civilian jurisdictions that the military justice system may incorporate; and whether the military justice system recognizes and enforces various crime victim rights. The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) added the requirement to assess whether it is feasible to grant victims and their Special Victim Counsel legal standing to enforce rights the FY 14 NDAA granted to victims.

METHODOLOGY

In compiling this report, the Subcommittee gathered and analyzed evidence from nineteen preparatory, Subcommittee and RSP public meetings. During these meetings, Subcommittee and RSP members heard testimony from victim service providers and military justice personnel involved in supporting victims immediately following a sexual assault and throughout the reporting and criminal justice processes. Members also spoke to sexual assault survivors regarding their personal experiences with victim services in the military and to victim advocates and advocacy organizations. In addition, members of the Subcommittee conducted two site visits to Fort Hood, Texas and Joint Base San Antonio-Lackland, Texas and received briefings from military justice practitioners and participated in roundtable discussions with victim service providers, current Special Victim Counsel, new recruits, and training personnel. The Subcommittee members conducted these roundtable sessions in a non-attribution environment to foster candor on the part of the participants. The Subcommittee also considered extensive responses the Military Services provided to requests for information from the RSP, material experts who testified at Subcommittee and RSP hearings wrote or provided, and publicly available documentary evidence. The Subcommittee generated this report based upon the efforts outlined above and a series of Subcommittee meetings devoted to deliberating on the findings and recommendations listed throughout this report.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
INTRODUCTION

In order to succeed in its mission to defend our nation, the Armed Forces must eliminate any threat that erodes the critical bonds of trust that are essential between and among Service members and their leaders. Military leaders recognize sexual assault is one such threat and if not addressed, could destroy the force. Therefore, Congress and the Department of Defense undertook a substantial effort to care and provide for sexual assault victims, and it is vital that the military maintain its focus on victim services. The majority of the services the Department of Defense provides need time to mature into established programs and also require ongoing assessment to determine whether they are effective at supporting and protecting sexual assault victims. Victim services can only work if they are effective and victims access them. Congress and the Department of Defense put the pieces in place, but the Department of Defense must now comprehensively and continually assess the benefits and overlaps in its programs in order to move victim services forward.

RECOMMENDATIONS AND FINDINGS

The Subcommittee divided its assessment into three topics: Victim Services, the military’s Special Victim counsel Program, and Victim Rights. Within each of these sections the Subcommittee also reviewed similar services offered in civilian jurisdictions.

Victim Services

The Subcommittee completed a comprehensive assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes. Through this assessment, the Subcommittee learned there are unique military attributes that affect reporting sexual assaults and utilizing available victim services. Specific military barriers to reporting and accessing victim services include the duty to obey all lawful orders, the close proximity in which Service members live and work, the potential for an offender to supervise a victim, Service members’ focus on mission, and certain collateral misconduct of the victim. However, the dedication of military leaders, mission focus, and the military’s command structure provide a matchless organizational ability to develop and enforce programs and policies to care for victims, eliminate sexual assault, and maintain the bonds of trust necessary to achieve overall mission readiness. Recognizing this unique structural ability, the Subcommittee makes several findings and recommendations which address victim care following a sexual assault and seek to ensure both victim recovery and mission readiness.

First, the Subcommittee found the availability of victim services in the military is expansive and victim centered. However, there are some improvements and developments that can further the goals of increased reporting, enhanced victim confidence, and unit readiness. For example, to ensure Service members recognize and overcome barriers endemic within the military that may interfere with reporting instances of sexual assault, the Subcommittee recommends implementing or expanding training on the prohibition against retaliation following a sexual assault report; developing methods for emphasizing that reporting instances of sexual assault can increase good order and discipline; studying whether a policy should be implemented that eliminates punishment for low level collateral offenses; and developing policies that protect victims from suffering damage to their military careers following a report of a sexual assault.

The Subcommittee also recommends clarifying the right of the victim to meet with Special Victim Counsel prior to determining whether to file a restricted or unrestricted report or no report at all, and that Military Criminal Investigators be required to advise victims of this right. Both of these recommendations are directed at empowering the victim and increasing his or her control over both the reporting and investigative processes.
Second, the level and quality of victim support is crucial to victim care and healing after an assault and to the long-term readiness of sexual assault victims. Overall, the Subcommittee finds the military strives to provide victims with a high level of care but the services are only effective if they are utilized and trusted by victims. As such, to ensure victims receive the best possible care and create confidence in the systems, some changes are necessary to current programs and policies. For example, because the Department of Defense does not have a uniform method for evaluating the different victim service programs, it appears many of the roles and responsibilities overlap between the programs; the training and curriculum are not always up to date; and some victim service personnel have an overload of responsibilities.

Therefore, the Subcommittee recommends the Department of Defense implement a uniform method of evaluating all victim service programs to determine effectiveness, efficiency, and sustainability of the programs and personnel. Further, the Subcommittee heard that some sexual assault victims have difficulty obtaining timely and consistent mental health appointments. The Subcommittee recommends the Services immediately evaluate the availability of and access to adequate and consistent mental healthcare for sexual assault victims. The Secretaries of the Services should also develop policies aimed at ensuring victims’ careers are not negatively impacted merely for seeking mental health treatment following a sexual assault.

Lastly, since the Department of Defense established its Sexual Assault Prevention and Response Office (SAPRO) in 2005, Congress mandated and the Department of Defense implemented dozens of initiatives to address various sexual assault victim services and programs. While these initiatives seek to enhance victim reporting and confidence, many of the initiatives occurred in quick succession without providing victim service personnel the ability to fully implement one program before mandating another. This rapid succession has resulted, in the Subcommittee’s view, to the Department of Defense’s inability to adequately assess the initiatives to determine which are effective, which should be discontinued, and which should receive funding to ensure long-term sustainability.

The Subcommittee also heard from victim service personnel that the speed and number of recent initiatives left them feeling frustrated and ill equipped to successfully implement the requirements while at the same time making sure victims receive the best care available. As a result, the Subcommittee recommends the Secretary of Defense, prior to mandating any further initiatives, perform an in-depth and comprehensive evaluation of all victim service programs to determine which are effective and require additional funding, and which the Department of Defense should discontinue. This recommendation affords the Department of Defense and the Military Services time to fully implement new victim services programs and initiatives and gather necessary data to determine whether the programs are effective at supporting and protecting sexual assault victims.

Special Victim Counsel

The Department of Defense created, and Congress mandated, the Special Victim Counsel (SVC) Program to provide legal assistance to and represent the interests of sexual assault victims. The SVC provides independent advice to sexual assault victims; assists victims in understanding the investigation and adjudicative processes of the military justice system; advocates protection of victims’ rights; and empowers victims by removing barriers to their full participation in the military justice process.

Early victim surveys and victim testimony suggests the SVC program is a valuable tool for victims, and effective in providing victims support and clarity throughout the military justice process. To ensure the program’s long-term sustainability, the Subcommittee recommends Congress appropriate sufficient annual funds to the Service programs; that the DoD develop a standardized evaluation with appropriate metrics to ensure continued victim satisfaction; and that the Services work together to share “best practices” between the
individual SVC programs. The Subcommittee also recommends additional selection criteria to ensure those judge advocates selected to serve as SVCs are experienced and qualified.

Additionally, while each Service successfully implemented an SVC program, the Subcommittee recommends additional policy or statutory requirements necessary for the program's continued success and effectiveness. First, the Subcommittee found the Services end the attorney-client relationship between the victim and SVC when a court-martial is over at the installation level and the Convening Authority acts on the findings and sentence, if any. However, a right of the victim may still be at issue and the victim may still require an SVC's advice and representation. The Subcommittee recommends the Services amend their policies to provide victims SVC representation so long as a right is at issue, including appellate review.

Second, SVCs' current right to access information regarding their clients' cases case is limited. The Subcommittee recommends clarifying an SVC's ability to obtain evidence necessary and relevant to assert a victim's rights. This will ensure SVCs can obtain information to effectively represent their clients. Lastly, the Subcommittee found current policies are unclear on whether a victim may seek advice from an SVC prior to making a restricted or unrestricted report or not to report at all, although the Subcommittee heard from some SVCs that they currently provide this advice. To promote victim confidence and support, the Subcommittee recommends amending policies to expressly provide that sexual assault victims may seek confidential legal advice from an SVC prior to or in the absence of a formal sexual assault report.

Victim Rights in the Military

Under the FY14 NDAA, Congress required the RSP to assess the feasibility and appropriateness of extending to military crime victims those same rights afforded a crime victim in civilian criminal legal proceedings under the Crime Victims’ Rights Act (CVRA). The Subcommittee conducted a comprehensive evaluation and comparison of victim rights in Department of Defense policy, the FY14 NDAA, and the CVRA. The Subcommittee also gathered extensive testimony and other evidence from subject-matter experts on how civilian jurisdictions implement and execute the CVRA in law and practice and ways the Department of Defense can import similar rights and enforcement mechanisms in light of different practices in the military justice system. The Subcommittee’s review revealed that, while the FY14 NDAA provisions and current Department of Defense policy incorporate many CVRA rights and provisions almost verbatim, some differences remain that statute, policy, or regulation should address.

The Subcommittee found certain rights, set forth in Department of Defense policy and the FY14 NDAA, mirror those rights set out in the CVRA, but due to military practice are not directly analogous. In particular, the CVRA grants victims the right to heard at public hearings and the right to confer with the attorney for the government in criminal cases. Likewise, Department of Defense policies, Service policies, and the FY14 NDAA grant victims the right to confer with the trial counsel in criminal cases and the right to be heard at certain public hearings.

However, since a commander serving as the convening authority makes decisions on case disposition under the Uniform Code of Military Justice, as well as whether to enter into a plea bargain with the accused, a victim’s right to confer with a counsel representing the government or to be heard at public hearings in the military justice system is not directly analogous to the CVRA rights. Therefore, the Subcommittee recommends modifying the procedures to provide a mechanism to ensure that the victim is able to provide his or her concerns and preferences to the convening authority prior to a decision regarding case disposition or whether to accept, reject, or modify a proposed pretrial agreement.
In addition, while both the CVRA and the FY14 NDAA offer victims a right to be heard at sentencing, the current military procedural rules require a victim to testify under oath subject to cross-examination. In contrast, the CVRA and Rules for Practice in federal civilian jurisdictions provide victims a right to present matters during sentencing without being subject to cross-examination. The Subcommittee recommends amending the current Rules for Courts-Martial to provide victims the right to make an unsworn victim impact statement, with several protections to ensure fairness to the convicted Service member.

The Subcommittee also addressed several areas in which Congress directed that the DoD implement mechanisms to enforce statutory victim rights. Specifically, the Subcommittee recommends amending the Uniform Code of Military Justice and the Rules for Courts-Martial to expressly include the legal standing victims have to enforce the newly enacted statutory victim rights at trial and in appellate courts; that the Secretary of Defense recommend changes to the Manual for Courts-Martial prescribing time periods and procedures under which a victim may assert these rights; and that Congress amend the FY14 NDAA to provide for one Department of Defense entity to review and investigate claims that military officials failed to grant or comply with these rights.

CONCLUSION

Through its assessment, the Subcommittee finds the military provides extensive and expansive services for sexual assault victims. The Subcommittee also finds Department of Defense policy and the Uniform Code of Military Justice incorporate many rights and provisions set forth in the CVRA. However, greater measures will ensure victims receive necessary care and protection following a sexual assault. With this in mind, the Subcommittee offers its recommendations concerning military victims’ rights, the Special Victim Counsel Program, and the various victim services in the military. The Subcommittee’s recommendations highlight the important role continuous and comprehensive victim support plays in caring for sexual assault victims and ensuring mission readiness of the Armed Forces.
I. FINDINGS AND RECOMMENDATIONS ON VICTIM SERVICES

Finding 1-1: Over the last five years, Congress mandated and DoD initiated dozens of additions and changes to victim service programs, many in such quick succession that SAPR personnel had to begin implementing a new initiative before fully implementing previously required programs.

Finding 1-2: Due to the number and rapid succession of programs and initiatives, DoD has not performed an assessment and evaluation of all current programs, to determine which are effective, which should be continued, expanded or are duplicative of other programs, and how best to allocate funds and personnel for victim service programs in a resource constrained environment.

Recommendation 1: The Secretary of Defense direct the Military Services to fully implement all of the currently mandated programs, initiatives, and other requirements Congress directed in the FY14 and prior year NDAA and capture enough data to adequately assess the effectiveness, efficiency, and value of all existing programs with the goal to streamline or eliminate those that are not successful, and to continue, expand, and preserve the programs that are successful.

Recommendation 1a: The Secretary of Defense direct SAPRO to evaluate and assess all programs and initiatives and measure the effectiveness of each to determine which programs and initiatives are effective, which should be continued, expanded, and preserved, and how best to allocate funding for the effective programs and initiatives.

Recommendation 2: The Secretary of Defense develop and implement policy and regulations such that sexual assault victims have the right and ability to consult with an SVC before deciding whether to make a restricted or unrestricted report, or no report at all. Communication made during this consultation would be confidential and protected under the attorney-client privilege.

Recommendation 2a: 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 s/he has the right to speak with an SVC before determining whether to file a restricted or unrestricted report, or no report at all.
Finding 3: In an effort to educate new military recruits about sexual assault and sexual assault prevention, DoD requires that all new Service members receive sexual assault prevention training within fourteen days of their initial entry into the Service. However sexual assaults may occur within the victim’s first week in the military.

Recommendation 3: The Secretaries of the Military Services direct Commanders of Military Entrance Processing Stations (MEPS) to provide sexual assault prevention information to new recruits that include the definition of sexual assault, possible consequences of a conviction for sexual offenses in the military and information about the DoD Safe Helpline and other avenues for assistance. This recommendation expands upon the Defense Task Force on Sexual Assault in the Military Services’ recommendation to make available, and to visibly post, sexual assault prevention and awareness campaign materials at MEPS.

Finding 4-1: FY14 NDAA, Section 1743, directs the Secretary of Defense to establish a policy to require a written incident report to the installation commander, if any, and the first general officer and first officer in the grade of O-6 in the chains of command of the victim and the alleged offender not later than eight days after a Service member files an unrestricted sexual assault report.

Finding 4-2: The statute does not require tracking of or reporting on services to victims who make restricted reports.

Finding 4-3: This statutory requirement enhances DoD’s requirement for SARC’s to inform commanders within 24 hours of both unrestricted and restricted sexual assault reports set forth in current policy.

Recommendation 4: The Secretary of Defense direct the Services to require written incident reports no later than eight days following a restricted or unrestricted report detailing the services provided to the victim when a member of the Armed Forces is the victim.

Recommendation 4a: When restricted reports are made, SAPRO should work with the Services to ensure adequate measures are in place to protect the identity of the victim while providing sufficient information to track the victim’s care.

Finding 5-1: There is no current mechanism for a sexual assault victim to keep a report of sexual assault restricted and request an expedited transfer.

Finding 5-2: DoD policy does not permit victims who file a restricted report of a sexual assault to request a temporary or permanent expedited transfer from their assigned command or installation, or to a different location within their assigned duty or living location.

Finding 5-3: If the commander knows or learns about a sexual assault, the report becomes unrestricted, even if the victim filed or intended to file a restricted report. The commander must notify the MCIO and an investigation must be opened.

Finding 5-4: By nature of their duties, a request for a transfer on behalf of another Service member from a SARC or SAPR VA provides the commander with the information that a sexual assault has taken place and the identity of the victim. Under current policy, the commander will be obligated to start an investigation, even if the victim intended the report to stay restricted.
Finding 5-5: Commanders have inherent flexibility to transfer Service members or place them on limited duty status due to medical conditions. Current DoD policy allows health care personnel to convey to the victim’s unit commander any possible adverse duty impact related to the victim’s medical condition and prognosis, even when the sexual assault report is restricted. Under this policy, confidential communication related to the sexual assault may not be disclosed to the commander.

**Recommendation 5:** Service Secretaries should ensure that command orientation and training address the commander’s authority to make duty or living assignment transfers based upon the recommendation of medical personnel, even if the specific underlying reason for the request for transfer is protected and cannot be disclosed.

**Recommendation 5a:** Training for medical personnel, SARCs, and VAs, should include the options that a commander has available to make or effect transfers based on recommendations from medical personnel.

Finding 6-1: The Rape, Abuse, and Incest National Network (RAINN) contracted with DoD to develop and staff the Safe Helpline as a 24/7, anonymous sexual assault hotline for Military Service members.

Finding 6-2: Military installations advertise the Safe Helpline as a hotline phone number, but also advertise their own installation numbers which are not always answered 24/7 and instead may require the caller to leave a message.

Finding 6-3: The Safe Helpline database of referrals to military victim service providers is not always adequate or accurate to ensure that every caller can be connected to a local victim service provider by the Safe Helpline staff upon request.

**Recommendation 6:** The Secretaries of the Military Services set forth clear guidance that DoD Safe Helpline is the single 24/7 sexual assault crisis hotline for Military Service members.

**Recommendation 6a:** The DoD Safe Helpline establish an easily remembered number similar to its website name of SafeHelpline.org.

**Recommendation 6b:** DoD require the Services to provide the Safe Helpline with sufficient contact information at each installation or deployed location so that local victim service providers can be reached on a 24/7 basis.

Finding 7-1: The FY 2012 NDAA required the Secretary of Defense to establish a professional and uniform training and certification program for SARCs and VAs.

Finding 7-2: DoD SAPRO evaluated the Services’ SARC and VA training in 2012. These evaluations, while providing useful information about the Services’ training programs, did not use consistent criteria for evaluation across the Services, and DoD SAPRO did not make assessment of the uniformity of the programs across the Services. In addition, some of the training materials used by the Services were outdated and contained incorrect information.

Finding 7-3: The FY 2014 NDAA required the Secretary of Defense to submit to the Committees on Armed Services of the Senate and the House of Representatives a report containing a review of the Services’ SAPR training common core elements within 120 days of enactment of the Act. The review is not complete as of the date of this report.
Recommendation 7: The Secretary of Defense direct that the periodic evaluations of training provided for Services’ SARC and VA be conducted and include an assessment as to whether the training and curriculum across the Services is uniform, is effective, and reflects all existing initiatives, programs, and policies.

Finding 8-1: DoD issued Instruction 6400.07 “Standards for Victim Assistance Services in the Military Community,” on November 25, 2013, based on standards established by the National Victim Assistance Standards Consortium.

Finding 8-2: The purpose of the Instruction is to establish a baseline of service standards to provide uniformity across programs and across the Services in providing quality victim assistance.

Finding 8-3: The Instruction identifies four victim assistance-related programs for establishing a baseline of service standards: SAPR, Family Advocacy Program (FAP) Victim and Witness Assistance Program (VWAP), and the Military Equal Opportunity Program (which handles discrimination and sexual harassment).

Finding 8-4: Each of these programs was established independently and at different times and with somewhat differing constituents. However, there are no additional policies or requirements outside of this instruction that require identifying gaps or redundancies in victim services.

Finding 8-5: The SVC program, while under the cognizance of the Judge Advocate General of each Service, is not included in the victim assistance standards although also involves a victim advocacy component.

Recommendation 8: The Secretary of Defense direct SAPRO or the DoD IG to assess the roles and responsibilities of SARC, VA, VWL, and FAP personnel, to ensure advocacy personnel are effectively utilized, they are properly delineated; overlap is minimized; and to determine whether their roles should be modified, and whether all current victim assistance related programs should be sustained in this resource constrained environment. Such review should factor the new SVC program recognizing that the Service Judge Advocate Generals are the sole supervisory chain for judge advocates.

Finding 9-1: There are currently over 20,000 trained and certified SARCs and VAs across the Services. Because some part-time uniformed SAPR VAs are assigned to units in which there are few or no reports of sexual assault, some uniformed personnel trained as VAs may not ever serve a victim.

Finding 9-2: Victim Advocates who are not regularly assigned to assist victims of sexual assault may not develop or maintain proficiency in providing victim support when they are assigned a case.

Recommendation 9: The Secretary of Defense direct SAPRO to determine an appropriate caseload and number of advocates, and to ensure that VAs become and remain proficient in their duties. Victim advocate duties should include partnering with or observing other professionals who provide victim services (including community providers) or other experiential work to gain further practical skills and confidence while awaiting assignment to a case.

Finding 10: SARCs are tasked with managerial, outreach and training, administrative as well as victim care duties. Many SARCs believe that their foremost challenge is having too many responsibilities to effectively perform all of the varied duties required of the job.
ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 10:** The Secretary of Defense direct SAPRO to evaluate the duties and responsibilities of the SARC position required by SAPR policy and to ensure that there are sufficient positions created with defined roles that allow for excellence.

**Finding 11:** The Subcommittee heard from sexual assault victims who had difficulty obtaining timely mental health appointments as well as reports that victims may not see the same therapist consistently. The Subcommittee also heard evidence of concern that counseling may negatively impact victims’ careers. While the Subcommittee received evidence of recent programs in the Services to embed counselors within units to facilitate access to care, we were not in a position to evaluate whether the practice is a successful method to alleviate the difficulties victims experience in obtaining timely mental health, obtaining consistent therapeutic services, or reducing concern about negative impact on military careers.

**Recommendation 11:** The Secretaries of the Military Services evaluate the availability of and access to adequate and consistent mental healthcare for victims of sexual assault; and to evaluate the option of incorporating counselors into the SAPR program in a manner similar to the integration in the FAP Program. Additionally, the Secretaries of the Military Services establish policies to ensure that mental health treatment for sexual assault victims will not have negative implications on such victims’ eligibility for career advancement or promotion.

**Finding 12-1:** DoD initiated the Family Advocacy Program (FAP) over twenty years ago to support military families and to provide services for victims of domestic violence and child abuse. Domestic violence victims who are also victims of sexual assault are treated and supported by the FAP.

**Finding 12-2:** These incidents are recorded in the separate database used by the Family Advocacy Program, and not in the Defense Sexual Assault Incident Database (DSAID), which was developed to track sexual assaults. Thus, sexual assault reports that are part of domestic violence cases are not included in SAPRO’s annual report of adult unwanted sexual contact cases.

**Recommendation 12:** The Secretary of Defense direct that adult unwanted sexual contact reports handled by FAP and recorded in its database be included in the annual SAPRO report of adult unwanted sexual contact cases.

**Finding 13:** It has been recognized that a percentage of the men and women in the military experienced unwanted sexual contact before entering military service. A substantial percentage of these victims may be subject to revictimization.

**Recommendation 13:** The Secretary of Defense direct SAPRO to work with the Centers for Disease Control and other appropriate agencies to develop services for military members who have previously experienced sexual abuse, and to develop strategies to encourage utilization of these services in order to prevent revictimization and develop or maintain skills necessary to fully engage in military activities and requirements.

**Finding 14:** Harassment and retaliation against a victim in response to an allegation of sexual assault erodes unit cohesion, and the fear of harassment and retaliation deters victims from coming forward to report instances of sexual assault.
**Recommendation 14:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, that retaliation or harassment by Service members in response to an allegation of sexual assault violates good order and discipline.

**Finding 15:** When an offender outranks or directly commands a victim, sexual assault is an especially egregious abuse of power. There have been instances when military officials and Service members have ignored or retaliated against those who reported incidents of sexual assault when the offender is a high-performing Service member or a superior offending against a subordinate.

**Recommendation 15:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, explaining that implicit or explicit invitations or demands for sex or sexualized interactions from commanders or superiors are not lawful orders, should not be obeyed, violate the code of military conduct, and will be punished.

**Finding 16:** Inculcating the notion that the needs of the individual must be subordinate to the needs of the unit is a staple of military training. Nevertheless, the subordination of the individual to the mission may be misinterpreted to deter reports of sexual assault and encourage retaliation against victims who come forward.

**Recommendation 16:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, emphasizing that reporting instances of sexual assault is essential for good order and discipline and protects rather than undermines morale.

**Finding 17:** Male victims of sexual assault are often left out of the conversation about how sexual assault functions in the military. This omission deters some male victims from reporting sexual assault.

**Recommendation 17:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, with examples of male on male sexual assault, including hazing and sexual abuse by groups of men. The training should emphasize the psychological damage done by sexual assault against male victims.

**Finding 18:** Department of Defense policy states that collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim’s fear of punishment.

**Recommendation 18:** The Secretary of Defense direct a study of what constitutes low-level collateral misconduct in sexual assault cases and assess whether to implement a policy in which commanders will not prosecute low-level collateral misconduct.

**Finding 19:** The fear of damage to one’s military career deters victims from reporting a sexual assault.
Recommendation 19: The Secretary of Defense implement policy that protects victims of military sexual assault from suffering damage to their military careers (including but not limited to weakened performance evaluations or lost promotions, security clearances, or personnel reliability certifications) based on having been a victim of sexual assault, having reported sexual assault, or having sought treatment for sexual assault. Additionally, the DoD promulgate regulations that ensure the SVC advise their clients of the means by which they can challenge any inappropriate personnel action based on having been a victim or seeking treatment.

II. FINDINGS AND RECOMMENDATIONS ON SPECIAL VICTIM COUNSEL

Finding 20-1: Early survey results and victim testimony indicate the SVC program is an invaluable tool for victims. This program instills confidence in the victim and helps him or her better understand the military justice process and his or her rights under the Code.

Finding 20-2: Congress authorized $25M in the FY14 NDAA to assist the Services with the operation costs of implementing the SVC program. However, the Services anticipate needing significant staff and monetary to implement and sustain the SVC program in the future.

Recommendation 20: Congress appropriate sufficient funds annually to DoD to ensure the Services are able to sustain a robust SVC program.

Finding 21: The Military Services currently do not have a standard evaluation of effectiveness for the SVC program.

Recommendation 21: The Secretaries of the Military Services develop a standard evaluation mechanism with appropriate metrics, when appropriate, to measure the effectiveness of the SVC program in each Service on an annual basis.

Finding 22-1: On August 14, 2013, the Secretary of Defense directed the Service Secretaries establish a special victim’s advocacy program best suited for the individual Service. Furthermore, he directed the Services to determine their own best practices and periodically share those practices with the other Services. No standards or requirements have been established outlining how and when these best practices should be shared.

Finding 22-2: The SVC program managers of the respective SVC programs regularly reach out to one another via email and telephone to communicate SVC issues and exchange lessons learned/best practices generated by their respective Services. On a more formal basis, the SVC program managers meet monthly to discuss a variety of SVC program issues.

Recommendation 22: The Secretary of Defense establish a mandatory inter-Service working group to assess the practices of all Military Service SVC programs. The inter-Service working group should discuss, deliberate, and decide upon the best practices being utilized by all the Military Services. The working group should then ensure each Military Service implement the best practices of the SVC programs and SVC receive adequate training on these practices. The working group should consist of, at a minimum, the SVC Program Heads from each Military Service. The first meeting should occur within twelve months from the date of this report. Thereafter, the working group should meet at least annually.
**Finding 23-1:** The Special Victim Counsel Program is a relatively new program, existing for slightly more than twelve months. Even the most experienced Special Victim Counsel has limited experience as an advocate for victim’s rights.

**Finding 23-2:** Additionally there is limited case law on issues related to victim’s rights and victim’s counsel. While both the Air Force and the Army currently offer short courses on the SVC program, these courses do not focus on the day-to-day experiences of a SVC.

**Recommendation 23:** The Secretaries of the Military Services establish collaborative methods to disseminate information and training of SVC between the Services, including an inter-Service website where SVC can access training materials and resources from each Service.

**Finding 24-1:** In general, the policy of the Military Services requires an officer have prior military justice experience before selection to perform duties as an SVC. The required length of time or level of experience in military justice varies throughout the Services.

**Finding 24-2:** It is unclear if selection requires actual participation in courts-martial.

**Recommendation 24:** The Secretary of Defense direct the Military Services to implement additional selection criteria for their individual Special Victim Counsel Programs to require that counsel have appropriate trial experience prior to being selected as Special Victim Counsel. The criteria should include special emphasis on the unique selection of SVC and require actual courtroom experience rather than simply requiring service in a military justice billet for a certain period of time.

**Finding 25-1:** Pursuant to Service policy, a victim and SVC establish an attorney-client relationship at their first meeting.

**Finding 25-2:** This relationship continues until final disposition of the matter or the attorney is reassigned or leaves active duty.

**Finding 25-3:** For court-martial purposes, the Services have determined case disposition occurs at the time the Convening Authority takes final action in the case.

**Recommendation 25:** The Secretary of Defense direct the Military Services to extend the opportunity for SVC representation to a victim so long as a right of the victim exists and is at issue. This includes any time following final action by the convening authority and during appellate review. While it may not be feasible, due to mission requirements, for the victim to maintain the same SVC throughout the duration of the process, the policy should permit for appointment of an alternate SVC to advise the victim and assert any right or interest still at issue following final action.

**Finding 26:** A Special Victim Counsel’s right to access records is no greater than his or her client’s access rights. Currently, the government trial counsel may, but is not expressly required to, disclose information and records to the SVC. Further, when disclosing information, the trial counsel is limited by the Freedom of Information Act and the Privacy Act.
Recommendation 26: The Secretary of Defense implement policy clarifying the victim's right to access records which are relevant to the assertion of a victim's particular right through his or her SVC. The policy should include language establishing that once the SVC makes a request for information that is subsequently denied by the trial counsel, the SVC may petition the court for access to the relevant information. Furthermore, it should permit the military judge to then perform an in-camera review to determine what documents, if any, are relevant and necessary to the asserted right to release to the SVC as well as the appropriate method for disclosing those relevant documents to the victim. If the military judge declines to disclose the records, the reasons should be made on the record in order for the victim to seek further review.

Finding 27: To be eligible for SVC representation, an adult victim of sexual assault must make an unrestricted or restricted report of sexual assault under the Uniform Code of Military Justice and otherwise be entitled to legal assistance under 10 U.S.C. § 1044. Pursuant to DoD policy, an SVC is not a listed restricted reporting entity. It is unclear if a victim may seek SVC advice prior to making an official report.

Recommendation 27: The Secretary of Defense develop and implement policy and regulations such that sexual assault victims have the right and ability to consult with an SVC before deciding whether to make a restricted or unrestricted report, or no report at all. Communication made during this consultation would be confidential and protected under the attorney-client privilege.

Recommendation 27a: 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 s/he has the right to speak with an SVC before determining whether to file a restricted or unrestricted report, or no report at all.

Finding 28-1: The Army has not created a “separate and distinct” SVC division. Instead, the Army SVC program falls under the current Legal Assistance Organization.

Finding 28-2: SVC are usually located within the installation legal assistance office and they are supervised by the Chief of Legal Assistance and the installation Staff Judge Advocate.

Finding 28-3: If a conflict of interest arises, SVC may contact his or her technical chain, the SVC Program Manager, for advice. The Program Manager will then raise the issue to the Staff Judge Advocate.

Recommendation 28: The Secretary of the Army create a “separate and distinct” Special Victim Counsel Division with its own chain of command and support personnel to alleviate any actual or potential conflict of interest between the SVC and the local Office of the Staff Judge Advocate and ensure SVC independence.

Finding 29-1: Legislation currently pending in Congress would add to SVC requirements. Under the Victims Protection Act of 2014, which passed the Senate on March 10, 2014, and is pending in the House of Representatives, SVC would be required to advise victims of sexual assault on the advantages and disadvantages of prosecution by courts-martial versus in a civilian jurisdiction.

Finding 29-2: The pending legislation also requires the establishment of a process for victims of sexual assaults that occur in the United States to be consulted regarding his or her preference on prosecution by courts-martial or a civilian forum.
Finding 29-3: While not binding, the victims’ preference must be given “great weight” in determining the prosecution forum. Prior to enacting this legislation, Congress did not receive extensive evidence on the potential impacts such legislation would have on victims and the military justice system.

Recommendation 29: Congress defer adopting the above provision of the Victims Protection Act of 2014 until Congress obtains further evidence and information about the potential impact of such legislation on victims and the military justice system.

Finding 30-1: The Army and Air Force expressly provide for SVC representation for “entry level personnel” who are alleged to have been involved in an unprofessional relationship that involves sexual contact with an instructor or staff member, even though the sexual assault-type crime has not been committed or alleged.

Finding 30-2: The Marine Corps SVC policy does not have this provision and the Navy and Coast Guard have yet to publish a policy on the Service SVC program.

Recommendation 30: The Navy, Marine Corps, and Coast Guard implement or amend their individual SVC policies to provide for SVC representation for entry level personnel who are alleged to have been involved in a relationship that involves sexual contact with an instructor or staff member, even though a crime has not been alleged.

III. FINDINGS AND RECOMMENDATIONS ON CRIME VICTIMS’ RIGHTS

Finding 31-1: The right to confer with the prosecutor under the CVRA is not directly analogous to the right to confer with trial counsel (military prosecutor) under the military justice system.

Finding 31-2: The CVRA grants victims the right to confer with the prosecutor in criminal cases. Similarly, DoD policy, Service policies, and the FY14 NDAA grant victims the right to confer with the trial counsel in criminal cases.

Finding 31-3: In the military justice system, a victim may confer with trial counsel on matters such as whether to pursue court-martial, nonjudicial punishment or administrative action in the case; and, if pursuing courts-martial, what level of court-martial may be appropriate.

Finding 31-4: However, since a commander serving as the convening authority makes decisions on how to dispose of cases under the UCMJ, a victim’s right to confer with the trial counsel in the military justice system is not directly analogous to the CVRA right to confer with the prosecutor.

Recommendation 31: The Secretary of Defense direct the creation and implementation of mechanisms, where not currently in place, requiring trial counsel to convey the victim’s specific concerns and preferences regarding case disposition to the convening authority, so the convening authority may consider the victim’s concerns and preferences prior to making a decision on case disposition. These procedures will account for the convening authority’s role in the disposition of cases under the military justice system and create a process more analogous to a victim conferring with a prosecutor under the CVRA.
Finding 32-1: The FY14 NDAA extended most of the rights afforded civilian crime victims under the CVRA to crime victims under the military justice system by adding these rights into the UCMJ as Article 6b except the right to be reasonably heard on the plea.

Finding 32-2: The right to be heard on the plea as provided under the CVRA does not extend to the rights conferred under Article 6b.

Finding 32-3: The right to be heard on the plea is not directly analogous to the military justice system due to the differences in the manner in which pretrial agreements are accepted under military practice as compared to the civilian system.

Finding 32-4: The analogous opportunity for the victim’s input to be heard in the military justice system is before the convening authority decides to accept, reject, or propose a counter offer to a pretrial agreement submitted by an accused.

Recommendation 32: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations that provide victims a right to be heard regarding a pretrial agreement.

Recommendation 32a: The proposed changes should provide victims the right to be heard regarding a plea, with appropriate consideration to account for military pretrial agreement practice.

Recommendation 32b: The recommended changes include the right to be heard before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement offer submitted by an accused. The convening authority should retain discretion to determine the best means to comply with this right and consider the victim’s opinion (e.g., submission in writing, in person).

Finding 33-1: Victims should be able to enforce the rights guaranteed by Article 6b, UCMJ. The FY14 NDAA did not specify any enforcement mechanism; rather, the FY14 NDAA requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe appropriate regulations to implement mechanisms to ensure enforcement of such rights, including mechanisms for application of such rights and for consideration and disposition of applications for such rights.

Finding 33-2: The CVRA expressly provides for legal standing for victims to seek enforcement of those rights listed in the CVRA. Specifically, the CVRA directs a victim to assert his or her rights in the district court in which the alleged offender is being prosecuted and if the offender has not yet been charged the asserted claim should take place in the district court of where the crime occurred. The district court will then immediately decide any motion asserting a victim’s right.

Finding 33-3: The CVRA expressly provides for an expedited review of any trial court decision on a victim’s right. The CVRA allows a victim to petition the court of appeals for a writ of mandamus and the appellate court shall review the issue within seventy-two hours of the filing of the petition.
**Recommendation 33:** The Secretary of Defense clarify that victims have legal standing to enforce their rights listed in Article 6b, UCMJ, at trial and appellate courts. Specifically, the Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to expressly provide for a victim’s ability to assert a violation of his or her rights in the trial court, in which the crime occurred, at any relevant time in the proceedings, including pretrial, during trial, and post-trial. The Secretary of Defense will provide procedures for a victim to seek mandatory expedited review of any alleged violation of those rights listed in Article 6b, UCMJ from an appellate court.

**Finding 34-1:** The FY14 NDAA amended Article 6 of the Uniform Code of Military Justice to extend to military crime victims many of the rights conferred to crime victims under the CVRA. These rights were incorporated into the UCMJ as Article 6b.

**Finding 34-2:** The CVRA requires prosecutors and investigators to use their “best efforts” to see that crime victims are notified of, and accorded, the rights under the CVRA. It further places responsibility on the court to ensure that crime victims are afforded the rights guaranteed in court proceedings under the CVRA.

**Finding 34-3:** The FY14 NDAA did not place a similar requirement on military investigators, prosecutors or military courts to ensure that crime victims in military proceedings have been afforded the rights specified in Article 6b, UCMJ.

**Finding 34-4:** Rather, the legislation requires the Secretary of Defense to “recommend changes to the Manual for Courts-Martial to the President and to prescribe appropriate regulations” to implement mechanisms for ensuring that victims are notified of and accorded the rights specified in Article 6b, UCMJ.

**Recommendation 34:** Implement mechanisms to ensure that victims are notified of and accorded the rights provided by Article 6b, UCMJ.

**Recommendation 34a:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to ensure that military investigators, prosecutors and other DoD military and civilian employees engaged in the detection, investigation, or prosecution of crime notify and accord victims the rights specified in Article 6b, UCMJ.

**Recommendation 34b:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe mechanisms that make military courts responsible for ensuring compliance with the rights afforded to crime victims in court proceedings under Article 6b, UCMJ.

**Finding 35-1:** The CVRA provides conditions and time limits under which a victim may petition to re-open a plea or sentence that are not directly applicable to the military rules for courts-martial.

**Finding 35-2:** Specifically, the CVRA provides that, “A victim may make a motion to re-open a plea or sentence only if – (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged.”

**Finding 35-3:** There is no similar provision setting forth the conditions and time period under which a victim may petition to assert the rights set forth in Article 6b, UCMJ.
EXECUTIVE SUMMARY

Finding 35-4: Rather, the FY14 NDAA requires the Secretary of Defense to recommend to the President changes to the Manual for Courts-Martial and to prescribe appropriate regulations including mechanisms to enforce such rights and consider and dispose of applications for such rights.

Finding 35-5: Under military rules and procedures, a sexual assault victim may submit matters to the convening authority under certain conditions before the convening authority takes action on the case.

Recommendation 35: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations establishing the time period under which a victim may petition to assert the rights to reopen a courts-martial plea or sentencing hearing, to ensure clarity regarding when a court-martial hearing can be reopened based on the request of a victim or victim’s counsel and to ensure the finality of court-martial proceedings. This time period should be sufficient so as not to limit or interfere with the victim’s right to present matters to the convening authority prior to his or her taking action on the case.

Finding 36-1: To promote compliance, the CVRA directed the U.S. Attorney General to establish regulations that designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of crime victim’s rights. The Department of Justice established the Office of the Victims’ Rights Ombudsman to receive and investigate complaints filed by crime victims against its employees.

Finding 36-2: Similarly, the FY14 NDAA requires the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a Service in the Navy) to designate an authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights.

Finding 36-3: Designation of a separate authority within each of the Armed Forces and Coast Guard (when not operating as a Service in the Navy) to receive and investigate complaints could result in disparate procedures, rules, and standards for making and investigating complaints relating to a failure to comply with crime victims’ rights.

Recommendation 36: Congress enact legislation to require the Secretary of Defense designate one entity within the Department of Defense to receive and investigate complaints relating to violations of or failures by military and civilian employees from all of the Military Services to provide the rights guaranteed by Article 6b, UCMJ.

Finding 37-1: The CVRA includes the opportunity for a victim to be reasonably heard at sentencing by allowing him or her to make a statement that is neither under oath nor subject to cross-examination.

Finding 37-2: Under military rules, a sexual assault victim may present evidence of financial, social, psychological, and medical impact of an offense the accused committed.

Finding 37-3: Unless there is an agreement from the defense, however, the victim must testify under oath, and is subject to cross-examination.
Recommendation 37: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to provide victims the right to make an unsworn victim impact statement, not subject to cross examination during the presentencing proceeding, with the following safeguards:

- The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;
- If there is “new matter” brought up in the victim’s unsworn statement, sentencing should be delayed so the defense can respond; and
- The unsworn statement should be subject to the same objections available to the government regarding the accused’s unsworn statement.

Finding 38-1: The Court of Appeals for the Armed Forces has addressed the issue of whether a victim has the right to be heard through counsel with regard to certain issues.

Finding 38-2: Absent formal clarification regarding whether references to a victim’s right to be heard includes through counsel, litigation on this issue is likely to continue.

Recommendation 38: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to clarify that all victim rights that include a right for the victim to be heard include the right to be heard through counsel.
The core task of our Armed Forces remains to defend our nation and win its wars.”1 In order to succeed in its mission, the Armed Forces must eliminate any threat that erodes the critical bonds of complete trust that are essential between and among Service members and their leaders “to accomplish their mission in the chaos of war.”2 Military leaders recognize that sexual assault’s effects are corrosive and, if not thoroughly addressed, could destroy the fabric of the force.3 In essence, “[s]exual assaults endanger our own, violate our professional culture and core values, erode readiness and team cohesion and violate the sacred trust and faith of those who serve and whom we serve.”4

In the past few years, Congress and the Department of Defense have undertaken a substantial effort to put into place a constellation of initiatives to attend to the needs of sexual assault victims, and it is vital that the military maintain its focus on victim services. The majority of the services now provided need time to mature into established programs and also require ongoing assessment for future evaluations. Congress and the Department of Defense have put the pieces in place, but the Department of Defense must now comprehensively and continually assess the benefit and overlap of its programs in order to move victim services forward.

The services and response systems the military offers to sexual assault victims can only be useful when they are effective and victims access them. All sexual assault victims, military and non-military, face many issues that make it one of the most underreported crimes in the United States. The hierarchical structure of military service and its focus on obedience, order, and mission before self are, paradoxically, key ingredients to both success in battle and barriers to sexual assault reporting and accessing services.

There are unique military attributes that effect reporting sexual assaults and utilizing available victim services. Specific barriers to reporting and accessing victim services endemic to military structure include the duty to obey all lawful orders, the close proximity in which Service members live and work, the potential for an offender to supervise a victim, Service members’ focus on mission, and collateral misconduct on the victim’s part, such as underage drinking, fraternization, or violation of military orders.5 Sexual assaults in the military generally involve 18 to 24 year-old Service members who know each other, are close in rank, have often consumed alcohol,

4 Strategic Direction to the Joint Force on Sexual Assault, 7 May 2012 at 5.
5 See Section III, Section F (Victim Services, Sexual Assault Reporting) of this report for a specific discussion of these barriers.
and take place on military installations while off-duty. These particular characteristics of victims and offenders, as well as the circumstances surrounding many of the incidents may actually enhance the difficulties inherent in overcoming barriers due in part to the very nature and essence of military organizations.

The same features of the military’s structure and hierarchy that foster success in battle and present challenges to reporting and responding to sexual assault also present unique opportunities for development, including cultural change. The dedication of military leaders, the Department of Defense’s resources (in money and personnel), mission focus, and command structure provide a matchless organizational ability to develop and enforce innovative and comprehensive programs and policies to prevent and respond to military sexual assault. The Armed Forces have proven effective in other social transformations, contributing “…positive social change throughout our history – through racial integration, the integration of women across all Services, and the elimination of discrimination on the basis of sexual orientation.”

The Department of Defense can lead the nation in the fight against sexual assault.

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II. OVERVIEW OF SUBCOMMITTEE ASSESSMENT

A. RESPONSIBILITY OF THE SUBCOMMITTEE

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13NDAA) directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under Section 920 of Title 10, United States Code (Article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.” In order to assist the RSP in accomplishing the many areas Congress directed it to assess in twelve months, the Secretary of Defense established three subcommittees: Role of the Commander, Comparative Systems, and Victim Services.

On September 23, 2013, the Secretary of Defense established the RSP Subcommittees and appointed nine members to the Victim Services Subcommittee, including four members of the RSP. The overall mission of the Victim Services Subcommittee is to assess the adequacy of military systems and proceedings for providing support and protection to victims in the investigation, prosecution, and adjudication of crimes involving adult sexual assault. To assist with this mission, the Secretary of Defense (SECDEF) established five initial objectives for the Victim Services Subcommittee:

1. Assess the adequacy of military systems and proceedings to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes;

2. Assess whether military systems and proceedings provide victims the rights afforded by 18 U.S.C. § 3771, Department of Defense Directive 1030.1 (Victim and Witness Assistance), and Department of Defense Instruction 1030.2 (Victim and Witness Procedures);

3. Assess differences between military and civilian systems in providing support and protection to victims of adult sexual crimes;

4. Identify best practices for victim support and protection from civilian jurisdictions that may be incorporated into any phase of the military system; and

5. Assess the effectiveness of proposed legislative initiatives modifying military justice processes in providing support and protection to victims of adult sexual assault crimes.

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9 Victim Services Subcommittee, Terms of Reference (September 23, 2013) (on file with the RSP).
10 Victim Services Subcommittee, Terms of Reference (September 23, 2013) (on file with the RSP).
The National Defense Authorization Act for Fiscal Year 2014 added two additional requirements for the RSP related to the mission of the Victim Services Subcommittee. The Subcommittee also completed:

1. An assessment regarding whether the roles, responsibilities, and authorities of Special Victims’ Counsel to provide legal assistance under Section 1044e of Title 10, United States Code, as added by Section 1716, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense; and

2. An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ the right afforded a crime victim in civilian criminal legal proceedings under subsection 17(a)(4) of Section 3771 of Title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section.11

To perform the required assessments, the Victim Services Subcommittee utilized a multi-method approach. This approach included gathering witness testimony at various RSP and Subcommittee meetings; conducting site visits to different military installations; requesting documentation from the Department of Defense and the Services; and conducting extensive document review and data analysis.

B. METHODOLOGY OF SUBCOMMITTEE REVIEW

Meetings

Since June 2013, RSP and Subcommittee members held 22 public meetings, Subcommittee meetings, and preparatory sessions with more than 150 different presenters.12

Presenters included crime victim rights advocates and organizations; survivors of sexual assault;13 current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims’ counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocates General from each of the Services; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners (SANE); first responders; and current United States Senators.

At the various meetings, Subcommittee members were able to question witnesses and receive testimony, documents and other materials regarding the Department of Defense’s victim service programs and initiatives, the effectiveness of those programs, and recommendations for improvement to those services from victim support personnel and survivors of sexual assault. In addition, Subcommittee members heard testimony from

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12 A complete list of meetings, preparatory sessions, and site visits conducted by the Response Systems Panel and the Victim Services Subcommittee including presenters, topics, and materials are found at the Response Systems Panel website, http://responsesystemspanel.whs.mil/.
13 Survivors who appeared before the Subcommittee were afforded the opportunity to keep their identities and Service affiliation confidential, and are referred to throughout the report by their initials.
civilian practitioners and support personnel on the implementation, structure, and productivity of civilian victim service programs throughout the nation and how these programs compared to similar ones in the military.

The Subcommittee supplemented the witnesses it heard and materials it reviewed about civilian services to sexual assault victims with the Joint Services Committee on Military Justice Sexual Assault Subcommittee’s (JSC-SAS) study of eighteen separate jurisdictions in fourteen states. The JSC-SAS undertook its study in part to provide factual information to the RSP.

The materials the RSP and Subcommittee received and verbatim transcripts of all RSP and Subcommittee meetings are posted on the RSP website at http://responsesystemspanel.whs.mil.

Military Site Visits

Members of the Victim Services Subcommittee also conducted two preparatory site visits to gather first-hand information about the effectiveness of victim services at various military installations. During these site visits, Subcommittee members toured Fort Hood and Joint Base San Antonio-Lackland, Texas, where they received briefings from the local Commands, the Staff Judge Advocate Offices, and Special Victims Counsel Personnel. Additionally, several roundtable meetings were held where Subcommittee members were able to meet with SAPR victim advocates, SARC, victim witness liaisons, Family Advocacy victim advocates, behavioral health professionals, military and civilian medical personnel, a military prosecutor, special victim counsel and basic trainees and instructors to see and hear how victims are supported throughout the investigation, trial, and post-trial phases of a court-martial. These site visits were supported by a non-attribution environment to foster candor on the part of the participants. Because no information would be attributed to any one individual, the Service members and civilians were able to provide honest, candid and unguarded opinions about their experiences, their impressions of victim services, military prosecutions, sexual assault response measures, and other relevant topics.

During the roundtable discussions, Subcommittee members discussed specific cases and circumstances with victim services personnel in order to better understand their experiences with the military justice system and the support services offered to victims of sexual assault. This informal setting offered victim service personnel the opportunity to discuss any concerns with the current services offered and to provide recommendations to the Subcommittee members on how to improve victim care throughout the military. Additionally, a roundtable discussion with current Special Victim Counsel (SVC) enabled Subcommittee members to gather information on the Special Victim Counsel Programs in the Military Services and the emerging role of SVC in the reporting, investigation, and prosecution of sex-related crimes. Special Victim Counsel discussed their day-to-day functions, the scope of their representation of victims of sexual assault, and current impediments they were experiencing to providing what they considered to be appropriate representation.

Requests for Information

In addition, the RSP Chair sent letters with more than 130 requests for information (RFIs) to the Secretary of Defense and the Secretaries of the Military Services. The RFIs focused on topics relevant to the subcommittees: role of the commander, comparing military and civilian investigative and prosecution systems, and victim services. To date, DoD and the Services have submitted more than 14,983 pages of narrative responses and attached documents, including policies, procedures, statistics, correspondence, and surveys. The RSP also sent letters to eighteen victim advocacy organizations around the country soliciting input from those organizations to assist the RSP and the Subcommittee in its review. Advocacy organizations providing information to the RSP included those working specifically in military sexual assault, including Protect Our Defenders (POD),
Service Women’s Action Network (SWAN), Rape, Abuse, and Incest National Network (RAINN), the National Organization for Victim Assistance, and the National Alliance to End Sexual Violence.

Document Review
The Subcommittee also considered publicly available information such as government reports on victim service programs, transcripts of hearing testimony, policy memoranda regarding the implementation and execution of victim services, official correspondence, statistical data, training aids and videos, and planning documents. Additionally, the Subcommittee reviewed federal and state court opinions related to the Crime Victim’s Rights Act (CVRA) as well as law review articles on various victim service programs and the implementation of the Special Victim Counsel Program in the military. As part of this legal research, the Subcommittee examined a Court of Appeals for the Armed Forces (CAAF) opinion on SVC standing and conducted a thorough analysis of the differences between the CVRA and the newly enacted Article 6b, UCMJ.

Report Writing
The Victim Services Subcommittee held a series of meetings to make major decisions on the direction of this report and to determine additional evidence necessary to answer impending questions from the Subcommittee members. Once the Subcommittee completed gathering evidence, it held meetings to discuss the content of the report and to deliberate on the Subcommittee’s findings and recommendations. The Subcommittee members developed their findings and recommendations based on the information they received from witnesses, documentary submissions, site visits, and the Service and DoD responses to requests for information while, at the same time, carefully considering the terms of reference from the Secretary of Defense.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
A. RESPONSIBILITY OF SUBCOMMITTEE

The Secretary of Defense directed the Victim Services Subcommittee to assess “the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes....”14 Congress also directed the RSP to compare and assess the differences between Military and civilian systems “in providing support and protection to victims and ...[to identify] civilian best practices that may be incorporated into any phase of the military system”15 and to “[a]ssess the effectiveness of proposed legislative initiatives modifying military justice processes in providing support and protection to victims of adult sexual assault crimes.” The Victims Services Subcommittee examined both.

The Victim Services Subcommittee of the RSP completed a comprehensive evaluation of victims’ services in the military and a comparison of the military systems with corresponding civilian systems. The comparison of victim services in the civilian systems, while extensive, did not extend to services provided by every one of the more than 2,300 state felony prosecutor offices across the United States, or the more than 230 headquarter and staffed branch offices of the U.S. Attorney’s Office.16 Rather, the Subcommittee supplemented the witnesses it heard and materials it reviewed about civilian services to sexual assault victims with the Joint Services Committee on Military Justice Sexual Assault Subcommittee’s (JSC-SAS) study of eighteen separate jurisdictions in fourteen states. The JSC-SAS undertook its study in order to provide factual information to the RSP, and its work is described in more detail below.17

This section provides an overview of the development of a formal sexual assault program within the Department of Defense and describes the roles and responsibilities of the programs and personnel involved in providing victim assistance in the military and civilian jurisdictions, and makes findings and recommendations to improve these programs and to provide Congress and DoD guidance for the way ahead.

B. ROSTER OF DOD VICTIM SERVICES PERSONNEL AND PROGRAMS

The following are definitions or descriptions of the victims services programs and personnel commonly discussed throughout this report.

15 Id. at § 576(d)(1)(B).
**Department of Defense Sexual Assault Prevention and Response (SAPR) Program:** A DoD program for the Military Services and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is to have an environment and military community intolerant of sexual assault.

**Department of Defense Sexual Assault Prevention and Response Office (DoD SAPRO):** The DoD single point of authority, accountability and oversight for the SAPR program. It does not oversee legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Services and the IG, respectively.

**Family Advocacy Program (FAP):** A DoD program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence. FAPs consist of coordinated efforts designed to prevent and intervene in cases of family distress, and to promote healthy family life.

**Sexual Assault Response Coordinator (SARC):** The single point of contact at an installation or within a geographic area tasked to oversee sexual assault awareness, prevention, and response training; coordinate medical treatment, including emergency care, for sexual assault victims; and track the services provided to a sexual assault victim from the initial report through final disposition and resolution. SARCs may be civilian or uniformed as designated by each Service and must be able to perform victim advocate duties when needed. SARCs can accept both restricted and unrestricted reports of sexual assault.

**Sexual Assault Prevention and Response Victim Advocate (SAPR VA):** A civilian or uniformed sexual assault victim advocate, responsible for providing non-clinical crisis intervention, referral, and ongoing support to adult sexual assault victims in the military. Support will include providing information on available options and resources to victims and accompanying victims to court, interviews and appointments when desired by the victim. The SAPR VA also provides liaison assistance for victims with other organizations and agencies on victim care matters. The SAPR VA reports directly to the SARC when performing victim advocacy duties. SARCs can accept both restricted and unrestricted reports of sexual assault.

**Domestic Abuse Victim Advocate (DAVA):** Civilian advocates who provide assistance through the Family Advocacy program to military victims of spousal or intimate partner domestic abuse, including sexual abuse.

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19 Id.

20 Id.; see also id. at encl. 2, ¶ 1.f.


22 DoDD 6495.01 ¶ 4.e(1).

23 Id.; see also U.S. DEP’T OF DEF. INSTRUCTION [hereinafter DoDI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 6, ¶1.h(8) (March 28, 2014, Incorporating Change 1, February 12, 2014) (designating that SARCs must perform victim advocacy duties, as needed).

24 DoDD 6495.01, ¶ 4.e(2).

25 Id.

26 Id.

27 Id.
as well as child victims of abuse, sexual violence, or neglect. Like the SAPR VA, a DAVA informs a domestic sexual assault and abuse victim of both restricted and unrestricted reporting options, develops a safety plan with the victim, provides relevant information and available options to support a victim’s decision making, assists the victim in gaining access to service providers and victim support resources, and consults and works with the Victim Witness Liaison when assigned.

Special Victim Counsel (SVC): Specially trained uniformed judge advocates to represent the interests of sexual assault victims. The SVC provides independent advice to sexual assault victims; assists victims in understanding the investigation and adjudicative processes of the military justice system; advocates for the protection of victims’ rights; and empowers victims by “removing barriers to their full participation in the military justice process.”

Victim Witness Liaison (VWL): Civilian or uniformed service providers operating within the installation legal offices. The role of the VWL in the military is one of facilitator and coordinator, not advocate. It is the responsibility of the VWL to see that victims and witnesses of all types of crime are provided with information about available military and civilian emergency medical and social services, advocacy services, military protective orders, restitution, and other available services; assisting with the victim receiving those services; providing the victim with information about the military justice system and notification of certain hearings during that process; ensuring the victim is able to consult with government representatives at certain points during the court-martial process; and notifying a victim of an offenders confinement status following the court-martial.

C. DOD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM

The mission of the DoD Sexual Assault Prevention and Response (SAPR) Program is to prevent and respond to the crime of sexual assault “in order to enable military readiness and reduce — with a goal to eliminate — sexual assault from the military.” Since its inception in 2004, the DoD SAPR program has been the single source for sexual assault policy across DoD.


29 Id. at §§ 6.4.3.1 - 6.4.3.13.

30 UNITED STATES AIR FORCE SPECIAL VICTIM’S COUNSEL RULES FOR PRACTICE AND PROCEDURE 2 (July 1, 2013).

31 U.S. DEP’T OF DEF. INSTR. [hereinafter DoDI] 1030.02, VICTIM AND WITNESS PROCEDURES, ¶ 5.2.8 (June 4, 2004).


33 Transcript of RSP Public Meeting 94 (June 27, 2013) (testimony of Major General Gary S. Patton, Director of DoD Sexual Assault and Prevention and Response Office); see also PowerPoint Presentation of DoD SAPRO, “Sexual Assault Prevention and Response Program,” slide 3 (June 27, 2013) (“The Department of Defense prevents and responds to the crime of sexual assault in order to enable military readiness and reduce – with goal to eliminate – sexual assault from the military.”). Note: the Subcommittee uses the term “testimony” to describe the unsworn remarks and responses made by individuals invited to appear before the RSP and Subcommittee to share their experiences and expertise on issues related to sexual assault in the military.

34 See generally DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2009 [hereinafter FY09 SAPRO REPORT] at 6 (providing a history of the DoD Sexual Assault Prevention and Response (SAPR) program).
The SAPR program began with Secretary of Defense Donald Rumsfeld’s concern about reports of sexual assaults of deployed Service members in Iraq and Kuwait in 2004. Secretary Rumsfeld directed a task force to evaluate the sexual assault programs and policies throughout the Military Services, and, as a result, DoD established the Sexual Assault Prevention and Response Office (SAPRO) under the purview of the Under Secretary of Defense for Personnel and Readiness (USD P&R). DoD issued the first Department-wide SAPR policy in October 2005 as DoD Directive 6495.01 “Sexual Assault Prevention and Response (SAPR) Program,” which it reissued most recently in January, 2012, with additional changes in April, 2013.

DoD SAPR policy, set forth in DoD Directive 6495.01 and DoD Instruction 6495.02, offered, for the first time, a restricted reporting option for sexual assault victims who want to obtain services while maintaining confidentiality; mandated baseline and pre-deployment sexual assault prevention training for Service members and first responders (e.g., healthcare providers, victim advocates, law enforcement, criminal investigators, judge advocates, chaplains); and created Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs) to provide services specifically for sexual assault victims.

Since the inaugural DoD sexual assault policy in 2005, the DoD SAPR program has undergone and implemented an ongoing and increasing list of changes, additions, and improvements from both the Secretary of Defense and Congress. As one witness commented to the RSP, “I see a real difference in the way the commanders understand the issues of sexual assault and sexual harassment. I see a 100 percent increase in the amount of attention paid to the education of all soldiers about the crime.” Some of those key services to protect and support victims are described below.

D. OVERVIEW OF VICTIM SERVICES PROGRAMS IN THE MILITARY

Although SAPR is the military’s flagship program devoted to sexual assault response and prevention, it is not the only source of sexual assault victim assistance or support in the military. Statutes and DoD Policy direct that four separate programs and five categories of victim assistance personnel perform sexual assault support and advocacy-related duties.

36 FY09 SAPRO Report at 6; see also DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, CALENDAR YEAR 2004 [hereinafter CY04 SAPRO Report] at 3-4 (May 6, 2005).
38 See DoDD 6945.01.
40 See CY04 SAPRO Report at 4-6.
41 A legislative history of the development and oversight of the DoD SAPR program may be found in Appendix B to this report.
42 Transcript of RSP Public Meeting, 218 (November 7, 2013) (testimony of Master Sergeant Carol Chapman, U.S. Army, SHARP Program Manager, 7th Infantry Division, Joint Base Lewis McChord, Washington).
**III. VICTIM SERVICES**

**Family Advocacy Program (FAP)**

The Family Advocacy Program (FAP), established in 1981, is the oldest and most mature sexual assault prevention and response program in DoD. FAP is a congressionally mandated initiative tasked to prevent and respond to reports of child abuse/neglect and domestic abuse – including sexual abuse - in military families. It works in cooperation with civilian social service agencies and civilian law enforcement. The program provides services to adult victims of spousal and intimate partner abuse and victims of child abuse and neglect, as well as the offenders.

A domestic abuse victim, as defined by DoD, is an individual who is a current or former spouse of the abuser, a person with whom the abuser shares a child in common, or a current or former intimate partner/domestic partner with whom the abuser shares or has shared a common domicile. If a spouse or intimate partner commits a sexual assault against a military member, the FAP provides all support and counseling services for the victim. The SAPR program does not track cases or provide services for this category of adult sexual assault victims, per DoD policy. The FAP personnel include licensed clinicians, Domestic Abuse Victim Advocates (DAVAs), education and outreach staff, and administrative staff to assist victims.

FAP’s mission is both broader and narrower in scope than SAPR’s mission. It is broader in that it includes child sexual assault victims, all forms of domestic violence, and child abuse, not exclusively sex crimes. It is narrower...
with respect to sexual assault, since FAP handles only adult sexual assaults that arise from intimate partners or domestic violence which are not covered by SAPRO and are not counted in SAPRO’s sexual assault statistics.\footnote{See DoDI 6495.02 § 2.c(2); and see DoDD 6495.01 § 2.a(3).}

**Victim Witness Assistance Program (VWAP)**

Following enactment of the Victim Witness Protection Act of 1982, DoD established its Victim Witness Assistance Program (VWAP) to incorporate much of the federal statute in military policy.\footnote{Task Force Report for Care of Victims of Sexual Assault 9 (April 2004).} The mission of the VWAP is to provide assistance to all military crime victims throughout the military justice process, from the investigation and prosecution through the duration of confinement of a convicted offender.\footnote{Id.} The VWAP establishes military crime victims’ rights in DoD policy and provides for assistance to victims of all crimes, including sexual assault.\footnote{See U.S. Dep’t of Def. Directive [hereinafter DoDD] 1030.01, Victim and Witness Assistance, ¶ 4.2 (April 13, 2004, certified current as of April 23, 2007).} Victim Witness Liaisons (VWLs) are the service providers to crime victims under the VWAP program.\footnote{U.S. Dep’t of Def. Instr. [hereinafter DoDI] 1030.02, Victim and Witness Procedures, ¶ 5.2.8 (June 4, 2004).}

**Sexual Assault Prevention and Response Program (SAPR)**

In 2005, DoD developed a program to provide 24/7 victim assistance capability exclusively to adult military sexual assault victims and sexual assault prevention training to first responders, commanders and all Service members at the time they initially enter the Armed Forces and thereafter on an annual basis.\footnote{See DoDD 6495.01 ¶ 4; and see DoDI 6495.02, encl. 10.} The personnel tasked with providing training and services under this program are Sexual Assault Response Coordinators (SARCS) and their subordinates, SAPR Victim Advocates (VAs).\footnote{DoDD 6495.01 ¶ 4.e(1) – (2).} DoD defines sexual assault, and therefore the victims eligible for services under this program, as “intentional sexual contact characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent,” including the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.\footnote{DoDD 6495.02 at 93.}

**Special Victims’ Counsel (SVC) Program**

The newest program established to provide assistance to sexual assault victims in the military is the Special Victims’ Counsel (SVC) Program, launched with initial operating capability across all of the Services in October 2013, per Secretary of Defense direction, and subsequent codification in the FY14 NDAA.\footnote{See Transcript of RSP Public Meeting, 104-197 (November 8, 2013) (testimony of SVC Program Heads).} The SVC program goes beyond what is available in the civilian criminal justice system today by providing every military sexual assault victim the option of a military lawyer to individually represent him or her and advocate his or her interests from the moment the sexual assault is reported through final disposition of the case.\footnote{Id.} An overarching

\footnote{The Response Systems Panel has not yet considered or deliberated on the contents of this report.}
III. VICTIM SERVICES

The goal of the SVC program is to instill confidence in victims so that more victims come forward and report incidents of sexual assault.60

E. OVERVIEW OF PSYCHOLOGICAL HEALTHCARE FOR SEXUAL ASSAULT VICTIMS

Uniformed and civilian psychiatrists, psychologists, mental health nurses, social workers, and mental health technicians provide military mental health services to sexual assault victims and many others.61 In addition to clinics located within military treatment facilities, the following programs also provide counseling services to sexual assault victims:

- Each Military Service’s substance abuse prevention and treatment programs;
- Family Support Centers (FSCs), some offering non-medical counseling for various clinical disorders, such as anxiety, depression, and PTSD;
- Family Advocacy Programs;
- Military OneSource, a 24-hour, 7-day-a-week, confidential non-medical information and referral system that Service members and their dependents can access globally through the telephone, Internet, and e-mail and offers confidential in-person family and personal counseling in local communities at no cost for up to six sessions per person per problem per year;62
- Anonymous counseling services offered by the DoD Safe Helpline and Safe HelpRoom;63 and,
- Military mental health services are often delivered in partnership with services provided by military chaplains, particularly in deployed environments.64 Pastoral counseling is often sought because fewer stigmas are associated with it and members may feel greater confidence that the matter will be kept confidential.65

Access to quality mental health care is a critical component of a robust response system for military sexual assault victims. Congress, in the FY 2006 NDAA, directed the Secretary of Defense to establish a task force to assess and make recommendations for improving “the efficacy of mental health services provided to members of the Armed Forces, reflecting its concerns about the delivery of mental health care in the military.”66 The subsequently empaneled Defense Task Force on Mental Health (DTF-MH), comprised of seven members from

60 Id.
61 DEFENSE TASK FORCE ON MENTAL HEALTH 12 (June 2007).
62 DEFENSE TASK FORCE ON MENTAL HEALTH 13 (June 2007) For a clinical problem (defined as any disorder for which TRICARE provides reimbursement), Military OneSource facilitates referral to TRICARE or the nearest Military Treatment Facility (MTF). Id.
63 See DoD Safe Helpline located at https://www.safehelpline.org/.
64 DEFENSE TASK FORCE ON MENTAL HEALTH 13 (June 2007).
65 Id.
66 Id. at ES-1.
within and outside of the military, visited 38 installations world-wide encompassing all Services, and published
a report of its findings and recommendations to Congress in June 2007.\textsuperscript{67}

The DTF-MH report summarized the task force’s observations into a “single finding underpinning all others:
The Military Health System lacks the fiscal resources and the fully-trained personnel to fulfill its mission
to support psychological health in peacetime or fulfill the enhanced requirements imposed during times of
conflict.”\textsuperscript{68}

The DTF-MH made a number of recommendations to address the shortcomings it found, including embedding
uniformed military health providers in military units to facilitate access and availability of mental health
professionals, integrating mental health providers in primary medical care settings where mental health
concerns are often first raised and stigmas seem lower, and ensuring a full continuum of easily-accessible
evidence-based care to ensure effective help is available when most needed.\textsuperscript{69} Since then, the DoD has worked
to implement the recommendations of the Task Force.

Mental health practitioners who spoke to the Subcommittee described the embedded uniformed providers now
in the Services. For example, the Deputy Director of Psychological Health for the Air Force reported that the Air
Force now has multiple entry points of access to behavioral health, including integrated behavioral healthcare
in primary care and within units.\textsuperscript{70}

In addition, an Army licensed clinical social worker reported to the Subcommittee that as of January 2014,
 thirty-seven of the Army’s brigade combat teams and fourteen other brigade-sized units are supported
by embedded behavioral health (EBH) units.\textsuperscript{71} An EBH unit consists of a psychiatrist, a psychiatric nurse
practitioner, three clinical psychologists and three social workers as well as five additional staff.\textsuperscript{72} The Army
clinical social worker contrasted this with his service in 2004 in the 25th Infantry, where he, a psychiatrist
and a psychologist had responsibility for over 16,000 soldiers.\textsuperscript{73} The Navy and Marine Corps have embedded
providers in Marine Corps regiments, on large seagoing platforms, and within special operations units.\textsuperscript{74}

DoD has quadrupled the size of its mental health system since 9/11.\textsuperscript{75} One issue clinicians deal with frequently
is whether a patient wants to be treated with medication or with therapy.\textsuperscript{76} According to the Director for Mental

\textsuperscript{67} Id. at ES-2.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 16.
\textsuperscript{70} Transcript of RSP Victim Service Subcommittee Meeting 241–242 (February 26, 2014) (testimony of Colonel Tracy Neal- Walden, U.S.
Air Force, Deputy Director of Psychological Health for the Air Force).
\textsuperscript{71} Transcript of Victim Services Subcommittee Meeting 249 (February 26, 2014) (testimony of Lieutenant Colonel Todd Yosick, U.S.
Army, Behavioral Health Strategic Integrator and Liaison to the Department of Defense and Veterans Administration, Army Surgeon
General).
\textsuperscript{72} Transcript of Victim Services Subcommittee Meeting 249-250 (February 26, 2014) (testimony of Lieutenant Colonel Todd Yosick).
\textsuperscript{73} Transcript of Victim Services Subcommittee Meeting 250 (February 26, 2014) (testimony of Lieutenant Colonel Todd Yosick).
\textsuperscript{74} Transcript of VSS Subcommittee Meeting 262 (February 26, 2014) (testimony of Captain John Ralph, U.S. Navy, Director of
Psychological Health for Navy Medicine and Chief of Staff for Wounded, Ill, and Injured Programs).
\textsuperscript{75} Transcript of RSP Victim Services Subcommittee Meeting 239 (February 26, 2014) (testimony of CAPT Mike Colston, MC, U.S. Navy,
Director of Mental Health Program, Clinical and Program Policy, Office of the Assistant Secretary of Defense (Health Affairs))
\textsuperscript{76} Transcript of RSP Victim Service Subcommittee Meeting 237 (February 26, 2014) (testimony of CAPT Mike Colston)
Health Policy for DoD, “Patient preference always drives the type of approach [that is used] to help folks achieve recovery.” The Services’ behavioral health providers are trained in evidence-based psychotherapies such as cognitive behavior therapy, exposure therapy, cognitive processing therapy, eye movement desensitization and reprocessing (EMDR), and acceptance and commitment therapy, all of which are useful for treating disorders related to sexual assault and PTSD. In addition, the Army developed a Behavioral Health Data Portal (BHDP) that all of the Services are adopting to look at outcomes and track personnel as they move from one duty location to the next. The BHDP was launched by the Army in 2012 as part of “a multi-year effort to build the structures and best practices needed to create a Behavioral Health System of Care.” The BHDP consists of a web-based patient portal where patients log on in their Behavioral Health clinic waiting room prior to each appointment and answer standard, research-validated questions about items related to their presenting symptoms, stressors, and level of functioning, which are then used by the clinicians to guide treatment planning and risk assessment in a standardized, high quality manner.

Despite improvements, some victims who spoke to the RSP and the Subcommittee described continued challenges in obtaining adequate mental health services including long wait times to get appointments and therapists that did not know how to deal with sexual assault victims. One recent sexual assault victim described her experience to the Subcommittee as, “when I first went to mental health, I did my initial [evaluation] with someone else and then I didn’t get an appointment after that. And then eventually my command called up there...and then I get an appointment with somebody, and then after that it was somebody else. So, I just stopped going completely.”

On the other hand, one intimate partner sexual assault victim described changes she observed to the system in the past few years. She had made a report a number of years earlier, for which the offender was not held accountable and she felt completely unsupported, and then participated in another case more recently, after another victim made a report against the same offender. She participated in the subsequent trial in which he was convicted of both sexual assaults, stated that, “I cannot express to you how much different the atmosphere, the command support, the available services were between my initial reports and my experience over the past year...the changes that have been made in policy and services have directly impacted my life and the life of my family.” She went on to specifically praise the change in the quality of counseling she has received and emphasized how important it is for the [Services] to have qualified, dedicated mental health professionals and social workers available for all...victims.

77 Id.
78 Transcript of RSP Victim Service Subcommittee Meeting 243 (February 26, 2014) (testimony of Col Tracy Neal-Walden)
79 Id. at 244.
81 Id.
82 Transcript of RSP Victim Service Subcommittee Meeting 105-107 (March 13, 2014) (testimony of Mr. I.C. and Ms. P.C.).
84 Transcript of RSP Victim Service Subcommittee Meeting 19 (March 13, 2014) (testimony of Ms. J.P.).
85 Id.at 21.
F. SEXUAL ASSAULT REPORTING

Sexual assault victims are more than a witness to the crime. Their bodies are the crime scene. By providing victims with a voice in the process, we begin to empower them in a way that will help in their recovery.86

1. Structural Impediments to Reporting Sexual Assault

All sexual assault victims, military and civilian, face substantial barriers that make sexual assault one of the most underreported crimes in the United States.87 Society’s tendency to blame the victim of a sexual assault for the crime; victim’s struggles with concomitant shame and self-blame; feelings of confusion, helplessness, and lack of control; and the fear of the consequences of reporting ensure that experiences of sexual assault are often shrouded in silence and secrecy.88

Victims of military sexual assault face additional structural barriers to reporting. The hierarchical structure of military service and its focus on obedience, order, and mission before self, although crucial to success in battle, may provide opportunities for sexual assault and discourage those who have been victimized from reporting. The duty to obey all lawful orders, the close proximity in which Service members live and work, the fact that offenders may outrank or supervise their victims, and the threat of collateral misconduct charges deter victims from being able to seek redress and access needed services.

Retaliation and Harassment

Service members live and work in close proximity to one another.89 Once a sexual assault has occurred, the nearby presence of the offender can cause psychological trauma for victims. As one victim explained, “I ended up spending a year living about 100 feet away from the man that assaulted me and that again probably did more damage than anything else.”90

86 Transcript of RSP Meeting 89 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO).


88 See Transcript of RSP Victim Service Subcommittee Meeting 313-314 (February 26, 2014) (testimony of Captain John A. Ralph, U.S. Navy) (stating that he has never encountered “a patient who was a sexual assault victim or a combat victim who didn’t engage in self-blame”…and that self-blame is “almost universal after a traumatic experience.”).

89 As one victim explained:

One of the problems I had was, early on my command tried to get [the offender] moved to get us separated and no other command on base would take him. They didn’t want to deal with it. So he ended up still working with me on different shifts. There was no contact order in place, but I still saw him around. He was still around. He lived across the street.

Transcript of RSP Victim Service Subcommittee Meeting 50 (March 13, 2014) (testimony of Ms. P.C.).

90 Transcript of RSP Public Meeting 498 (December 11, 2013) (public comment of Major Melissa Brown).
An allegation of sexual assault may then divide loyalties among a close-knit group of people who should be working toward a common goal. When unit cohesion is a powerful mandate, Service members may seek to silence the victim’s allegation of sexual assault by one of their own or retaliate against him or her to keep the unit “whole.” As one victim explained, “[I]n my unit where I worked, I mean once the report became unrestricted, they kind of turned into a choosing sides battle. I had my food stolen. I had my wallet stolen. I had to dig it out of the trash. It was just overall really bad.”  

This kind of retaliation causes psychological trauma for victims.

Another victim described how others in the same unit were deterred from reporting because of the retaliation she experienced:

I was not the only person...that this drill sergeant had victimized. There were many and there was many in that same unit with me in that same bay. Once I had came forward, they saw what I had went through, all the hazing, all the harassment and they were terrified . . . have asked them... why didn't you say anything? And they just, they all had said that they were not strong enough. They didn't feel like they could trust anybody there and they didn’t want to put themselves out there and have people look at 'em funny. [sic]

According to DoD’s Workplace and Gender Relations Survey (WGRA), 47 percent of women who did not report “unwanted sexual contact” indicated that they were afraid of reprisal or retaliation from the person who did it, or from their friends, or thought they would be labeled a troublemaker. Of those victims who did not report having been sexually assaulted to the chain of command, 43 percent of active duty female victims and 14 percent of active duty male victims indicated that they did not report because they heard about negative experiences other victims went through who reported their situation.

**Deference to Command**

A sexual assault victim and offender may have the relationship of subordinate and commanding officer. Particularly when an offender is a superior, others may ignore the allegations or avoid acquiring knowledge about instances of sexual assault. One victim told the Subcommittee that, because of the initial response she received from her senior leadership, she felt reporting was futile.

From 2004 to 2006 ... I was physically and sexually assaulted on numerous occasions by another soldier. The abuser was a Staff Sergeant, later promoted to Sergeant First Class while I was a Sergeant E5 at the time. He was very well respected in our unit by fellow soldiers and our command team, and though I sought help from my command on numerous occasions, my cries for help were deliberately ignored. At one point, I sought...
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Offenders may be competent, even outstanding soldiers, sailors, airmen, and marines, respected by leaders and subordinates alike, which can make people disbelieve the victim.

[M]any times people, people look at just the outside, you know, [the] competence that somebody has, and the outside character and the outside way that a person presents themselves. From the outside this drill sergeant was stellar. He was fast-tracking on his way to first sergeant. He really was...a lot of times people miss, they miss the, the singling out stuff, and they miss him pulling females to the side.97

Worse, a victim may be under an offender’s direct control. “[My assailant] taught our sexual harassment class and we were given instructions to report to him if we had any issues.”98

This victim explained that Service members are taught to obey lawful orders. “In boot camp, you are taught blind obedience to every order as your only option. Saying ‘no’ did not exist. There was no one to reach out to.”99

Subordination of the Individual to the Mission

Service members are appropriately trained to be mission-focused and willing to subordinate the self in service of the larger goals and needs of the unit. However, an exclusive focus on the unit may deter the reporting of sexual assault. As one sexual assault victim told the RSP:

I didn’t have the courage at that point to pick up a phone and call 911 and have police come and get me and take me where I should have gone. Instead, I thought, I need to go home and fix this and change my clothes and get to work and do my job, because that’s what I’m supposed to do. And I think that that’s probably a reason that many individuals don’t report when they need to for their cases to be prosecuted. It took me a year and a half, and personal, physical distress, to actually go seek help and then finally report my sexual assault. Part of that was driven by my requirement to deploy. I felt that reporting it would distract my unit and distract me from that mission that I was given.100

Focus on Female Victims of Sexual Assault

Male victims of sexual assault do not identify as victims and report their attacks in part because sexual assault awareness campaigns tend to focus predominantly or exclusively on female victims. As one victim advocate explained, “One of the biggest hurdles today for male survivors in the military to face is the lack of recognition of their status as survivors. One of the most offensive awareness campaigns a few years ago was the ‘Ask Her When She’s Sober’ campaign.”101

96 Transcript of RSP Victim Service Subcommittee Meeting 17 (March 13, 2014) (testimony of Ms. J.P.).
98 Transcript of RSP Victim Service Subcommittee Meeting 11 (March 13, 2014) (testimony of Ms. E.M.).
99 Id.
100 Transcript of RSP Public Meeting 497-498 (December 11, 2013) (public comment of Major Melissa Brown).
101 Transcript of RSP Victim Service Subcommittee Meeting 18 (November 8, 2013) (testimony of Mr. Brian Lewis).
Prosecution for Collateral Misconduct

During an instance of sexual assault, a victim “may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders),” behavior that is often referred to as collateral misconduct.\(^\text{102}\) Commanders have discretion to defer action on alleged collateral misconduct by sexual assault victims.\(^\text{103}\)

According to information the Services provided in response to the RSP’s request, the Air Force, Army, Navy, and Marine Corps have not, in the past, tracked the prosecutions of victims of sexual assault for collateral misconduct.\(^\text{104}\) The Coast Guard submitted information from Fiscal Year 2007 to Fiscal Year 2013 that indicated few punishments of victims of sexual assault for collateral misconduct.\(^\text{105}\) The Army submitted information for Fiscal Year 2013 that indicated that prosecutions of victims of sexual assault for collateral misconduct occurred in less than 5 percent of cases.\(^\text{106}\)

The WGRA indicated that 23 percent of active duty female victims who chose not to report having been sexually assaulted feared they or others would be punished for infractions or violations, such as underage drinking, if they had reported.\(^\text{107}\) Of the active duty male victims who did not report, 22 percent feared they or others would be punished for infractions or violations, such as underage drinking.\(^\text{108}\) As a result, the Department of Defense recognizes, “Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim’s fear of punishment.”\(^\text{109}\)

Damage to Military Career

The WGRA indicated that 28 percent of active duty female victims who did not report believed that, if they had they reported their sexual assaults, their performance evaluations or chances for promotion would suffer and 15 percent believed they might lose their security clearances or personnel reliability certifications.\(^\text{110}\) Of the active duty male victims who did not report, 16 percent believed their performance evaluation or chance for promotion would suffer and 15 percent believed they might lose their security clearance or personnel reliability certification.\(^\text{111}\)

Victim’s Lack of Control Over the Report

A survey of victims of military sexual assault who did not report reveals that they most often did not want anyone to know of the sexual assault (70 percent); they felt uncomfortable making a report of sexual assault

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\(^\text{102}\) DoDI 6495.02 encl. 5, ¶ 7.a.

\(^\text{103}\) Id.

\(^\text{104}\) Services’ Response to Request for Information 49 (November 21, 2013).

\(^\text{105}\) Id.

\(^\text{106}\) Army Response to Request for Information 138 (April 11, 2014) Responses are still pending from the Air Force, Navy, and Marines, as the RSP recently submitted this additional request for information.

\(^\text{107}\) See SAPRO PowerPoint (Oct. 23 2013).

\(^\text{108}\) Id.

\(^\text{109}\) DoDI 6495.02 encl. 5, ¶ 7[a].

\(^\text{110}\) See SAPRO PowerPoint (Oct. 23, 2013) at 9.

\(^\text{111}\) Id.
to command (66 percent); and they did not think the report would be kept confidential (51 percent). These
survey results suggest that victims do not believe they can control the information about having been hurt if
they make a report of sexual assault.

2. Methods for Reporting Sexual Assault

“Once you look into the face of a fellow Service member and tell them that you’re sorry
they were raped because you were too afraid to come forward, it doesn’t go away.”

A sexual assault victim who decides to report the incident may do so in a number of different ways. He or she
may seek emergency medical attention and report the assault to a healthcare provider; reveal the assault to a
trusted friend, spiritual advisor or family member; may seek assistance at a local rape crisis center; or, of course,
report the sexual assault directly to law enforcement. In addition, military sexual assault victims may choose to
report a sexual assault to a member of his or her chain of command (including the commanding officer) or any
number of other military professionals, including a SARC or VA at his or her installation, command, or unit.

DoD’s preference is for victims to file unrestricted reports, which allow commanders to both hold offenders
accountable and facilitates the provision of services to victims. However, like some civilian jurisdictions, DoD
recognizes some victims’ preference to confidentially seek services without the publicity and emotional stress
of an investigation and possible court-martial, and thus implemented the restricted reporting option in 2005.
Restricted reporting is intended to “give victims additional time and increased control over the release and
management of their personal information and empowers them to seek relevant information and support to
make more informed decisions about participating in the criminal investigation.”

Military sexual assault victims and adult military dependents have the choice to make either a restricted
or unrestricted report. An unrestricted report triggers an investigation by the Service’s Military Criminal
Investigative Organization (MCIO) and notification of the victim’s and alleged offender’s commander.
Victims who file an unrestricted report are assigned a SARC or VA who will facilitate the victim’s access to
medical treatment, counseling and other services related to the assault, including a Sexual Assault Forensic
Examination.

A restricted report allows a victim to confidentially disclose the assault to SARCs, VAs, or healthcare providers
in order to receive treatment and services. However, a restricted report does not trigger a law enforcement
investigation and the command is notified only that an alleged sexual assault occurred, but is not provided the
victim or offender’s name or any other personally identifiable information. While a victim who files a restricted
report may convert it to an unrestricted report at any time, the converse is not the case – once a victim files an

112 Id.
113 Transcript of RSP Victim Service Subcommittee Meeting 12 (March 13, 2013) (testimony of E.M.).
114 DoDI 6495.02 encl. 4, ¶ 3.
115 DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 [hereinafter FY12 SAPRO
116 DoDI 6495.02 encl. 4, ¶ 3(b).
117 Id. at encl. 4, ¶ 1b(3). While a chaplain or legal assistance attorney may engage in confidential communications with a victim to
provide advice and support, DoD policy prohibits either from accepting a Restricted Report; a chaplain or legal assistance attorney
must refer the victim to a SARC to make the official election of a Restricted or Unrestricted Report. Id.
III. VICTIM SERVICES

unrestricted report it may not be converted into a restricted report, although the victim can at any time decline to cooperate in the law enforcement investigation.\textsuperscript{118}

Some military professionals such as chaplains, legal assistance attorneys, defense counsel and Special Victims Counsel have protected, privileged, and confidential relationships with victims. A victim's disclosure of a sexual assault to these professionals does not need to be reported to law enforcement or the command. None are permitted to accept a formally documented restricted report under DoD policy.\textsuperscript{119} However, if in the course of an otherwise privileged communication with a chaplain or legal assistance attorney, a victim indicates that he or she wishes to file a restricted report, the chaplain or attorney must facilitate contact with the SARC or VA for reporting purposes.\textsuperscript{120}

Incomplete Reports

If a victim approaches a SARC or VA and begins to make a report, but then changes his or her mind and leaves without completing and signing the report, the SARC or VA is not required to inform investigators or commanders about the report and will not produce the report or disclose the communications surrounding the report.\textsuperscript{121}

Reports to a “Confidante” and Third Party Disclosure

A victim's communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a restricted report. However, “if the person to whom the victim confided the information is in the victim's chain of command or DoD law enforcement, there can be no restricted report.”\textsuperscript{122}

When a commander or law enforcement official receives information about a sexual assault from an independent source, even if the victim has already made a restricted report, an independent investigation of the incident must begin, regardless of the victim's wishes.\textsuperscript{123}

However, if there was a restricted report made prior to the investigation, a victim’s communications with a SARC, VA or healthcare personnel, including the results of the SAFE, remain confidential and may not be disclosed unless a specific exception applies. All personnel involved with the investigation and prosecution of sexual assault cases should honor a victim’s decision at any time to decline to participate in an investigation or prosecution, although the investigation may continue regardless of the victim's participation.\textsuperscript{124}

\textsuperscript{118} Id. at encl. 4, ¶ 1.a.b.

\textsuperscript{119} Id. at encl. 4, ¶ 1b(1), (3). A SARC, Victim Advocate, or Medical Professional may receive a restricted report; only a SARC, VA and Healthcare Provider may receive a restricted report. Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at encl. 4, ¶ 1.c(3).

\textsuperscript{122} Id. at encl. 4, ¶ 1(c)(1).

\textsuperscript{123} Id. at encl. 5, ¶ 3.h(1); id. at ¶ 1.f(1)

\textsuperscript{124} Id. at encl. 4, ¶ 1.f(2)4
Inadvertent or Improper Disclosures

If a SARC, SAPR VA, or healthcare personnel make an unauthorized disclosure of a confidential communication [including restricted reporting], that person is subject to disciplinary action. Unauthorized disclosure has no impact on the status of the Restricted Report. All Restricted Reporting information is still confidential and protected. However, unauthorized or inadvertent disclosures made to a commander or law enforcement shall result in notification to the MCIO.125

Section 1742 of the FY14 NDAA requires that commanding officers who “receive a report of a sex-related offense involving a member of the Armed Forces in the chain of command of such officer” must refer the report to the appropriate Service MCIO.126 There are currently no exceptions to this requirement, which caused issues for a victim, who told the Subcommittee:

The Victim Advocate that was assigned...actually was trying to figure out how to get me time off, to take care of the things that needed to be taken care of, and then when... [my supervisor] was called, and the word “victim” was mentioned. That made it go unrestricted.127

And as for me, I, my gosh, I wanted to file a restricted report, but it was taken out of my hands [by an inadvertent disclosure] before I was even able to really get anything on paper.128

The Services told the Subcommittee they are addressing the issue of inadvertent disclosure with education and training efforts to ensure Service members and first responders have a clear understanding of reporting options and the exceptions to Restricted Reporting.129 Victim advocates and other support personnel must facilitate access to support and assistance services without revealing personal information when they assist victims who desire that their sexual assault report remain restricted.

Exceptions to Restricted Report Confidentiality

There are several exceptions to the general rule that personally identifiable information, confidential communications, and Sexual Assault Forensic Examination (SAFE) kits associated with restricted reports are confidential. These exceptions generally include:

- When the victim authorizes disclosure in writing;
- When there is an imminent threat to the health or safety of the victim or another person;
- When required for fitness for duty or disability determinations;

125 Id. at encl. 4, ¶ 5.e.
126 FY14 NDAA § 1742 (a), (b), 127 Stat. 672 (2013).
127 Transcript from Subcommittee Meeting 43 (March 13, 2013) (testimony of Mr. I.C.).
128 Id. at 42.
129 DoDI 6495.02 at encl. 5 ¶7.a; see also FY12 SAPRO Report at 23.
III. VICTIM SERVICES

- When required for coordination of direct victim treatment; or
- When required by law.\footnote{DoDI 6495.02 at encl. 4, ¶ 5.b(1) – (5).}

Additionally, healthcare personnel may convey to the victim’s unit commander any possible adverse duty impact related to the victim’s medical condition and prognosis, however, such circumstances do NOT otherwise warrant a restricted reporting exception to policy.\footnote{DoDI 6495.02 at encl. 4, ¶ 5.c.} Therefore, any confidential communications related to the sexual assault may not be disclosed.\footnote{Id. at 98.} The SARC will evaluate the confidential information to determine whether an exception applies, but cannot disclose it until consulting with the command legal office. The SARC or VA must also inform the victim before disclosing information pursuant to an exception.\footnote{Id. at encl. 4, ¶ 5.d.}

G. SEXUAL ASSAULT CRISIS LINE FOR SERVICE MEMBERS

The DoD Safe Helpline, established in April 2011, is a secure and anonymous phone line that provides Active Duty, Reserve, and National Guard service sexual assault victims immediate crisis information about reporting and accessing victim services.\footnote{FY12 SAPRO Report at 30.} DoD owns the Safe Helpline and operates it through a contract with the non-profit Rape, Abuse and Incest National Network (RAINN).\footnote{Id.} The Safe Helpline provides an additional channel for adult Service members to seek one-on-one sexual assault assistance and crisis support tailored to their individual needs, securely and anonymously.\footnote{Transcript from RSP Public Meeting, 96 (November 7, 2013) (Ms. Bette Stebbins Inch).}

Safe Helpline staff members, many of whom are part time, are required to complete a background check and to seventy hours of training on sexual assault, the military, and the neurobiology of trauma.\footnote{Id. at 98.} They also participate in monthly in-service trainings and receive clinical supervision and ongoing support from professional supervisors.\footnote{Id.}

Safe Helpline has a database of military, civilian, and veteran services available to make referrals to callers requesting additional services including SARC and SAPR VA contact information for each of the Military Services, the National Guard and Coast Guard.\footnote{Id.} It can transfer callers directly to installation-based SARC, on-call SAPR VAs, as well as civilian rape crisis centers, Military OneSource, and to other various victim service

\footnotesize{\text{\textsuperscript{130} DoDI 6495.02 at encl. 4, ¶ 5.b(1) – (5).}}
\footnotesize{\text{\textsuperscript{131} DoDI 6495.02 at encl. 4, ¶ 5.c.}}
\footnotesize{\text{\textsuperscript{132} Id.}}
\footnotesize{\text{\textsuperscript{133} Id. at encl. 4, ¶ 5.d.}}
\footnotesize{\text{\textsuperscript{134} FY12 SAPRO Report at 30.}}
\footnotesize{\text{\textsuperscript{135} Id.}}
\footnotesize{\text{\textsuperscript{136} Transcript from RSP Public Meeting, 96 (November 7, 2013) (Ms. Bette Stebbins Inch).}}
\footnotesize{\text{\textsuperscript{137} Id. at 98.}}
\footnotesize{\text{\textsuperscript{138} Id.}}
\footnotesize{\text{\textsuperscript{139} FY12 SAPRO Report at 30.}}
entities. The service is intended to personally connect the victim with a resource representative for further assistance.

If the local contact is unavailable, Safe Helpline staff procedure is to offer contact information to the caller to follow up with support personnel at a later time.

In addition to the phone line, a Service member may log on to the Safe Helpline website which allows users to receive live, one-on-one confidential help with a trained professional through a secure instant-messaging format. The website also provides vital information about recovering from and reporting sexual assault. The online helpline has “helped over 4,000 people... and it is a secure environment because... [SAPRO] wanted to ensure that this would be an anonymous service and that it would be confidential.” Safe Helpline texting capabilities also provide immediate, up-to-date contact information for SARC's and medical, legal, spiritual, and Military Police personnel.

Victims can also seek assistance by accessing the Safe HelpRoom and the Safe Helpline Application for smart phones. Mr. Scott Berkowitz, the Founder of RAIIN, told the RSP that, “[I]n a couple of ways, DoD victim care...is actually ahead of the civilian world. They’ve recognized that technology can be valuable and cost-effective in treating survivors... this understanding has led DoD to create two services that have no civilian parallel: the Safe HelpRoom and Safe Helpline app.” The Safe HelpRoom is an online peer-to-peer support system which allows survivors in the military to help each other in a safe and anonymous community. “Well trained moderators provide help while the Service members themselves get to discuss the topics most important to them. It’s a tool that could be of great use in the civilian world... ” The Safe Helpline app enables survivors to create a “customized self-care plan, so it’s particularly useful for those who are stationed abroad.” Victims are able to “manage the short and long-term effects of sexual assault... [and to] create a tailored self-care plan that can be stored for future reference and access without internet connection.”

140 Id.
141 Id. The practice of directly connecting a victim to a service provider is known as a “warm hand-off.”
143 Transcript from RSP Public Meeting, 98 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).
144 Id.
145 Id. at 99
146 Id. at 97
147 Transcript from RSP public Meeting 350 (November 7, 2013) (testimony of Mr. Scott Berkowitz, Founder and President of Rape, Abuse, and Incest National Network (RAINN)).
148 Id.
149 Id.
150 Id.
151 Id.
152 Transcript of RSP Public Meeting 100 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).
III. VICTIM SERVICES

DoD’s intent is for the Safe Helpline to be the sole DoD hotline to provide crisis intervention and to facilitate victim reporting through connection to the nearest SARC and other resources, as warranted.\textsuperscript{153} However, each of the Military Services also has local base and installation SARC or SAPR VAs, and advertises contact information for these individuals.\textsuperscript{154}

Not all of the local phone lines are staffed with personnel who answer the phone on a seven-day/twenty-four-hour basis.\textsuperscript{155} In addition, not all the Military Services websites have the DoD Safe Helpline phone number listed as a primary twenty-four-hour per day phone line for contact about a sexual assault incident or question.\textsuperscript{156} This can create confusion in military members who call a local number and receive a pre-recorded message, rather than a live person.\textsuperscript{157}

Safe Helpline staff members also conduct audits of the phone numbers the Military Services provide to ensure the phone numbers for SARCs and VAs are current and accurate.\textsuperscript{158} Nevertheless, Subcommittee members heard from some victims and victim support personnel that victims are sometimes provided a phone number when personal contact is not made, and that the Safe Helpline provided some out of date or incorrect numbers.\textsuperscript{159}

In a DoD survey, sixty-six percent of women and seventy-three percent of men indicated that they are aware of the DoD Safe Helpline.\textsuperscript{160} However, some witnesses told the Subcommittee that it would be more helpful if the Safe Helpline number was easily remembered, such as the website, which is SafeHelpline.org.\textsuperscript{161}

\begin{itemize}
  \item \textsuperscript{153} DoDI 6495.02 at encl. 2, ¶ 6.y(1). However, the DoD Safe Helpline does not replace local base and installation SARC or SAPR VA contact information. \textit{Id.} at encl 2, ¶ 6.y(2).
  \item \textsuperscript{155} Transcript of RSP Victim Service Subcommittee Meeting 115–16 (testimony of Ms. P.C.)(recounting her experience of calling a hotline number and receiving a recorded message).
  \item \textsuperscript{156} See Fort Bragg SHARP Website available at http://www.bragg.army.mil/18abc/SHARP/Pages/default.aspx; see also Fort Hood SHARP Website available at http://www.hood.army.mil/sharp.
  \item \textsuperscript{157} See, e.g., Transcript of RSP Victim Services Subcommittee Meeting 72 (March 13, 2014) (testimony of sexual assault victim identified as MS. PC)(indicating she called a hotline and was not going to leave a message after it went to voice mail).
  \item \textsuperscript{158} Transcript from RSP Public Meeting, 98 [Nov. 7, 2013](Testimony of Bette Stebbins Inch).
  \item \textsuperscript{159} See Minutes from RSP Victim Services Subcommittee site visit, Joint Base San Antonio (December 13, 2013).
  \item \textsuperscript{160} 2012 WGRA, at 5.
\end{itemize}
H. SERVICES AVAILABLE TO MILITARY SEXUAL ASSAULT VICTIMS FILING A RESTRICTED OR UNRESTRICTED REPORT

Whether a sexual assault victim chooses to make a restricted or unrestricted report, the following DoD programs and personnel are available to provide support and assistance to military victims.

SARC and SAPR VA

A SARC is required to respond, in person, to every reported victim of a sexual assault, although the SARC may delegate this duty to a SAPR VA. SARC and SAPR VAs must maintain 24/7 availability at each installation or deployed area. A SARC is responsible for providing victims non-clinical support and crisis intervention and assisting the victim in making an official incident report, restricted or unrestricted.

Special Victims’ Counsel

Military sexual assault victims who make either restricted or unrestricted reports are eligible for Special Victim Counsel (SVC) representation. Immediately upon contacting a first responder, such as a SARC, SAPR VA, law enforcement or command, a sexual assault victim must be notified of his or her right to representation by an SVC, a brief description of the role of the SVC and an explanation that SVC may be declined or requested at any time.

Medical Services

The FY 2014 NDAA requires assignment of a Sexual Assault Nurse Examiner (SANE) to all Military Treatment Facilities (MTFs) with 24-hour emergency departments. Other MTFs must have access to a SANE. Additionally, per DoD policy, sexual assault victims receive priority and are treated as emergency cases at all MTFs. A Sexual Assault Forensic Exam (SAFE) must be offered and encouraged.

Mental Health Services

Sexual assault survivors are at increased risk for depression, anxiety, and PTSD, all of which confer functional limitations and have long-lasting effects on an individual’s well-being. “Regardless of whether survivors are male or female, whether sexual abuse occurred prior to the military or during service, whether the

162 DoDI 6495.02 at encl. 6, ¶ 1g(1), (2).
163 Id. at ¶ 4.i; id. at encl. 6, ¶ 1g.
164 Id. at encl. 6, ¶ 2b(2); id. at encl. 6, ¶ 1.h.
165 See UNITED STATES AIR FORCE SPECIAL VICTIM’S COUNSEL RULES FOR PRACTICE AND PROCEDURE, Rule 6 (July 1, 2013); see also UNITED STATES ARMY, SPECIAL VICTIM COUNSEL HANDBOOK, Chapter 1 (November 1, 2013); Transcript of RSP Public Meeting 106-45 [November 8, 2013] (testimony of SVC Program Heads).
166 UNITED STATES ARMY, SPECIAL VICTIM COUNSEL HANDBOOK, Chapter 2–1 (November 1, 2013). See section IV, infra, for a complete description of the SVC program and the Subcommittee’s findings and recommendations with regard to the program.
167 FY14 NDAA, at § 1725, 127 Stat. 672 [2013].
168 DoDI 6495.02 at ¶ 4.l.
169 Transcript of RSP Victim Service Subcommittee Meeting 235 (February 26, 2014) (testimony of CAPT Mike Colston).
manifestations are physical or emotional, DoD has policies and procedures in place to ensure...a structured, competent, coordinated continuum of care for survivors.\textsuperscript{170}

**Community Services**

Military sexual assault victims are also able to access community services. One of the responsibilities of SARCs and Family Advocacy DAVAs is community outreach to form relationships with community organizations that provide services to sexual assault victims such as rape-crisis centers, local hospitals and law enforcement. The DoD Helpline is an additional resource to connect victims with community resources beyond services available on the installation or base.

**I. Services Available with Unrestricted Sexual Assault Reports**

There are additional programs available to the victim who makes an unrestricted report of sexual assault beyond those available to those who make a restricted sexual assault report in the military.

**Expedited Transfer**

Since 2011, victims who make an unrestricted report of sexual assault have the option to request an expedited transfer from their assigned command or base.\textsuperscript{171} The SARC, VA, or the Service member’s commanding officer (CO) must notify the Service member of the option to request a temporary or permanent expedited transfer from their assigned command or installation at the time of the report, or as soon as practicable.\textsuperscript{172}

Once the victim makes the request and the commander determines that the report of sexual assault is credible\textsuperscript{173} the commander must process the transfer request within 72 hours.\textsuperscript{174} If a commander denies the request for transfer, it must go to the first general officer in the chain of command, who will endorse the transfer or forward the request to a higher level to make the final determination.\textsuperscript{175}

One Air Force SARC told the RSP, “[w]ith the program changes that have been made since 2005 until now, I think expedited transfers have been huge for victims . . . .”\textsuperscript{176} Victim advocate groups also attest to the necessity of this policy for victim care. In his testimony before the Response Systems Panel, Mr. Greg Jacob, the Director for the Service Women’s Action Network, acknowledged, “. . . policies that allow victims to transfer away from hostile units . . . go a long way in ensuring that victims are not in continued jeopardy.”\textsuperscript{177}

\begin{itemize}
  \item \textsuperscript{170} Id. at 235-236.
  \item \textsuperscript{172} Id.; see also DoDI 6495.02 at encl.5 ¶5.b.
  \item \textsuperscript{173} See DTM 11-063. A credible report determination is made after considering the advice of the supporting judge advocate, or other legal advisor concerned, and the available evidence based on an MCIO’s investigations information. Id.; see also, DoDI 6495.02 at encl.5 ¶ 5.b(5).
  \item \textsuperscript{174} See DTM 11-063; see also, Transcript from RSP Public Meeting 160 (November 7, 2013) (testimony of Dr. Christine Altendorf, U.S. Army, Director, Sexual Harassment/Assault Response and Prevention (SHARP)).
  \item \textsuperscript{175} Transcript from RSP Public Meeting 160 (November 7, 2013) (testimony of Dr. Christine Altendorf, U.S. Army, Director, Sexual Harassment/Assault Response and Prevention (SHARP)).
  \item \textsuperscript{176} Transcript of RSP Public Meeting, 233 (November 7, 2013) (testimony of Master Sergeant Stacia Rountree, U.S.A.F., Victim Advocate, 11th Wing, Andrews AFB).
  \item \textsuperscript{177} Transcript of RSP Public Meeting, 339-340 (November 7, 2013) (testimony of Mr. Greg Jacob, former Marine, Policy Director, Service
\end{itemize}
Representatives from each Military Service told the RSP that ninety-nine to one-hundred percent of expedited transfer requests were approved within the individual Services. In 2012, 216 of 218 requests for expedited transfer made by victims from all Military Services were approved.

However, expedited transfers are not available to those who file a restricted report. If a Service member files a restricted report and requests an expedited transfer, the Service member must convert his or her restricted report to an unrestricted report to qualify for the transfer.

This results in a difficult choice for some victims, particularly when the offender lives or works nearby. For example, one victim told the Subcommittee that, despite her preference to keep her report restricted, she had to convert it to unrestricted in order to move away from her assailant, who lived next door. She stated, “[w]hile I had filed a restricted report, I was unable to have my room moved due to clauses in [the reporting requirements], where if your command is notified, it automatically becomes unrestricted. So I lived next to the person that assaulted me for two weeks after [the assault occurred].”

**Command Support**

A unit commander who receives an unrestricted report of an incident of sexual assault is required to immediately refer the matter to the appropriate Military Criminal Investigation Organization (MCIO). A commander can issue a Military Protective Order (MPO) to provide for the victim’s protection from the offender if necessary and may consider moving the alleged offender out of the unit, rather than the victim. The commander can ensure that a victim is receiving needed services and is not ostracized or bullied by others in the unit.

**“Eight-Day” Report**

The FY 2014 NDAA requires an incident report be provided to the installation commander, the first officer in the grade of O-6, and the first general officer or flag officer in the chain of command of the victim and the offender (if the offender is a member of the Armed Forces), within eight days of a Service member filing an Unrestricted Report. In addition to ensuring that unrestricted reports of sexual assault have been referred to the appropriate investigatory agency, the report details actions taken, or in progress, to provide the necessary care and support to the sexual assault victim. These actions include connecting the victim to a SARC for

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179 FY12 SAPRO Report at 3.
180 DoDi 6495.02 at encl. 5, ¶ 5.b(2).
181 Id. at encl. 5, ¶ 5.b(2)(b).
182 Transcript of RSP Victim Service Subcommittee Meeting 27 (March 13, 2014) (testimony of Ms. P.C.).
183 DoDi 6495.02, at encl. 2, ¶ 6.i(3).
184 See id. at encl. 5, ¶ 6 (Military Protective Orders).
185 FY14 NDAA, at §1743 (a), 127 Stat. 672 (2013). The statute only specifies that the report is to be submitted by a “designated person.”
186 Id.
187 Id. at § 1743(b).
referral to available services, the dates of such referrals, whether a request for expedited transfer has been made and if so, the processing status, and issuance of any military protective orders in connection with the incident. These reports are in addition to mandatory SARC notification of either a restricted or unrestricted report of sexual assault to the installation commander within 24 hours.

**Victim-Witness Liaison (VWL)**

In general, the law enforcement official or commander responsible for the investigation will inform the victims and witnesses of their right to receive victim/witness services as soon as the investigator is involved in the case. The law enforcement official will assist the victim in contacting the VWL or provide the contact information to the victim. This notification is mandatory by DoD policy and is included in DD Form 2701, detailing a victim's rights, which must be provided to the victim and/or witness immediately upon initiation of an investigation.

**Case Management Group Oversight**

To ensure sexual assault victims are provided the services and support they need, a multidisciplinary team, known as a case management group (CMG), is required to meet on a monthly basis to review and assess actions in response to unrestricted reports of sexual assault, facilitate monthly victim updates, and direct system coordination, accountability, entry of disposition and victim access to quality service. CMG members carefully consider and implement measures to help facilitate and assure the victim's well-being and recovery from the sexual assault, closely monitor the victim's progress and recovery, and confirm that each victim has been informed of available SAPR services, such as counseling, medical care, and legal resources without violating victim confidentiality. Case management groups are generally known in civilian communities as a Sexual Assault Response Team (SART).

The installation commander chairs CMG meetings. The CMG also includes the installation SARC as co-chair, the commander for each victim who's case is being reviewed, all SARCs assigned to the installation, each victim’s VA, MCIO representatives working on a particular case, medical and mental health providers, members of the Staff Judge Advocates Office, and Victim Witness Assistance Program (VWAP) representatives. Each entity is responsible for discussing its individual role in facilitating victim care following a reported sexual assault. One SARC explained the CMG meetings as, “[a]n important tool that helps us to [ensure victim’s needs are met] is the [CMG] meeting. As a SARC, I serve as the co-chair of this meeting with the installation commanding officer where we discuss individual cases to ensure victim care as well as address any systemic issues needing improvement. Additionally, to ensure victim safety, we have a designated individual at the meeting whose responsibility is to provide ongoing safety assessments as the case progresses.”

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188 *Id.* at § 1743(c)(E)(i)-(iv).
189 *DoDI 6495.02*, at encl. 4, ¶ 4.a.
190 *See* *DoDI 1030.02* at ¶ 6.1.
191 The Army refers to these groups as Sexual Assault Review Boards (SARBs).
192 *See* *DoDI 6495.02*, at encl. 9.
193 *See* *id.* at encl. 9 ¶ 2.
194 *Id.* at ¶ 1.c.
J. The Roles and Requirements of Victim Assistance Personnel

1. Sexual Assault Response Coordinator (SARC) and SAPR Victim Advocate (SAPR VA)

The SARC is central to SAPR military victim advocate services. SARCs serve as the single point of contact to coordinate the response when a victim reports a sexual assault and provide non-clinical support to adult sexual assault victims. SARCs are required to respond, in person, to every restricted and unrestricted report of sexual assault on a military installation as soon as they are notified, unless otherwise requested by the victim. The SARC may also designate a VA, who, at the company level, is usually a trained, collateral duty Service member, to respond and speak with the victim. DoD currently has thousands of part-time SARCs and VAs trained and available at military installations in the United States and deployed all over the world, including over 10,000 trained VAs in the Army alone.

SARCs manage an installation or unit’s sexual assault prevention and response program. SARCs have three categories of responsibilities: training, victim care, and managerial duties. These include:

Prevention Training

- Facilitating annual SAPR training for all installation personnel.
- Facilitating briefings on victim advocacy services to Service members, military dependents, DoD civilian employees outside the continental United States (OCONUS), DoD contractors (accompanying the Military Services in contingency operations OCONUS), and other command or installation personnel, as appropriate.
- Training VAs.

196 DoDI 6495.02, at encl. 6, ¶1.a.
197 Id.
198 DoDI 6495.02, at encl. 6, ¶ 1.g(1).
199 Transcript of RSP Meeting 93 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch) VAs are victim advocates who report to the SARC regarding their VA duties. Id.
200 DoDI 6495.02, encl. 6, ¶ 1.g(2).
201 Transcript of RSP Panel Meeting 57 (7 Nov 2013) (testimony of Major General Gary S. Patton), [explaining data from the SAPRO slide presentation] DoD calculates the number of full-time, certified SARCs and VAs required across the Services at 492 SARCs and 492 VAs. Id. As of November 7, 2013, the Director of DoD SAPRO reported ninety-one percent of the SARC positions and eighty-four percent of the VA positions were filled with fully trained and certified personnel. Id. at 58.
203 Transcript of RSP Meeting 92 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).
204 DoDI 6495.02 encl. 6, ¶ 1.h[12].
205 Id. at encl. 6, ¶ 1.h(11).
206 Id.
III. VICTIM SERVICES

- Providing each commander with one-on-one SAPR training within 30 days of him or her taking command. This training includes a trends brief for units and areas of responsibility and the confidentiality requirements for restricted reporting.207

Victim Care

- Performing the duties of a VA, when needed.208

- Responding, in person, to every reported sexual assault victim, or assigning a VA to do so.209

Program Management

- Reporting an unrestricted or restricted (without personally identifying information) sexual assault report to installation commander within 24 hours of an official report.210

- Facilitating the development and collaboration of SAPR public awareness campaigns, including planning local events for Sexual Assault Awareness Month, and publicizing the DoD Safe Helpline on all outreach materials.211

- Acting as a liaison with commanders, DoD law enforcement, MCIOs, and civilian authorities, as appropriate, for the purpose of facilitating victim advocacy 24 hours a day, 7 days a week, for all reported sexual assaults occurring either on or off the installation involving Service members and other persons covered by DoD policy.212

- Assessing the potential impact of State laws governing the reporting requirements for adult sexual assault that may affect compliance with the Restricted Reporting option and develop or revise applicable Memoranda of Understanding and Memoranda of Agreement, as appropriate.213

- Collaborating with Medical Treatment Facilities (MTFs) within their respective areas of responsibility to establish protocols and procedures for direct notification of the SARC and SAPR VA for all reported sexual assaults, and facilitating ongoing training of healthcare personnel on the roles and responsibilities of the SARC and SAPR VAs.214

- Collaborating with local private or public sector entities that provide medical care to Service members or TRICARE eligible beneficiaries who are sexual assault victims and a Sexual Assault Forensic Exam (SAFE) outside of a military installation through a Memorandum of Understanding

207 Id. at encl. 5, ¶ 3.b.
208 Id. at encl. 6, ¶ 1.a.
209 Id. at encl. 6, ¶ 1.h(5).
210 Id. at encl. 6, ¶ 1.h(5). This notification may be extended to 48 hours after the Unrestricted Report of the incident if there are extenuating circumstances in the deployed environments. Id.
211 Id. at encl. 6, ¶ 1.h(13).
212 Id. at encl. 6, ¶ 1.h(17).
213 Id. at encl. 6, ¶ 1.h(18). SARCs must consult with command legal representatives, healthcare personnel, and MCIOs, for advice and coordination. Id.
214 Id. at encl. 6, ¶ 1.h(19).
or Memorandum of Agreement and providing off-installation referrals to the sexual assault victims, as needed.215

- Securing victim consent to transfer case management documents when a victim has a temporary or permanent change of station or deployment. Upon receipt of victim consent, expeditiously transferring case management documents to ensure continuity of care and SAPR services.216

- Documenting and tracking the services referred to and requested by the victim from the time of the initial report of a sexual assault through the final case disposition or until the victim no longer desires services.217

- Entering information into the Defense Sexual Assault Incident Database (DSAID) or Military Service DSAID-interface within 48 hours of the report of sexual assault.218

- Providing information to assist installation commanders manage trends and characteristics of sexual assault crimes at the Military Service-level and mitigate the risk factors that may be present within the associated environment (e.g., the necessity for better lighting in the showers or latrines and in the surrounding area).219

- Participating in the CMG that reviews individual cases of unrestricted sexual assault.220

In the 2012 QuickCompass survey221 of SARC across the Services, the foremost challenge mentioned was that the SARC “has too many responsibilities to effectively perform all of the duties required of the job.”222 In the survey, only fifty-two percent agreed that they had sufficient time to complete SARC duties.223 SARCs and VAs related similar concerns to Subcommittee members on site visits.224 Another frequently mentioned challenge

215 Id. at encl. 6, ¶ 1.h[20].

216 Id. at encl. 6, ¶ 1.h[21]. If the SARC has already closed the case and terminated victim contact, no other action is needed. Id.

217 Id. at encl. 6, ¶ 1.h[22].

218 Id. at encl. 6, ¶ 1.h[22][a]. In deployed locations that have internet connectivity issues, the time frame is extended to 96 hours. Id.

219 Id. at encl. 6, ¶ 1.h[23].

220 Id. at encl. 6, ¶ 1.h[24] [a] The installation SARC shall serve as the co-chair of the CMG. This responsibility is not delegable. If an installation has multiple SARCs on the installation, a Lead SARC shall be designated by the Service concerned, and shall serve as the co-chair. Id. (b) Other SARCs and SAPR VAs shall actively participate in each CMG meeting by presenting oral updates on their assigned sexual assault victim cases, providing recommendations and, if needed, seeking assistance from the chair or victim’s commander. Id.

221 DEFENSE MANPOWER DATA CENTER, 2012 QUICKCOMPASS OF SEXUAL ASSAULT RESPONSE COORDINATORS, SURVEY NOTE [hereinafter 2012 SARC QuickCompass] (March 1, 2013). The 2012 QuickCompass of Sexual Assault Response Coordinators (2012 QSARC) is a replication of a survey of SARCs performed by the Defense Manpower Data Center (DMDC) in 2009 at the request of the Defense Task Force on Sexual Assault in the Military Services (DITSAAMS). Id. The survey is designed to assess the effectiveness of SAPR programs within the Services and Reserve components in areas including resources, procedures, programs, and outreach. Id. The 2012 QSARC was fielded July to August 2012 and completed surveys were received from 289 of 606 surveyed installation SARCs provided to DMDC by Service SAPR program managers. Id. The overall weighted response rate was 52%. Id.

222 Id. at 4.

223 Id. at 2.

224 See Minutes from RSP Victim Services Subcommittee site visit, Fort Hood, Texas (December 9, 2013).
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

III. VICTIM SERVICES

was “the lack of administrative or other staff support to perform all of the functions required to manage
caseloads and perform training.”225 The change most recommended by the SARC was to make all SARC full-
time, preferably civilian, positions.

While the SARC primarily provides management and oversight of victim services, SAPR VAs provide 24/7
direct assistance to victims seeking help.226 VAs are expected to help victims “navigate the military’s response
network.”227 “VAs are not counselors, therapists or investigators, rather they are there to furnish accurate and
comprehensive information on available options and resources.”228 VAs “educate victims so they can make
informed decisions about their care and involvement in the investigative process.”229

SAPR-VAs have three primary duties. First, VAs must be trained in and understand the confidentiality
requirements of restricted reporting and the privilege between military victim advocate and victim codified in
Military Rule of Evidence 514, including its exceptions.230 Second, VAs must facilitate care and provide referrals
and non-clinical support to adult sexual assault victims.231 Third, the VA is directly accountable to the SARC for
providing victim advocacy for adult sexual assault victims.232

Per DoD policy, SARCs and VAs may be civilian or uniformed. They must be credentialed by the Defense
Sexual Assault Advocate Certification Program (D-SAACP), undergo a National Agency Check background
investigation, and must not have a qualifying conviction for a crime of sexual assault or be required to be
registered as a sex offender.233 The Services have varying additional requirements, commonly flexible schedules,
outstanding duty performance evaluations, good communication skills, and emotional maturity.234

DoD policy does not determine rank and pay grade for SARCs and VAs. As a result, there are considerable
variations between the Services for the minimum qualification and experience requirements for SARC and
VA positions.235 While the criteria vary slightly, most civilian SARCs and VAs who are hired to work within the

225 2012 SARC Quick Compass at 4.
226 FY07 SAPRO Report at 6.
227 Id.
228 Id.
229 Id.
231 DoDI 6495.02, encl. 6, ¶ 2.a(3).
232 Id. at encl. 6, ¶ 2.a(3)(b).
233 DEPARTMENT OF DEFENSE, DIRECTIVE-TYPE MEMORANDUM 14–001, DEFENSE SEXUAL ASSAULT ADVOCATE CERTIFICATION
PROGRAM (D-SAACP), Attachment 2, ¶ 4.a (January 14, 2014); DoDI 6495.02, at encl. 6, ¶ 1.b. In the application packet, the
applicant has to sign a Code of Professional Ethics that they’ll follow. They have to submit two letters of recommendation, and there
are four levels of certification that the applicant can apply for. Id. They have to submit two letters of recommendation, one from
their immediate supervisor, one from their commander. Id.
234 Services’ Responses to Request for Information 8a, 9a, 10a, 11a (November 7, 2013).
235 Id. For uniformed SARCs, the Air Force allows only commissioned officers at the captain level (O-3) or above; the Army and Marine
Corps require SARCs to be at least a major (O-4) or chief warrant officer 3; the Army also allows sergeants first class; the Navy has
no rank requirements; and the Coast Guard has only civilian SARCs. Id. As for civilian SARCs, the minimum pay grade ranges by
Service from GS-9 level (the Navy and Marine Corps) to GS-12 (Air Force and Coast Guard). Id.
military’s SAPR program are required to have a victim advocacy background, a bachelor’s degree in a related field and one to three years’ experience with victims.\textsuperscript{236} Generally, the SARC\textemdash select and train the VAs.\textsuperscript{237}

In the FY 2012 NDAA, Congress emphasized the importance of SARC and VA training by codifying a mandate for the Secretary of Defense to establish a professional and uniform training and certification program for SARC\textemdash recruit, select and train the VAs.\textsuperscript{238} To fulfill this requirement, SAPRO established the DoD Sexual Assault Advocate Certification Program (D-SAACP) in 2012 to standardize and professionalize the roles of SARC\textemdash recruit, select and train the VAs across the Services.\textsuperscript{239} The certification program was developed in collaboration with civilian subject matter experts from the Department of Justice’s Office of Victims of Crime, National Organization of Victim Advocates (NOVA), the National Advocate Credentialing Program (NACP), and the National Victim Assistance Standards Consortium.\textsuperscript{240}

DoD standards for victim assistance services apply to: 1) the SAPR Program, 2) the Family Advocacy Program (FAP), 3) the Victim Witness Assistance Program (VWAP), and 4) the Military Equal Opportunity Program.\textsuperscript{241} The DoD policy is based on standards established by the National Victim Assistance Standards Consortium in 2003,\textsuperscript{242} and categorizes its provisions into the areas of competency, ethics, and “foundational” standards.\textsuperscript{243} There are fifty-one specific standards that victim assistance personnel are expected to understand and meet.\textsuperscript{244}

The D-SAACP has three program objectives: 1) to provide a national credential for SARC\textemdash recruit, select and train the VAs, 2) to establish a competency framework for training SARC\textemdash recruit, select and train the VAs, and 3) to develop an oversight and evaluation plan to train DoD personnel to provide advocacy services.\textsuperscript{245}

As of October 1, 2013, all SARC\textemdash recruit, select and train the VAs must be certified by D-SAACP prior to beginning SAPR duties.\textsuperscript{246} To receive certification, an applicant must first complete 40 hours of NACP-approved victim advocacy training.\textsuperscript{247}

\begin{itemize}
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} National Defense Authorization Act for Fiscal Year 2012, PUB. L. NO. 112-81, [hereinafter, FY12 NDAA], § 584; see also DOD SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE U.S. ARMY 2 (January 22, 2013); Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP) 2 (January 7, 2012); DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES (DTF-SAMS) Report Recommendation 6a, (December 1, 2009).
\item \textsuperscript{239} Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP), Section 1.1 (January 7, 2012).
\item \textsuperscript{240} Id.
\item \textsuperscript{241} U.S. DEPT OF DEF. DIRECTORY [hereinafter DoDI] 6400.07, STANDARDS FOR VICTIM ASSISTANCE IN THE MILITARY COMMUNITY (November 25, 2013).
\item \textsuperscript{242} Id. at ¶ 1.a (referencing DeHart, D.D. (2003) National Victim Assistance Standards Consortium; Standards for Victim Assistance Programs and Providers. Columbia, SC: Center for Child and Family Studies, University of South Carolina).
\item \textsuperscript{243} Id. at encl. 2.
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} See Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP) (January 7, 2012).
\end{itemize}
In addition, each SARC and VA must complete an application, submit two letters of recommendation, sign a Code of Professional Ethics, and complete a National Agency Check (NAC) to be eligible for certification.\footnote{DEPARTMENT OF DEFENSE, DIRECTIVE-TYPE MEMORANDUM 14-001, DEFENSE SEXUAL ASSAULT ADVOCATE CERTIFICATION PROGRAM (D-SAACP), Attachment 2, ¶ 4.a, 4.b(1) (January 14, 2014); see also DEPARTMENT OF DEFENSE, FORM 2950, DEPARTMENT OF DEFENSE SEXUAL ASSAULT ADVOCATE CERTIFICATION PROGRAM APPLICATION PACKET (October, 2012).} In order to maintain the certification, SARCs and VAs complete thirty-two hours of NACP-approved continuing education training every two years and certifications may be revoked at any time for failures to meet program standards or misconduct.\footnote{Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP) (January 7, 2012).} According to the NOVA website, all of the Services have NACP-approved training programs.\footnote{Approved courses include: U.S. Army Sexual Harassment/Assault Response & Prevention Certification Course; U.S. Air Force Sexual Assault Training Program; U.S. Coast Guard Victim Advocate Training; U.S. Forces Korea Sexual Assault Victim Advocate Training; U.S. Marine Corps Sexual Assault Prevention & Response Program Uniformed Victim Advocate Training; U.S. Navy SARC with SAVI Training Program; and U.S. Navy Sexual Assault Victim Intervention (SAVI) Training Program. See National Organization for Victim Assistance (NOVA) website available at http://www.trynova.org/help-crime-victim/nacp/nacp-pre-approved-training/.} There are four levels in the Certification Program. Level one is intended for uniformed, collateral duty SARCs and requires successful completion of the certification training and two letters of recommendation, but no experience. Level two is for full-time SARCs and VAs and requires 3,900 hours of sexual assault victim advocacy experience. Level three requires 7,800 hours of victim advocacy experience; level four requires 15,600 hours of victim advocacy experience.\footnote{Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP), ¶ 4 (January 7, 2012).}

SAPRO conducted a training observation for each Service and the National Guard Bureau and issued a report for each Service, assessing the extent to which standards and policy requirements are effectively incorporated into the training of SARCs and VAs.\footnote{See DOD SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE U.S. ARMY 2 (January 22, 2013). *This report is in response to the requirement in DoDI 6495.02 for Services and the National Guard Bureau to submit a copy of their SAPR training programs, or SAPR training elements, to the Under Secretary of Defense (Personnel & Readiness) through the SAPRO for evaluation of consistency and compliance with DoD SAPR training standards contained in DoDI 6495.02. * Id. at 2; see also DOD SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE U.S. AIR FORCE (January 31, 2013); DOD SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE U.S. NAVY (March 8, 2013); DOD SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE U.S. MARINE CORPS (February 22, 2013); DOD SAPRO, OBSERVATION OF SEXUAL ASSAULT RESPONSE COORDINATOR (SARC) AND VICTIM ADVOCATE (VA) SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING: REPORT TO THE NATIONAL GUARD BUREAU (January 25, 2013).} These reviews focused on evaluating training practices and methods as well as evaluating course content against DoDI 6495.02, DoD Standards for Victim Assistance Services and the D-SAACP SARC/VA competency framework.\footnote{See id.}

DoD SAPRO deployed teams of military personnel along with training and subject matter experts to observe training courses to conduct the training observations.\footnote{See id.} The style and content of the report produced after observation of the training of each Service’s course were not consistent, indicating that standardized evaluation...
criteria were not used to evaluate programs across the Services.255 Each report detailed strengths of SARC and VA training and provided recommendations for improvement. Consequently, none of the reports are directly comparable, and do not provide the necessary information for evaluating the consistency of training across the Services.256

2. Family Advocacy Domestic Abuse Victim Advocates (DAVA)

Since 2004, DAVAs have been a required component of DoD FAP.257 The advocates are considered crucial to the FAP program because they are “sometimes the first person who sees the victim, who walks into the process, gets them to their court appointment, helps them get a civilian protection order if needed, help talk to the command about military protection orders; they are with the victim at any location and help them through the whole process.”258

FAP continues to handle domestic sexual abuse because it “ha[s] the licensed clinicians...the treatment and it has just been in existence and what [they]’ve done all these years and it’s working.”259 SAPR handles all other sexual assault cases. There is still cross-over with FAP and SAPR programs in several areas. For instance, domestic abuse cases are frequently reported via the Safe Helpline.260 The FAP program, like SAPR, offers a restricted reporting option for adult domestic abuse victims who wish to obtain services without involving law enforcement or command.261 Adult domestic sexual assault victims are also eligible for Special Victim Counsel.262 The installation SARC and the installation FAP must coordinate when a sexual assault occurs within a domestic relationship or involves child abuse.263

DAVAs are organized differently by Military Service. For instance, in the Navy and Marine Corps, the FAP is its own line function operating closely with medical assets for consultation, evaluation, and treatment.264 In the Air Force, the FAP is integrated into the medical system. Army FAP offers clinical services under the medical system, while Army Community Service conducts prevention services.265

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255 See id.
256 See id.
257 Transcript of RSP Victim Service Subcommittee Meeting 244 (February 26, 2014) (testimony of Katherine Robertson, DoD Family Advocacy Program Manager); See DEFENSE TASK FORCE ON DOMESTIC VIOLENCE (DTFDV) – 2003 THIRD YEAR REPORT (2003) (One of the recommendations from the DTFDV established by Congress in 2000, was for DoD to implement a “Victim Advocate Program” system-wide and to establish collaborative partnerships and working agreements with local civilian authorities). Id. at vii.
258 Transcript of RSP Victim Service Subcommittee Meeting 245 (February 26, 2014) (testimony of Katherine Robertson).
259 Id. at 247.
260 Id. at 256.
261 See DoDI 6400.06 encl. 3; see also Transcript of RSP Victim Service Subcommittee Meeting 244 (February 26, 2014) (testimony of Katherine Robertson). A domestic violence Restricted Report may be made to a victim advocate, a FAP clinician, or healthcare providers, allowing a victim to get services, medical treatment, and counseling without command or law enforcement being notified. Id.
262 Transcript of RSP Victim Service Subcommittee Meeting 249 (February 26, 2014) (testimony of Katherine Robertson).
263 DoDD 6495.01 at ¶ 2.a(3); See also DoDI 6495.02, at ¶ 2.b(2).
264 DEFENSE TASK FORCE ON MENTAL HEALTH 13 (2007).
265 Id.
DAVAs must have a bachelor’s or master’s degree in a social science, victim advocate certification, and a minimum of two years’ experience working in the field of domestic violence advocacy.\textsuperscript{266} In addition to victim advocates, FAP also employs prevention staff for training and outreach.\textsuperscript{267} These primary prevention educators are also required to have a bachelor’s or master’s degree with family service agency experience.\textsuperscript{268}

3. Case Management of SAPR and FAP Programs

The SARC must enter information into the Defense Sexual Assault Incident Database (DSAID) or Military Service DSAID-interface within 48 hours of receiving a restricted or unrestricted sexual assault report.\textsuperscript{269} The SARC must continue to document and track the services referred to, and requested by, the victim from the time of the initial report of a sexual assault through the final case disposition, or until the victim no longer desires services.\textsuperscript{270}

For case management within the FAP program, each Service captures incident data in Service-specific case management systems.\textsuperscript{271} This data is entered by the clinician or administrative staff.\textsuperscript{272} In addition to the case management systems, child maltreatment and domestic abuse data is entered into an automated DoD central registry managed by the Defense Manpower Data Center (DMDC).\textsuperscript{273} The central registry includes information on (1) unsubstantiated reports not linked to an identifiable individual and (2) information on substantiated reports linked to identifiable active duty and retired Service members, DoD civilian employees, contractors and their family members.\textsuperscript{274} The purpose of central registry is not case management, but to analyze the scope of child maltreatment and domestic abuse to inform policy decisions, to support replies to public, congressional, and other government inquiries, to conduct FAP workload analysis, to support empirically based budget projections and to conduct background checks on applicants for employment in DoD sanctioned child care organizations.\textsuperscript{275}

As a result of these separate databases, the military sexual assault data reported annually by SAPRO does not include domestic and intimate partner sexual assaults.

\textsuperscript{266} Transcript of RSP Victim Service Subcommittee Meeting 241 (February 26, 2014) (testimony of Katherine Robertson); see also Katherine Robertson, LCSW, “Department of Defense Family Advocacy Program (FAP) Overview,” PowerPoint presentation to RSP Victim Services Subcommittee (Feb 13, 2014).

\textsuperscript{267} Transcript of RSP Victim Services Subcommittee Meeting 241 (February 26, 2014) (testimony of Katherine Robertson, DoD Family Advocacy Program Manager).

\textsuperscript{268} Id.; see also Katherine Robertson, LCSW, “Department of Defense Family Advocacy Program (FAP) Overview,” PowerPoint presentation to RSP Victim Services Subcommittee (Feb 13, 2014).

\textsuperscript{269} DoDI 6495.02, encl. 6, ¶ 1.h(22)(a). In deployed locations that have internet connectivity issues, the time frame is extended to 96 hours. Id.

\textsuperscript{270} Id. at encl. 6, ¶ 1.h(22).

\textsuperscript{271} Melvina Thornton, DoD FAP, “DAVA response to RSP Victim Services Subcommittee” (April 22, 2014) on file with the RSP.

\textsuperscript{272} Id.

\textsuperscript{273} DoD 6400.1-M-1 at 6.

\textsuperscript{274} Id.

\textsuperscript{275} Id. at C1.2.1 - C1.2.4; see also Melvina Thornton, DoD FAP, “DAVA response to RSP Victim Services Subcommittee” (April 22, 2014) on file with the RSP.
4. Staffing and Workload of SAPR and Family Advocacy Victim Advocates

The structure of SARC and VA positions varies. Most bases have a full-time “installation” SARC who reports directly to the installation commander.\footnote{Services’ Responses to Request for Information 8a, 9a, 10a, 11a (November 7, 2013).} Some Services require a civilian SARC while others have both uniformed and civilian installation SARCs.\footnote{Id.} There are also “command” SARCs who are typically uniformed and work for an operational commander rather than for the installation.\footnote{Id.} These SARCs are generally deployable and often perform the position as a collateral duty.\footnote{Id.}

Typically, there is at least one full-time VA at the installation level.\footnote{Id.} Like SARCs, at least one full-time equivalent VA is required to be assigned to each brigade-sized unit.\footnote{Id.} The installation VAs may be either uniformed or civilians in most Services.\footnote{Id.} Below the brigade level, most VAs are uniformed and have the position as a collateral or volunteer duty.\footnote{Id.}

During Subcommittee site visits, SARCs and VAs told members of the Subcommittee that many VAs never handle an actual sexual assault case because there are far more VAs than sexual assault reports.\footnote{See Minutes from RSP Victim Services Subcommittee site visit, Fort Hood, Texas (December 9, 2013).} Subsequently, some of the VAs indicated they felt unprepared to actually handle a case.\footnote{Id.}

In contrast to the SAPR Program, the FAP is staffed by 1,900 clinicians, victim advocates, installation officers, educators and support personnel across all of the Services.\footnote{See Transcript of RSP Victim Services Subcommittee Meeting 254, 241 (February 26, 2014) (testimony of Katherine Robertson).} While many of these employees do not deploy, they do not encounter the situation experienced by some part time SAPR VAs of rarely handling a case on their own.

K. VICTIM WITNESS LIAISON (VWL)

The objective of the Victim Witness Assistance Program (VWAP) is to lessen the effects of crime on victims and witnesses by helping them understand and participate in the military justice process and to ensure that the victims’ rights are protected.\footnote{See Transcript of RSP Public Meeting 88 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).} Each Service requires the appointment of a VWL to crime victims\footnote{See Transcript of RSP Public Meeting 90 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).} to

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\footnote{276} Services’ Responses to Request for Information 8a, 9a, 10a, 11a (November 7, 2013).
\footnote{277} Id.
\footnote{278} Id.
\footnote{279} Id.
\footnote{280} Id.
\footnote{281} Id.
\footnote{282} Id.
\footnote{283} See Minutes from RSP Victim Services Subcommittee site visit, Fort Hood, Texas (December 9, 2013).
\footnote{284} Id.
\footnote{285} Transcript of RSP Victim Services Subcommittee Meeting 254, 241 (February 26, 2014) (testimony of Katherine Robertson).
\footnote{286} See Transcript of RSP Public Meeting 88 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).
\footnote{287} See Transcript of RSP Public Meeting 90 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch).

In the Marine Corps and the Navy, this position is known as the Victim Witness Assistance Coordinator. See OPNAVINST 5800.7A; MCO 5800.14. However, for purposes of clarity, we will refer to this position as a Victim Witness Liaison throughout this report.
implement the DoD policy requirements. The VWL works for the commander or local staff judge advocate and serves as the victim’s primary point of contact for information and assistance in securing available victim/witness services. The VWAP is not limited to sexual assault victims or those cases prosecuted at courts-martial. Instead, VWAP services are available to all crime victims and witnesses whose cases DoD entities are investigating.

A VWL will ensure that a victim remains informed of his or her rights throughout the military justice process. This includes the right to notification of certain court-martial proceedings, the right to consult with the trial counsel on decisions regarding case disposition, and notification of all available resources. The VWL will also assist the victim or witness in arranging for medical care, notification of employers, counseling, and childcare. During the court-martial of the alleged offender, the liaison coordinates with the case paralegal and the legal office to make all necessary victim and witness travel arrangements and to separate him or her from the accused during the trial. Because the VWL works for the installation legal office, confidentiality does not exist between the victim or witness and the VWL.

The role of the VWL in the military is one of facilitator and coordinator, not advocate. The VWL’s responsibilities include:

- providing victims and witnesses information about available military and civilian emergency medical and social services, advocacy services, military protective orders, restitution, and other available services;
- assisting the victim’s receipt of those services;
- providing the victim with information about the military justice system and notification of certain hearings during that process;
- ensuring the victim is able to consult with government representatives at certain points during the court-martial process; and
- notifying a victim of an offender’s confinement status following the court-martial.

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288 The DoD policy does not set forth an organizational or structural requirement. Therefore, the staffing and organization of the programs vary between the Services.
289 See generally AR 27-10; see also AFI 51-201; MCO 5800.14; OPNAVINST 5800.7A.
290 See id.
291 See id.
292 See DoDI 1030.02, at ¶¶ 6.1,6.2, 6.3.
293 See Transcript of RSP Public Meeting 221 (November 7, 2013) (testimony of Ms. Christa Thompson, U.S. Army Victim Witness Liaison at Fort Carson, Colorado).
294 See id.
Additionally, when appropriate, the VWL consults with victims concerning decisions not prefer charges, pretrial restraint, pretrial dismissal of charges, and negotiations of pretrial agreements and their potential terms. 297 This consultation may be limited when justified by the circumstances. 298 The VWL may act as an intermediary between the defense, prosecution, and the victim or witness. The VWL's role as an intermediary is to ensure victims and witnesses are treated with respect and that there is minimal interference with their lives and privacy. 299 Following the trial, the VWL notifies victims of their post-trial rights and ensures the victim is put in contact with a VWL at the offender's confinement facility. 300

In general, the law enforcement official or commander responsible for the investigation will inform victims and witnesses of their right to receive victim/witness services. DoD policy mandates this notification using a form commanders or investigators must provide the victim and/or witness immediately upon initiation of an investigation. After notifying the victim or witness of the right to assistance, the commander or law enforcement agent provides the victim and/or witness with contact information for the local VWL and helps contact the office, if requested. 301 The victim or witness may also contact the VWL directly. 302 However, the VWL is not a reporting entity for purposes of reporting sexual assault and communications with the VWL are not privileged since the VWL works for the Staff Judge Advocate or installation commander. 303

Eligibility and Background

DoD policy does not require a certain rank or pay grade for an individual to serve as a VWL. DoD merely requires “victim assistance personnel [to] maintain standards of competence. Additionally, they must “exercise careful judgment, apply flexibility and innovative problem solving, and take appropriate precautions to protect victims’ welfare under the guiding principle of ‘do no harm’.”304 As a result, the Services vary considerably in the rank or experience level required of VWLs.

Training Requirements

DoD policy also does not set forth specific training requirements for those selected to serve as a VWL. Rather, the Secretaries of the Military Services must “establish a training program to ensure [victim witness assistance personnel] receive instruction to assist them in complying” with DoD policy. 305 In most of the Services, the Staff Judge Advocate or commander is responsible for providing VWAP training to representatives of all agencies performing victim/witness assistance functions within their jurisdictions. 306 The training generally covers victim’s rights, available compensation, provider’s responsibilities, and requirements and procedures

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297 See id.
298 See id.
299 See id.
300 See id.
301 See AR 27-10.
302 See id.; see also AFI 51-201; MCO 5800.14; OPNAVINST 5800.7A.
303 See id.
304 See id.
305 DoDI 1030.02, ¶ 5.2.7.
306 See generally AR 27-10; see also AFI 51-201; MCO 5800.14; OPNAVINST 5800.7A.
established by DoD policy. Additionally, some of the Services offer annual short courses focused on the VWAP program.

**Case Management**

DoD requires each Service to prepare an annual report which is forwarded to the Undersecretary of Defense for Personnel and Readiness. The Services report the number of victims and witnesses informed of their right to seek VWAP assistance by law enforcement or criminal investigations personnel and the number of victims or witnesses who actually sought assistance. The report serves to quantify VWAP assistance provided. Although the Army has a victim satisfaction form the local Staff Judge Advocate and Victim/Witness Coordinator may review, there is no requirement to use victim satisfaction surveys or to evaluate VWAP services.

**L. VICTIM ADVOCATE - VICTIM PRIVILEGE**

A prior Congressionally convened Task Force recommended DoD establish a victim advocate-victim privilege after discovering victims perceived “interference with the victim- victim advocate relationship and continuing victim advocate services when the victim advocate was identified as a potential witness in a court-martial,” and Service members reported being “re-victimized” when communications between the victim and his or her victim advocate were used to cross-examine them in a court-martial. The President signed an executive order in 2012 establishing Military Rule of Evidence 514, “victim advocate-victim privilege,” which protects communications between victims and their SARC or VA, with some exceptions. The privilege applies to SARCs, SAPR VAs, and DAVAs under the FAP.

A victim’s communications with a VWL are not confidential or privileged since the VWL works for the Staff Judge Advocate or installation commander.

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307 See id.
308 See id.
309 DoDI 1030.02.
310 Id.
312 See generally AFI 51-20; MCO 5800.14; OPNAVINST 5800.7A.
313 Id.
314 MIL. R. EVID. 514 (Victim advocate-victim privilege).
315 See Transcript of RSP Public Meeting 90 (November 7, 2014) (testimony of Ms. Bette Stebbins Inch) (stating that SARCs and SAPR VAs can accept restricted reports, and have privileged communications under MRE 514); and see id. at 228 (testimony of Ms. Christa Thompson) (stating her recommendation as a VWL in the field for over twenty years, that VWLs should have privilege for communications with victims, noting that it is currently limited to victim advocates only which causes confusion with victims when dealing with VWLs).
316 See id. at 110. When asked to compare the victim counsel with the already existing VWL program, Ms. Stebbins made the distinction that there are no privileged communications between victims and their VWL and that VWLs do not have the ability to advocate on behalf of victims for issues like rape shield. Id.
M. CIVILIAN VICTIM SERVICES

Study of Civilian Jurisdictions’ Support for Sexual Assault Victims

On November 8, 2012, the Secretary of Defense wrote to House Armed Services Committee Chairman Howard “Buck” McKeon to tell him the Secretary was directing the Joint Services Committee on Military Justice (JSC) to embark upon a comprehensive fact-gathering process that involved identifying comparable data and best practices from military and civilian jurisdictions in the prosecution of sexual assaults and provision of services to sexual assault victims. To carry out the Secretary’s direction, the JSC formed the Sexual Assault Subcommittee (JSC-SAS) which embarked upon a fact gathering process to study and collect information regarding the investigation, prosecution, and adjudication of sexual assault crimes by prosecutors, police and victim support programs in civilian jurisdictions across the United States and provide the information to the JSC, DoD General Counsel, the House Armed Services Committee, the Senate Armed Services Committee and the RSP.

The JSC-SAS was directed to exercise its independent professional judgment in deciding how many and which civilian jurisdictions to include in its review, and to inquire into any areas that it believed would be helpful to the Response Systems Panel. It was further directed to identify and study jurisdictions that have programs similar to the military Special Victim Counsel program and those that do not have similar programs, as well as to study jurisdictions with victim support programs embedded in the prosecutors’ office and others with victim support programs independent of a prosecutor’s office. In all, the JSC-SAS studied eighteen separate jurisdictions in fourteen different states, and met with prosecutors, investigators and police, defense attorneys, victim advocates, victim rights organizations, and civilian counsel who represent sexual assault victims. The JSC-SAS was specifically directed to provide the relevant data and information it collected to the RSP.

In addition to information from the JSC-SAS, the RSP and Subcommittee heard directly from representatives of civilian agencies and jurisdictions that provide support to sexual assault victims.

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320 Id.


322 Id. at 6-8; see also, JSC-SAS Memorandum.

323 Id.

324 See generally Transcript of RSP Public Meeting (November 7-8, 2013); Transcript of RSP Subcommittee Meeting (November 21, 2013, January 9, 2014, and February 26, 2014).
III. VICTIM SERVICES

Overview of Victim Advocate Services in Civilian Communities

For the most part, non-lawyer victim advocates, not victim’s counsel, are primarily responsible for providing support for sexual assault victims in civilian communities. In jurisdictions where victim counsel are available, victim advocates may work in conjunction with victim’s counsel to provide support to sexual assault victims.325

The JSC-SAS study found that all eighteen of the jurisdictions studied offered victim advocacy services to sexual assault victims, whether the crimes are reported to police, prosecuted in the criminal justice system, or the victim chooses to seek only supportive services.326 Various entities provide victim advocate services, from nonprofit organizations to police departments and the prosecutor’s office.327 Services vary from state to state, and jurisdiction to jurisdiction within states.328 According to the Bureau of Justice Statistics, one in four sexual assault victims utilize services provided either by nonprofit or funded victim advocate organizations.329

In some cases, limited funding dictates the availability of services to sexual assault victims. Since the recession began in 2008, many programs providing advocate support to sexual assault victims have either faced severe cuts or lost all funding. For instance, more than seven percent of rape crisis centers have gone out of business in the last five years; 24 hours centers have declined from about 1, 150 to closer to 1,050.330

In some jurisdictions where comprehensive services remain available, non-profit organization victim advocates provide support for sexual assault victims from report of a crime, through the investigative stage, during trial preparation and throughout the trial or case disposition.331 In at least one jurisdiction, Maricopa County, Arizona, the prosecutor’s office started to take a more active role in the post-trial clemency procedure to ensure that victim’s rights are taken into account at that stage of the criminal justice process.332 In Athens-Clarke County District Attorney’s Office in Athens, Georgia, victim advocates continue to provide services to the victim through the appellate process.333

325 See, e.g., JSC-SAS Report Appendix D (Arizona); JSC-SAS Report Appendix I (Maryland); JSC-SAS Report Appendix L (Oregon); JSC-SAS Report Appendix N (Texas).
326 See JSC-SAS Report Appendices C - P.
327 See JSC-SAS Report Appendices C - P (providing an overview of victim advocacy services provided in eighteen jurisdictions in fourteen states); see also Transcript of RSP Victim Services Subcommittee Meeting 211 (February 26, 2014) (testimony of Mr. Scott Berkowitz) (indicating there are more than 1,000 local sexual assault service programs throughout the United States that respond to an extensive array of mental health, medical, legal and other needs).
328 See JSC-SAS Report Appendices C - P.
330 Transcript of RSP Victim Services Subcommittee Meeting 332 (February 26, 2014) (testimony of Mr. Scott Berkowitz).
331 See Transcript of RSP Victim Services Subcommittee Meeting 256 (November 21, 2013) (testimony of Commander Sherry J. King, JAGC, U.S. Navy, JSC-SAS Subcommittee Member).
332 See JSC-SAS Report Appendix D.
333 Transcript of RSP Public Meeting 263 (November 7, 2013) (testimony of Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia).
Community Based Victim Advocates

The Subcommittee learned about civilian jurisdictions with community based advocates to provide support services to sexual assault victims. These agencies provide initial advocacy services to victims, whether or not the victim decides to report the incident to law enforcement, where permitted by law.

Advocates from community agencies (often known as rape crisis centers) may provide a variety of services, from hotlines and support, to counseling, shelters, community outreach and education. For example, advocates from the community based agency known as The Cottage in Athens, Georgia, will meet with a victim prior to law enforcement involvement. The Cottage meets the victim’s immediate needs through crisis counseling, and the agency provides support while discussing whether to report the offense to law enforcement, or have a SANE exam without police involvement. The Cottage also provides short term counseling, and refers victims to other more in-depth counseling and group therapy.

The YWCA in Grand Rapids, Michigan provides another example of a community based advocacy service that, like DoD, offers services regardless of whether a victim files a report with law enforcement. The YWCA provides support services, including a 24-hour crisis line, as well as SANE exams, and “soft” rooms for victims to speak to law enforcement personnel in a comfortable environment. Short term counseling and group therapy services are also available. A victim’s spouse or family member may also receive some services, including short term counseling services, free of charge through grants to the agency, unless a victims’ insurance policy covers the cost of ongoing counseling services.

Victim advocacy services may co-locate in hospitals or other locations where victims might make an initial report of sexual assault. For example, in Queens and Manhattan, New York, Mount Sinai Hospital’s “hundreds of community advocates...”

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334 See, JSC-SAS Report Appendix Q (providing non-exhaustive list of community agencies in jurisdictions studied by JSC-SAS committee members).

335 See, e.g., JSC-SAS Report Appendix M at 6. (stating Women Organized Against Rape (WOAR) advocates provide services that include a 24-hour hotline, medical accompaniment, adult drop-in groups, counseling and support, accompaniment to court hearings, and support during the court process in Philadelphia); Transcript of RSP Victim Services Subcommittee Meeting 211 (February 26, 2014) (testimony of Mr. Scott Berkowitz).

336 See JSC-SAS Report Appendix H at 3.

337 Id.

338 Id.

339 Transcript of RSP Victim Services Subcommittee Meeting 344–45 (February 26, 2014) (testimony of Ms. Patricia Haist, Director of clinical Services, YWCA West Central, Grand Rapids, Michigan) (stating victims may receive a SANE exam and other services without reporting a crime to police, and there is an agreement with local law enforcement to permit “anonymous” reporting which the victim may later confer to an actual standard report).

340 Id. at 343.

341 Id.

342 Id.

343 Id. at 349.

344 Id.

345 See, e.g., Transcript of RSP Public Meeting 284 (November 8, 2013) (testimony of Mr. Chris Mallios, Attorney Advisor for AEQitas); see also JSC-SAS Report Appendix K-3 (Manhattan, NY) and K-4 (Queens, NY); JSC-SAS Report Appendix M at 5 (Philadelphia, PA); Transcript of RSP Public Meeting 283 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher).
of volunteer advocates” staff the victim advocate program.\textsuperscript{346} Prosecutors, police, and doctors train the volunteer advocates who are available anytime to victims at the hospital.\textsuperscript{347} A prosecutor told the RSP that, "one of the most important ingredients for a successful investigation of these cases is that you have a victim who's strong enough to go forward."\textsuperscript{348} She went on to explain that, "the value of having a nonparty, non-lawyer advocate to offer a victim emotional support at that stage is enormous. The ER advocates are trained and wonderful, and they hand off the case to a specially trained social worker once they get to the DA’s office. [T]hat combination of help helps victims and guides them through what, as you can imagine, is a very confusing and intimidating process."\textsuperscript{349} She credited Mount Sinai’s services in helping victims through the process, calling it a “wonderful program.”\textsuperscript{350}

With some exceptions, a victim’s communications with a victim advocate in a community based organization are typically privileged, as they are in the military. Communication between the victim and advocates from criminal justice based organizations described below, however, have no protection and are subject to release.\textsuperscript{351}

**Victim Advocates in the Criminal Justice System**

The advocate’s role at this juncture is to provide crisis stabilization, advocacy, information, referral, justice support (support services to detectives and prosecutors), case management, court accompaniment, liaison, and assistance with crime victim’s compensation funds to help ensure that victims are best able to participate in the investigative process.\textsuperscript{352} In addition, like community victim advocates, criminal justice based advocates from law enforcement or prosecution offices may provide referrals to mental health counselors and other services.\textsuperscript{353}

In addition to victim support, victim advocates can ensure that police interviews do not discourage cooperation with the investigative process through unintentional use of language or types of questions that can lead a victim to withdraw from the investigative process.\textsuperscript{354} Depending on the jurisdiction, criminal justice based victim advocates are part of the law enforcement agency’s staff, the prosecutor’s staff, or both.

\begin{itemize}
\item \textsuperscript{346} *Transcript of RSP Public Meeting* 228 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher).
\item \textsuperscript{347} Id.
\item \textsuperscript{348} Id. at 227.
\item \textsuperscript{349} Id. at 228.
\item \textsuperscript{350} Id.
\item \textsuperscript{351} See *Transcript of RSP Public Meeting* (Nov. 8, 2013); see also JSC-SAS Report Appendix C (Anchorage, AL); JSC-SAS Report Appendix L (Multnomah and Yamhill Counties, OR).
\item \textsuperscript{352} See, e.g., JSC-SAS Report Appendix L at 5 (Multnomah and Yamhill Counties, Oregon); JSC-SAS Report Appendix T at 2 (Austin, Texas).
\item \textsuperscript{353} See, e.g., JSC-SAS Report Appendix E at 3 (referral services provided by the Victim Advocates from the San Diego Police Department); JSC-SAS Report Appendix J at 4 (the Case Managers from the prosecutor’s office do not provide counseling services themselves, but provide referrals for counseling and other services).
\item \textsuperscript{354} See, e.g., *Transcript of RSP Public Meeting* 253-55 (November 7, 2013) (testimony of Ms. Gail Reid) (discussing that advocacy has changed a prior police practice of threatening victims regarding making false report, or warning that they’re going to “ruin this person’s life” and that bringing about change is only really possible when advocates are empowered).
\end{itemize}
Law Enforcement

Some law enforcement agencies, including the FBI, employ non-lawyer victim advocates to provide advocacy services beginning when a victim reports a sexual assault. Others team with community advocacy agencies that provide these initial victim advocacy services through contract or other agreement with a law enforcement agency.

However, services are not necessarily consistent from one jurisdiction to the next. For instance, while the Portland Police Department employs two full time victim advocates, there are no police based victim advocates in many other Oregon jurisdictions. In Arlington, Virginia, Austin, Texas and Multnomah County, Oregon, for example, advocates from the prosecutor’s or investigator’s office initiate early contact with the victim, and may provide support while the investigation continues or may just provide initial information. When there are advocates from more than one organization providing support to the same victim, the organizations coordinate how, when or whether transitions are made based on their organization’s scope and the victim’s preferences.

Prosecution Based Victim Advocates

From a prosecutor’s perspective… the victim specialist is an invaluable ally. They routinely introduce our victim to the criminal justice system. They explain to our victims what their rights are, and they provide the guidance on the often complicated court process that they are about to embark upon. And they create a critical bond between the prosecution team and the victim. In short, they allow us, the prosecutors, to focus our

See JSC-SAS Report Appendix D at 3 (Maricopa County, Arizona) (explaining that victim advocates are employed by some police departments in Arizona); JSC-SAS Report Appendix E at 3–5 (San Diego, California) (describing San Diego Police Department crisis intervention unit which provides short term support and referral services); JSC-SAS Report Appendix G at 1–3 (District of Columbia) (explaining that both the FBI and local law enforcement agencies such as the Metropolitan Police Department in Washington DC have victim advocates who are assigned as soon as officers respond to a crime scene); see also, Transcript of RSP Public Meeting 260 (December 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau).

JSC-SAS Report Appendix C at 2 (Anchorage, Alaska) (explaining that Standing Together Against Rape (STAR) advocates will accompany a victim through the investigative process in Alaska); JSC-SAS Report Appendix D at 3 (Maricopa County, Arizona) (explaining that in Arizona where there are no police advocates employed by an agency, community victim advocates working out of advocacy centers are present for victim support from the beginning of the investigation); JSC-SAS Report Appendix E at 3–5 (San Diego, California) (explaining that in addition to advocates who work for the San Diego PD, community based advocates are available to accompany victims to law enforcement interviews); JSC-SAS Report Appendix I at 3–4 (Baltimore, Maryland) (explaining that Turnaround has a collaborative relationship with the Baltimore Police Department such that when law enforcement is called to the scene, Turnaround is also notified so a victim advocate can respond).

See, e.g., JSC-SAS Report Appendix L at 5 (Multnomah and Yamhill Counties, Oregon) (explaining that while the Portland Police Department employs two full time victim advocates, there are no police based victim advocates in many Oregon jurisdictions).

Id.

See Transcript of RSP Public Meeting 258 (November 7, 2013) (testimony of Ms. Autumn Jones, Director of Victim Witness Program for Arlington County and the City of Falls Church, VA): see also, JSC-SAS Report Appendix L (Multnomah and Yamhill Counties, Oregon); JSC-SAS Report Appendix N (Austin, Texas).

JSC-SAS Report Appendix M (Philadelphia, Pennsylvania) (explaining that advocates in Pennsylvania coordinate among each other and with the prosecutor’s office, and are familiar with the services each provides to victims).
energy on trial preparation and strategy while at the same time allowing prosecutors to know that our victims are well cared for.\textsuperscript{361}

Ms. Theo Stamos, Commonwealth’s Attorney for Arlington County and the City of Falls Church, VA.

All eighteen civilian prosecution offices the JSC-SAS visited employ victim advocates to assist sexual assault victims throughout their involvement in the criminal justice system.\textsuperscript{362} The titles, roles, and responsibilities vary depending on the practice of the jurisdiction, type of office, other services available, and the scope of the jurisdiction’s victim’s rights law.

Prosecution based advocates can provide a number of services, which vary by jurisdiction, but generally include advising the victim of his or her rights, advocating to prosecutors to ensure the victim’s rights are enforced, advising victims about and supporting victims during court proceedings, and ensuring the victim receives necessary services throughout the process.\textsuperscript{363} They also assist prosecutors during discussions with victims when a case that has been referred by police will not be charged.\textsuperscript{364}

Prosecutors also rely on victim advocates to ensure practical compliance with victim rights requirements, such as notifying victims of court hearings and other proceedings, providing updates to, and helping explain plea agreements.\textsuperscript{365} Advocates and prosecutors indicate that the advocate urges what the victim wants in a case, whether or not it is the same action or outcome the prosecutor believes appropriate.\textsuperscript{366} Prosecutors told the RSP and Subcommittee that they find their victim advocates “crucial,” and “phenomenal.”\textsuperscript{367}

In some jurisdictions such as the New York District Attorney offices in Bronx, Brooklyn and Queens, prosecution offices provide services beyond those normally provided by a victim advocate. They hire social

\textsuperscript{361} Transcript of RSP Public Meeting 215 (Nov. 8, 2013) (testimony of Ms. Theo Stamos, Commonwealth’s Attorney for Arlington County and the City of Falls Church, VA).

\textsuperscript{362} See Transcript of RSP Public Meeting 258 (November 7, 2013) (testimony of Ms. Autumn Jones); Transcript of RSP Public Meeting 258 (November 7, 2013) (testimony of Ms. Ashley Ivey); see also JSC-SAS Report Appendix G (District of Columbia).

\textsuperscript{363} See JSC-SAS Report Appendices C - P.

\textsuperscript{364} See, e.g., JSC-SAS Report Appendix I (a social worker on staff with the State’s Attorney for Baltimore City may work with the victim when discussing a case that the prosecutor has determined cannot be charged); JSC-SAS Report Appendix I (discussing the role a victim advocate in Yamhill County, Oregon plays in discussing the prosecutor’s decision that a sexual assault charge cannot be filed).

\textsuperscript{365} See JSC-SAS Report Appendix F at 3 (Kent County, Delaware) (explaining that victim advocates keep victims informed of all proceedings, work closely with victims whether a case is prosecuted or not, and manage services a victim may be entitled to receive); JSC-SAS Report Appendix H (Clarke County, Georgia) (describing the role of victim advocates to explain victim rights, the court system, prepare the victim to face the accused at trial, and provide crisis intervention); JSC-SAS Report Appendix P (Snohomish County, Washington) (describing duties of victim advocates which include helping the victim understand and navigate the justice system, protecting victim rights by ensuring victims are notified of bail hearings and other hearings the victim is permitted to be present at, and ensuring that their views are accounted for when appropriate).

\textsuperscript{366} Transcript of RSP Public Meeting 259–60 (Nov. 7, 2013)(testimony of Ms. Autumn Jones); Transcript of RSP Public Meeting 265 (testimony of Ms. Ashley Ivey).

\textsuperscript{367} See JSC-SAS Report Appendix F at 3 (Kent County, Delaware) (stating that “The Social Worker victim advocates are “crucial” to the office); Transcript of RSP Public Meeting 284 (Nov. 8, 2013) (testimony of Chris Mallios ) (describing victim advocates who worked in the Philadelphia District Attorney’s Office and local community based advocates).
workers who are available to provide short-term or long-term counseling to victims, in some cases, regardless of whether there is a criminal charge pending.\footnote{368}

### Confidentiality of Communications

One potential limitation for prosecution based victim advocates is that communications between victim and advocate are typically not protected.\footnote{369} In Arizona, which protects statements made to victim advocates from disclosure, there is an exception for exculpatory or impeachment material the prosecutor is required to disclose to the defense.\footnote{370} Communications are subject to release to the prosecutor and potentially to the defense, especially if the communication contains exculpatory or impeachment material.\footnote{371} Advocates generally find these situations are rare, given that the goal is not to “get the story” from victims again, but to provide referrals to resources and services and ensure victims are informed of the status of their case.\footnote{372}

### Education, Training, and Prevention

The JSC-SAS found that in the eighteen jurisdictions it examined, victim advocate training varies from jurisdiction to jurisdiction, and depended on the type of agency in which the advocate works.\footnote{373} For instance, advocates who work in prosecution and police agencies understand the criminal justice system and procedures in the jurisdiction in which they work. They can explain the jurisdiction’s processes and procedures to the victim throughout the duration of the case.\footnote{374} Some prosecutor’s offices require that victim advocates have either a bachelor or master’s degree with majors in criminal justice, social work, or a similar “helping” profession.\footnote{375} In New York, where social workers provide clinical counseling support, they are required to have a master’s degree in social work or an equivalent profession.\footnote{376} Advocates who work in her community agency are also well versed on the criminal justice system, according to one victim advocate who appeared before the RSP.\footnote{377}

Some agencies, such as the YWCA in Grand Rapids, Michigan, have both paid staff and volunteer victim advocates.\footnote{378} Volunteer advocates are not required to be college graduates and are provided 35 to 40 hours of training prior to providing any services, such as court- accompaniment.\footnote{379} Their work is also observed by

\footnote{368} See Transcript of RSP Public Meeting 228 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher); see also JSC-SAS Report Appendices K-1 (Bronx, New York), K-2 (Brooklyn, New York), K3 (Manhattan, New York), K-4 (Queens, New York).

\footnote{369} JSC-SAS Report Appendix K-2 (Brooklyn, New York)(“Social workers...conduct crisis counseling and turn over their notes if any Brady material comes up”).

\footnote{370} JSC-SAS Report Appendix D at 4 (Maricopa County, Arizona) (stating that victim advocates in the Maricopa County District Attorney’s Office have an advocate-victim privilege, but that privilege does not extend to exculpatory material).

\footnote{371} See, Transcript of RSP Public Meeting 258-59 (Nov. 8, 2013) (testimony of Ms. Keli Luther).

\footnote{372} Id.

\footnote{373} See JSC-SAS Report Appendices C – P.

\footnote{374} JSC-SAS Report Appendix K-1 at 3 (Bronx, New York).

\footnote{375} Transcript of RSP Public Meeting 257 (Nov. 7, 2013) (testimony of Ms. Autumn Jones); see also, JSC-SAS Report Appendix M at 6 (Philadelphia, Pennsylvania).

\footnote{376} See, e.g., JSC-SAS Report Appendix K-2 (Brooklyn, New York).

\footnote{377} Transcript of RSP Public Meeting 253-55 (November 7, 2013) (testimony of Ms. Gail Reid).

\footnote{378} Transcript of RSP Victim Services Subcommittee Meeting 354, 360 (February 26, 2014) (testimony of Ms. Patricia Haist).

\footnote{379} Id.at 360.
III. VICTIM SERVICES

a more seasoned volunteer.380 The YWCA also holds monthly in-house training meetings for advocates.381 In San Diego, advocates from a local community advocate organization are required to complete a five week training period, which encompasses both a formal program and shadowing other advocates.382 One prosecutor described that victim advocates in her jurisdiction sometimes gain experience volunteering at a shelter or other community agency working specifically with sexual abuse or domestic violence victims before joining the prosecutor’s office.383

Prosecution offices in several jurisdictions the JSC-SAS visited have formal training for their victim advocates, including observation of court procedures and shadowing an experienced advocate before working independently with victims.384 For example, victim advocates in the Bronx District Attorney’s Office undergo formal training, court observation, and other on-the-job training before receiving their own cases.385 The informal shadowing may include observing criminal trials and meeting with system based advocates. At the Maricopa County, Arizona, District Attorney’s Office, victim advocates are required to have bachelor’s degrees, prior experience as an advocate, parole or probation officer, and complete a training program before beginning to shadow other advocates.386 They typically do not handle cases on their own until working in the office for a few months.387

Multidisciplinary Teams

Like the military’s case management groups, jurisdictions around the country have multidisciplinary sexual assault response teams or groups that meet regularly to discuss specific cases, support for the victim and evidentiary issues relating to the case. For example, San Diego’s Sexual Assault Response Team (SART) reported that these meetings lead to cooperation and problem solving that reaches across disciplines in a community that can result in system changes benefitting all.388 The military is integrated into this team; this integration is considered a “best practice” in the region.389 In the opinion of San Diego SART personnel, these interactions help professionals understand each other’s roles and what each brings to sexual assault investigation, prosecution, prevention and education even better than formal training.390

380 Id. at 360-361.
381 Id. at 361.
382 JSC-SAS Report Appendix E at 5 (San Diego, California).
383 Transcript of RSP Public Meeting 258 (Nov. 7, 2013) (testimony of Ms. Autumn Jones).
384 See, e.g., JSC-SAS Report Appendix K-2 (Brooklyn, New York) (explaining that social workers in the Brooklyn, NY District Attorney’s Office undergo a two week training program that includes training by the ADA’s, speakers, sexual assault victim testimonials, shadowing experienced social works and other on-the-job training for which the new social worker must by “signed off” or certified by an experienced supervisor before beginning duties). JSC-SAS Report Appendix K-1 (Bronx, New York), (explaining victim advocates must complete a two-week observation period in the court-room, in addition to unit training and observation by a supervisor). JSC-SAS Report Appendix E (San Diego, California).
385 Id.
386 JSC-SAS Report Appendix D at 4 (Maricopa County, Arizona).
387 Id.
388 See, e.g., JSC-SAS Report Appendix E (San Diego, California) (discussing San Diego SART).
389 Id. at 9.
390 Id.; see also, JSC-SAS Report Appendix H (Clarke County, Georgia) (explaining multi-disciplinary SART team in Athens-Clarke County Georgia that includes specialized police detectives, victim advocates from District Attorney office and the Cottage, Family Protection or SANE personnel, University of Georgia Police, university police, and the health department).
N. SUBCOMMITTEE ASSESSMENT

Need for Proper Training, Assessment, and Break from New Initiatives

Some victims told the RSP or Subcommittee that the SAPR training they received was not effective, in part because sexual assault training is only one of many required training topics. One victim told the RSP that “[t]he training that we ask of our military, we’re right now at a training burn out. I think about every 30 to 60 days we hear about a new suicide prevention training program, or sexual assault training program and we’ve got to be very specific about what we add to the plate to ensure that it’s supported and it’s effective...We implement and implement and implement. And we really do need to test, evaluate, and then apply that across a bigger spectrum.”

Another victim stated that “[t]he training that we had…was very interesting. In the first couple weeks we get there [to basic training], they compile every little single thing that they need to throw at you in a PowerPoint, death by PowerPoint. We had so many slide shows to go through; EO [Equal Opportunity], SHARP [Sexual Harassment/Assault Response & Prevention], how to do this, how to do that. Um, when it came down to it, I honestly can’t remember one thing particular that came from any of the videos at all because we were so tired, and we were so beat down, and none of those videos helped me at all.”

Many subject matter experts who appeared before the Subcommittee also discussed the need to make programs more effective, particularly by assessing the new initiatives to determine what truly works. A program analyst for the Navy SAPR Program stated that “…I’ve seen that we’ve thrown a lot of different things out there at the field, and, you know, we’ve implemented a lot of different programs, and we’ve flooded our sailors with a lot of information. And I think that it can be a little overwhelming...[I]n talking with the SARCs, they’ve been overwhelmed with all of the different initiatives, and all the different trainings, and all the different things we keep pushing and pushing and pushing. And we’ve got to give it time.”

The Subcommittee consistently asked military victim service providers if they needed anything they did not have already. One witness responded with a sentiment shared by many the Subcommittee talked to,

So what’s missing is time...We need time to implement some of this. The rollout has been so fast and furious in the last two years that we’re exhausted. I honestly feel like I have not completed one quality project since I’ve worked for the Marine Corps. You can’t get the ink dry before you’re working on the next project. I can’t answer emails because we’re so busy rolling out, collecting data, rolling out, collecting data. That’s what we do all day long. Last week we spent a good deal of time – myself and our other three SARCs – on two very acute victims who needed some – a lot of attention. And since our [victims] are spread all over, we’re on the phone and we’re traveling constantly to them. And at the same time I had to weigh, do I get my DoD end of the year report in, or do I get this person hospitalized this week?...The rollout is fast and furious, and we need time to implement what has already been put in place before we roll out anything else because I really don’t think we have a good grasp of what we’ve already created.

391 Transcript of RSP Public Meeting 504 (December 11, 2013) (public comment of Major Melissa Brown).
393 Transcript of RSP Victim Services Subcommittee Meeting 163-164 (November 21, 2013) (testimony of Ms. Tanya Rogers, Program Analyst, USN SAPR Program).
394 Transcript of RSP Victim Services Subcommittee Meeting 187-188 (November 21, 2013) (testimony of Ms. Peggy Cuevas, Director, U.S.M.C. MARFORRES SARC).
III. VICTIM SERVICES

DoD guidelines for the care of military sexual assault victims are comparable to civilian recommendations for care. The next step is to evaluate the extent to which the care that victims actually receive complies with DoD directives for the care they ought to receive. High quality epidemiological data would be useful to establish baseline incidence of military sexual assault and to (1) track future changes in incidence and disclosure, (2) better target prevention and intervention programs, and (3) document risk of sexual assault among Service members relative to civilians.

Moreover, study of the needs of undisclosed victims of military sexual assault who have not disclosed the incident would allow DoD to (1) better understand barriers and facilitators’ of disclosure, (2) improve efforts to increase the likelihood of disclosure, (3) develop strategies to protect victims from being penalized for disclosing an incident, and (4) appropriately scale services to meet the needs of victims who may not have disclosed in the past.

Selecting Personnel for SAPR Positions

The Services and DoD must retain flexibility in assigning military personnel to fulfill the Armed Forces’ worldwide mission. While the Services have improved their selection criteria for victim services personnel, continued focus on putting the right people in these sensitive jobs is warranted. In this area, victims mentioned several qualities important to them.

According to one victim, passion was the key component necessary for effectiveness.

The SHARP program definitely could have been enhanced if they had maybe a live speaker talk about it, or if they just had somebody that was passionate about it. I think that’s where a lot of times it gets kind of get thrown under the rug. We just make people the SHARP, but they’re not passionate about it. They have no desire to, to really get with victims and see how, how they operate because you can’t really fix something that’s a problem if you don’t understand where that person may be coming from. A lot of the times I’ve ran into a few that just, they’re not approachable. As a victim, you need to be approachable. If I can’t approach you with my deepest, darkest secrets, you are nothing. You, you are of no help. All the training you have is nothing if I don’t come forward.

Another victim told the RSP that victims must be able to trust victim services personnel. “Victim advocates, you can’t place people in those jobs that don’t want to do it. They have to be recommended by, I believe, their commanders and I think they should be endorsed…You know I can look in my military formation and tell you which people I would trust. And which people I would ask to do that job if they were interested. But I think it

396 Id.
397 Id.
needs to be a 360 assessment that they’re the right person for the job. And they be supported to do it. And not assigned because we need to put a name on the line.”

Victim services personnel must be professional. One victim described to the Subcommittee that, “[A]fter the charges were formally filed, I was assigned a Victim Witness Liaison. This Victim Witness Liaison was not helpful...I recommend that Victim Witness Liaisons not be a part-time or a collateral duty for people who are not passionate in the job. Any Army personnel, civilian, or military personnel who work with the victims have to want to be there to help, and must have the best training and resources possible.”

Finally, two victims who appeared before the RSP and Subcommittee spoke about consistency. According to the first victim, “After the court-martial, I kind of went, like, on a fast, downward slope and I spent 17 days in a psychiatric hospital afterwards. And I was finally able to get the help I needed. I got lucky, there was a Major TDY [on temporary duty] in there that did a prolonged exposure therapy with me, that really helped a lot.”

Similarly, a Marine victim told the RSP, “...I would say that the one consistency I saw in victim services was inconsistency. There was and is a lack of continuity of care, both while active duty and within the VA hospitals afterwards. I saw over a dozen different counselors from the first time I sought care to the time I left the Marines. When I did finally find a doctor with whom I meshed, a couple months later, I received orders to move to a new base, where I subsequently started the process all over again.”

The Importance of Victim Support

The level and quality of victim support is crucial to victim care and healing after an assault. Victims who spoke to the RSP and Subcommittee received their support from different sources, including the command. One victim stated, “Most important, my leaders never doubted me. They never blamed me. They encouraged, supported, and mentored me to ultimately be successful in the Army.” Mental health professionals can also provide the crucial support a victim needs. “I cannot stress enough the change in the quality of counseling I received, and I cannot stress to you enough how important it is... have qualified, dedicated mental health professionals and social workers available for all of its victims.” SARCs or VAs are also critical, and may be the first person to come in contact with a victim. “[W]hen I went and made my initial report, it was well received. The SARC, she took great care of me. She took the report, gave me the information I needed.”

Another victim commented on the entire range of support he received: “[E]veryone in my process was able to handle everything in a professional manner. So my Commander, my First Shirt, and my SARC, my Victim Witness, like all of them, I still keep in touch with them today, and they're a really great support system and very helpful in my process.”

399 Transcript of RSP Public Meeting 501 (December 11, 2013) (public comment of Major Melissa Brown).
400 Transcript of RSP Victim Services Subcommittee Meeting 23-24 (March 13, 2014) (testimony of Ms. J.P.).
401 Transcript of RSP Victim Services Subcommittee Meeting 27 (March 13, 2014) (testimony of Ms. P.C.).
402 Transcript of RSP Victim Services Subcommittee Meeting 56-57 (Nov. 8, 2013) (testimony of Ms. Sarah Plummer).
403 Transcript of RSP Victim Services Subcommittee Meeting 10 (Nov. 8, 2013) (testimony of Sergeant Major Julie Guerra).
404 Transcript of RSP Victim Services Subcommittee Meeting [Mar 13, 2014] (testimony of Ms. J.P.)
405 Transcript of RSP Panel Meeting 498 (December 11, 2013) (public comment of Major Melissa Brown).
406 Transcript of RSP Victim Services Subcommittee Meeting 34 (Mar 13, 2014) (testimony of Mr. I.C.).
III. VICTIM SERVICES

O. FINDINGS AND RECOMMENDATIONS

Finding 1-1: Over the last five years, Congress mandated and DoD initiated dozens of additions and changes to victim service programs, many in such quick succession that SAPR personnel had to begin implementing a new initiative before fully implementing previously required programs.

Finding 1-2: Due to the number and rapid succession of programs and initiatives, DoD has not performed an assessment and evaluation of all current programs, to determine which are effective, which should be continued, expanded or are duplicative of other programs, and how best to allocate funds and personnel for victim service programs in a resource constrained environment.

Recommendation 1: The Secretary of Defense direct the Military Services to fully implement all of the currently mandated programs, initiatives, and other requirements Congress directed in the FY14 and prior year NDAA's and capture enough data to adequately assess the effectiveness, efficiency, and value of all existing programs with the goal to streamline or eliminate those that are not successful, and to continue, expand, and preserve the programs that are successful.

Recommendation 1a: The Secretary of Defense direct SAPRO to evaluate and assess all programs and initiatives and measure the effectiveness of each to determine which programs and initiatives are effective, which should be continued, expanded, and preserved, and how best to allocate funding for the effective programs and initiatives.

Recommendation 2: The Secretary of Defense develop and implement policy and regulations such that sexual assault victims have the right and ability to consult with an SVC before deciding whether to make a restricted or unrestricted report, or no report at all. Communication made during this consultation would be confidential and protected under the attorney-client privilege.

Recommendation 2a: 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 s/he has the right to speak with an SVC before determining whether to file a restricted or unrestricted report, or no report at all.

Finding 3: In an effort to educate new military recruits about sexual assault and sexual assault prevention, DoD requires that all new Service members receive sexual assault prevention training within fourteen days of their initial entry into the Service. However sexual assaults may occur within the victim’s first week in the military.

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408 Transcript of RSP Victim Services Subcommittee Deliberation Meeting xxx-xxx (March 13, 2014) (discussion by victim who reported being singled out by instructor shortly after arriving at boot camp).
Recommendation 3: The Secretaries of the Military Services direct Commanders of Military Entrance Processing Stations (MEPS) to provide sexual assault prevention information to new recruits that include the definition of sexual assault, possible consequences of a conviction for sexual offenses in the military and information about the DoD Safe Helpline and other avenues for assistance. This recommendation expands upon the Defense Task Force on Sexual Assault in the Military Services’ recommendation to make available, and to visibly post, sexual assault prevention and awareness campaign materials at MEPS.

Finding 4-1: FY14 NDAA, Section 1743, directs the Secretary of Defense to establish a policy to require a written incident report to the installation commander, if any, and the first general officer and first officer in the grade of O-6 in the chains of command of the victim and the alleged offender not later than eight days after a Service member files an unrestricted sexual assault report.

Finding 4-2: The statute does not require tracking of or reporting on services to victims who make restricted reports.

Finding 4-3: This statutory requirement enhances DoD’s requirement for SARC’s to inform commanders within 24 hours of both unrestricted and restricted sexual assault reports set forth in current policy.409

Recommendation 4: The Secretary of Defense direct the Services to require written incident reports no later than eight days following a restricted or unrestricted report detailing the services provided to the victim, when a member of the Armed Forces is the victim.

Recommendation 4a: When restricted reports are made, SAPRO should work with the Services to ensure adequate measures are in place to protect the identity of the victim while providing sufficient information to track the victim’s care.

Finding 5-1: There is no current mechanism for a sexual assault victim to keep a report of sexual assault restricted and request an expedited transfer.

Finding 5-2: DoD policy does not permit victims who file a restricted report of a sexual assault to request a temporary or permanent expedited transfer from their assigned command or installation, or to a different location within their assigned duty or living location.

Finding 5-3: If the commander knows or learns about a sexual assault, the report becomes unrestricted, even if the victim filed or intended to file a restricted report. The commander must notify the MCIO and an investigation must be opened.

Finding 5-4: By nature of their duties, a request for a transfer on behalf of another Service member from a SARC or SAPR VA provides the commander with the information that a sexual assault has taken place and the identity of the victim. Under current policy, the commander will be obligated to start an investigation, even if the victim intended the report to stay restricted.

Finding 5-5: Commanders have inherent flexibility to transfer Service members or place them on limited duty status due to medical conditions. Current DoD policy allows health care personnel to convey to the victim’s

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409 DoDI 6495.02, encl. 4.
unit commander any possible adverse duty impact related to the victim’s medical condition and prognosis, even when the sexual assault report is restricted. Under this policy, confidential communication related to the sexual assault may not be disclosed to the commander.

**Recommendation 5:** Service Secretaries should ensure that command orientation and training address the commander’s authority to make duty or living assignment transfers based upon the recommendation of medical personnel, even if the specific underlying reason for the request for transfer is protected and cannot be disclosed.

**Recommendation 5a:** Training for medical personnel, SARCs, and VAs, should include the options that a commander has available to make or effect transfers based on recommendations from medical personnel.

**Finding 6-1:** The Rape, Abuse, and Incest National Network (RAINN) contracted with DoD to develop and staff the Safe Helpline as a 24/7, anonymous sexual assault hotline for Military Service members.

**Finding 6-2:** Military installations advertise the Safe Helpline as a hotline phone number, but also advertise their own installation numbers which are not always answered 24/7 and instead may require the caller to leave a message.

**Finding 6-3:** The Safe Helpline database of referrals to military victim service providers is not always adequate or accurate to ensure that every caller can be connected to a local victim service provider by the Safe Helpline staff upon request.

**Recommendation 6:** The Secretaries of the Military Services set forth clear guidance that DoD Safe Helpline is the single 24/7 sexual assault crisis hotline for Military Service members.

**Recommendation 6a:** The DoD Safe Helpline establish an easily remembered number similar to its website name of SafeHelpline.org.

**Recommendation 6b:** DoD require the Services to provide the Safe Helpline with sufficient contact information at each installation or deployed location so that local victim service providers can be reached on a 24/7 basis.

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410  *Id.* at encl. 4, ¶5.c.

411  *Id.*

412  See DoDI 6495.02 encl. 2, ¶ 4.y; The Safe Helpline phone number is 877-995-5247 and the website is SafeHelpline.org.

413  See Transcript of RSP Victim Services Subcommittee Meeting 115–116 (Ms. P.C.); Minutes from RSP Victim Services Subcommittee site visit, Joint Base San Antonio (December 13, 2013).

414  DoD uses the term “warm-handoff” for this connection. It is a procedure whereby the Safe Helpline responder conferences a caller with a SARC or other service provider and the responder stays on the line to ensure that a live person answers and to introduce the caller before terminating the responder’s end of the call, or, if there is no answer, the responder is able keep the caller on the line while dialing alternate numbers.
Finding 7-1: The FY 2012 NDAA required the Secretary of Defense to establish a professional and uniform training and certification program for SARC and VAs.\textsuperscript{415}

Finding 7-2: DoD SAPRO evaluated the Services’ SARC and VA training in 2012.\textsuperscript{416} These evaluations, while providing useful information about the Services’ training programs, did not use consistent criteria for evaluation across the Services, and DoD SAPRO did not make assessment of the uniformity of the programs across the Services.\textsuperscript{417} In addition, some of the training materials used by the Services were outdated and contained incorrect information.

Finding 7-3: The FY 2014 NDAA required the Secretary of Defense to submit to the Committees on Armed Services of the Senate and the House of Representatives a report containing a review of the Services’ SAPR training common core elements within 120 days of enactment of the Act.\textsuperscript{418} The review is not complete as of the date of this report.

Recommendation 7: The Secretary of Defense direct that the periodic evaluations of training provided for Services’ SARC and VA be conducted and include an assessment as to whether the training and curriculum across the Services is uniform, is effective, and reflects all existing initiatives, programs, and policies.

Finding 8-1: DoD issued Instruction 6400.07 “Standards for Victim Assistance Services in the Military Community,” on November 25, 2013, based on standards established by the National Victim Assistance Standards Consortium.\textsuperscript{419}

Finding 8-2: The purpose of the Instruction is to establish a baseline of service standards to provide uniformity across programs and across the Services in providing quality victim assistance.\textsuperscript{420}

Finding 8-3: The Instruction identifies four victim assistance-related programs for establishing a baseline of service standards: SAPR, Family Advocacy Program (FAP) Victim and Witness Assistance Program (VWAP), and the Military Equal Opportunity Program (which handles discrimination and sexual harassment).\textsuperscript{421}

Finding 8-4: Each of these programs was established independently and at different times and with somewhat differing constituents. However, there are no additional policies or requirements outside of this instruction that require identifying gaps or redundancies in victim services.

\textsuperscript{415} FY 2012 NDAA § 584(c)(1)

\textsuperscript{416} See SAPRO Training Observation Reports (RFI 31) Note: SAPRO called the reports “Observations” rather than evaluations, though they did evaluate the training programs.

\textsuperscript{417} See Id.

\textsuperscript{418} FY 2014 NDAA § 1733 (c)

\textsuperscript{419} The National Victim Assistance Standards Consortium (NVASC) is an ad-hoc group funded through the United States Department of Justice’s Office for Victims of Crime (OVC) that worked from 1999-2003 to draft a set of standards for programs and individual victim advocates.

\textsuperscript{420} Transcript of RSP Meeting 21 (November 7, 2013) (testimony of Ms. Bette Stebbins Inch); see also DoDI 6400.07

\textsuperscript{421} DoDI 6400.07 encl. 4 ¶1.c.
Finding 8-5: The SVC program, while under the cognizance of the Judge Advocate General of each Service, is not included in the victim assistance standards although also involves a victim advocacy component.

Recommendation 8: The Secretary of Defense direct SAPRO or the DoD IG to assess the roles and responsibilities of SARC, VA, VWL, and FAP personnel, to ensure advocacy personnel are effectively utilized, they are properly delineated; overlap is minimized; and to determine whether their roles should be modified, and whether all current victim assistance related programs should be sustained in this resource constrained environment. Such review should factor the new SVC program recognizing that the Service Judge Advocate Generals are the sole supervisory chain for judge advocates.

Finding 9-1: There are currently over 20,000 trained and certified SARCs and VAs across the Services. Because some part-time uniformed SAPR VAs are assigned to units in which there are few or no reports of sexual assault, some uniformed personnel trained as VAs may not ever serve a victim.

Finding 9-2: Victim Advocates who are not regularly assigned to assist victims of sexual assault may not develop or maintain proficiency in providing victim support when they are assigned a case.

Recommendation 9: The Secretary of Defense direct SAPRO to determine an appropriate caseload and number of advocates, and to ensure that VAs become and remain proficient in their duties. Victim advocate duties should include partnering with or observing other professionals who provide victim services (including community providers) or other experiential work to gain further practical skills and confidence while awaiting assignment to a case.

Finding 10: SARCs are tasked with managerial, outreach and training, administrative as well as victim care duties. Many SARCs believe that their foremost challenge is having too many responsibilities to effectively perform all of the varied duties required of the job.

Recommendation 10: The Secretary of Defense direct SAPRO to evaluate the duties and responsibilities of the SARC position required by SAPR policy and to ensure that there are sufficient positions created with defined roles that allow for excellence.

Finding 11: The Subcommittee heard from sexual assault victims who had difficulty obtaining timely mental health appointments as well as reports that victims may not see the same therapist consistently. The Subcommittee also heard evidence of concern that counseling may negatively impact victims’ careers. While the Subcommittee received evidence of recent programs in the Services to embed counselors within units to facilitate access to care, we were not in a position to evaluate whether the practice is a successful method to alleviate the difficulties victims experience in obtaining timely mental health, obtaining consistent therapeutic services, or reducing concern about negative impact on military careers.

Recommendation 11: The Secretaries of the Military Services evaluate the availability of and access to adequate and consistent mental healthcare for victims of sexual assault; and to evaluate the option of incorporating counselors into the SAPR program in a manner similar to the integration in the FAP Program. Additionally, the Secretaries of the Military Services establish policies to ensure that mental health treatment for sexual assault victims will not have negative implications on such victims’ eligibility for career advancement or promotion.
**Finding 12-1:** DoD initiated the Family Advocacy Program (FAP) over twenty years ago to support military families and to provide services for victims of domestic violence and child abuse. DoD 6400.1-M-1, supra at 43. Domestic violence victims who are also victims of sexual assault are treated and supported by the FAP.

**Finding 12-2:** These incidents are recorded in the separate database used by the Family Advocacy Program, and not in the Defense Sexual Assault Incident Database (DSAID), which was developed to track sexual assaults. Thus, sexual assault reports that are part of domestic violence cases are not included in SAPRO’s annual report of adult unwanted sexual contact cases.

**Recommendation 12:** The Secretary of Defense direct that adult unwanted sexual contact reports handled by FAP and recorded in its database be included in the annual SAPRO report of adult unwanted sexual contact cases.

**Finding 13:** It has been recognized that a percentage of the men and women in the military experienced unwanted sexual contact before entering military service. See, e.g., 2012 WGRA (indicating that the WGRA survey of active duty members found that 30% of women and 6% of men report experiencing unwanted sexual contact prior to entering the military. The 2012 WGRA study further found that of the military members who had experienced unwanted sexual contact (USC) in the twelve months prior to the survey, 45% of the women and 19% of the men also reported having experienced USC prior to entering the military).

**Recommendation 13:** The Secretary of Defense direct SAPRO to work with the Centers for Disease Control and other appropriate agencies to develop services for military members who have previously experienced sexual abuse, and to develop strategies to encourage utilization of these services in order to prevent revictimization and develop or maintain skills necessary to fully engage in military activities and requirements.

**Finding 14:** Harassment and retaliation against a victim in response to an allegation of sexual assault erodes unit cohesion, and the fear of harassment and retaliation deters victims from coming forward to report instances of sexual assault.

**Recommendation 14:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, that retaliation or harassment by Service members in response to an allegation of sexual assault violates good order and discipline.

**Finding 15:** When an offender outranks or directly commands a victim, sexual assault is an especially egregious abuse of power. There have been instances when military officials and Service members have ignored or retaliated against those who reported incidents of sexual assault when the offender is a high-performing Service member or a superior offending against a subordinate.

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422 DoD 6400.1-M-1, supra at 43.

423 See, e.g., 2012 WGRA (indicating that the WGRA survey of active duty members found that 30% of women and 6% of men report experiencing unwanted sexual contact prior to entering the military. The 2012 WGRA study further found that of the military members who had experienced unwanted sexual contact (USC) in the twelve months prior to the survey, 45% of the women and 19% of the men also reported having experienced USC prior to entering the military).

424 The Subcommittee recognizes that SAPRO already has training protocols in place for new recruits that may accomplish the concerns expressed in Findings and Recommendations 14-17. http://www.sapr.mil/public/docs/prevention/SAPR_Accessions_CC-LO_20130808.pdf.
III. VICTIM SERVICES

**Recommendation 15:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, explaining that implicit or explicit invitations or demands for sex or sexualized interactions from commanders or superiors are not lawful orders, should not be obeyed, violate the code of military conduct, and will be punished.

**Finding 16:** Inculcating the notion that the needs of the individual must be subordinate to the needs of the unit is a staple of military training. Nevertheless, the subordination of the individual to the mission may be misinterpreted to deter reports of sexual assault and encourage retaliation against victims who come forward.

**Recommendation 16:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, emphasizing that reporting instances of sexual assault is essential for good order and discipline and protects rather than undermines morale.

**Finding 17:** Male victims of sexual assault are often left out of the conversation about how sexual assault functions in the military. This omission deters some male victims from reporting sexual assault.

**Recommendation 17:** To the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, with examples of male on male sexual assault, including hazing and sexual abuse by groups of men. The training should emphasize the psychological damage done by sexual assault against male victims.

**Finding 18:** Department of Defense policy states that collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim’s fear of punishment.425

**Recommendation 18:** The Secretary of Defense direct a study of what constitutes low-level collateral misconduct in sexual assault cases and assess whether to implement a policy in which commanders will not prosecute low-level collateral misconduct.

**Finding 19:** The fear of damage to one’s military career deters victims from reporting a sexual assault.

**Recommendation 19:** The Secretary of Defense implement policy that protects victims of military sexual assault from suffering damage to their military careers (including but not limited to weakened performance evaluations or lost promotions, security clearances, or personnel reliability certifications) based on having been a victim of sexual assault, having reported sexual assault, or having sought treatment for sexual assault. Additionally, the DoD promulgate regulations that ensure the SVC advise their clients of the means by which they can challenge any inappropriate personnel action based on having been a victim or seeking treatment.

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425 DoD 6495.02 encl. 5, §7.a.
IV. SPECIAL VICTIM COUNSEL

A. RESPONSIBILITY OF THE SUBCOMMITTEE

The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) requires the Response Systems Panel (RSP) to assess whether the roles, responsibilities, and authorities of Special Victims’ Counsel to provide legal assistance under Section 1044e of Title 10, United States Code, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

B. OVERVIEW OF SPECIAL VICTIM COUNSEL PROGRAM

The Special Victim Counsel (SVC) Program was created by the Services and mandated by Congress to “strengthen . . . support of victims of sexual assault and enhance their rights” within the military justice system “while neither causing unreasonable delay nor infringing upon the rights of an accused.” An independent SVC represents the “interests of the victim — and only the victim. The objective is not for SVC to establish an adversarial relationship with the government counsel or defense counsel, but to provide victims with the peace of mind of having independent representation by a licensed attorney- one eminently capable of communicating their interests throughout the military justice process.” An overarching goal of the SVC program is to instill confidence in victims so that more victims come forward and report incidents of sexual assault.

Access to SVC is designed to empower victims to recognize and assert their rights and to actively participate more in the military justice process. SVC provides independent advice to sexual assault victims, assist victims in understanding the investigation and adjudicative processes of the military justice system, advocates for the protection of victims’ rights, and empowers victims by “removing barriers to their full participation in the military justice process to achieve this goal.”

426 United States Army, Special Victim Counsel Handbook, pg 1 (November 1, 2013).
428 See generally Transcript of RSP Public Meeting, 118-90 (November 8, 2013) (Testimony of SVC Program Heads).
429 See id.; see also United States Air Force Special Victim Counsel Rules of Practice and Procedure, pg 2 (July 1, 2013).
430 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, pg. 2 (July 1, 2013).
C. BACKGROUND

Military Special Victim Counsel

Discussion of providing special counsel for victims began in May 2011 when the Undersecretary of Defense for Personnel and Readiness requested the Service Secretaries to provide input into the feasibility of offering significant legal assistance to crime victims, including sexual assault victims. Based on their input, the Undersecretary issued a memorandum on October 17, 2011, concluding “the Services can provide, and in most cases are already providing, legal assistance to victims of crimes including sexual assault.” The Undersecretary then explained the scope of representation available to all crime victims includes informing victims of the victim witness assistance program (VWAP), the differences between restricted and unrestricted reporting options for sexual assault victims, available outside agency assistance, available benefits, and information on the military justice system.

The National Defense Authorization Act for Fiscal Year 2012, Section 581, enacted on January 3, 2012, codified, through 10 U.S.C. 1565b, the requirement to provide victim services and legal assistance to a victim of sexual assault who is a member of the Armed Forces or dependent. This includes military or civilian legal assistance from an attorney, assistance provided by a Sexual Assault Response Coordinator, and support from a Victim Advocate. This assistance is available to victims that file either restricted or unrestricted reports of sexual assault.

While the statute did not specifically address the scope of representation available to sexual assault victims, such as whether legal assistance counsel could represent sexual assault victims during investigation and adjudication of the alleged offender’s case, the Department of Defense General Counsel did provide guidance on the scope of assistance available. In a November 9, 2012, memorandum, the DoD General Counsel stated, “to the extent the victim could retain the advice or representation of private counsel [for legal assistance], nothing in §§ 1044 and 1565b prohibits a JAG from providing the same legal advice and representation, to the same extent.” Furthermore, “these statutes do not preclude providing legal assistance to sexual assault victims in criminal contexts, including attending victim interviews and ‘interfacing with military prosecutors,”

432 Id.
433 Id.
435 Id.
436 U.S. Department of Defense, Memorandum from the General Counsel on “Legal Assistance to Victims of Sexual Assault” (November 9, 2012).
437 Under 10 U.S.C. § 1044, a person is eligible for military legal assistance if he or she is currently serving on active duty, retired from the military and receiving retirement pay, a member of a reserve or guard component when on active duty orders, a dependent of an active duty or retired Service member, or a civilian employee of the federal government serving in an area where other legal services are not available.
438 U.S. Department of Defense, Memorandum from the General Counsel on “Legal Assistance to Victims of Sexual Assault” (November 9, 2012).
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

IV. SPECIAL VICTIM COUNSEL

The Services subsequently cited this Memorandum as support for creation of the Service's Special Victims' Counsel (SVC) Programs.440

Then, in August 2013, the Secretary of Defense formally directed the Services to establish a special victim advocacy program best suited for each Service and for it to be fully operational by January 1, 2014.441 On April 4, 2014, DoD and the Services provided a report to Congress and the RSP indicating each Service had reached full operational capability by the deadline set by the Secretary of Defense.442


The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) codified the right of a sexual assault victim to obtain legal services through a Special Victim’s Counsel (SVC).443 The statute directed the Service Secretaries to appoint SVC to provide legal assistance to individuals eligible to receive military legal assistance who are victims of sex related offenses and to provide in-depth and advanced training for all SVC.444 Additionally, the statute clarifies many aspects of the SVC role and that it covers victims of sex-related offenses under not just Article 120 (Rape and Sexual Assault) but also Articles 120a (Stalking), 120b (Rape and Sexual Assault of a Child) and 120c (Other Sexual Misconduct). The statute also defines the nature of the relationship between SVC and a victim as one of “an attorney and a client.”445

The scope of representation permitted under the statute is expansive and includes legal consultation related to:

- potential collateral misconduct;
- the Victim Witness Assistance Program;
- responsibilities and support provided by SARC and VA, including to include any privileges that may exist regarding communications between those persons and the victim;
- potential for civil litigation against parties other than DoD;
- the military justice system;
- accompanying the victim to any proceedings in connection with the reporting, military investigation, and military prosecution of the offense;

439 Id.  
441 Memorandum from Secretary of Defense to the Secretaries of the Military Services, regarding “Sexual Assault and Prevention” (August 14, 2013).  
444 FY14 NDAA, at 1716 (a)(1)(a).  
445 Id. at 1716(c).
- eligibility and requirements for available medical and mental health services;
- personal civil legal matters,
- any proceedings of the military justice process in which a victim can participate as a witness or other party;
- military and civilian protective or restraining orders;
- understanding the eligibility for and obtaining any available military or veteran benefits; and
- other legal assistance as authorized by the Secretary of Defense. 446

D. PURPOSE AND ELIGIBILITY FOR SERVICES

Eligibility for Services

In general, to be eligible for SVC assistance, a sexual assault victim must make an unrestricted or restricted report of sexual assault under the Uniform Code of Military Justice and otherwise be entitled to legal assistance under 10 U.S.C. § 1044. 448 An eligible victim must be offered the SVC services as soon as he or she reports an alleged sex-related offense or at the time he or she seeks assistance from a Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, trial counsel, a healthcare provider, or any other designated personnel. 449 The victim is entitled to SVC assistance regardless of choosing to file a restricted or unrestricted report. 450

Pursuant to Service policies, any active duty military personnel who report being a victim of sexual assault are eligible for SVC assistance in cases involving civilian or unknown perpetrators. 451 In these cases, however, the SVC cannot represent a victim in civilian court and must explain this limitation to the victims. 452 In addition, the Air Force and the Army expressly provide for SVC representation for “entry level personnel” who are “alleged to have been involved in an unprofessional relationship that involves physical contact of a sexual

446 FY 14 NDAA § 1701(b)(1)-(9).
447 The U.S. Navy and U.S. Marine Corps refer to the Special Victim Counsel as “Victim Legal Counsel.” See Transcript of RSP Public Meeting, 118–162 (November 8, 2013) (Testimony of Colonel Carol Joyce and Captain Karen Fischer-Anderson); see also DoD SVC Implementation Report, 2–4. However, for purposes of this report, all victims’ counsel will be called “SVC.”
448 See FY 14 NDAA at 1716(a); see also United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 1 (July 1, 2013); United States Army, Special Victim Counsel Handbook, Chapter 1 (November 1, 2013); MCO P5 5800.16A, para 6003.
449 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 2 (July 1, 2013); see also United States Army, Special Victim Counsel Handbook, Chapter 2 (November 1, 2013); MCO P5 5800.16A, para. 6003.
450 FY 14 NDAA at 1716(a); see also United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 1 (July 1, 2013); see also United States Army, Special Victim Counsel Handbook, Chapter 1 (November 1, 2013); MCO P5800.16A, para. 6003.
451 U.S. Army Special Victim Counsel Handbook, Chapter 1 (November 1, 2013); United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 1 (July 1, 2013); MCO P5800.16A, para. 6003.
452 U.S. Army Special Victim Counsel Handbook, Chapter 1 (November 1, 2013); United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 1 (July 1, 2013).
Military dependents can be eligible for SVC as well. If a victim is a civilian dependent of an active duty member, a commander must have UCMJ authority over the alleged offender in order for the victim be eligible to receive SVC services. The FY14 NDAA further expanded dependent access to SVC services. Prior to its enactment, most Services limited representation to “adult” victims of sexual assault. Now, statute requires that each of the Military Services provide representation to dependent minors who are victims of sexual assault and the Services have indicated this will be achieved by the end of June 2014.

Active duty Service members who were victims of sexual assaults occurring prior to service are not eligible for SVC assistance or representation unless the military has jurisdiction over the alleged offense. However, they are entitled to assistance through the servicing legal assistance office and the local sexual assault response office.

Unlike the other Services, the Marine Corps does not limit SVC representation to sexual assault victims; rather, all crime victims may obtain SVC services. The Marine Corps defines a victim as any person who alleges to have suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime in violation of the UCMJ. Additionally, even prior to enactment of the FY 14 NDAA, the Marine Corps did not “distinguish its eligibility based on the age of those dependents” and made SVC representation available to minor victims.

Obtaining Special Victim Counsel

Based on DoD and Service policy, after filing a restricted or unrestricted sexual assault report, the installation Sexual Assault Response Coordinator, Victim Advocate, or other first responder should immediately inform victims of his or her right to Special Victim Counsel. “Victims will be provided with a brief description of the role of the SVC and an explanation that the SVC is available and may be requested at any time throughout the duration of the justice process.” Once the victim is informed of his or her right to representation, he or she can waive the representation. However, it is incumbent upon the first responder to ensure the victim is aware an

453 U.S. Army Special Victim Counsel Handbook, Chapter 1 (November 1, 2013); United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 1 (July 1, 2013).

454 See United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 1 (July 1, 2013); see also United States Army, Special Victim Counsel Handbook, Chapter 1 (November 1, 2013); MCO P5800.16A, para. 6003.

455 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, 1 (July 1, 2013); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 1 (November 1, 2013).

456 FY 14 NDAA § 1716(g); see also DoD SVC Implementation Report, pg 3-6 (citing FY 14 NDAA 1716).

457 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, 1 (July 1, 2013); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 1 (November 1, 2013).

458 MCO P5800.16A, para 6003.

459 Id.

460 Transcript of RSP Public Meeting, 122 (November 8, 2013) (Testimony of Colonel Carol Joyce).

461 See United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 2 (July 1, 2013); see also United States Army, Special Victim Counsel Handbook, Chapter 2 (November 1, 2013); MCO P5800.16A, para 6003; see generally Transcript of RSP Public Meeting, 106-90 (November 8, 2013) (Testimony of SVC Program Heads).

462 United States Army, Special Victim Counsel Handbook, Chapter 2 (November 1, 2013).
VICTIM SERVICES SUBCOMMITTEE

initial waiver does not permanently waive representation; the victim is able to obtain SVC at any time.463 Once the government initiates prosecution against a service member by preferring charges against him or her, the trial counsel is required to again provide the victim with notification of his or her right to obtain SVC.464 The trial counsel will also ensure the victim has the time to obtain an SVC if desired.465

At least one Service expressly allows a victim to directly contact the SVC office for representation or for questions regarding representation at any time.466 However, in general, the Services prohibit an SVC from soliciting representation of a client.467 While SVC have protected privilege and confidential relationships with clients, they are not an entity designated to accept a restricted report for purposes of documenting a formal report under Department of Defense policy.468 But, if in the course of an otherwise privileged communication with a legal assistance attorney, a victim indicates that he or she wishes to file a restricted report, the legal assistance attorney must facilitate contact with the SARC or VA for reporting purposes.469

According to the Services, once a victim exercises his or her right to SVC, the local SVC Office or, for the Army, the local legal assistance office, is notified. That office will then appoint SVC to represent the victim. Once appointed, the SVC must contact the victim within forty-eight hours.470

E. ORGANIZATION AND STRUCTURE OF SVC PROGRAMS

Organization

Each Service, except the Army, has created a new SVC division with an independent chain of command.471 In general, each Service’s SVC division is led by an Officer-in-Charge (OIC), usually an O-6, responsible for leading, mentoring, evaluating, and training personnel assigned to the SVC program.472 Usually located at the headquarters office, the OIC is assisted by a deputy, generally with the rank of O-5, and several regional

463 Id.; see also United States Air Force Rules of Practice and Procedure, Rule 2 (July 1, 2013); MCO P5800.16A, para 6003.
464 Id.; see also United States Air Force Rules of Practice and Procedure, Rule 2 (July 1, 2013).
465 Id.
466 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 2 (July 1, 2013).
467 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 2 (July 1, 2013); see also United States Army, Special Victim Counsel Handbook, Chapter 2 (November 1, 2013).
468 Id.; see also U.S. Dept. of Def. Instr. [hereinafter DoDi] 6495.02, Sexual Assault Prevention and Response Program Procedures, Encl 4. (April 12, 2012) (only a SARC, VA and Health Care Provider may receive a restricted report).
469 DoDi 6495.02, Encl. 4.
470 United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 2 (July 1, 2013); see also United States Army, Special Victim Counsel Handbook, Chapter 2 (November 1, 2013); Transcript of RSP Public Meeting, 104-60 (November 8, 2013) (Testimony of SVC Program Heads).
471 See Transcript of RSP Public Meeting, 115-80 (November 8, 2013) (Testimony of SVC Program Heads); see also DoD SVC Implementation Report; Service Responses to RSP Request for Information Question 4 (on file with the RSP).
472 In the Air Force this position is referred to as the “Division Chief.” However, for purposes of clarity, we will refer to the Service Head of the SVC programs as the OIC.
473 Id. at 115–162 (Testimony of SVC Program Heads).
division heads with the rank of O-4. The OIC ensures SVC are stationed throughout the country and overseas at major installations. If there is no SVC located at an installation, the OIC must designate another installation SVC to provide the required services. Special Victim Counsel are located throughout the country and abroad, and are able to raise any concerns or questions to their direct chain of command at any time, regardless of the physical location of their chain of command. This independent organizational setup closely mirrors the Services’ provision of trial defense counsel.

The autonomous nature of the SVC program is designed to ensure the SVC can zealously represent clients without fear of career impact or potential or actual conflicts of interest, even when the client’s interests are at odds with the government. Furthermore, SVC can directly contact their independent regional leadership and SVC Program OIC regarding ethical concerns or questions regarding the scope of representation. Lastly, the Services established the SVC division to be “separate and distinct in order for victims to realize that this is out there and not to be confused with the traditional legal assistance that [has always been] provided.”

Unlike the other Services, the Army has not created a “separate and distinct” SVC division. Instead, the Army directed that the SVC Program fall under the current Legal Assistance Organization. A Program Manager, with a rank of O-6, heads the Army’s SVC Program. This individual provides technical supervision over SVC “so if there is a conflict or there is some kind of adverse relationship” the SVC may contact the program manager who then raises the issue with the installation Staff Judge Advocate, who is normally in the direct chain of supervision of both the SVC and the trial counsel. Special Victim Counsel works through the supervisory and technical chain of supervision to resolve ethical concerns and/or questions of first impression. This supervisory chain includes their Chiefs of Legal Assistance, Deputy Staff Judge Advocates, and Staff Judge Advocates. As necessary, or in cases in which the Chief of Legal Assistance, Deputy and/or Staff Judge Advocate face a conflict of interest, the SVC will consult with his or her technical chain of command, the SVC Program Manager.

Pursuant to Army policy, SVC are specially trained legal assistance attorneys who work under the direct supervision of their Chief of Legal Assistance. The installation Staff Judge Advocate selects the SVC and the

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474 Id.; see also Service Responses to RSP Requests for Information, Question 4 (on file with RSP); MCO P5800.16A, para. 6002.
475 Id.; see also Service Responses to RSP Requests for Information, Question 4 (on file with RSP); MCO P5800.16A, para. 6002.
477 Id.; see also United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 9 (July 1, 2013).
479 Id.
480 Id. at 118-20 (Testimony of Colonel Carol Joyce).
481 Transcript of RSP Public Meeting, 107-10 (November 8, 2013) (Testimony of Colonel James McKee); see also DoD SVC Implementation Report, 1.
482 The Staff Judge Advocate advises the General Court-Martial Convening Authority.
483 Transcript of RSP Public Meeting, 107-14 (November 8, 2013) (Testimony of Colonel James McKee); see also DoD SVC Implementation Report, 1.
484 Transcript of RSP Public Meeting, 107-14 (November 8, 2013) (Testimony of Colonel James McKee); see also DoD SVC Implementation Report, 1; U.S. Army Response to RSP Request for Information, Question 4 (on file with the RSP).
485 U.S. Army Response to RSP Requests for Information, Question 4 (on file with RSP).
Chief of the Legal Assistance Office and the Staff Judge Advocate professionally evaluate him or her.\textsuperscript{486} The Army determined this rating scheme would not create a conflict of interest and would not adversely impact a SVC’s career as “Army legal assistance attorneys are used to representing clients with interests adverse to the command, and our SJAs respect their professionalism in providing quality legal representation in such cases.”\textsuperscript{487} Additionally, “[i]t was determined that it was unnecessary to create a separate legal structure for SVC, as the legal system’s model is already working efficiently.”\textsuperscript{488}

Criteria and Selection

Pursuant to the FY 14 NDAA, SVC are required to meet the same qualifications as other legal assistance attorneys (i.e., judge advocate or a civilian attorney who is a member of the bar of a Federal court or of the highest court of a State) and be certified as competent to be designated as a Special Victims’ Counsel by the Service Judge Advocate General.\textsuperscript{489}

In addition to the above statutory requirements, the Service Staff Judge Advocate, The Judge Advocate General, or SVC Program OIC, who select the SVC, look to additional factors in the selection process.\textsuperscript{490} To be selected, the individual must be a judge advocate, in the rank of O-3 or above; have completed the judge advocate basic course; and, preferably, have some prior military justice experience.\textsuperscript{491} For example, in the Air Force, “the experience level of SVC is slightly less, but comparable to, the experience level of JAGs “entering more senior defense counsel positions.”\textsuperscript{492} This means SVC should have some courtroom experience and be familiar with investigations, the court-martial process, and trial practice.\textsuperscript{493} Although not expressly required in every Service, it is preferred that the counsel have experience as both defense and trial counsel before serving as SVC.\textsuperscript{494}

Special Victim Counsel are also selected based on their “sound judgment and their maturity to represent victims of sexual assault.”\textsuperscript{495} The officer must have the maturity and experience necessary to be able to independently manage an office, represent clients, and zealously advocate to commanders and convening authorities, with supervision and oversight that is geographically separated.\textsuperscript{496} The selecting official will also consider the SVC candidate’s willingness and desire to serve as an SVC in selection.\textsuperscript{497}

\textsuperscript{486} Id.
\textsuperscript{487} Id.
\textsuperscript{488} Id.
\textsuperscript{489} FY 14 NDAA §1716(d).
\textsuperscript{490} Transcript of RSP Public Meeting, 104-60 (November 8, 2013) (Testimony of SVC Program Heads); see also Service Responses to RSP Request for Information, Question 4 (on file with the RSP).
\textsuperscript{491} Transcript of RSP Public Meeting, 104-60 (November 8, 2013) (Testimony of SVC Program Heads); see also Service Responses to RSP Request for Information, Question 4 (on file with the RSP); DoD SVC Implementation Report.
\textsuperscript{492} Air Force Response to RSP Requests for Information, Question 4 (on file with the RSP).
\textsuperscript{493} See Services Response to RSP Requests for Information, Question 4 (on file with the RSP).
\textsuperscript{494} Transcript of RSP Public Meeting, 131 (November 8, 2013) (Testimony of Captain Karen Fisher-Anderson); see also Service Responses to RSP Request for Information Question 4; DoD SVC Implementation Report.
\textsuperscript{495} Transcript of RSP Public Meeting, 109 (November 8, 2013) (Testimony of Colonel James McKee)
\textsuperscript{496} Transcript of RSP Public Meeting, 104-60 (November 8, 2013) (Testimony of SVC Program Heads)
\textsuperscript{497} Transcript of RSP Public Meeting, 130-31 (November 8, 2013) (Testimony of Captain Karen Fisher-Anderson)
IV. SPECIAL VICTIM COUNSEL

Required Training and Certification

All SVC must be licensed and competent to practice law. In addition, SVC must be certified to practice law under Article 27(b), UCMJ; be sworn under Article 42, UCMJ; have graduated from Judge Advocate Officer Basic Course; and attended an approved SVC training course. Depending on the Service, the local Staff Judge Advocate or Service Judge Advocate General will approve the SVC course.

Pursuant to the FY 14 NDAA, the Service Secretaries and the Secretary of Homeland Security (for the Coast Guard) are now statutorily required to provide “in-depth and advanced training” for all SVC. Currently, the Air Force and the Army offer specialized SVC courses at their Legal Centers and Schools. These courses last one to two weeks and SVC are selected from each of the different Services attend. The Navy is currently creating its own SVC course, modeled after the Air Force.

The Army and Air Force annual SVC courses include training on advocating for victims, understanding the psychological conditions of sexual assault victims, behavioral aspects of victims, the victim witness assistance program, victim interviews, interfacing with victims, the military justice process, the post-trial process, the role of SVC, and SVC rules of practice and procedure. The Army also established a JAG University website for SVC to access a document library and collaborate with other Army attorneys.

Assignment Length

Based on Service policy, the duration of an officer’s SVC assignment varies. In general, SVC will serve a minimum of one year and not more than two years. If a Naval Reserve officer is activated to serve as an

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498 U.S. Army Special Victim Counsel Handbook, Chapter 8 (November 1, 2013).

499 Article 27(b), UCMJ, provides no person acting as investigating officer, military judge, or court member in a case may act as the trial counsel or defense counsel in the same case unless specifically requested by the accused.

500 Article 42, UCMJ, provides that all members of a court-martial must take an oath to faithfully perform their duties and each witness to a court-martial will be examined under oath.

501 See United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 8 (July 1, 2013); see also Transcript of RSP Public Meeting, 107-80 (November 8, 2013); see also Service Responses to RSP Requests for Information, Question 4 (on file with the RSP).

502 See United States Air Force Special Victim’s Counsel Rules for Practice and Procedure, Rule 8 (July 1, 2013); see also United States Army Special Victim Counsel Handbook, Chapter 8 (November 1, 2013); Service Responses to RSP Requests for Information, Question 4 (on file with the RSP); DoD SVC Implementation Report.

503 FY 14 NDAA §1716(b)

504 See U.S Army and U.S. Air Force Response to RSP Requests for Information, Question 4 (on file with the RSP); see also DoD SVC Implementation Report, 1, 7

505 See Service Responses to RSP Requests for Information, Question 4 (on file with the RSP); see also DoD SVC Implementation Report.


507 See The U.S. Air Force Judge Advocate General’s School, Memorandum for Special Victims’ Counsel Attendees (May 16, 2013); see also United States Army, Special Victim Counsel Course Desk book (November 2013); DoD SVC Implementation Report, 2, 7 (April 4, 2014).

508 Transcript of RSP Public Meeting, 114 (November 8, 2013) [Testimony of Colonel James McKee]

509 See Service Responses to RSP Request for Information Question 4; see also The Army Judge Advocate General, Memorandum for Judge Advocate Legal Services Personnel regarding “Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (November 1, 2013).
SVC, the assignment may last three years. Air Force SVC remain non-deployable for the duration of their assignment. The Army does not have the same limitation but provides, “[s]pecial consideration should be given to ensure that continuity is not broken between a SVC and the victim represented. Thus, care must be given when making deployment determinations that involve a SVC who is actively representing victims.”

Cost and Necessary Resources

Due to the distinct Service missions, size, and locations of installations, the cost of sustaining the SVC programs varies.

Air Force

For FY 2014, the Air Force anticipates the SVC Program will require $2.25M in operating costs to include supplies and services, travel, education and training, and IT equipment. Based on a caseload of 712 clients during the brief period the Program has been in place and anticipated increases in client demand, the Air Force expects a sustainable program to require twenty-nine SVC and ten paralegals, five supervisory O-4s (majors), an O-6 Division Chief, a Civilian Deputy (GS-14), and an E-7 to provide policy and management.

The Program also requires a civilian (GS-13) at the Air Force Judge Advocate General’s School to formalize continued legal education and training. Due to SVC program requirements, the Air Force anticipates some installation level legal offices may curtail or eliminate some legal assistance services to adequately resource the program.

Army

The Army currently has 208 judge advocates serving as SVC: 91 Active Army counsel, 47 Army National Guard Counsel, 70 Reserve Component counsel, and the Program Manager. Because SVC work in the legal assistance offices, they have access to paralegal and civilian support already within those offices.

Between November 1, 2013, and February 14, 2014, 536 victims received SVC assistance. The SVC and total legal assistance caseload varies from installation to installation. Some installations anticipate reducing additional legal assistance services to meet the demands of the SVC program. The Army Judge Advocate General has given Staff Judge Advocates the authority to limit services to retirees and their family members

510 Transcript of RSP Public Meeting, 166-67 (November 8, 2013) (Testimony of Captain Karen Fisher-Anderson)
511 See United States Air Force Special Victim Counsel Rules for Practice and Procedure, Rule 8 (July 13, 2013).
512 United States Army Special Victim Counsel Handbook, Chapter 8 (November 1, 2013).
513 See Air Force Response to RSP Request for Information Question 4 (on file with the RSP).
514 See U.S. Air Force Response to RSP Requests for Information, Question 4 (on file with the RSP); see also DoD SVC Implementation Report, 6 (April 4, 2014).
516 Id.
517 DoD SVC Implementation Report, 2.
518 See Army Response to RSP Request for Information Question 4 (on file with the RSP).
519 DoD SVC Implementation Report, 2.
520 Army Response to RSP Request for Information Question 4 (on file with Response Systems Panel).
to meet the demands of serving sexual assault victims. To offset this impact, the Army Chief of Staff has authorized the mobilization of twenty Reserve Component judge advocates to backfill some of the legal assistance offices.

Navy

The Navy anticipates the SVC Program will require about five million dollars per year in manpower costs and an additional $41,000.00 per year in facility costs, $45,000.00 per year in supply costs, $66,000.00 per year in training costs, and $300,000.00 for SVC travel costs. Thirty judge advocates are currently assigned to the program including the OIC and ten active component E-5s. The Navy has proposed increasing JAG Corps billets to support Program staffing requirements. To date, Navy SVC have assisted over 300 sex assault victims.

Overall, establishing the SVC program required growing the JAG Corps by thirty judge advocate billets to meet SVC mission requirements without adversely affecting the provision of legal services in other mission areas. The thirty additional billets will be funded beginning in FY14 and 15, but it will take several years to grow the JAG Corps through increased retention and accession quotas, which will allow a full transition from a reserve-active component mix to all active component SVC. The aggressive implementation timeline for the SVC program required the JAG Corps to assign officers outside their normal assignment cycle, sometimes transferring judge advocates out of their current positions on relatively short notice and before their normally scheduled rotations.

Marine Corps

The Marine Corps SVC Program budget for FY14 included $150,000 for operations and maintenance. Approximately $100,000 is required to train and certify all SVC and supporting personnel, while $40,000 will be utilized for case-related travel and required site visits. Approximately $10,000 will be used for office management. Additionally, there will be costs associated with SVC travel for courts-martial that will fall upon convening authorities.

521 Id.
522 Id.
523 As mentioned supra, Victim Legal Counsel is the term utilized by the Marine Corps and the Navy instead of Special Victim Counsel. However, for purposes of clarity, this report will refer to all victims’ counsel as SVC.
525 Id.; see also DoD SVC Implementation Report, 3.
526 Navy Response to RSP Request for Information Question 4 (on file with the RSP).
527 DoD SVC Implementation Report, 4.
528 Navy Response to RSP Request for Information Question 4 (on file with the RSP).
529 Id.
530 Id.
Currently, the SVC program is staffed with fifteen active duty judge advocates, eight enlisted Legal Support Specialists, and three part-time SVC. 532 To provide long-term continuity, the civilian paralegals will replace enlisted personnel during FY14. 533 During the initial operating phase of the Marine Corp’s SVC program, 114 victims received SVC representation. Then, from January 1, 2014 to February 21, 2014, an additional 113 victims received SVC representation. 534

In order to fill the Regional SVC and SVC billets by November 1, 2013, the Marine Corps had to move experienced individuals out of their existing duties without immediate replacements and curtail non-trial legal services. 535 However, the Marine Corps has not compromised its ability to try or defend complex cases or the speed with which such cases go to trial. 536

Coast Guard

The SVC program is currently administered by a full-time reserve O-6 judge advocate, one O-3 SVC coordinator, and seventeen SVC. 537 The seventeen SVC provide services as a collateral duty. 538 A permanent organizational structure has been approved and will be implemented later this year. The program will be led by a GS-15 civilian attorney and will include six active duty SVC, one enlisted yeoman, and one GS-8 administrative assistant. 539 As of March 8, 2014, the Coast Guard has provided SVC services to fifty-six victims. 540

Funding

Congress authorized $25 million to the Department of Defense specifically to assist the Services with the cost of implementation, staffing, and operations for their individual SVC programs. 541

F. SCOPE OF REPRESENTATION

Overview of Responsibilities

The Special Victim Counsel Program is designed to “empower victims [by] fostering victims’ understanding of the military justice process and aiding each victim with the legal assistance needed to allow full participation in applicable programs and services and the military justice process.” 542 SVC accomplish this goal by providing

532 DoD SVC Implementation Report, 5.
533 Id.
534 Id.
535 Marine Corps Response to RSP Request for Information Question 4 (on file with the RSP).
536 Id.
537 DoD SVC Implementation Report, 8.
538 Id.
539 Id.
540 Id.
effective and timely advice, availability to assist victims throughout the entire investigatory and adjudicative processes, and advocacy on behalf of clients to ensure their rights are protected.\textsuperscript{543} According to one SVC, "[y]ou are not only an advocate but also a protector of your client's best interests. This usually means you should work to ensure your client is not inadvertently forced to re-live the trauma of the sexual assault by re-telling the story unless necessary for the case."\textsuperscript{544}

A SVC's primary duty is to represent the clients' rights and interests during the investigation and court-martial process.\textsuperscript{545} A SVC may not represent a client in civilian courts.\textsuperscript{546} In general, SVC services include, but are not limited to, accompanying and advising the victim during interviews, examinations and hearings; advocating to government counsel and commanders on behalf of the victim; advising the victim on collateral civil matters which stem from the alleged sexual assault; advising the victim on the difference between a restricted and unrestricted report; advising the victim on the court-martial process; coordinating with the Sexual Assault Response and Victim Witness Assistance personnel to ensure the victim is informed of all available services; assisting victims with obtaining available resources; advising the victim regarding available medical and mental health services; ensuring the victim is aware of his or her rights within the military justice system; and ensuring the victim's rights are enforced by all persons involved in the court-martial process-this includes those rights expressly delineated in Article 6b, UCMJ.\textsuperscript{547} Additionally, an SVC may represent the victim in courts-martial as permitted by law and assist victims with any post-trial submissions to the convening authority.\textsuperscript{548}

Legislation currently pending in Congress would add to the requirements of SVCs. The Victims Protection Act of 2014, passed by the Senate on March 10, 2014, and currently pending in the House of Representatives, SVC duties would also include a requirement to advise victims of sexual assault on the advantages and disadvantages of prosecution by courts-martial versus in a civilian jurisdiction.\textsuperscript{549}

In addition, a process must be established by which victims of sexual assault (that occur in the United States) are consulted regarding the victims' preference on prosecution by courts-martial or a civilian forum. While not binding, the victims' preference must be given "great weight" in determining the prosecution forum. Finally, if a victim expresses a preference for civilian prosecution, and the civilian jurisdiction declines to prosecute or defer to court-martial prosecution, the victim must be "promptly notified."\textsuperscript{550}

\textsuperscript{543} Id.


\textsuperscript{545} See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 4 (July 1, 2013); see also U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013); Service Responses to RSP Requests for Information, Question 4 (on file with Response Systems Panel); \textit{Transcript of RSP Public Meeting}, 110-80 (November 8, 2013) (Testimony of SVC Program Heads).

\textsuperscript{546} See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 6, (July 1, 2013); see also U.S. Army Special Victim Counsel Handbook, Chapter 6 (November 1, 2013); Service Responses to RSP Requests for Information, Question 4 (on file with Response Systems Panel).

\textsuperscript{547} See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 4 (July 1, 2013); see also U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013); MCO P5800.16A, para 6004; Service Responses to RSP Requests for Information, Question 4 (on file with Response Systems Panel); \textit{Transcript of RSP Public Meeting}, 110-80 (November 8, 2013) (Testimony of SVC Program Heads).

\textsuperscript{548} See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 4 (July 1, 2013); see also U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013).

\textsuperscript{549} S. 1917 113th Congress (2nd Sess. 2013) (the Victims Protection Act of 2014).

\textsuperscript{550} Id., § 3(b).
The Department of Defense has commented on this legislative proposal. While DoD supports consulting with victims throughout the process and taking their preferences into account when appropriate, it expressed concern about giving a victims’ preference as to prosecution forum “great weight.” DoD pointed out that it has no authority over civilian jurisdictions. Also, with concurrent jurisdiction, a military prosecution would not preclude prosecution of the same offense in a civilian court. Finally, DoD is concerned that allowing victim preference could result in trial delays, which is inconsistent with “the cause of justice and military readiness.”

Interaction with the Victim Witness Assistance Program and SARC

The Sexual Assault Response Coordinator (SARC) serves as the installation’s single point of contact for integrating and coordinating sexual assault victim care services. Services start at the initial sexual assault report. As the central point of coordination, the SARC ensures the victim’s request for an SVC is forwarded through the appropriate channels to ensure immediate appointment of counsel. Once the victim and SVC form an attorney-client relationship, counsel will inform the SARC. Special Victim Counsel should work in conjunction with the SARC to coordinate delivery of services and avoid duplication of services and may advocate to the responsible agencies when these services are not being adequately provided.

Similarly, the SVC works in conjunction with the installation Victim Witness Liaison, to ensure victims are afforded certain enumerated rights, such as conferring with trial counsel and notifying the victim of court-martial proceedings. A victim liaison may be assigned to each victim. Along with the Staff Judge Advocate and the trial counsel, the victim liaison is the SVC’s point of contact in the prosecution’s office for obtaining case updates and communicating questions and concerns from the victim. Any communication between the victim or the SVC and the victim liaison is not confidential or privileged. While there is overlap in the objectives of the SVC and the Victim Witness Liaison, the programs are separate and distinct as the victim liaison works for the government and serves as a facilitator of services, not as an advocate.

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551 Letter from the Assistant Secretary of Defense for Legislative Affairs to the Honorable Carl Levin (on file with the Response Systems to Adult Sexual Assault Crimes Panel).

552 See DoDI 6495.02, Sexual Assault Prevention and Response Program Procedures (Apr. 17, 2012).

553 See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); see also U.S. Army Special Victim Counsel handbook, Chapter 3 (November 1, 2013); MCO P5800.16A, para 6003.

554 See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); see also U.S. Army Special Victim Counsel handbook, Chapter 3 (November 1, 2013); MCO P5800.16A, para 6003.

555 The victim witness liaison works for the commander or local staff judge advocate and is usually located in the prosecutor’s office. This individual serves as the victim’s primary point of contact for information and assistance in securing available victim/witness services.

556 See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); see also U.S. Army Special Victim Counsel handbook, Chapter 3 (November 1, 2013); MCO P5800.16A, para 6003.

557 See Department of Defense Instruction 1030.2, Victim and Witness Assistance Procedure (June 4, 2004); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); see also U.S. Army Special Victim Counsel handbook, Chapter 3 (November 1, 2013); MCO P5800.16A, para 6003.

558 See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); see also U.S. Army Special Victim Counsel handbook, Chapter 3 (November 1, 2013); MCO P5800.16A, para 6003.
Standing

“The SVC Program does not increase a victim’s standing in a court-martial hearing and other military justice proceedings beyond the standing victims are currently afforded under existing law and rules.”559 Pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 103, a victim is not a party to a court-martial and does not have the same entitlements as litigation parties under the Uniform Code of Military Justice.560 However, the Court of Appeals for the Armed Forces (CAAF), the highest military court, composed of civilians appointed by the President and confirmed by the Senate, recently addressed the issue of standing in LRM v. Kastenberg.561

In Kastenburg, the victim served notice on the court that she wanted to exercise her right to be heard, through her SVC, during hearings pursuant to Military Rules of Evidence [hereinafter M.R.E.] 412 (Rape Shield) and 513 (Psychotherapist-Patient Privilege). The defense opposed the request.562 Following the SVC’s argument that the victim had the right to be heard, the military judge ruled the victim did not have standing on matters of law but she could be heard on matters of fact. The military judge found standing “denotes the right to present an argument of law before the court which is fundamentally different than the opportunity to be heard.”563 Thus, the military judge ruled the victim had no standing to move the court for relief to produce documents or to present legal argument.564 After filing a request for reconsideration with the trial judge, the victim filed a request for extraordinary relief petitioning the Air Force Court of Criminal Appeals (AFCCA) for a writ of mandamus. The AFCCA denied the writ outright finding the court lacked jurisdiction to hear the raised issue.565

The Air Force Judge Advocate General then certified three issues to CAAF for consideration.566 The certified issues included whether: (1) the AFCCA erred by finding no jurisdiction existed; (2) whether the military judge erred by denying the victim, LRM, the opportunity to be heard through counsel thereby denying her due process under the Military Rules of Evidence; and (3) whether the CAAF should issue a writ of mandamus.567 The CAAF, citing previous case law, determined, “LRM’s position as a non-party to the courts-martial . . . does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege.”568 The court further found, a “reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim . . . who is represented by counsel be heard through counsel. This is self-evident in the case of M.R.E. 513, the invocation of which necessarily includes a legal conclusion that a privilege applies.”569 The court then went on to acknowledge M.R.E. 513 and M.R.E. 412 both include a provision specifically addressing the victim’s right to be heard during related proceedings.570

559 U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013).
562 Id. at 366.
563 Id. at 366-67.
564 Id.
565 Id.
566 Article 67(a)(2), UCMJ, provides the CAAF shall review the record in “all cases reviewed by the Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review.”
567 Id. at 366.
568 Id. at 368.
569 Id. at 370.
570 Id.
Lastly, the court found that while the M.R.E.s expressly provided for a right to be heard, “[a] military judge has the discretion . . . and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context.”

In the context of M.R.E. 412 and 513, a victim clearly has the right to present facts as well as legal argument through his or her SVC. However, it is unclear if CAAF’s holding is limited to the specific rules of evidence discussed in the opinion or whether a victim will have standing to make an argument and/or present evidence whenever an alleged violation of an enumerated right under Article 6b, UCMJ, occurs. Additionally, because the Judge Advocate General of the Air Force certified the issue to the a provision of the UCMJ that mandates CAAF review the issue, CAAF did not address whether the extraordinary writ is an appropriate mechanism for reviewing an alleged violation of a victim’s right under the Military Rules of Evidence or Article 6b, UCMJ.

While it is unclear if the CAAF intended to limit is holding, the Services interpret Kastenburg to provide SVC standing only to the “right to be heard” set forth in MREs 412, 513, and 514. The current policy for both the Army and the Air Force is “for purposes of these three MREs and future MREs or RCMs giving victims the right to be heard in military justice proceedings, SVC or civilian victims’ counsel may be allowed to speak on their client’s behalf, as permitted by the presiding judge.” The Services did not address the issue of standing in the DoD report on SVC Implementation submitted to Congress and the RSP on April 4, 2014.

**SVC Access to Records**

The right of Special Victim Counsel to access records is no greater than their clients’ access rights. While the FY 14 NDAA does provide for various notification and consultation requirements, the statute is silent regarding a victim’s right to access documentary evidence such as records. Further, neither military case law nor Service regulations address the issue. The Army’s approach is:

- a victim’s request for investigative reports and other military justice documents during the pretrial phase must be processed under applicable Freedom of Information Act or Privacy Act procedures . . . In addition to these access rights, [SVC] may request information directly from the Trial Counsel under the “need to know” exception to the Privacy Act. In this case, the Trial Counsel may, but is not required to, disclose information and records to the SVC. Information and records obtained by the SVC under the “need to know” exception are for the SVC use only and may not be shared with the victim.

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571 Id. at 371.
572 U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 4 (July 1, 2013); see also U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013).
573 DoD SVC Implementation Report.
574 574 See U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 4 (July 1, 2013); see also U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013).
575 See FY 14 NDAA 1716.
576 U.S. Army Special Victim Counsel Handbook, Chapter 4 (November 1, 2013).
IV. SPECIAL VICTIM COUNSEL

Collateral Misconduct

An investigation into the facts and circumstances surrounding a sexual assault may produce evidence that the victim engaged in misconduct. “Collateral misconduct is misconduct that is committed by a victim of a sexual assault that has a direct nexus to the sexual assault.”

Typical examples of collateral misconduct include underage drinking, adultery, fraternization, and violations of regulations or orders. In each Service, SVC provide some advice to victims about potential collateral misconduct issues. For example, in the Marine Corps an SVC may advise the victim on legal options such as testimonial immunity.

However, the SVC’s ability to represent victims on collateral misconduct varies slightly throughout the Services. In general, Service policies dictate that upon learning of collateral misconduct, SVC will inform the victim that trial defense services are available, and inform the victim that SVC will not serve as the victim’s primary counsel for purposes of collateral misconduct if any administrative or punitive action is sought. The Air Force has clarified its policy, indicating that the appointed trial defense counsel will serve as primary counsel for purposes of collateral misconduct and the SVC may serve as secondary counsel. Only Service members, not military dependents, are entitled to trial defense services.

Duration of Representation

According to individual Service policies, SVC’s representation terminates upon final disposition of a case. Final disposition is considered the point when the Convening Authority takes action on the findings and sentence of the court-martial. For non-judicial punishment actions under Article 15, UCMJ, final disposition is considered the point when the punishment is complete. For administrative actions, case disposition occurs when the separation authority takes action. Once SVC is appointed, representation continues uninterrupted until final disposition of the case or until the victim releases the SVC- whichever occurs sooner.


578 Id.

579 See U.S. Army Special Victim Counsel Handbook, Chapter 5 (November 1, 2013); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule (July 1, 2013); MCO P5800.16A, para 6004.

580 MCO P5500.16A, para 6004.


583 See U.S. Dep’t of the Army, Reg. 27-10, Military Justice, Chapter 6 (3 Oct 2011); MCO P5800.16A, chap. 2; U.S. Dep’t of the Air Force Instruction 51-201, Administration of Military Justice, Chapter 5 (21 Dec 07).

584 U.S. Army Special Victim Counsel Handbook, Chapter 3,(November 1, 2013); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); MCO P5800.16A para 6005.

585 U.S. Army Special Victim Counsel Handbook, Chapter 3,(November 1, 2013); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); MCO P5800.16A para 6005.

586 U.S. Army Special Victim Counsel Handbook, Chapter 3 (November 1, 2013).

587 See Service Responses to RSP Request for Information Question 4 (on file with the RSP).
Navy and Marine Corps, transfers of counsel due to military service will also terminate the relationship, but additional counsel will be provided. 588 Based on Service policies, SVC generally do not represent the victim during appellate review of a court-martial. 589

G. INITIAL MEASURES OF VICTIM SATISFACTION

Air Force Survey and Intended Surveys

As the pilot program for the Department of Defense, the Air Force was the first to launch the SVC program and reach full operating capability. While the other Services began to implement SVC programs in the summer of 2013, the Air Force program began significantly earlier in January 2013. 590 As such, the Air Force is the only Service to implement and complete initial small sample victim satisfaction survey. 591 The Air Force initiated its Victim Impact Survey in March 2013 and provided it to thirty-six 592 sexual assault victims, including those represented by an SVC and those who were not. 589 The survey included questions such as: what was the level of satisfaction with the appointed SVC; would you recommend other victims seek representation from an SVC; did your SVC effectively advocate on your behalf; and did your SVC assist you in understanding the military justice process. 594

According to the Air Force, the initial survey results were overwhelmingly positive and prove the effectiveness of the SVC program. 595 For example: ninety-two percent of those surveyed indicated they were “extremely satisfied” with the advice and support the SVC provided during the court-martial process; ninety-eight percent would recommend other victims request an SVC; and ninety-six percent indicated their SVC helped them understand the investigation and court-martial process. 596 The survey also indicated that ninety percent of those who used an SVC were female; eighty percent were active duty; and ninety percent filed unrestricted reports. 597

588 See U.S. Navy and U.S. Marine Corps Responses to RSP Request for Information Question 4 (on file with the RSP).

589 See U.S. Army Special Victim Counsel Handbook, Chapter 3, (November 1, 2013); see also U.S. Air Force Special Victim Counsel Rules of Practice and Procedure, Rule 3 (July 1, 2013); MCO P5800.16A para 6005.


591 Id at 148-57.

592 Though Air Force SVC are currently representing 458 clients, the Victim Impact Survey is not provided to them until the military justice process concludes and the attorney-client relationship ends. At the time of the initial survey, only thirty-six victims met this qualification.

593 Id.; see also U.S. Air Force Response to RSP Request for Information Question 1d; DoD SVC Implementation Report, 8.


596 See Transcript of RSP Public Meeting, 150-57 (November 8, 2013) (Testimony of Colonel Dawn Hankins); DoD SVC Implementation Report, 8.

Currently, the Army, Navy, and Marine Corps are developing surveys modeled on the Air Force Victim Impact Survey. Additionally, the Judge Advocate General of the Army has tasked the Army SVC Program Manager with gathering information for the first twelve months of the Army’s SVC program to evaluate the cost and effectiveness of the program. However, the Services have neither defined what “effective” means for the program nor developed using any standardized method of evaluating program effectiveness.

Victim Testimony

The Subcommittee heard testimony from military sexual assault victims, including three still on active duty. The three witnesses were on active duty at the time of the assault and have remained on active duty following the investigation and adjudication of their alleged offenders. All three witnesses testified their SVC assisted them throughout the court-martial process by helping them understand the complicated rules associated with the trial process, advocating on their behalf to government counsel and the court, and ensuring their rights were protected. Each witness testified that the SVC was critical to his or her ability to understand the process and participate effectively as witnesses against their accuser. They believe that having an SVC was a positive experience and would recommend other victims seek SVC representation immediately upon filing a report of sexual assault - restricted or unrestricted. Two of the witnesses praised the SVC program despite the acquittal of their alleged offenders in courts-martial.

One of the victims testified about her experiences as a victim both before and after the SVC program. Ms. JP told the Subcommittee “I have, unfortunately, witnessed the handling of a situation before and after the [Service’s] current initiative to combat sexual assault ...” Prior to the SVC program, Ms. JP testified against her then husband who was charged with physically and sexually assaulting Ms. J.P. Ultimately, he was acquitted of most offenses. Ms. J.P. stated she “felt let down by the system” and that any additional reporting was senseless. But, after learning her offender was, again, accused of sexual assault in 2012, Ms. J.P. “knew [she] had to come forward” to prevent other women from being abused. She testified that her “experience [during the second court-martial] ... was completely different and incomparable to the first ... [and she could] not express to [the Subcommittee] how much different the atmosphere, the command support, and the available

601 An additional witness was present but the testimony is not relevant for this portion of the report.
602 See Transcript VSS Subcommittee Meeting, 6-135 (March 13, 2014) (Victim Testimony).
603 Id.
604 Id.
605 Id.
606 Id.
607 Transcript of RSP Public Meeting 15 (March 13, 2014) (Testimony of Ms. J.P.).
608 Id. at 16-18.
609 Id. at 18
610 Id. at 18-19
services were between [her] initial reports and [her] experience over the last year.”611 She credited a large part of her experience directly to her SVC’s representation. According to Ms. J.P, “[h]e was able to work with me through the entire court-martial process. He was able to hear the past ten years of my horror, explain the trial process which I was about to go through, and assist me in understanding the complex and incomprehensible rules of the court . . . I felt incredibly supported that an attorney was assigned just to me, whose only allegiance was my best interest.”612

H. SPECIAL VICTIM COUNSEL IN CIVILIAN JURISDICTIONS

Prevalence of Representation

The concept of attorneys providing legal support to non-party victims in criminal proceedings has become more common in the federal courts and state jurisdictions than before as protecting crime victim’s rights to notice, privacy interests, and other rights have become an increasingly complex practice.613 Lawyers representing only the rights of victims in criminal cases are relatively limited, used for just over ten years in some jurisdictions.614 Nowhere in the United States is the practice as comprehensive or organized as the program now in effect in the Military Services.615

Even within jurisdictions where attorneys and victim rights organizations play an active role in representing a victim’s interest in a criminal case, attorneys represent only a small percentage of victims involved in the criminal justice system.616 Special victim attorneys represent an even smaller percentage of sexual assault victims in the criminal legal system.617 For instance, in Arizona, which has enforced victim rights for over twenty

611 Id. at 19.

612 Id. at 22.

613 Transcript of RSP Public Meeting 240-41 (November 8, 2013) (Ms. Keli Luther, Maricopa County Deputy Attorney); Transcript of RSP Public Meeting 243-44 (November 8, 2013) (testimony of Mr. Mike Andrews, D.C. Crime Victims’ Resource Center); REDACTED JOINT SERVICES COMMITTEE-SEXUAL ASSAULT SUBCOMMITTEE REPORT [hereinafter JSC-SAS Report], Appendix C (Anchorage, Alaska), Appendix D (Maricopa County, Arizona), Appendix G (District of Columbia), Appendix I (Baltimore Maryland), Appendix L (Multnomah and Yamhill County, Oregon).

614 Transcript of RSP Public Meeting 235-36 (November 8, 2013) (testimony of Ms. Keli Luther, Maricopa County Deputy Attorney (discussing the “grand constitutional experiment” that began in 2002 with a program to permit a crime victim to retain an attorney for the sole purpose of effectuating her rights within the criminal justice process.”); Transcript of RSP Public Meeting 243 (November 8, 2013) (testimony of Mr. Mike Andrews, D.C. Crime Victims’ Resource Center).

615 Transcript of RSP Public Meeting 229 (November 8, 2013) (testimony of Ms. Marjory Fisher, Bureau Chief, Special Victims Bureau, Office of the District Attorney, Queens, New York) (indicating that in New York City, the instances of victims retaining counsel is rare – “maybe twice a year in a very busy county in which I work.”); Transcript of RSP Public Meeting 205-06 (November 8, 2013) (testimony of Mr. Chris Mallios, Attorney Advisor for AEquitas and former Assistant District Attorney, Philadelphia District Attorney’s Office) (indicating that it was fairly rare in his experience to have victims’ rights attorneys unless there was a civil case or if the judge appointed an attorney because of potential Fifth Amendment issues); Transcript of RSP Public Meeting 240 (November 8, 2013) (testimony of Ms. Keli Luther) (Prosecutors recognize that 99 percent of our victims still will not have counsel); JSC-SAS Report Appendix K-3 (Attorney victim advocates are not typically retained by victims in the Manhattan, NY District Attorney’s Office); See also, JSC-SAS Report Appendix E (San Diego, CA), Appendix F (Delaware), Appendix H (Athens, GA), Appendix I (Grand Rapids, MI), Appendix P (Snohomish County, WA) (all indicating the appearance of victim counsel is infrequent or does not occur).

616 Transcript of RSP Public Meeting 240-41 (November 8, 2013) (testimony of Ms. Keli Luther).

617 Transcript of RSP Public Meeting 239 (November 8, 2013) (testimony of Ms. Keli Luther); JSC-SAS Report Appendix D-5 (Victims have counsel who represent them in less than one percent of the sexual assault cases in Arizona); JSC-SAS Report Appendix I-5 (Staff attorneys at the Maryland Crime Victims’ Resource Center represent victims of various types of crimes, and currently have
IV. SPECIAL VICTIM COUNSEL

years, including victim access to attorneys for over ten years, prosecutors recognize that ninety-nine percent of the victims still do not have counsel.618

The Role of Special Victim Counsel

Victim’s attorneys can ensure victims are treated with dignity, respect, fairness, and are free from intimidation and harassment.619 An attorney well trained in victims’ rights can successfully shepherd crime victims through the gauntlet of the criminal justice system, which is often very intimidating to victims.620

The role victim counsel plays in the criminal process varies among jurisdictions, as do specific victim rights and their source (statute, constitution, rule, or all).621 There is generally more involvement in the criminal case by special victim counsel in jurisdictions with codified enforcement mechanisms.622

Civilian special victim counsel represent their clients’ rights and interests and will support their desires regarding criminal prosecution, regardless of their preference to pursue criminal charges or have the criminal case dismissed.623 While special victim counsel generally have good relationships and work cooperatively with prosecutors, they represent their clients’ rights and interests regardless of that interest intersecting with the prosecutor’s.624 Prosecutors may refer victims to special victim counsel in instances when there is an issue that arises during the criminal case prosecutors believe could best be handled by an attorney whose sole duty is to represent the victim’s interests.625

Typically, civilian special victim counsel provide advice about the criminal justice system provide representation to ensure that that the statutory and constitutional rights of the victim, where enacted, are

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618 Transcript of RSP Public Meeting 240 (November 8, 2013) (testimony of Ms. Keli Luther).
619 Transcript of RSP Public Meeting 240 (November 8, 2013) (testimony of Ms. Keli Luther).
620 Transcript of RSP Public Meeting 240 (November 8, 2013) (testimony of Ms. Keli Luther).
621 Transcript of RSP Public Meeting 240 (November 8, 2013) (testimony of Ms. Keli Luther regarding Arizona’s constitutional and statutory victim rights); see also JSC-SAS Report Appendix C-7 (Describing victim rights in Alaska granted by both statute and constitution); JSC-SAS Report Appendix P-7 (Washington constitution and statutory code contain victim rights, but there are no enforcement mechanisms); JSC-SAS Report Appendix N-6 (victims have standing both from the Texas Constitution and by statute but there are no explicit enforcement mechanisms, which limits the role victims’ attorneys play in the criminal case).
622 See, e.g., JSC-SAS Report Appendix D (Arizona), Appendix G (District of Columbia), Appendix L (Oregon) (all provide for enforcement of victim rights).
623 See, e.g., JSC-SAS Report, Appendix I (Maryland) (Maryland Crime Victims’ Resource Center (MCVRC attorneys sometimes make motions and file appeals focused on upholding victim rights, even though the victim’s interests may not be the same as the State’s broader interests).
624 JSC-SAS Report Appendix D-4 (Arizona)(Victim Counsel generally have a cooperative relationship with prosecutors, and the prosecutor’s office will refer victims to victim counsel to ensure rights are upheld); JSC-SAS Report Appendix I-5 (Maryland)(Staff attorneys from the Maryland Crime Victims’ Resource Center describe that the needs of victims in sexual assault cases do not always correlate with the interests of the State, and they can represent the victim’s interests, which may include working out a plea agreement so the victim does not need to testify).
625 JSC-SAS Report Appendix C (Alaska) (Prosecutors refer victims to Office of Victim Rights (OVR) when the defense makes a request for medical or mental health records, as they don’t have standing to make the argument), Appendix D (Arizona)(Prosecutors will refer victims to victims’ counsel to ensure that the victim’s rights are upheld).
upheld.\textsuperscript{626} Most jurisdictions provide the victim the right to be heard at bail hearings. Attorneys often assist victims at this juncture of the process.\textsuperscript{627} Lawyers who represent victims have noted that simply filing a notice of appearance seems to increase the likelihood that the government will comply with the victim’s rights.\textsuperscript{628}

Although special victim counsel may not play a significant role during the criminal trial itself, victim counsel in civilian jurisdictions that have them may represent clients during discrete moments in the criminal justice process, including:

1. **Victim Safety – Representation at bail hearings and other hearings to set conditions of a defendant’s release.** In some jurisdictions, special victim counsel are involved in filing protection orders, as well as, landlord-tenant issues or other related matters that arise out of a sexual assault incident or investigation.\textsuperscript{629}

2. **Victim’s Privacy Rights -** Typically, victim counsel are involved in requests for disclosure of medical and mental health records and privacy regarding prior sexual history.\textsuperscript{630} A large part of the practice of victim counsel is motion practice, especially as it relates to enforcing the privacy interests of the victim in his or her records and prior sexual history.

3. **Victim’s Right to be Present -** Victims typically have a right to be present in the courtroom, but with some exceptions.\textsuperscript{631} Civilian special victim counsel often participates in motion practice seeking enforcement of this right.

4. **Sentencing -** Victim interests include providing an impact statement and obtaining restitution, where there are losses the offender is responsible for payment.\textsuperscript{632} Civilian special victim counsel often assist with preparation and, sometimes, delivery of victim impact statements, as well as motion practice in the form of sentencing and restitution memoranda.

5. **Victims have a right to have the proceedings handled in a timely manner in many jurisdictions, and therefore, attorneys may represent victims when issues of trial dates and continuances arise.\textsuperscript{633}**

\textsuperscript{626} Transcript of RSP Public Meeting 235-36 (November 8, 2013) (testimony of Ms. Keli Luther).

\textsuperscript{627} See, e.g., JSC-SAS Report Appendix C-6 (Alaska Office of Victim Rights counsel participate in bail and release hearings, and Judges will inquire whether the victim has been notified of the hearing prior to proceeding).

\textsuperscript{628} JSC-SAS Report, Appendix D-5 (Arizona) (The notice of appearance also serves to educate on Arizona crime victims’ rights); Appendix I-5 (Maryland) (Entering a notice of appearance changes the dynamic in a case).

\textsuperscript{629} Transcript of RSP Public Meeting 246 (November 8, 2013) (testimony of Mike Andrews, D.C. Crime Victims’ Resource Center); JSC-SAS Report, Appendix D-5 (Maricopa County, Arizona); Appendix C-4 (Anchorage, Alaska); Appendix L-6-8 (Multnomah and Yamhill County, Oregon) Appendix N (Texas).

\textsuperscript{630} JSC-SAS Report, Appendix D (Arizona); Appendix C (Alaska); Appendix L (Oregon) Appendix N (Texas).

\textsuperscript{631} \textit{Id.}

\textsuperscript{632} \textit{Id.}

\textsuperscript{633} \textit{Id.}
Access to Documents
Access to discovery or reports from the prosecutor’s file varies among jurisdictions. For example, in Texas, even though victims have standing in court, they are not explicitly entitled to discovery, and prosecutors generally do not share evidence with victim counsel. Attorneys can obtain a copy of the police report by sending a letter of representation to the police department.

Organization, Background and Training of Civilian Victim Counsel
Attorneys who work in civilian jurisdictions as victim counsel often, but not always, have a background or experience in criminal law. Many attorneys who represent victims in either federal or state criminal proceedings are funded by grants or other public funding, although many attorneys also provide services on a pro bono basis. As previously indicated, funding for programs may be limited, and is not always consistently provided. For instance, in Washington, DC, the D.C. Crime Victims’ Resource Center is currently one of the only pro bono legal clinics that represent crime victims. Mr. Mike Andrews, managing attorney for the D.C. Crime Victim’s Resource Center, testified, “[t]he D.C. Crime Victim’s Resource Center is unique because we’re the only pro bono legal clinic in the D.C. metropolitan area that represents crime victims. Years ago, there [were] several clinics . . . and with funding restraints, those clinics had kind of went by the wayside.”

Prosecutors’ Concerns with Victim Relationship
While many prosecutors have encountered attorneys representing a victim filing a civil suit to recover damages, there are few jurisdictions where prosecutors are familiar with the concept of counsel representing a victim on issues related to a criminal sexual assault case. Some prosecutors expressed concern to the RSP about victim’s counsel, worrying, among other things, that they will interfere with the relationship and close bond the prosecutor forms with sexual assault victims while preparing for trial. They worry, for instance, that...
professional ethics rules prohibiting a lawyer from communicating with an individual about the subject matter of the representation if that individual is represented by counsel could inject an unnecessary wedge between the victim and prosecutor. 643

For example, Ms. Theo Stamos, the Commonwealth’s Attorney for Arlington County, Virginia, told the RSP, “... I firmly believe that if we are doing our jobs correctly with the dedication, professionalism, and sensitivity that these types of cases demand, victim attorneys would really be a redundancy.” 644 Similarly, Ms. Marjorie Fisher, the Chief of the Special Victims Bureau in Queens, New York, told the RSP, “I worry that if the victim had their own lawyer in every single case, that the relationship that I think is sacrosanct in our office that exists between the victim and her counsel could circumvent or diminish the critical relationship that my ADAs have with their victim.” 645

Prosecutor Concerns over Records and Potentially Exculpatory Material

The role the prosecutor plays in protecting the interests and specific rights of victims also varies between jurisdictions, depending on applicable statutory or constitutional provisions and local practice. For instance, in some jurisdictions, such as Alaska, prosecutors do not have standing to argue the victim’s privacy interests in his or her medical or counseling records. 646 In others, such as Arizona, prosecutors have standing to argue the victim’s privacy interests, as do counsel who represent victims in the criminal process. 647

Likewise, some prosecutors believe it is their duty and obligation to represent a victim’s interests during hearings related to the victim’s previous sexual history or release of medical or psychiatric records. 648 Some prosecutors worry that they may not be told of potentially exculpatory information when a victim has an attorney with whom they have confidentiality. 649 This is especially true in situations where a victim’s medical or mental health records are being subpoenaed by the defense. 650

Value of Special Victim Counsel to Sexual Assault Victims

While the specific laws, rules, availability, and attitudes regarding the role of victim counsel in the criminal justice system vary, the goal remains the same: to ensure that victims are treated with dignity, respect, as well

Judge Barbara Jones.

643 Transcript of RSP Public Meeting 216 (November 8, 2013) (testimony of Ms. Theo Stamos).
644 Id. at 215–16.
645 Id. at 218–20.
646 JSC-SAS Report, Appendix C-4 (Anchorage, Alaska) (prosecutors have no standing to assert a privilege on behalf of a victim and may suggest victims contact OVR for assistance).
647 Transcript of RSP Public Meeting 241 (November 8, 2013) (testimony of Ms. Keli Luther).
649 Id. at 231.
650 Transcript of RSP Public Meeting 208 (November 8, 2013) (testimony of Mr. Chris Mallios); Transcript of RSP Public Meeting 250 (November 8, 2013) (comment by RSP Chairwoman Judge Barbara Jones).
as fairness, and to be free from intimidation and harassment.  

Finding 20-1: Early survey results and victim testimony indicate the SVC program is an invaluable tool for victims. This program instills confidence in the victim and helps him or her better understand the military justice process and his or her rights under the Code.

Finding 20-2: Congress authorized $25M in the FY14 NDAA to assist the Services with the operation costs of implementing the SVC program. However, the Services anticipate needing significant staff and monetary to implement and sustain the SVC program in the future.

Recommendation 20: Congress appropriate sufficient funds annually to DoD to ensure the Services are able to sustain a robust SVC program.

Finding 21: The Military Services currently do not have a standard evaluation of effectiveness for the SVC program.

Recommendation 21: The Secretaries of the Military Services develop a standard evaluation mechanism with appropriate metrics, when appropriate, to measure the effectiveness of the SVC program in each Service on an annual basis.

Finding 22-1: On August 14, 2013, the Secretary of Defense directed the Service Secretaries establish a special victim’s advocacy program best suited for the individual Service. Furthermore, he directed the Services to determine their own best practices and periodically share those practices with the other Services. No standards or requirements have been established outlining how and when these best practices should be shared.

Finding 22-2: The SVC program managers of the respective SVC programs regularly reach out to one another via email and telephone to communicate SVC issues and exchange lessons learned/best practices generated by their respective Services. On a more formal basis, the SVC program managers meet monthly to discuss a variety of SVC program issues.

651 Transcript of RSP Public Meeting 240 (November 8, 2013) (testimony of Ms. Keli Luther).
652 Id. at 238.
653 Army’s response to RFI #44.
654 Army’s response to RFI #44. The last meeting took place at CID Headquarters in Quantico, Virginia on 4 April 2014 and involved Army CID, AF OSI, and NCSI to discuss best practices for collecting evidence when an SVC was involved in the case. Id.
Recommendation 22: The Secretary of Defense establish a mandatory inter-Service working group to assess the practices of all Military Service SVC programs. The inter-Service working group should discuss, deliberate, and decide upon the best practices being utilized by all the Military Services. The working group should then ensure each Military Service implement the best practices of the SVC programs and SVC receive adequate training on these practices. The working group should consist of, at a minimum, the SVC Program Heads from each Military Service. The first meeting should occur within twelve months from the date of this report. Thereafter, the working group should meet at least annually.

Finding 23-1: The Special Victim Counsel Program is a relatively new program, existing for slightly more than twelve months. Even the most experienced Special Victim Counsel has limited experience as an advocate for victim’s rights.

Finding 23-2: Additionally there is limited case law on issues related to victim’s rights and victim’s counsel. While both the Air Force and the Army currently offer short courses on the SVC program, these courses do not focus on the day-to-day experiences of a SVC.

Recommendation 23: The Secretaries of the Military Services establish collaborative methods to disseminate information and training of SVC between the Services, including an inter-Service website where SVC can access training materials and resources from each Service.

Finding 24-1: In general, the policy of the Military Services requires an officer have prior military justice experience before selection to perform duties as an SVC. The required length of time or level of experience in military justice varies throughout the Services.

Finding 24-2: It is unclear if selection requires actual participation in courts-martial.

Recommendation 24: The Secretary of Defense direct the Military Services to implement additional selection criteria for their individual Special Victim Counsel Programs to require that counsel have appropriate trial experience prior to being selected as Special Victim Counsel. The criteria should include special emphasis on the unique selection of SVC and require actual courtroom experience rather than simply requiring service in a military justice billet for a certain period of time.

Finding 25-1: Pursuant to Service policy, a victim and SVC establish an attorney-client relationship at their first meeting.

Finding 25-2: This relationship continues until final disposition of the matter or the attorney is reassigned or leaves active duty.

Finding 25-3: For court-martial purposes, the Services have determined case disposition occurs at the time the Convening Authority takes final action in the case.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

IV. SPECIAL VICTIM COUNSEL

**Recommendation 25**: The Secretary of Defense direct the Military Services to extend the opportunity for SVC representation to a victim so long as a right of the victim exists and is at issue. This includes any time following final action by the convening authority and during appellate review. While it may not be feasible, due to mission requirements, for the victim to maintain the same SVC throughout the duration of the process, the policy should permit for appointment of an alternate SVC to advise the victim and assert any right or interest still at issue following final action.

**Finding 26**: A Special Victim Counsel’s right to access records is no greater than his or her client’s access rights. Currently, the government trial counsel may, but is not expressly required to, disclose information and records to the SVC. Further, when disclosing information, the trial counsel is limited by the Freedom of Information Act and the Privacy Act.

**Recommendation 26**: The Secretary of Defense implement policy clarifying the victim’s right to access records which are relevant to the assertion of a victim’s particular right through his or her SVC. The policy should include language establishing that once the SVC makes a request for information that is subsequently denied by the trial counsel, the SVC may petition the court for access to the relevant information. Furthermore, it should permit the military judge to then perform an in-camera review to determine what documents, if any, are relevant and necessary to the asserted right to release to the SVC as well as the appropriate method for disclosing those relevant documents to the victim. If the military judge declines to disclose the records, the reasons should be made on the record in order for the victim to seek further review.

**Finding 27**: To be eligible for SVC representation, an adult victim of sexual assault must make an unrestricted or restricted report of sexual assault under the Uniform Code of Military Justice and otherwise be entitled to legal assistance under 10 U.S.C. § 1044. Pursuant to DoD policy, an SVC is not a listed restricted reporting entity. It is unclear if a victim may seek SVC advice prior to making an official report.

**Recommendation 27**: The Secretary of Defense develop and implement policy and regulations such that sexual assault victims have the right and ability to consult with an SVC before deciding whether to make a restricted or unrestricted report, or no report at all. Communication made during this consultation would be confidential and protected under the attorney-client privilege.

**Recommendation 27a**: 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 s/he has the right to speak with an SVC before determining whether to file a restricted or unrestricted report, or no report at all.

**Finding 28-1**: The Army has not created a “separate and distinct” SVC division. Instead, the Army SVC program falls under the current Legal Assistance Organization.

**Finding 28-2**: SVC are usually located within the installation legal assistance office and they are supervised by the Chief of Legal Assistance and the installation Staff Judge Advocate.

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655 Recommendation 27 and 27a are identical to recommendation 2 and 2a in the Victim Services section. The Subcommittee thought it prudent to put these recommendations in both places.
**Finding 28-3:** If a conflict of interest arises, SVC may contact his or her technical chain, the SVC Program Manager, for advice. The Program Manager will then raise the issue to the Staff Judge Advocate.

**Recommendation 28:** The Secretary of the Army create a “separate and distinct” Special Victim Counsel Division with its own chain of command and support personnel to alleviate any actual or potential conflict of interest between the SVC and the local Office of the Staff Judge Advocate and ensure SVC independence.

**Finding 29-1:** Legislation currently pending in Congress would add to SVC requirements. Under the Victims Protection Act of 2014, which passed the Senate on March 10, 2014, and is pending in the House of Representatives, SVC would be required to advise victims of sexual assault on the advantages and disadvantages of prosecution by courts-martial versus in a civilian jurisdiction.

**Finding 29-2:** The pending legislation also requires the establishment of a process for victims of sexual assaults that occur in the United States to be consulted regarding his or her preference on prosecution by courts-martial or a civilian forum.

**Finding 29-3:** While not binding, the victims’ preference must be given “great weight” in determining the prosecution forum. Prior to enacting this legislation, Congress did not receive extensive evidence on the potential impacts such legislation would have on victims and the military justice system.

**Recommendation 29:** Congress defer adopting the above provision of the Victims Protection Act of 2014 until Congress obtains further evidence and information about the potential impact of such legislation on victims and the military justice system.

**Finding 30-1:** The Army and Air Force expressly provide for SVC representation for “entry level personnel” who are alleged to have been involved in an unprofessional relationship that involves sexual contact with an instructor or staff member, even though the sexual assault-type crime has not been committed or alleged.

**Finding 30-2:** The Marine Corps SVC policy does not have this provision and the Navy and Coast Guard have yet to publish a policy on the Service SVC program.

**Recommendation 30:** The Navy, Marine Corps, and Coast Guard implement or amend their individual SVC policies to provide for SVC representation for entry level personnel who are alleged to have been involved in a relationship that involves sexual contact with an instructor or staff member, even though a crime has not been alleged.
A. RESPONSIBILITY OF THE SUBCOMMITTEE

The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) called for the Response Systems Panel (RSP) to assess the feasibility and appropriateness of extending the rights available to crime victims in civilian criminal legal proceedings under the Crime Victims’ Rights Act and legal standing to seek enforcement of crime victim rights as provided in the CVRA to crime victims covered by the Uniform Code of Military Justice.\(^656\)

In addition, the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the RSP to assess the adequacy of military systems and proceedings “to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes,” including “whether victims are provided the rights afforded by” the CVRA, Department of Defense (DoD) Directive 1030.1, and DoD Instruction 1030.2,(setting forth current DoD policy regarding victims’ rights); and assess differences between military and civilian systems “in providing support and protection to victims” of adult sexual assault crimes.\(^657\)

The Victim Services Subcommittee conducted a comprehensive evaluation and comparison of the rights granted to crime victims under the jurisdiction of the UCMJ – through DoD policy and Congressional action - and the rights granted to crime victims in civilian criminal jurisdictions under the CVRA. We have come to the following findings and recommendations.

B. CRIME VICTIMS’ RIGHTS UNDER FEDERAL LAW

Shortly after efforts to pass a victims’ rights amendment to the U.S. Constitution failed,\(^658\) Congress passed the Crime Victims’ Rights Act (CVRA) in October 2004.\(^659\) The Act evolved out of “a long effort to afford greater deference to victims in the criminal justice process.”\(^660\) The CVRA was analogous to various victims’ bill of rights provisions in state laws and augmented a “variety of preexisting federal victims’ rights legislation.”\(^661\)

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656 FY14 NDAA, § 1731, 127 Stat. 672 (2013)
659 18 U.S.C. §3771. (The CVRA was enacted on October 20, 2004, amended on July 27, 2006, and amended again on May 7, 2009. The most recent version (effective December 1, 2009) was used by the Subcommittee in its victim rights analysis).
660 CRS Report at 1 (April 24, 2012).
661 CRS Report at 1 (April 24, 2012).  E.g., 18 U.S.C. §3510 (victim attendance rights), 3525 (victims compensation fund), 3555 (notice to
The CVRA grants “crime victims” eight rights.\(^{662}\)

1. The right to be reasonably protected from the accused;

2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime, or of any release or escape of the accused;

3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;

4. The right to be reasonably heard\(^{663}\) at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;\(^{664}\)

5. The reasonable right to confer with the attorney for the Government in the case;\(^{665}\)

6. The right to full and timely restitution as provided in law;

7. The right to proceedings free from unreasonable delay;

8. The right to be treated with fairness and with respect for the victim’s dignity and privacy.

The Department of Justice and federal courts are responsible for enforcing the CVRA’s provisions. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime, “shall make their best efforts to see that crime victims are notified of, and accorded,” the rights under the CVRA.\(^{666}\) The prosecutor must advise crime

\(^{662}\) 18 U.S.C. §3771(a). A “crime victim” is “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.” 18 U.S.C. §3771(e).

\(^{663}\) The right to be reasonably heard is not meant to be a veto, but an opportunity to present relevant information. CRS Report at 24 (citing S.Rept.105-409 at 27–28 (1998); S.Rept. 106–254 at 32–33 (2000); S.Rept. 108–191 at 36–37 (2003)).

\(^{664}\) 18 U.S.C. § 3771 “assures crime victims of the right to reasonably be heard at proceedings when a plea bargain is accepted. The right only attaches to the acceptance of plea bargains in open court (i.e., at public proceedings). The right clearly does not vest a victim with the right to participate in plea negotiations between the defendant and the prosecutor, which are neither public nor proceedings. By the same token, the right to be heard is not the right to decide; victims must be heard, but their views are not necessarily controlling.” CRS Report at 29–30 (footnotes omitted).

\(^{665}\) The obligation of this right “rests with the government, and the courts are bound to ensure that it is honored.” CRS Report at 32 (April 24, 2013). The intent of this section is that victims have a right to confer with the prosecutor about concerns which are pertinent to the case, case proceedings or disposition. Id. at 32 (footnote omitted).

\(^{666}\) 18 U.S.C. §3771(c)(1). “At least one court has expressed the view that ‘the provision requires at least some proactive procedure designed to ensure victim’s rights,’ while noting the apparent primacy of the right to attend.” CRS Report at 38 (quoting United States v. Turner, 367 F.Supp.2d 319, 323 (E.D.N.Y. 2005), and also quoting “[w]hile some proactive steps seem to be required, the statute just as clearly does not, in most circumstances, require courts to adopt every conceivable procedure that might protect the exercise of victims’ rights. Specifically, it is only with respect to orders denying a victim’s right to attend court proceedings that judges are directed to ‘make every effort’ to find reasonable alternatives to exclusion. 18 U.S.C. 3771(b). There is a lot of ground between extending some effort to ‘ensure’ that victims are afforded their rights and making ‘every effort’ to do so.”). Id. at n.194.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

V. CRIME VICTIMS’ RIGHTS

victims of their option to obtain the advice of an attorney to consult with and represent their rights. The district court is responsible for ensuring crime victims are afforded their rights guaranteed by the CVRA in court proceedings. The CVRA places special emphasis on the crime victims’ right to attend public court proceedings, requiring courts to “make every effort to permit the fullest attendance possible by the victim, and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding” prior to excluding a crime victim from a proceeding. A court’s decision to exclude a victim from a public court proceeding must be supported by clear and convincing evidence. The reasons for any decision denying relief to a victim of a violation of any of the eight enumerated rights “shall be clearly stated on the record.”

The CVRA provides an enforcement mechanism for crime victims to seek enforcement of their guaranteed rights. A crime victim is to assert his or her rights “in the district court in which a defendant is being prosecuted for the crime of, or if no prosecution is underway, in the district court in which the crime occurred.” The district court “shall take up and decide any motion asserting a victim’s right forthwith.” If the district court denies the relief sought, the victim “may petition the court of appeals for a writ of mandamus[]” and the court of appeals must rule on that petition within 72 hours after filing. Decisions are designed to be prompt: “[i]n no event shall proceedings be stayed or subject to a continuance of more than five days.” If the court of appeals denies the victim’s request, “the reasons for the denial shall be clearly stated on the record in a written opinion.”

Relief for violating a right afforded under the CVRA is limited. Failure to afford a right to a crime victim will not provide grounds for a new trial. A crime victim may make a motion to re-open a plea or sentence only under

667 18 U.S.C. 3771(c)(2).
671 Id. 18 U.S.C. 3771(b)(2) discusses proceedings based on a writ of habeas corpus, which has limited applicability to the subcommittee’s analysis.
674 18 U.S.C. §3771 (d)(3). “The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure.” Id. Also, “[i]n any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.” 18 U.S.C. §3771 (d)(4). Neither the Federal Rules of Criminal Procedure nor the Federal Rules of Appellate Procedure specifically address the writ of mandamus provision. CRS Report at 40 n. 201. “Although the 72-hour deadline reflects Congress’s desire for prompt appellate action on mandamus petitions, at least one appellate court did not think the failure to meet the deadline deprived it of jurisdiction to grant the petition, United States v. Monzel, 641 F.3d 528, 531–32 (D.C. Cir. 2011); but see In re McNulty, 579 F.3d 344, 348 n.4 (6th Cir. 2010)(‘We would like to express our frustration that Congress permitted the courts only 72 hours in which to read, research, write, circulate, and file an order or opinion on these petitions for a writ of mandamus’).” Id.
677 The participation of victim rights in the criminal process is designed to make sure the truth-finding process is not disrupted, and the central truth-finding process in criminal procedure is the trial process itself. Transcript of RSP Victim Services Subcommittee Meeting 16 (Jan. 9, 2014) (testimony of Professor Douglass Beloof); see also CRS Report at 42 n.216 (stating that “Rules 60(b)(5) and 69(b)(6), the corresponding provisions in the Federal Rules of Criminal Procedure state respectively that ‘[a] victim may move to reopen a plea or sentence only if: (A) the victim asked to be heard before or during the proceeding at issue, and the request was
the following limited circumstances: the right to be heard was asserted before or during the proceeding at issue and such right was denied; the victim petitioned the court of appeals for a writ of mandamus within fourteen days; and, in the case of a plea, the accused has not pled to the highest offense charged.\textsuperscript{678} The CVRA creates “no cause of action for damages” and does not create, enlarge, or imply “any duty or obligation to any victim or other person for the breach of which the United States[,] or any of its officers or employees[,] could be held liable in damages.”\textsuperscript{679} Finally, nothing in the CVRA “shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”\textsuperscript{680} The rights provided under the CVRA apply at the trial court, and do not expressly provide a victim with the right to appeal the defendant’s conviction and sentence based on a violation of the CVRA.\textsuperscript{681}

C. CRIME VICTIMS’ RIGHTS IN THE UNITED STATES MILITARY PRIOR TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

Overview

Prior to enactment of the FY14 NDAA, the rights of victims in the military were primarily a product of the Victim Witness Assistance Program (VWAP), which was developed in 1994 to protect the rights of all victims and witnesses located at DoD installations worldwide.\textsuperscript{682} Military officials indicate that “[t]he overarching aim of [the] VWAP program is to…assist victims and witnesses, within available resources and without infringing on the rights of the accused.”\textsuperscript{683} The DoD uses a multidisciplinary and collaborative approach that includes VWAP coordinators and liaisons at local installations, criminal investigators, chaplains, family advocacy personnel, sexual assault response coordinators, judge advocates, unit commanding officers, corrections personnel, victim advocates, and other Service designated personnel to provide services.\textsuperscript{684} The VWAP is a key element of the

\begin{itemize}
  \item \textsuperscript{678} 18 U.S.C. §3771 (d)(5).
  \item \textsuperscript{679} 18 U.S.C. §3771 (d)(6).
  \item \textsuperscript{680} 18 U.S.C. §3771 (d)(6). To promote compliance, the CVRA directed the U.S. Attorney General to promulgate regulations that designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim; require a course of training for members of the Department of Justice and assist them in responding more effectively to the needs of crime victims; and to contain disciplinary sanctions for employees of the Department of Justice who willfully or wantonly fail to comply with the CVRA. 18 U.S.C. §3771 (f). Members from the Department of Justice familiar with the CVRA were invited to testify to the RSP Victim Services Subcommittee to inform them on the process and application of the CVRA, but the invitation was declined.
  \item \textsuperscript{681} CRS Report at 31 n. 152 (citing United States v. Hunter, 548 F.3d 1308, 1311 (10th Cir. 2008), which states that “[a] failure to afford a victim any right described in these rules is not grounds for a new trial’’); see also 18 U.S.C. §3771 (d)(5).
  \item \textsuperscript{682} Transcript of RSP Victim Services Subcommittee Meeting 224–225 (Jan. 9, 2014) (testimony of Major Ryan Oakley, Office of the Under Secretary of Defense for Personnel and Readiness, Office of Legal Policy ).
  \item \textsuperscript{683} Id. at 2225.
  \item \textsuperscript{684} Id.
\end{itemize}
DoD’s Special Victim Capability, established to provide enhanced support for victims of sexual assault, serious domestic violence, and child abuse. 685

The DoD is updating DoD policy and the UCMJ to parallel the rights afforded to crime victims the in the CVRA. 686 In the policy reissuance, DoD indicates that it also will provide enforcement mechanisms in each Military Service to receive and investigate complaints and provide a range of disciplinary sanctions for failure to comply with requirements relating to victims’ rights. 687

**DoD’s Victim Rights Policy**

DoD’s victim rights policy dates back to 1994. It was modeled on the Victims’ Rights and Restitution Act of 1990, the predecessor of the CVRA. 688 Under current DoD policy, victims are entitled to the following seven rights:

1. To be treated with fairness and respect for the victim’s dignity and privacy;
2. To be reasonably protected from the accused offender;
3. To be notified of court proceedings;
4. To be present at all public court proceedings related to the defense, unless the court determines that the testimony of the victim would be materially affected if the victim heard witness testimony at trial;
5. To confer with the attorney for the government in the case;
6. To receive available restitution; and
7. To be provided with information about the conviction, sentencing, imprisonment, and release of the offender. 689

The DoD’s crime victims’ rights policy is similar to those contained in the CVRA— with two exceptions. 690 First, DoD policy provides no right to be reasonably heard at a public proceeding involving the release, plea, sentencing, or parole proceeding. 691 Second, there is no right to proceedings free from unreasonable...

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685 Transcript of RSP Victim Services Subcommittee Meeting 225 (Jan. 9, 2014) (testimony of Major Ryan Oakley) (citing Transcript of Response Systems To Adult Sexual Assault Crimes Panel Meeting 120 (Dec. 11, 2013) for more information on the Special Victims Capability program); see also FY13 NDAA § 573.


687 Id.at 226.


690 Transcript of RSP Victim Services Subcommittee Meeting 245 (Jan. 9, 2014) (testimony of Major Ryan Oakley).

691 Id.
delay. In addition, unlike the CVRA, DoD policy does not contain an enforcement mechanism or remedy for noncompliance with the enumerated rights.

Prior to enactment of the FY14 NDAA, military crime victims’ rights were provided by DoD policy, applied across the Services (including the Coast Guard when operating under the Department of the Navy), and were supplemented by Service-specific regulations. The DoD’s VWAP policy defines a “victim” as “a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the Uniform Code of Military Justice...or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components.” New DoD policy expands the definition to include military members and their families, DoD civilians, contractors and family members as victims when stationed outside the continental United States.

Recognizing the need to protect the necessary role of crime victims and witnesses in the criminal justice process, policy requires law enforcement and legal personnel directly engaged in the detection, investigation, or prosecution of crimes to ensure that victims are accorded their rights. Through the VWAP procedures, DoD requires notification to crime victims at key stages of the investigatory and military justice process.

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692 Id.

693 See DoD Directive 1030.01 and DoD Instruction 1030.02; see also Transcript of RSP Victim Services Subcommittee Meeting 245 (Jan. 9, 2014) (testimony of Major Ryan Oakley) (stating that “...our current guidance does not provide a specific procedure for the enforcement of these rights”).

694 DoDD 1030.01, Victim Witness Assistance, and the accompanying DoD Instruction 1030.02, Victim Witness Assistance Procedures; see also RSP Transcript of RSP Victim Services Subcommittee Meeting 227-228 (Jan. 9, 2014) (testimony of Major Ryan Oakley).

695 Transcript of RSP Victim Services Subcommittee Meeting 227-228 (Jan. 9, 2014) (testimony of Major Ryan Oakley); see Air Force Instruction 51-201(2013), Army Regulation 27-10(2011), JAG/COMNAVLEGSVCCOMINST 5800.4A (2011), MCO P5800.16A (2011), and COMDTINST M5810.1E(2011) for Service specific regulations regarding victims and witnesses during the military investigatory and justice process.


697 Transcript of RSP Victim Services Subcommittee Meeting 228 (Jan. 9, 2014) (testimony of Major Ryan Oakley). The installation commander is the local responsible official for providing victims and witnesses the VWAP multi-disciplinary services. Id at 229. This responsibility is normally designated to the staff judge advocate at the installation, who then appoints a qualified, trained VWAP coordinator. Id.

698 DoDD 1030.01 (2004) ¶¶ 4.1, 4.4.

699 Transcript of RSP Victim Services Subcommittee Meeting 229-230 (Jan. 9, 2014) (testimony of Major Ryan Oakley). During the initial notification, victims and witnesses are told about their rights and are given key points of contact and available support services. Id. The information on rights is given through a brochure known as DD Form 2701, Initial Information for Victims and Witnesses of Crime. Id. Once the decision to pursue court-martial charges is made, the victim will be given Form 2702, Court- Martial Information for Victims and Witnesses. Id. This provides an overall summary of the court-martial and military justice process, and provides an additional notification of rights. Id. In the event of conviction or confinement, victims have the choice to receive further information, through DD Form 2703, Post-Trial Information for Victims and Witnesses. Id. The victim may also be notified about the offender’s sentence, confinement status, clemency, parole hearings, and release from confinement through DD Form 2704, Victim and Witness Certification and Election Concerning Inmate Status, and DD Form 2705, Victim and Witness Notification of Changes in Inmate Status. Id. at 230-231.
D. MILITARY CRIME VICTIMS’ RIGHTS UNDER THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

Statutory Provision

The FY14 NDAA incorporated the following rights into the UCMJ as Article 6b: (1) The right to be reasonably protected from the accused;

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

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

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

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

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

(7) The right to proceedings free from unreasonable delay; and

(8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense.700

700 FY14 NDAA § 1701 at 707.
The Secretary of Defense has one year to recommend changes to the Manual for Courts-Martial to the President to implement these rights.\(^\text{701}\) The FY14 NDAA also directed the Secretary to consider mechanisms for affording rights to victims, and mandates that regulations include:

- (A) Mechanisms for ensuring that victims are notified of, and accorded, the rights specified in Article 6b of the Uniform Code of Military Justice;
- (B) Mechanisms for ensuring that members of the Armed Forces and civilian personnel of the Department of Defense and the Coast Guard make their best efforts to ensure that victims are notified of, and accorded, the rights specified in Article 6b of the Uniform Code of Military Justice;
- (C) Mechanisms for the enforcement of such rights, including mechanisms for application for such rights and for consideration and disposition of applications for such rights;
- (D) The designation of an authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights; and
- (E) Disciplinary sanctions for members of the Armed Forces and other personnel of the Department of Defense and Coast Guard who willfully or wantonly fail to comply with requirements relating to such rights.\(^\text{702}\)

### Differences Between the CVRA and NDAA

Comparing crime victims’ rights under the CVRA with those under the FY14 NDAA reveals that, while Article 6b incorporates many CVRA rights into the UCMJ, some differences remain. Both the CVRA and the NDAA grant the reasonable right to confer with the attorney representing the Government; the right to receive restitution as provided in law; the right to proceedings free from unreasonable delay; and the right to be “treated with fairness and with respect for the victim’s dignity and privacy.”\(^\text{703}\) Whereas the CVRA and the NDAA grant crime victims the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused[,] the NDAA grants the right to reasonable, accurate, and timely notice of a public hearing concerning the continuation of confinement prior to the trial of the accused; a preliminary hearing under Article 32 relating to the offense; a court-martial relating to the offense; a public proceeding of the Service Clemency and Parole Board relating to the offense; and the release or escape of the accused, unless such notice may endanger the safety of any person. 18 U.S.C. §3771(a); FY14 NDAA §1701 at 707. The CVRA states the right as “not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” 18 U.S.C. §3771(a)(3). The NDAA states the right as not to be excluded from any public hearing or proceeding described above “unless the military judge or investigating officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense would be materially altered if the victim heard other testimony at that hearing or proceeding.” FY14 NDAA §1701 at 707-708.

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\(^{701}\) FY14 NDAA § 1701 at 710. “Not later than one year after the date of the enactment” of FY14 NDAA, “the Secretary of Defense shall recommend to the President changes to the Manual for Courts-Martial to implement Section 806b of Title 10, United States Code[,] and...the Secretary of Defense and Secretary of Homeland Security (with respect to the Coast Guard when it is not operating as a service in the Navy) shall prescribe such regulations as each such Secretary considers appropriate to implement such section.” I'd.

\(^{702}\) FY14 NDAA § 1701 at 710-711.

\(^{703}\) 18 U.S.C. §3771(a); see also FY14 NDAA §1701.

\(^{704}\) While the CVRA grants “the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused[,]” the NDAA grants the right to reasonable, accurate, and timely notice of a public hearing concerning the continuation of confinement prior to the trial of the accused; a preliminary hearing under Article 32 relating to the offense; a court-martial relating to the offense; a public proceeding of the Service Clemency and Parole Board relating to the offense; and the release or escape of the accused, unless such notice may endanger the safety of any person. 18 U.S.C. §3771(a)(2); FY14 NDAA §1701 at 707. The CVRA states the right as “not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” 18 U.S.C. §3771(a)(3). The NDAA states the right as not to be excluded from any public hearing or proceeding described above “unless the military judge or investigating officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense would be materially altered if the victim heard other testimony at that hearing or proceeding.” FY14 NDAA §1701 at 707-708.
There are numerous differences between military sentencing procedure and procedures followed in state and federal courts which make any comparisons or general conclusions difficult.\textsuperscript{705} Nonetheless, one difference in the right to be heard at sentencing arises in military rules. The sentencing phase of a trial, whether contested or pursuant to an offer to plead guilty, is governed by the Rules for Courts-Martial. Military procedure requires the victim and other witnesses- except the accused- to appear and testify under oath, subject to the rules of evidence and defense cross-examination.\textsuperscript{706} In general, the government presents evidence in aggravation, which includes evidence directly relating to or resulting from the offenses of which the accused has been found guilty. “Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused.”\textsuperscript{707} In order to be heard, either the trial or defense counsel must call the victim. However, as part of a pre-trial agreement or stipulation, the victim may sometimes be allowed to submit a written impact statement rather than be required to testify under oath.\textsuperscript{708}

The requirement that a victim testify in person and under oath to present victim impact evidence is in contrast to the Federal Rules of Criminal Procedure, which generally permit a victim of a sexual abuse to make an unworn statement or present information at sentencing.\textsuperscript{709} Military practice is also inconsistent with statutes in a number of state jurisdictions, which permit a victim to present a victim impact statement without testifying under oath or being subject to cross examination.\textsuperscript{710}

Unlike the CVRA, which grants “the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding,”\textsuperscript{711} Article 6b grants the right to be reasonably heard at a public hearing regarding continuing confinement prior to the accused’s trial; a sentencing hearing relating to the offense; and a public proceeding of the Service clemency and parole board relating to the offense, but is silent on the right to be heard on the plea.\textsuperscript{712}

There are also several CVRA provisions without analogous provisions in the NDAA. Congress directed DoD to address some of these provisions in its implementing regulations. First, the NDAA lacks a provision that

\textsuperscript{705} See Report of the Comparative Systems Subcommittee to the RSP for a more detailed discussion of military and civilian sentencing practices.

\textsuperscript{706} R.C.M. 1001(b)(4).

\textsuperscript{707} R.C.M. 1001(b)(4); see also R.C.M. 1001(c)(3) and (d) permits the military judge to relax the rules of evidence only with respect to matters in extenuation or mitigation or both, leaving the only possible time for a victim to testify with relaxed rules of evidence being during rebuttal. Additionally, although the Rules for Courts-Martial grant the ability to do an unsworn statement, that rule only pertains to the accused. R.C.M. 1001(c)(2)(C).

\textsuperscript{708} See R.C.M. 1001(c)(3) (Noting that with respect to extenuation and mitigation, the rules of evidence may be relaxed, to include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability).

\textsuperscript{709} See Fed. R. Crim. P. 32(i)(4)(B).


\textsuperscript{711} 18 U.S.C. §3771(a)(4).

\textsuperscript{712} FY14 NDAA §1701 at 708.
mirrors the CVRA’s instruction to the court to ensure that victims are afforded the rights enumerated in Article 6b, UCMJ.

Second, while the NDAA requires clear and convincing evidence that a victim’s testimony would be materially altered by hearing other testimony before a victim can be excluded from public proceedings, it is missing the CVRA’s requirements that, before a court excludes a crime victim from a public proceeding, the court should: (1) make every effort to permit the fullest attendance possible and to consider reasonable alternatives to excluding the crime victim; and (2) clearly state on the record the reasons for any decision denying relief under the CVRA by clear and convincing evidence.

Third, the NDAA also lacks a provision similar to CVRA’s enforcement mechanism, which allows a victim to assert rights in district court and, if the district court denies the relief sought, allows the victim to petition the court of appeals for a writ of mandamus. However, the NDAA instructed DoD to include in its regulations a mechanism to enforce the rights specified in Article 6b.

Fourth, the NDAA has no provision similar to the CVRA’s compliance mechanism. The CVRA instructed the Department of Justice to designate an internal administrative authority to receive and investigate complaints relating to the provision or violation of a crime victim’s rights; requires training for employees and offices of the Department of Justice that fail to comply with provisions of federal law pertaining to the treatment of crime victims, and otherwise assist the employees and offices in responding more effectively to the needs of crime victims; and contains disciplinary sanctions for Department of Justice employees who willfully or wantonly fail to comply with provisions of federal law pertaining to the treatment of crime victims.

However, the NDAA instructed DoD to include a mechanism for ensuring that Armed Forces members and DoD and Coast Guard civilian personnel make their best efforts to ensure that victims are notified of, and accorded, the rights specified in Article 6b, UCMJ in DoD regulations. The NDAA also instructed DoD to designate an authority within each Service to receive and investigate complaints relating to the provision or violation of such rights, and provide disciplinary sanctions for Armed Forces members and other DoD and Coast Guard personnel who willfully or wantonly fail to comply with requirements relating to such rights in its regulations.

Finally, the NDAA has no similar provision to the CVRA’s limitation of liabilities section. The CVRA section outlines that the failure to afford a CVRA right will not provide grounds for a new trial as well as when a victim may petition a court to reopen a plea or sentence. The limitations provision also makes explicit that the CVRA creates no cause of action for damages and that nothing in the CVRA is construed to impair the prosecutorial discretion of the Attorney General or any officer under his or her discretion. While the NDAA does have a limiting clause indicating that it should not be construed to authorize a cause of action for damages, it does not have a similar provision indicating that nothing should be construed to limit prosecutorial discretion.

**Updating DoD Policy**

On September 20, 2012, the DoD General Counsel directed the Joint Service Committee on Military Justice (“JSC”) to study and compare the rights granted by the CVRA to DoD VWAP policy. On December 20, 2012, the JSC recommended to the DoD General Counsel that two additional rights provided by the CVRA — the right to be heard during public proceedings and the right to be free from unreasonable delay — be incorporated

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713 Transcript of RSP Victim Services Subcommittee Meeting 260 (Jan. 9, 2014) (testimony of Major Ryan Oakley); September 20, 2012 letter from Mr. Jeh Johnson, General Counsel of the Department of Defense, to Chairman, Joint Service Committee on Military Justice.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

V. CRIME VICTIMS’ RIGHTS

The JSC also recommended that it be authorized to study jurisdictions with procedures in place which address the failure to comply with the victim's assertion of rights and to determine best practices for a potential enforcement mechanism to include in the military justice system.715

Subsequently, on October 8, 2013, the Acting DoD General Counsel directed the JSC to propose an amendment to the Manual for Courts-Martial to incorporate the CVRA’s protections, to the extent they are not already part of military justice practice and process.716 The DoD Office of Legal Policy indicated that it will continue to work closely with the Office of General Counsel, the JSC, and Service counterparts to ensure the newly enacted Article 6b, UCMJ, is effectively implemented.717 Further, it indicated that the revised DoD policy will direct the Military Services to prescribe enforcement mechanisms to ensure that victims are notified and properly afforded their rights and remedies in a timely manner.718

Finally, DoD is incorporating the provisions of the FY14 NDAA into the new DoD Instruction 1030.02, which will constitute DoD’s single, overarching VWAP Instruction detailing policy and procedures.719 While Article 6b, UCMJ, is effective immediately, the JSC will continue to study and propose necessary amendments to the Manual for Courts-Martial.720

714 December 20, 2012 letter from COL Charles Pede, Chair, Joint Service Committee on Military Justice, to Office of General Counsel of the Department of Defense, regarding the Joint Service Committee Response to the Senate Armed Services Committee Directive to Review Department of Defense Directive 1030.01.

715 February 18, 2013 letter from Mr. Taylor, Acting General Counsel of the Department of Defense, to Chairman, Committee on Armed Services, regarding Senate Report 112-173, which accompanied S.3254, the FY13 NDAA and, at pages 115-116, referenced the Crime Victims’ Rights Act, stating that DoD Directive 1030.01 did not include the victims’ right to be heard during public proceedings and to proceedings free from unreasonable delay. Although not yet updated in the VWAP policy, the rights were granted in the FY14 NDAA §1701 which extended crime victims’ rights to victims of offenses under the Uniform Code of Military Justice into the Uniform Code of Military Justice at §806b, Article 6b, and grants the victim the right to be reasonably heard at a public hearing concerning the continuation of confinement prior to trial of the accused; a sentencing hearing relating to the offense; and a public proceeding of the Service clemency and parole board relating to the offense. FY14 NDAA §1701 at 708. It also grants the right to proceedings free from unreasonable delay. Id.

716 Transcript of RSP Victim Services Subcommittee Meeting 260-261 (Jan. 9, 2014) (testimony of Major Ryan Oakley).

717 Id. at 262.

718 Id. at 263. The enforcement mechanism will specifically include the designation of authority in each Military Service to receive and investigate complaints, and also to review, and adjudicate when appropriate, disciplinary sanctions. Id. at 263–264. The Department of Justice Office of the Victims’ Rights Ombudsman, as set up by the CVRA, serves a similar purpose. 18 U.S.C.A. §3771; see also http://www.justice.gov/usao/eousa/vr/.

719 Transcript of RSP Victim Services Subcommittee Meeting 264 (Jan. 9, 2014) (testimony of Major Ryan Oakley).

720 Id.
E. FINDINGS AND RECOMMENDATIONS

Finding 31-1: The right to confer with the prosecutor under the CVRA is not directly analogous to the right to confer with trial counsel (military prosecutor) under the military justice system.

Finding 31-2: The CVRA grants victims the right to confer with the prosecutor in criminal cases. Similarly, DoD policy, Service policies, and the FY14 NDAA grant victims the right to confer with the trial counsel in criminal cases.

Finding 31-3: In the military justice system, a victim may confer with trial counsel on matters such as whether to pursue court-martial, nonjudicial punishment or administrative action in the case; and, if pursuing court-martial, what level of court-martial may be appropriate.\footnote{DoDI 1 030.02 ¶ 6.3.}

Finding 31-4: However, since a commander serving as the convening authority makes decisions on how to dispose of cases under the UCMJ, a victim’s right to confer with the trial counsel in the military justice system is not directly analogous to the CVRA right to confer with the prosecutor.

Recommendation 31: The Secretary of Defense direct the creation and implementation of mechanisms, where not currently in place, requiring trial counsel to convey the victim’s specific concerns and preferences regarding case disposition to the convening authority, so the convening authority may consider the victim’s concerns and preferences prior to making a decision on case disposition. These procedures will account for the convening authority’s role in the disposition of cases under the military justice system and create a process more analogous to a victim conferring with a prosecutor under the CVRA.\footnote{There are two related provisions to this recommendation in the FY14 NDAA. Section 1744(a)(2)(B) specifies that the Secretary of a Military Service shall require that for decisions not to refer charges of certain sex-related offenses for trial by court-martial, that “a determination be made whether the victim’s statement and views concerning disposition of the alleged sex-related offense were considered by the convening authority in making the referral decision.” FY14 NDAA § 1744(a)(2)(B). Also, the Sense of Congress in the FY14 NDAA, regarding the sparing use of discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses, provides in part that whenever possible, the victims of rape, sexual assault, forcible sodomy, or attempts to commit such offenses “shall be consulted prior to the determination regarding whether to discharge the members who committed such offenses” and that “convening authorities should consider the views of [the] victims...when determining whether to discharge the members who committed such offenses in lieu of trying such members by court-martial...” FY14 NDAA §1753.}

Finding 32-1: The FY14 NDAA extended most of the rights afforded civilian crime victims under the CVRA to crime victims under the military justice system\footnote{H.R. 3304, §17 01, Extension of Crime Victims’ Rights to Victims of Offenses Under the Uniform Code of Military Justice, 113th Congress: National Defense Authorization Act for Fiscal Year 2014. (2013).} by adding these rights into the UCMJ as Article 6b except the right to be reasonably heard on the plea.

Finding 32-2: The right to be heard on the plea as provided under the CVRA\footnote{18 U.S.C. § 3771 (a)(4) provides crime victims the right to be “reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”} does not extend to the rights conferred under Article 6b.
V. CRIME VICTIMS’ RIGHTS

Finding 32-3: The right to be heard on the plea is not directly analogous to the military justice system due to the differences in the manner in which pretrial agreements are accepted under military practice as compared to the civilian system.

Finding 32-4: The analogous opportunity for the victim’s input to be heard in the military justice system is before the convening authority decides to accept, reject, or propose a counter offer to a pretrial agreement submitted by an accused. 725

Recommendation 32: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations that provide victims a right to be heard regarding a pretrial agreement.

Recommendation 32a: The proposed changes should provide victims the right to be heard regarding a plea, with appropriate consideration to account for military pretrial agreement practice.

Recommendation 32b: The recommended changes include the right to be heard before the convening authority decides to accept, reject, or propose a counter offer to a pretrial agreement offer submitted by an accused. 726 The convening authority should retain discretion to determine the best means to comply with this right and consider the victim’s opinion (e.g., submission in writing, in person).

Finding 33-1: Victims should be able to enforce the rights guaranteed by Article 6b, UCMJ. 727 The FY14 NDAA did not specify any enforcement mechanism; rather, the FY14 NDAA requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe appropriate regulations to implement mechanisms to ensure enforcement of such rights, including mechanisms for application of such rights and for consideration and disposition of applications for such rights. 728

Finding 33-2: The CVRA expressly provides for legal standing for victims to seek enforcement of those rights listed in the CVRA. Specifically, the CVRA directs a victim to assert his or her rights in the district court in which the alleged offender is being prosecuted and if the offender has not yet been charged the asserted claim should take place in the district court of where the crime occurred. The district court will then immediately decide any motion asserting a victim’s right.

Finding 33-3: The CVRA expressly provides for an expedited review of any trial court decision on a victim’s right. The CVRA allows a victim to petition the court of appeals for a writ of mandamus and the appellate court shall review the issue within seventy-two hours of the filing of the petition.

725 See R.C.M. 705(a) (An accused and the convening authority may enter into a pretrial agreement).
726 See R.C.M. 705(d) (describing procedure regarding pretrial agreement negotiation).
727 DoD policy found at DoDD 1030.01 and DoDI 1030.02 and the FY14 NDAA does not expressly provide for a method of enforcement. However, the FY14 NDAA directs the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to enact regulations which provide for “mechanisms for the enforcement of such rights, including mechanisms for application of such rights and for consideration and disposition of applications for such rights.” FYNDAA 14 § 1701 at 711. Additionally, Congress directs the Secretary of Defense to designate an “authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights.” Id.
728 FY14 NDAA §1701(b).
Recommendation 33: The Secretary of Defense clarify that victims have legal standing to enforce their rights listed in Article 6b, UCMJ, at trial and appellate courts. Specifically, the Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to expressly provide for a victim’s ability to assert a violation of his or her rights in the trial court, in which the crime occurred, at any relevant time in the proceedings, including pretrial, during trial, and post-trial. The Secretary of Defense will provide procedures for a victim to seek mandatory expedited review of any alleged violation of those rights listed in Article 6b, UCMJ from an appellate court.

Finding 34-1: The FY14 NDAA amended Article 6 of the Uniform Code of Military Justice to extend to military crime victims many of the rights conferred to crime victims under the CVRA. These rights were incorporated into the UCMJ as Article 6b.

Finding 34-2: The CVRA requires prosecutors and investigators to use their “best efforts” to see that crime victims are notified of, and accorded, the rights under the CVRA. It further places responsibility on the court to ensure that crime victims are afforded the rights guaranteed in court proceedings under the CVRA.

Finding 34-3: The FY14 NDAA did not place a similar requirement on military investigators, prosecutors or military courts to ensure that crime victims in military proceedings have been afforded the rights specified in Article 6b, UCMJ.

Finding 34-4: Rather, the legislation requires the Secretary of Defense to “recommend changes to the Manual for Courts-Martial to the President and to prescribe appropriate regulations” to implement mechanisms for ensuring that victims are notified of and accorded the rights specified in Article 6b, UCMJ.729

Recommendation 34: Implement mechanisms to ensure that victims are notified of and accorded the rights provided by Article 6b, UCMJ.

Recommendation 34a: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to ensure that military investigators, prosecutors and other DoD military and civilian employees engaged in the detection, investigation, or prosecution of crime notify and accord victims the rights specified in Article 6b, UCMJ.

Recommendation 34b: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe mechanisms that make military courts responsible for ensuring compliance with the rights afforded to crime victims in court proceedings under Article 6b, UCMJ.

Finding 35-1: The CVRA provides conditions and time limits under which a victim may petition to re-open a plea or sentence that are not directly applicable to the military rules for courts-martial.

Finding 35-2: Specifically, the CVRA provides that, “A victim may make a motion to re-open a plea or sentence only if – (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and (C) in the case of a plea, the accused has not pleaded to the highest offense charged.”

729 FY14 NDAA §1701(b).
V. CRIME VICTIMS’ RIGHTS

Finding 35-3: There is no similar provision setting forth the conditions and time period under which a victim may petition to assert the rights set forth in Article 6b, UCMJ.

Finding 35-4: Rather, the FY14 NDAA requires the Secretary of Defense to recommend to the President changes to the Manual for Courts-Martial and to prescribe appropriate regulations including mechanisms to enforce such rights and consider and dispose of applications for such rights.730

Finding 35-5: Under military rules and procedures, a sexual assault victim may submit matters to the convening authority under certain conditions before the convening authority takes action on the case.731

Recommendation 35: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations establishing the time period under which a victim may petition to assert the rights to reopen a courts-martial plea or sentencing hearing, to ensure clarity regarding when a court-martial hearing can be reopened based on the request of a victim or victim’s counsel and to ensure the finality of court-martial proceedings. This time period should be sufficient so as not to limit or interfere with the victim’s right to present matters to the convening authority prior to his or her taking action on the case.732

Finding 36-1: To promote compliance, the CVRA directed the U.S. Attorney General to establish regulations that designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of crime victim’s rights.733 The Department of Justice established the Office of the Victims’ Rights Ombudsman to receive and investigate complaints filed by crime victims against its employees.

Finding 36-2: Similarly, the FY14 NDAA requires the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a Service in the Navy) to designate an authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights.

Finding 36-3: Designation of a separate authority within each of the Armed Forces and Coast Guard (when not operating as a Service in the Navy) to receive and investigate complaints could result in disparate procedures, rules, and standards for making and investigating complaints relating to a failure to comply with crime victims’ rights.

Recommendation 36: Congress enact legislation to require the Secretary of Defense designate one entity within the Department of Defense to receive and investigate complaints relating to violations of or failures by military and civilian employees from all of the Military Services to provide the rights guaranteed by Article 6b, UCMJ.

730 FY14 NDAA § 1701 sec 806b, Article 6b.
731 FY14 NDAA § 1706(a).
732 See Rule for Courts-Martial 1107 (governing action by convening authority); see also FY14 NDAA Sec. 1706(a) enacting a provision allowing victim submission of matters for consideration by the convening authority.
733 18 U.S.C. §3771(f)
**Finding 37-1:** The CVRA includes the opportunity for a victim to be reasonably heard at sentencing by allowing him or her to make a statement that is neither under oath nor subject to cross-examination. 734

**Finding 37-2:** Under military rules, a sexual assault victim may present evidence of financial, social, psychological, and medical impact of an offense the accused committed. 735

**Finding 37-3:** Unless there is an agreement from the defense, however, the victim must testify under oath, and is subject to cross-examination. 736

**Recommendation 37:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to provide victims the right to make an unsworn victim impact statement, not subject to cross-examination during the presentencing proceeding, with the following safeguards:

- The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;
- If there is “new matter” brought up in the victim’s unsworn statement, sentencing should be delayed so the defense can respond; and
- The unsworn statement should be subject to the same objections available to the government regarding the accused’s unsworn statement.

**Finding 38-1:** The Court of Appeals for the Armed Forces has addressed the issue of whether a victim has the right to be heard through counsel with regard to certain issues. 737

**Finding 38-2:** Absent formal clarification regarding whether references to a victim’s right to be heard includes through counsel, litigation on this issue is likely to continue.

**Recommendation 38:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to clarify that all victim rights that include a right for the victim to be heard include the right to be heard through counsel.

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735 R.C.M. 1001(b)(4).

736 R.C.M. 1001(b)(4); see also R.C.M. 913(c)(2); RCM 1001(c)(2)(C); M.R.E. 611.

I write separately to explain why I stand apart from my colleagues on the issue of whether the victim should have the right to make an unsworn victim impact statement at the sentencing hearing. While the reality is that victims are not always cross-examined at the sentencing hearing, it is crucial that the accused retains that right. The Rules for Courts-Martial are written to “…secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.” Allowing an unsworn victim statement subverts these goals. Retaining the adversarial nature during sentencing is inherently fundamental to the military justice process. When combined with the recent changes to the Article 32 (b) hearing, this proposed change is drawing us ever so close to a system which is devoid of due process for a military member accused of sexual assault. I cannot abide by such changes.

As an initial matter, due to the ability to cross-examine the victim, the defense may learn for the first time during sentencing that the victim had received mental health counseling that was previously not disclosed to the defense. This problem is exacerbated by the recent changes to Article 32 (b) hearings which severely limit the right of the accused to a pre-trial interview of the alleged victim. This can lead to post-trial 39a sessions where evidence relevant to the defense is disclosed. The relevant information would not come out without the ability to cross-examine the witness. At a post-trial 39a session, the military judge could reopen the case on the merits, which could lead to a different result entirely. In the very least, the ability to cross-examine the victim leads to additional information on sentencing that makes for a more informed and fair result for the accused.

More generally, the unsworn victim impact statement does not allow the accused to question the victim about inconsistencies between his or her statement at sentencing and his or her testimony on the merits. To illustrate, I recently had a case in which the victim’s testimony at sentencing was so inconsistent with her trial testimony that it led the panel members to ask the military judge whether they could reconsider their verdict on the merits regarding guilt. It was precisely the tool of cross-examination during sentencing that brought the witness’s discrepancies to light.

738 R.C.M. 102(b).
739 An Article 39(a) session refers to the ability of the military judge to call the court into session without the presence of the members. 10 U.S.C. §839.
740 The military judge ruled that the members could not reopen the merits portion of the case.
The Subcommittee heard similar testimony on this topic, as a federal defense attorney discussed unsworn victim impact statements at sentencing.

What frightens me is when they [victims] say things that no one else has said in the process before, and it’s the first time you’re hearing it when you’re up there, and the judge ends up taking that fact, and using that fact to give my client a longer sentence… My example… it was a pimp-prostitute relationship… and at the sentencing, the victim submitted a statement saying that as a result of what, her activities, she was sterile. And the judge used that fact, from her statement – it wasn’t backed up by any medical reports or anything else, used that fact to imply what’s called a permanent physical injury enhancement, which significantly increased the defendant’s sentence. We objected and appealed, and what ended up strengthening our appeal greatly was between the time of the sentencing and the appeal, she had a baby… It got remanded back and his sentence was reduced, but if we hadn’t filed that appeal, or if she’d gotten pregnant later in life, this person would be doing a lot longer on the basis of a statement that she submitted that was really just her say-so and not backed up by any medical evidence or anything like that.741

No one knows what a judge, or panel, may take away from unsworn testimony. Due to the peculiarities of the military system, there is no presentence report, and the first time that the defense would hear the information in the unsworn statement would be at the sentencing hearing, especially given the new limited pre-trial access to the alleged victim. It is of no moment that the accused retains the right to rebut the victim’s unsworn statement. That right is meaningless when there is no time to prepare a rebuttal with witnesses or evidence. It is likewise an inadequate safeguard to say that the victim would get the same limiting instruction that the accused receives when the accused gives an unsworn statement.742 The accused should have a right to an unsworn statement because, at the point of sentencing, guilt has been determined and the accused is facing constraints on his or her liberty.743 Any mistakes made by the panel regarding the proper weight to accord the accused’s unsworn statement only inures to the benefit of the accused, which is an appropriate safety net in the military justice system.

Conversely, the victim’s role at sentencing is completely dissimilar. Although the victim may be facing a cathartic moment with an unsworn statement, the purpose of sentencing is not therapy.744 That is a counselor’s job. Any mistakes by the panel regarding the proper weight to accord the victim’s unsworn statement would be to the detriment of the accused and would raise major appellate issues. A colloquy between the trial counsel


742 Under the Rules for Courts-Martial, “[t]he accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.” R.C.M. 1001(c)(2)(C).

743 The purpose underlying the right of allocution is to “permit a convicted defendant an opportunity to plead personally to the court for leniency in his sentence by stating mitigating factors and to have that plea considered by the court in determining the appropriate sentence.” U.S. v. Tamayo, 80 F.3d 1514, 1518 (11th Cir. 1996) [citing Green v. United States, 365 U.S. 301, 304–05 (1961) and Fed.R.Crim.P. 32(a)(1)(C)]. Furthermore, the defendant’s “[a]llocution serves an important function at initial sentencing, where the district court exercises discretion in determining an appropriate sentence.” Id.

VI. ADDITIONAL VIEWS OF SUBCOMMITTEE MEMBERS

and victim, similar to a colloquy between the defense counsel and accused, may be interpreted as sworn testimony. Even the specter of sworn testimony would be unduly prejudicial to the accused. We must not lose sight of the fact that even after conviction, the accused is a Service member who has served his or her country, often during times of war.

The discussion given by the Manual for Courts-Martial regarding the accused’s unsworn statement is clear. It should ordinarily not include what is properly argument, but inclusion of such matter by the accused when personally making an oral statement normally should not be grounds for stopping the statement.745 Similar latitude to the victim is impermissible. The accused must have the ability to object and contest improper argument during sentencing so that the accused gets a fair sentence that fits the crime for which he or she was convicted, and to ensure that the government’s (and victim’s) evidence and argument fit within the narrow provisions set forth in Rule for Courts-Martial 1001.746

If the RSP adopts the recommendation of the majority of the Subcommittee, I would like the Panel to consider adopting it with the following safeguards:

- If the victim refuses to provide a pretrial interview, the victim should not be allowed to make an unsworn statement at sentencing;
- The statement must be provided to the defense five days in advance of trial, to allow the defense the opportunity to provide meaningful rebuttal;
- The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;
- If there is “new matter” brought up in the victim’s unsworn statement, sentencing should be delayed so the defense can respond; and
- The unsworn statement should be subject to objections such as relevance and hearsay.

745 R.C.M. 1001(c)(2)(C) Discussion.
746 This is the main rule that governs sentencing in the military.
SEPARATE STATEMENT ON COLLATERAL MISCONDUCT

Michelle J. Anderson
Dean and Professor of Law
City University of New York School of Law

Meg Garvin
Executive Director, National Crime Victim Law Institute Clinical Professor of Law, Crime Victim Litigation Clinic Lewis & Clark Law School

The Honorable Christel E. Marquardt
Judge, Retired
Kansas Court of Appeals

We write separately from our colleagues on the Victim Services Subcommittee to recommend stronger measures on the issue of “collateral misconduct.” The threat that service members who have been sexually assaulted will be punished, up to and including prosecution, for conduct that they engaged in before or during the offense keeps many victims silent. The ability to punish sexual assault victims for such conduct creates a major barrier to the reporting and prosecution of sexual assault. In practice, victims are rarely prosecuted for such conduct, yet the threat of prosecution looms large, providing perpetrators with cover and intimidating victims. Eliminating the criminal prosecution of service members who report having been sexually assaulted would remove the leverage perpetrators continue to have and encourage victims to step forward.

The military criminalizes a range of behaviors that are not criminal in the civilian world, such as alcohol offenses, adultery, and fraternization (i.e., relationships between service members of different ranks outside a professional setting).1 When service members are sexually assaulted, whether by another service member or a civilian, the victim may have engaged in one or more of these activities around the time of the assault.2 If victims elect to report having been sexually assaulted, a convening authority may prosecute them for these behaviors or other crimes, collectively referred to as “collateral misconduct.”3

The civilian world has largely abandoned charges of collateral misconduct against a person who comes forward to report having been sexually assaulted.4 Even when the victim's misconduct involves offenses such as drug possession or prostitution, civilian prosecutors rarely charge the victim with criminal behavior.5 They choose, instead, to focus on the offense of highest import and consequence, the sexual assault.

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1 See, e.g., http://www.militaryreporter.org/om041397.html (soldier's crime of fraternization “is not even illegal in the civilian world”).


3 Id.

4 See, e.g., JSC-SAS Report Appendix E at 4 (bigger concern for District Attorney's Office in San Diego is whether victim lies about having committed misconduct, not misconduct itself); Appendix M at 8 (it is policy of Philadelphia District Attorney's Office not to charge victims for low level drug use/possession or alcohol violations, and immunity is sometimes granted for other offenses such as prostitution).

5 See, e.g., JSC-SAS Report Appendix F at 2 (police and prosecutors in Kent County, Delaware advise victims who may have committed minor misconduct such as underage drinking or drug use that they are focused on sexual assault and not minor misconduct); Appendix O at 1 (investigators in Snohomish County, Washington typically advise victim that law enforcement is not investigating or concerned with victim's drug possession or prostitution, because knowing what truly happened with the sexual assault is more
VI. ADDITIONAL VIEWS OF SUBCOMMITTEE MEMBERS

Civilian prosecutors realize that a policy of charging the victims with collateral offenses would deter them from coming forward to report sexual assault.\(^6\) From a public safety perspective, therefore, it is better to refuse to prosecute minor offenses in order to encourage and prosecute sexual assault. This practice works to ensure that sexual abusers are brought to justice.\(^7\)

The military’s policy allowing commanders the discretion to prosecute sexual assault victims for collateral misconduct\(^8\) creates a substantial structural impediment to victims reporting sexual offenses. The 2012 Department of Defense’s Workplace and Gender Relations Survey of Active Duty Members indicates that over 20 percent of victims who chose not to report having been sexually assaulted feared they or others would be punished for infractions or violations, such as underage drinking, if they reported the crimes they suffered.\(^9\)

These recent data are not new to the military. As far back as 2004, the Undersecretary of Defense wrote in a memo to the Secretaries of the Military Departments:

> One of the most significant barriers to the reporting of sexual assault is the victim’s fear of punishment for some of the victim’s own actions leading up to or associated with the sexual assault incident. Many reported sexual assaults involve circumstances in which the victim may have engaged in some form of misconduct (i.e., underage drinking or other alcohol related offenses, adultery, fraternization or other violations of certain regulations or orders).\(^10\)

The 2013 Department of Defense instruction on sexual assault prevention procedures later underscored: “Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim’s fear of punishment.”\(^11\)

The Victim Services Subcommittee Report finds that the threat of prosecution for collateral misconduct is a structural impediment to the reporting of sexual assault.\(^12\) Yet the Subcommittee only recommends that the Department of Defense study the problem and makes no recommendation about the wisdom of continuing to vest commanders with the authority to prosecute sexual assault victims themselves, even when the threat of prosecution deters victims from reporting.\(^13\)

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\(^{6}\) See Transcript of RSP Public Meeting 200-01 (Nov. 8, 2013)(Testimony of Mr. Chris Mallios, Attorney Advisor for AEQuitas).

\(^{7}\) See http://www.rollcall.com/news/military_women_fear_collateral_damage_from_reporting_sexual_assault-226859-1.html (some military sexual assault victims "simply assume that by reporting a crime, they've earned immunity from prosecution, a common arrangement in the civilian world, especially where fear of punishment would otherwise prevent reporting. Under the Violence Against Women Act, for example, undocumented victims may not be penalized for their immigration status and can even receive temporary legal status in exchange for assisting in the investigation of crimes.").


\(^{9}\) Transcript of RSP Role of the Commander Subcommittee Meeting, slide 9 of accompanying presentation (October 23, 2013).


\(^{11}\) Department of Defense Instruction 6495.02 (2013, incorporating February 12, 2014 change), Enclosure 5, ¶7(a).


\(^{13}\) See Supra Report, Section III, Subsection O, Recommendation 18.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Some subcommittee members expressed concern that the RSP did not receive evidence on the consequences of a military policy to discourage or disallow prosecutions of sexual assault victims for collateral misconduct. Since such a policy does not exist in the military, any testimony about it would be speculative. The evidence we do have on the record suggests that the Services themselves do not believe that the power to prosecute victims of sexual assault for collateral misconduct is critical. According to information the Services provided in response to the RSP’s request, the Air Force, Army, Navy, and Marine Corps have not tracked the prosecutions of victims of sexual assault for collateral misconduct. When they have tracked it, prosecutions appear to be few and of minor import.

The Coast Guard submitted information from fiscal years 2007-13 showing that it pursued very few prosecutions of collateral misconduct. The Army submitted data for fiscal year 2013 showing that adverse actions against sexual assault victims for collateral misconduct occurred in less than 5 percent of cases, and adverse actions, where they occurred, were mild. For example, adverse actions for collateral misconduct included counseling statements for underage drinking and non-judicial punishments for fraternization. In one jurisdiction, for three sexual assault cases, commanders considered punishing the underage drinking and fraternization engaged in by victims, but in all three cases the commander did not administer even non-judicial punishment.

Given these data, one cannot seriously argue that commanders must retain the discretion to prosecute sexual assault victims for collateral misconduct because military good order and discipline are at stake.

Despite the fact that commanders rarely impose punishment upon victims for collateral misconduct, many victims are so fearful that they will be punished for the behavior that they never report to command having been sexually assaulted. Sexual predators can exploit that fear and use the potential criminal liability of victims to persuade them to remain silent. Hence, many assaults go undetected and unpunished, leaving those perpetrators free to offend again. Deterring reports of sexual assault through the prosecution of victims’ collateral misconduct causes a serious diminution in military good order and discipline. It is worthy of reconsideration.

We recommend that the Department of Defense develop and implement a policy that commanders will not prosecute instances of lower-level collateral misconduct against those reporting credible allegations of sexual assault. Lower-level collateral misconduct would include underage drinking or related alcohol offenses, adultery, and fraternization. However, the Department of Defense may go further and define lower-level

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15 DoD and Service responses to Request for Information 49.

16 See DoD and Service responses to Request for Information 49 (indicating that Coast Guard took “action” for collateral misconduct against five individuals in FY07, two in FY08, seven in FY09, six in FY10 -11, four in FY12, and none in FY13. None of the “action” taken involved anything more serious than NJP. These instances are only of those cases of sexual assault in which the victim chose to report.

17 DoD and Service responses to Request for Information 138.

18 Id.

19 RFI 138.

20 See, e.g., Transcript of RSP Public Meeting 69-71 (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro)(describing discussion with SARC who warned that she would be charged with an offense if she decided to file sexual assault report); see also, Transcript of RSP Role of the Commander Subcommittee Meeting 62 (discussion between RSP Member Hillman and Dr. Galbreath that 22% of responses to the question regarding why victims didn’t report in 2012 Workplace and Gender Relations Survey (WGRA) were that “you fear that you or others would be punished”).
collateral misconduct as any offense that is less serious than sexual assault itself, given that commanders should be willing to forgo the pursuit of these lesser offenses when faced with a very serious crime that too often has gone unreported and unpunished.
Appendix A:

TERMS OF REFERENCE

These terms of reference establish the Secretary of Defense’s (SecDef) objectives for an independent subcommittee review of military and civilian systems for providing support and protection to victims in the investigation, prosecution, and adjudication of adult sexual assault crimes. At the SecDef’s direction, the Victim Services Subcommittee (“the Subcommittee”) has been established under the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) to conduct this assessment.

**Mission Statement:** Assess the adequacy of military systems and proceedings for providing support and protection to victims in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. § 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

**Issue Statement:** Section 576(d)(1) of the FY 2013 National Defense Authorization Act provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). This includes an assessment of military systems for providing support and protection to victims in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses. In addition, the Subcommittee should identify systems or methods for strengthening the effectiveness of military systems. Section 1731 of the FY 2014 National Defense Authorization Act established additional tasks for the Response Systems Panel.

**Objectives and Scope:** The Subcommittee will address the following specific objectives.

- Assess the adequacy of military systems and proceedings to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes.

- Assess whether military systems and proceedings provide victims the rights afforded by 18 U.S.C. § 3771, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2.

- Assess differences between military and civilian systems in providing support and protection to victims of adult sexual assault crimes.

- Identify best practices for victim support and protection from civilian jurisdictions that may be incorporated into any phase of the military system.

- Assess the effectiveness of proposed legislative initiatives modifying military justice processes in providing support and protection to victims of adult sexual assault crimes.
• An assessment regarding whether the roles, responsibilities, and authorities of Special Victims’ Counsel to provide legal assistance under Section 1044e of Title 10, United States Code, as added by Section 1716, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

• An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ the right afforded a crime victim in civilian criminal legal proceedings under subsection 17 (a)(4) of Section 3771 of Title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section.
On October 6, 2005, the Acting Deputy Secretary of Defense formally established the DoD Sexual Assault Prevention and Response (SAPR) Program. In June 2006, DoD issued initial SAPR program procedures.

The 2005 DoD policy introduced significant improvements to the military response system that are still in place today, including:

- A restricted reporting option for victims who wished to obtain services while maintaining confidentiality.
- Baseline and pre-deployment sexual assault prevention training for Service members and first responders (e.g., healthcare providers, victim advocates, law enforcement, criminal investigators, judge advocates, chaplains).
- Recommendation to commanders to delay disciplinary action for victims’ collateral misconduct until after final disposition of a sexual assault case.
- Required review of all administrative separations involving sexual assault victims to ensure that a “full and fair consideration of the victim’s military service and particular situation were taken into account during the separation action and to ensure that it was not in retaliation for the report.”
- Directed the Military Services to establish “immediate response capability” for “each report of sexual assault in all locations, including deployed locations, to ensure victims have timely access to appropriate services and that there is system accountability.”
- Established Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs).

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1 DoDD 6495.01 (October 6, 2005)
2 DoDI 6495.02 (June 23, 2006)
4 CY2004 SAPRO Report at 4-5
5 CY2004 SAPRO Report at 5
6 CY2004 SAPRO Report at 6
In addition, the inaugural DoD policy directed each of the Military Services to establish sexual assault program offices at all major installations, staffed by more than 1,000 trained SARCs and Victim Advocates (VAs) to implement the new SAPR programs. Since 2005, SARCs and SAPR VAs have become the heart of DoD’s sexual assault response program.

DoD SAPRO conducted a SAPR strategic planning effort in 2009 to align SAPR priorities across DoD. In May 2012, the Joint Chiefs of Staff weighed in on the importance of the issue, providing their strategic guidance in a report that directed a review and revision of SAPR strategy. In May 2013, DoD issued the current SAPR strategic plan. “Sexual assault” for purposes of receiving SAPR victim services, is defined as “intentional sexual contact characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent.”

The 2013 plan incorporated four key priorities originally developed in 2009: 1) increase reporting of sexual assaults, 2) increase the quality and access to services and support for sexual assault victims, 3) improve accountability, and 4) improve prevention and awareness.

CONGRESSIONAL OVERSIGHT OF DOD-SAPRO

The Defense Task Force on Sexual Assault in the Military Services

In 2004, Congress directed the Secretary of Defense to establish a task force examining matters relating to sexual harassment and violence at the United States Military Academy and the United States Naval Academy in the wake of a number of sexual misconduct allegations at the academies. After completing its report in 2005, Congress directed the task force to continue and assess the Military Services’ response to sexual assault.

The mission of the Defense Task Force on Sexual Assault in the Military Services (DTF-SAMS) was to assess current programs and recommend ways for the military to improve victim care, prevention efforts, program

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7 CY 2005 SAPRO Report at 1, DoD released its sexual assault policy framework in January 2005 in a series of Directive-Type-Memoranda (DTMs) that were consolidated and issued as Directive 6495.1 in October 2005. (p5)
8 SAPRO Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault and Response Training Report to the U.S. Army (Jan 22, 2013) [hereinafter Army Training Observation Report] at 2.
10 The Joint Chiefs of Staff, Strategic Direction to the Joint Force on Sexual Assault Prevention and Response (May 7, 2012).
11 Department of Defense Sexual Assault Prevention and Response Strategic Plan 5 (April 30, 2013)
12 DoDI 6495.02 at 94 (glossary), Department of Defense Sexual Assault Prevention and Response Program PowerPoint Presentation slide 5 (June 27, 2013) Offenses are charged based on the act perpetrated, the level of force used, and the ability of the victim to consent. Id. The UCMJ offenses included in the definition of “sexual assault” are: 1) rape (Art 120); 2) sexual assault (Art 120); Forcible Sodomy (Art 125); attempts to commit (Art 80); aggravated sexual contact (Art 120); and abusive sexual contact (Art 120). Id.
13 Department of Defense Sexual Assault Prevention and Response Strategic Plan 5 (April 30, 2013)
oversight, investigations, reporting, data collection and protecting confidentiality. Over the course of nine months, DTF-SAMS held two hundred sixteen structured focus group discussions during site visits to sixty installations world-wide. DTF-SAMS issued its report on December 1, 2009, containing eighty-three substantive recommendations to Congress, the Secretary of Defense, the Combatant Commanders, DoD Inspector General, the Judge Advocates General, Joint Commanders, Commanders of recruiting organizations and SAPRO.

DTF-SAMS’ recommendations covered four major areas: strategic direction, prevention and training, response to victims, and accountability. Overall, DTF-SAMS concluded that “since [the inception of the SAPR Program] in 2005, [the DoD] and Military Services … made major strides toward improving their capacity to respond to reports of sexual assaults,” but, the report continues, “the overall progress of the SAPR program [was] uneven.” Specifically, DTF-SAMS determined that a “lack of strategy and ineffective organizational structures … hindered adequate prevention and response to sexual assault.”

As a result, DTF-SAMS made a number of recommendations to “restruct[e] SAPRO and improve the visibility of its mission . . . to develop a credible data and reporting system and to establish consistency in SAPR programs and structures among the Military Services.” In addition, DTF-SAMS “urge[d] DOD and the Military Services to reinvigorate their victim support programs and ... develop strategic prevention strategies supported by a clear plan for continuous program evaluation.”

DoD SAPRO identified ninety-one recommendations from the DTF-SAMS study and told the RSP that it has “implemented all but six of them... and [they are] waiting for some of the processes...put in place a while back to complete...then those will be closed as well.”

Legislation

Since DTF-SAMS released its report in 2009, Congress has continued to enact statutory changes to address the issue of sexual assault in the military, many of which relate to victim services.

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16 FY05 NDAA, at § 576.
17 DTF-SAMS
19 DTF SAMS p2
20 DTF SAMS p2
21 DTF SAMS p3
22 DTF SAMS p3; DTF-SAMS made eight primary recommendations with respect to victim response Recommendation 20) Ensure victims are offered adequate legal assistance and appropriate privileged communications; 21) Give victims the opportunity to decline to continue participation in sexual assault investigations and decline SAPR Services; 22) Provide access to SAPR services to family members, retirees, DoD civilians and contractors; 23) ensure Restricted Reporting option; 24) Establish protocols for medical care of both male and female victims; 25) Improve sexual assault forensic exam practices; 26) Ensure victims’ medical records are complete and accurate; 27) establish universal hotline to facilitate victim reporting. At 68–74.
23 Transcript of RSP Meeting (June 27, 2013) (testimony of Dr. Nathan Galbreath).
The National Defense Authorization Act for Fiscal Year 2010 (FY10 NDAA) included two sections related to improved sexual assault prevention and response in the Armed Forces.24

<table>
<thead>
<tr>
<th>Section</th>
<th>Requirement</th>
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<tbody>
<tr>
<td>Section 567(a).</td>
<td>Amended the FY05 NDAA to require a revised sexual assault response plan within 180 days.25</td>
</tr>
<tr>
<td>Section 567 (b) and (c).</td>
<td>Required report evaluating the availability of sexual assault medical forensic examinations (SAFEs) in combat zones and the number of military protective orders related to sexual assaults.26</td>
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</table>

The National Defense Authorization Act for Fiscal Year 2011 (FY11 NDAA) included ten sections related to improved sexual assault prevention and response in the Armed Forces.27

<table>
<thead>
<tr>
<th>Section</th>
<th>Requirement</th>
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<tbody>
<tr>
<td>Section 1601.</td>
<td>Defines “sexual assault prevention and response program” as Department of Defense policies and programs intended to reduce the number of sexual assaults and improve the response to reports of sexual assaults.</td>
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<tr>
<td>Section 1602(e).</td>
<td>Required consistent terminology, position descriptions, program standards and organizational structures.</td>
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<tr>
<td>Section 1611.</td>
<td>Established a Director of SAPRO.</td>
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<tr>
<td>Section 1612.</td>
<td>Required the Secretary of Defense to issue standards to assess and evaluate the effectiveness of the sexual assault and prevention response program of each Service.</td>
</tr>
<tr>
<td>Section 1613.</td>
<td>Required report and plan for completion of acquisition of centralized Department of Defense sexual assault database.</td>
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<tr>
<td>Section 1614.</td>
<td>Required clarification on the limitations of restricted reports of sexual assault.</td>
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<tr>
<td>Section 1621.</td>
<td>Required the Secretary of Defense to establish consistent protocols for providing medical care for sexual assault victims.</td>
</tr>
<tr>
<td>Section 1622.</td>
<td>Provides that a member of the Armed Forces or a dependent thereof who is the victim of a sexual assault is entitled to assistance from a Sexual Assault Victim Advocate</td>
</tr>
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25 FY10 NDAA, at §567(a)(5).
26 FY10 NDAA, at § 567(b) and (c).
### APPENDIX B: HISTORICAL DISCUSSION OF THE SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM

<table>
<thead>
<tr>
<th>Section 1631</th>
<th>Annual report regarding sexual assaults involving members of the Armed Forces and improvement to sexual assault prevention and response program.</th>
</tr>
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<tbody>
<tr>
<td>Section 1632</td>
<td>Required the Secretary of Defense to evaluate the feasibility of: extending SAPR services to Department of Defense civilian employees, defense contractors and the Reserve component; requiring that a copy of the record of courts-martial proceedings be given to the victim when victim testified; providing legal assistance to sexual assault victims; and requiring use of forensic medical examiners when access to civilian resources is limited.</td>
</tr>
</tbody>
</table>


The National Defense Authorization Act for Fiscal Year 2012 (FY12 NDAA) included eight sections related to improved sexual assault prevention and response in the Armed Forces.

<table>
<thead>
<tr>
<th>Section 541</th>
<th>Reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice.</th>
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</thead>
<tbody>
<tr>
<td>Section 542</td>
<td>Amended Article 47 (refusal to appear or testify) to add the case of a subpoena <em>duces tecum</em> for an Article 32 investigation.</td>
</tr>
<tr>
<td>Section 581</td>
<td>Required legal assistance counsel to be offered as soon as victim contacts a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, or a trial counsel; and required victim to be informed that they may decline services or opt to utilize them at any time.</td>
</tr>
<tr>
<td>Section 582</td>
<td>Required consideration of expedited transfer for victims making unrestricted reports.</td>
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<tr>
<td>Section 583</td>
<td>Required Director of the Sexual Assault Prevention and Response Office to be a general or flag officer or a DoD Senior Executive Service level civilian.</td>
</tr>
</tbody>
</table>
| Section 584 | Required at least one full-time SARC and full-time VA for each brigade level unit; and required SARC and VAs to be certified prior to assignment.  
  - *Section 1724 of the FY14 NDAA amends this section to extend the requirement of timely access to Sexual Assault Response Coordinators to members of the National Guard and Reserves.* |

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Training and Education Programs for Sexual Assault Prevention and Response Program. Required outside victim advocacy experts be used in developing SAPR curriculums; required SAPR training at initial entry, annual refresher training, professional military education, peer education, and leadership training; required consistent SAPR training throughout the military Services; and required first responders to receive SAPR training courses.

- Section 574 of the FY13 NDAA amended this section to require training for new or prospective commanders; and required SAPR training for troops within 14 days of initial entrance on active duty or into a duty status with a reserve component.

Department of Defense policy and procedures on retention and access to evidence and records relating to sexual assaults involving members of the Armed Forces.

Section 585.

Section 586.


The National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) included twelve sections related to improved sexual assault prevention and response in the Armed Forces.29

<table>
<thead>
<tr>
<th>Section</th>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 570.</td>
<td>Amended the Armed Forces Workplace and Gender Relations Surveys to add “assault” along with “harassment and discrimination” to the survey; and to clarify when surveys are required.</td>
</tr>
<tr>
<td>Section 571.</td>
<td>Provides authority, upon request by the member, to retain or recall to active duty reserve members who are sexual assault victims while on active duty.</td>
</tr>
</tbody>
</table>

**APPENDIX B: HISTORICAL DISCUSSION OF THE SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM**

| Section 572. | Additional elements in comprehensive Department of Defense policy on sexual assault prevention and response.  

(a)(1) Requires tracking unrestricted reports, to include whether disposition by court-martial, non-judicial punishment or other administrative action.  

(a)(2) Requires administrative discharge if convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged.  

(a)(3) Requires commanders to conduct climate assessments within 120 days after commander assumes command and annually thereafter so long as in command.  

   - Section 1721 of the FY14 NDAA amends section 572 to require SECDEF to direct Secretaries to verify and track compliance of commanding officers in conducting organizational climate assessments for purposes of preventing and responding to sexual assaults.  

(a)(4) Requires DoD to post and widely disseminate information about resources available to report and respond to sexual assaults, including establishment of hotline numbers and Internet sites.  

(a)(5) Requires an education campaign to clearly inform members about authorities available to correct military records if a member experiences a retaliatory personnel action for making a report of sexual assault or sexual harassment.  

(b) Requires Services to clearly inform members about correction of their military records if a member experiences a retaliatory personnel action for making a report.  

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| Section 573. | Required the Military Services to establish “Special Victim Capabilities” to respond to allegations of certain special victim offenses; and which consist of collaborative teams of specially trained and selected investigators, judge advocates, victim witness assistance personnel.  

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| Section 574. | Enhancement to training and education for sexual assault prevention and response.  

   - Amends Section 585 of the FY12 NDAA to require sexual assault prevention and response training in the training for new or prospective commanders at all levels of command; and requires SAPR training for troops within 14 days of initial entrance on active duty or into a duty status with a reserve component.  

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| Section 575. | Added additional reporting requirements to the case synopses portion of the annual SAPR report.  

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30 FY13 NDAA, at § 572(b)(5). Members of the Armed Forces may seek remedies under chapter 79 of title 10, U.S.C. for the correction of military records when a member experiences any retaliatory personnel action for making a report of sexual assault or harassment.

The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) included 36 provisions related to improved sexual assault prevention and response in the Armed Forces.31 Unless otherwise noted, the provisions were effective immediately.

<table>
<thead>
<tr>
<th>Section</th>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 576.</strong></td>
<td>Independent reviews and assessments of Uniform Code of Military Justice and judicial proceedings of sexual assault cases.</td>
</tr>
<tr>
<td><strong>Section 577.</strong></td>
<td>Required Restricted Reports to be maintained for 50 years, if requested by victim.</td>
</tr>
<tr>
<td></td>
<td><em>Section 1723 of the FY14 NDAA amends this section to require retention for 50 years.</em></td>
</tr>
<tr>
<td><strong>Section 578.</strong></td>
<td>Required flag officer review of circumstances and grounds for involuntary separation of any member of the Armed Forces who made an Unrestricted Report of sexual assault within twelve months of separation action, within one year after making the Unrestricted Report.</td>
</tr>
<tr>
<td><strong>Section 579.</strong></td>
<td>Required creation of sexual harassment policy that includes prevention training, reporting mechanisms, responding to incidents.</td>
</tr>
<tr>
<td></td>
<td><em>(a) Required the Secretary of Defense to develop a comprehensive policy to prevent and respond to sexual harassment in the Armed Forces.</em></td>
</tr>
<tr>
<td></td>
<td><em>(b) Requires a plan to collect data on substantiated incidents of sexual harassment involving members of the Armed Forces for the purpose of identifying cases in which a member is accused of multiple incidents of sexual harassment</em></td>
</tr>
</tbody>
</table>

## APPENDIX B: HISTORICAL DISCUSSION OF THE SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM

<table>
<thead>
<tr>
<th>Section 1703.</th>
<th>Eliminates five-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1704.</td>
<td>Upon notice by trial counsel to defense counsel of the name of an alleged victim of a sex-related offense who trial counsel intends to call to testify at a preliminary hearing under Article 32 or a court-martial, defense counsel must make request to interview victim through trial counsel; and the interview of victim must take place in presence of trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate.</td>
</tr>
<tr>
<td>Section 1705.</td>
<td>(a) Discharge or dismissal for offenses of rape or sexual assault (under Art. 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts thereof (under Article 80); and trial of such offenses by general courts-martial.</td>
</tr>
<tr>
<td></td>
<td>- Effective June 26, 2014 (180 days after enactment of the Act).</td>
</tr>
<tr>
<td></td>
<td>(b) Jurisdiction limited to general courts-martial for offenses of rape or sexual assault (under Article 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts thereof (under Article 80).</td>
</tr>
<tr>
<td></td>
<td>- Effective June 26, 2014 (180 days after enactment of the Act).</td>
</tr>
<tr>
<td>Section 1706.</td>
<td>Participation by victim in clemency phase of courts-martial process.</td>
</tr>
<tr>
<td></td>
<td>- Further amends Section 1702 of the FY14 NDAA (which amends Article 60 of the UCMJ).</td>
</tr>
<tr>
<td></td>
<td>- Effective June 26, 2014 (180 days after enactment of the Act).</td>
</tr>
<tr>
<td>Section 1707.</td>
<td>Repeal of the offense of consensual sodomy under the Uniform Code of Military Justice.</td>
</tr>
<tr>
<td>Section 1708.</td>
<td>Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses.</td>
</tr>
<tr>
<td></td>
<td>- Effective June 26, 2014 (180 days after enactment of the Act).</td>
</tr>
<tr>
<td>Section 1709.</td>
<td>SECDEF to prescribe regulations that prohibit retaliation against members of the Armed Forces for reporting a criminal offense and criminalize retaliation under the UCMJ.</td>
</tr>
<tr>
<td></td>
<td>- Regulations prohibiting such retaliation due by April 26, 2014 (120 days after enactment of the Act).</td>
</tr>
<tr>
<td></td>
<td>- Report to Congress due June 26, 2014 (180 days after enactment of the Act) regarding whether a new punitive article is required to prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense.</td>
</tr>
<tr>
<td>Section 1711.</td>
<td>Prohibition on service in the Armed Forces by individuals who have been convicted of certain sexual offenses.</td>
</tr>
<tr>
<td>Section 1712.</td>
<td>Issuance of regulations applicable to the Coast Guard regarding consideration of request for permanent change of station or unit transfer by victim of sexual assault.</td>
</tr>
</tbody>
</table>
### Section 1713.

Allows the Secretary of Defense to provide guidance to commanders regarding their authority to reassign members alleged to have committed offenses under Articles 120, 120a, 120b, 120c, and 125 of the UCMJ.

### Section 1714.

Expansion and enhancement of authorities relating to protected communications of members of the Armed Forces and prohibited retaliatory actions.

### Section 1715.

Inspector General investigation of allegations of retaliatory personnel actions taken in response to making protected communications regarding sexual assault.

### Section 1716.

Requires Special Victims’ Counsel be made available to sexual assault victims.

- Effective June 26, 2014 (180 days after enactment of the Act).

### Section 1721.

Amends section 572 of the FY13 NDAA to require SECDEF to direct Secretaries to verify and track compliance of commanders in conducting organizational climate assessments for purposes of preventing and responding to sexual assaults.

### Section 1722.

Response Systems Panel report due in 12 months vice 18.

### Section 1723.

Amends section 577 of the FY13 NDAA to require mandatory 50-year retention for restricted and unrestricted report records on sexual assault involving members of the Armed Forces.

### Section 1724.

Amends section 584(a) of the FY12 NDAA to require timely access to Sexual Assault Response Coordinators by members of the National Guard and Reserves.

### Section 1725.

(a) Amends section 1602(e)(2) of the FY11 NDAA to address qualifications and selection of Department of Defense sexual assault prevention and response personnel.

(b) Requires the assignment of at least one full-time sexual assault nurse to any emergency department that operates 24 hours per day.

(c) No later than April 26, 2014, SECDEF submits report to the Armed Services Committees on the adequacy of training, qualifications, and experience of sexual assault prevention and response personnel.

### Section 1726.

Amends section 1611 of the FY11 NDAA to add responsibilities to the Sexual Assault Prevention and Response Office for Department of Defense sexual assault prevention and response program.

### Section 1731.

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
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</table>
| 1732.   | Requires the Secretary of Defense to review practices of MCIOs in response to allegations of Uniform Code of Military Justice violations and develop policy regarding use of case determinations to record results of MCIO investigations, similar to uniform crime report if feasible.  
- Review to be completed no later than June 26, 2014 (180 days after enactment of the Act). After review, SECDEF to develop uniform policy for the Armed Forces. |
| 1733.   | Review of training and education provided members of the Armed Forces on sexual assault prevention and response.  
- No later than April 26, 2014 (120 days after enactment of the Act), SECDEF to submit a report to Congress containing the results of the review. |
| 1734.   | Report on implementation of Department of Defense policy on the retention of and access to evidence and records relating to sexual assaults involving members of the Armed Forces.  
- No later than April 26, 2014 (120 days after enactment of the Act), SECDEF to submit report to Congress containing the results of the review. |
| 1741.   | Enhanced protections for prospective members and new members of the Armed Forces during entry-level processing and training.  
- No later than April 26, 2014 (120 days after enactment of the Act), SECDEF to submit report to Congress to assess whether a new punitive article is needed for prohibition of inappropriate senior-subordinate relationships with entry-level personnel. |
| 1742.   | Commanding officer action on reports on sexual offenses involving members of the Armed Forces.  
- A commanding officer, upon receipt of a report of a sex-related offense involving a member in the commanding officer's chain of command, must immediately refer the report to the appropriate MCIO. |
| 1743.   | Eight-day incident reporting requirement in response to unrestricted report of sexual assault in which the victim is a member of the Armed Forces.  
- No later than June 26, 2014, SECDEF to prescribe regulations to carry out this section. |
| **Section 1744.** | Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.  
- Requires the Secretary of military departments to review all cases under Articles 120(a), 120(b), 125, and attempts thereof, where the SJA recommends referral and the convening authority declines to refer charges. Requires review by the next superior commander authorized to exercise general court-martial convening authority when both the SJA recommends not referring charges and the convening authority does not refer charges. Also requires written statement explaining the reasons for convening authority's decision not to refer any charges for trial by court-martial. |
| **Section 1745.** | Inclusion and command review of information on sex-related offenses in personnel service records of members of the Armed Forces. |
| **Section 1746.** | Prevention of sexual assault at military service academies (within 14 days of arriving at school). |
| **Section 1747.** | Required notification whenever members of the Armed Forces are completing Standard Form 86 to allow a member to answer “no” to question 21 if the member received counseling related to a sexual assault. This legislation codified the April 5, 2013, policy guidance issued by the Director of National Intelligence. |
| **Section 1751.** | Sense of Congress on commanding officer responsibility for command climate free of retaliation. |
| **Section 1752.** | Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the Uniform Code of Military Justice through courts-martial. |
| **Section 1753.** | Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses. |
Appendix C:

SUBCOMMITTEE MEMBERS AND STAFF

MAI FERNANDEZ, EXECUTIVE DIRECTOR, NATIONAL CENTER FOR VICTIMS OF CRIME – VICTIM SERVICES

Subcommittee Chair

Mai Fernandez has been executive director of the National Center for Victims of Crime since June 2010. Ms. Fernandez has had a distinguished 25-year career in the criminal justice, nonprofit, and policy arenas. She has served as the acting executive director of the Latin American Youth Center, a DC-based nonprofit organization that provides multicultural, underserved youth with education, social, and job training services. Ms. Fernandez has spent the last 13 years managing programs that serve victims of child abuse, sex trafficking, and gang violence. Before joining the Latin American Youth Center, Fernandez served as Assistant District Attorney for New York County, helping victims navigate the criminal justice system and pleading their cases before the court. She also developed policy for victims of domestic and youth violence at the U.S. Department of Justice, Office of Justice Programs, and served as a Congressional aide to U.S. Representatives Mickey Leland and Jim Florio.

FORMER REP. ELIZABETH HOLTZMAN

Rep. Holtzman is counsel with the law firm, Herrick Feinstein, LLP. Rep. Holtzman served as a U.S. Congresswoman (D-NY, 1973-81) for eight years. While in office, she authored the Rape Privacy Act. She subsequently served for eight years as the Kings County, New York (Brooklyn) District Attorney, the fourth largest DA’s office in the country, from 1981-89. There, she helped change rape laws, improved standards and methods for prosecution, and developed programs to train police and medical personnel. Rep. Holtzman was also the only woman elected Comptroller of New York City. Rep. Holtzman graduated from Radcliffe College, magna cum laude, and received her law degree from Harvard Law School.
BG COLLEEN MCGUIRE, U.S. ARMY (RETIRED)

Brigadier General (Retired) Colleen McGuire is the seventh Executive Director of Delta Gamma Fraternity. In August 2012, BG McGuire retired from the United States Army after more than 32 years of service, including deployments to Somalia and Iraq. She last served at the Pentagon as the Director of Manpower and Personnel on the Joint Staff. As a military police officer, BG McGuire is the first woman in the history of the U.S. Army to hold the highest law enforcement office, Provost Marshal General of the Army; first woman to command the U.S. Army’s premier felony investigative organization, Criminal Investigations Command; and the first woman to command the Department of Defense all-male maximum security prison at Fort Leavenworth, Kansas. BG McGuire also served as the director of the Army’s Suicide Prevention Task Force.

MICHELLE J. ANDERSON, J.D., LL.M., DEAN AND PROFESSOR OF LAW, CUNY SCHOOL OF LAW

Michelle Anderson has been the Dean of CUNY School of Law since 2006 and has seen the law school through a period of great renewal and transformation in development, programs, and recognition. Dean Anderson is a leading scholar on rape law and has written numerous law review articles on the subject. Her article redefining what rape should be legally, “Negotiating Sex,” was selected as the core text on rape law in Criminal Law Conversations, published by Oxford University Press in 2009. Previously, Dean Anderson clerked on the United States Court of Appeals for the Ninth Circuit, and has taught at Georgetown University Law Center and as a visiting professor of law at the University Of Pittsburgh School Of Law.


Dean Schenck became Associate Dean for Academic Affairs at The George Washington University Law School in 2009 after serving in the Army’s Judge Advocate General’s Corps for more than 25 years. She also has served as a judge, lawyer, and educator. While in the military, she was an appellate military judge on the U.S. Army Court of Criminal Appeals in 2002 and received the 2003 Judge Advocates Association Outstanding Career Armed Services Attorney Award (Army). In 2005, Dean Schenck was the first female appointed as a Senior Judge on that court, where she served until she retired. In 2007, the Secretary of Defense also appointed her to serve concurrently as Associate Judge on the U.S. Court of Military Commission Review. After retiring from the military as a colonel in 2008, Dean Schenck served as Senior Advisor to the Defense Task Force on Sexual Assault in Military Services.
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 16 years, and heard a wide range of cases including accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering, and terrorism. 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 chief of the Organized Crime Unit in the Southern District of New York.

JUDGE CHRISTEL E. MARQUARDT, KANSAS COURT OF APPEALS, TOPEKA, KANSAS

Judge Marquardt was born in Chicago, Illinois. She received her B.S. in Education from Missouri Western State College in St. Joseph, Missouri and graduated with honors from Washburn University School of Law in 1974. While at Washburn, she served as managing editor of the Washburn Law Journal. After law school, she was an attorney in private practice at firms in Topeka and Kansas City. In 1994, Judge Marquardt and her son Andrew formed Marquardt & Associates, L.L.C. in Fairway, Kansas where she practiced until her appointment to the court in 1995. Judge Marquardt served as the first woman president of the Kansas Bar Association in 1987-88. She has been a member of the American Bar Association’s Board of Governors and has served in its House of Delegates since 1988. She is a past chair of the Washburn University of Topeka, Board of Regents and past chair of the Washburn University School of Law Board of Governors.

MEG GARVIN, M.A., J.D., EXECUTIVE DIRECTOR OF THE NATIONAL CRIME VICTIM LAW INSTITUTE (NCVLI) AND CLINICAL PROFESSOR OF LAW AT LEWIS & CLARK LAW SCHOOL

Meg Garvin, M.A., J.D., joined the National Crime Victim Law Institute (NCVLI) in 2003. She serves as Executive Director of NCVLI and clinical professor of law at Lewis & Clark Law School. Ms. Garvin is recognized as a leading expert on victims’ rights. She has testified before Congress and the Oregon Legislature on the current state of victim law. She serves on the Legislative & Public Policy Committee of the Oregon Attorney General’s Sexual Assault Task Force, co-chairs the Oregon Attorney General’s Crime Victims’ Rights Task Force, and is a Board member of the Citizens’ Crime Commission. She previously served as co-chair of the American Bar Association’s Criminal Justice Section Victims Committee, and as a member of the board of directors for the National Organization of Victim Assistance. She is the recipient of the 2012 Crime Victims First-Stewart Family Outstanding Community Service Award. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota and clerked for the Eighth Circuit Court of Appeals.
WILLIAM E. CASSARA, J.D., ATTORNEY AT LAW, U.S. ARMY (RETIRED).

For more than 20 years, Mr. Cassara has represented service members of all military branches in courts-martial, appeals of court-martial convictions, military discharge upgrades, administrative separations, security clearance matters, records correction, medical and physical evaluation boards and all other areas of military law. Mr. Cassara served six years on active duty in the Army JAG Corps and sixteen years in the Army JAG Corps Reserves. He served as a prosecutor, defense counsel and as appellate defense counsel. He has appeared before the Army Court of Criminal Appeals, the Air Force Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals and the Coast Guard Court of Criminal Appeals.

SUBCOMMITTEE STAFF

Commander Sherry King, U.S. Navy – Supervising Attorney

Ms. Julie Carson

Ms. Rachel Landsee

Ms. Kristin McGrory
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>SAPR</td>
<td>Sexual assault prevention and response</td>
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<tr>
<td>SAPRO</td>
<td>Sexual Assault Prevention and Response Office</td>
</tr>
<tr>
<td>SARB</td>
<td>Sexual Assault Review Board</td>
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<tr>
<td>SARC</td>
<td>Sexual Assault Response Coordinator</td>
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<td>SART</td>
<td>Sexual Assault Response Team</td>
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<td>SASC</td>
<td>Senate Armed Services Committee</td>
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<td>SAVI</td>
<td>Sexual Assault Victim Intervention</td>
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<td>Sec</td>
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<td>session</td>
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<tr>
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<td>STAR</td>
<td>Standing Together Against Rape</td>
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<td>SVC</td>
<td>Special Victims’ Counsel</td>
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<td>TRICARE</td>
<td>Triple option benefit plan available for military families</td>
</tr>
<tr>
<td>UCMJ</td>
<td>Uniform Code of Military Justice</td>
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<tr>
<td>USM.C</td>
<td>United States Marine Corps</td>
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<tr>
<td>USD P&amp;R</td>
<td>Under Secretary of Defense for Personnel and Readiness</td>
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<td>USN</td>
<td>United States Navy</td>
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<td>VA</td>
<td>victim advocate</td>
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<td>Vol</td>
<td>volume</td>
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<tr>
<td>VSS</td>
<td>Victim Services Subcommittee</td>
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<td>W.D.N.C.</td>
<td>Western District of North Carolina</td>
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*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
Appendix E:
PRESENTATIONS TO THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

JUNE 27, 2013
Public Meeting of the RSP
U.S. District Court for the District of Columbia
Washington, D.C.
- Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society
- Ms. Delilah Rumburg, Executive Director, Pennsylvania Coalition Against Rape
- Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)
- Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO
- Mr. Fred Borch, Army JAG Corps Regimental Historian
- Captain Robert Crow, Joint Service Committee Representative

AUG. 1, 2013
Preparatory Session of the RSP
One Liberty Center
Arlington, VA
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office
- Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program
- Major Jaclyn Grieser, Army Special Victim Prosecutor
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program
- Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch
- Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
• Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations
• Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service
• Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director
• Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager
• Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

AUG. 5, 2013
Preparatory Session of the RSP
One Liberty Center
Arlington, VA
• Professor Jeffrey Corn, South Texas College of Law
• Professor Chris Behan, Southern Illinois University School of Law
• Professor Michel Drapeau, University of Ottawa
• Professor Eugene Fidell, Yale Law School (via telephone)
• Professor Victor Hansen, New England School of Law
• Professor Rachel VanLandingham, Stetson University College of Law
• Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, British Army (via telephone)
• Major General William Mayville, Jr., U.S. Army
• Colonel Dan Brookhart, U.S. Army
• Colonel Jeannie Leavitt, U.S. Air Force
• Lieutenant Colonel Debra Luker, U.S. Air Force
• Rear Admiral Dixon Smith, U.S. Navy
• Captain David Harrison, U.S. Navy
• Commander Frank Hutchison, U.S. Navy
• Major General Steven Busby, U.S. Marine Corps
• Lieutenant Colonel Kevin Harris, U.S. Marine Corps
• Rear Admiral William Baumgartner, U.S. Coast Guard
• Captain P.J. McGuire, U.S. Coast Guard
• Air Commodore Cronan, Director General, Australia Defence Force Legal Service (via telephone)

AUG. 6, 2013
Preparatory Session of the RSP
One Liberty Center
Arlington, VA
• Lieutenant Colonel Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
• Dr. David Lisak, Professor, University of Massachusetts-Boston
• Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice
• Dr. Jim Lynch, former Director of the Bureau of Justice Statistics and current Chair, Department of Criminology and Criminal Justice at the University of Maryland

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: PRESENTATIONS TO THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://response systems panel.whs.mil/

SEPT. 24, 2013  Public Meeting of the RSP  
U.S. District Court for the District of Columbia  
Washington, D.C.   

- Professor Jeffrey Corn, South Texas College of Law  
- Professor Chris Behan, Southern Illinois University School of Law  
- Professor Michel Drapeau, University of Ottawa  
- Professor Eugene Fidell, Yale Law School (telephonic)  
- Professor Victor Hansen, New England School of Law  
- Professor Rachel VanLandingham, Stetson University College of Law  
- Lord Martin Thomas of Gresford QC, Chair of the Association of Military Advocates in the United Kingdom  
- Professor Amos Guiora, University of Utah College of Law  
- Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces  
- Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command  
- Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service  
- Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom  
- Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army  
- Senator Kirsten Gillibrand (New York)  
- Senator Claire McCaskill (Missouri)

SEPT. 25, 2013  Public Meeting of the RSP  
U.S. District Court for the District of Columbia  
Washington, D.C.   

- Lieutenant General Michael Linnington, U.S. Army  
- Colonel Corey Bradley, U.S. Army  
- Rear Admiral Dixon Smith, U.S. Navy  
- Captain David Harrison, U.S. Navy  
- Commander Frank Hutchison, U.S. Navy  
- General Edward Rice, U.S. Air Force  
- Colonel Polly S. Kenny, U.S. Air Force  
- Major General Steven Busby, U.S. Marine Corps  
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps  
- Rear Admiral Thomas Ostebo, U.S. Coast Guard  
- Commander William Dwyer, U.S. Coast Guard  
- Brigadier General Richard C. Gross, Legal Counsel, Chairman of the Joint Chiefs of Staff  
- Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army  
- Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy  
- Major General Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX E: PRESENTATIONS TO THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

• Ms. Marti Ribeiro
• Command Sergeant Major Julie Guerra, U.S. Army
• Colonel James McKee, Special Victims’ Advocate Program, U.S. Army
• Colonel Carol Joyce, Officer in Charge, Victims’ Legal Counsel Organization, U.S. Marine Corps
• Captain Karen Fischer-Anderson, Chief of Staff, Victims’ Legal Counsel, U.S. Navy
• Captain Sloan Tyler, Director, Office of Special Victims’ Counsel, U.S. Coast Guard
• Colonel Dawn Hankins, Chief, Special Victims’ Counsel Division, U.S. Air Force
• Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C.
• Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia
• Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York
• Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona
• Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center
• Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service
• Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization
• Captain Charles Purnell, US. Navy Defense Service Office
• Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force
• Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard
• Mr. David Court of Court and Carpenter, Stuttgart, Germany
• Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas
• Ms. Bridget Wilson, Attorney, San Diego, California

NOV. 21, 2013 Victim Services Subcommittee Meeting
One Liberty Center
Arlington, VA

• Ms. Shawn Wren, Director, U.S. Coast Guard Sexual Assault and Prevention Office
• Ms. Tanya Rogers, Program Analyst, US Navy Sexual Assault and Prevention Office
• Lieutenant Colonel Mike Lewis, Victim Witness Liaison (accompanied by Lisa Surrette, US Air Force Sexual Assault Response Coordinator and Captain Allison DeVito, Victim Witness Liaison
• Ms. Peggy Cuevas, Director US Marine Corps, MARFORRES, Sexual Assault Response Coordinator (accompanied by Gunnery Sergeant Yesenia Rodriguez, Unit Victim Advocate, Marine Corps Base Quantico, and Chief
• Warrant Officer Three Dancy Simons, Regional Victim Witness Liaison Officer, National Capitol Region
• Carolyn Collins, U.S. Army (accompanied by Janet Mansfield, U.S. Army)
• Bette Stebbins Inch, Senior Victim Services Advisor, Department of Defense Sexual Assault Response and Prevention Office
• Lieutenant Colonel Michael Lewis, U.S. Air Force, Joint Services Committee on the UCMJ
• Commander Sherry King, U.S. Navy, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
VICTIM SERVICES SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Captain Nicholas Carter, U.S. Air Force, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)

**DEC. 10, 2013**

**Site Visit Victim Service Subcommittee**

*Fort Hood, TX*

- Military Justice Personnel
- Behavior Health Personnel
- Representatives from the Family Advocacy Program
- Sexual Assault Response Coordinator
- Victim Advocates
- Representatives from the Victim Witness Assistance Program
- Special Victim Counsel

**DEC. 11, 2013**

**Public Meeting of the RSP University of Texas**

*Austin, Austin, TX*

- Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School
- Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense (Personnel & Readiness)
- Dr. Cara J. Krulewitch, Director, Women’s Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs)
- Captain Jason Brown, Military Justice Branch, Judge Advocate Division, U.S. Marine Corps
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
- Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General
- Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service
- Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service
- Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation
- Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command
- Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau
- Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit
- Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police
- Sergeant Jason Staniszewski, Austin Police Department, Sex Crimes Unit
- Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations
APPENDIX E: PRESENTATIONS TO THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research
- Dr. Kim Lonsway, Director of Research for End Violence Against Women International
- Major Melissa Brown, Texas National Guard (Public Comment)
- Mr. Daniel Ross, Attorney, Chairman of the Advisory Committee, Institute on Domestic Violence and Sexual Assault (Public Comment)

**DEC. 12, 2013**  
**Public Meeting of the RSP**  
**University of Texas**  
**Austin, Austin, TX**

- Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney’s Office
- Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
- Captain Jason Brown, Military Justice Branch (JAM), Judge Advocate Division, Headquarters U.S. Marine Corps
- Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney’s Office, District of Columbia
- Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
- Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
- Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, Army Trial Defense Service, U.S. Army
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
- Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
- Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
- Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
- Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Anne Munch, Owner, Anne Munch Consulting, Inc.
- Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
- Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney’s Office
- Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
- Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program, U.S. Navy
- Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
- Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
- James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
- Lieutenant Colonel Devin Winklosky, U.S. Marine Corps, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General’s Legal Center and School

**DEC. 13, 2013** Site Visit Victim Services Subcommittee Site Visit

**Joint Base**
San Antonio – Lackland, TX

- Basic Military Training Instructors
- Basic Military Training Trainees
- Members of the Special Victim Counsel Office
- Sexual Assault Response Coordinators
- Victim Advocates
- Victim Witness Liaisons

**JAN. 9, 2014** Victim Services Subcommittee Meeting

**One Liberty Center**
Arlington, VA

- Professor Doug Beloof, Lewis and Clark Law School
- Mr. Russell Butler, Executive Director, Maryland Crime Victims’ Resource Center
- Mr. Jonathan Jeffress, Assistant Federal Public Defender, Washington D.C.
- Major Ryan Oakley, Department of Defense

**JAN 30, 2014** Public Meeting of the RSP

**The George Washington University Law School**
Washington, D.C.

- Major General (Retired) Martha Rainville, U.S. Air Force (via telephone)
- Brigadier General (Retired) Pat Foote, U.S. Army
- Rear Admiral (Retired) Marty Evans, U.S. Navy (via telephone)
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Captain Lory (Retired) Manning, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps (via telephone)
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration
- General (Retired) Ann Dunwoody, U.S. Army
- General (Retired) Roger Brady, U.S. Air Force
- Vice Admiral (Retired) Mike Vitale, U.S. Navy (via telephone)
- Lieutenant General (Retired) James Campbell, U.S. Army
- Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force (via telephone)
- Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard
APPENDIX E: PRESENTATIONS TO THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

FEB. 26, 2014  Victim Services Subcommittee Meeting
One Liberty Center
Arlington, VA

• Captain Mike Colston, Md, U.S. Navy, Director, Mental Health Program, Clinical and Program Policy, Office of the Assistant Secretary of Defense
• Captain John A. Ralph, U.S. Navy, Assistant Deputy Chief, Wounded, Ill, and Injured, Navy Bureau of Medicine and Surgery
• Colonel Marie Colasanti, U.S. Air Force, Chief, Family Advocacy Program, Lackland-Kelly AFB.
• Colonel Tracy Neal-Walden, U.S. Air Force, Deputy Director, Psychological Health, Air Force Medical Support Agency
• Lieutenant Colonel Todd Yosick, U.S. Army, Behavioral Health Strategic Integrator and Liaison to the Department of Defense And Veterans Administration.
• Commander Kristie Robson, Department Head, Clinical Programs, Navy Bureau of Medicine and Surgery
• Mr. Scott Berkowitz, Founder and President, Rape, Abuse and Incest National Network
• Crystel Griffen, U.S. Navy, Family Advocacy Program
• Patricia Haist, Director of Clinical Services, YWCA West Central Michigan
• Paulette Hubbert, PhD, LCSW, ADC II, USMC (Ret)
• Katherine Robertson, DoD, Service Family Advocacy Program
• Jacqueline Richardson, U.S. Army, Family Advocacy Program

MAR. 13, 2014  Victim Services Subcommittee Meeting
One Liberty Center
Arlington, VA

• Military Sexual Assault Survivors

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
Appendix F: SOURCES CONSULTED

1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

   a. Enacted Statutes


   18 U.S.C. § 3771
   18 U.S.C. § 3510
   18 U.S.C. § 3525
   18 U.S.C. § 3555
   18 U.S.C. § 3663
   10 U.S.C. § 1044
   10 U.S.C. § 1565b
   Uniform Code of Military Justice, 10 U.S.C. §§ 806, 806b, 827, 842, 920, 920a, 920b, 920c
   42 U.S.C. § 10607
   Ariz. Rev. Stat. §13-4426.01
   Iowa Code §915.21.3
b. Proposed Statutes

Military Justice Improvement Act of 2013, S. 967, 113th Congress (2013); S. 1197, § 552, amend. no. 2099 (2013); S. 1752, 113th Cong. (2013)


c. Reports of Congress


3. JUDICIAL DECISIONS

a. Supreme Court

Green v. United States, 365 U.S. 301 (1961)

b. Court of Appeals for the Armed Forces


c. Service Courts of Criminal Appeals

d. Circuit Court Opinions

In re Kenna, 453 F.3d 1136 (9th Cir. 2006) In re McNulty, 597 F.3d 344 (6th Cir. 2010) In re Siler, 571 F.3d 604 (6th Cir. 2009)

United States v. Coxton, 598 F.Supp.2d 737 (W.D.N.C. 2009)


U.S. v. Tamayo, 80 F.3d 1514 (11th Cir. 1996)


4. RULES AND REGULATIONS

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012)


DEPARTMENT OF THE AIR FORCE, INSTRUCTION 51-201, ADMINISTRATION OF MILITARY JUSTICE (Jun 6, 2013)


U.S. MARINE CORPS, ORDER 5800.14, VICTIM-WITNESS ASSISTANCE PROGRAM (Mar. 15, 2013)

DEPARTMENT OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, COMMANDER, NAVAL LEGAL
SERVICE COMMAND, INSTRUCTION 5800.4A, VICTIM AND WITNESS ASSISTANCE PROGRAM (Apr. 18, 2011)

DEPARTMENT OF HOMELAND SECURITY, UNITED STATES COAST GUARD, COMDTINST M5810.1E, MILITARY JUSTICE MANUAL (May, 2011)

DEPARTMENT OF DEFENSE, FORM 2701, INITIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Aug. 2013)

DEPARTMENT OF DEFENSE, FORM 2702, COURT-MARTIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (May 2004)

DEPARTMENT OF DEFENSE, FORM 2703, POST-TRIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (May 2004)

DEPARTMENT OF DEFENSE, FORM 2704, VICTIM AND WITNESS CERTIFICATION AND ELECTION CONCERNING INMATE STATUS (Mar 2013)

DEPARTMENT OF DEFENSE, FORM 2705, VICTIM AND WITNESS NOTIFICATION OF CHANGES IN INMATE STATUS (Mar 2013)

FEDERAL RULES OF CRIMINAL PROCEDURE (Dec. 2013)

### 5. MEETINGS AND HEARINGS

**a. Public Meetings of the Response Systems Panel**

Transcript of RSP Public Meeting (June 27, 2013)

Transcript of RSP Public Meeting (Sept. 24, 2013)

Transcript of RSP Public Meeting (Sept. 25, 2013)

Transcript of RSP Public Meeting (Nov. 7, 2013)

Transcript of RSP Public Meeting (Nov. 8, 2013)

Transcript of RSP Public Meeting (Dec. 11, 2013)

Transcript of RSP Public Meeting (Dec. 12, 2013)

Transcript of RSP Public Meeting (Jan. 30, 2014)

**b. Meetings of the RSP Subcommittees**

Transcript of Role of the Commander Subcommittee Meeting (Oct 23, 2013) PowerPoint Presentation of DoD SAPRO (Oct. 23, 2013)

Transcript of Victim Services Subcommittee Meeting (Nov 21, 2013) Transcript of Victim Services Subcommittee Meeting (Jan 9, 2014) Transcript of Victim Services Subcommittee Meeting (Feb 26, 2014)

PowerPoint Presentation of Ms. Katherine Robertson, LCSW, “Department of Defense Family Advocacy Program (FAP) Overview” (Feb. 13, 2014)

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1 The materials pertaining to the meetings of the Response Systems Panel and its Subcommittees are currently available at http://responsesystemspanel.whs.mil/index.php/meetings.
VICTIM SERVICES SUBCOMMITTEE

Transcript of Victim Services Subcommittee Meeting (Mar 13, 2014)

c. Other Hearings

Transcript of Briefing on Sexual Assault in the Military, U.S. Commission on Civil Rights (Jan. 11, 2013).
Transcript of Hearing to Receive Testimony on Sexual Assaults in the Military, Hearing Before the Personnel Subcommittee of the Senate Armed Services Committee (Mar. 13, 2013), available at
Written Statement of General Raymond Odierno, U.S. Army, to Armed Services Committee, U.S. Senate (June 4, 2013)

6. OFFICIAL REPORTS


DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (FISCAL YEAR 2009),

DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (CALENDAR YEAR 2004),

DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (FISCAL YEAR 2007),

DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (FISCAL YEAR 2006),


THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES (Dec. 2009)

DEFENSE TASK FORCE ON DOMESTIC VIOLENCE -THIRD YEAR REPORT (2003)


DEPARTMENT OF DEFENSE, REPORT ON IMPLEMENTATION OF SECTION 1716 OF THE NATIONAL DEFENSE AUTHORIZATION ACTO FOR FISCAL YEAR 2014 (Apr. 4, 2014)


Memorandum from Major General Gary S. Patton, Director, DoD SAPRO, re “Assessment of Services’ Reviews of Prevention and Reporting of Sexual Assault and Other Misconduct in Initial Military Training” (Apr. 3, 2013) (on file with Response Systems Panel)
APPENDIX F: SOURCES CONSULTED


CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, CRIME VICTIMS' RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771 (April 24, 2012)


7. OFFICIAL POLICY STATEMENTS

a. President


b. Department of Defense


The Response Systems Panel has not yet considered or deliberated on the contents of this report.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
APPENDIX F: SOURCES CONSULTED


U.S. Department of Defense, Memorandum from the General Counsel on “Legal Assistance to Victims of Sexual Assault” (November 9, 2012).

U.S. Department of Defense, Memorandum from Secretary of Defense to the Secretaries of the Military Departments, regarding “Sexual Assault and Prevention” (August 14, 2013).


c. Services

U.S. Air Force, Special Victim Counsel Rules for Practice and Procedure (July 1, 2013) U.S. Army, Special Victim Counsel Handbook (November 1, 2013)

The Army Judge Advocate General, Memorandum for Judge Advocate Legal Services Personnel regarding “Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (November 1, 2013).


8. RESPONSES TO RSP REQUESTS FOR INFORMATION

Services’ Responses to Request for Information 1d (Nov. 21, 2013)
Services’ Responses to Request for Information 4 (Nov. 21, 2013)
Services’ Responses to Request for Information 8 (Nov. 21, 2013)
Services’ Responses to Request for Information 9 (Nov. 21, 2013)
Services’ Responses to Request for Information 10 (Nov. 21, 2013)
Services’ Responses to Request for Information 11 (Nov. 21, 2013)
Army’s response to Request for Information 44 (Nov. 21, 2013)
Service’s Response to Request for Information 49 (Nov. 21, 2013)
Services’ response to RSP Request for Information 138 (Jan. 14, 2014)

9. BOOKS, BOOKLETS, AND FILMS
10. JOURNAL ARTICLES


11. LETTERS AND E-MAILS

Secretary of Defense, Leon Panetta, Letter to Chairman, Committee on Armed Services, U.S. House of Representatives, Howard “Buck” McKeon (Nov. 8, 2012)

General Counsel of the Department of Defense, Letter to Chairman, Joint Service Committee on Military Justice (Sept. 20, 2012)


Acting General Counsel of the Department of Defense, Letter to Chairman, Committee on Armed Services, regarding Senate Report 112-173 (Feb. 18, 2013).

Assistant Secretary of Defense for Legislative Affairs to Senator Carl Levin, Chair, Armed Services Committee, U.S. Senate [date].


Roger A. Canaff, Letter to Ms. Taryn Meeks, Executive Director of Protect Our Defenders (Sept. 16, 2013) (on file with Response Systems Panel)

E-mail from Melvina Thornton, to Victim Services Subcommittee, re DAVA response to Victim Services Subcommittee, (April 22, 2014) (on file with Response Systems Panel)

News Articles and Broadcasts


APPENDIX F: SOURCES CONSULTED

12. ONLINE RESOURCES

United States Department of Justice, Bureau of Justice statistics, at http://trac.syr.edu/data/jus/eousaData.html


Department of Justice, Office of the Victim’s Rights Ombudsman Website available at http://www.justice.gov/usao/eousa/vr/


Military Rape Crisis Center, http://militaryrapecrisiscenter.org/for-active-duty/reporting-option/

Appendix G:
VICTIM WITNESS LIAISON COMPARISON
<table>
<thead>
<tr>
<th>Issue</th>
<th>DOD/JCS</th>
<th>USARMY</th>
<th>USAF</th>
<th>USNAV</th>
<th>USMC</th>
<th>USCG</th>
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</thead>
<tbody>
<tr>
<td><strong>Governing Policy or Regulation</strong></td>
<td>DODD 1030.1 Victim Witness Assistance, April 23, 2007</td>
<td>Army Regulation 600-20 Chapter 7 and 8 Army Command Policy.</td>
<td>AFI 51-201 Administration of Military Justice Chapter 7</td>
<td>OPNAVINST 5800.7A Victim and Witness Assistance Program.</td>
<td>MCO 5800.14 Victim Witness Assistance Program</td>
<td>The Coast Guard does not have a Victim Witness Liaison Program.</td>
</tr>
<tr>
<td></td>
<td>DODI 1030.2 Victim Witness Procedures</td>
<td>Army Regulation 27-10 Legal Services: Military Justice. Chapter 17</td>
<td></td>
<td>SECNAVINST 5800.11B</td>
<td>MCO 5800.7 Legal Administration</td>
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<td></td>
<td>DODI 6400.07 Standards for Victim Assistance Services in the Military Community</td>
<td></td>
<td></td>
<td>BUPERINST 5800.3A Victim and Witness Assistance Program.</td>
<td>MARADMIN 507/13 27 Sept 13 FY 14 USMC Victim-Witness Assistance Program Training.</td>
<td></td>
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</tbody>
</table>

**VWL - Rank**

- The designated VWL should, when practicable, be a commissioned officer, or civilian in the grade of GS-11 or above.
- When necessary, an enlisted person in the rank of E-6 or above, or civilian in the grade of GS-6 or above, may be designated as a VWL when a commissioned officer is not.
- The victim liaison is selected and appointed by the Local Responsible Official (LRO) or delegate (usually the VWAP coordinator).
- The victim liaison may be a medical or mental health care provider, judge advocate, paralegal, or other person appropriate under the circumstances of a particular case. There is no specific.
- The designated Victim Witness Liaison Officer shall be appointed from the legal office and is preferably a staff judge advocate, civilian attorney, or paralegal in the grade of GS-9 or above.
- The Regional Victim Witness Liaison Officer (RVWLO) shall be an officer or civilian member of the regional installation commander’s staff.
- The Victim Witness Liaison Officer (VWLO) is an officer or civilian employee on the local installation Commander’s staff.
- The Victim and
### VWL COMPARISON CHART

<table>
<thead>
<tr>
<th>Issue</th>
<th>DOD/JCS</th>
<th>USARMY</th>
<th>USAF</th>
<th>USNAV</th>
<th>USMC</th>
<th>USCG</th>
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<tr>
<td><strong>VWL – criteria and certification</strong></td>
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<tr>
<td>Victim assistance personnel are expected</td>
<td>available.</td>
<td>rank requirement.</td>
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<td>Witness Coordinator (VWAC) may be an officer, staff non-commissioned officer or civilian employee on the commander’s staff.</td>
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<td>to maintain standards of competence. They provide victim assistance in accordance with DoD and Military Service qualification requirements, such as education, training, or relevant experience.</td>
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<td>Victim assistance personnel must exercise careful judgment, apply flexibility and innovative problem solving, and take appropriate precautions to protect victims’ welfare under the guiding principle of “do no harm.”</td>
<td>Staff Judge Advocates will designate in writing one or more VWLs they have certified as qualified to administer the Victim/Witness Assistance programs for their office.</td>
<td>The LRO or delegate will determine the individual most qualified to serve as a victim liaison.</td>
<td>The VWLO should have legal training/experience with VVAP.</td>
<td>The RVWLO will be of appropriate grade, experience, and maturity. The RVWLO shall not serve as trial counsel, defense counsel, staff judge advocate, or legal assistance attorney.</td>
<td>The RVWLO shall not serve as trial counsel, senior trial counsel, regional trial counsel, defense counsel, senior defense counsel, regional defense counsel, staff judge advocate, or legal assistance attorney.</td>
<td>The VWAC should not serve as a...</td>
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<td>Issue</td>
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<td>VWLs in writing. In addition to the rank requirements, to the extent permitted by resources, SJAs should refrain from appointing attorneys as VWLs. When an attorney is assigned as a VWL, the attorney must ensure that victims and witnesses understand the attorney’s role as a VWL and that an attorney-client relationship does not exist. To be most effective, VWLs must be perceived as impartial actors in the court-martial process. The Office of The Judge Advocate General of the Army (OTJAG) verifies through Article 6, UMCJ, visits to all installations that Staff Judge Advocates have complied with the uniformed victim advocate and must be of appropriate experience, temperament, and rank. Generally the VWAC should not serve as a victim advocate due to potentially conflicting roles, responsibilities, and duties to the victim and command. The unit VWAC shall not serve as a trial counsel, defense counsel, or legal assistance attorney.</td>
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## APPENDIX G: VICTIM WITNESS LIAISON COMPARISON

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<th>USMC</th>
<th>USCG</th>
</tr>
</thead>
<tbody>
<tr>
<td>VWL – Responsibilities</td>
<td>Per DODI 1030.1, paragraph 5.2.8, “The local responsible official (also referred to as a victim/witness coordinator or victim/witness liaison) shall coordinate the effort to ensure that systems are in place at the installation level to provide information on available benefits and services, assistance in obtaining those benefits and services, and other services required” from this instruction.</td>
<td>The role of the VWL is one of facilitator and coordinator. The VWL will act as a primary point of contact through which victims and witnesses may obtain information and assistance in securing available victim/witness services. The VWL will act in conjunction with the unit victim advocate who is responsible for providing crisis intervention, referral, and ongoing nonclinical support to a sexual assault. At the earliest opportunity after the detection of a crime, and where it may be done without interfering with an</td>
<td>The VWAP Coordinator selected by the SJA to implement and manage the VWAP. This individual is responsible for ensuring the accomplishment of required training by all local agencies. The VWAP Coordinator may also serve as victim liaison as appropriate under the circumstances of a particular case. The victim liaison is appointed to assist the victim during the military justice process. The designation need not be in writing. A liaison is responsible for making contact</td>
<td>The VWLO is the representative for the Regional Commander or Type Commander is responsible for coordination of victim and witness assistance within their area of responsibility. They will ensure: each command appoints a VWAC; maintain a list of VWACs; maintain a list of services for victims within their area; obtain reporting data from VWACs; and chair meetings of the local VWC.</td>
<td>The RVWLO is the regional MCI Commanding General’s primary representative responsible for the VWAP program within each region. The RVWLO is ensuring that all installations under their cognizance of their respective commanders comply with the law and applicable orders and regulations. The RVWLO will: ensure regional compliance with the VWAP; maintain a list of VWLOs from each installation under their commanding general; ensure basic VWAP training is</td>
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</table>
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

### VWL COMPARISON CHART

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<th>Issue</th>
<th>DOD/JCS</th>
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<td>provide support when confronted with a crisis situation.</td>
<td>AR 27-10 and provided with a victim/witness packet. The VWL should use appendix d of AR 27-10 to ensure victims are informed of the services provided. The VWL will inform the victim of available medical services and will assist the victim in obtaining financial, legal, and social service support. The VWL will assist the victim in contacting the available agencies. During the investigation and prosecution of a crime, the VWL or other government representative will notify the victim of significant events in the case. To include: the status of the investigation; apprehension of the suspect; decision whether to prefer; initial appearance of victim and the various service agencies that assist with VWAP. A liaison will ensure that a victim remains informed regarding their rights throughout the justice process. This includes the right to notification of certain court-martial proceedings, the right to consultation with the trial counsel on decisions regarding disposition of the case, and notification of all available resources. The victim liaison will assist the victim or witness in arranging for medical care, notification of employers, counseling, and childcare. The liaison will also coordinate with the case paralegal and the legal office to make sure that all arrangements are</td>
<td>VWC will maintain secure records of each victim and/or witness information and the contact made with those individuals.</td>
<td>VWACs, service providers, and SJAs on the installation; ensure each organization appoints a VWAC; chair and conduct installation level Victim Witness Counsel meetings; maintain a website with information about VWAP personnel; distribute relevant information; ensure victims are notified of their rights; ensure victims are aware of VWAC personnel; compile data in accordance with VWAP requirements; ensure deploying units receive appropriate training; and assist victims in exercising their rights. The VWAC is a local commander’s designated representative for victim and witness assistance matters. The VWAC will ensure that victims</td>
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### VWL COMPARISON CHART

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<td>provide an explanation of victim’s rights; provide information on available resources; as needed provide written information on the on and off base resources; provide information on the military justice system; and provide liaison assistance with other organizations and agencies on victim care matters.</td>
<td>the suspected offender at a judicial hearing; scheduling dates; detention or release of the offender; acceptance of a guilty plea or rendering of a verdict; the opportunity to speak with the trial counsel about presenting evidence at sentencing; when offender is eligible for parole; general information about the corrections process; how to submit a statement to the clemency and parole board.</td>
<td>made for the victim/witness to ensure that they are able to travel and remain away from the accused at trial.</td>
<td>The government trial counsel or designee (usually the liaison) will also notify victims of their post-trial rights. This includes being notified any changes to a confinement status or appearance.</td>
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<td>and witnesses understand the rights afforded them under the law and ensure close coordination with VWAP personnel so victims are aware of the available resources.</td>
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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<td>charges; decisions about pretrial restraint; pretrial dismissal of charges; negotiations of pretrial agreements and their potential terms. Consultation may be limited when justified by the circumstances.</td>
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<td>The VWL will ensure non contraband property of the victim used in the prosecution is returned to the victim.</td>
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<td>The VWL will notify the SJA when a victim or witness is concerned for their safety. Will also advise victim/witnesses of protections from intimidation.</td>
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<td>At the request of a victim or witness, a VWL may act as an intermediary between such persons and the government or defense. The VWLs</td>
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<td>counsel complied with notification requirements in accordance with the VWAP. In the event a case is not referred to court-martial, a VWAC may perform the notifications and confer with the victims.</td>
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<td>The VWAC located at each Brig will ensure victims are notified of any changes in a prisoner’s confinement status. This includes any granted parole and/or clemency.</td>
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### APPENDIX G: VICTIM WITNESS LIAISON COMPARISON

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<th>Issue</th>
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<td>role in arranging the interviews is to ensure victims and witnesses are treated with respect and interference with their lives and privacy is kept to a minimum. At trial, will assist victim/witnesses in obtaining a separate waiting area. Also at the request of the victim or witness, the VWL will inform a victim’s employer of his or her involvement in the case and the possibility of missing work. They will also explain to creditors the victim’s involvement in this case if such involvement created a financial hardship.</td>
<td>SJAs will ensure that annual victim/witness assistance program training is provided to representatives of all agencies performing</td>
<td>The LRO is responsible for developing and implementing a training program at each installation. The LRO is also responsible for</td>
<td>Formal training is established and maintained for the Victim Witness Assistance Program in the Basic Lawyer, Legal Officer, Legalman, SJA, and</td>
<td>HQMC, Judge Advocate Division sponsors annual training on the proper implementation of VWAP. The training will provide regional</td>
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<td>VWL COMPARISON CHART</td>
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<td><strong>VICTIM SERVICES SUBCOMMITTEE</strong></td>
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APPENDIX G: VICTIM WITNESS LIAISON COMPARISON

VWL COMPARISON CHART

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Carolina. From 17 to 19 September, OTJAG also trained 35 Army Special Victim Counsel, four VWLs, and five paralegals designated for direct support of Special Victim Prosecutors, in Seattle, Washington. This training included instruction on working with victims of sexual assault, counterintuitive behavior, transitional compensation, and other Army specific programs that address issues related to sexual assault.

Both training programs were held in conjunction with Trial Counsel Assistance Program (TCAP) training for prosecutors to encourage collaboration and continuity of services.

for the coordination between agencies.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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APPENDIX G: VICTIM WITNESS LIAISON COMPARISON

VWL COMPARISON CHART

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<td>Forms 2701, 2702, 2703, 2704, 2705; and the cumulative number of inmates in each service for whom victim witness notifications must be made by the confinement facilities. The USD (P&amp;R) shall consolidate all reports submitted and submit an annual report to the office for Victims of Crime at DOJ.</td>
<td>Form 2702; the number of victims and witnesses who were informed of their right to be notified of changes to a confinee’s status. The Central repository will report to the OTJAG, Criminal Law Division, cumulative figures from the previous year. The SJA of each command having GCM Jurisdiction will report, though major Army command channels, to OTJAG Crim law, cumulative information about the following: number of victims who received DD Form 2701 from VWLs or other government representatives; the number of victims who received DD Form 2703 from trial counsel, VWL, or another designee. SJAs will obtain data using the DD Form 2706, Annual Report on Victim and Witness Assistance, to the Under Secretary of Defense for Personnel and Readiness, quantifying the assistance provided victims and witnesses of crime. Each base SJA or equivalent reports: the number of victims and witnesses who received a DD Form 2701 from law enforcement or criminal investigations personnel; the number of victims and witnesses who received a DD Form 2702 from the government trial counsel or designee; the number of victims and witnesses who received a DD Form 2703 from the government trial counsel or designee; and the number of DD Forms for each year. The number of victims and witnesses who were notified of changes in inmate status must be reported. The VWAC shall retain this data and report those numbers to the central repository. An annual report is required to be presented to the Under Secretary of Defense (P and R) on the assistance provided to victims and witnesses of crime.</td>
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<td>and notifications. This will be forwarded to HQMC.</td>
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for their reports from subordinate commands. Negative reports are required. OTJAG will then prepare a consolidated report on DD Form 2706 for submission to the department of defense. SJAs will ensure that each victim and witness in an incident receives a victim/witness evaluation form DA Form 7568. Evaluations will be reviewed locally by the SJA and copies forwarded quarterly to the Victim/Witness coordinator at OTJAG, Criminal Law.

A part of the Army SAPR Action Plan, OTJAG continues to collect and review every Department of the Army (DA) Form 7568, Army/Victim/Witness Liaison Program Evaluation. These forms are provided victims and witnesses who elected via the DD Form 2704 to be notified of changes in confinee status through JA channels to their major command.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX G: VICTIM WITNESS LIAISON COMPARISON

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<td>to each victim and witness in each trial by special or general court-martial, including sexual assault cases. It is also provided to victims and witnesses in cases where there is an investigation pursuant to Article 32, UCMJ, that does not result in a trial. The DA Form 7568 is optional for trials by summary court-martial and nonjudicial proceedings. They are returned anonymously, are reviewed by the local Staff Judge Advocate and forwarded to OTJAG, Criminal Law Division for review quarterly in accordance with AR 27-10, Military Justice, Paragraph 17-28, dated 3 October 2011. These evaluations are overwhelmingly positive.</td>
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<td>Command Responsibilities</td>
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<td>Commanders are responsible for establishing the victim witness assistance programs within their GCM jurisdiction.</td>
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<td>SJAs are designated as the local responsible official and will implement the local victim witness liaison program.</td>
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<td>The SJA will designate VWLs in writing. The SJA will then ensure law enforcement agencies inform victims and witnesses of the VWLs name and contact information.</td>
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<td>The Judge Advocate General (TJAG) is responsible for coordinating, implementing and managing the Air Force VWAP.</td>
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<td>The LRO is the individual responsible for identifying victims and witnesses of crimes and providing the services required by the VWAP.</td>
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<td>Each installation commander or SPCMCA, as appropriate, is the LRO. LROs may delegate the LRO duties and responsibilities to the SJA. The delegation must be in writing and addressed to the base SJA by duty title rather than name.</td>
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<td>The SJA may further delegate the LRO duties and responsibilities in writing to a VWAP Coordinator while</td>
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<td>The Chief of Naval Operations is the Component responsible Official for implementation of the Navy’s VWAP program.</td>
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<td>Responsibility for oversight is delegated to Navy Personnel Command, Office of Legal Counsel. The will ensure materials are provided to the Local Responsible Officials and will receive reports concerning assistance to victims.</td>
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<td>Regional Commanders are responsible for the overall implementation of the VWAP within their geographic areas and for acting as the central point of contact for victims and witnesses. Program oversight is administered through the SJA that provides legal support to that commander. They</td>
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<td>Regional MCI CGs are responsible for ensuring the VWAP is properly implemented by installation VWLOs in their region. Regional MCI CGs will appoint the RVWLO.</td>
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<td>Installation CGs or GCMCAs are responsible for implementing the VWAP program on their installations. The CG will appoint a VWLO for the installation and subordinate installations. The CG will establish the Victim Witness Assistance Counsel and comply with VWAP reporting requirements.</td>
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<td>If a brig is located on the installation, the CG will appoint a VWAC for that confinement facility. Unit commanders are responsible for aggressively</td>
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### VWL COMPARISON CHART

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<td>maintaining oversight and overall responsibility for the program.</td>
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<td>will also ensure close coordination is maintained between VWAP personnel; establish a VWAC; ensure data collection; appoint a VWLO Unit and Type commanders are responsible for ensuring victims are afforded their rights and informed of the status of their case. They are responsible for ensuring compliance with the VWAP and ensuring those under their command are properly trained. They will appoint a VWAC and ensure that VWAC fulfills their responsibilities. supporting the VWAP program and ensuring compliance with that program. Each unit commander will appoint a VWAC. Unit commanders will make every effort to protect victims within their command. Commanders will provide annual VWAP training.</td>
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Appendix H:
SARC AND SAPR VA
COMPARISON CHART

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<tr>
<td>Governing Policy or Regulation</td>
<td>DODD 6495.01, Sexual Assault Prevention and Response (SAPR) Program, 23 January 2012, incorporating change 1</td>
<td>AR 600-20 Chapters 7 and 8 (20 Sep 2012)</td>
<td>AFI 36-6001, Sexual Assault Prevention and Response (SAPR) Program, 14 October 2010, paragraph 2.3.</td>
<td>August 8, 2013 Secretary of the Navy Instruction 1752.4B Sexual Assault Prevention and Response (SECNAV 1752.4B SAPR).</td>
<td>MCO 1752.5B, MFB, 1 March 2013, Sexual Assault Prevention and Response Program</td>
<td>COMDTINST M1754.10D (19 April 2012)</td>
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<td>Restricted Reporting to Third Parties</td>
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<td>A victim’s communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information is in the victim’s officer and/or non-commissioned officer chain of command or DoD law enforcement, there can be no Restricted Report.</td>
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<td>A victim’s disclosure of his/her sexual assault to persons outside the protective sphere of the persons covered by the Restricted Reporting policy may result in an investigation of the allegations. (AR 600-20 Appendix H-5(e).)</td>
<td>USAF SARC’s and VAs should also notify victims that any disclosure of information about their sexual assault to individuals other than the SARC, VA or Healthcare Personnel may result in the initiation of an official investigation regarding the allegations that the victim disclosed (AFI36-6001, 3.1.9.8.2)</td>
<td>A victim’s communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information is in the victim’s officer or non-commissioned officer chain of command or DoD law enforcement, there can be no Restricted Report. SECNAVINST 1752.4B, Encl</td>
<td>All Marines shall report all incidents of sexual assault which come under their observation to PMO/Law enforcement and the chain-of-command immediately. MCO 1752.5B Encl 1, Ch 8-4(a)</td>
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<tr>
<td>SAPR VA - Rank</td>
<td>Not Addressed</td>
<td>ILT/CW2/SSG/GS-9 (RFI 8a, 9a)</td>
<td>O-2/E-4/GS-11 (RFI 8a, 9a)</td>
<td>No rank requirement/GS-9 (RFI 8a, 9a)</td>
<td>Sgt/GS-9</td>
<td>No rank requirement (RFI 8a, 9a)</td>
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<tr>
<td>Victim Advocacy Program Structure</td>
<td>If an installation has multiple SARC across the installation, a Lead SARC shall be designated by the Service. (4)(h)(1)</td>
<td>In Garrison:  - Installation SARC - Responsible for coordinating local implementation of SAPR  - Installation VAs (IVA) - Work directly with Installation SARC, victims, unit VAs, and other installation response agencies  - Uniformed VAs (UVAs) – Provide limited victim advocacy as a collateral duty  Deployed Environment:  - Deployable SARC - Soldiers who</td>
<td>MAJCOM SARC - Administers SAPR program within that MAJCOM and provides functional oversight and guidance for Installation SARCs.  Installation SARC - Reports directly to the installation WG/CV. Is installation’s single point of contact for integrating and coord. SA victim care services. Tracks status of SA cases in AOR &amp; updates WG/CV.  Installation SARC Admin Assist. - performs clerical duties to directly support the SARC</td>
<td>Installation SARC - Military or civilian. Provides local management of SAVI program  SAVI Command POC - Responsible for facilitating awareness and prevention training and oversight of command compliance with SAVI program requirements. Command Data Collection Coordinator (DCC) - Responsible for obtaining data on sexual assault incidents to meet reporting requirements</td>
<td>Command SARC – Civilian or Military  Installation SARC – Full-time civilian employees  Uniformed VAs – A minimum of two appointed at each battalion, squadron or equivalent level command whether garrison or deployed. Each region, MCD, recruiting station, and MARFORRES site must have a minimum of 1 UVA. UVAs report to Command and Installation SARC for SA duties.</td>
<td>Employee Assistance Program Coordinator (EAPC)/SARC – Military or civilian. If a dedicated SARC is not co-located, serves as central POC at the Command or within a geographic area to conduct SAPR awareness, prevention and response training.  Family Advocacy Specialist (FAS) – Military or civilian. Handles cases of family violence within FAP. May also act as a SARC if needed and trained.</td>
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### SARC and SAPR VA COMPARISON CHART

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<th>Issue</th>
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<td>coordinate SAPR program as a collateral duty. At each brigade/unit of action and higher. No civilians. - UVAs – Soldiers who provide victim advocacy as a collateral duty. 2 UVAs for each battalion-sized unit. AR 600-20 (8-3)</td>
<td>and installation’s SAPR program. VAs – provide support, liaison services and care to victims of SA. All are volunteers. Can be civilian or active duty. Deployed Environment: - Can be trained military SARC or civilian SARC who volunteer. Normally, each AEW will warrant at least 1 SARC. For smaller deployments, cdrs must provide a sexual assault response capability. AFI 36-6001(2.2, 2.3, 2.4, 2.5)</td>
<td>- Installation VAs - Uniformed VAs – Respond to victims whenever sexual assault occurs in locations where installation VAs are not available (e.g., when deployed). OPNAVINST 1752.1B (8b(6), 9c(1), (3), (6), (7), 9d(2), (9), 9f(3), (4), (6), Encl (1)8)</td>
<td>sometimes lists UVA and sometimes UVA/VA, indicating that there can be civilian VAs though the civilian VA is never defined or specifically referred to in the reg. MCO 1752.5B (b(7)(a), (d), b(10)(a), Encl (1) Ch 3 (2)(a)(1), (2)(b)</td>
<td>should designate command member(s) as VAs. Commands are strongly encouraged to have at least one VA especially on afloat units. COMDTINST M1754.10D Ch 6(H), (1), (K)</td>
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**SAPR VA - Reporting Structure (RFI 8g, 9g)**

The Army is not currently identifying reporting structures, as each command has the flexibility to establish the appropriate structure for their organization and could change under the VA reports to the installation SARC, or as applicable, the installation SAVA. SAVA’s direct supervisor is the installation SARC. SAPR VAs report directly to the SARC regarding all sexual assault cases. UVAs coordinate directly with the Installation SARC and Command SARC regarding all sexual assault cases, but work directly for the victim when providing services. VAs work directly for the cognizant SARC in their VA role.
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<td>SARC’s. Regional SARC’s oversee</td>
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<td>Civilian full-time Command SARC’s</td>
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<td>as a subject matter expert, trainer, and</td>
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<td>program coordinator in conjunction with</td>
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<td>the Command SARC.</td>
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<td>The Command SARC also provides the</td>
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<td>Installation SARC with SAPR-related data</td>
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<td>and case information as requested.</td>
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<td>Installation SARC, and Command SARC’s</td>
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The SARC will manage the case and ensure the UVA is providing the support required. VAs work directly for the Installation SARC.
## SARC and SAPR VA COMPARISON CHART

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<tr>
<td>Marine Expeditionary Unit Commanders are required to appoint, in writing, a Command SARC.</td>
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<td>Installation SARCs work directly for the Installation Commander.</td>
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<td>together to expedite the flow of SAPR-related information to and from the field and to ensure victim care.</td>
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<td>All General Court-Martial Convening authorities and Marine Expeditionary Unit Commanders are required to appoint, in writing, a Command SARC.</td>
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### SAPR VA - Screening and selection process (including databases checked) (RFI 8b, 9b)

- After October 1, 2013, all SAPR VAs must be certified under this program.
- Applications consist of two letters of recommendation, one of which must be from the SARC’s Commanding Officer -- which must include a completed National Agency Check; the SARC/SAPR VA Code of Ethics; and a certificate of completion of 40 hours of victim advocacy training.
- The Army records check process 1402.5 (Criminal History Background Checks on Individuals in Child Care Services), January 19, 1993; U.S. Department of Justice National Sex Offender Registry; Army Military Human Resource Record; Department of the Army Inspector General files; and U.S. Army Criminal Investigation Command/Crime Records Center.
- The UVA program is volunteer. The UVA program is volunteer. The UVA program is volunteer. The UVA program is volunteer.
- To apply, airmen must complete: a Commander’s or Agency Head’s Statement of Understanding, a Volunteer’s Statement of Understanding for Volunteer Victim Advocates, a completed application, conduct a SARC interview per AFI 36-6001, be subjected to a criminal background check conducted by Commanders select Uniformed SAPR VAs whom they believe will be an appropriate fit for the role, attesting to their good moral character, professional abilities and willingness to perform the duties of a SAPR VA.
- SARCs conduct interviews and conduct ongoing assessment of the candidate’s suitability throughout the training process.
- UVAs must have: flexible schedule, be available 24/7, have no adverse fitness reports in grade, no history of SA or SH allegations, no history of Court-Martial, no NJP w/in last 3 years, no history of drugs, no alcohol incidents in last 3 yrs, no domestic violence history.
- UVAs - emotional maturity of the candidate to maintain the necessary
- VAs are screened for background misconduct, recommended by their command, and screened by the SARC for level of maturity, interest in SAPR and assisting victims, and any personal issues that could make the VA role too much of a challenge for the volunteer.
- UVAs - emotional maturity of the candidate to maintain the necessary
**SARC and SAPR VA COMPARISON CHART**

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<td>SAPR VAs must also obtain 32 hours of additional training and re-certify every two years.</td>
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<td>NOVA administers the D-SAACP through a contract with the DoD SAPRO.</td>
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<td>Deployable UVAs: Recommended by chain of command, First LTC or battalion level equivalent or higher must approve, Must be deployable, Able to respond 24/7 when on call, Have outstanding duty performance evaluation reports, demonstrate stability in personal affairs, have no history of domestic violence or severe personal problems including significant indebtedness, excessive use of alcohol, or any use of illegal drugs, no UCMJ violations for last 5 yrs, must be deployable with min of one year retainability in the unit (this is non-waiverable), collateral duty, available to attend SARB as needed, successfully complete training</td>
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<td>AFOSI using AFOSI Manual 71-122, and also a mental health background check. (See Attachment, AFI 36-6001 Atch 3, 4, 6)</td>
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<td>Civilian VAs must pass a background check conducted for all potential AF GS employees, position is Non-Critical Sensitive Security and requires a current Access National Agency Check with Inquiries or a National Agency Check with Local Agency Check and Credit as a condition of employment. To be hired as a SAVA, the applicant must possess knowledge of a wide range of generally accepted practices and procedures associated with victim advocacy, social services delivery systems,</td>
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<td>The candidate must not be under investigation for any criminal offense, does not carry a conviction for a sexual offense, is not required to register as a sexual offender, and has completed the National Agency Check (NAC). Civilian: minimum of one year specific experience working with victims of sexual assault or working in victim advocacy and victim advocacy services is required. They must submit a Declaration for Federal Employment (which asks about prior misconduct or illegal activities) to NAF HR.</td>
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<td>approachable, have good communication skills, ability to gain rapport, good listener, empathetic, must be comfortable with sensitive topics, discreet, able to maintain confidentiality, have a calm demeanor during stressful situations. They must have the ability to work within established guidelines, the ability to conduct training for unit personnel, to participate in monthly case management group mtgs, ability to complete basic data entry, ability to care for self and ask for support. They must receive a local background check prior to credentialing and appointment. The must receive a National Agency confidentiality. VAs must also have at least one year left at their unit, have resolved (healed from) any personal experience with sexual assault or other interpersonal trauma, and possess a desire to assist victims.</td>
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<td>No civilian VAs by policy (RFI 8a, 9a)</td>
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<tr>
<td><strong>SARC - Screening and Selection Process (including databases checked)</strong>&lt;br&gt;(RFI 10b, 11b)</td>
<td>prior to assuming duties.</td>
<td>principles, and behavioral theories relating to victim advocacy, sexual assault and other acts of interpersonal violence.&lt;br&gt;(RFI 8a, 9a)</td>
<td>Check.&lt;br&gt;Civilian:&lt;br&gt;- Completion of a four-year degree in behavioral health, social science, or a related field or work area and three years of experience that demonstrates the knowledge and skill needed to provide direct support to victims.&lt;br&gt;Must receive a local background check prior to credentialing and appointment. Additionally, VAs receive a National Agency Check prior to being offered the position.</td>
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<td>Per DoDD 6495.01, the SARC (civilian or uniformed) is a person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual</td>
<td>The Army records check process includes data as identified in the Department of Defense definition for &quot;Installation Records Check&quot; in Department of Defense</td>
<td>AFI 36-6001, para. 2.3.3.1.2. “SARC responsibilities are part of the 38F (Force Support) core competencies. Other officers or civilians, except those noted in paragraph 2.3.1.1., may serve as SARC’s provided</td>
<td>Commanders select Uniformed SARC’s whom they believe will be an appropriate fit for the role, attesting to their good moral character, professional abilities and willingness to perform the duties of</td>
<td>All Command SARC’s must receive a local background check prior to credentialing and appointment. The local background check is required within 120 days of submission for credentialing.</td>
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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| Support will include providing information on available options and resources to victims. The SARC, on behalf of the sexual assault victim, provides liaison assistance with other organizations and agencies on victim care matters and reports directly to the SARC when performing victim advocacy duties. Personnel who are interested in serving as a SARC are encouraged to volunteer for this duty assignment.
- Per DoDI 6495.02 SAPR Program Procedures (p49, Enc. 6), the SARC shall:
  - Comply with DoD Sexual Assault Advocate Instruction 1402.5 (Criminal History Background Checks on Individuals in Child Care Services), January 19, 1993; U.S. Department of Justice National Sex Offender Registry; Army Military Human Resource Record; Department of the Army Inspector General files; and U.S. Army Criminal Investigation Command/Crime Records Center databases.
  - Deployable SARCs and UVAs will be selected in accordance with the following requirements: Be recommended by the chain of command. The first LTC or battalion level equivalent or higher commander will approve the recommendation and sign the appointment order, must be they are released by their career field program manager, successfully complete requisite training identified in paragraph 2.8., and are approved by AFPC Assignments Branch.”
  - Hiring of civilian SARCs is covered under standard AF civilian personnel hiring directives. This includes an interview; meeting civilian personnel classification requirements, and a background check through the civilian personnel hiring process.
  - Eligibility to be a SARC. SARCs can be either an Air Force officer or DoD civilian employee. Military SARCs must be designated as deployable resources, and support the Air Force when deployed.
  - A SARC.
  - Another SARC facilitates ongoing assessment of the candidate’s suitability throughout the training process.
  - The Regional SARCs also verify that the Uniformed SARCs is not currently under investigation for any criminal offense; does not carry a conviction for a sexual offense; is not required to register as a sexual offender; and has completed the National Agency Check (NAC).
  - The Human Resources office advertises the SARC position and uses a credentialing plan to determine eligible candidates. Candidates must submit a Declaration for Federal Employment.
  - Additionally, SARCs receive a National Agency Check.
  - Full-time SARCs must receive a local background check prior to credentialing and appointment. Additionally, SARCs receive a National Agency Check prior to being offered the position.
  - Active-duty Command SARCs (collateral duty) are selected based on the same criteria as a UVA,
  - Command SARCs: All full-time civilian Command SARCs are required to complete a four-year degree in behavioral health or social science AND possess three years of experience that demonstrates acquired knowledge of one or more of the behavioral health disciplines.
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Certification requirements, be trained in and understand the confidentiality requirements of Restricted Reporting and MRE 514. Training must include exceptions to Restricted Reporting and MRE 514. must be deployed, must be able to respond to a sexual assault incident at any time when on call, must have outstanding duty performance, as evidenced by a review of the individual’s evaluation reports, must demonstrate stability in personal affairs. Support will not have a history of domestic violence or severe personal problems, including significant indebtedness, excessive use of alcohol, or any use of illegal drugs. Will be required to obtain a waiver from HQDA in instances where individuals have withdrawn from the Human Reliability or Personal eligibility Program during the 2 years preceding the nomination. Must not have been Force’s commitment to expeditionary missions, ensuring that SAPR capability is transferable to the battlefield (real or exercise). Military SARC positions cannot be converted to civilian positions without the approval of HQ USAF/A1. SARC responsibilities are part of the 38F (Force Support) core competencies. Other officers or civilians, except those noted in paragraph 2.3.1.1., may serve as SARC’s provided they are released by their career field program manager, successfully complete requisite training identified in paragraph 2.B., and are approved by AFPC Assignments Branch. Employment (which asks about prior misconduct or illegal activities) to NAF HR. FFSC Directors and/or SARC Supervisor is provided a list of eligible candidates and schedules interviews. RSARC developed standardized questions to be used for interview process throughout the region. FFSC Director and/or SARC Supervisor selects candidate. Once hired, SARC’s complete documentation for a National Agency Check (NAC). SARCs also serve as the SAPR VA when needed and based on victim’s preference. or social sciences equivalent to a major in the field OR an appropriate combination of education and experience that demonstrates possession of knowledge and skill equivalent to that gained in the above. The SARC is required to obtain and maintain certification/credentialing as required by the FY12 NDAA through the Department of Defense Sexual Assault Advocate Certification/Credentialing Program (D-SAACP) or an agency approved by Headquarters Marine Corps. Installation SARCs: (NF-4) Completion of a four-year degree in behavioral health or social science AND three years of experience that demonstrates acquired knowledge.
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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<td>assault. Acknowledge understanding of their advocacy roles and responsibilities using DD Form 2909, Victim Advocate and Supervisor Statements of Understanding. Questions 10 (a), (b), and (d) thru (i) are specific to the Military Services and National Guard Bureau SAPR program policies.</td>
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<td>punished under the provisions of the UCMJ during the 5 years preceding the nomination, must be deployable with a minimum of 1 year retainability in the unit (for short tour areas, UVA must have a minimum of 6 months retainability in the unit). This requirement is non-waiverable. The deployable SARC will be an NCO (SFC or higher), officer (MAJ/CW3 or higher), or civilian (GS–11 or higher). The UVA will be an NCO (SSG or higher), officer (1LT/CW2 or higher), or civilian (GS–9 or higher). They must be appointed on orders to the collateral duty of UVA/deployable SARC, must be available to attend Installation civilian SARC's must be GS-12 or NSPS equivalent and are governed by the mandatory SARC Standard Civilian Position Description. Civilian SARC's may volunteer to deploy contingent upon meeting required prerequisites (i.e., security clearance, weapons qualification, etc.) and subject to commander's approval. At installations where there is a civilian and a military SARC, the civilian will hold the position of SARC and the military SARC will serve as the deputy.</td>
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of one or more of the behavioral health or social sciences equivalent to a major in the field or an appropriate combination of education and experience that demonstrates
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

### APPENDIX H: SARC AND SAPR VA COMPARISON CHART

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<th>Issue</th>
<th>DOD/JCS</th>
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- the SARB, as required, must complete continuing education requirements on an annual basis.

- Following selection, UVAs/deployable SARCsv must successfully complete required training as a UVAs/deployable SARC prior to assuming responsibility within the unit.

**SAPR VA Curriculum (RFI 8c, 9c)**

- Amy SHARP 80-Hour Certification Course:
  - Credentialed by (D-SAACP).
  - Receive annual continuation training as part of the Army SHARP 24-Hour Recertification Online Course.
  - SARCsv/VA must apply every two years to remain credentialed under 40 National Organization of Victim Assistance (NOVA) certified hours of training at their installation by the local SARC/SAVA.
  - Also required to complete 32 hours of advanced continuing education every 2 years after initial NOVA certification.

- All SARCsv and Uniformed SAPR VAs receive 40 hours of in-person NACP approved SAPR VA training.
  - SAPR VAs are certified with the D-SAACP prior to providing direct services to sexual assault victims.
  - To recertify with D-SAACP, SAPR VAs complete a minimum of 32 hours of approved training.
  - All UVAs receive 40 hours of certified training.
  - The training is certified by the National Organization for Victim Advocacy (NOVA).
  - Credentialed by NOVA.
  - Additionally, all UVAs are required to maintain their certification by VAs are trained via a 3-day Coast Guard-specific VA training- taught by the cognizant SARC.
  - In the Spring of 2014 CG VAs will be applying for credentialing under the National Advocate Credentialing Program (NACP) from the National Organization for Victim Assistance.
  - Uniformed SAPR VAs receive 40 hours of in-person NACP approved SAPR VA training.
  - All UVAs receive 40 hours of certified training.
  - The training is certified by the National Organization for Victim Advocacy (NOVA).
  - Credentialed by NOVA.
  - Additionally, all UVAs are required to maintain their certification by VAs are trained via a 3-day Coast Guard-specific VA training- taught by the cognizant SARC.
  - In the Spring of 2014 CG VAs will be applying for credentialing under the National Advocate Credentialing Program (NACP) from the National Organization for Victim Assistance.
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<tr>
<td>SARC -Curriculum (RFI 10c, 11c)</td>
<td>the National Organization for Victim Assistance. SAVAs are NOVA certified after receiving 40 hours of training at this course. continuing education every two years (including 2 hours of mandatory ethics training). Civilian SAPR VAs receive 40 hours of in-person NACP approved SAPR VA training. Civilian SAPR VAs are certified with D-SAACP prior to providing direct services to sexual assault victims. completing 16 hours of continuing education annually. After receipt of certification, UVAs are required to provide proof of Continuing Education completion to NOVA every two years to maintain their credentials. (NOVA).</td>
<td>Army Victim Advocates receive certification training as part of the Army SHARP 80-Hour Certification Course. Qualified SARC and VAs are credentialed by the Department of Defense Sexual Assault Advocate Certification Program (D-SAACP). SARCs and VAs receive annual All SARC's receive specific training at the Sexual Assault Response Coordinator Course at Maxwell AFB. NOVA certified our 40 hour SARC Course held at Air University which is used for SARC's and SAVAs. The total course is 8 days, 64 total hours. All SARC's and SAVAs are NOVA certified after The Navy SAPR Program requires all SARC's to receive 80 hours of NACP approved training (40 hours of online SARC training and 40 hours of in-person initial SAPR VA training provided by a SARC). SARC training consists of training on how to supervise staff, Defense Sexual Assault Incident Database All SARC’s receive 40 hours of training certified by the National Organization for Victim Assistance (NOVA). Completion of this 40-hour curriculum, Command SARC training, and Defense Sexual Assault Incident Database (DSAID) training is required before SARC’s can be credentialed by NOVA and then appointed in writing. The Coast Guard does not have a Uniformed SARC program. Coast Guard SARCs receive a three-day Coast Guard-specific SARC training, 10 hours of online training, and are currently undergoing credentialing by NOVA for the NACP (to be completed by December 31st).</td>
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## SARC and SAPR VA COMPARISON CHART

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<tr>
<td>continuity training as part of the Army SHARP 24-Hour Recertification Online Course.</td>
<td>receiving 40 hours of training at this course.</td>
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<tr>
<td>SARCs/VAs must apply every two years under D-SAACP in order to remain credentialed under the National Organization for Victim Assistance.</td>
<td>They are also required to complete 32 hours of advanced continuing education every 2 years after initial NOVA certification.</td>
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<tr>
<td>All SARCs/VAs must be credentialed as outlined in the FY12 National Defense Authorization Act (NDAA) in order to have the ability to provide assistance to victims of sexual assault.</td>
<td>(DSAID), case management, trainer skill building, Sexual Assault Case Management Group (SACMG) facilitation, SAPR Command Personnel cross training (SAPR Point of Contact, SAPR Data Collection Coordinator, SAPR Command Liaison), and other advanced sexual assault topics.</td>
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<td>Additionally, all SARCs are required to maintain their certification by completing 16 hours of continuing education annually.</td>
<td>All SARCs are certified with the D-SAACP prior to providing direct services to sexual assault victims.</td>
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<td>After receipt of certification, SARCs are required to provide proof of completion of continuing education to NOVA every two years to maintain their credentials.</td>
<td>To recertify SARCs complete 32 hours of approved continuing education every two years (including 2 hours of mandatory ethics training).</td>
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<td>The SARC Annual Training exceeds the minimum D-SAACP requirement. SARCs receive an annual 40 hour advanced</td>
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### SARC and SAPR VA COMPARISON CHART

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<td>training that focuses on sexual assault response and prevention techniques. The training ensures a consistent message across the Enterprise and allows SARC's an opportunity to speak directly with other stakeholders, share ideas, and network with SARC's in other regions.</td>
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<td>SAPR VA – Number of full-time, part-time, volunteer and deployable SAPR VAs (RFI 8d, 9d)</td>
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<td>The current number of credentialed military and civilian full-time Victim Advocates is:</td>
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<td>- Active Army Component: 10,499</td>
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<tr>
<td>- 246 Full time (equivalent) VAs at Brigade level commands (either AD or Civilian) Required by FY12 NDAA – (76% (246 VAs) certified as of Nov. 2013) (Metric 6, MG Patton, RSP Public Meeting 57-58 (November 7,</td>
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<td>The Air Force currently has 2,237 volunteer VAs, all of whom are potentially deployable. All SAVAs are full-time Air Force Civilian employees. They may be deployable depending on their installation’s position description and negotiations. (RFI 8d, 9d)</td>
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<td>- 84 Full time (equivalent) VAs at Brigade level commands (either AD or Civilian)</td>
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<td>The Navy currently has 4,402 Uniformed SAPR VAs who perform this job on a collateral duty basis and deploy with their units as required. All UVAs are deployable and the billet is always a collateral duty (i.e., part-time). Rank Number 1st Lt - 77 2nd Lt - 48 Capt - 139 Maj - 9 WO1 - 4 CWO2 - 15 CW03 - 7 CW05 - 1 Sgt + PO2 - 146 SSgt + PO1 - 683 GySgt - 326 MSgt - 47 MGySgt - 7 TOTAL – 1510</td>
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<td>The Coast Guard currently has approximately 1000 volunteer, part-time, active-duty VAs.</td>
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## SARC and SAPR VA Comparison Chart

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<td>2013)</td>
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<td></td>
<td>- Civilians not separated from UVAs above (RFI 8d, 9d)</td>
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<td>- National Guard Bureau: 394 (RFI 8d, 9d)</td>
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<td></td>
<td>- 54 Full time (equivalent) SARCS &amp; VAs at Brigade level commands (either AD or Civilian)</td>
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<td>Required by FY12 NDAA – (100% (84 VAs) certified as of Nov. 2013) Metric 6, MG Patton, RSP Public Meeting 57-58 (November 7, 2013)</td>
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<td>AD or Civilian</td>
<td>Required by FY12 NDAA – (100% (64 VAs) certified as of Nov. 2013) Metric 6, MG Patton, RSP Public Meeting 57-58 (November 7, 2013)</td>
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<td>SARC - Number of full-time, part-time, volunteer and deployable SARCS (RFI 10d, 11d)</td>
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<td>The current number of credentialed military and civilian full-time SARCS is:</td>
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<td>447 - Full time (equivalent) SARCS at Brigade level commands (either AD or Civilian)</td>
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<td>- Active Army Component: 1,214 (RFI 10d, 11d)</td>
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<td>- 322 - Full time (equivalent) SARCS at Brigade level commands (either AD or Civilian)</td>
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<td>- There are 46 full-time military SARCS. They are all deployable.</td>
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<td>- There are 75 full-time civilian SARCS. These are typically non-deployable civilian positions.</td>
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<td>- 84 - Full time</td>
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<td>- The Navy has 5 Uniformed SARCS.</td>
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<td>- The Navy does not deploy SARCS.</td>
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<td>- The Navy in the process of hiring Deployed Resiliency Counselors (DRCs) which are licensed Clinical Counselors.</td>
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<td>- The DRC will</td>
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<td>- The Marine Corps has 40 part-time (or collateral duty) deployable, Uniformed SARCS.</td>
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<td>- The Marine Corps also has six part-time (or collateral duty) civilian SARCS.</td>
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<td>- The civilian</td>
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<td>- The Coast Guard does not have a Uniformed SARC program.</td>
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<td>- The Coast Guard employs one full-time SARC, and 44 part-time SARCS (EAPC and FAS) at this time.</td>
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<td>- There are no</td>
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<td>Required by FY12 NDAA – (86% (277) certified as of Nov. 2013) Metric 6, MG Patton, RSP Public Meeting 57-58 (November 7, 2013) Civilians not separated from USARCs above (RFI 10d, 11d) National Guard Bureau: 2,394 (RFI 10d, 11d)</td>
<td>(equivalent) SARC at Brigade level commands (either AD or Civilian) Required by FY12 NDAA – (100% (84) certified as of Nov. 2013) Metric 6, MG Patton, RSP Public Meeting 57-58 (November 7, 2013)</td>
<td>receive all required SARC training and be D-SAACP certified. The DRC will serve as a liaison to the homeport SARC while deployed providing immediate victim response and coordination of allegations of sexual assault while afloat to their assigned ship, under the guidance and direction of the homeport SARC. (RFI 10d, 11d)</td>
<td>- There are currently 81 civilian SARCs and 2 vacancies. - The Navy is able to deploy SARCs as needed. (RFI 10d, 11d)</td>
<td>- 64 - Full time (equivalent) SARC at Brigade level commands (either AD or Civilian) Required by FY12 NDAA – (100% (64) certified as of Nov. 2013)</td>
<td>SARCs are not deployable. (RFI 10d, 11d)</td>
<td>- The Marine Corps currently has 40 full-time civilian SARCs. - They are all full-time and none of them are deployable. (RFI 10d, 11d)</td>
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<td>SARC and SAPR VA COMPARISON CHART</td>
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<tr>
<td>SAPR VA - breakdown by age, gender, rank, education, and certification status (RFI 8e, 9e)</td>
<td>Due to recent revisions to our screening and credentialing policies, the Army is in the process of gathering specific personally identifying information (PII) for currently serving full-time and collateral duty military SARC and VAs in order to break down by age, gender, rank, and education. At this time, the data is not available. The SHARP Program Office previously only maintained limited personally identifying information (PII) for SHARP personnel. Civilian SARC and VAs are permanent hires into the position; as such, the</td>
<td>We currently do not require our installation or Major Command (MAJCOM) SARC and VAs to track and/or report the gender, age, and outside education of our VAs.</td>
<td>There are no age, gender, rank, or education requirements to serve as a Uniformed or civilian SAPR VA; therefore this data is not tracked by CNIC. All SAPR VAs are certified with D-SAACP.</td>
<td>The Marine Corps does not track UVAs by age, gender, or education.</td>
<td>Coast Guard VAs will undergo the credentialing process in Spring of 2014 (see c.).</td>
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</table>
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

## SARC and SAPR VA Comparison Chart

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<tr>
<td>Army does not track length of assignment.</td>
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<tr>
<td>SARC – Breakdown by age, gender, rank, education, and certification status (RFI 10c, 11c)</td>
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<tr>
<td>Due to recent revisions to our screening and credentialing policies, the Army is in the process of gathering specific personally identifying information (PII) for currently serving full-time and collateral duty military SARC and VAs in order to break down by age, gender, rank, and education. At this time, the data is not available. The SHARP Program Office previously only maintained limited personally identifying information (PII) for SHARP personnel.</td>
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<tr>
<td>We currently do not require our installation or Major Command (MAJCOM) SARC to track and/or report the gender, age and outside education of our SARC. All of the Uniformed SARC are currently males, the highest rank is a LCDR, and the highest education is a Masters of Science. All SARC are certified with D-SAACP. Civilian: There are 11 male SARC and 71 females and the highest education is a Doctorate.</td>
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<tr>
<td>There are no age, gender, rank, or education requirements to serve as a Uniformed SARC.</td>
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<td>The Coast Guard does not have a Uniformed SARC program.</td>
<td>Collateral Duty (Marine) (Navy)</td>
<td>Col 2 CDR 1</td>
<td>LtCol 5 LCDR 2</td>
<td>Maj 8 LT 2</td>
<td>Capt 12 LTJG 1</td>
<td>CWO-3 1 MSgt 1 GS-15 1 GS-14 2 GS-13 1 GS-12 1 TOTALS 34 6</td>
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<td>14 are male, 30 are female; all have at least a Bachelor's degree, but most have Masters degrees in behavioral science fields</td>
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VICTIM SERVICES SUBCOMMITTEE
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APPENDIX H: SARC AND SAPR VA COMPARISON CHART

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<tr>
<td>SAPR VA - Average Caseload (RFI 8f, 9f)</td>
<td>N/A</td>
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<td>The Army is not currently tracking average caseload or desired caseload. As installation size, assigned manning and command missions vary, so do the case loads per SHARP personnel at each installation. This variance was considered when assigning full-time assets at brigade and equivalent units to ensure effective services are provided to victims.</td>
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<td>Average caseload is for the VA to only have one case at a time. This allows the VA to focus on their victim and prevent any “burn out” by the VA. The SAVA’s caseload could be a maximum of five. However, the AF prefers the SAVA to have fewer cases to allow for efficient supervision of the Volunteer VAs.</td>
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<td>Many Uniformed SAPR VAs will never work directly with a victim. Those that do typically have very low caseloads working with 1 or 2 victims at any one time. As the civilian SAPR VAs are recent additions to the SAPR program, their caseloads vary based on location. Typically, the average caseload is 1-2 open cases. As they become integrated into the 24/7 response watch bill, their caseload may increase.</td>
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<td>The caseload for a UVA will vary. Some UVAs may never have a case and others may have two or three. Victims are allowed to choose whether or not they work with a UVA or Civilian VA. Additionally, victims can choose their UVA. The UVA does not have to be in their unit and can be from another unit.</td>
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<td>The average ongoing caseload for a VA is approximately 20 cases. The level of involvement for each case varies and, therefore, the desired caseload is difficult to define.</td>
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<td>For example, a VA may only assist a victim for a short period or could assist a victim for the duration of a case (which can be</td>
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<td>Average caseload is typically one per VA (as one is enough to manage for a part-time volunteer), but many VAs never have cases as our numbers of VAs far outweigh the number of cases.</td>
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</table>
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

**SARC and SAPR VA COMPARISON CHART**

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<tr>
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<tr>
<td>SARC - Average Caseload (RFI 10f, 11f)</td>
<td>The Army is not currently tracking average caseload or desired caseload. As installation size, assigned manning and command missions vary, so do the caseloads per SHARP personnel at each installation. This variance was considered when assigning full-time assets at brigade and equivalent units to ensure effective services are provided to victims.</td>
<td>The range would be from 1-3, depending on location, availability of VA personnel/volunteers, etc. (e.g. INCONUS-remote, or OCONUS-availability of personnel). The current caseloads are manageable by our current SARC[s].</td>
<td>Average caseloads vary by Region for SARC[s], but are approximately 5-10 cases.</td>
<td>The average caseload for a collateral duty SARC varies and is dependent upon the number of cases in their command. Additionally, collateral duty SARC[s] at the Division, Wing, Group and Marine Expeditionary Force levels partner with civilian full-time Command SARC[s], which decreases their caseload.</td>
<td>The Coast Guard does not have a Uniformed SARC program. The average caseload is 0-5 cases per civilian SARC.</td>
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<tr>
<td>SAPR VA - Performance Evaluation (RFI 8h, 9h)</td>
<td>The Army is not currently tracking performance evaluation at the HQDA level. This is not a requirement for our VA[s], as they are volunteers. However, the SARC and/or SAVA gives feedback back when needed, usually with every case.</td>
<td>Uniformed SAPR VAs receive annual evaluations by their supervisory chain of command. Regions conduct an evaluation for civilian SAPR VAs biannually.</td>
<td>Sergeants and above receive Fitness Reports annually. These Fitness Reports evaluate the overall performance of the Marine and includes an evaluation of any collateral duty held.</td>
<td>The performance of VA[s] is continually evaluated for professionalism and appropriateness by the SARC.</td>
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<td>N/A</td>
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SARC and SAPR VA COMPARISON CHART

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<tbody>
<tr>
<td>SARC – Performance Evaluation (RFI 10h, 11h)</td>
<td>The Army is not currently tracking performance evaluation at the HQDA level.</td>
<td>Uniformed SARC, like all military personnel, receive formal initial and annual feedback from their direct supervisor (installation SARC) as well as required annual civilian performance reports.</td>
<td>Such as duty as UVA. Examples of categories on the Fitness Report include performance, effectiveness under stress, taking care of subordinates, setting the example, judgment, and decision-making ability. The performance of a civilian VA is evaluated on an annual basis, which includes a mid-year review, via a formal HR process. In addition to the formal HR process, Installation SARCs provide direct supervision of case management and constantly evaluate the VA’s ability to work with victims.</td>
<td>Uniformed SARCs receive annual SARC evaluations and military Fitness Reports. Regions conduct biannual evaluations.</td>
<td>Uniformed SARCs receive Fitness Reports annually. These Fitness Reports evaluate the overall performance of the Marine and includes an</td>
<td>The Coast Guard does not have a Uniformed SARC program. GS civilians have an annual performance evaluation.</td>
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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<td>SARC and SAPR VA COMPARISON CHART</td>
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<td><strong>Commander</strong></td>
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<td>(RFI 8i, 9i)</td>
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<td>The Army does not track the average length of assignment.</td>
<td>RFI 8i, 9i</td>
<td>N/A</td>
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<td>SARCs and VAs are either full-time at brigade and higher for which standard assignment policies apply or collateral duty managed at the unit level, with assignment length at commander discretion, subject to Commander (installation Vice Commander) as well as annual officer performance reports.</td>
<td>N/A</td>
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<td>The Air Force currently does not track the average length of time that a VA serves in that position. Once trained, and after receiving any refresher training, a VA could serve in that capacity their entire AF career; it does not depend solely on an assignment action. For additional</td>
<td>N/A</td>
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<td>12 months (1 year)</td>
<td>N/A</td>
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<td>The length of assignment for a UV A varies and depends on the amount of time to a unit. UVAs must be appointed by their Commanding Officer and cannot act in that capacity if not appointed in writing.</td>
<td>N/A</td>
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<td>Civilian VAs maintain employment until</td>
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<td>VAs can be assigned to respond to only the initial report depending on the level of assistance desired by the victim, but more often can be involved for up to a year (or more sometimes) as the legal process unfolds.</td>
<td>N/A</td>
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</table>

SARCs, like all civilian (GS) personnel, receive formal initial and annual feedback from their direct supervisor (installation Vice Commander) as well as annual civilian performance reports. For SARC’s, GS SARCs that are in the region are also evaluated at the six-month and one year marks through the GS IPMS process. Evaluation of any collateral duty held. Examples of categories on the Fitness Report include performance, effectiveness under stress, taking care of subordinates, setting the example, judgment, and decision-making ability.

The performance of a civilian SARC is evaluated on an annual basis, which includes a mid-year review, via a formal HR process.

The length of assignment for a UVA varies and depends on the amount of time to a unit. UVAs must be appointed by their Commanding Officer and cannot act in that capacity if not appointed in writing. Civilian VAs maintain employment until VAs can be assigned to respond to only the initial report depending on the level of assistance desired by the victim, but more often can be involved for up to a year (or more sometimes) as the legal process unfolds.
### SARC and SAPR VA COMPARISON CHART

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SARC – Average Length of Assignment  
(RFI 10i, 11i)

| | standard time on station.  
Civilian SARC and VAs are permanent hires into the position; as such, the Army does not track length of assignment.  
| | information, see Tab 7, “SAVA and VA Bullet Background Paper (30 Oct 13).”  
As this is a new program, it is unclear how long the civilian SAVAs will remain in their position. This will be according to the existing civilian personnel regulations.  
| | FY13.  
| | terminated or they leave the position. The Marine Corps has only recently started to employ full-time civilian SAPR VAs and therefore cannot provide a length in which they typically maintain employment.  
| | The Army does not track the average length of assignment; however, the Army does require a one-year minimum retainability for deployable SARC in accordance with AR 600-20, paragraph 8-6h.  
SARC and VAs are either full-time at the brigade and higher for which standard assignment policies apply or collateral duty managed at the unit level, with  
| | This varies per the Air Force officer assignment process but averages 3-4 years.  
For civilian SARCS, assignments can be indefinite, they are handled according to the existing civilian personnel regulations.  
| | Tours last approximately 3 years.  
Civilians - these are permanent positions.  
| | The length of assignment for a UVA can vary and will depend on the amount of time attached to a unit. UV As must be appointed by their Commanding Officer and cannot act in that capacity if not appointed in writing (*response refers to UVA not SARC)  
SARCs maintain employment until terminated or they leave the position. The Marine Corps began hiring full-  
| | The Coast Guard does not have a Uniformed SARC program.  
GS civilians remain in their positions until they leave or are relieved. |
### SARC and SAPR VA COMPARISON CHART

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<tr>
<td>DSAID – Who enters data and how is data verified? (RFI 45)</td>
<td>The SARC is responsible for entering information into DSAID. Only SARCs who have, at a minimum, a favorable NAC shall be permitted access to enter sexual assault reports into DSAID.</td>
<td>Each installation will have the capability and responsibility of entering information into the system. The lead SARC will track the status of sexual assault cases within their designated area of responsibility utilizing DSAIDs as the database. Only SARCs who, at a minimum, have a favorable NAC and are credentialed through National Organization of Victim Assistance (NOVA) shall be permitted access to enter sexual assault reports into DSAID.</td>
<td>SARCs must also maintain in DSAID, or the DSAID-interfaced Military Service data system, an account of the services referred to and requested by the victim for all reported sexual assault incidents, from medical treatment through counseling, and from the time of the initial report of a sexual assault through the final case disposition or until the victim no longer desires services. Finally, Commanders are required to provide reports of disposition of sexual assault cases to NCIS, who enters the information into DSAID.</td>
<td>In January 2014, the SARCs will begin to enter new data into DSAID (prior closed cases will not be entered), using the metrics that DoD SAPRO has populated into DSAID. The DSAID metrics match the Congressional requirements for data collection.</td>
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### SARC and SAPR VA COMPARISON CHART

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<tr>
<td>DSAID – When must data be entered? (RFI 45b)</td>
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<td>Information will be entered into DSAID within 48 hours of the report of sexual assault. In deployed locations that have internet connectivity issues, the time frame is extended to 96 hours.</td>
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<td>The minimum standard to open a case is controlled by to identify cases in which a member is accused of multiple incidents of sexual harassment.</td>
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<td>DoD/DSAID. In DSAID, there are two options to open a case: a normal option and a “with limited data” option. Closing a report requires that you provide information in all of the mandatory DSAID fields.</td>
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<tr>
<td>SARCs must enter information related to reported sexual assaults into DSAID within 48 hours of the initial report. In deployed locations that have internet connectivity issues, the time frame is extended to 96 hours. Only SARCs who have, at a minimum, a favorable National Agency Check (NAC) are permitted access to enter sexual assault reports into DSAID.</td>
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<td>Information is entered into DSAID within 48 hours of the report of sexual assault. In deployed locations that have internet connectivity issues, the time frame is extended to 96 hours.</td>
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<td>No response.</td>
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### Substantiation – Ramifications for Unfounded Reports

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<tr>
<th>Generally, there is no ramification to a service member who made a report of</th>
<th>An important note is that AFOSI does not determine whether a case is “unfounded.”</th>
<th>A report of a crime, made in good faith, is never the subject of negative</th>
<th>The Marine Corps does not have a policy for determining if an</th>
<th>The Coast Guard is developing the response to this question but will</th>
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<td>(RFI 65)</td>
<td>sexual assault that is later unfounded. The only exception is a situation is when Soldiers and/or civilians who are found to have knowingly and willfully provided a false report to CID are indexed as subjects for False Swearing, False Official Statement or Title 18 US Code Section 1001 (False Statements). Any disciplinary action or lack thereof is decided by the commander once the investigation is closed. If the false statement was used to obtain a transfer from one installation to another, then additional offenses, such as larceny or fraud could also be reported. There are occasions where investigations are unfounded and CID does not list the victim as a subject for False Swearing. If the Commander</td>
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<td>In every investigation that AFOSI opens, a Report of Investigation is provided to the Commander for action. The Initial Disposition Authority Commander is the one who would make a determination that a report is unfounded. If the Initial Disposition Authority Commander determined that a case was “baseless,” there would be no ramifications for the victim who made the report because the victim did not do anything wrong (i.e. this is not a false report) in reporting conduct that after thorough investigation was found not to be a crime.</td>
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<td>ramifications for a service member. However, under circumstances in which an allegation was apparently made with malicious intent so as to raise suspicion of a violation of the UCMJ, those allegations would be investigated in the same manner as any other similar, suspected offense.</td>
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<td>Offenses could include violations of Article 107, false official statement, Article 131, perjury, Article 127, extortion, or Article 134, obstructing justice. In cases involving an allegation of sexual assault, due consideration is always given to the neuro-biological effects of trauma which may make memory formation and recovery complex and lead to honest yet</td>
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<td>allocation is “unfounded” or what the Marine Corps does to a person who made the unfounded report. The commander has discretion to prosecute someone who makes a false report if the false official statement charge is supported by the evidence.</td>
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<td>need additional time to provide the answer.</td>
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## SARC and SAPR VA COMPARISON CHART

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<td>This occurs when victims report an incident in which they believe they were sexually assaulted, but the investigation, and supported prosecutor review, finds the act did not meet the elements of proof for a sexual assault offense.</td>
<td>determined that a case was “false” and the Air Force had jurisdiction over the victim who made the false report, the Commander would have the full range of administrative, nonjudicial, and judicial remedies at his/her disposal to take action in the case. Not every case that is determined to be “false” by a Commander includes misconduct on the part of the victim. Upon the advice of the Staff Judge Advocate, the Commander would make a decision on a case-by-case basis how to handle the false report.</td>
<td>inconsistent statements. Once an NCIS investigation is complete, the case is forwarded to the accused’s commander. In accordance with Secretary of Defense policy, the initial disposition decision for reports of rape, sexual assault, forcible sodomy, and attempts to commit these offenses must be made by Sexual Assault Initial Disposition Authorities (SA-IDAs), who are Navy Captains (pay grade O-6) or above designated as Special Court-Martial Convening Authorities. If the accused’s commander is not an SA-IDA, the commander must forward the case to the appropriate SA-IDA in the chain of</td>
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<tr>
<td>Who Substantiates Reports?</td>
<td>It is not a CID investigator’s responsibility to determine whether a sexual assault is founded or unfounded. The decision as to whether an offense is founded or not, and whether the accused should be indexed as having committed a founded offense belongs to the supported prosecutor. The CID report merely reflects the opinion or decision of the supported prosecutor as to the founding or unfounding of an offense. This is basically the same process that all civilian law enforcement agencies in the United States follow.</td>
<td>In the Air Force, only commanders may conclude that a sexual assault allegation is unfounded. Once AFOSI receives a sexual assault allegation, and investigators complete their investigation, AFOSI forwards the investigation to the accused Airman’s commander in a report that evaluates the evidence and makes a recommendation as to disposition. The commander, with the advice of his/her SJA, then determines whether the allegation is founded, and proceeds to whatever disposition of the case is deemed appropriate. AFOSI does not</td>
<td>NCIS investigators do not make determinations regarding substantiated or unfounded allegations, regardless of the type of case (sexual assault, robbery, domestic violence, etc.). NCIS investigators obtain facts and evidence and present those findings to the appropriate convening authority. As NCIS fills the role of a neutral fact-finding and investigative body, placing the determination decision on them could compromise their mission, impede the case investigation or raise questions of partiality. Once an NCIS investigation is complete, a Sexual Assault Initial Disposition Authorities (SA-IDAs) determine whether sexual assault allegations are considered substantiated or unfounded. SA-IDAs are commanders in pay-grade O-6 or above who are Special Court-Martial.</td>
<td>NCIS investigators do not make determinations regarding substantiated or unfounded allegations, regardless of the type of case (sexual assault, robbery, domestic violence, etc.). NCIS investigators obtain facts and evidence and present those findings to the appropriate convening authority. The Coast Guard is developing the response to this question but will need additional time to provide the answer.</td>
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Command for the initial disposition decision.
### SARC and SAPR VA COMPARISON CHART

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| employ with their District Attorneys or prosecutors when founding offenses and effecting arrest warrants. | determine whether sexual assault allegations are considered substantiated or founded. It is AFOSI’s position that having AFOSI personnel render such an opinion presents an inappropriate conflict with the requirement to conduct objective and impartial investigations. AFOSI’s Standards of Professional Conduct specifically require agents to remain objective and unbiased in their investigation and reporting of investigative information. AFOSI further believes having criminal investigators render an opinion regarding substantiated/founded or unsubstantiated/unfounded is contrary to the complete, the case is forwarded to the accused’s commander. In accordance with Secretary of Defense policy, the initial disposition decision for reports of rape, sexual assault, forcible sodomy, and attempts to commit these offenses must be made by Sexual Assault Initial Disposition Authorities (SA-IDAs), who are Navy Captains (pay grade O-6) or above designated as Special Court-Martial Convening Authorities. If the accused’s commander is not an SA-IDA, the commander must forward the case to the appropriate SA-IDA in the chain of command for the initial disposition decision. SA-IDAs must Convening Authorities (SPCMCA).
<p>| | | | | | | |
|                                                                      |                                                                        |                                                                        |                                                                      |                                                                        |                                                                      |                                                                        |
|                                                                      |                                                                        |                                                                        |                                                                      |                                                                        |                                                                      |                                                                        |
|                                                                      | Convening Authorities (SPCMCA).                                          |                                                                        |                                                                      |                                                                        |                                                                      |                                                                        |
|                                                                      | The SA-IDA will consult with staff judge advocates (SJA) and receive advice from them relating to military justice matters. In addition, the SA-IDA will receive advice from the applicable Region Legal Service Office (RLSO). As NCIS fills the role of a neutral fact-finding and investigative body, placing the determination decision on them could compromise their mission, impede the case investigation or raise questions of partiality. | | | | |</p>
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- Guidance prescribed by the Council of the Inspectors General on Integrity and Efficiency, Quality Standards for Investigations. These Standards specifically call for investigators to “…not allow conjecture, unsubstantiated opinion, bias, or personal observations or conclusions …”

- Finally, in an August 6, 2013 Memorandum to senior DoD and Services’ senior leaders, the Secretary of Defense emphasized commanders must “…base their decision [in matters of military justice] on their independent judgment.” Having APOSI investigators convey judgment as to whether an allegation is substantiated/founded or consult with a judge advocate prior to making disposition decisions, ensuring that appropriate legal considerations for these major offenses are fully evaluated and balanced with good order and discipline. Having received legal advice from a trained and experienced staff judge advocate and/or prosecutor, based on the nature of the offenses and an analysis of the evidence available, the SA-IDA may recommend that the suspect face charges at a general court-martial. The SA-IDA also has the option, when appropriate, to send charges to a special court-martial, summary court-martial, or non-judicial punishment and may also process the suspect for administrative
Appendix I:
SPECIAL VICTIM COUNSEL
COMPARISON CHART
### Issue: Military Special Victim Counsel Rules/Regs

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<th>DOD/FY 14 NDAA</th>
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<tr>
<td>Secretary of Defense (DTM), Sexual Assault Prevention and Response, 14 August 2013</td>
<td>Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel, 1 November 2013</td>
<td>Air Force Special Victims’ Counsel Program Rules of Practice and Procedure, 1 July 2013 (RFI Q29 Tab 9)</td>
<td>Navy Victims’ Legal Manual is still in draft form and not yet released.</td>
<td>MCO P5800.16A Ch 7, LEGADMINMAN, The Marine Corps Victims’ Legal Counsel Organization, Chapter 6, 10 Feb 14</td>
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<td>Under SECDEF DTM, Legal Assistance for Victims of Crimes, 17 October 2011</td>
<td>Special Victim Counsel Handbook, 1 Nov 2013</td>
<td>Air Force Special Victims’ Counsel Program Charter, 1 July 2013 (RFI Q29 Tab 10)</td>
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<td>FY14 NDAA §1716</td>
<td>FY14 NDAA §1716</td>
<td>AFC 51-504, para 1.3</td>
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### Issue: Number of SVCs

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<tr>
<td>Not addressed in NDAA</td>
<td>67 SVCs trained - 52 Active Counsel, 13 ARNG, 2 Reserve Component</td>
<td>24 SVCs and 10 paralegals</td>
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<td>USA RFI 4(a) (Nov. 5, 2013)</td>
<td>Summer 2014 – 29 SVCs and 10 paralegals</td>
<td>USAF RFI 4(a) (Nov. 5, 2013); see also USAF SVC Rules of Practice and Procedure, Attachment 1, (July 1, 2013); see also Col Dawn Hankins, USAF, Testimony,</td>
<td>18 active component judge advocates are assigned to the VLC. 11 reservists are assigned as Navy VLC on ADSW orders for at least one year. There are no</td>
<td>USN RFI 4(a) (Nov. 5, 2013)</td>
<td>The Marine Corps will re-code 9 judge advocate billets, and add one colonel (O-6/4402) and five majors (1 O-4/4402 and 4 O-4/4409s).</td>
<td>USMC RFI 4(d) (Nov. 5, 2013)</td>
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<td>USA RFI 4(a) (Nov. 5, 2013)</td>
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**Notes:**
- 14 active duty SVCs qualified and designated as SVC. This represents 10% of USCG active duty JAs in legal assignments.
- USCG RFI 4(a) (Nov. 5, 2013)
- Several new military and civilian positions have been authorized.
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<td>8 Nov 13, p. 140, 143.</td>
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<td>civilian attorneys performing VLC duties</td>
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<td>USN RFI 4(f) (Nov. 5, 2013)</td>
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<td>Proposed steady-state VLC Program manning is 30 JAs (1 O-6 Chief of Staff, 4 O-4 Senior VLCs, and 25 LT VLCs)</td>
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<td>USN RFI 4(d) (Nov. 5, 2013); see also, CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, p.128-129, 166-167.</td>
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<td>including administrative support, junior and senior legal staff and management staff positions.</td>
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<td>Permanent staff is expected to be in place by summer 2014.</td>
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<td>There have been 25 counsel detailed as SVC.</td>
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<td>CAPT Sloan Tyler, USCG, Testimony, 8 Nov 13, pp.135-136.</td>
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<tr>
<td>Caseload</td>
<td>Not addressed in NDAA</td>
<td>Information not provided in RFI 4</td>
<td>534 clients over 1st 9 months of program. 409 clients at 5 Nov 13 USAF RFI 4(d) (Nov. 5, 2013)</td>
<td>Information not provided in RFI 4</td>
<td>Information not provided in RFI 4</td>
<td>Information not provided in RFI 4</td>
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<td></td>
<td>Since Jan 2013, the USAF SVC program has assisted 555 victims of sexual assault in 93 courts-martial and 92 Article 32</td>
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<td>There were 21 active cases as of Nov 8, 2013.</td>
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<td></td>
<td>CAPT Sloan Tyler, USCG, Testimony, 8 Nov 13, p.139.</td>
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SPECIAL VICTIMS’ COUNSEL COMPARISON CHART

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<td>SVCs have participated in over 700 interviews with investigators, defense counsel and trial counsel.</td>
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<td>Total SVC hours are 18,000. Col Dawn Hankins, USAF, Testimony, 8 Nov 13, p. 145.</td>
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<td>SVC – Rank/GS Level</td>
<td>Not addressed in NDAA</td>
<td>Active Army Judge Advocates USA RFI 4(f) (Nov. 5, 2013)</td>
<td>Not addressed in RFI 4 O-3 – Captains USAF SVC Rules of Practice and Procedure, Attachment 1, (July 1, 2013)</td>
<td>VLC rank levels range from Lieutenants (O-3) to Commanders (O-5), plus a Captain (O-6) as Chief of Staff. USN RFI 4(f) (Nov. 5, 2013)</td>
<td>One colonel (O-6/4402) majors (O-4) captains (O-3) USMC RFI 4(d) (Nov. 5, 2013); see also, Col Carol Joyce, USMC, Testimony, 8 Nov 13, p. 121.</td>
<td>Currently, all SVCs are: LTs (O-3) or LCDRs (O-4) USCG RFI 4(f) (Nov. 5, 2013)</td>
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<tr>
<td>What are victim attorneys called?</td>
<td>FY14NDAA 1716(a)(1)(a) The Secretary concerned shall designate counsel (to be known as ‘Special Victims’ Counsel’)</td>
<td>Special Victim Counsel USA RFI 4(a) (Nov. 5, 2013)</td>
<td>Special Victims’ Counsel USAF RFI 4(a) (Nov. 5, 2013)</td>
<td>Victim Legal Counsel USN RFI 4(a) (Nov. 5, 2013)</td>
<td>Victim Legal Counsel USMC RFI 4(a) (Nov. 5, 2013)</td>
<td>Special Victim Counsel USCG RFI 4(a) (Nov. 5, 2013)</td>
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<td>Full-time or</td>
<td>Not addressed in</td>
<td>Not addressed in</td>
<td>Full-time</td>
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<td>Collateral Duty</td>
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<tr>
<td>collateral duty</td>
<td>NDAA</td>
<td>RFI 4</td>
<td>USAF RFI 4(a) (Nov. 5, 2013) Can be part-time USAF SVC Rules of Practice and Procedure, Rule 9, (July 1, 2013)</td>
<td>RFI 4</td>
<td>RFI 4 VCLO personnel shall perform routine non-VCLO duties, such as unit PT, training, and standing duty, so long as those collateral duties do not conflict with their statutory, regulatory and ethical obligations to their client. LEGADMINMAN 5800.16A Ch 7, 6010, (10 Feb 14)</td>
<td>initially – will move to full-time in FY14 USCG RFI 4(a) (Nov. 5, 2013)</td>
</tr>
<tr>
<td>Locations</td>
<td>Not addressed in NDAA</td>
<td>Active Counsel located at 32 installations Those installations without a resident SVC have an identified installation for SVC support. SVC Program Manager (PM) may allocate assets as needed to ensure every Army Special Victim has access to an SVC</td>
<td>22 installations worldwide Summer 2014 - 19 locations worldwide. USAF RFI 4(d) (Nov. 5, 2013); see also USAF SVC Rules of Practice and Procedure, Attachment 1, (July 1, 2013)</td>
<td>15 Installations U.S. Naval Academy, Oceana, Mayport, Great Lakes, Coronado, San Diego, Bremerton, Pearl Harbor and Guam, Norfolk, Pensacola, Gulfport, Everett and Rota, Spain. Followed by Groton, Jacksonville, Leemoore, Ventura and Bahrain.</td>
<td>Four (4) Regional Victims’ Legal Counsel Offices have been established at MCB Camp Lejeune, MCB Camp Pendleton, MCB Camp Butler, and MCB Quantico. MCB Kaneohe Bay, HI; MCAS Miramar, CA; MCAGCC 29 Palms, CA; and MCRD Parris Island, SC.</td>
<td>Not addressed in RFI 4</td>
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

### SPECIAL VICTIMS’ COUNSEL COMPARISON CHART

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<tr>
<td>SVC -- Who is eligible for services?</td>
<td>FY 14NDAA 1716(a)(1)(f)</td>
<td>Not addressed in RFI 4</td>
<td>Not specified in RFI 4</td>
<td>Not addressed in RFI 4</td>
<td>Victims of sexual assault and other crimes who are: Active duty military members and reservists on active duty, and all other eligible victims as resources permit. Services also provided to adult dependents of AD service members, as determined by eligibility for Legal Assistance Services.</td>
<td>Not addressed in RFI 4</td>
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<td>Individuals eligible for military legal assistance regardless of whether unrestricted or restricted report of SA. Individual shall be informed that the assistance of a SVC may be declined in whole or in part. Declining assistance does not</td>
<td>All active duty, Army Reserve, ARNG victims who 1) report they are victims of SA under UCMJ and 2) Cdr has jurisdiction and 3) victim is in active status at time of offense. Army members who report they are victim of SA under state and federal laws when alleged</td>
<td>It is limited to victims of sexual assault at this time, but AF is willing to look at expanding in the future. Col. Dawn Hankins, USAF, Testimony, 8 Nov 13, p. 179.195. All active duty, AF Reserve, ANG victims who 1) report they are victims of SA under</td>
<td>Victims of sexual assault. CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, p. 179.195.</td>
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<td>USA RFI 4(a) (Nov. 5, 2013); See also, COL James McKee, USA, Testimony, 8 Nov 13, p.112.</td>
<td>into 10 regions worldwide, with each region covering 4 to 12 different installations.</td>
<td>The goal is to physically locate VLC at or near Fleet &amp; Family Service Centers. All VLC have private offices. Eight VLC are located near or with SARC/VAs. USN RFI 4(a) (Nov. 5, 2013); see also, CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, pp.144-145.</td>
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<td>USMC RFI 4(a) (Nov. 5, 2013); see also, Col Carol Joyce, USMC, Testimony, 8 Nov 13, pp.120-121,127.</td>
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<td></td>
<td>USA RFI 4(b)</td>
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<td>preclude the individual from subsequently requesting the assistance of a SVC.</td>
<td>perpetrator is civilian or unknown perpetrator.</td>
<td>UCMJ and 2) AF Cdr has jurisdiction and 3) victim is in active status at time of offense.</td>
<td>All entry-level status Army members who are alleged to have been involved in an unprofessional relationship with BMT faculty or staff.</td>
<td>(Nov. 5, 2013); see also, Col Carol Joyce, USMC, Testimony, 8 Nov 13, pp. 122-123, 179.</td>
<td>A victim is a person who alleges to have suffered physical, emotional, or pecuniary harm as a result of a crime in violation of the Uniform Code of Military Justice.</td>
<td>USMC RFI 4(b) (Nov. 5, 2013), see also LEGADMINMAN 5800.16A Ch 7, 6003.1, (10 Feb 14)</td>
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<td>perpetrator is civilian or unknown perpetrator.</td>
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<td>AF members who report they are victim of SA under state and federal laws when alleged perpetrator is civilian or unknown perpetrator.</td>
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<td>If SA prior to military service, victim NOT eligible for SVC.</td>
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<td>If SA prior to military service, victim NOT eligible for SVC.</td>
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<td>Adult dependents of Active Duty members if 1) Cdr has jurisdiction and 2) eligible dependent at time of offense. Restricted and unrestricted.</td>
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<td>Adult dependents of Active Duty members if 1) report SA, 2) AF Cdr has jurisdiction and 3) eligible dependent at time of offense.</td>
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<td>Victims in other Services &amp; their dependents if perpetrator is Army member in title 10 status. Restricted and unrestricted.</td>
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<td>Victims in other Services &amp; their dependents if perpetrator is AF member in title 10 status.</td>
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<td>All other victims (excluding minors) if Cdr has jurisdiction and eligible under AR 27-3, Restricted and unrestricted. Deployed victims – in-country SVCs available. SVC Program Manager, OTJAG, has final authority on determination of eligibility and may grant exceptions on case-by-case basis consistent with 10 U.S.C. 1044 and 1056(b) USA SVC Handbook, Ch 1, (Nov 1, 2013); see also, COL James McKee, USA, Testimony, 8 Nov 13, p.179.</td>
<td>status AF who are alleged to have been involved in an unprofessional relationship with BMT faculty or staff. Deployed victims – eligible through reach-back capability. Chief, SVC Div, AFLOA/CLSV, has final authority on determination of eligibility and may grant exceptions on case-by-case basis consistent with 10 U.S.C. 1044 and 1056(b) USAF SVC Charter Part C, Note 1, (1 Jul 13); USAF SVC Rules of Practice</td>
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<tr>
<td>SVC - Reporting Structure</td>
<td>FY 14 NDAA 1716(a)(1)(e)</td>
<td>SVC reports directly to Captain of Legal Assistance.</td>
<td>O-6 SVC Division Chief (HQ) Civilian Deputy (GS-14) (HQ)</td>
<td>The VLC program is an independent line of operation separate from the prosecution and the convening authority.</td>
<td>SVC reports to Officer in Charge VLCO (OIC) (O-6 experienced active duty Marine judge advocate)</td>
<td>SVCs Report to The Office of Special Victim’s Counsel (OSVC) at Coast Guard HQ.</td>
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<td>Service TJAGS are responsible for the establishment and supervision of individuals designated as Special Victims’ Counsel.</td>
<td>SVC Program manager (PM) has technical supervision over all Army SVCs.</td>
<td>SVC Reports directly to the Division Chief.</td>
<td>VLC will report to Commander, Naval Legal Service Command via their OIC, Deputy Chief of Staff, and Chief of Staff.</td>
<td>USN SVC Supervisory and reporting chain is autonomous from, and independent of, convening authorities, OICs, and staff judge advocates.</td>
<td>USCG SVCs Report to The Office of Special Victim’s Counsel (OSVC) at Coast Guard HQ.</td>
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<td>USAR RFI 4(d) (Nov. 5, 2013); See also, COL James McKee, USA, Testimony, 8 Nov 13, pp. 108-109, 184.</td>
<td>SJAs will provide professional oversight of SVCs.</td>
<td>Under independent chain of command in AFLOA, Special Victims’ Counsel Division</td>
<td>Establishment of the VLCP necessitated creation of a third echelon III command under CNLSC.</td>
<td>USN RFI 4(d) (Nov. 5, 2013); see also, CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, p.128-129.</td>
<td>USCG RFI 4(f) (Nov. 5, 2013)</td>
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<td>SVCs Report to Fiscal</td>
<td>Generally, the interests of the victim are in concert with the interests of the command. If a situation arises in which the interests are not in concert, the SVC will turn to the SVCP Manager for technical advice</td>
<td>SVCs operate independently from the command and supervision chains</td>
<td>Marine VLC are administratively</td>
<td>The Director of the OSVC is currently a CAPT (06) who reports to the Deputy Judge Advocate General of the Coast Guard (SES).</td>
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<td>and Procedure, Rule 1, (July 1, 2013)</td>
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<td>and supervision for professional responsibility per AR 27-26. Functional and policy oversight of SVCs will be provided by the SVCP Manager, OTJAG. SJAs will make the initial appointment to the position of SVC. In general, CLAs will make individual appointments of SVCs to victims. A tracking system will be used to track SVCs and their workload. SJAs that host SVCs will host SVC within the legal assistance office and ensure adequate administrative support for the SVC.</td>
<td>that govern the Air Force units and locations that SVCs support. USAF SVC Charter, Part A (3) (1 Jul 13) Installation SJAs will provide professional oversight of part-time SVCs while performing non-SVC duties. AFLOA/CLSV has oversight over the detailing process. Installation SJAs that host SVCs will provide appropriate office space. A tracking system will be used to track SVCs and their workload. USAF SVC Rules of Practice and Procedure, Rule 9, (July 1, 2013)</td>
<td>attached to Legal Services Support Sections (LSSS). Marine VLC are under the operational control and supervision of, and responsible and accountable to, the OIC, VLCO and the responsible Regional Victims’ Legal Counsel (RVLC) for the delivery of VLC services. LEGADMINMAN, 6001.2, Ch 1(10 Feb 14)</td>
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APPENDIX I: SPECIAL VICTIM COUNSEL COMPARISON CHART

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<td>SVC - Screening and Selection Process</td>
<td>FY14NDAA 1716(a)(1)(d)</td>
<td>Selected by Staff Judge Advocates</td>
<td>Active duty member certified as trial counsel (requires graduation from the Judge Advocate Staff Officer Course, serving proficiently as trial counsel in courts-martial, and being recommended for certification by their (SJA) and a military judge).</td>
<td>Criteria for selection was based on desire to be VLC, experience level, professional maturity, people skills and all had to be professionally recommended.</td>
<td>The OIC, VLCO will review each nominee. RVLC must be active duty Marine judge advocates serving in or selected to the grade of major (O-4), with expertise in military justice matters, to include experience in at least one contested complex case, and with the Necessary Military Occupational Specialty (NMOS)</td>
<td>All Coast Guard SVCs are certified, active duty judge advocates. All SVCs receive specialized training as Coast Guard Victim Advocates and are certified as such. Coastal Guard SVCs have attended a variety of specialized training programs provided by our sister services.</td>
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- USA SVC Handbook, Ch 9, (Nov 1, 2013)
- The SVC Program Manager reports directly to the Assistant JAG for Military, Legal and Operations, OTJAG. SVCPM also coordinates with the HQDA G-1 COL James McKee, USA, Testimony, 8 Nov 13, p 106.
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<td>TJAG of the armed force in which the JA is a member or by which the civilian attorney is employed.</td>
<td>support the Army National Guard and the U.S. Army Reserve. SVCs will not be civilian attorneys. USA RFI 4(f) (Nov. 5, 2013)</td>
<td>SVCs selected by the Staff Judge Advocate based on military justice experience, sound judgment and maturity. COL James McKee, USA, Testimony, 8 Nov 13, p 108, 184.</td>
<td>successfully complete a TJAG-approved SVC course. The experience level of SVCs is slightly less, but comparable to, the experience level of JAGs entering Area Defense Counsel (ADC) positions, both in terms of number of assignments, time in the JAG Corps, and number of courts-martial tried as JAGs. Both require the level of maturity and experience necessary to be able to independently manage an office, represent clients, and zealously advocate to commanders and convening authorities, with supervision and oversight that is geographically separated.</td>
<td>more senior folks have SJA experience. Interviews were conducted and TJAG personally approved every candidate. After completion of training, all VLC were certified as Victims’ Legal Counsel by the Judge Advocate General. USN RFI 4(f) (Nov. 5, 2013); see also, CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, pp. 130-131.</td>
<td>of 4409 (Master of Criminal Law). VLC and AVLC must be active duty Marine judge advocates, serving in or selected to the grade of captain (O-3), with the NMOS of 4409. VLCs must have at least six months of military justice experience, unless waived by the OIC, VLCO. USMC RFI 4(f) (Nov. 5, 2013), see also LEGADMINMAN 5800.16A Ch 7, 6002.5a, (10 Feb 14) RVLC must be O-4/Major, with experience in military justice matters, to include at least one contested complex case, and with NMOS of 4409</td>
<td>Currently, all SVCs are LTs (03) or LCDRs (04). USCG RFI 4(f) (Nov. 5, 2013) SVCs are military attorneys who receive specialized training to provide support to sexual assault victims. CAPT Sloan Tyler, USCG, Testimony, 8 Nov 13, pp.135-136.</td>
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### SPECIAL VICTIMS’ COUNSEL COMPARISON CHART

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<td>SVC Training Requirements</td>
<td>FY14NDAA 1716(b)</td>
<td>Not specified in RFI 4(f)</td>
<td>Graduation from Judge Advocate Staff Officer Course TIAG approved SVC course USAF RFI 4(f) (Nov. 5, 2013)</td>
<td>Initial training of 20 Navy VLC was provided by the Air Force. One Navy VLC attended the Army course.</td>
<td>All VLC are required to attend training approved by the SJA to CMC. Must attend the Air Force Special Victims’ Counsel Course at Maxwell AFB, Montgomery, AL.1</td>
<td>All SVCs receive specialized training as Coast Guard Victim Advocates and are certified as such. Coast Guard SVCs have attended a variety of specialized training programs provided by our sister services.</td>
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1 Marine Corps RFI 4a (Nov. 5, 2013)
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<td>need not be detailed to a court-martial, but will be required to state their qualifications on the record as directed by the Trial Judiciary.</td>
<td>non-deployable status while serving as SVC.</td>
<td>non-deployable status while serving as SVC.</td>
<td>and for Navy specific breakouts USN RFI 4(a) (Nov. 5, 2013)</td>
<td>counsel course in Charlottesville, VA USMC RFI 4(f) (Nov. 5, 2013)</td>
<td>A Marine VLCs ability, training, and experience should match the complexity of the case. Supervisory attorneys will only assign counsel who are properly qualified to handle a particular case.</td>
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<td>JAGs selected to serve as SVCs must successfully complete a TJAG approved SVC course before assuming duty. USA SVC Handbook, Ch 8, (1 Nov 13) The Army has established a JAG university presence, a legal assistance military suite web site for collaboration and a document library where attorneys can share forms, briefs, and other documents COL James McKee, USA, Testimony, 8 Nov 13, p114.</td>
<td>USAF SVC Rules of Practice and Procedure, Rule 8, (July 1, 2013)</td>
<td>USAF SVC Rules of Practice and Procedure, Rule 8, (July 1, 2013)</td>
<td>and for Navy specific breakouts USN RFI 4(a) (Nov. 5, 2013)</td>
<td>A Marine VLCs ability, training, and experience should match the complexity of the case. Supervisory attorneys will only assign counsel who are properly qualified to handle a particular case. LEGADMINMAN 5800.16A Ch 7, 6001.5f, (10 Feb 14)</td>
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<tr>
<td>SVC-Mission &amp; Scope of representation</td>
<td>FY14NDAA §1716 (a)(1)(a)</td>
<td>The Secretary concerned shall designate legal counsel (to be known as ‘Special Victims’ Counsel’) for the purpose of providing legal assistance to an individual eligible for military legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.</td>
<td>An SVC’s role is to zealously represent the victim of a sexual assault. SVC will represent victim’s best interests even if it does not align with those of the U.S. or those of the accused. An SVC’s primary duty is to the victim. USA RFI 4(b) (Nov. 5, 2013); see also USA SVC Handbook, Ch 3 (1 Nov 13)</td>
<td>Representation in civilian courts is not authorized under this program. SVC may provide assistance to a victim with respect to state and federal victim compensation and restitution programs. SVC may generally</td>
<td>Not provided in AF RFI 4</td>
<td>Not specified in RFI 4</td>
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<td>Purpose of SVC Program is to: Provide advice – develop victims’ understanding of the investigatory and military justice processes; Provide advocacy – protect the rights afforded to victims in the military justice system; Empower victims by removing barriers to their full participation in the military justice process USAF SVC Rules of Practice and Procedure, p2, (1 Jul 13)</td>
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<td>PVC will provide confidential legal assistance to eligible victims of crime in place of legal assistance attorneys. They will fully advise victims of their rights in the military justice process. When detailed, they will represent victims at military justice proceedings.</td>
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<td>advocate a victim’s interests off-base to civilian prosecutors, law enforcement agencies, and other civilian government agencies. SVCs may not advocate a victim’s interests to the Dept of Veterans Affairs or represent a victim in the disability evaluation system. USA SVC Handbook, Ch 6, (1 Nov 13)</td>
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<td>SVCs may advocate a victim’s interests to the media consistent with the AF Rules of Professional Conduct, AF Standards for Criminal Justice, the Uniform Rules of Practice before AF Courts-Martial and SVC’s governing state rules of professional conduct. USAF SVC Rules of Practice and Procedure, Rule 6, (1 Jul 13)</td>
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<td>An SVC may make a statement to the media that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or client. Statement shall be limited to such information as is compensation and restitution programs. SAF SVC Rules of Practice and Procedure, Rule 6, (1 Jul 13)</td>
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<td>being a witness in the military justice system. SVC ensures the victim understands their rights and feels respected and included in the process. CAPT Sloan Tyler, USCG, Testimony, 8 Nov 13, pp.135-136.</td>
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### Special Victims’ Counsel Comparison Chart

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<tr>
<td>Accompany and advise the victim during interviews, examinations, and hearings</td>
<td>SVC authorized to provide legal consultation regarding:</td>
<td>FY14NDAA §1716 (a)(1)(b)</td>
<td>SVC – Pre-trial role</td>
<td>SVCs provide assistance to victims in answering questions about the military justice process, Inform victim of availability of other victim support services, Engage and interact with VAs, SARC’s, trial and defense counsel and commands to help the victim protect his or her interests.</td>
<td>SVCs provide assistance to victims in answering questions about the military justice process, Inform victim of availability of other victim support services, Engage and interact with VAs, SARC’s, trial and defense counsel and commands to help the victim protect his or her interests.</td>
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<tr>
<td>Referral of the victim to the U.S. Army Trial Defense Service (TDS) for collateral misconduct, if necessary; Advocate the victim’s interest with government counsel and commanders on disposition options; Advise the victim on collateral civil issues arising from the crime; Provide the victim with legal assistance services as needed; Answer any questions that the victim may have about the military justice process</td>
<td>Services to Military victims and DoD Agencies: Civil legal matters (may include traditional legal assistance), Article 32, Pretrial Confinement Hearings, Depository and Investigative proceedings, Courts of Inquiry Articles 138, notaries and administrative oaths</td>
<td>Submit FOIA requests for collateral misconduct with a direct nexus to the SA</td>
<td>Will advise the victim of rights afforded under VWAP</td>
<td>Will advise on role of the VA and any privileges between the victim and VA</td>
<td>Advocate of victims duties to court and responsibility to testify</td>
<td>SVC services are provided primarily through telephonic communications.</td>
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<td>The role of the VVL and what privileges do or do not exist between the victim and the VVL.</td>
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<td>Will advise on proceedings the victim may observe or participate in</td>
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<td>When appropriate, attend military justice proceedings (including Article</td>
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<td>Advise on collateral misconduct and refer to defense services</td>
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<td>32) and Article 60, WAFO, and other regulations and case law.</td>
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### SPECIAL VICTIMS’ COUNSEL COMPARISON CHART

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<tr>
<td>The nature of communication made to the WVL in comparison to that made to a SVC or legal assistance attorney under § 1044 of this title</td>
<td>The victim may have about the court-martial process.</td>
<td>Corrections of Military Records, Civilian criminal matters, claims, Discharge Review Board, MEO complaints, IG complaints, OPR and EPR corrections, Pay problems, Formal Physical Eval. Boards, Medical Eval. Boards, FOIA requests for matters other than services authorized for representation.</td>
<td>Advise on eligibility for military/veterans benefits</td>
<td>Advise on availability of Legal Assistance counsel to assist with personal civil matters or assist in obtaining military/veterans benefits.</td>
<td>SVC will NOT assist with: Preparing IG complaints, Military EO complaints, Congressional complaints, Or similar matters. SVC MAY advise client that these avenues exist and may review contents of complaint to ensure client’s rights not and mental health counseling</td>
<td>VLC will provide confidential legal counseling and advice including but not limited to: VWAP, SAPR, FAP programs, benefits and privileges. Difference between restricted and unrestricted reports Information on the military justice system, roles and responsibilities and MRE 412,513 and 514.</td>
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<td>The potential for civil litigation against other parties (other than DoD)</td>
<td>The victim is informed of: Their reporting options; Their rights as a victim; Their eligibility for military and Veterans Administration (VA) benefits; Their right to request an expedited transfer; Their ability to obtain a military protective order and/or a civilian protective order; and The nature of the military justice system and victim’s rights/duties.</td>
<td>SVC will NOT request an expedited transfer; Their ability to obtain a military protective order and/or a civilian protective order; and The nature of the military justice system and victim’s rights/duties.</td>
<td>Will refer the victim, when appropriate, to the legal assistance office for traditional legal services. USMC RFI 4(b) (Nov. 5, 2013)</td>
<td>Will work with SARC and VAs to assist with MPOs or restraining orders Will explain difference between a Restricted and Unrestricted report and how to change reporting status if desired.</td>
<td>The services</td>
<td>Can also assist victims in working through legal concerns relating to underlying sexual assault allegations other than military justice/discipline issues. For example, SVCs have been successful in assisting victims with re-assignment or related command issues.</td>
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<td>The roles and responsibilities of the trial counsel, the defense counsel, and mental health counseling</td>
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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<td>and investigators.</td>
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<td>Any proceedings of the military justice process in which victim may</td>
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<td>The Government’s authority to compel cooperation and testimony.</td>
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<td>The victim’s responsibility to testify and other duties to the court.</td>
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<td>Eligibility and requirements for services available from appropriate</td>
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<td>Testimony, 8 Nov 13, pp110-111</td>
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<td>restraint or confinement, pretrial agreement negotiations, plea</td>
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<td>USAF RFI 4(b) (Nov. 5, 2013); See also USAF Charter Part B(2)(a)</td>
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<td>If requested and available, will attend interviews with</td>
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<td>investigators, trial counsel and defense counsel</td>
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<td>Will represent the victim in the military justice proceeding such as</td>
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<td>an Article 32 pretrial investigation – where victim has opportunity</td>
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<td>to be present and heard. VLC will present facts and legal arguments</td>
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<td>through written pleadings and oral argument if permitted by the</td>
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<td>court. VLC will attend all military justice proceedings where</td>
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<td>available for emotional and mental health counseling and</td>
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<td>The availability of MPOs and CROs.</td>
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<td>Eligibility for and potential benefits available through the</td>
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<td>transitional compensation programs.</td>
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<td>Other rights or benefits provided to victims under law or</td>
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<td>regulation, to include future legislation, DODDs, DODIs, SecNavInst,</td>
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<td>MCOs, etc.</td>
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<td>LEGADM/DIRMAN 5800.16A Ch 7, 6001.5f, (10 Feb 14)</td>
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**APPENDIX I: SPECIAL VICTIM COUNSEL COMPARISON CHART**

The Response Systems Panel has not yet considered or deliberated on the contents of this report.
### SPECIAL VICTIMS' COUNSEL COMPARISON CHART

<table>
<thead>
<tr>
<th>Issue</th>
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<td>other medical services.</td>
<td>where victim is required or entitled to attend.</td>
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<td>Legal consultation and assistance:</td>
<td>Victim’s right to notification of all court-martial proceedings.</td>
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<td>In personal civil legal matters in accordance with § 1044 of this title.</td>
<td>In addition, victims will also be notified of the opportunity to provide input during the post-trial process and how to submit victim impact statements to the Army Clemency and Parole Board for consideration in clemency decisions.</td>
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<td>In any proceedings of the military justice process in which a victim can participate as a witness or other party.</td>
<td>SVCs are permitted to attend all interviews of victim with investigators, TC and DC. At interviews, SVCs should ensure that the interviewer has an additional party present to reduce the likelihood that the SVC may be called later as a regarding, decisions not to prefer charges, dismissal of charges, pretrial restraint or confinement, pretrial agreement negotiations, plea negotiations, discharge or resignation in lieu of trial by court-martial and scheduling of judicial proceedings where victim is required or entitled to attend.</td>
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<td>In understanding the availability of, and obtaining any protections offered by, civilian and military protecting or restraining orders.</td>
<td>Victim’s right to notification of all court-martial proceedings.</td>
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<td>In understanding the eligibility and requirements for, and obtaining, any available military and veteran benefits found in section 1059 of this title and other State and Federal</td>
<td>USAF SVC Rules of Practice and Procedure, Rule 4.1., (1 Jul 13); see also Col Dawn Hanks, USAF, Testimony, 8 Nov 13, pp. 146-147.</td>
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Will assist in obtaining information relevant to the case, including the status of the investigation and the status of the accused.

Will assist and facilitate communication with trial counsel where the victim has a right to confer such as whether or not charges will be preferred, whether charges will be dismissed, or whether a pretrial agreement will be approved.

Will provide basic legal assistance directly connected to the reported sexual assault. This includes notarizations and basic powers of attorney. If assistance is needed on more substantive legal assistance.
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<td>victims’ compensation programs.</td>
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<td>Such other legal assistance as the SECDEF (or SECDHS) may authorize in the regulations prescribed under subsection (h).</td>
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<td>witness. USA SVC Handbook, Ch 4 (1 Nov 13)</td>
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<td>matters, the VLC will coordinate referral to the nearest Regional Legal Service Office. VLC will assist victims who believe they are being retaliated against by advising them of potential avenues of relief such as submitting an Article 1150 or Article 138 Complaint, requesting mast, or filing a Congressional complaint and reviewing any complaint submitted by victim. VLC will act in a PERSREP capacity where retaliation is related to the sexual assault. USN RFI 4(b) (Nov. 5, 2013)</td>
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<td>SVC - Role during court martial</td>
<td>Accompany and advise the victim</td>
<td>Advocacy during General and Special</td>
<td>VLC will attend a court-martial where</td>
<td>Not specified in RFI 4</td>
<td>Not specified in RFI 4</td>
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### SPECIAL VICTIMS' COUNSEL COMPARISON CHART

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<tr>
<td>SVC - Post-trial Role</td>
<td>during court-martial proceedings. Represent the victim in court-martial proceedings as permitted by law. USA RFI 4(b) (Nov. 5, 2013)</td>
<td>Courts-Martial; Advocacy during Summary Courts-Martial. USAF RFI 4(b) (Nov. 5, 2013)</td>
<td>the victim is afforded an opportunity to be present and to be heard. VLC will present facts and legal argument on the victims' behalf and through written pleadings and oral argument if permitted by the court. VLC will attend all military justice proceedings where the victim testifies. USN RFI 4(b) (Nov. 5, 2013)</td>
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<td>Assist the victim with post-trial submissions to include victim impact statements. USA RFI 4(b) (Nov. 5, 2013); See also, COL James McKee, USA, Testimony, 8 Nov 13, p178.</td>
<td>Post-Trial - matters submitted to CA; Clemency and Parole Boards USAF RFI 4(b) (Nov. 5, 2013)</td>
<td>SVCs help victim submit victim impact statements during post-trial phase. USAF reg</td>
<td>Not addressed in RFI 4</td>
<td>Not specified in RFI 4</td>
<td>Not specified in RFI 4</td>
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<td>SVC — Standing and Access to Information</td>
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<td>gives victims right to submit post-trial statement during clemency phase.</td>
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<td>Col Dawn Hanks, USAF, Testimony, 8 Nov 13, p.146.</td>
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<td>Victims whether represented by SVC or civilian counsel, are non-parties to a court-martial under RCM 103.</td>
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<td>MRE 412, 513, 514 afford victims a reasonable opportunity to attend and be heard at hearings concerning these rules.</td>
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<td>This includes the right to present evidence, argument, and closing statements.</td>
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<td>SVCs may represent victims in these and other UCMJ proceedings where victims are afforded standing, as permitted by the presiding military judge, and may obtain copies of</td>
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<td>Presentation of evidence and argument by victims.</td>
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<td>TC and DC will serve SVC with copies of motions and responses (as well as accompanying documents) under MRE 412, 513, 514, filed by parties to the case.</td>
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<td>Any filings by SVCs must comply with the pretrial order from the military judge or Rules of Practice Before Army Courts-Martial if no such order.</td>
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<td>SVC’s right to access records is no greater than their client’s access rights.</td>
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<td>TC may, but is not motions and other relevant information necessary in order for the victim’s opportunity to be heard to be meaningful.</td>
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<tr>
<td>SVCs have a right to records which is not greater than their client’s rights.</td>
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<td>USAF SVC Rules of Practice and Procedure, Rules 4.6 and 4.9, (1 Jul 13)</td>
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<td>required to disclose information and records to the SVC if requested under the “need to know” exception to the Privacy Act. Such information is for SVC use only and may not be shared with the victim.</td>
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<td>USA SVC Handbook, Ch 4.5, 4.8, (1 Nov 13); see example, COL James McKee, USA, Testimony, 8 Nov 13, p113.</td>
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<td>When is a victim eligible for an SVC?</td>
<td>FY14NDAA 1716(a)(1)(f)</td>
<td>Not addressed in RFI 4</td>
<td>The VA or first individual to make contact with the eligible victim (for example, SARC, Victim Advocate, FAP, military investigator, victim liaison, or legal office personnel) will inform the victim of the availability of SVC services, at any The first individual to make contact with the eligible victim (for example, SARC, Victim Advocate, FAP, military investigator, victim liaison, or legal office personnel) will inform the victim of the availability of SVC services, as an extension of legal assistance for victims, in.</td>
<td>Not addressed in RFI 4</td>
<td>Victim must be informed by SARC, VA, VWL, military criminal investigator, victim/witness liaison or coordinator, or trial counsel that they have a right to a VLC. Upon seeking assistance from a (SARC), SAPR or FAP VA, military criminal investigator, victim/witness liaison or coordinator, or trial counsel, all eligible persons who assert direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault or.</td>
<td>Not addressed in RFI 4</td>
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<td>Upon report of an alleged sex-related offense or at the time the victim seeks assistance from a SARC, SAPR VA, MCIO, VWL, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary concerned.</td>
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<td>Authority (GCMCA) or similar disposition of the complaint or when the client determines services are no-longer required.</td>
<td>USA RFI 4(b) (Nov. 5, 2013); See also, COL James McKee, USA, Testimony, 8 Nov 13, p178.</td>
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<td>Once appointed, an SVC remains the counsel for the victim for all matters relating to the SA until released by the victim.</td>
<td>USAF RFI 4(b) (Nov. 5, 2013); see also AF SVC Rules of Practice and Procedure, Rule 3.3 (1 Jul 13); Col as aspects of the reported sexual assault are concluded (after a disposition decision is made by the appropriate Sexual Assault Initial Disposition Authority, or in the case of a court martial, after action is taken on the findings and sentence by the Convening Authority); or one of the parties transfers to a new duty station or terminates military service. The legal processing of the case remains at the original location, the original VLC will continue with the case unless the victim requests release of the original VLC.</td>
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<td>Transfer of counsel due to deployments, expedited transfers, and other unique circumstances will be coordinated by SJA through SVCP manager. Victim will be consulted throughout the process complete. For courts-martial, case disposition is considered complete at action or earlier termination of charges. The SVC-client relationship will be terminated after case disposition once all ongoing legal needs are met and upon agreement between the parties. Once an SVC is detailed to represent a victim of sexual assault, the SVC remains the counsel for all matters relating to the sexual assault, unless released by the victim.</td>
<td>USN RFI 4(b) (Nov. 5, 2013)</td>
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<td>Post-trial assistance will be evaluated on a case-by-case basis. USMC RFI 4(b) (Nov. 5, 2013); see also, Col Carol Joyce, USMC, Testimony, 8 Nov 13, pp. 125-126, 188-189, LEGADMINMAN 5800.16A Ch 7, 6005, (10 Feb 14)</td>
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<td>SVC –Collateral Misconduct</td>
<td>Not addressed in NDAA</td>
<td>SVC may represent the victim for covered collateral misconduct IAW the SVC Rules of Practice and Procedure, with the victim’s consent.</td>
<td>An SVC will inform the victim of the availability of TDS counsel and that it is Army policy that the SVC will not serve as counsel for purposes of collateral misconduct.</td>
<td>If there is collateral misconduct connected to the sexual assault on the part of the victim, the VLC will provide limited personal representation advice regarding the alleged misconduct. VLC will explain the potential consequences of the collateral misconduct. With permission of the victim, the VLC VLC will refer victims to defense services for collateral misconduct. Victim should see VLC first and VLC will refer to TDS.</td>
<td>If a victim appears to have committed</td>
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<td>USA RFI 4(b) (Nov. 5, 2013); see also USA SVC Handbook, Ch 5 (1 Nov 13); see also COL James McKee, USA, Testimony, 8 Nov 13, pp.181-182.</td>
<td>also Col Dawn Hankins, USAF, Testimony, 8 Nov 13, p. 181. Only victims that are members of the AF are eligible for representation for collateral misconduct. Victims that are members of other Services may seek representation IAW their Service’s Military Defense programs. Representation is generally not authorized for collateral misconduct of civilian victims. SVC may represent victim as secondary counsel for covered collateral misconduct, unless victim chooses to have SVC for sole representation. AF SVC Rules of may advocate on the victim's behalf to military authorities regarding the collateral misconduct. If the victim faces administrative or disciplinary proceedings connected to the collateral misconduct, the VLC will work with the defense counsel to promote and protect the victim's rights and interests. USN RFI 4(b) (Nov. 5, 2013); see also CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, p. 186. collateral misconduct related to the crime of which he or she is a victim, VLC may advise victim on legal options, including seeking testimonial or transactional immunity, and provide referral to Defense Services if needed. LEGADMINMAN 5800.16A Ch 7, 6003.4, (10 Feb 14)</td>
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<tr>
<td>SVC – How integrated with existing legal assistance and SAPR VA services?</td>
<td>Practice and Procedure, Rule 5.1, 5.3, (1 Jul 13)</td>
<td>The SVC will work in Legal Assistance Offices across the U.S. Army. Supervised by Installation Chief of Legal Services. They are required to coordinate with VWL, VA, unit VA, Special Victim Prosecutor, Trial Counsel, Trial Defense Counsel, SJA, CID and others on the services provided. Required to establish contact with local SARC/Victim Advocates and must establish procedures for expedited referral of victims-clients who request SVC services. SVC or FAP notifies CLA when victim requests</td>
<td>The first individual to make contact with the eligible victim (for example, SARC, Victim Advocate, Family Advocacy Program, military investigator, victim liaison, or legal office personnel) will inform the victim of the availability of SVC services, as an extension of legal assistance for victims, utilizing DD Form 2701, Initial Information for Victims and Witnesses of Crime. Victims may also contact SVC offices directly to request SVC representation. SVCs work closely with VWAP personnel to ensure that all rights afforded to crime victims are in addition to, and not in lieu of, other victim advocate services offered by the Navy. SARC will oversee the management of a sexual assault case. Victim advocates will facilitate access to service providers and be the day-to-day support person to ensure the victim knows what services are available. There may be overlap by Trial Counsel and VLC in providing necessary VWAP forms to the victim. VLC and TC will communicate early and often in a case to ensure each VLC services are in place of legal assistance attorneys. The VLC will provide confidential legal assistance to eligible victims of sexual assault and other crimes in place of legal assistance attorneys. Integration is facilitated in part by the Special Victim's Counsel Working Group that supports the Office of Special Victim's Counsel (OSVC). The Working Group includes representatives of the office which directs Coast Guard legal Assistance services and representation in Physical Disability Evaluation System cases. That office and OSVC both report to the Deputy Judge Advocate General, in part to facilitate that coordination. In addition, one option under consideration for Final Operational Capability is</td>
<td>VLC services are in addition to, and not in lieu of, other victim advocate services offered by the Navy. SARC will oversee the management of a sexual assault case. Victim advocates will facilitate access to service providers and be the day-to-day support person to ensure the victim knows what services are available. There may be overlap by Trial Counsel and VLC in providing necessary VWAP forms to the victim. VLC and TC will communicate early and often in a case to ensure each VLC services are in place of legal assistance attorneys. The VLC will provide confidential legal assistance to eligible victims of sexual assault and other crimes in place of legal assistance attorneys. Integration is facilitated in part by the Special Victim's Counsel Working Group that supports the Office of Special Victim's Counsel (OSVC). The Working Group includes representatives of the office which directs Coast Guard legal Assistance services and representation in Physical Disability Evaluation System cases. That office and OSVC both report to the Deputy Judge Advocate General, in part to facilitate that coordination. In addition, one option under consideration for Final Operational Capability is</td>
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<td>In each of these relationships, the SVC will work with those individuals to coordinate support for the victim and avoid duplication of efforts.</td>
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<td>Chiefs of Legal Assistance will assign each victim-client to an SVC.</td>
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<td>Conflicts checks will be run before SVCs are assigned or makes initial contact with the victim-client.</td>
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<td>Special Victims data will be recorded in the Army Legal Assistance Client Information System.</td>
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<td>If the Chief of Legal Assistance is unable to appoint a SVC due to a conflict, the Chief counsel understands what has been provided to the victim in terms of legal forms and information.</td>
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<td>SVCs also work closely with victim advocates to ensure that all mental and emotional needs of represented victims are being met. While there are overlapping responsibilities, the provision of services is a fully-integrated, holistic team approach to take care of victims of sexual assault.</td>
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<td>While an SVC might be involved in areas of overlapping responsibility, only the SVC can address legal needs and concerns, including in-court representation.</td>
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<td>VLC are communicating and training with SARC and VAs so all players understand their own roles and each other’s.</td>
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<td>USN RFI 4(c) (Nov. 5, 2013)</td>
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<td>USMC RFI 4(c) (Nov. 5, 2013); see also AF SVC Rules of Practice and placing OSVC and the Director of Coast Guard Legal Assistance within the same office.</td>
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<td>Program, Victim Advocates (VA), the (VWAP), and services provided by Chaplains and medical personnel. (SARC), SAPR or FAP VA, military criminal investigator, victim/witness liaison or coordinator, or trial counsel, must inform all eligible persons who assert direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault shall be informed of and given the opportunity to consult with a VLC.</td>
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<td>SVC services are closely coordinated with services provided by other Victim Advocates, SARC, chaplains and others. This coordination will continue in the FOC phase of operations. USCG RFI 4(c) (Nov. 5, 2013)</td>
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**APPENDIX I: SPECIAL VICTIM COUNSEL COMPARISON CHART**
**SPECIAL VICTIMS’ COUNSEL COMPARISON CHART**

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<th>Issue</th>
<th>DOD/FY 14 NDAA</th>
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<tr>
<td>of Legal Assistance will coordinate with the SVC Program Manager for the designation of an alternate SVC.</td>
<td>Procedure, Rule 3.4-3.5, (1 Jul 13)</td>
<td>SVC is the central person that victims use to be able to access all other services, whether medical care, mental health, issues with education, training problems, etc.</td>
<td>Col Dawn Hankins, USAF, Testimony, 8 Nov 13, pp. 168-169.</td>
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<td>USA RFI 4(c) (Nov. 5, 2013); See also USA SVC Handbook, Ch 3-4 and 3-5, (1 Nov 13)</td>
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<td>SVC —Cost and Resources required</td>
<td>Because SVCs will work in the legal assistance offices, they will have access to paralegal and civilian support.</td>
<td>For FY 2014, it is anticipated that the SVC Program will require $2.25M to operate. The cost of the program includes supplies and services; travel; education and training; and IT equipment.</td>
<td>Projected costs to support the VLC program:</td>
<td>VLCO requires: $150,000 for its operations and maintenance budget for FY14.</td>
<td>Not specified in RFI 4</td>
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<td></td>
<td>CSA has authorized mobilization of 20 Reserve Component JAs to serve as backfill in some of the Legal assistance offices.</td>
<td>With the current caseload of 409 clients (534 clients over the life of the program over nine months) and</td>
<td>$5M per year in Manpower costs once the program evens out</td>
<td>$100,000 required to train and certify all VLS and supporting personnel.</td>
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<td>At this time, required number of</td>
<td>$41,000 annually in facility costs</td>
<td>$45,000 annually in supplies</td>
<td>$40,000 for case-related travel</td>
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<td>$66,000 annually in training costs</td>
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<td>$10,000 for office management.</td>
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<td>SVCs is unknown. TJAG has tasked SVC PM to gather data over the next 12 months to determine the required resources. USA RFI 4(d) (Nov. 5, 2013)</td>
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<td>$300,000 initially for VLC travel. USN RFI 4(d) (Nov. 5, 2013)</td>
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<td>Additional costs associated with VLC travel for courts-martial. USMC RFI 4(d) (Nov. 5, 2013)</td>
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<td>anticipated increases in client demand, we expect a sustainable program to require 29 SVCs and 10 paralegals. The headquarters element for policy and management requires an O-6 Division Chief, a Civilian Deputy (GS-14), and an E-7. With a worldwide mission and span of control issues given the number of personnel numbers, we assess a need in the future for 3-5 supervisory O-4s (majors). The program also requires a civilian (GS-13) at our Judge Advocate General’s School to formalize continued legal education and training. USAF RFI 4(d) (Nov. 5, 2013)</td>
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<td>There will be 30 judge advocates assigned to the VLCP including the Chief of Staff and ten active component E-5 YNs. USN RFI 4(d) (Nov. 5, 2013)</td>
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<td>Requests for specific case-related funding submitted to the convening authority shall be considered and processed consistent with Article 46, UCMJ, MCM and JAGMAN.</td>
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<td>LEGADMINMAN 5800.16A Ch 7, 6001.5, (10 Feb 14)</td>
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The Response Systems Panel has not yet considered or deliberated on the contents of this report.
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<td><strong>Issue</strong></td>
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<td><strong>Impact on Overall JAG Structure</strong></td>
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<td><strong>Administrative Responsibility:</strong></td>
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<td><strong>Not addressed in</strong></td>
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<tr>
<td><strong>USA RFI 4(d)</strong></td>
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<td><strong>USA RFI 4(d)</strong> (Nov. 5, 2013)</td>
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<tr>
<td>SVC – Legal services being eliminated or curtailed to resource SVC Program</td>
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<td></td>
<td>13, p164.</td>
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<td>command under CNLSC.</td>
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<td>(Nov. 5, 2013)</td>
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<td>USN RFI 4(d) (Nov. 5, 2013)</td>
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<td>One reservist O-4 judge advocate with litigation experience has been given orders to MCB Quantico to augment the gap caused by the movement of personnel. USMC RFI 4(e) (Nov. 5, 2013)</td>
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<td>Navy has proposed increasing the JAG Corps end strength by 30 billets. CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, pp. 166-167.</td>
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<td>USMC RFI 4(e) (Nov. 5, 2013); see also Col Dawn Hankins, USAF, Testimony, 8 Nov 13, pp. 163-164.</td>
<td></td>
<td>No legal services are being eliminated or curtailed in order to resource the VLCP. USN RFI 4(e) (Nov. 5, 2013)</td>
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<td></td>
<td>USAF RFI 4(e) (Nov. 5, 2013); see also Col Dawn Hankins, USAF, Testimony, 8 Nov 13, pp. 163-164.</td>
<td></td>
<td>No legal services are being eliminated or curtailed in order to resource the victim attorney program.</td>
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<td></td>
<td>Legal assistance services to Retirees and their family members will be reduced if the SVC caseload results in an inability to maintain the normal level of legal assistance services. The SVC caseload will vary from installation to installation, as will the legal assistance workload. It is anticipated that some installations are going to have to</td>
<td></td>
<td>Installation-level legal offices may curtail or eliminate some legal assistance services to resource the victim attorney program.</td>
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<td>CMC has directed that there can be no reduction in the ability to try or defend complex cases, and no reduction in the speed of such complex cases as a result of the establishment of the Marine Corps VLCO.</td>
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<td></td>
<td>The Coast Guard does not anticipate eliminating or significantly reducing any legal resources or services as a result of establishing its Special Victim’s Counsel capability. USCG RFI 4(e) (Nov. 5, 2013)</td>
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<td>reduce additional legal assistance services to meet the demands of the SVC program.</td>
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<td>capability requirement.</td>
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<td>USMCRFI 4(e) (Nov. 5, 2013)</td>
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<td>Staff Judge Advocates are directed to mitigate the loss of services to retirees and their families, when feasible, by having Reserve Component judge advocates service retiree clients and their families on weekends and have special designated days for retirees and their families to come into the SJA office.</td>
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<td>USA RFI 4(e) (Nov. 5, 2013)</td>
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<td><strong>Assessment, Evaluation and Reports</strong></td>
<td>FY14 NDAA 1716(c) Report Required: Not later than 90 days after the date of the enactment of this Act, the Secretary of</td>
<td>The Judge Advocate General has tasked the SVC PM to gather data over the next 12 months to determine the required resources.</td>
<td>In order to measure the effectiveness of the SVC Program as a whole, a Victim Impact Survey (VIS) was fielded on 20 March 2013 with feedback from several</td>
<td>The USN will be modeling victim surveys after the USAF surveys. CAPT Karen Fischer-Anderson, USN, Testimony, 8 Nov 13, p. 187.</td>
<td>Not addressed in RFI 1 or 4</td>
<td>The Coast Guard does not collect metrics on the training and performance of trial, defense or victims’ counsel. Through standing MOU with the</td>
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The USMC will be modeling victim surveys after the USAF surveys. Col Carol Joyce, USMC, Testimony.
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<td>Defense, in coordination with the SecDHS for USCG shall submit to SASC &amp; HASC a report describing how the Armed Forces will implement the requirements of section 1044e of title 10 U.S.C. as added by subsection (a). The report required by paragraph (1) shall also be submitted to the RSP and to the Joint Services Committee on Military Justice.</td>
<td>USA RFI 4(d) (Nov. 5, 2013)</td>
<td>The U.S. Army will be gathering workload data from the SVC program throughout the year. USA RFI 4(e) (Nov. 5, 2013); see also COL James McKee, USA, Testimony, 8 Nov 13, p.164.</td>
<td>civilian subject matter experts incorporated into the questions and format. The VIS is provided to all sexual assault victims involved in the military justice process, including those represented by an SVC and those who are not. Recent results include: 1. 92% “extremely satisfied” with the advice and support SVC provided during the Article 32 hearing and court-martial; 2. 98% would recommend other victims request an SVC; 3. 93% indicated their SVC advocated effectively on their behalf;</td>
<td>8 Nov 13, p. 187.</td>
<td>Navy, Coast Guard judge advocates gain trial experience through assignment to Navy Defense Service offices on two year rotations. Over the last eight years, USCG JAs have trained as prosecutors with the Marine Corps Trial Counsel offices. USCG RFI 1(d) (Nov. 5, 2013)</td>
<td>USCG doesn’t have a survey at this point but they are interested in looking a the USAF survey. CAPT Sloan Tyler, USCG, Testimony, 8 Nov 13, p. 187.</td>
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4. 96% indicated their SVC helped them understand the investigation and court-martial processes

USAF RFI 1(d) (Nov. 5, 2013); See also, Col Dawn Hankins, USAF, Testimony, 8 Nov 13, pp. 151-152.

82% of clients have requested SVC support to protect privacy in some way.

124 cases have been closed. This is when the survey is given.

Modeled some of the questions on a Rand impact evaluation study.

Col Dawn Hankins, USAF, Testimony, 8 Nov 13, pp. 147-149.

Over 90% of clients are female.

Over 80% are
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<td>Active duty.</td>
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<td>90% filed unrestricted reports.</td>
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<td>Of those who filed restricted report and asked for SVC, nearly 50%</td>
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<td>converted to unrestricted report.</td>
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<td>Col Dawn Hankins, USAF, Testimony, 8 Nov 13, pp. 155-156.</td>
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<td>How will SVC resolve ethical concerns or cases of first impression?</td>
<td>FY 14NDAA 1716(a)(1)(c):</td>
<td>Special Victims' Counsel will work through their supervisory and technical chain of supervision to resolve ethical concerns and/or questions of first impression. This will include their Chiefs of Legal Assistance, DSJAs, and SJAs. As necessary, or in cases in which the Chief of Legal Assistance, DSJA and/or SJA are conflicted, the SVC can raise ethical concerns or cases of first impression to either the Chief, Special Victims' Counsel Division, or the Deputy Chief, Special Victims' Counsel Division. They may also contact their State Bar or the Air Force Professional Responsibility Office for guidance.</td>
<td>VLC will raise &amp; discuss any ethical concerns with their supervising OICs. If necessary, they will seek further guidance up the chain of command and will consult with the Professional Responsibility POC at OJAG Code 13. USN RFI 4(g) (Nov. 5, 2013)</td>
<td>VLC will follow the guidance provided by rules, regulations, statutes and case law (to include JAGINST 5803.1D, and State Bar rules), they will also seek advice and counseling through their supervisory chain – the VLCO. USN RFI 4(g) (Nov. 5, 2013)</td>
<td>VLC will follow the guidance provided by rules, regulations, statutes and case law (to include JAGINST 5803.1D, and State Bar rules), they will also seek advice and counseling through their supervisory chain – the VLCO. USN RFI 4(g) (Nov. 5, 2013)</td>
<td>The Coast Guard has an established legal Professional Responsibility Program through which counsel can resolve potential ethical concerns. The SVC Working Group that supports the (OSVC) includes a representative of the Office of Legal Policy and Program Development that oversees the Professional Responsibility Program, and is a</td>
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<tr>
<td>SVC – Civilian programs or organizations consulted or researched to develop SVC Program</td>
<td>will consult with their technical chains, the SVC PM. USA RFI 4(g) (Nov. 5, 2013)</td>
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<td>The Office of The Judge Advocate General, Criminal Law Division, assigned a judge advocate as the U.S. Army representative to the McKeon Study group of the Joint Services Committee (DOD). In that capacity, the judge advocate visited with the directors of a number of state victim service programs and consulted telephonically with a number of others. This information was used as the SVC program was being developed. None of these civilian programs</td>
<td>The Air Force has consulted with, and received training from the following individuals and organizations: 1. Ms. Meg Garvin, Executive Director of the National Crime Victim Law Institute (NCVLI). 2. Ms. Jessica Mindlin, National Director of Training and Technical Assistance from the Victim Rights Law Center (VRLC). 3. Dr. Rebecca Campbell, Professor of Psychology at Michigan State University. 4. Mr. Russell Butler, Executive Director of the Maryland Crime</td>
<td>None known. USN RFI 4(h) (Nov. 5, 2013)</td>
<td>The OIC, VLCO has been coordinating with the Marine Corps and Navy representatives from the Sexual Assault Subcommittee that falls under the Joint Services Committee on Military Justice, referred to as the JSC-SAS. The JSC-SAS travelled to various civilian jurisdictions to make comparisons between the State and Federal victims’ counsel services programs and identify best practices. Additionally, the OIC, VLCO met with the Director of the DOJ Office for</td>
<td>The Coast Guard consulted with the sister services, especially the Air Force, in developing its program. To develop policies and procedures that govern the delivery of SVC services, the Coast Guard reviewed and considered applicable ethical and practice standards of the ABA, its Legal Professional Responsibility Program and Legal Rules of Professional Conduct, and those established by the bars in the several states in which Coast Guard</td>
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<td>offered the scope of services of the magnitude directed by the Secretary of Defense.</td>
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<td>These state programs developed under a single Code of Professional Responsibility. SVC program operates under the Army Rules of Professional Responsibility for Lawyers as well as their own state licensing rules governing Professional Responsibility. USA RFI 4(h) (Nov. 5, 2013)</td>
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<td>SVC – coordination with other services to standardize training and services offered</td>
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<td>There is no formal process at this early stage for all of the services to standardize training and services; however, all the services have attended each other’s training and have collaborated about delivering</td>
<td>DoD has directed the Services to share best practices. This includes sharing curriculums from SVC training courses hosted by the various services. In addition to conducting our own training course, the Air Force hosted a</td>
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<td>The Navy has consulted closely with the Air Force and the Marine Corps on the stand up of the VLCP and is interested in working with the Air Force and other military services to standardize training and VLC services. Consistent with the direction of the SECDEF, the Marine Corps has established a VLCO that best meets the needs of the Marine Corps. The services offered by the VLCO are similar to those offered by the other Services.</td>
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<td>The Coast Guard looks forward to cooperating with its sister services in developing appropriate training and guidance for Special Victim’s Counsel as the services implement and develop this new capability.</td>
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<td>services to victims of sexual assaults. As a result there has been a great deal of exchange of training ideas. USA RFI 4(i) (Nov. 5, 2013)</td>
<td>joint-service training course October 15-18, 2013 to train over 60 victims counsel from the Navy, Marine Corps, and Air National Guard to assist them with meeting the requirement to reach Initial Operating Capability by Nov 1, 2013. The Air Force expects to continue to offer and provide joint-service SVC training on an annual basis. USAF RFI 4(i) (Nov. 5, 2013)</td>
<td>A period of at least six months post-January 2014 is needed in order to evaluate the VLC Program and determine what is working well, what needs improvement, and to determine if the current Air Force and Army training meets the needs of the practitioners. USN RFI 4(i) (Nov. 5, 2013)</td>
<td>but the Marine Corps has not limited victims’ legal counsel services to victims of sexual assault, but instead has extended these services to all eligible crime victims. Marine Corps VLCs have all attended the Air Force’s Special Victims’ Counsel Course and the completion of this course is necessary for certification as a Marine Corps VLC. USMC RFI 4(i) (Nov. 5, 2013)</td>
<td>USCG RFI 4(i) (Nov. 5, 2013)</td>
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**SVC Curriculum**

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<td>A copy of the recent curriculum will be delivered to the RSP on disk. USA RFI 4(j) (Nov. 5, 2013) Sexual Assault Expert Symposium: 3-day training.</td>
<td>See RFI Tabs 3 &amp; 4 (Narrative Schedule 4 Day training at AF JAG School in May and October 2013) USAF RFI 4(j) (Nov. 5, 2013) Curriculum</td>
<td>The Navy has no specific curriculum as of this date but we are developing a VLC course to be presented in January of 2014 for newly reported VLC. The curriculum will closely mirror the Marine Corps VLC attorneys training conduct by the Air Force. USMC RFI 4(j) (Nov. 5, 2013)</td>
<td>The Coast Guard does not have an independent SVC training program. Coast Guard SVCs attend Coast Guard Victim Advocate training and other military justice, criminal</td>
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### Special Victims' Counsel Comparison Chart

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<th>DOD/FY 14 NDAA</th>
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<tr>
<td>Classes are taught by some of the leading experts in their fields. The experts include: a Forensic Pathologist; a Forensic Psychologist; a Forensic Psychiatrist; a Sexual Assault Forensic Examiner/Sexual Assault Nurse Examiner; a Forensic Toxicologist; a Forensic Child Interviewer; a Forensic Computer Examiner; a Fingerprint Examiner; a Trace Evidence Examiner; and a DNA and Serology Examiner. USA RFI 1(d) (Nov. 5, 2013)</td>
<td>includes: - Fundamental Concepts of Being a Victims' Attorney, - Appellate Updates on applicable areas of law, - VWAP/SARC/NCIS/OSI and TC Interaction, - The Neurobiology of Trauma/Cognitive Interviewing, - Post-Trial Processing for VLC, - Professional Responsibility concerns, - Mental Health Issues/Referrals/PTSD/Resiliency and Suicide Awareness, - Cognitive Biases; - Behavioral Aspects of Victims - Understanding Sex Offenders. - SVC from the Air Force discussed their challenges and successes in the field and took questions from other service</td>
<td>Air Force’s curriculum. USN RFI 4(j) (Nov. 5, 2013)</td>
<td>Navy is developing a 2-day course in Newport, RI for newly-reported VLC.</td>
<td>Navy is developing a 2-day course in Newport, RI for newly-reported VLC.</td>
<td>Navy is developing a 2-day course in Newport, RI for newly-reported VLC.</td>
<td>Navy is developing a 2-day course in Newport, RI for newly-reported VLC.</td>
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Investigation and SVC-related training offered by our sister services. USCG RFI 4(j) (Nov. 5, 2013)
### SPECIAL VICTIMS’ COUNSEL COMPARISON CHART

<table>
<thead>
<tr>
<th>Issue</th>
<th>DOD/FY 14 NDAA</th>
<th>USARMY</th>
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<th>USNAV</th>
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<tr>
<td>SVC–Retaliation and Complaints</td>
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<tr>
<td>Legal assistance attorneys have always assisted Soldiers with filing Article 138 complaints. SVCs may also assume that duty.</td>
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<tr>
<td>Army provides procedures for victim who believes they have been retaliated against under Article 138</td>
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<td>SVC may advise the client that these and similar avenues exist for addressing a complaint SVC</td>
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<tr>
<td>An SVC will not assist a member in preparing IG complaints, Military Equal Opportunity Complaints, Congressional Complaints, or similar matters.</td>
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<tr>
<td>VLC will assist victims who believe they are being retaliated against by advising them of potential avenues of relief such as: submitting an Article 1150 or Article 138 Complaint, requesting mast, or filing a Congressional complaint.</td>
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<td>VLC can assist a victim in filing a complaint. Methods for requesting redress of grievances: a complaint through the chain of command (including a victim advocate or Sexual Assault Response Coordinator); a complaint to law enforcement; correspondence</td>
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<tr>
<td>SVC will assist a victim with filing a complaint.</td>
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<tr>
<td>All VLC students conducted Client Intake Interviews using victim advocates role playing different scenarios. On the final day of the course, exercise with a mock Military Judge, Trial and Defense Counsel on issues related to M.R.E. 412, 513 and 514.</td>
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<td>USN RFI 1(d) (Nov. 5, 2013)</td>
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</table>
## SPECIAL VICTIMS’ COUNSEL COMPARISON CHART

<table>
<thead>
<tr>
<th>Issue</th>
<th>DOD/FY 14 NDAA</th>
<th>USARMY</th>
<th>USAF</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Complaints of Wrong; The Inspector General’s office; DoD or Army hotlines and websites set up to allow victims to bypass the chain of command for redress.</td>
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<tr>
<td>Victims may report retaliatory actions taken against them to CID, SARC/VA, VWL, SVC, trial counsel or established hotlines.</td>
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<td>All Service IGs receiving reprisal complaints required by Whistleblower Act to notify DoD IG.</td>
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<td>A complainant has direct and priority access to the Army Board for Correction of Military Records</td>
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<tr>
<td>When a Special or General CMCA may review a client’s IG, Congressional, or similar complaint for the purpose of assuring that the contents of the complaint do not jeopardize the client’s rights or position wrt the matter that led to the original representation.</td>
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<td>An SVC may submit a Freedom of Information Act (FOIA)/Privacy Act request for his or her client in the furtherance of a representation on a matter within the category of services provided.</td>
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<tr>
<td>USAF RFI 4(b) (Nov. 5, 2013)</td>
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<td>New AF policy allows any person discharged within a year of making a report of sexual assault to have their complaint submitted by the victim.</td>
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<tr>
<td>VLC will act in a PERSREP capacity so long as the retaliation is related to the report of sexual assault. If the retaliation is unrelated to the report of sexual assault, the VLC will coordinate referral to a defense counsel for PERSREP advice.</td>
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<td>USN RFI 4(b) (Nov. 5, 2013)</td>
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<td>with a Member of Congress; an Inspector General (IG) complaint for instances of fraud, waste, and abuse; an Equal Opportunity complaint for instances of discrimination or sexual harassment; an Article 138 (UCMJ) complaint, for instances of specific abuse, discriminatory practices of a superior officer, or where the command is not following regulations; an Article 139 (UCMJ) complaint, where personal property is taken or destroyed; a Navy Regulation Article 1150 complaint for redress of wrong against any superior the victim believes retaliated against him or her; and a petition the Board for Correction of</td>
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APPENDIX I: SPECIAL VICTIM COUNSEL COMPARISON CHART
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

### SPECIAL VICTIMS' COUNSEL COMPARISON CHART

<table>
<thead>
<tr>
<th>Issue</th>
<th>DOD/FY 14 NDAA</th>
<th>USARMY</th>
<th>USAF</th>
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<th>USMC</th>
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<tbody>
<tr>
<td>reviews administrative separation actions involving sexual assault victims, the review must consider if the separation appears to be in retaliation for the Soldier filing an unrestricted report. If so, reviewer must consult a JA. USA RFI 6 (Nov. 5, 2013)</td>
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<td>case reviewed if he or she alleges the discharge is due to retaliation. Another avenue for a victim is a military justice action for maltreatment under Article 93, UCMJ USAF RFI 5 (Nov. 5, 2013)</td>
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<tr>
<td>Victims have multiple avenues with which to file a complaint for redress for retaliation: Law enforcement investigators, Victim liaisons, VAs, trial counsel, SVC, IG, and Commanding Officers.</td>
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<td>Victims are made aware of these and other programs in numerous ways, primarily through the operation of the VWAP program.</td>
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<td>Military Records to change adverse items, or make other corrections, in a member’s official record. Article 92 (dereliction of duty, specifically for not complying with The Military Whistleblower Protection Act (10 U.S.C. § 1034); Article 134 (obstructing justice); and Article 134 (wrongful interference with an adverse administrative proceeding). USMC RFI (5) and (6) (Nov. 5, 2013)</td>
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<td>Issue</td>
<td>DOD/FY 14 NDAA</td>
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<td>USAF RF16 (Nov. 5, 2013)</td>
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<td>Appendix J:</td>
<td>COMPARISON OF VICTIM RIGHTS</td>
<td>THE NDAA, THE CVRA, AND DOD POLICY</td>
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<td></td>
<td>FY14 NDAA §1701</td>
<td>18 U.S.C. § 3771 CVRA</td>
<td>DOD Directive 1030.1 Victim and Witness Assistance</td>
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<td>Rights Granted</td>
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<tr>
<td>The right to be reasonably protected from the accused</td>
<td>The right to be reasonably protected from the accused</td>
<td>The right to be reasonably protected from the accused offender</td>
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<td>The right to reasonable, accurate, and timely notice of any of the following:</td>
<td>The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused</td>
<td>The right to be notified of court proceedings</td>
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<tr>
<td>(A) A public hearing concerning the continuation of confinement prior to trial of the accused</td>
<td>(B) A preliminary hearing under Article 32 relating to the offense</td>
<td>(C) The release or escape of the accused, unless such notice may endanger the safety of any person</td>
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<tr>
<td>(C) A court-martial relating to the offense</td>
<td>(D) A public proceeding of the service clemency and parole board relating to the offense</td>
<td>(E) The right not to be excluded from any public hearing or proceeding described above unless the military judge or investigating officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense would be materially altered if the victim heard other testimony at that hearing or proceeding</td>
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<tr>
<td>The right not to be excluded from any public hearing or proceeding described above unless the military judge or investigating officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense would be materially altered if the victim heard other testimony at that hearing or proceeding</td>
<td>The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding</td>
<td>The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial</td>
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<td>The right to be reasonably heard at any of the following:</td>
<td>The right to be reasonably heard at any public</td>
<td>The right to be reasonably heard at any public</td>
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<td>No similar provision currently, but according to testimony, DoD</td>
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</table>
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

| (A) A public hearing concerning the continuation of confinement prior to trial of the accused | proceeding in the district court involving release, plea, sentencing, or any parole proceeding. | is working to include a provision that mirrors the CVRA. |
| (B) A sentencing hearing relating to the offense | The right to confer with the attorney for the Government in the case |
| (C) A public proceeding of the service clemency and parole board relating to the offense | The right to confer with the attorney for the Government in the case |

| The reasonable right to confer with the counsel representing the Government in any of the above listed proceedings | The reasonable right to confer with the attorney for the Government in the case |
| The right to receive restitution as provided in law | The right to full and timely restitution as provided in law |
| The right to proceedings free from unreasonable delay | The right to proceedings free from unreasonable delay |
| The right to be treated with fairness and with respect for the dignity and privacy of the victim | The right to be treated with fairness and with respect for the victim’s dignity and privacy |
| The FY14 NDAA directed the Secretary to consider mechanisms for affording rights to victims, mandating that regulations include mechanisms for ensuring that victims are notified of, and accorded, the rights specified in Article 6b, UCMJ. | No similar provision currently, but according to testimony, DoD is currently working to include a provision that mirrors the CVRA. |
| In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described above. Before making a determination to exclude the victim from a public proceeding, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this |
| No similar provision |

APPENDIX J

Comparison of Victim Rights

The NDAA, the CVRA, and DOD Policy

The right to be treated with fairness and respect for the dignity and privacy
<table>
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<tr>
<th>Definition of Victim</th>
<th>Definition of Victim</th>
<th>Definition of Victim</th>
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<tr>
<td>The term victim means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the Uniform Code of Military Justice</td>
<td>The term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia</td>
<td>Victim. A person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the Uniform Code of Military Justice</td>
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<tr>
<th>Enforcement</th>
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<td>The FY14 NDAA directed the Secretary to consider mechanisms for affording rights to victims, mandating that regulations include mechanisms for the enforcement of such rights, including mechanisms for application for such rights and for consideration and disposition of applications for such rights.</td>
<td>The rights described above shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals will decide the motion within 72 hours. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.</td>
<td>No similar provision</td>
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<th>Procedures to Promote Compliance</th>
<th>Procedures to Promote Compliance</th>
<th>Procedures to Promote Compliance</th>
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<tr>
<td>The FY14 NDAA directed the</td>
<td>The Department of Justice</td>
<td>No similar provision</td>
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Secretary to consider mechanisms for affording rights to victims, mandating that regulations include the designation of an authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights and disciplinary sanctions for members of the Armed Forces and other personnel of the Department of Defense and Coast Guard who willfully or wantonly fail to comply with requirements relating to such rights.

Regulation will designate an administrative authority within the DOJ to receive and investigate complaints relating to the provision or violation of the rights of a crime victim; require a course of training for employees and offices of the DOJ that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims; contain disciplinary sanctions, including suspension or termination from employment, for DOJ employees who willfully or wantonly fail to comply with provisions of Federal Law pertaining to the treatment of crime victims; and provide that the Attorney General, or his designee, shall be the final arbiter of the complaint.

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<tr>
<th>Limitations</th>
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<tr>
<td>The FY14 NDAA has a limiting clause indicating that Article 6b, UCMJ should not be construed to authorize a cause of action for damages. The FY14 NDAA does not have similar provision to the CVRA indicating that nothing should be construed to limit prosecutorial discretion.</td>
<td>The failure to afford a right under the CVRA will not provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if the victim asserted the right to be heard before or during the proceeding at issue and such right was denied; the victim petitions the court of</td>
<td>No similar provision</td>
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<tr>
<td>appeals for a writ of mandamus within 14 days; and, in the case of a plea, the accused has not pled to the highest offense charged. The CVRA creates no cause of action for damages and does not create, enlarge, or imply any duty or obligation to any victim or other person for the breach of which the United States, or any of its officers or employees, could be held liable in damages. Nothing in the CVRA is construed to impair the prosecutorial discretion of the Attorney General or any officer under his or her direction.</td>
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### Appendix K:

**US GOVERNMENT ACCOUNTABILITY OFFICE REPORT LIST**

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<thead>
<tr>
<th>GAO DOCUMENT</th>
<th>DATE</th>
<th>SUMMARY</th>
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<tr>
<td>GAO Report to Congressional Addresses: Military Personnel, DoD Has Taken Steps to Meet the Health Needs of Deployed Servicewomen, but Actions are Needed to Enhance Care for Sexual Assault Victims.</td>
<td>January 2013</td>
<td>While the DoD is taking steps to address the health care needs of deployed servicewomen, military health care providers do not have a consistent understanding of their responsibilities in caring for sexual assault victims because the department has not established guidance for the treatment of injuries stemming from sexual assault—which requires that specific steps are taken while providing care to help ensure a victim’s right to confidentiality.</td>
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<tr>
<td>Military Personnel: Prior GAO Work on DoD’s Actions to Prevent and Respond to Sexual Assault in the Military.</td>
<td>March 30, 2012</td>
<td>GAO finds DoD has fully implemented thirteen recommendations and has partially implemented the remaining twelve recommendations which GAO will continue to monitor.</td>
</tr>
<tr>
<td>Military Justice: Oversight and Better Collaboration Needed for Sexual Assault Investigations and Adjudications.</td>
<td>June 22, 2011</td>
<td>GAO was asked to address the extent to which (1) the Department of Defense (DOD) conducts oversight of the military services’ investigative organizations and (2) the services provide resources for investigations and adjudications of alleged sexual assault incidents.</td>
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</table>

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
<table>
<thead>
<tr>
<th>Title</th>
<th>Date</th>
<th>Description</th>
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<tbody>
<tr>
<td>Military Personnel: DoD’s and the Coast Guard’s Sexual Assault</td>
<td>February 24, 2010</td>
<td>This report discusses our efforts to evaluate the Department of Defense’s (DOD) and the U.S. Coast Guard’s oversight and implementation of their respective sexual assault prevention and response programs. Our findings build upon our previous work related to sexual assault in the military services.</td>
</tr>
<tr>
<td>Prevention and Response Program Need to be Further Strengthened.</td>
<td></td>
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<tr>
<td>Military Personnel: Additional Actions are Needed to Strengthen DoD’s</td>
<td>February 24, 2010</td>
<td>DOD has addressed four of GAO's nine recommendations from 2008 regarding the oversight and implementation of its sexual assault prevention and response programs. Our findings build upon our previous work related to sexual assault in the military services.</td>
</tr>
<tr>
<td>and the Coast Guard’s Sexual Assault Prevention and Response Programs.</td>
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<tr>
<td>Military Personnel: Actions Needed to Strengthen Implementation and</td>
<td>September 10, 2008</td>
<td>This statement addresses implementation and oversight of DOD’s and the Coast Guard’s programs to prevent and respond to sexual assault incidents. Specifically, it addresses the extent to which DOD and the Coast Guard (1) have developed and implemented policies and procedures to prevent, respond to, and resolve reported sexual assault incidents; (2) have visibility over reports of sexual assault in the military; and (3) exercise oversight over reports of sexual assault involving servicemembers.</td>
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<td>Oversight of DoD’s and the Coast Guard’s Sexual Assault Prevention</td>
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<td>and Response Programs.</td>
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<td>Preliminary Observations on DoD’s and the Coast Guard’s Sexual</td>
<td>July 31, 2008</td>
<td>This statement addresses the extent to which DOD and the Coast Guard (1) have developed and implemented policies and programs to prevent, respond to, and resolve sexual assault incidents involving servicemembers; (2) have visibility over reports of sexual assault; and (3) exercise oversight over reports of sexual assault.</td>
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<td>Assault Prevention and Response Programs.</td>
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<tr>
<td>Title</td>
<td>Date</td>
<td>Description</td>
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<td>Military Personnel: The DoD and Coast Guard Academies have Taken Steps to Address Incidents of Sexual Harassment and Assault, but Greater Federal Oversight is Needed.</td>
<td>January 17, 2008</td>
<td>This report evaluates (1) the academies’ programs to prevent, respond to, and resolve sexual harassment and assault cases; (2) the academies’ visibility over sexual harassment and assault incidents; and (3) DOD and Coast Guard oversight of their academies’ efforts.</td>
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### Appendix L:

**INSPECTOR GENERAL REPORT LIST**

<table>
<thead>
<tr>
<th>INSPECTOR GENERAL REPORT</th>
<th>DATE</th>
<th>SUMMARY</th>
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<tbody>
<tr>
<td>Evaluation of the Military Criminal Investigative Organizations Sexual Assault Investigations.</td>
<td>July 9, 2013</td>
<td>The DoD IG evaluated the Military Criminal Investigative Organizations’ (MCIO) sexual assault investigations completed in 2010 to determine whether they completed investigations as required by DoD, Military Service, and MCIO guidance.</td>
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<td>Evaluation of the Military Criminal Investigative Organizations Sexual Assault Investigation Training.</td>
<td>February 28, 2013</td>
<td>The DoD IG evaluated the MCIOs sexual assault investigation training to determine whether it adequately supports the Department.</td>
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<tr>
<td>Evaluation of DoD Sexual Assault Response in Operations Enduring and Iraqi Freedom Areas of Operation.</td>
<td>February 1, 2010</td>
<td>The DoD IG review sought to determine whether DoD policies and practices ensure sexual assault complaints involving contractors in the areas of operation were properly received, processed and referred for investigation.</td>
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<tr>
<td>Report on Service Academy Sexual Assault and Leadership Survey.</td>
<td>March 4, 2005</td>
<td>The DoD IG gathered information from cadets and midshipmen on their experiences with sexual assault and harassment while attending the service academies.</td>
</tr>
<tr>
<td>Report on the United States Air Force Academy Sexual Assault Survey.</td>
<td>September 11, 2003</td>
<td>The DoD IG administered a survey of female cadets at the US Air Force Academy. The purpose of the survey was to determine the scope of sexual assault incidents and to assess perceptions of female cadets concerning the Academy’s response efforts.</td>
</tr>
</tbody>
</table>

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*
| Evaluation of DoD Correctional Facility Compliance with Military Sex Offender Notification Requirements. | June 26, 2002 | The study evaluates whether the services satisfy their notification requirements for military sex offenders. |
ANNEX A: Report of the Comparative Systems Subcommittee
ANNEX B: Report of the Role of the Commander Subcommittee
ANNEX C: Report of the Victim Services Subcommittee